ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Little Rock, Arkansas
March 26-27, 1998

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26-27,1998
Winrock International Conference Center
Morrilton, Arkansas

Introductory Items

1. Welcome and introduction of guests. (Oral)

2. Approval of minutes of September 1997 meeting.

3. Report on the January 1998 meeting of the Committee on Rules of Practice and Procedure. (This will be an oral report.)

4. Report on the January 1998 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

5. Report on recent meetings of the Advisory Committee on Civil Rules. (This will be an oral report.)

Action Items

6. Preliminary Draft of Proposed Amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 published in August 1997. (Materials: Reporter's memorandum dated 2/22/98; the proposed amendments; summary of public comments received; letters received from commentators.)

7. The "Litigation Package" — proposed amendments to Rules 9013 and 9014, and related proposed amendments to 25 other rules. (Materials: Reporter's memorandum dated 2/18/98; the proposed amendments; letter from the Hon. Donald E. Cordova dated 2/12/98; § 111(d) of Pub. L. No. 103-121.)

8. Proposed Draft of Introduction to the "Litigation Package." (Materials: Reporter's memorandum dated 2/15/98; revised draft of Introduction; revised draft showing changes from previous draft.)

9. Rules of Attorney Conduct. (Materials: memorandum dated 2/11/98 from Prof. Daniel R. Coquillette, Reporter to the Standing Committee, to the Hon. Alicemarie H. Stotler, Chair of the Standing Committee, on Federal Rules of Attorney Conduct; memorandum dated 12/1/97 from Prof. Coquillette to the Standing Committee; draft of suggested revisions to Fed. R. App. P. 46; draft of suggested revisions to Fed. R. Civ. P. 83; draft of suggested

Federal Rules of Attorney Conduct; Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct.)

10. Notice to Governmental Units. (Materials: Reporter's memorandum dated 2/16/98; proposed amendments to Rule 2002(j); proposed amendments to Rules 1007 and 5003; memorandum dated 2/2/98 from J. Christopher Kohn; Recommendation 4.2.1 of the National Bankruptcy Review Commission; § 503 of H.R. 3150; § 405 of H.R. 3150.

11. Report of the Forms Subcommittee: Proposed Revisions to Official Forms 1 and 7 Relating to Notice to Governmental Units. (Materials: proposed Official Form 1, Voluntary Petition; proposed Exhibit "C" to the Voluntary Petition; proposed Official Form 7, Statement of Financial Affairs.)

12. Bankruptcy Rule 9020, Contempt Proceedings. (Materials: Reporter's memorandum dated 2/24/98; letter from the Hon. A. Thomas Small dated 2/14/97; 1983 version of Rule 9020; decision in Matter of Terrebonne Fuel and Lube, Inc.; memorandum of J. Christopher Kohn dated 2/11/98; excerpt from the Report of the Proceedings of the Judicial Conference of the United States, March 1996, and materials on expanding contempt authority of federal magistrate judges.)

13. Report of the National Bankruptcy Review Commission. (Materials: Reporter's memorandum dated 2/15/98.)

14. Bankruptcy Rules 4003(b) and 1017(e)(1) and Motions to Extend Time. (Materials: Reporter's memorandum dated 8/6/97; decision in In re Laurain; letter from the Hon. Steven W. Rhodes to the Hon. Paul Mannes dated 6/4/97.)

15. Rule 9022, Notice of Judgment or Order. (Materials: letter from Richard G. Heltzel dated 7/14/97.)

16. Consideration of Whether Proposed Amendments to Rules 2002(a)(6), 2002(g), and 2002(j), (previously approved by the Advisory Committee), should be published for comment. (Materials: drafts of Rules 2002(a)(6), 2002(g), and 2002(j).)

17. Rule 9009, Forms. (Materials: memorandum dated 2/18/98 to bankruptcy clerks of court concerning delay in implementing new official forms; examples of § 341 notices containing local variations.)

Information Items

18. Report on Revisions to Official Form 6, Schedule E, Creditors Holding Claims Entitled to Priority, and Official Form 10, Proof of Claim, Resulting from the Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code. (Materials:

announcement published in the Federal Register on 2/12/98; revised Official Forms 6E and 10, effective 4/1/98.)

19. Reports on the Status of the Electronic Case Files Initiative, the Electronic Courtroom Project, and other Technology Issues. (Materials: These will be oral reports.)

20. Report on the Federal Judicial Center Study of Alternative Dispute Resolution Programs in Bankruptcy Courts. (Materials: to be distributed separately.)

21. Additional Subcommittee Reports [if any]. (Oral)

Administrative Matters

22. Status of All Subcommittees. (Materials: list of existing subcommittees and their members.)

23. Discussion of dates and locations for March 1999 and September/October 1999 meetings. (Oral)

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Item 1 will be oral.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 11 - 12, 1997

Williamsburg, Virginia

Draft Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Bernice B. Donald
District Judge Robert W. Gettleman
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Kenneth N. Klee
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and Alan W. Perry, Esquire, liaison to this Committee from the Standing Committee, were unable to attend. Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), attended part of the meeting as a representative of that committee. Brady C. Williamson, Esquire, the chairman of the National Bankruptcy Review Commission ("NBRC"), and James I. Shepard, a member of the NBRC, also attended part of the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Director, Executive Office for United States Trustees (EOUST); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Cecelia B. Morris, Clerk, United States Bankruptcy Court for the Southern District of New York; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office,

Administrative Office; and Elizabeth C. Wiggins and Robert Niemic, Research Division, Federal Judicial Center ("FJC").

In addition, David B. Foltz, Jr., Esquire, from Houston, Texas, and Alan S.Tenenbaum, Esquire, of the 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 of the Standing Committee. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Chairman introduced the guests and welcomed them to the meeting.

The Committee approved the draft minutes of the March 1997 meeting subject to minor editorial changes on pages 4, 15, and 19.

Judge Duplantier and Professor Resnick reported on the June 1997 meeting of the Standing Committee. Judge Duplantier said the Standing Committee had approved the amendments to the Official Forms, as proposed by the Committee, including the changes made to proposed Official Form 10, the Proof of Claim, after the March 1997 meeting and circulated by mail and facsimile transmission to the members. At the Standing Committee meeting, Alan W. Perry, Esquire, had inquired about inconsistencies in the dates and abbreviated designations of the forms in the top left corner of each form. In response to these questions, these dates and designations were edited uniformly to the month and year of anticipated Judicial Conference action and variations in the abbreviated designations were reduced, the Chairman said. The Standing Committee also had approved the Advisory Committee's recommendation that a transition or phase-in period for the new forms be authorized, with March 1, 1998, as the date on which the new forms would become mandatory.

The Chairman said the Standing Committee also had approved the publication for comment of the package of rules forwarded by the Advisory Committee. He noted that the preliminary draft pamphlets had just been printed and had been distributed to the members at the meeting as well as by mail.

Professor Resnick said the Standing Committee has been examining over the past several years a few areas of practice in federal courts in which issues of attorney conduct have arisen, with a view toward ascertaining whether any uniform federal rules might be either appropriate or helpful in a field that traditionally has been regulated by the states and local federal district

courts. The various state rules and the American Bar Association's model code are often inconsistent, especially with respect to defining and addressing conflicts of interest, a situation that can leave practitioners subject to contradictory rules. Professor Resnick said he had spoken with Professor Daniel R. Coquillette, Reporter to the Standing Committee, who stated that he planned to draft an amendment to Federal Rule of Civil Procedure 83 that would prohibit courts from making local rules that would conflict with "Appendix A." Professor Coquillette told Professor Resnick that he also planned to draft an "Appendix A" to the civil rules that would contain five to eight "core" federal rules of attorney conduct.

Professor Resnick noted that the Standing Committee has held two seminars on the subject, which were attended by Gerald K. Smith of the Advisory Committee, and that there appears to be recognition that bankruptcy practice may have to be carved out of at least some aspects of the kinds of rules the Standing Committee appears to be contemplating. Professor Resnick also noted, however, that most bankruptcy court local rules on the subject refer to district court or state rules and, therefor, if the Federal Rules of Civil Procedure are amended, those amendments may be binding on the bankruptcy courts. Accordingly, he said, the Advisory Committee needs to monitor this attorney conduct rules project very attentively. Ultimately, the Advisory Committee may have to draft its own "core" rules or, at minimum, consider and comment on any proposed civil rules amendments. Professor Resnick also said that the FJC last year had completed a study of attorney conduct issues in district courts and that Professor Coquillette has suggested that a similar study be done in the bankruptcy courts. This proposed study, he said, will require input from the Advisory Committee. **The Chairman said that he, Mr. Smith, and the Reporter would consult with Ms. Wiggins concerning any proposed study.**

The Reporter noted that on April 1, 1998, adjustments to certain dollar amounts in the Bankruptcy Code are scheduled to take effect. Some of the affected dollar amounts also appear on some of the official forms. He reminded the Committee that in 1996 the Standing Committee and the Judicial Conference had acted to permit these adjustments to be made automatically without further Committee or Conference involvement. Amendments to the Bankruptcy Code enacted in 1994 specify the procedure and formula to be used to adjust the dollar amounts and require that the adjustments be published in the Federal Register no later than March 1. The Administrative Office will take care of making the computations needed and arranging and paying for the publication. Conforming amendments to the affected forms -- the Proof of Claim and Schedule E -- will be distributed in the normal way.

Judge Duplantier said that the Advisory Committee on Civil Rules had sponsored a two-day conference on discovery the week before at Boston College Law School. Professor Resnick said he had attended the conference and that it appeared to him that the only consensus reached during the two days is that local opt-outs from an otherwise national rule should not be permitted. There was a divided vote on what the national rule should provide with respect to

mandatory disclosures, with the majority opposed. The minority, however, was sizable, he said. Judge Robreno said he had attended a meeting of the Civil Rules Committee and would be attending another in October. He said he had been studying the Rand Corporation report issued in connection with the experiments conducted under the Civil Justice Reform Act. The Rand researchers had studied 12,000 cases and their findings are quite controversial, he said. The report indicates that the various pilot programs undertaken under the Civil Justice Reform Act had little effect on costs of litigation or parties' satisfaction with the process, and that alternative dispute resolution (ADR) programs also made little difference. The only factor that made a difference, according to the report, was the setting of an early trial date. The report also indicated that differentiating cases for appropriate management according to size and complexity is a useful exercise, he said. Judge Robreno also said the Advisory Committee should be aware of the June 1997 decision of the Supreme Court in the "Georgine" case, Amchem Products, Inc. v. Windsor, ____ U.S. ____, 117 S.Ct. 2231 (1997), which held that settlement classes are not permissible unless they meet all the requirements for a regular class under Federal Rule of Civil Procedure 23.

Judge Duplantier also said he had attended the June 1997 meeting of the Bankruptcy Committee. Judge Hodges, who attended the Advisory Committee meeting as a representative of the Bankruptcy Committee, observed that the two committees overlap very little in their responsibilities but have many common interests. One area of interest to both groups is fees and he noted that the Bankruptcy Committee had made recommendations concerning bankruptcy fees at the June meeting. Other issues the Bankruptcy Committee is working on actively, he said, are additional judgeships, consolidation of bankruptcy and district court clerks' offices, the *in forma pauperis* study which is due to Congress on March 31,1998, and methods to improve the operations of United States trustees and bankruptcy administrators.

Mr. McCabe added that the Bankruptcy Committee also had taken up Recommendation 73 of the Long Range Plan for the Judiciary, which states that the judiciary does not have enough information about its bankruptcy cases to support program decisions, and assigned to its Long Range Planning Subcommittee the task of recommending ways to make more and better bankruptcy information available to those who need it. The subcommittee had met September 9 and divided into two subgroups, one of which will focus on court data and the other of which will work on financial and demographic information. Mr. McCabe said he believes the best way to standardize information coming in to the courts may be through the official forms. Mr. Sommer, after noting that amendments to the official forms would be considered by the Judicial Conference the following week, said the Committee should be mindful about timing future amendments to the forms, because lawyers must purchase new or upgraded software each time the forms are amended.

Ms. Wiggins said the FJC presently transfers district and appellate court data to the Interuniversity Consortium for Political Research, which makes the data available to other

researchers, and is working with the Statistics Division of the Administrative Office to make bankruptcy data available also. Professor Resnick reported that he had attended a conference held in April 1997 under the sponsorship of the Rand Corporation and the EOUST which had included social scientists, academics, and a National Bankruptcy Review Commissioner, John A. Gose. Professor Resnick said he was concerned about privacy issues that arise with widespread distribution of information disclosed by debtors in bankruptcy cases. For example, he said, there is a 10-year limit on including bankruptcy information in a credit report, but information placed on the Internet cannot be erased. Ms. Wiggins said the FJC is sensitive to the privacy issues and is working to purge certain items from the bankruptcy data. She said the FJC intends to work with the General Counsel of the Administrative Office and with the Bankruptcy Committee on the matter. Judge Duplantier asked if the Committee ever had been asked to add social science questions to the official forms. The Reporter said requests had been made in the past, such as a request to add the question whether the debtor is male or female.

Notice to the Government

Judge Small introduced the discussion by noting that proposals by the Reporter, Mr. Kohn, and Mr. David B. Foltz, Jr., had been considered at the Committee's last meeting and been referred to a new subcommittee chaired by him. He recalled that one proposal would have required the clerk to establish and maintain a register for addresses of governmental units. The March 1997 discussion had highlighted problems with the proposal: 1) on the part of clerks concerning the frequency of updates and the number of addresses permitted per government agency, and 2) on the part of debtors over the effect, under § 523(a)(3), of a debtor's failure to provide a correct address. Over the summer, Judge Small said, the subcommittee had met by telephone and, after further discussion, had directed the Reporter to draft amendments incorporating many of the proposals presented at the March 1997 meeting. The Reporter added that the effort to amend the rules to provide for better notice to governmental units actually had begun at the March 1995 meeting, when the Committee had considered the issues and requested new proposals that would reflect the concerns raised at that time.

Professor Resnick summarized the elements of the various proposals that the Committee had considered at the March 1997 meeting; 1) amending Rule 1007 to require that wherever a debt to a governmental unit is listed a debtor state the name of the agency through which the debt was incurred; 2) amending Rule 5003 to require the clerk to keep a register of mailing addresses for government agencies; 3)requiring the debtor to use the register address if the entity listed is a unit of the federal government or of the government of a state; 4) providing a "safe harbor" for the debtor who uses the address in the register but providing also that use of a different address does not bar the discharge if the governmental unit involved receives actual notice of the

bankruptcy case;[1] 5) amending Rule 2002 to provide that when notice to the United States attorney also is required, that the name of the agency through which the debt was incurred be included in the notice to the United States attorney; 6) requiring disclosure in the Statement of Financial Affairs of additional information about the debtor's personal and business relationships that would enable taxing authorities to investigate the status of the debtor's tax obligations and about environmental claims, both actual and potential; and 7) requiring a debtor to mail a copy of the environmental part of its Statement of Financial Affairs to the relevant government agencies.

Mr. Klee said the Committee needs a policy basis for approving the proposals, which he viewed as having conflicting objectives. On the one hand, he said, a false oath can jeopardize the discharge and on the other, the proposed tax and environmental disclosures could result in self-incrimination. With respect to the notice proposals, he said, due process requires notice, but with these proposals, if notice is not given correctly, the discharge may be jeopardized. What is different about a bankruptcy, he asked, that these disclosures should be required? He said the clerk, rather than the debtor, should give notice, and that the only practical approach is for the clerk to give notice to the entire register, which should be national and not limited to the state where the court is located. Professor Resnick responded that the use of the register would occur only when a governmental unit is a creditor and that its purpose is to help government agencies overcome the problems that arise from the massiveness of their programs. He said the environmental disclosures proposed for the Statement of Financial Affairs are a different matter and are much more controversial.

Notice to the Government — Rules 2002 and 5003

The Committee began its consideration of the draft amendments with the proposed amendments to Rule 5003(e) (establishment of a register) and proposed new Rule 2002(g)(2) (filing by governmental unit of preferred address information). Mr. Shepard said the NBRC had heard much about the importance of notice, especially when the time to act is short. The opportunity clearly exists to delay notice, he said, and a remedy is needed. The NBRC view is that the Bankruptcy Code should provide sanctions for deficient noticing, and the rules should specify the mechanics of proper noticing. Mr. Shepard said he thinks the register should go beyond the immediate state in the which the court is located. Mr. Klee added that Indian reservations, foreign states, municipalities, and other, smaller, government units also should be included. Mr. Heltzel pointed out that the number of government entities in the State of California alone is over 7,000, and including further jurisdictions is simply impractical. Professor Resnick suggested that it probably would be better to start with a manageable amount

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[1]Although the Reporter characterized this as a "safe harbor" provision for the debtor who uses the address in the register, Mr. Kohn emphasized that it makes use of the register address voluntary.

of material and see how it goes. He said the Committee also had been asked why the register should be limited to governmental units, with a suggestion to include private creditors such as Citibank as well. A relatively small register will help, he said, and probably be sufficient for most cases.

Judge Cristol expressed concern about the debtor using a register list that is more than five months old. He said he thinks there should be a distinction in treatment depending on whether a creditor is a voluntary one (private lending institution) or an involuntary one (such as a taxing authority). For a voluntary creditor, he said, a debtor should have records and the debt should not be discharged if notice is not provided. Mr. Kohn said the "outside" states may need to be listed in a register more than the immediate one. He also said a register would benefit debtors, because using the address listed there is *per se* effective notice and creditors also benefit because timelier notice helps them to avoid violating the automatic stay. Mr. Sommer said he favors good notice, but that if a registry is too large it is not really useful. Judge Kressel suggested turning the thrust of the amendment around to say "do the best you can in providing an address, but you can do even better if you use the register." He said he also would want the rule to make clear that notice will still go to the address listed by the debtor on the mailing matrix and not require the clerk to override the matrix with any different address from the register.

Mr. Klee said he still would like the word "state" in line 7 of Rule 5003(e) changed to "state or territory" and to have conforming changes made throughout the drafts. Mr. Rosen asked whether the government could search for information using a debtor's social security number. Mr. Kohn said this is impractical, because the federal government has no central database and each state would have to go through all one million annual filings to find the cases in which that state is a creditor.

Judge Duplantier asked whether anyone on the Committee opposed the general idea of "a register." Mr. Heltzel said he opposed the amount of work it would require of the clerk. Mr. Batson said he doubted the idea would work in practice. **When the matter was put to a vote, the result was 9 - 4 in favor. On the question of expanding the scope of the register** beyond the proposal, as amended, Mr. Heltzel said clerk opposition would be massive, and **only one member voted in favor.**

Continuing with the various provisions of the draft of Rule 5003, the Chairman asked if the Committee thought the dates on which the register is updated should be uniform. The consensus was that they should.

Mr. Kohn said he does not like limiting an agency to one address and would prefer to give the clerk discretion in the matter. Judge Duplantier asked how the debtor would know which one to choose if several addresses were listed. Kohn suggested that the addresses could be distributed by counties, but Mr. Heltzel said the government agencies are not all organized the

same way, that their boundaries seldom match those of the court districts. His district, for example, comprises parts of three IRS districts, he said. Professor Tabb asked if there should be a safe harbor provided for a debtor who has only a one-in-three chance of choosing the right address. Mr. Heltzel questioned what will happen when people move. He also said he had been sampling matrices filed in his district to determine how well debtors are complying with the addresses posted in the local roster of government agency addresses that he has maintained for many years; he found compliance is only about 50 percent.

Judge Kressel suggested changing the word "district" on line 7 of Rule 5003(e) to "court" and making conforming changes throughout the drafts. Judge Gettleman made a motion to change the frequency of register updates to once per year (from twice per year), which carried with one opposed.

Mr. Sommer said that in the draft of Rule 2002(g)(2), at lines 13 through 15, he found the language confusing and asked the Reporter why he did not simply say "the agency"? Professor Resnick responded that it is not the agency that has the claim, but the United States or the state. If agency were to be added, he said, it might appear that municipalities could be included. In the same way, he said, the reference to Rule 5003 is intended to show that the United States or a state can file an address for one or another of its agencies, but the creditor is still the United States or the state. Judge Kressel concurred and observed that the cases on notice say that notice to the Small Business Administration, for example, is not notice to the Internal Revenue Service. There was general agreement that drafting on these points presents difficult issues and that the definition of "governmental unit" in §101 of the Code increases the difficulties. The Reporter invited help from the Committee in resolving this drafting point.

Mr. Rosen said the heading of Rule 2002(g)(2) should be changed to use the phrase "the United States, states, and territories" to reflect the discussion at the meeting. Judge Cordova said the would "separate" on line 21 of the rule should be deleted.

Mr. Sommer asked how Rule 2002(g)(2) would work with Rule 2002(g)(1), which provides for using the address on a filed proof of claim if that address differs from the one provided by the debtor. Professor Resnick suggested that he could either insert in (g)(1) a carve-out such as "except as provided in (g)(2)" or he could add a proof of claim option to subdivision (g)(2).

A motion by Mr. Rosen that in the draft of Rule 2002(g)(1), lines 10 - 11, a provision be inserted that a creditor that wants a different address used in subsequent notices must file a request and serve copies on the debtor and trustee carried by a vote of 9 - 3. The Committee then reconsidered the matter, based on the amount of paper that would be generated. Professor Resnick suggested amending proposed subdivision (g)(2) at lines 17 - 19 to carve out subdivision (g)(1), but Mr. Sommer said it would be a mistake to carve out of subdivision (g)(1)

the requirement to use the address on the matrix or any later-filed schedule unless a request is filed to use a different address. Mr. Heltzel said the real process of sending notices is highly computerized, with the actual printing and mailing performed by a contractor at a remote site. As a practical matter, he said, the clerk can't make corrections, but simply adds any new addresses received and sends notices to all.

After this discussion, a new suggestion was made: **delete subdivision (g)(2), (refrain from amending Rule 2002 at all), and rely instead on draft Rule 1007(m)(2) (debtor's duty to use register address). Although there was no vote taken, no member expressed any objection** to this approach. The Reporter said he would redraft Rule 5003(e) to delete the reference to (g)(2) and to provide simply for setting up the register.

The Committee discussed again Rule 5003 and the issue of whether to limit a government agency to one address or permit multiple addresses to be used. Mr. Batson spoke passionately against requiring citizens to help the government by providing information that may be damaging to their interests. Mr. Smith said he is ready to reconsider the creditor's option to provide a new address by doing so on the Proof of Claim. Mr. Kohn said that multiple addresses seem to be working without causing problems in those districts that have established registers by local rules and that the various addresses conform to geographic divisions within the particular district. **A motion to limit each agency to one register address carried by a vote of 5 - 4.**

With respect to the draft of Rule 2002(j), the Reporter said the proposed changes all were stylistic with the exception of lines 61 - 64, which contain the provision requiring that when notice must be mailed also to the United States attorney, the notice shall identify in the address the name of the department, agency, or instrumentality through which the debt was incurred. **The Chairman stated that, seeing no objection, the amendment would be adopted, subject to review by the Style Subcommittee.**

National Bankruptcy Review Commission

Brady C. Williamson, chairman of the NBRC, reported that the Commission expected to issue its report on time, on October 20, 1997, and that it would be published electronically as well as in paper form. He said the report would be available on several websites, including the Government Printing Office (GPO) and the site maintained by the judiciary. Commissioner James I. Shepard spoke of the importance of notice to the bankruptcy system. If the public's right and interest is not protected in bankruptcy proceedings, he said, the system is not working properly.

Notice to the Government — Rule 1007

The Committee, returning to its consideration of government noticing, discussed the draft

of proposed Rule 1007(m), in particular the "safe harbor" provisions that safeguard the discharge if the debtor incorrectly names a government agency or uses an address that is different from the address in the clerk's register, but the creditor agency timely receives actual notice of the case. Mr. Klee said the language should track that of § 523(a)(3). Mr. Sommer and Judge Kressel said the provision should be rewritten more explicitly as a "safe harbor." Judge Duplantier asked how many members thought there should be no "safe harbor." Only Mr. Kohn raised his hand. Judge Duplantier asked how many members would favor language such as "the debtor may use" the register address rather than "the debtor shall" use it. The show of hands was clearly in favor. Mr. Klee observed that some circuits have ruled that if a requirement is in the rules and not followed, the debtor is not discharged. Mr. Rosen said that whether an agency is correctly named should not control whether a debtor receives a discharge in an actual notice situation. **The draft of Rule 1007 was recommitted to the subcommittee.**

Notice to the Government — Official Form 7
(Tax and Environmental Questions)

The Reporter introduced the discussion of the proposed addition of several tax questions to Official Form 7, the debtor's Statement of Financial Affairs, and stated that the four questions shown in the agenda book represent the Government Noticing Subcommittee's winnowing of the submissions received from the Department of Justice. It was the subcommittee's judgment, he said, that if any tax questions are added, the addition should be limited to the questions shown. Mr. Sommer said that in the proposed new question 16, on line 3, the phrase "had been married" should be changed to "was married." He also said some of the proposed questions overlap existing ones, and the Committee should try to avoid duplication of information. He suggested referring the proposed questions either to the Forms Subcommittee or the Style Subcommittee.

Mr. Smith said that proposed question 17 should clarify whether the word "owned" means only 100 percent ownership or is intended also to cover partial ownership. He referred the Committee to the current question 16, which is quite similar, and suggested that it could be broadened to include proposed question 17. Mr. Smith also asked why the information on former spouses is needed. Mr. Kohn said that is for community property purposes. Mr. Sommer suggested substituting "if you listed community debts, name any former spouse." Mr. Klee said trustees also would find the information useful for contribution purposes. Other suggestions by members were to generally refine question 22 and add "If the debtor is a corporation . . . ," and in question 23 to limit applicability to the debtor as an employer and possibly to corporations only. **The consensus was that these questions should not be added specially, but only when there is a general review of forms.**

Judge Small introduced the discussion of the proposed environmental questions by noting that they pertain to identified claims only and do not include the disclosure of "imminent danger" on property of the debtor, which Mr. Kohn advocates. Mr. Klee said he would want question

24.a. limited to disclosure of notices actually received by the debtor and would want the clerk, rather than the debtor, to mail the part of the statement containing the disclosures. The Reporter said any requirement to mail part of the statement to creditors should be in the rules and that Rule 1007 could provide for it. Mr. Batson asked whether affording environmental protection agencies with extra information could open the door to requests for similar service by other agencies. **There was consensus that merely adding an instructional note to the form would not be sufficient to require a debtor to mail a portion of its statement to certain creditors and that, if the Committee approves such a requirement, it must be stated in the rules.**

Mr. Smith said he thinks the "imminent danger" information should be disclosed. Mr. Klee said that goes beyond the debtor-creditor relationship and had Fifth Amendment implications. Judge Robreno suggested that such information would be appropriate to inquire about at a § 341 meeting. Judge Gettleman asked whether such disclosures would go beyond what the environmental laws would require. Judge Cristol said environmental issues generally arise in a chapter 7 case where there is a fight between the bank, the trustee, and the other creditors over who will bear the expense of cleanup, and the sooner the existence of an environmental problem is known the better it is for all. Mr. Sommer asked whether it is so important that the participants in the case need the information sooner than the § 341 meeting. Mr. Patchan said it should be known to the U.S. trustee, who appoints the case trustee, before the appointment is made and suggested that there should be a requirement in the rules for separate notice. Mr. Foltz stated that question 24, as drafted, would not have disclosed the problems he has encountered, which included representing a debtor that had hazardous biomedical material on its premises. Mr. Foltz said he would like the substance creating an "imminent danger" to be identified and thinks it should be disclosed immediately. Mr. Klee said there should be a distinction between different types of debtors and what is required of them. He said he supports requiring disclosure by a business and thinks the standard should be that the substance does, rather than may, pose a hazard. Mr. Batson suggested that the standard should be "imminent threat to public health and safety," including environmental safety.

Concerning the general principle of requiring disclosure, the vote was in favor, with one opposed. Turning to the mechanism for establishing the requirement, Professor Resnick suggested that the disclosures in question may go beyond what already is required under § 521 and need a statutory change, especially if separate notice is to be given. Mr. Patchan again supported special notice to the U. S. trustee as the person most likely to respond immediately. Professor Resnick suggested there could be a checkbox on the petition, and checking the box would signal the clerk to notify the U. S. attorney immediately. Judge Cordova said the U.S. trustee should receive the notice, not the U. S. attorney. Judge Robreno said he favors using the statement of affairs rather than adding to the filing requirements set out by Congress. He said he also was concerned about how the word "imminent" would be interpreted. Mr. Rosen said that in a bankruptcy, the property is transferred to a new person, the trustee, who should know the risk being undertaken.

The Reporter suggested that a two-step disclosure might be possible, with items that create an imminent danger and need urgent attention to be disclosed on Day 1, and other items that are not urgent disclosed in the statement of affairs. A show of hands indicated that the Committee generally favored a two-stage approach, with one opposing vote and two abstentions. A second vote showed nine members favoring broad disclosure at the outset, including both urgent and non-urgent items. Professor Resnick said he thought disclosure might be more effective if limited to matters that require urgent attention. He said this could be done with a box labeled "Check here and give a brief description." Mr. Sommer said he favored a combination of a rule and form to go out for comment with the rule amendment. Judge Donald said the requirement should be only for disclosure of hazards known to the debtor, with a duty to amend based on later information.

The Committee determined to recommit to the Forms Subcommittee the issue of environmental disclosures, both those that present an "imminent danger" and those for which disclosure is less urgent.

Litigation Subcommittee — Rules 9013 and 9014

The Reporter introduced the discussion by reviewing the Committee's action at the March 1997 meeting approving in principle the subcommittee's proposed amendments, subject to further refinement, review by the Style Subcommittee, and deferral of certain issues. He said he had submitted the drafts to the Style Subcommittee of the Standing Committee for its recommendations, and that the Advisory Committee's own Style Subcommittee had gone over those recommendations in a telephone conference in which the Litigation Subcommittee chairman, Mr. Klee, also had participated. Professor Resnick said that during the summer he also had reviewed the rules generally to identify those that would require conforming amendments. He said that as a result of this review he also wanted to bring back to the Committee the matter of amending Rule 9034, which governs notice to the United States trustee. A proposal to amend that rule had been defeated at the March 1997 meeting, but deleting notice to the U.S. trustee as part of the conforming of rules to the proposed Rules 9013 and 9014 might cause the Committee to take a different view of amending Rule 9034, he said. Professor Resnick described the various agenda materials: Exhibit A contains the style revision, with portions related to deferred issues shown in brackets; Exhibit B is identical to Exhibit A, but marked to show some additional proposals from the Reporter that resulted from his review of other rules; Exhibit C lists proposed amendments to 20 rules to conform to the proposed amendments to Rules 9013 and 9014; Exhibit D contains proposed amendments to Rule 1006, deferred at the March 1997 meeting; and Exhibit E shows proposed amendments to Rule 1007 that were approved in principle at the March 1997, subject to further refinement.

Judge Duplantier said that, although the Committee had approved in principle the proposed amendments to Rules 9013 and 9014, the proposals were open to reconsideration and

he noted that Judge Robreno had written a letter describing a different approach. Judge Robreno's letter, which was distributed to the Committee separately from the agenda book, would be discussed at the appropriate moment, he said. Speaking for himself, Judge Duplantier said his objective in managing litigation is to identify the big case early on, so it can be singled out for special attention and management. The routine matters, however, should not be unduly burdened with requirements that are needed only in a big case. He suggested as targets for deletion from proposed Rule 9014 two items that he thinks will burden routine matters and can be specially provided for when needed: the list of witnesses, and the 25-day response time. He said that motion practice is similar to discovery; the problems are in the big cases.

Mr. Smith said the attorney for the movant usually knows when a matter is complex and should trigger the extraordinary procedures, but Judge Duplantier said it may sometimes be the responder who creates the complexity. Judge Robreno spoke generally against the proposed Rule 9014(m), which gives the court discretion to depart from the prescribed procedures. He said it seemed to him to be like the opt-out provided in Federal Rule of Civil Procedure 26(a) and is really like adopting no rule. He also said the draft seems to be legislating for the extraordinary, while he prefers an approach that states basic principles for all, leaving the court to give directions in major matters. Judge Duplantier said he did not think proposed subdivision (m) would create a general opt-out.

Mr. Klee reviewed the status of the litigation project. Like Gaul, he said, it is divided into three parts. Adversary proceedings comprise one part, and are not affected by the proposals. Proposed Rule 9013 is another part, addressing matters that usually proceed unopposed, and the proposals concerning these appear to enjoy broad support within the Committee. Proposed Rule 9014 is the third part, and there are three approaches within the Committee: Judge Robreno's, Judge Duplantier's, and the subcommittee's draft. The Committee then turned to the materials and considered the proposals in order.

The Reporter noted that the first bracketed material in the draft of Rule 9013 is subdivision (a)(5), concerning an application for approval of employment of a professional. Professor Resnick said that deleting the brackets would create a conflict with what is proposed for Rule 2014 and that perhaps the best course would be to delete (a)(5) from Rule 9013 altogether and leave Rule 2014 as a stand-alone rule. **There was no opposition to deleting subdivision (a)(5).**

The next bracketed subdivision is (a)(11), which addresses a request for examination under Rule 2004, and the Reporter noted that the Rule 2004 Subcommittee had decided to table the proposals to require notice of a Rule 2004 examination. Deleting subdivision (a)(11), he said, would leave the question of notice to local rule. **Mr. Klee made a motion to retain subdivision (a)(11) (and delete the brackets), which carried by a vote of 7 to 6.**

Turning to Exhibit B, which includes additions made to the draft after the Reporter's review of other rules, **there was consensus to retain subdivision (a)(14),** concerning conditional approval of a disclosure statement under Rule 3017.1. With respect to subdivision (a)(15), concerning protection of secret, confidential, scandalous, or defamatory materials, Judge Robreno raised the issue of public interest. **A motion to include subdivision (a)(15) drew a tie vote of 6 to 6, which the Chairman resolved by voting to include (a)(15).**

Judge Kressel expressed concern about the provision in subdivision (e) that the applicant is to serve the order, once it has been signed by the judge. Judge Kressel said the rule needs to ensure that the order is served, because the clerk will docket it and the appeal time will begin to run. He said he thinks the rule should require that, if the court issues an order, the clerk must serve a copy on the applicant, any entity listed in Rule 9013(c), and any other entity the court directs. **A motion to amend the draft to require the clerk to serve any order carried by a vote of 9 to 2.**

A motion to approve proposed Rule 9013 as amended at the meeting carried on a voice vote.

Turning to the subcommittee's draft of Rule 9014, the Chairman said the draft is nearing completion. He said he would like to shorten the response time, put the burden on the respondent to say the matter is complex and needs more time.

Judge Robreno made a motion to substitute his draft. He said the essence of his proposed rule is its subdivision (c). Under his draft rule, he said, the rule would state the principles, and the details would be left to local rule. Judge Robreno said the proposed substitution would provide a mandate to bankruptcy courts to refrain from awarding relief unless a court found that the party against whom relief was sought had been afforded, in the circumstances, 1) adequate notice of the hearing, 2) an opportunity to respond to the administrative motion, 3) an opportunity to offer evidence on any contested issues, 4) an opportunity to cross examine adverse witnesses, and 5) an opportunity for discovery in the circumstances.

Mr. Sommer said he supports the principle of uniformity and would publish the subcommittee's draft. Judge Kressel agreed and said the sole finding of the FJC study was a desire for uniformity. He said the Committee should publish the draft and see what the comments are. Professor Tabb said the draft seems to him to be micromanagement. Professor Resnick said he did not agree and noted that the draft had been streamlined since two meetings prior. He also observed that the policy of the Standing Committee is uniformity in rule and against local rules. Judge Cordova said the draft appears to be unduly complicating motion practice, and the only items needed are notice to the opposing party, and opportunity to respond (which should be ten days), and reasonable time to be heard. Judge Donald said the procedures look more complicated on paper than they would be in practice, and Judge Duplantier and Mr.

Sommer agreed. The Reporter said the trend in the civil rules with respect to discovery is toward limiting the number of depositions and interrogatories. This is a technique for identifying the big case, he said, because studies show that in most cases discovery takes less than three hours, and a need for more than the rule permits forces the parties to go to the judge. If the draft of Rule 9014 is amended to make the response time ten days, he said, that would have a similar result of sending the parties in a complex matter to the judge with a request for more time. **The motion to substitute Judge Robreno's draft for the subcommittee's draft of Rule 9014 failed by a vote of 3 to 9.**

The Committee then turned to the subcommittee's draft of Rule 9014. The Chairman said the rule should be drafted so that in a non-routine matter, the respondent can request more time. Mr. Smith said the extension should be automatic if there is a response. The Reporter said this extension already is built-in, because, if there is a response, the first hearing is a status conference (unless there is no genuine triable issue of fact). Judge Small said he thinks the shortest response time possible would be 15 days. Others suggested ten days, with 24 hours for further response from the movant, or with three days for further response. Mr. Sommer said shortening the time is workable so long as the rule retains the "at least" language, so the time can be extended. **A suggestion to establish 15 days as the time for response, with five days for further response, drew 9 votes in favor. A subsequent motion to change the 15 days to 20 days carried by a vote of 8 to 2.**

A motion to strike the requirement that the movant (lines 31-35) and the respondent (lines 95-101) provide witness lists with their initial pleadings carried, 7 to 3.

The Committee then began a subdivision-by-subdivision review of the subcommittee's draft. In response to a question about the inclusion in subdivision (a)(2) of the approval of a disclosure statement and the confirmation of a plan as matters to which Rule 9014 would not apply, the Reporter said no motion or status conference is required for these matters now, that the Code requires the court to hold a confirmation hearing, and that Rule 9014 would allow the court to skip the confirmation hearing if no objection were filed. **A motion to apply Rule 9014 procedures to Rules 3017, 3019, and 3020(b) carried by a vote of 6 to 5.** Judge Kressel said it is the objection to a disclosure statement or to confirmation of a plan that triggers Rule 9014 now, and that should continue. The Reporter said any motion involving valuation needs an attached appraisal under the subcommittee's draft, which may not be appropriate for a disclosure statement or a plan. **A motion that Rule 9014 apply to these matters but that the objection be the initiating "motion" failed by a vote of 3 to 6.** Mr. Klee reiterated that the survey showed people think there are too many different procedures in the rules. The Reporter noted that there also is a conflict with existing Rule 2002(b), which requires a 25-day notice of a hearing on approval of a disclosure statement or confirmation of a plan. **A motion to reconsider and carve out Rules 3017 and 3020(b) from Rule 9014 carried by a vote of 10 to 1. A motion to retain the reference to Rule 3015(g), modification of a chapter 13 plan, in subdivision (a)(2)**

carried 8 to 2. [Subsequently, the Committee determined that Rule 3015(g) is to be governed by Rule 9014.] The Committee then agreed to amend Rule 3019 to provide that a request for a determination that a class be deemed unaffected by a plan is governed by Rule 9014. The Committee decided to delete as redundant, however, the reference to Rule 3017.1, because it is included in Rule 9013(a) which is carved out generally.

In subdivision (a)(5), the Committee also determined to delete the word "other" in line 18 and to insert the word "the" after the word "or" in line 19. The Committee voted 7 to 2 to retain subdivision (b)(3)(C), requiring the movant to provide a copy of any valuation report when valuation is "an" (rather than "at") issue.

Concerning subdivision (c), Mr. Sommer said there is an ambiguity surrounding the phrase "at least" when applied to the time limit that could permit a party to file a motion and wait to serve it. The Reporter asked whether the court can change time periods other than under Rule 9014, which permits such changes in a particular case only. **The Committee voted 7 to 4 in favor of allowing the court to circumvent the "at least" and allow a local rule to provide for a longer initial time period.** Judge Duplantier said this action would destroy uniformity, and **in a second vote, the Committee reversed and voted 8 to 3 against a local rule opt-out.**

In subdivision (c)(1)(F), the Committee determined to insert the word "on" after "lien" in line 60 and to delete the word "adversely" in line 62. In subdivision (c)(1)(G), the Committee inserted the words "to service" after "entitled" in line 64.

Concerning subdivision (h)(1)(C), a member questioned whether the shortened time period provided in the subcommittee's draft would be workable with the shortened answer time voted earlier. **The Committee voted 4 to 3 against shortening these periods and then voted to delete the subdivision entirely. Upon a motion to reconsider, subdivision (h)(1)(C) was restored with the phrase "30 days" in line 141 deleted and the brackets surrounding "10 days" deleted in line 143. The Committee voted to delete subdivision (h)(2),** which Judge Gettleman had pointed out as redundant of Federal Rule of Civil Procedure 37.

In subdivision (i)(1)(B), line 171, the Committee discussed how much notice the court should be required to give when it decides that the first hearing in a matter will be an evidentiary hearing. Five members favored three days, but Mr. Batson wanted a longer time. Mr. Klee said a longer time would not work when the response does not come in until five days before the originally scheduled hearing date. Both Rule 9006 and subdivision (n) of the (Exhibit B) draft allow for alteration of time periods, he said, and the Reporter suggested that line 171 could simply require "reasonable" notice. **The Committee voted 7 to 3 in favor of requiring reasonable notice. In subdivision (i)(2), line 181, the Committee changed "unrepresented" to "not represented."**

In subdivision (l), line 211, the Committee agreed to delete the brackets around "7009" in the list of adversary proceeding rules that will apply. In lines 216-17, and in subdivision (n), line 229, the Committee determined to delete the phrase "within the time necessary." In subdivision (n), line 225, the Committee also determined to delete the phrase "with or without prior notice."

The Chairman requested that, for the publication of the draft for comment, the Reporter and Mr. Klee write an introduction to the litigation package that would tell members of the bench and bar what to focus on, such as the issues just debated by the Committee. Ms. Wiggins suggested as a model the "Call for Comment" that accompanied the preliminary draft of Rule 11 of the Federal Rules of Civil Procedure. Judge Robreno asked if any report or other document accompanying the package would contain a disclaimer that it is not approved by the Committee. The Reporter said he envisioned a report to the Standing Committee that the Committee would ask to have published with the preliminary draft. **At the Chairman's request, the Reporter and Mr. Klee agreed to have the report ready in time to include in the agenda book for the March 1998 meeting.**

A motion to adopt the subcommittee's draft of Rule 9014 as amended at the meeting carried by a vote of 8 to 3.

Litigation "Package" — Conforming Amendments to Other Rules

The Committee then turned to Exhibit C, which contains proposed conforming amendments to other rules that would be required if proposed Rules 9013 and 9014 become national rules. The Reporter noted that he had included style changes also, and that, if approved by the Committee, these amendments still would have to be reviewed by the style subcommittees of the Standing Committee and the Advisory Committee.

Rule 1014. **The Committee approved the Reporter's draft with one change, inserting in line 17, before the word "transfer," the phrase beginning on line 18 "if the court determines . . . ."**

Rule 1017. The Reporter noted that Rule 1017(c), which is shown as deleted because it would conflict with proposed Rule 9014, had been published for comment. He said the subdivision would simply remain in effect if Rule 9014 does not become effective. **The Committee changed the word "motion" to "application" in subdivision (f)(2), line 40, and approved the Reporter's draft.**

Rule 2001. **The Committee approved the Reporter's draft.**

Rule 2004(a). (Not in materials.) **The Committee determined to change the word**

"motion" to "application."

Rule 2007. The Reporter noted that the changes shown are all stylistic except for the addition of a provision that the matter is governed by Rule 9014. **The Committee approved the Reporter's draft.**

Rule 2016. The Reporter said he had restyled the rule, making substantive changes only to change "application" to "motion" and provide that Rule 9014 governs. **The Committee changed the word "request" on line 28 to "motion," changed "applies" to "apply" in line 56, and changed "application" to "motion" in line 57. The Committee approved the Reporter's draft with the changes noted.**

Rule 3001. It was noted that the response time in the current rule would be shortened as a consequence of bring the matter under Rule 9014. **The Committee approved the Reporter's draft.**

Rule 3006. The Committee discussed whether the rule should say "claim" or " proof of claim," and Judge Cordova noted that usage is inconsistent throughout the rules. **The Committee approved the Reporter's draft.**

Rule 3007. The Reporter noted that conforming the procedure for objecting to a claim would shorten the response time from 30 days to 15 and change the procedures generally, by requiring that the matter be set for hearing and a status conference be held. Judge Kressel said he thinks the existing rule contemplates that some basis for the objection will be stated in the papers filed. Several members thought the response time should be longer, wanted to retain the 30 days, and change the response time in Rule 9014 to 30 days also (subdivision (c)(1), line 43). Mr. Patchan said the Rule 9014 procedures would burden the pro se party and generate unnecessary paper to get the matter before the court. **The Committee approved the Reporter's draft with the following changes. In line 2, insert "except that the motion shall be served and filed at least 30 days before the hearing" after "Rule 9014"; in line 6, change "If" to "But", and delete the word "is" before the word "joined"; and, line 7, delete the comma and substitute "is" for "it becomes."**

Rule 3012. **The Committee deleted the phrase "of a party in interest" and approved the Reporter's draft.**

Rule 3013. **The Committee approved the Reporter's draft.**

Rule 3015. Subdivision (f), objection to confirmation, the Reporter said, would be a stand alone procedure, and the changes from the current rule would be to provide for service as in Rule 9014 and to make discovery available. A member raised the issue of whether there

should be a deadline for filing an objection, and **the Committee decided to delete the word "timely" from line 14. The Committee also struck the text of subdivision (g), subject to review by the Reporter. Subdivision (g) is to remain, but simply say that modification of a plan after confirmation is governed by Rule 9014. The Committee approved the Reporter's draft with the changes specified.**

Rule 3020(b)(1). After discussion, **the Committee decided to change the first sentence back to the passive voice, and approved the Reporter's draft, with that change.**

Rule 4001. Professor Resnick explained that most of the changes he was recommending are to eliminate redundancies, state that Rule 9014 applies, or make style improvements. **The Committee approved the Reporter's draft.**

Rule 6004. The consensus was that the redrafting effort had become overzealous with respect to the rearranging of the paragraphs. **The Committee directed that the paragraphs be restored to the order in which they appear in the existing rule and that lines 11 - 13 and 38 - 42 be restored to the passive voice. The Committee also changed the reference to "(d)" in line 11 to "(e)" and decided to move the clause on lines 35 - 38 beginning "to all creditors" to form an insert at line 33, after the word "give."** When redrafted, Judge Duplantier said, the **rule should make it clear that a sale may be accomplished by notice, but, if an objection is filed, Rule 9014 applies and the objection is treated as a response. The objector should be required to obtain a hearing date if none has been set in the notice. In addition, the Committee decided to delete the bracketed language at lines 49 - 51. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 6006. **The Committee approved the Reporter's draft.**

Rule 6007. **The Committee restored the phrase "or debtor in possession" on lines 3 and 4,** which had been marked for deletion by the Reporter, **and inserted in line 15 after the word "is" the phrase "treated as a motion." The Committee also directed that Rule 6007(b) also be amended to provide that Rule 9014 applies. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 9006. **The Committee approved the abrogation of subdivision (d),** and noted a typographical error in identifying the subdivision in the Committee Note.

Rule 9017. **The Committee approved the Reporter's draft.**

Rule 9021. **The Committee approved the Reporter's draft.**

Rule 9034. **The Committee deleted lines 27 and 28 and approved the Reporter's**

draft.

Rule 1006. Turning to Exhibit D, the Reporter explained that Rule 1006 would be a stand alone rule. The change to the existing rule is to substitute the word "request" for the word "application," as that is now a specific procedure governed by Rule 9013. The Reporter said he also had made substantive clarifications about pre- and post-petition payments to bankruptcy petition preparers. **The Committee approved the Reporter's draft.**

Rule 1007. (Exhibit E.) The Reporter noted that this also is a stand alone rule which the Committee had previously approved and is back for review after redrafting. **After changing the word "is" in line 16 to "are," the Committee approved the Reporter's draft.**

The Reporter said these 23 rules will be submitted to the two style subcommittees and then reviewed by the Committee at the March 1998 meeting.

Rule 2002(a)(6)

After discussion of the Reporter's draft of amendments to raise from $500 to $1000 the amount of a fee request that would trigger notice to all creditors, **the Committee inserted in line 9 of the draft the phrase "of an entity," deleted line 11, and substituted the word "request" for the word "hearing" in line 12. The Committee approved the Reporter's draft with the changes noted.**

Rule 2002(g)

This rule requires the clerk to use the address provided by a creditor in a filed proof of claim, if that address differs from the one listed on the schedules filed by the debtor. The rule allows the clerk to ignore any new address on a proof of claim, however, if a notice of no dividend has been given. The Reporter noted that Bankruptcy Judge Paul Mannes, the former chairman of the Committee, had suggested that, in a case in which assets later appear and a further notice of possible distribution must be sent, any address provided by a creditor on a proof of claim should be used. **A motion to adopt the Reporter's draft, except the portion that requires the use of an address provided in a proof of claim, failed by a vote of 3 to 9. A motion to adopt the Reporter's draft carried by a vote of 9 to 0.** A member requested that the Style Subcommittee give particular attention to this amendment, especially to clarifying the purpose and use of the word "subsequent" in line 10.

Alternative Dispute Resolution Subcommittee

Professor Tabb stated that the subcommittee is in a watching mode. The FJC has completed a survey aimed at discovering whether problems exist, he said. A second survey to

explore any problems found in the initial one remains a possibility, he said. Mr. Niemic reported on the preliminary results of the survey. He said a very small number of problems had been reported, leaving the Committee to consider whether any problems in the areas of mediator confidentiality and ex parte communication between the mediator and the judge should be tolerated. Mr. Klee indicated he would be interested in whether the results of the survey differed depending on whether the mediator was paid or was a volunteer. He said he also is interested in how frequently the ex parte contact between the judge and the mediator was with the consent of the parties.

Field Trip to Courtroom 21

The Committee visited Courtroom 21, which is located at the Marshall-Wythe School of Law of the College of William and Mary. Professor Frederic I. Lederer of the law school faculty demonstrated some of the special features of the courtroom, which include video-conference participation by judges at remote locations, video presentation of evidence, and real time court reporting. Ms. Morris used the facilities to explain and demonstrate for the Committee the electronic filing system now being used in the Manhattan office of the bankruptcy court for the Southern District of New York. The Committee could view actual documents filed in cases, and Ms. Morris demonstrated the procedures an attorney would use to file a new document in one of the cases on the system. A private vendor of an electronic filing system also made a presentation.

Miscellaneous Matters

The Committee discussed dates and locations for the autumn 1998 meeting. Members appeared to favor New York, Boston, New England, Sun Valley, or the north rim of the Grand Canyon as possible locations. Staff will explore availability of space at these locations for October 8 - 9, 1998.

All other matters on the Committee's agenda were put over to the March 1998 meeting.

Respectfully submitted,

Patricia S. Channon

Items 3 through 5 will be oral reports.

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TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PRELIMINARY DRAFT OF PROPOSED AMENDMENTS PUBLISHED IN 1997

DATE: FEBRUARY 22, 1998

In August 1997, a preliminary draft of proposed amendments to the Bankruptcy Rules was published for comment by the bench and bar. The published draft, which is enclosed as Exhibit A, includes proposed amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006 and 9014.

The public comment period ended on February 15, 1998. The Advisory Committee received 14 letters commenting on the proposed amendments. A public hearing scheduled for January 30, 1998, was canceled for lack of witnesses.

For your convenience, I have summarized the public comments and have divided the summaries into several categories. These summaries are in Exhibit B. The summaries are only brief descriptions and are not intended to serve as substitutes for the letters. Copies of the letters, appearing in the order in which they were received and identified by number, are enclosed as Exhibit C.

Need for a Conforming Amendment to Rule 9006(b)(2)

Rule 1017(b)(3) provides that notice of an order dismissing a case for failure to pay the filing fee must be sent to all creditors within 30 days after dismissal. The preliminary draft of proposed amendments to the Bankruptcy Rules published in August

would delete Rule 1017(b)(3) as unnecessary (Rule 2002(f) requires the clerk to send creditors notice of dismissal of a case regardless of the grounds for dismissal).

In again reviewing the proposed amendments, I discovered that a technical amendment must be made to Rule 9006(b)(2) to conform to the deletion of Rule 1017(b)(3). I suggest that the following amendment to Rule 9006(b) be adopted:

> (2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rules 1007(d), ~~1017(b)(3),~~ 2003(a) and (d), 7052, 9023, and 9024.

Committee Note

Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

This change is technical and would not require publication for comment. I recommend that this amendment be added to the package of proposed amendments.

At the March meeting in Little Rock, after considering the public comments and my suggested amendment to Rule 9006(b)(2), the Advisory Committee will be asked to vote on the proposed amendments and, if approved, they will be presented to the Standing Committee at its June meeting.

EXHIBIT A

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure

Request for Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 1998

AMENDMENTS ARE BEING PROPOSED TO:

Bankruptcy Rules	1017,1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014
Criminal Rules	6, 11, 24, 30, 54, and new Rule 32.2

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

- Bankruptcy Rules in Washington, D.C. on January 30, 1998; and
- Criminal Rules in New Orleans, Louisiana on December 12, 1997

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

August 1997

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure

Request for Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 1998

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Criminal Rules	6, 11, 24, 30, 54, and new Rule 32.2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Address all communications on rules to
Secretary of the Committee of Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, D.C. 20544

August 1997

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 1997

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committees on the Bankruptcy and Criminal Rules have proposed amendments to the federal rules and requested that the proposals be circulated to the bench, bar, and public for comment. The advisory committee notes explain the proposals.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than February 15, 1998.** All communications on rules should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

To provide persons and organizations wishing an opportunity to comment orally on the proposed amendments, a hearing is scheduled to be held on the amendments to the Bankruptcy Rules in Washington, D.C. on January 30, 1998; and to the Criminal Rules in New Orleans, on December 12, 1997.

Those wishing to testify should contact the Secretary of the Committee at the above address **at least 30 days before the hearing.** The advisory committees will review all timely received comments and will take a fresh look at the proposals in light of the comments. If an advisory committee approves a proposal, it and any revisions as well as a summary of all comments received from the public will then be considered by the Standing Committee. All comments are made part of the official record and are available for public inspection.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals**, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

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PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO THE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 12, 1997

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 13-14, 1997, in Charleston, South Carolina.

* * * * *

I. Action Items

* * * * *

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 Submitted for Approval to Publish.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1017 is amended to specify the parties entitled to notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. Currently, all creditors are entitled to notice of a hearing on the motion if it is a chapter 7 case. To avoid the expense of sending notice to all creditors, the proposed amendments provide that the debtor, the trustee, and any other entities specified by the court, are the only parties entitled to notice. The rule is amended further to provide that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 is governed by Rule 9014. Other amendments are stylistic or designed to

delete redundant provisions that are covered by other rules.

(b) Rule 1019 is amended (1) to clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires; (2) to provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim; and (3) to conform the rule to the 1994 amendment to § 502(b)(9) and to the 1996 amendment to Rule 3002(c)(1) regarding the 180-day period for filing a claim of a governmental unit. Other amendments are stylistic.

(c) Rule 2002(a)(4) is amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, and statements, must be sent to all creditors. This amendment conforms to the proposed amendments to Rule 1017 which requires that the notice be sent only to certain parties. This subdivision is amended further to delete the requirement that notice of a hearing on dismissal of the case based on the debtor's failure to pay the filing fee must be sent to all creditors. Rule 2002(f) is amended to provided for notice of the suspension of proceedings under § 305 of the Code.

(d) Rule 2003(d) is amended to require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. Also, the amended gives a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute. These amendments and other stylistic revisions are designed to conform to proposed amendments to Rule 2007.1(b)(3) on the election of a trustee in a chapter 11 case.

(e) Rule 3020(e) is added to automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

(f) Rule 3021 is amended to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

(g) Rule 4001(a)(3) is added to automatically stay for ten days an order granting relief from an automatic

stay so that parties will have sufficient time to request a stay pending appeal.

(h) Rule 4004(a) is amended to clarify that the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to discharge must be filed before the time has expired. Other amendments are stylistic.

(i) Rule 4007 is amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. This rule is amended further to clarify that a motion for an extension of time for filing a complaint must be filed before the time has expired. Other amendments are stylistic.

(j) Rule 6004(g) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

(k) Rule 6006(d) is added to automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) so that parties will have sufficient time to request a stay pending appeal.

(l) Rule 7001 is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Other amendments are stylistic.

(m) Rule 7004(e) is amended to provide that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

(n) Rule 7062 is amended to delete the additional exceptions to Rule 62(a) F.R. Civ. P. The deletion of these exceptions—which are orders issued in contested matters rather than adversary proceedings—is consistent with the amendment to Rule 9014 that renders Rule 7062 inapplicable to contested matters. For proposed amendments that provide a new automatic ten-day stay of certain orders, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

(o) Rule 9006(c)(2) is amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case to chapter 7.

(p) Rule 9014 is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter. Rule 7062, which provides that Rule 62 F.R.Civ.P. is applicable in adversary proceedings, is not appropriate for most orders granting or denying motions governed by Rule 9014. For proposed amendments that provide a new automatic ten-day stay of certain orders to that parties will have sufficient time to obtain a stay pending appeal, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1017. Dismissal or Conversion of Case; Suspension

(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, ~~or~~ for want of prosecution or other cause, or by consent of the parties, before ~~prior to~~ a hearing on notice as provided in Rule 2002. For ~~such~~ the purpose of the notice, the debtor shall file a list of ~~all~~ creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it ~~the preparing and filing by the~~

*New matter is underlined; matter to be omitted is lined through.

~~debtor or other entity~~.

(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.

(1) ~~For failure to pay any installment of the filing fee,~~ If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.

(2) If the case is dismissed or ~~the case~~ closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

~~(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner~~

~~provided in Rule 2002.~~

(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.

~~(c)~~ (d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before ~~A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to~~ a hearing on notice as provided in Rule 2002(a).

~~(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a~~

~~case to another chapter, except pursuant to §§706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.~~

(e) DISMISSAL OF INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. An individual debtor's case may be dismissed for substantial abuse ~~pursuant to~~ under § 707(b) only on motion by the

United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) A motion by the United States trustee shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held~~ ~~pursuant to~~ under § 341(a), unless, before such time has expired, the court for cause extends the time for filing the motion. The motion shall ~~advise the debtor of~~ set forth all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is on the court's own motion, notice ~~thereof~~ of the hearing shall be served on the debtor ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~pursuant~~

to under § 341(a). The notice shall ~~advise the debtor~~ of set forth all matters to be considered by the court at the hearing.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) A proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b), is governed by Rule 9014.

(2) Conversion or dismissal under §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§1208(a) or 1307(a). The filing date of the notice shall be deemed the date

of the conversion order for the purposes of applying §348(c) and Rule 1019. The clerk shall forthwith transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently require notice to all creditors of a hearing on dismissal of a voluntary chapter 7 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment, and the amendment to Rule 2002, will have the effect of avoiding the expense of sending notices of the motion to all creditors in a chapter 7 case.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 under § 707(b) is governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) FILING OF LISTS, INVENTORIES, SCHEDULES, STATEMENTS.

* * * * *

(B) If a statement of intention is required, it ~~The statement of intention, if required,~~ shall be filed within 30 days ~~following~~ after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an ~~An~~ extension of time ~~may be granted~~ for cause only on written motion

filed, or oral request made during a hearing, ~~motion made~~ before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(6) ~~FILING OF~~ POSTPETITION CLAIMS; PRECONVERSION ADMINISTRATIVE EXPENSES; NOTICE. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or within 90 days after the first date set for the meeting of creditors under § 341 called after conversion of the case. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within 180 days after the date of

the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)-(d) and 3002. ~~On~~ Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d), ~~notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix~~

~~the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code.~~

* * * * *

COMMITTEE NOTE

Paragraph (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Subdivision (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within the specified time, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The 180-day period applicable to governmental units is intended to conform to § 502(b)(9) of the Code and Rule 3002(c)(1). The time for filing a request for payment of an administrative expense may be enlarged as provided in Rule 9006(b), but may not be reduced. *See* Rule 9006(c)(2). If an administrative expense claimant fails to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request

for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase "including the United States, any state, or any subdivision thereof" is deleted as unnecessary. Other amendments to this rule are stylistic.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee**

(a) TWENTY–DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

* * * * *

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or ~~and~~ a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) ~~of the Code~~ or is on dismissal of the case for failure to pay the filing fee~~, or the conversion of the case to another chapter~~;

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b), which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of the suspension of proceedings under § 305.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE ~~TO THE COURT~~.

(1) *Report of Undisputed Election.* In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.

(2) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States

trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. ~~The presiding officer shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed no later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to the style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. Unless the court orders otherwise, any transfer of assets, issuance of securities, and cash distributions provided for in the plan may not be made before the expiration of the 10-day period. The stay of the confirmation order under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period less than 10 days.

Rule 3021. Distribution Under Plan***

Except as provided in Rule 3020(e), ~~After confirmation of a plan~~ after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed

*** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

claims ~~pursuant to~~ under Rule 3003(c)(5) that have been allowed. For ~~the purpose~~ purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

* * * * *

(3) STAY OF ORDER. An order granting a motion for relief from an automatic stay made in accordance

with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

* * * * *

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor, and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay. Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period less than 10 days.

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT

OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). In a chapter 11 reorganization case, ~~such~~ the complaint shall be filed ~~not~~ no later than the first date set for the hearing on confirmation. ~~Not less than 25 days~~ At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may ~~extend~~ for cause extend the time to file ~~for filing~~ a complaint objecting to discharge. The motion shall be ~~made~~ filed before ~~such~~ the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

Rule 4007. Determination of Dischargeability of a Debt

* * * * *

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, OR ~~AND~~ CHAPTER 12 FAMILY

FARMER'S DEBT ADJUSTMENT ~~CASES~~ CASE; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of ~~any~~ a debt ~~pursuant to~~ under § 523(c) ~~of the Code~~ shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors ~~not~~ no less than 30 ~~days~~ days' notice of the time so fixed in the manner provided in Rule 2002. On motion of ~~any~~ a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing ~~a time for the filing of~~ the time to

file a complaint to determine the dischargeability of any debt pursuant to under § 523(c) and shall give not no less than 30 days days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made filed before the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir.

1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

Rule 6004. Use, Sale, or Lease of Property

* * * * *

(g) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented. It does not affect the time for filing a notice of appeal in accordance with Rule 8002.

Rule 6004(g) does not apply to orders regarding the use of cash collateral and does not affect the trustee's right to use, sell, or lease property without a court order to the extent permitted under § 363 of the Code.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period less than 10 days.

Rule 6006. Assumption, Rejection ~~and~~ or Assignment of an Executory ~~Contracts and~~ Contract or Unexpired ~~Leases~~ Lease

* * * * *

(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period less than 10 days.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. ~~It is a proceeding~~ Any of the following is an adversary proceeding:

(1) a proceeding to recover money or property, ~~except~~ other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval ~~pursuant to~~ under § 363(h) for the sale of both the interest of the estate and of a co-owner in property~~;~~;

(4) a proceeding to object to or revoke a discharge~~;~~;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan~~;~~;

(6) a proceeding to determine the dischargeability of a debt~~;~~;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9,

chapter 11, chapter 12, or chapter 13 plan provides for subordination ~~is provided in a chapter 9, 11, 12, or 13 plan;~~;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing;; or

(10) a proceeding to determine a claim or cause of action removed ~~pursuant to~~ under 28 U.S.C. § 1452.

COMMITTEE NOTE

This rule is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief that is provided for in a plan under circumstances in which substantive law permits the relief. Other amendments are stylistic.

Rule 7004. Process, Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. ~~If service is made pursuant to Rule 4(c)-(j)~~ Service made under Rule 4(e), (g),

(h)(1), (i), or (j)(2) F.R.Civ.P. ~~it~~ shall be ~~made~~ by delivery of the summons and complaint within 10 days after the summons is issued ~~following issuance of the summons~~. If service is ~~made~~ by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued ~~following issuance of the summons~~. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended so that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by~~

~~§ 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court orders otherwise. *See also* the amendments to Rules 3020, 3021, 4001, 6004, and 6006 that delay the implementation of certain types of orders for a period of ten days unless the court otherwise directs.

Rule 9006. Time

* * * * *

(c) REDUCTION.

* * * * *

(2) REDUCTION NOT PERMITTED. The court may not reduce the time for taking action ~~pursuant to~~ under Rules 1019(6), 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to add a reference to Rule 1019(6), which fixes the time for filing a request for payment of an administrative expense incurred after the commencement of the case but before conversion of the case to chapter 7.

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the

manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062,~~ 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, amendments to Rules 3020, 4001, 6004, and 6006 automatically stay certain types of orders for a period of ten days, unless the court orders otherwise.

EXHIBIT B

SUMMARY OF PUBLIC COMMENTS ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

The Advisory Committee received a total of 14 letters from commentators. The following summary contains brief descriptions of the comments received. Copies of the letters are included as Exhibit C.

(1) General Comment Applicable to All Proposed Amendments.

The Committee received a letter from **Jack E. Horsley, Esq.** (Letter #003) commenting with general approval of the entire package ("I look with favor upon everything in the pamphlet....").

(2) Comments Relating to the Rule 7062 Package.

Seven of the 16 Rules that would be changed by the proposed amendments relate to the application of a ten-day automatic stay of certain orders. Under the current Rules, Rule 7062 and Rule 9014 make applicable to contested matters the automatic 10-day stay of judgments under Civil Rule 62. The Advisory Committee voted to delete the reference to Rule 7062 found in Rule 9014, delete the exceptions to the 10-day stay listed in Rule 7062, and amend other rules to impose a new automatic 10-day stay for (1) an order granting relief from the automatic stay (Rule 4001); (2) an order authorizing the use, sale, or lease of property (Rule 6004); (3) an order authorizing the assignment of an executory contract or lease (Rule 6006); and (4) an order confirming a chapter 9 or chapter 11 plan (Rule 3021).

Eleven of the 14 letters received commented specifically on all or part of this "Rule 7062 package" of amendments:

(a) **George C. Webster II, Esq.** (Letter #009) wrote in support of the Rule 7062 package. His 6-page letter explains the uncertainty that exists under the current Rules regarding the application of Civil Rule 62(a). He also discusses problems caused by uncertainty as to when certain orders will become moot and the "false emergencies" that result. The proposed amendments that will add 10-day stays to Rules 3020, 4001, 6004, and 6006 will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush..."

(b) **William E. Shmidheiser, III, Esq.** (Letter #004) wrote that the addition of the 10-day stay to Rules 3020, 4001, 6004, or 6006 would represent a fundamental shift in the way business is conducted in bankruptcy cases. These amendments would slow down even more the already glacial pace of business, probably killing many otherwise barely-viable deals. "The net result will be to make doing business with bankruptcy estates even more less attractive than it already is. A bad idea."

(c) **Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.)** (Letter #006) wrote in opposition to the addition of the 10-day stay in Rules 3020, 4001(a)(3), 6004, or 6006. Judge Higdon is concerned that the areas which will have the 10-day stay "are exactly those areas which often are quite time sensitive... Wouldn't it be logical, given that fact, that, as under the present rule, the 10 day stay specifically <u>not</u> be applicable to such time sensitive areas." Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order (the court and the parties "being human and often harried, will likely forget that the order must specifically except application of the stay"). Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(d) **Hon. David N. Naugle, Bankruptcy Judge (C.D. Cal.)** (Letter #002) wrote that the proposed 10-day stay of orders granting relief from the automatic stay in foreclosure and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay. The letter does not address the other 10-day stay provisions in the proposed amendments to Rules 3021, 6004, or 6006.

(e) **Hon. Leslie Tchaikovsky, Bankruptcy Judge (N.D. Cal.)** (Letter #005) wrote that only one of the proposed amendments - - Rule 4001(a)(3) -- is "a very bad idea ... It would prejudice many to benefit only a few." In most cases, "each day of delay represents a quantifiable dollar loss to the creditor." Debtors do not often appeal such orders; "more often, they file a new bankruptcy case, thereby invoking a new automatic stay". When a debtor wishes to appeal, he or she may request a stay pending appeal.

(f) **Wade H. Logan, Esq.** (Letter #008) opposes the addition of the 10-day stay in Rules 3020, 4001, 6004, and 6006 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(g) **Arthur Rolston, Esq.** (Letter #010) suggests that the new 10-day stays that will be added to Rules 4001(a), 6004, and 6006 should apply only to matters that are actually contested, but not to uncontested matters. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise. "There appears little reason why secured lenders, proposed assignees of leases and other parties impacted by such orders should be subjected to an automatic delay when the proceedings before the Bankruptcy Court issuing the order were unopposed."

(h) **Eugene E. Derryberry, Esq.** (Letter #007) opposes the proposed amendments to Rule 4001(a)(3). As a lawyer for creditors (in most cases secured creditors), he claims that creditors file relief from stay motions only when the debtor is in serious default, and usually a consent order is entered without a hearing. In many cases in which an agreed order cannot be obtained, "the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments...." The proposed amendment "grants an unreasonable delay to debtors who do not need or deserve such protection." He lists factors that the Committee should consider: (1) competent counsel for the debtor could obtain a stay pending appeal when appropriate; (2) the proposed rule is "in effect *ex parte*" with none of the showings usually made in considering stays; (3) the proposed rule "unfairly tilts the playing field against secured creditors" in favor of "bad faith filers;" (4) the imposition of sanctions for frivolous appeals "is an illusory deterrent seldom obtainable;" and (5) "the stay of a consent or agreed order is manifestly inappropriate."

(i) **Prof. Anthony Michael Sabino** (Letter #011) opposes the proposed amendments to Rules 4001(a)(3), 6004(g), and 6006(d). Pointing out that most relief from stay motions are granted, he comments that a mandatory stay would "work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions." He has the same general comments regarding orders under Rule 6004 and 6006. He comments that these new 10-day stays will be a burden overly harmful to the bankruptcy system. He does not address the 10-day stay in the proposed amendments to Rule 3020.

(j) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that the proposed amendments to Rule 9014 and 7062 (rendering Rule 7062 inapplicable to most contested matters) "are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay" and "many of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period..." With respect to the new 10-day stays added to certain rules, these matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Finally, "since the court would have discretion to impose or modify the stay, "parties should not be prejudiced under the amended Rules."

(k) **New Jersey Bar Association, Bankruptcy Law Section** (Letter #012) suggests that the new 10-day stay in Rules 4001(a)(3) (automatic stay), Rule 3020(e) (confirmation order), and Rule 6004(g) (use, sale, or lease of property) be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. "In our experience, district court judges are routinely able to consider emergent applications for a stay from the entry of the order." The competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(3) Proposed Rule 1017(c) and Rule 2002(a)(4).

The proposed amendments to Rule 1017 and Rule 2002(a)(4) would eliminate the

need to send notice to all creditors when the U.S. trustee moves to dismiss a case because of the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. The motion would have to be served only on the debtor, the trustee, and on any other entities as the court directs. In addition, the provision that requires the clerk to give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal would be deleted and the clerk's duty to give notice of the dismissal would be governed by the same general provision in Rule 2002(f) that applies to dismissal orders based on other grounds. The Committee received four letters that comment on these proposed amendments:

(a) **Prof. Michael Anthony Sabino** (Letter #011) opposes the proposed new Rule 1017(c) and the amendment to Rule 2002(a)(4). He believes that it is important for creditors to receive notice of the motion to dismiss for failure to file lists, schedules or statements. He claims that creditors can give the court vital information as to the debtor's true intentions, the debtor's good or bad faith, and the reasons why the debtor failed to file the required documents. He claims that creditors "usually possess knowledge superior to that of the case trustee or the U.S. trustee" and the proposed amendment would "harm the system by foreclosing the vital contribution of knowledgeable creditors."

(b) **New Jersey Bar Association, Bankruptcy Law Section** (Letter# 012) is not in favor of eliminating notice to all creditors of dismissal of a case for failure to pay the filing fee [Reporter's note: under Rule 2002(f), creditors would receive notice of the dismissal], and notice of a hearing on dismissal for failure to file schedules, etc. Creditors and their lawyers often spend time preparing applications for various types of relief, such as relief from the stay, and should receive prompt notice of dismissal or a hearing on dismissal so that they do not waste efforts on matters that will become moot. Because there are few creditors in most chapter 7 cases, the cost of providing notice is "relatively insignificant."

(c) **Wade H. Logan, III, Esq.** (Letter # 008), commenting as a member of

the American College of Trial Lawyers, is in favor of "the greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss" for failing to file the list of creditors, schedules, or statement of financial affairs. But he suggests that notice also be given to any party that files a notice of appearance in the case pursuant to Rules 2002 and 9010.

(d) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that the amendment that eliminates the need to give all creditors notice of a motion to dismiss for failure to file schedules is appropriate. "It is costly and unnecessary to give all creditors notice of a hearing on dismissal of a case based on the failure to file a list of creditors, schedules and statement of financial affairs or substantial abuse or failure to pay the filing fee." But the Litigation Committee disagrees with the deletion of Rule 1017(b)(3), which requires the clerk to give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal. Rule 2002(f), which requires that notice of dismissal be sent to creditors regardless of the basis for dismissal, does not have a time limit. "Therefore, the 30 day requirement now contained in Rule 1017(b)(3) should be retained or an appropriate time period be added to Rule 2002(f)."

(4) Rules 4004 and 4007.

The proposed amendments to Rules 4004 and 4007 are intended to clarify that (1) the 60-day deadline for filing a complaint objecting to discharge or for determining dischargeability of a particular debt runs from the first date scheduled for the meeting of creditors, rather than the date when the meeting is actually held, and (2) that a motion for an extension of this deadline must be *filed* (rather than *made*) before the deadline expires. The Committee received two letters that comment on these amendments.

(a) **William E. Shmidheiser, III, Esq.** (Letter #004) opposes the proposed amendment providing that the 60-day deadline runs from the first date scheduled for the meeting of creditors. He urges the adoption of a rule that starts the 60-day period from the date on which the meeting is actually held. He commented that

creditors often use the meeting of creditors to weigh whether or not they want to file a complaint under Rule 4004 or 4007 "based in large part on the debtor's demeanor and responses to three or four questions" posed at the meeting. "Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor" at the meeting, persuading the creditor not to pursue the matter further. The proposed amendment might lead to more complaints for exception to discharge being filed. He commented that it is not unusual for the meeting to be continued because of the debtor's failure to appear due to illness, bad weather, car trouble, etc. "On the other hand, I am hard pressed to think of a good reason for a change in those Rules. I therefore urge that it remain as it is presently stated."

(b) **Wade H. Logan, III** (Letter #008) commented that amendments to require a motion for an extension of time to be *filed* before the time expires are "well reasoned," but that they present an excellent opportunity to set forth further guidance on the effect of the expiration of the time before the hearing on the extension motion. That is, what happens when a timely motion for an extension is filed before the deadline, but the court does not rule on the motion until after the deadline expires? He claims that there is a split of authority on this question. In some courts the motion is deemed moot after the time expires, in some courts a tolling period is assumed until the court rules on the motion, and in some courts the judge routinely enters a "bridge order" to cover the period between the expiration of the period and the hearing date. "Practice in this area should be made consistent among all jurisdictions." This comment also applies to the proposed amendments to Rule 1019(1)(b), which contains a similar provision requiring the filing of a motion for an extension of time to file a statement of intention in a converted case.

(c) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) wrote that these changes are appropriate and that they "address confusion under the current rules, especially where the initial meeting is not held on the scheduled date."

(5) Rule 1019(6).

The proposed amendments to Rule 1019(6) provide, among other things, that the holder of an administrative expense claim incurred before a case is converted to chapter 7

must file a request for payment under section 503(a) of the Code, rather than a proof of claim. The Committee received four letters commenting on Rule 1019(6):

(a) **James Gadsden, Esq.** (Letter #001) opposes the proposed amendment and suggests that the "present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses." He comments that requiring a claimant to file a request for payment places a substantial additional burden on the claimant. "The claimant must prepare a more elaborate pleading and must serve and file a motion and request a hearing on the request" and the motion must be made shortly after conversion when parties are unlikely to be able to determine the likelihood of a distribution with respect to preconversion administrative expense claims (which are subordinated to postconversion administrative expenses). Mr. Gadsden relates his experiences in representing a landlord that has had preconversion administrative expense claims for postpetition rent in cases involving tenants, but received little or no distribution because of subordination to chapter 7 administrative expenses.

(b) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) believes that this amendment is problematic for two reasons. First, holders of small administrative claims will not hire lawyers to file motions. Second, court dockets will be burdened by large numbers of motions seeking allowance of claims. Both of these comments assume that a motion under § 503(a) would be necessary; one member of the Committee does not construe this rule amendment as requiring claimants to file motions for allowance of administrative claims. They mention one actual converted case in which landlords on 500 leases would have been required to file motions to establish priority with respect to postpetition rent claims. The trustee in that case simply requested an order setting a bar date for the filing of chapter 11 administrative claims, "clearly a more efficient and cost effective procedure." Forcing claimants to file motions to establish priority is contrary to current practice, and is an "inefficient, burdensome and costly procedure upon both the Court and the creditors." The Litigation Committee agrees, however, with the proposed change to Rule 9006 so that the time period for filing postconversion administrative claims may not be extended.

(c) **Karen Cordry, Esq.** (Letter #013), writing on her own behalf and not on behalf of National Association of Attorneys General (to which she is Bankruptcy Counsel), offers the following comments: (1) the commentary should

alert practitioners that the deadline for filing preconversion administrative expense claims is new and did not exist before; (2) the amendment will require administrative expense claimants to file requests for payment even in no-asset cases - this will be confusing because prepetition claimants will be told they need not file anything, but administrative expense claimants will have to in order to protect their priority positions; (3) why is there a need to have a bar date for preconversion administrative expense claims separate from a bar date for other administrative expenses set at the end of the case (she suggests that the bar date be the same for both). "That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. In most cases, the most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances." Ms. Cordry also suggests that Rule 1019(5) be clarified. Finally, she notes that "the present rules are largely geared to dealing with prepetition claims, administrative expense claimants often fall through the cracks."

(d) **New Jersey Bar Association, Bankruptcy Law Section** (Letter #012) suggests that the proposed amendment to Rule 1019(6) be modified to provide that the 90-day deadline for filing administrative expense claims after conversion of the case shall apply only if the administrative expense claimant received prior notice of the date set for the meeting of creditors. In many cases the debtor does not update the list of creditors after conversion and it is possible that administrative claimants will not receive notice of the conversion and date set for the meeting of creditors. These claimants should not be bound by the 90-day deadline.

(6) Rule 2003(d) - Chapter 11 Trustee Elections.

Rule 2003(d) would be amended to change the deadline to file a motion to resolve a disputed chapter 11 trustee election. The deadline will be 10 days after the time when the U.S. trustee files a report of the disputed election, rather than 10 days from the time of the creditors' meeting. **The Litigation Committee, Association of the Bar of the District of Columbia** (Letter #014) notes that the deadline in the present rule is unrealistic and that "the proposed changes provide a more functional procedure to resolve

disputed elections."

(7) Rule 7001(7).

Rule 7001(7) is amended to recognize that an adversary proceeding is not necessary to obtain an injunction or other equitable relief if a plan provides for such relief. The Committee received three comments relating to this rule.

(a) **Wade H. Logan, III, Esq.** (Letter #008) commented that the proposed amendment to Rule 7001(7) is "well advised."

(b) **Prof. Michael Anthony Sabino** (Letter #011) commented on the stylistic change at the beginning of Rule 7001 (the language: "Any of the following is an adversary proceeding."). He finds this language confusing and thinks that it can be interpreted to mean that the list of proceedings in Rule 7001 is a nonexclusive list. He suggests using "adversary proceedings are:" or "only the following matters are deemed to be adversary proceedings:" He also thinks that the proposed language at the end of Rule 7001(7) will cause confusion and suggests that the language ("plan provides for the relief") be changed to "plan provides for such injunctive or other equitable relief."

(c) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that this change would streamline the confirmation process and avoid time consuming ancillary litigation. "However, imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors. However, certain types of injunctive relief are included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard."

(8) *Rule 7004(e).*

Rule 7004(e) would be amended to provide that the ten day limit on service of a summons after issuance does not apply to service in a foreign country. **The Litigation Committee, Bar Association of the District of Columbia** (Letter #014), commented

that this amendment "is a practical change in recognition of the difficulty in international service."

(9) Rule 1019(1)(B).

Rule 1019(1)(B) would be amended to clarify that an extension of time to file a statement of intention regarding collateral may be granted only if a motion for the extension is made either by written motion or orally at a hearing before the time has expired. **The Litigation Committee of the Association of the Bar of the District of Columbia** (Letter #014) commented that the revision is appropriate in that the present rule is unclear regarding the ability to make an oral request.

EXHIBIT C

LETTERS RECEIVED FROM COMMENTATORS RELATING TO THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

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November 12, 1997

Secretary of the Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Administrative Office of United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 1019(6) of the Federal Rules of Bankruptcy Procedure

Dear Sirs:

I am writing to urge that the Committee reconsider the proposed amendment to Rule 1019(6) which would require the filing of a request for payment rather than a proof of claim for debts accrued prior to conversion of a case under chapter 11 to a case under chapter 7. The present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses.

This firm represents a landlord which has suffered numerous bankruptcies among its tenants over the past several years. A substantial number of those cases have involved companies which initially filed for relief under chapter 11 where the cases were converted to cases under chapter 7 when the attempt to reorganize failed. Frequently, the landlord had a claim for unpaid rent for the period between the filing and conversion of the case. In many of those cases the landlord ultimately received little or no distribution on the claim for the rent during the chapter 11 phase of the case because of the subordination of the chapter 11 administrative claims to the chapter 7 administrative claims under Bankruptcy Code §726(b).

Under the present rule, the landlord need only file a proof of claim to assert its claim for unpaid post-petition rent. A proof of claim supplies sufficient detail for the trustee to evaluate the claim without placing an undue burden on the claimant. In the event that a distribution will be made, the claim can be and is addressed in informal communications with the trustee and, if necessary, in the claims objection process.

Requiring the claimant to file a request for payment places a substantial additional burden on the claimant. The claimant must prepare a more elaborate pleading and must serve and file a motion and request a hearing on the request in order to have the claim allowed. The proposed amended rule requires that the motion be made shortly after conversion at a time when the parties are unlikely to be able to determine the likelihood of a distribution on the chapter 11 administrative claims and at time when the trustee is newly appointed and concentrating his efforts on liquidating the assets of the estate. Claims for chapter 11 administrative expenses need not be addressed before the trustee is in a position to make a distribution at the conclusion of the liquidation case when trustees commonly address the allowance of pre-petition claims.

In short, the present proof of claims process for business expenses accrued prior to conversion meets the need of the parties and should not be modified.

I would be happy to supply any further information which may assist the committee in its evaluation of my comment.

Very truly yours,

James Gadsden

JG:mc

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
3420 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501-3819

DAVID N. NAUGLE
Bankruptcy Judge

TELEPHONE
(909) 774-1021

September 19, 1997

97-BK-
002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Bankruptcy Procedure (Rule 4001(a)(3))

Dear Mr. McCabe:

The proposed 10-day stay of relief from stay orders in foreclosure (legitimate and scam cases) and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay.

Very truly yours,

DAVID N. NAUGLE
Bankruptcy Judge

DN/lp

cf: Hon. Geraldine Mund,
Chief Bankruptcy Judge

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September 23, 1997

97-BK-003

97-CR-003

Mr. Peter G. McCabe
Secretary
Rules Committee Support Office
Administrative Office of the
US Courts
Thurgood Marshall Federal Judiciary
Building
Columbus Circle NE
Washington, DC 20544

Dear Mr. McCabe:

Thank you for your letter of September 9th. A heavy workload here has delayed my expressing my appreciation. A Judicial Conference and its request for public comment on the Preliminary Draft comprise a well supported approach.

I read with interest the full text of the proposed amendments referred to in the second paragraph of your letter. I look with favor upon everything in the pamphlet and I am grateful to you for keeping me advised and giving me an opportunity to take part in this important project.

Respectfully yours,

Jack E. Horsley

Jack E. Horsley

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October 13, 1997

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D. C. 20544

Re: Comment on proposed Bankruptcy Rule Amendments

Dear Mr. McCabe:

I am in receipt of a "Preliminary Draft of Proposed Amendments to the Federal Rules of Practice & Procedure" and am responding to the request for written comments.

I write from the perspective of a bankruptcy practitioner with 18 years of experience at all different levels of bankruptcy work, from small-scale Chapter 7 and Chapter 13 cases to fairly sizeable Chapter 11 cases involving as much as $5 million to $8 million. I must confess I have little experience with the mega-cases that we hear so much about. My experience is more with the humdrum bread-and-butter cases which make up 95% of the actual world of bankruptcy.

Proposed Rules 4004 and 4007 -- The proposed amendment to "clarify that the deadline for filing a complaint objecting to discharge is 60 days after the first date set for the meeting of creditors, regardless of the actual meeting date," is a bad, bad, bad idea. I say this as an attorney who has represented both debtors and creditors. Most creditors who are considering filing a complaint for exception to discharge use the First Meeting of Creditors as an opportunity to weigh whether or not they want to file such a complaint, based in large part on the debtor's demeanor and responses to three or four questions which the creditor might pose at the First Meeting of Creditors. Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor at the First Meeting of Creditors, persuading the creditor not to pursue the matter further.

On the other hand, a debtor whose answers are evasive or incriminatory may persuade a creditor that the case has a solid foundation. In the consumer creditor cases,

Bankruptcy Code § 523(d) mandates, as we say, that "If you go to kill the king, you must kill the king." In other words, you don't bring a consumer debt nondischargeability action unless you are 95% sure you will prevail, because if you lose you must pay the consumer debtor's attorney's fees, in addition to paying your own attorney's fees. The First Meeting of Creditors thus gives the consumer creditor and its counsel a chance to size up the debtor prior to instituting its suit, and helps weed out those cases.

Bringing a complaint for nondischargeability is an expensive process for all concerned, including the debtor, even in a non-consumer debt situation, and any change in the Rule which might lead to more complaints for exception to discharge being filed rather than fewer is to be avoided. Yet that is what the proposed amendment would do.

The practical reason for that is as follows. It is not at all unusual for First Meetings of Creditors to be continued. Often the debtor forgets to show up, or is sick, or has car trouble. In the wintertime, we have First Meetings which are cancelled because of snow, and sometimes the Chapter 7 Trustee is sick or has car trouble. If the last date for filing a complaint objecting to discharge is 60 days after the first scheduled date, regardless of the actual meeting date, that would mean in many cases that the creditor would have to elect to file a complaint for exception to discharge before the actual First Meeting of Creditors was ever held, or just a few days after, without sufficient time to evaluate the debtor's under-oath responses to some pretty basic questions, which is, after all, one of the intended functions of the First Meeting of Creditors.

On the other hand, I am hard pressed to think of a good reason for a change in those Rules. I therefore urge that it remain as it is presently stated.

Rules 302(e), 3021, 4001(a)(3), 6004(g), and 6006(d) --- As I understand it, all of these rules are to be amended to provide that there would be an "automatic stay" for 10 days after the entry of an Order confirming a Chapter 11 Plan, granting relief from the stay, or authorizing use, sale or lease of property.

This would represent a fundamental shift in the way business is conducted in Bankruptcy Court. At the present time, routinely transactions close immediately on entry of the Order approving the sale, or Plan, or loan. These Rule changes would slow down even more the already glacial pace of business, probably killing many otherwise

barely-viable deals. The net result will be to make doing business with bankruptcy estates even less attractive than it already is. A bad idea.

Very truly yours,

William E. Shmidheiser, III

WES/mh/107909

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
1300 CLAY STREET
P.O. BOX 2070
OAKLAND, CALIFORNIA 94612

LESLIE TCHAIKOVSKY
BANKRUPTCY JUDGE

TELEPHONE (510) 879-3540
Leslie_Tchaikovsky@ce9.uscourts.gov

97-BK-005

October 23, 1997

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Offices of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Secretary:

I have reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure and have a problem with only one proposed change. It is proposed that there be a ten day stay of all orders granting relief from the automatic stay to give the aggrieved party time to file a notice of appeal. I think the proposed amendment is a very bad idea. It would prejudice many to benefit only a few. Moreover, the benefit does not appear necessary.

In the case of most orders, ten days delay is inconsequential. However, in the case of orders for relief from stay, in the majority of cases, each day of delay represents a quantifiable dollar loss to the creditor. Debtors do not often appeal orders of this nature. (More often, they file a new bankruptcy case, thereby invoking a new automatic stay.) When they do wish to file a notice of appeal, they may request a stay at the hearing. In a case in which it is credible that an appeal may be taken, the judge will certainly stay the order at least long enough for a stay to be requested from the appellate court.

In California, by state law, unless otherwise ordered by the bankruptcy court, a nonjudicial foreclosure sale may not be held any sooner than seven days after an order granting relief from the automatic stay. If this amendment is enacted, in these instances, the debtor will receive an additional seventeen days delay, in most instances, unwarranted, at the expense of the secured creditor, instead of only seven.

Sincerely,

Leslie Tchaikovsky

Leslie Tchaikovsky

United States Bankruptcy Court
District of Oregon
1001 S.W. 5th Ave.
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Chambers of
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97-BK-006

November 3, 1997

Mr. Peter McCabe
Secretary to the Rules Committee
Administrative Office of the US Courts
One Columbus Circle, N.E.
Washington, D.C. 20544-0001

Re: Certain Proposed Amendments to the Bankruptcy Rules

Dear Peter:

The Oregon bankruptcy judges have reviewed the Bankruptcy Rules Committee's proposed changes to Bankruptcy Rules 3020(e), 4001(a), 6004, 6006, 7062, and 9014. As we read these changes they would, acting together, first, eliminate application of BR 7062 to contested matters. Second, however, the 10 day stay applicable under 7062 would then be restored as applicable to selected matters, namely, orders for relief from stay, orders confirming Chapter 9 and 11 plans, orders authorizing the use, sale or lease of property, and orders authorizing assignment under Section 365 absent court order directing otherwise.

We are concerned that the areas which have been specifically identified for application of the 10 day stay are exactly those areas which often are quite time sensitive; that is, areas where the court and parties are addressing a matter which urgently needs to be resolved. Wouldn't it be logical, given that fact, that, as under the present rule, the 10 day stay specifically not be applicable to such time sensitive areas?

We recognize that the rule allows the judge to except the order from application of the stay in a particular case. However, the reality is that given the urgency of the matter more often than not the order should not be affected by the stay but the court and the parties, being human and often harried, will likely forget that the order must specifically except application of the stay.

We also recognize that the present Rules create an ambiguity with regard to the application of the Rule 62 stay as to those contested matters apart from the ones now specifically excepted from the stay. However, wouldn't that ambiguity be addressed simply by the first proposed change, i.e., eliminating the application of BR 7062 to contested matters?

Can you provide us with any information about the analysis the Rules Committee applied which led to these proposed rule changes? We are confused and concerned but we may be missing some important piece of the puzzle.

Sincerely,

Polly S. Higdon
Chief Bankruptcy Judge

PSH:mo
cc: All Oregon Bankruptcy Judges

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97-BK-007

November 14, 1997

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Bankruptcy Procedure

Dear Sir/Madam:

We have reviewed with interest the proposed changes to the bankruptcy rules as reported in our bankruptcy service.

We are particularly concerned about proposed Rule 4001(a)(3), which would automatically stay for 10 days any order granting relief from the automatic stay. The stated purpose of this rule is to give the debtor sufficient time to request a stay pending appeal.

Our practice consists primarily of representing creditors, and in most cases secured creditors. In our experience, secured creditors have not been overly aggressive in bringing motions for relief, in view of the expense involved. Thus in practically every case, the motion is brought on for hearing only when the debtor is seriously in default. In the majority of cases, a consent order is endorsed and entered without a hearing. In many of the cases in which an agreed order cannot be entered, the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments, a practice which we consider an abuse of the bankruptcy process.

Based on the foregoing experience, we believe the proposed change grants an unreasonable delay to debtors who do not need or deserve such protection. For example, if a bankruptcy is filed shortly before a foreclosure sale, often in a second or third bankruptcy filing by the same debtor, we are able to obtain immediate relief from the bankruptcy stay in many cases by a telephone hearing under "emergency" conditions, so that the sale can continue. This avoids the substantial expense (seldom recovered from the debtor) of a rescheduled foreclosure. The proposed rule would preclude a secured creditor from avoiding bad faith or abusive filings in this way, and would create a 10-day window during which a bad faith filer could act with impunity.

HM\HM\389010.1

For that matter, we have found that appeals from orders granting relief from the automatic stay are rare.

We note in passing that orders of the United States district courts are not automatically stayed, and that some cause need be shown and some protection afforded the prevailing party, such as by the posting of a bond.

Accordingly, we respectfully request that the committee consider the following:

1. If the debtor has competent bankruptcy counsel (a circumstance which we believe should be encouraged), such counsel can obtain a stay of an order if appropriate.

2. The rule as proposed is in effect ex parte, with none of the showings (such as likelihood of success, and lack of harm to the prevailing party) made in considering stays.

3. The granting of an automatic 10-day stay of every order granting relief from the stay unfairly tilts the playing field against secured creditors acting in good faith after a serious default, in favor of bad faith filers. This is especially so when the debtor has no intention of appealing or when any appeal would be utterly lacking in merit.

4. The imposition of sanctions for frivolous appeals is an illusory deterrent seldom obtainable.

5. The stay of a consent or agreed order is manifestly inappropriate.

We appreciate your consideration of these views.

Very truly yours,

Eugene E. Derryberry

EED/abs
cc: Hon. Robert W. Goodlatte

HM\HM\389010.1

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Please Reply to the Charleston Office

November 19, 1997

97-BK-008

Peter G. McCabe, Esquire
Secretary
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Our File No. 2054-13

Dear Mr. McCabe:

Thank you for providing me the opportunity, as a member of the American College of Trial Lawyers, to comment upon the proposed amendments to the Federal Rules of Bankruptcy Procedure. In formalizing these comments, I have discussed their merit with the bankruptcy practitioners in my firm, upon whose judgments my comments are largely based.

A. Rule 1017. We applaud the greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss a Chapter 7 or Chapter 13 Case on motion of the U.S. Trustee, based upon the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. It would be our suggestion, however, that any party filing a Notice of Appearance in the case, pursuant to Rules 2002 and 9010, FRBP be included in the notification. To that end, we would join in the proposed amendment of Rule 2002(a)(4).

B. There are various proposed changes which require a motion for extension to be filed prior to the statutory expiration date. While such proposals are well reasoned, this amendment may provide an excellent opportunity to set forth further guidance as to whether such extension is deemed granted prior to a hearing on the subject motion. Currently, there is a split of authority or custom as to the effect of

the expiration of an extension deadline. In some jurisdictions, disposition of such motions must be heard prior to the expiration date or the motion is deemed moot. In other jurisdictions, a tolling period is assumed until the Court may consider the merits of the motion for extension. Other jurisdictions routinely execute "Bridge Orders" to cover the period between the motion deadline and the hearing date. Practice in this area should be made consistent among all jurisdictions.

These comments would relate to the proposed changes for Rules 1019, 2002(a)(4), 4004, and 4007.

C. There are a number of proposed changes that would implement an automatic ten day stay between the date on which the Court enters a ruling, in order to allow the losing party to institute appropriate appellate measures. This issue has not proven a problem in our district. It is our view that this requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified. These comments apply to the proposed changes for Rules 3020(e), 3021, 4001(a)(3), 6004(g), and 6006(d).

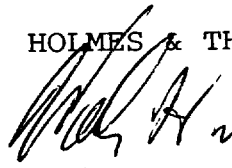
D. The proposed change for Rule 7001(7) is well advised.

Again, thank you for allowing me the opportunity to provide comments on the proposed Rules. If I, or any member of my firm, may be of additional assistance in this matter, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

HOLMES & THOMSON, L.L.P.



Wade H. Logan, III

WHLIII/sec

cc: The Honorable Strom Thurmond
The Honorable Ernest F. Hollings
The Honorable Mark Sanford

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January 15, 1998

97-BK-009

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

I write this letter on behalf of the Bankruptcy Committee of the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association in support of the amendments to Rules 3020, 4001, 6004, 6006, 7062, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") proposed by the Advisory Committee on Bankruptcy Rules and published for comment in August 1997.

The proposed amendment to Bankruptcy Rule 9014 would delete the reference therein to Bankruptcy Rule 7062, thus limiting to adversary proceedings the applicability of Bankruptcy 7062 and the ten-day stay of Federal Rule of Civil Procedure 62(a) ("Rule 62(a)") incorporated by Bankruptcy Rule 7062. As a result, there could be no reliance upon the automatic ten-day stay of Rule 62(a) except with respect to orders entered in adversary proceedings. As a counterpart, the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 provide for an automatic ten-day stay of the effectiveness of orders confirming plans (Bankruptcy Rule 3020), orders granting relief from the stay (Bankruptcy Rule 4001), orders authorizing the use, sale, or lease of property other than cash collateral (Rule 6004), and orders authorizing the assignment of executory contracts and unexpired leases (Bankruptcy Rule 6006).

The proposed amendments remedy what is probably the most significant problem caused by current Bankruptcy Rules 9014 and 7062 – uncertainty regarding the applicability of the ten-day automatic stay of Rule 62(a) to an order of the Bankruptcy Court. This uncertainty has caused parties to rely upon stays which, it turns

out, were not in effect,[1] and to violate stays that the party mistakenly did not recognize to be in effect.[2]

The uncertainty stems from two principal causes. The first is the perception that the language of Rule 62(a) might stay the effectiveness of an order, rather than only staying execution upon or enforcement of the order, and confusion regarding what constitutes "enforcement."[3] Second, confusion exists with respect to whether Bankruptcy Rule 7062 applies in certain contexts (i.e., whether an order is entered in a contested matter to which Bankruptcy Rule 9014 applies).[4]

The problems caused by this confusion have, as a practical matter, been limited by the 1983 and 1991 amendments to Bankruptcy Rule 7062, which made Rule 62(a) expressly inapplicable to orders granting relief from the automatic stay, orders regarding the use of cash collateral, orders regarding the use, sale, or lease of property, orders authorizing borrowings, and orders authorizing the assumption or assignment of

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1 See, e.g., In re Barnes, 119 B.R. 552, 555 (Bankr. S.D. Ohio 1989) (execution on judgment against debtor within ten days after order dismissing case valid; order dismissing case not subject to Rule 62(a)); In re Pero Bros. Farms, Inc., 91 B.R. 1000, 1001 (Bankr. S.D. Fla. 1988) (motion to convert filed too late; order confirming plan not subject to Rule 62(a)).

2 See, e.g., Chrysler Credit Corp. v. Cooper (In re Cooper), 16 B.R. 19, 22 (Bankr. W.D. Mo. 1981) (repossession of car within ten days after entry of order dismissing case violated stay of Rule 62(a)).

3 See Fish Market Nominee Corp. v. Pelofsky, 72 F.3d 4, 6 (1st Cir. 1995) ("Contrary to Fish Market's position, Rule 62(a) does not purport to make a judgment ineffective for 10 days after entry; on the contrary, the judgment retains full force and effect for other purposes. . . . Instead, Rule 62(a) merely stays proceedings to enforce the judgment. . . .").

4 See Lugo v. Saez (In re Saez), 721 F.2d 848, 852 (1st Cir. 1983) (Bankruptcy Rule 7062 does not apply to an order dismissing a case because it was not entered in a contested matter); In re Barnes, 119 B.R. at 555 (same). Underlying this aspect of the problem is the lack of a precise definition for "contested matter". See, e.g., Iles v. LTV Aerospace Defense Co. (In re Chateaugay Corp.), 104 B.R. 626, 634 (S.D.N.Y. 1989) ("'Contested matter' is not defined in the Code or the rules."), appeal dismissed, 930 F.2d 245 (2d Cir. 1991); In re RFD, Inc., 211 B.R. 403, 407-08 (Bankr. D. Kan. 1997) ("Except to say that relief in contested matters should be requested by motion, the quoted statement [from Bankruptcy Rule 9014] does not define 'contested matter.'").

executory contracts and unexpired leases.[5] However, uncertainty regarding the application and effect of Rule 62(a) remains with respect to other types of orders.

In the case law, this appears to be most often reflected in confusion by practitioners regarding the applicability of Rule 62(a) to orders dismissing cases. However, the potential exists for problems to arise relating to the uncertain application of Rule 62(a) with respect to virtually every order of the Bankruptcy Court not specifically excluded by Bankruptcy Rule 7062 or entered in an adversary proceeding, ranging from orders confirming plans, to orders allowing or disallowing claims, to orders approving the retention of professionals, to orders authorizing the payment of administrative expenses.[6]

The proposed amendment to delete the reference to Bankruptcy Rule 7062 in Bankruptcy Rule 9014 will eliminate the current state of uncertainty. As a result

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[5] One result of the prior amendments to Bankruptcy Rule 7062 is the implication that Rule 62(a) would otherwise apply to the orders explicitly excluded by the prior amendments to Bankruptcy Rule 7062 and does apply to certain orders which were considered for exclusion but were not excluded. Compare 9 Norton Bankruptcy Law & Practice 2d (1997) at 489-90 ("From a practical standpoint, it is essential that a discretionary stay be obtained as to those situations which are excepted from the scope of the 10-day automatic stay. . . . Other exceptions were considered for the 1991 Amendments. The Advisory Committee rejected the idea of making an order authorizing the sale of property pursuant to a plan and the confirmation of a plan additional exceptions. This was rejected because an order authorizing a sale of property pursuant to a plan should wait until the plan becomes 'final'. . . . It was felt that a plan should not be consummated until after the confirmation order becomes final by the expiration of the ten-day period.") and In re Tempo Tech. Corp., 202 B.R. 363, 374 (D. Del. 1996) ("This amendment excepted orders authorizing section 363(b)(1) sales from the general ten day stay of all federal court orders under Fed. R. Civ. P. 62(a).") with Ewell v. Diebert (In re Ewell), 958 F.2d 276, 280 (9th Cir. 1992) ("Our cases strongly suggest that, even if Bankruptcy Rule 7062 had not been amended, Rule 62(a) would have no application to judicially authorized sales of estate property in bankruptcy proceedings.") and In re Whatley, 155 B.R. 775, 781 (Bankr. D. Colo. 1993) (confirmation order not subject to Rule 62(a)).

[6] Compare Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419 (9th Cir. 1996) ("The Bankruptcy Court confirmed the plan on May 5, 1993, and FmHA filed its timely notice of appeal on May 14, one day before the expiration of the automatic stay provided in Bankruptcy Rule 7062."), cert. denied, ___ U.S. ___, 117 S. Ct. 681 (1997) with In re Pero Bros. Farms, Inc., 91 B.R. at 1001 (order confirming plan not subject to Rule 62(a)) and In re Whatley, 155 B.R. at 781 (order confirming plan, order disallowing claim, and order allowing claim not subject to Rule 62(a)).

of the proposed amendment, those parties who want an immediate stay not specifically provided by the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 will know that they must seek a stay under Bankruptcy Rule 8005 rather than courting the risk of mistakenly relying upon the applicability of Rule 62(a).

The proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 also provide clarity by explicitly providing that the effectiveness of orders covered by those rules is stayed. Since the closing of transactions subject to orders under those rules will generally moot an appeal,[7] the amendments appropriately place the burden to acquire a modification of the ten-day stay on the party who would seek to moot an appeal by closing the transaction immediately.

Under the current rules which permit appeals from orders subject to Bankruptcy Rules 3020, 4001, 6004, and 6006 to be mooted by an event that could occur at any time after the entry of an order, the parties and courts are subject to "emergency" stay motions in situations where the mooting event would and need not occur until a stay could be sought on a less urgent timetable; the opposing parties and the court simply do not know when the mooting event will take place.[8] Thus, the parties and courts are engaged in expedited proceedings when there is no need for this disruption; the existing rules create the sort of pointless emergencies that have been decried in the case law.[9]

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[7] See, e.g., Manges v. Seattle - First Nat'l Bank (In re Manges), 29 F.3d 1034 (5th Cir. 1994) (appeal from confirmation order moot), cert. denied, ___ U.S. ___, 115 S. Ct. 1105 (1995); Van Iperen v. Production Credit Ass'n (In re Van Iperen), 819 F.2d 189 (8th Cir. 1987) (appeal from order granting relief from stay moot); Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d 645 (3d Cir. 1997) (appeal from order approving sale moot); Sulmeyer v. Karbach Enter. (In re Exennium, Inc.), 715 F.2d 1401 (9th Cir. 1983) (appeal from order authorizing assumption and assignment of leases moot).

[8] Even in situations where the plan, sale agreement, loan document or assignment contract provide for an effective date or closing ten days or more after the entry of the order, such documents frequently allow an earlier effective date or closing without further court order with the consent of certain parties; the party which would seek a stay is usually not among the parties who must consent to an early closing or effective date.

[9] See generally Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 491-92 (C.D. Cal. 1995) ("When an ex parte motion is filed, it is hand-delivered immediately from the clerk's office to the judge. The judge drops everything except other urgent matters to study the papers. It is assumed that the tomatoes are about to spoil or the yacht is about to leave the jurisdiction and that all will be lost unless immediate action is taken. Other litigants are relegated to a secondary priority. The

The proposed amendments should reduce considerably the unnecessary "emergencies" caused by uncertainty regarding when the mooting event will occur.

In those instances where a transaction must close or a plan must go effective within ten days after entry of the order, the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 would permit the court to modify the stay so that the transaction may close or the plan may go effective. The only "cost" of the proposed amendments would be to reduce the ability of a party to surprise opponents by an immediate closing so as to moot an appeal; leveling the playing field by reducing the prospect of mooting by ambush is a small "price" to pay for decreasing the number of motions based upon false emergencies.[10]

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judge stops processing other motions. . . . Lawyers must understand that filing an ex parte motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!'. There had better be a fire."); Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics Am., Inc.), 101 B.R. 191, 193 (C.D. Cal. 1989) ("Ex parte applications throw the system out of whack. They impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel who are required to make a hurried response under pressure, usually for no good reason. They demand priority consideration, where such consideration is seldom deserved.").

[10] See generally In re T&H Diner, Inc., 108 B.R. 448, 452 (D.N.J. 1989) (lessor relets premises during adjournment it requested of hearing on appeal from orders denying debtor's motion to assume lease and lifting the automatic stay, "It should also be noted that a dismissal of this matter on mootness grounds will be manifestly inequitable. . . . Under these circumstances, the court finds it unfair, perhaps even manipulative, for the landlords to seek the court's indulgence for an adjournment and then argue that the action has been rendered moot."); In re Halladay Ent., Inc., 5 B.R. 83, 87 (Bankr. S.D. Tex. 1980) ("To hold that a sale made within ten (10) days of the order approving sale is irreversible under any circumstances would deprive a party from attaining the status quo during an appeal or a motion under Rule 62 and, such a result, in my opinion, is clearly contrary to the intent of Rule 805 and Rule 62. Rule 805 contemplates that an order approving sale may be stayed and unless it is stayed, the sale to a good faith purchaser is final. Such a stay and appeal could easily be circumvented if the parties are allowed to consummate a sale immediately upon entry of an order.").

Thank you for your consideration of these comments.

Sincerely,

George C. Webster II

GCW:sd

cc: Susan B. Hall, Esq.
Chair, Bankruptcy Committee of
the Commercial Law and Bankruptcy Section

#4245

RECEIVED 2/9/98

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97-BK-010

February 3, 1998

OUR FILE NO

101:ADMIN\L\COMMITTE.001

Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Comments to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure (August, 1997)

Gentlepersons:

The undersigned practices extensively in bankruptcy matters, and I have had an opportunity to review the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure.

My comment is directed to the proposed amendments to Rules 4001(a)(3), 6004(g) and 6006(d). Each of these rules provides that unless the Court determines otherwise, certain orders are automatically stayed for a period of 10 days after entry of the order. I would propose that the aforesaid rules apply only as to ***contested*** matters, but if the application is uncontested, the general rule should be that the order is effective immediately unless the Court orders otherwise.

There appears little reason why secured lenders, proposed assignees of leases and other parties impacted by such orders should be subjected to an automatic delay when the proceedings before the Bankruptcy Court issuing the order were unopposed.

Thank you for your kind attention.

Sincerely,

Arthur L. Rolston

ALR:djs

ST. JOHN'S UNIVERSITY

FOUNDED 1870

COLLEGE OF BUSINESS ADMINISTRATION
DEPARTMENT OF LAW

97-BK-011

#4251

12 February 1998

Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re:Proposed Draft/Proposed Amendments/Bankruptcy Rules
Release Date: August 1997

Dear Mr. McCabe:

Reference is made to the abovecaptioned. As provided therein, I wish to submit my written comments, as set forth below, prior to the 15 February 1998 deadline. I would be most appreciative if you would place them before the Committee for considertion.

By way of introduction, as to my credentials, the undersigned formerly served as Judicial Law Clerk to the late Hon. D. Joseph DeVito, U.S. Bankruptcy Court, is a nationally known expert in bankruptcy law, is a Professor of Law, is the author of the treatise *Practical Guide to Bankruptcy*, and has commented on prior Proposed Amendments to the Federal Rules of Bankruptcy Procedure.

GENERAL COMMENT

Overall, the current Proposed Amendments to the Federal Rules of Bankruptcy Procedure (the "Rules") are most satisfactory, and should be enacted. These proposals represent various changes, both substantive and stylistic, which would improve the admininstration of our nation's bankruptcy laws, primarily by clarifying their purposes and intentions.

Therefore, on the whole, the Proposed Amendments should be adopted.

Nonetheless, it is the opinion of this commentator that certain of these proposals should not be enacted in their present form. These limited items, as outlined below, would

foment negative changes to the administration of bankruptcy law; in effect, they would create more problems than they would solve. Therefore, the following opposition and/or proposals for further change are made below.

RULE 1017

It is now proposed that Rule 1017 be amended to eliminate notice to creditors of a motion to dismiss a debtor's Chapter 7 or 13 case for reason of the debtor's failure to file a list of creditors, schedules, or a statement of affairs. The avowed purpose of said change is to avoid the expense of notification beyond the minimal parties of the debtor, the trustee, the U.S. Trustee, and parties specified by the Court.

This amendment should not be made. It would be highly detrimental to the bankruptcy system, for the following reasons. Oftentimes, creditors have useful information regarding the debtor. The mere failure of the debtor to properly file its schedules and so forth is merely the tip of the iceberg in a great many of these cases. Creditors, who usually possess knowlege superior to that of the case trustee or the U.S. Trustee, can contribute vital information as to debtor's true intentions, its good or bad faith, and so on. In sum, creditors play an important role in fully informing the Bankruptcy Court as to why a debtor is deficient in the filing of its necessary documents.

If creditors are denied notice of such dismissal motions, then they are foreclosed from contributing to the process. The exclusion of creditors by this lack of notice would leave all responsibility to the case trustee or the U.S. Trustee, already strained by limited resources, to apply what would essentially be a mechanical test. Finally, permitting the court to designate certain creditors be notified at its discretion is not a solution. At such a typically early stage, the court also lacks familiarity with the debtor.

In sum, notice to creditors, as provided in the present Rule, must be maintained. The proposed amendment would harm the system by foreclosing the vital contribution of knowledgeable creditors.

RULE 2002(a)(4)

Same comment as for Rule 1017.

RULE 4001(a)(3)

The proposed amendment would provide that an order granting relief from the automatic stay would itself be automatically stayed for a period of no less than ten (10) days. The purpose is to allow affected parties time to file an appeal and likewise seek a stay pending appeal.

This amendment should not be made. It would work a severe injustice upon creditors and others, and provide little or nothing in the way of new, meaningful help for debtors.

Since the advent of the modern Bankruptcy Code in 1978, vast experience has demonstrated that the bulk of motions for relief from the automatic stay (hereinafter "stay relief motions") are routinely granted, for they are of the "garden variety" type. In brief, the secured creditor bringing the motion is indisputably entitled to the relief, the debtor has no defense, and there is no ground for an appeal thereof, much less grounds for a stay pending appeal.

Indeed, immediate enforcement of the stay relief motion is imperative to the petitioning creditor. The cases are legion where the creditor has been deprived of its property for a very long time (i.e., the huge number of instances where the debtor has dragged out a state court foreclosure for years, then finally files bankruptcy as yet another delaying tactic), has finally put an end to the debtor's judicial delays, and now sets in motion the events necessary to realize upon its rights (i.e., the scheduling of a foreclosure sale, and all the notice, publication, and other strenuous and expensive requirements thereof).

By contrast, the debtor has typically capitalized on every procedural delay tactic available, has absolutely no basis in fact or law for an appeal, and in fact will not file an appeal. For those rare exceptions where the debtor has actual grounds for an appeal and does indeed pursue one, moving to stay the decision is merely part of its legitimate burden, and so, like any other, that rare debtor must move with alacrity and convince the court of its right to a stay pending appeal.

In sum, the imposition as proposed of a mandatory ten day automatic stay of orders granting stay relief would work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions. The greater good demands this proposed amendment be rejected.

RULE 6004(g)

An amendment has been proposed to modify this rule to provide an automatic stay of an order authorizing the use, sale or lease of property (other than cash collateral), so as to allow affected parties time to seek a stay pending appeal.

First, the proposed amendment is much like the "ten day stay" proposed for Rule 4001(a)(3). For that reason, the same general objections set forth hereinabove are repeated as to this proposal as well.

More precisely, this specific amendment is ill-advised, since it would be debilitating to the proper functioning of the bankruptcy process. Whether in a Chapter 7 liquidation or a Chapter 11 reorganization, the disposition of a debtor's assets by use, sale or lease is usually undertaken under the most strained of circumstances, where time is of the essence. Therefore, a ten day stay would no doubt unduly burden such vital activities.

Certainly, many of these orders are in fact appealed, and it would be of great help to the objecting party to have additional time in which to move to stay the judgment pending appeal. Nonetheless, the present burden placed upon those seeking a stay is not unjust, and there is simply no good reason to lighten their load when to do so would be much more harmful to the expeditious handling of the debtor's assets.

To be sure, the undersigned's personal experience has usually been on the losing side of a use, sale or lease motion, thereby compelling a massive effort to draft, file, and obtain a stay of judgment. Many times in the past I have most heartily wished for a ten day stay, so I might seek a stay pending appeal! But the truth of the matter is the realization that such a new rule will do much more harm than good to the overall administration of bankruptcy cases.

In sum, an automatic stay of ten days of use, sale or lease orders would be a burden overly harmful to the system, with little or no offsetting benefits. The proposed rule change should therefore be rejected.

RULE 6006(d)

Same comment as Rule 6004(g). Given that orders regarding executory contracts and unexpired leases are the functional equivalent of use, sale or lease orders, the same criticisms apply.

The proposed amendment should therefore be rejected.

RULE 7001

It has been proposed that the opening paragraph of Rule 7001 be amended to state "[a]ny of the following is an adversary proceeding."

While the intent is understandable, the language does not do it justice and is confusing. To state "any of the following" can be interpreted to mean that the denomination of certain actions in Rule 7001 is a nonexclusive list. Traditionally, Rule 7001 defines a narrow list of actions that must be brought as adversary proceedings; all else in the universe of cases and controversies are subject to motion practice pursuant to Rule 9014 as "contested matters." It is presumed the intent is still to have Rule 7001 recite an exclusive list of adversary proceedings, leaving all else as contested matters.

Therefore, the proposed language should be rejected. Instead, any amended language should say "adversary proceedings are:" or "only the following matters are deemed to be adversary proceedings:" or some such language in that vein. This will eliminate confusion at some future time.

Further, it is proposed that Paragraph 7 of Rule 7001 be modified to make clear that an action to obtain injunctive relief is not an adversary proceeding, if undertaken pursuant to a Chapter 9, 11 or 13 plan. The amended paragraph would end with the words "the relief".

That is not explicit enough, and will cause confusion. The ending of Paragraph 7 should be the "plan provides for such injunctive or other equitable relief." This makes clear what type of relief this exclusion is limited to, thereby eliminating any possible misunderstanding.

RULE 7062

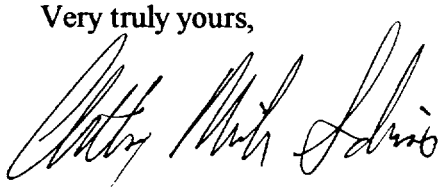
Rule 7062 is to be amended to reflect the other proposed amendments to Rules 4001(a)(3), 6004(g), and 6006(d) regarding the imposition of ten day stays.

As aforstated, the undersigned opposes such changes to the aforementioned Rules. Therefore, logically, opposition is stated to this reflexive change to Rule 7062. In sum, Rule 7062 should remain unchanged.

CONCLUSION

The instant Proposed Amendments to the Bankruptcy Rules generally mark beneficial and necessary change. Notwithstanding, the undersigned respectfully requests the Committee seriously consider the foregoing criticisms and comments regarding certain proposals, which in a very practical sense would be highly detrimental to the adminstration of our nation's bankruptcy laws if enacted in their present versions. In any event, I trust the Committee will find my statements to be helpful, and I am available for further consultation. With thanks, I remain,

Very truly yours,



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BANKRUPTCY LAW SECTION

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February 13, 1998

97-BK-012

VIA FEDERAL EXPRESS

Mr. Peter G. McCabe
Secretary of the Committee of
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Room 4-170
Washington, DC 20544

Re: New Jersey Bar Association, Bankruptcy Law Section
Comments as to Proposed Amendments to Official
Bankruptcy Forms and New Official Bankruptcy Forms

Dear Mr. McCabe:

The Bankruptcy Law Section of the New Jersey State Bar Association has appointed a committee to review and comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure. The committee offers the following comments.

Rule 1017

The committee is not in favor of the proposed amendments to Rule 1017 which would eliminate notice to creditors of the dismissal of a Chapter 7 case for failure to pay the filing fees and of notice of a hearing on dismissal for failure to timely file a list of creditors, schedules and statement of financial affairs. Creditors and their counsel often begin preparing applications to the court for various types of relief, including relief from automatic stay, immediately after receiving a notice of commencement of a Chapter 7 case. Creditors are entitled to receive prompt notice that a case has been dismissed for failure to pay filing fees, or that a motion has been filed to dismiss a case for failure to file schedules, to avoid incurring time and expense with respect to matters that have been, or may be, rendered moot. Because in the vast majority of Chapter 7 cases,

the number of creditors is small, the cost of providing such notice is relatively insignificant.

Rule 1019(6)

Proposed Rule 1019(6), as currently drafted, requires administrative expense creditors to file a request for payment within 90 days after the first date set for the meeting of creditors called after conversion of a case. In many cases, the debtor may not update its list of creditors following conversion to include all administrative expenses incurred prior to the conversion. If an administrative expense creditor does not receive notice of the conversion and the date fixed for the meeting of creditors, such creditor should not be bound by the 90 day deadline. We therefore recommend that proposed Rule 1019(6) be modified to a provide that a request for payment of an administrative expense must be filed within 90 days after the first date set for the meeting of creditors called after conversion of a case, if the administrative expense claimant received prior notice of the date set for the meeting of creditors.

Rules 3020(e), 4001(a)(3) and 6004(g)

We agree with the concept embodied in these proposed amendments that the right to appeal should not be rendered a nullity merely because action is taken to moot an appeal before an application for a stay can be filed and heard by the appellate tribunal. However, in the context of the use, sale or lease of property, confirmation of a plan and/or relief from the stay, severe economic or other prejudice may result if the effectiveness of a bankruptcy court order is automatically stayed for ten days. Moreover, in our experience, district court judges are routinely able to consider emergent applications for a stay pending appeal of bankruptcy court orders well prior to 10 days from the entry of the order. We believe that the competing interests addressed in these proposed amendments can be best served by reducing the proposed ten day stay to three days. A three day stay will be sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced.

We appreciate the opportunity to comment on the proposed rule amendments. If the Committee of Rules of Practice and Procedure has questions or requires further information, please do not hesitate to contact me.

Very truly yours,

JACK M. ZACKIN

JMZ/kc

#4266
RECEIVED
2/19/98

97-BK-013

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CHRISTINE T. MILLIKEN
Executive Director
General Counsel

February 13, 1998

Secretary of the Committee of Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Changes to Bankruptcy Rules

I would like to comment briefly on the proposed changes to Rule 1019(6) and suggest that some clarifying language in Section 1019(5) would also be helpful. (Please note these are my own comments and do not reflect an official position of the Attorneys General.) I think the changes to Rule 1019(6) appropriately reflect that there are two separate kinds of postpetition debts: administrative expenses, and other unpaid debts that do not rise to the level of an administrative expense and which, therefore, must be treated as a claim. That distinction is not clearly recognized in the current provisions. In particular, Rule 1019(5)(A)(i) and (B)(i) provide that the debtor is to provide a schedule of all unpaid postpetition "debts" (which could include both postpetition claims and administrative expenses), but then states that his list should include the names and addresses of "each holder of a claim." I would suggest that those provisions would be better worded in the same way as in the new Rule 1019(6) -- i.e., the debtor should file a schedule of unpaid debts and include the names and addresses "of those entities listed on the schedule." This would then eliminate the question of whether a person with an administrative expense is or is not the holder of a "claim."

Turning then to the proposed changes in Rule 1019(6), the rule, as noted, does appropriately distinguish between administrative expenses and claims. I do have some concerns and questions, though, about the decision to impose a new time limit, not heretofore in existence, on the filing of the request for administrative expenses. First, the commentary on the rule does not make plain that this is, indeed, a new requirement and that practitioners must be alert to a new deadline that they were not hitherto subject to. This is an important fact and one that should be clearly disclosed.

Second, the proposal would make it mandatory to file a request for administrative expenses within the established deadline even if the trustee has determined that the matter is a "no asset" case. However, it makes no more sense to require expense requests to be filed in such an instance than it would to require proofs of claim to be filed. Imposing such a requirement will cause confusion because the "no asset" notice would have to say that "claimants" need not file claims but those with

administrative expenses must do so. This will be confusing in and of itself; moreover, it will require those who are owed money by the debtor to determine, at their peril, whether or not they hold an administrative expense claim. If they do not, they may simply sit back and wait to see whether the case will later change to an asset case. If, on the other hand, they do have an administrative expense but do not file (even though there is no money to pay that expense), they will be denied payment if the case later does have assets. The result is that most persons will feel obligated to file an expense request, "just in case." This places an undue and unnecessary burden on both the expense holder and the other parties in the system.

For much the same reasons, I question why there is any need to set a deadline for these preconversion administrative expenses separate and apart from whatever deadline the court will set in the end for other administrative expenses. They will not be paid any earlier than if they were submitted at the end, nor will they receive any higher priority. And, if the estate in the end turns out to be administratively insolvent with respect to even postconversion expenses, the preconversion expense claimants and other parties in the case will simply have been put to an unnecessary burden and expense. In short, I would suggest that it make better sense to simply provide that the deadline for these expense requests would be the same as that imposed for any other types of administrative expenses. That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. In most cases, the most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances.

I appreciate the chance to comment on these proposals and hope that these statements will be of assistance. My concern here is primarily with ensuring fair treatment of these claimants while imposing the least burden on the system. Because the present rules are largely geared to dealing with prepetition claims, administrative expense claimants often fall through the cracks. I welcome the effort to ensure that they are taken into account, while I urge that the solution not cause new problems.

Very truly yours,

Karen Cordry

Karen Cordry, NAAG Bankruptcy Counsel

The BAR ASSOCIATION of the DISTRICT of COLUMBIA

Established 1871 Chartered 1874

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#4267

RECEIVED 2/20/98

February 14, 1998

97-BK-014

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

The Judicial Conference Standing Committee on Rules of Practice and Procedure has requested comment on various proposed amendments to the federal rules, including the Federal Rules of Bankruptcy Procedure. The Litigation Committee of the Bar Association of the District of Columbia, and its Subcommittee on Court Rules, submit these comments concerning the proposed amendments.

The Bar Association of the District of Columbia is a voluntary bar association. The responsibilities of its Litigation Committee include serving as a commentator on proposed changes to court rules. Comments submitted by the Litigation Committee represent only its views, and not necessarily those of the Bar Association.

1. Stay of Orders.

The most significant change to the Rules governs the application of Federal Rule of Civil Procedure 62 to Bankruptcy Court orders entered in contested matters and adversary proceedings. Currently, the ten day automatic stay of the effectiveness of orders applies to all orders entered in contested matters and adversary proceedings with the exceptions provided in Federal Rule 62 and the following additional exceptions provided in Bankruptcy Rule 7062:

a. Orders granting relief from the automatic stay

b. Orders authorizing or prohibiting the use of cash collateral Orders authorizing or prohibiting the use, sale or lease of property under § 363

c. Orders authorizing the trustee to obtain credit pursuant to § 364

d. Orders authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365.

The amendments propose to delete the reference to Rule 7062 contained in Rule 9014 which governs procedures in contested matters and to delete the additional exceptions provided by Rule 7062 listed above. The result is twofold. One, the ten day automatic stay of orders entered in contested matters does not apply unless specifically imposed by the Court. Two, the ten day stay only applies in adversary proceedings as limited by Federal Rule 62.

However, the ten day stay is imposed in certain contested matters by amendment to the following Rules:

a. 3020(e) (orders confirming a plan in Chapter 9 or 11 cases)

b. 3021 (time for commencement of distributions under a confirmed plan)

c. 4001(a)(3) (orders granting relief from the stay)

d. 6004(g) (orders authorizing the use, sale or lease of property other than cash collateral)

e. 6006(d) (orders authorizing the assignment of executory contracts and unexpired leases)

Each of these rules as amended gives the Court discretion to waive the ten day stay entirely or shorten the period as circumstances may require.

Comment. These changes are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay. Furthermore, many of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period, such as orders rejecting executory contracts or unexpired leases. Each of the matters in which the stay is imposed involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal. Since the Court has discretion to impose or modify the stay, parties should not be prejudiced under the amended Rules.

2. Injunctive Relief.

Rule 7001 is amended to clarify that an adversary proceeding is not necessary to obtain injunctive or other equitable relief where such relief is provided in a Chapter 9, 11, 12 or 13 plan of reorganization. The official comment states that substantive law must support such relief.

Comment. This change would certainly streamline the confirmation process and avoid time consuming ancillary litigation. However, imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors. However, certain types of injunctive relief are included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard.

3. Discharge.

Rule 4004(a) which pertains to objections to general discharge under Section 727(a) and Rule 4007(c) which pertains to objections to discharge of specific debts under Section 523(c) are each amended to provide that complaints must be filed within 60 days of the first date set for the meeting of creditors regardless of whether the meeting is actually held. Each Rule is also amended to clarify that requests for extension of the time periods must be "filed" before the expiration of the time.

Comment. These changes address confusion under the current rules, especially where the initial meeting is not held on the scheduled date, and are appropriate.

4. Service and Notice.

a. **Rule 1017(b)(3).** This subpart has been eliminated by the commission. Rule 1017(b)(3) provided a 30 day notice of dismissal to all listed creditors and to those creditors filing claims. The committee note says that Rule 1017(b)(3) is deleted as unnecessary, because 2002(f) provides notice to creditors upon dismissal.

Comment. Rule 2002(f) does provide a notice requirement, but unlike the 2002(a) twenty-day notices, and the 2002(b) twenty-five-day notices, 2002(f) does not specify a time period for notices. Therefore, the 30 day requirement now contained in 1017(b)(3) should be retained or an appropriate time period be added to 2002(f).

b. **Rule 7004(e).** The Rule is amended to provide that the ten day limit on service of a summons after issuance does not apply to service in a foreign country.

Comment. This is a practical change in recognition of the difficulty in international service.

c. **Rule 2002.** The Rule is amended to conform to Rule 1017.

Comment. The revisions are appropriate. It is costly and unnecessary to give all creditors notice of a hearing on dismissal of a case based on the failure to file a list of creditors, schedules and statement of financial affairs or substantial abuse or failure to pay the filing fee.

5. Election of Trustee.

Rule 2003(d) is amended to require the United States Trustee to mail a copy of a report of a disputed election on or before the date that the report is filed to any interested party which has requested it. The party has ten days from filing the report to file a motion to resolve the dispute.

Comment. The Rule currently requires such motion to be filed ten days after the meeting of creditors. This is an unrealistic deadline because the report may not be available within that time period. Therefore, the proposed changes provide a more functional procedure to resolve disputed elections.

6. Conversion of a Reorganization Case to a Liquidation Case.

a. **Statement of Intent.** Rule 1019(1)(B) is amended to clarify that extensions of the time to file a statement of intent regarding retention of collateral must be made before the time has expired, either by written motion filed with the court or by oral request made during a hearing.

Comment. The current Rule is unclear regarding the ability to make an oral request. Therefore, the revision is appropriate.

b. **Administrative Claims.** Rule 1019(6) currently requires holders of claims incurred in the reorganization case to file proofs of claim after a case is converted to a liquidation case. A number of members of our Committee interpret the Committee Note to the proposed amendment, by referring to Section 503(a), as apparently requiring such claimants to file motions for allowance of such administrative claims pursuant to Section 503(a) within ninety days of the meeting of creditors.

Comment. The proposed amendment is problematic for two reasons. One, holders of small administrative claims are not going to incur the cost of hiring an attorney to prepare and file a motion. Such creditors will simply forego the opportunity to obtain the priority status for their claim. Second, the court's docket would be burdened by large numbers of motions seeking allowance of such priority. For example, in the Merry-Go-Round Enterprises case currently pending in Baltimore, Maryland, which converted from a Chapter 11 reorganization to a Chapter 7 liquidation, landlords of the remaining 500 leases would have been required to file pleadings with the Court to establish priority for their unpaid post petition rent claims. The Trustee in this case simply requested the Court to establish a bar date for the filing of Chapter 11 administrative claims, clearly a more efficient and cost effective procedure. While the revisions are proposed to conform the Rule with the requirements of 11 U.S.C. § 348(d), it is contrary to current practice to require holders of claims incurred postpetition to file motions to establish the priority accorded to administrative creditors pursuant to 11 U.S.C. § 726(b). It is an inefficient, burdensome and costly procedure upon both the Court and the creditors.

Alternate Comment. One of our Committee's members, Mr. Pearlstein, does not interpret the proposed amendments to Rule 1019(6) as requiring claimants to file motions for allowance of administrative claims, and therefore supports the proposed amendments to the Rule.

7. Time.

Rule 9006 is modified to provide that the new time periods provided in Rule 1019(6) to file a motion for allowance of an administrative postpetition claim may not be reduced by the Court.

Comment. This revision is appropriate and conforms to the same restriction for claims filed pursuant to Rule 3002(c).

Very truly yours,

Michael J. Mueller 2/9/98

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7

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: THE LITIGATION PACKAGE
RULES 9013, 9014, AND MORE

DATE: FEBRUARY 18, 1998

At the September 1997 meeting in Williamsburg, the Advisory Committee approved proposed amendments to Rules 9013 and 9014, and to 25 other rules, subject to stylistic revisions by the Style Subcommittee. These amendments would substantially change litigation practice in bankruptcy courts. A draft of the proposed amendments is attached as Exhibit A.

I also enclose for your information a letter that I received from Judge Cordova in which he expressed opposition to the proposed amendments. The letter is attached as Exhibit B.

You will notice that I placed the rules included in Exhibit A in numerical order, which is how they will appear when presented to the Standing Committee. The amendments to Rules 9013 and 9014, which are the most important, are on pages 55-72.

The Standing Committee's Style Subcommittee, including Bryan Garner, reviewed and commented on these drafts. The Advisory Committee's Style Subcommittee, together with Ken Klee, chair of the Litigation Subcommittee, held a two-hour telephone conference for the purpose of reviewing the comments of the Standing Committee's Style Subcommittee and making stylistic improvements. These improvements are reflected in Exhibit A.

Despite the considerable amount of time spent on these proposed amendments, and the numerous discussions during the past

two years, I would like to raise a few more matters for your consideration before this package is presented to the Standing Committee with a request for publication:

(1) *Rule 9006(d)*. At the September meeting, I recommended that Rule 9006(d) be abrogated. Rule 9006(d) provides as follows:

> (d) FOR MOTIONS - - AFFIDAVITS. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

In reviewing all the Rules to determine which ones need to be revised to conform to the extensive revisions to Rules 9013 and 9014, I first concluded, and recommended to the Committee, that Rule 9006(d) should be deleted because it would not be consistent with Rule 9013 applications or Rule 9014 motions. However, I since reconsidered and now believe that it should be retained, but with amendments to limit its scope to (a) motions within adversary proceedings, and (b) procedural or dispositive motions within a Rule 9014 administrative proceeding.

The 5-day and 1-day time periods in Rule 9006(d) are the same as those provided in Civil Rule 6(d), which are applicable to motions in civil actions in district court. There is no reason why they should not be applicable to motions relating to adversary proceedings. I also think that Rule 9006(d) should

apply to procedural or dispositive motions made within administrative proceedings under Rule 9014. For your consideration, I restored to the draft (see page 53 of Exhibit A) Rule 9006(d) with amendments to limit its scope.

Consistent with the restoration of Rule 9006(d), I also added a new subdivision to the draft of Rule 9014 (see Rule 9014(m) on page 67 of Exhibit A) and a conforming amendment to Rule 9014(a)(4) on page 59, to clarify that Rule 9006(d) applies to procedural and dispositive motions related to pending administrative motions.

(2) Application of Civil Rule 7(b)(1) to Procedural and Dispositive Motions Within a Pending Rule 9014 Administrative Proceeding.

For similar reasons, I reconsidered the effect of deleting the current Rule 9013 (you will recall that the Committee voted to completely revise Rule 9013, which means that the current text will disappear). I now believe that the substance of Rule 9013, which contains basic requirements regarding motions in general (i.e., a motion shall state grounds with particularity, etc.) should be restored somewhere, and that it should be applicable to procedural or dispositive motions made within a Rule 9014 administrative proceeding.

In reviewing Part VII and the Civil Rules, I realized that Civil Rule 7(b)(1) is similar to current Rule 9013 and is applicable to motions made in adversary proceedings (see Rule

7007). Rule 7(b)(1) provides as follows:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

In a new subdivision added to the draft of Rule 9014 (see Rule 9014(m) on page 67), I added a provision that says that Civil Rule 7(b)(1) applies to a procedural or dispositive motion in a Rule 9014 administrative proceeding.

By adding the reference to Civil Rule 7(b)(1) in Rule 9014(m), the Committee would actually be keeping the *status quo* because procedural and dispositive motions in contested matters are now governed by Rule 9013, which contains similar language.

(3) *Rule 2014*. The Advisory Committee and its Subcommittee on Rule 2014 has been considering proposals to amend Rule 2014 for several years. The Advisory Committee approved amendments that would provide new procedures for requests for court approval of the employment of professional persons. But the Committee has not been able to agree on new language to define the information that must be disclosed by the professional. Please see the proposed amendments to Rule 2014 on pages 18-21 of Exhibit A.

The Advisory Committee approved the complete revision of Rule 2014 as shown on pages 18-21, except for Rule 2014(b)(3). Since Rule 2014 is not governed by Rule 9014 (see Rule 9014(a)(2)), which makes it a free-standing rule procedurally, it

would be unfortunate for this rule to remain as is without the procedural improvements already adopted by the Committee. Therefore, I included the proposed amendments to Rule 2014 in the package of rules set forth in Exhibit A, but I drafted Rule 2014(b)(3) in a manner that does not change the current standard for disclosure. That is, the draft incorporates the procedural improvements while keeping the current disclosure standard.

(4) *Rule 3012.* The Style Subcommittee, in performing its work, noticed that Rule 3012 is in need of substantial stylistic improvement and asked me to redraft it. In particular, we noticed that the rule refers to the valuation of a *claim,* rather than valuation of *property.* The title of the rule also is in need of improvement, according to the Style Subcommittee. Please consider the amendments to Rule 3012 on page 33.

(5) *Rule 3015(g).* The draft of Rule 9014 that I prepared and presented to the Advisory Committee in September listed Rule 3015(g) proceedings (modification of a chapter 12 or chapter 13 plan after confirmation) as one of those that are excluded from the scope of Rule 9014. But the Committee rejected that approach and asked me to draft amendments to Rule 3015(g) that provide that a request to modify the plan is governed by Rule 9014. Please see pages 34-36 of Exhibit A. You will notice that I placed in brackets language indicating that a response to a motion to modify a plan does not have to be served on creditors.

(6) *Rule 1006(c).* The Committee voted to add Rule 1006(c)

(see page 2 of Exhibit A) so that a court may rule on a request to waive the filing fee without notice or a hearing, but only if it may be waived under applicable law.

When the Committee approved this provision, there was in effect a three-year *in forma pauperis* program under which, in six pilot districts, the filing fee could be waived for individuals unable to pay the fee in installments. The pilot program was established by statute to enable the Judicial Conference to carry out its duty to report to the House and Senate Judiciary Committees by March 31, 1998, on the costs and benefits of an *in forma pauperis* system. Section 111(d), Pub. L. No. 103-121, 107 Stat. 1165 (Dept. Of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1994). The pilot program began on October 1, 1994, and terminated on September 30, 1997. A copy of section 111(d) of the Appropriations Act is enclosed as Exhibit C.

At this time, there is no authority for bankruptcy courts to waive the filing fee. My question for the Committee is whether the proposed amendment to Rule 1006 at this time would be misleading (even though the Committee Note states that this provision is not intended to create any right to a waiver of fees). Will Rule 1006(c) invite requests for fee waivers when no such right exists in any bankruptcy court? Should the Committee wait to see if an *in forma pauperis* system is established by Congress before recommending this amendment?

EXHIBIT A

PROPOSED AMENDMENTS

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in ~~subdivision (b) of this rule~~ Rule 1006(b) or (c). For ~~the purpose~~ purposes of this rule, "filing fee" means the ~~filing~~ fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk ~~upon the commencement of a case under the Code~~ when the case is commenced.

(b) PAYING ~~PAYMENT OF FILING FEE~~ IN INSTALLMENTS.

(1) *Request* ~~*Application*~~ *for Permission to Pay* ~~*Filing Fee*~~ *in Installments*. The clerk shall accept for filing an individual's voluntary petition if it is ~~A voluntary petition by an individual shall be accepted for filing if~~ accompanied by the debtor's signed ~~application~~ request stating that the debtor is unable to pay the filing fee except in installments. The ~~application~~ request shall state the proposed terms of the installment payments and that the ~~applicant~~ debtor has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) *Action on ~~Application~~ the Request*. Before ~~Prior to~~ the meeting of creditors, with or without notice or a hearing, the court may order the filing fee paid to the clerk or grant leave to pay it in installments and fix the number, amount, and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable ~~not~~ no later than 120 days after ~~filing~~ the petition is filed. For cause ~~shown~~, the court may extend the time of any installment to a time that is~~, provided the last installment is paid not~~ no later than 180 days after ~~filing~~ the petition is filed.

(3) ~~*Postponement*~~ *Postponing Payment of ~~Attorney's~~ Other Fees*. After a petition is filed, ~~The~~ the filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney, bankruptcy petition preparer, or any other person who renders services to the debtor in connection with the case.

(c) *Waiver of Filing Fee.* If a filing fee may be waived under applicable law, and a request for waiver of the filing fee is filed, the court may waive the fee, with or without notice or a hearing.

COMMITTEE NOTE

This rule is amended to provide that a request to pay the filing fee in installments or a request for a waiver of the filing fee may be granted by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to these requests. This rule is not intended to expand or create any right to a waiver of fees.

Under subdivision (b)(1), the debtor is required to state in the request for permission to pay the filing fee in installments that the debtor has neither paid money nor transferred property to an attorney for services rendered in connection with the case. A similar statement is not required with respect to bankruptcy petition preparers. A debtor who pays a bankruptcy petition preparer should not be disqualified from paying the filing fee in installments. But after the petition is filed, the debtor is prohibited by Rule 1006(b)(3) from paying fees to an attorney, bankruptcy petition preparer, or any other person for services in connection with the case until the filing fee, including every installment, is paid in full.

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. Except as provided in Rule 1007(d), (e) and (h), in a voluntary case, the debtor shall file the ~~The~~ schedules and statements, other than the statement of intention, ~~shall be filed~~ with the petition ~~in a voluntary case,~~ or, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days after the petition is filed~~, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule~~. In an involuntary case, the debtor shall file the schedules and statements, other than the statement of intention, ~~shall be filed by the debtor~~ within 15 days after ~~entry of~~ the order for relief is entered. Unless the court directs otherwise, schedules ~~Schedules~~ and statements filed ~~prior to~~ before a case is converted ~~the conversion of a case~~ to another chapter ~~shall be~~ are deemed filed in the converted case ~~unless the court directs otherwise.~~ ~~Any~~ A request to extend the ~~for an extension of~~ time for ~~the~~ filing ~~of~~ the schedules and statements may be granted with or without notice or a hearing ~~only on motion for cause shown and on notice to the~~

~~United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct~~. Notice of an extension of time shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

This rule is amended to provide that a request for an extension of time to file schedules and statements under subdivision (c) may be resolved by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to the request. The other amendments are stylistic.

Rule 1014. Dismissal and Change of Venue

(a) DISMISSAL AND TRANSFER OF CASES.

(1) *Cases Filed in Proper District.* If a petition is filed in a proper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred~~ the court may transfer the case to any other district if ~~the court~~ it determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) *Cases Filed in Improper District.* If a petition is filed in an improper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties~~ the

court may dismiss the case or, if it determines that transfer is in the interest of justice or for the convenience of the parties, transfer the case to another district.

(b) ~~PROCEDURE WHEN~~ PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ~~ARE~~ FILED IN DIFFERENT DISTRICTS ~~COURTS~~. If petitions ~~commencing cases under the Code~~ are filed in different districts by or against (1) the same debtor, ~~or~~ (2) a partnership and one or more of its general partners, ~~or~~ (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending ~~and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court~~, the court ~~may~~ shall determine, in the interest of justice or for the convenience of the parties, the district or districts in which the ~~case or~~ cases should proceed. ~~Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.~~ Until that determination is made, any other court where another petition is pending shall stay its proceedings unless the court in which the motion is

pending orders otherwise.

(c) PROCEDURE GOVERNING MOTION. Rule 9014 governs a motion made under this rule. Every entity filing a petition against the debtor under § 303 of the Code shall be treated as an entity listed in Rule 9014(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. The list of entities entitled to notice of a hearing on transfer or dismissal of a case under this rule is deleted as unnecessary because Rule 9014, which governs a motion under this rule, sets forth the list of entities entitled to service of the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the transfer or dismissal of a case in the list of matters with respect to which the United States trustee is entitled to receive papers.

Rule 1017. Dismissal or Conversion of Case; Suspension

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~~(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.~~

****

(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an ~~An~~ individual debtor's case ~~may be dismissed~~ for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion ~~and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs~~.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within ~~A motion by the United States trustee shall be filed no later than~~ 60 days after the first date set for the meeting of creditors under § 341(a), unless, before ~~such~~ the time has expired,

the court for cause extends the time for filing the motion. The United States trustee shall set forth in the motion ~~The motion shall set forth~~ all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor, the debtor's attorney, and the trustee no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing. The clerk shall transmit a copy of the notice to the United States trustee.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) Rule 9014 governs a ~~A~~ proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), ~~or~~ 1307(a) or (b), or Rule 1017(e)(2)~~, is governed by Rule 9014~~.

(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on

~~motion~~ application filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes ~~shall be deemed~~ the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly ~~forthwith~~ transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (e) is amended to delete the list of the entities entitled to service of the motion except when the motion is on the court's own initiative. When the United States trustee files the motion for dismissal under § 707(b), the list of the entities to be served is in Rule 9014(c)(1).

Subdivision (f) is amended to provided that a proceeding to dismiss a case under § 707(b) is not governed by Rule 9014 if it is initiated on the court's own motion.

The other amendments are stylistic.

Rule 2001. Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case

(a) APPOINTMENT. At any time after ~~following the commencement of~~ an involuntary ~~liquidation~~ case is commenced under chapter 7 and before an order for relief, the court on ~~written~~ motion of a party in interest may order the appointment of an interim trustee under § 303(g) of the Code. ~~The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.~~ Rule 9014 governs the motion. Every entity filing a petition against the debtor under § 303 shall be treated as an entity listed in Rule 9014(c)(1).

****

COMMITTEE NOTE

This rule is amended to provide that a motion for the appointment of an interim trustee is governed by Rule 9014. The petitioners, as well as the entities listed in Rule 9014(c)(1), are entitled to be served with the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the appointment of an interim trustee on the list of matters as to which the United States trustee is entitled to receive papers.

Rule 2004. Examination

(a) EXAMINATION ON ~~MOTION~~ APPLICATION. On ~~motion~~ application of any party in interest, the court may order the examination of any entity. Rule 9013 governs the application.

****

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS ~~DOCUMENTARY EVIDENCE~~. The attendance of an entity for examination and for the production of ~~documentary evidence~~ documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled ~~in the manner~~ as provided in Rule 9016 for the attendance of a witness ~~witnesses~~ at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is authorized to practice in that court or in the court in which the case is pending.

****

COMMITTEE NOTE

Subdivision (a) is amended to conform to the amendments to Rule 9013, which governs an application for an order under this rule.

Subdivision (c) is amended to clarify that an examination ordered pursuant to Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in

the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

Rule 2007. Review of Appointment of Creditors' Committee Organized Before Commencement of ~~the~~ a Chapter 9 or Chapter 11 Case

(a) MOTION TO REVIEW APPOINTMENT. If a committee appointed by the United States trustee ~~pursuant to~~ under § 1102(a) of the Code consists of the members of a committee organized by creditors before ~~the commencement of~~ a chapter 9 or chapter 11 case was commenced, on motion of a party in interest ~~and after a hearing on notice to the United States trustee and other entities as the court may direct~~, the court may determine whether the appointment ~~of the committee~~ satisfies the requirements of § 1102(b)(1) ~~of the Code~~. Rule 9014 governs the motion. If the court finds that the appointment failed to satisfy the requirements of § 1102(b)(1), the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate relief.

(b) SELECTION OF COMMITTEE MEMBERS ~~OF COMMITTEE~~. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) ~~of the Code~~ and who attended ~~were present~~ in person or were represented at a meeting for ~~of~~ which all

creditors having unsecured claims of over $1,000, or the 100 unsecured creditors having the largest claims, had been given at least five ~~days~~ days' notice in writing, and ~~of~~ at which ~~meeting~~ written minutes reporting the names of the creditor witnesses present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited ~~pursuant to~~ in accordance with Rule 2006 and the lists and statements required by Rule 2006(e) ~~subdivision (e) thereof~~ have been transmitted to the United States trustee; and

(3) the organization of the committee was in all other respects fair and proper.

~~(c) FAILURE TO COMPLY WITH REQUIREMENTS FOR APPOINTMENT. After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014 and to make stylistic improvements.

Rule 2014. Employment of Professional ~~Persons~~ Person

(a) MOTION FOR AN ORDER AUTHORIZING EMPLOYMENT. A request for an order authorizing employment under § 327, § 1103, or § 1114 of the Code may be made only by written motion of the trustee or committee. The motion shall:

(1) state specific facts showing why the employment is necessary;

(2) state the name of the person to be employed and the reasons for the selection;

(3) state the professional services to be rendered;

(4) disclose any proposed arrangement for compensation;

(5) state that, to the best of the movant's knowledge, the person to be employed is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion; and

(6) disclose any interest that the person to be employed holds or represents that is adverse to the estate.

(b) STATEMENT OF PROFESSIONAL. The motion shall be accompanied by a verified statement of the person to be employed. The statement shall:

(1) state that the person is eligible under the

Bankruptcy Code for employment for the purposes set forth in the motion;

(2) disclose any interest that the person holds or represents that is adverse to the estate;

(3) disclose the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee;

(4) if the professional is an attorney, state the information required to be disclosed under § 329(a); and

(5) state whether the person shared or has agreed to share any compensation with any person and, if so, the particulars of any sharing or agreement to share other than the details of any agreement for the sharing of compensation with a partner, employee, or regular associate of the partnership, corporation, or person to be employed.

(c) SERVICE. The motion and at least 10 days' notice of the hearing shall be transmitted to the United States trustee, unless the case is a chapter 9

case, and shall be served on:

(1) the trustee;

(2) any committee elected under § 705 or appointed under § 1102 of the Code, or the committee's authorized agent;

(3) the creditors included on the list filed under Rule 1007(d); and

(4) any other entity as the court may direct.

(d) HEARING. The court may resolve the motion without a hearing if no objection or request for a hearing is filed at least 2 days before the scheduled hearing date.

(e) INTERIM EMPLOYMENT ORDER. If the motion so requests, the court may authorize employment on an interim basis without notice and a hearing pending resolution of the motion. A copy of the order authorizing employment on an interim basis, the motion, and at least 5 days' notice of the hearing shall be served forthwith on the entities listed in Rule 2014(c). The hearing shall be scheduled for a time that is not more than 14 days after service of the order authorizing interim employment, unless the court orders otherwise.

(f) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 days after discovering any matter that is required to be disclosed under Rule 2014(b), but that has not

yet been disclosed, a person employed under this rule shall file a supplemental verified statement, serve copies on the entities listed in Rule 2014(c) and, unless the case is a chapter 9 municipality case, transmit a copy to the United States trustee.

(g) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF EMPLOYED PROFESSIONAL. If, under the Code and this rule, a court authorizes the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or withdrawal of a partner.

~~(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the~~

~~employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.~~

~~(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.~~

COMMITTEE NOTE

This rule is amended to improve the procedures for obtaining an order authorizing the employment of professionals. The trustee -- which is defined in Rule 9001(10) to include a debtor in possession in a chapter 11 case -- or a committee seeking authorization is required to file a motion, rather than an application, and copies of the motion must be served on the parties in interest specified in the rule. If the motion requests, the court may authorize employment on an interim basis without a hearing so as to avoid delays in obtaining professional assistance immediately.

The moving party is required to state that, to the best of the person's knowledge, the professional to be employed is eligible to serve. The rule also requires that the professional state in a verified statement that the professional is eligible to serve. Eligibility is governed by the Bankruptcy Code and may depend on the purposes for which the professional is to be employed. For example, an attorney may be employed to represent the trustee or debtor in possession under § 327(a) only if the person is disinterested. See 11 U.S.C. § 101 for the definition of "disinterested." If an attorney is retained solely as special counsel under § 327(e), the professional need not be disinterested so long as other requirements are met. Nonetheless, regardless of the purpose for which the professional is to be employed, the moving party must disclose any interest that the person to be employed holds or represents that is adverse to the estate.

Arrangements for sharing compensation have been added to the matters that must be disclosed. Subdivision (f) is added to require timely supplemental disclosures.

Subdivision (g) is expanded to cover firms when the professional is not an attorney or accountant, and is amended to clarify that, if a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or withdrawal of a partner.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

~~(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT.~~ ~~An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by~~

~~an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.~~

(a) MOTION FOR COMPENSATION OR REIMBURSEMENT. Rule 9014 governs a motion for interim or final payment from the estate for compensation for services rendered or the reimbursement of expenses.

(1) The motion shall state the amount requested, the services rendered, the time expended, and the expenses incurred. If compensation is requested, the motion shall also state:

(A) the source and the amount of any payments that have been made or promised for services rendered or to be rendered in any capacity in connection with the case;

(B) whether any compensation previously received has been shared and whether an agreement or understanding exists between the movant and any other entity to share compensation received or to be received for services rendered in or in connection with the

case; and

(c) the particulars of any sharing of compensation or any agreement or understanding with respect to sharing compensation, but the details of any agreement by the movant to share compensation as a member or regular associate of a firm of lawyers or accountants is not required.

(2) This Rule 2016(a) applies to a motion for compensation for services rendered by an attorney or accountant even if the motion is filed by a creditor or other entity.

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COMMITTEE NOTE

This rule is amended to provide that a proceeding for compensation or reimbursement of expenses from the estate is governed by Rule 9014. The provision requiring transmittal of papers to the United States trustee is deleted as unnecessary. See Rule 9034. The other amendments are stylistic.

Rule 3001. Proof of Claim

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(e) TRANSFERRED CLAIM.

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~~(5) *Service of Objection or Motion; Notice of Hearing.* A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.~~

(5) *Procedures.* An objection under Rule 3001(e)(2) or (4), or a motion under Rule 3001(e)(3) or (4), is governed by Rule 9014. The transferor or transferee, whichever is appropriate, shall be treated as an entity listed in Rule 9014(c)(1).

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COMMITTEE NOTE

Paragraph (e)(5) is amended to provide that an objection or motion under Rule 3001(e) is governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014. Since the objection or motion is governed by Rule 9014, service must be made 20 days before the hearing

date, rather than 30 days as is provided under the current Rule 3001(e)(5).

The other amendments are stylistic.

Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan

(a) WITHDRAWAL OF CLAIM. Except as provided in this rule, a ~~A~~ creditor may withdraw a claim as of right by filing a notice of withdrawal~~, except as provided in this rule~~. Unless the court orders otherwise, a creditor may not withdraw a claim if, after the creditor files a proof of claim, ~~If after a creditor has filed a proof of claim~~ an objection to the claim is filed, ~~thereto~~ ~~or~~ a complaint is filed against ~~that~~ the creditor in an adversary proceeding, ~~or~~ the creditor has accepted or rejected ~~the~~ a plan, or the creditor has otherwise ~~or otherwise has~~ participated significantly in the case~~, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code~~. Rule 9014 governs a motion to withdraw a claim. The order may include ~~order of the court shall contain such~~ terms and conditions ~~as~~ which the court ~~deems~~ considers proper.

(b) EFFECT ON ACCEPTANCE OR REJECTION OF A PLAN. Unless the court orders otherwise, an authorized withdrawal of a claim ~~shall constitute~~ constitutes withdrawal of any related acceptance or rejection of a

plan.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice of the hearing on a creditor's withdrawal of a claim is deleted as unnecessary. See Rule 9014(c). The other amendments are stylistic.

Rule 3007. Objections to Claims

An objection to the allowance of a claim is treated as a motion governed by Rule 9014, except that (a) the motion shall be served at least 30 days before the hearing, and (b) an objection joined with a demand for relief of the kind specified in Rule 7001 is an adversary proceeding ~~shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding~~.

COMMITTEE NOTE

This rule is amended to clarify that an objection to the allowance of a claim is an administrative proceeding governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014(b). But service of the motion must be made at least 30 days before the hearing date, rather than 20 days as is required for administrative motions under Rule 9014(c). The claimant may file a response under Rule 9014(d).

If an objection to a claim is joined with relief of the kind specified in Rule 7001, the objecting party must file and serve a complaint commencing an adversary proceeding under Part VII of these Rules.

The other amendments are stylistic.

Rule 3012. Valuation of Property Securing Lien ~~Security~~

On motion, the court may determine the value of a secured creditor's interest in the estate's interest in property ~~a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct~~. The motion is governed by Rule 9014, and the holder of the secured claim shall be treated as an entity listed in Rule 9014(c).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Other amendments are stylistic.

Rule 3013. Classification of Claims and Interests

~~For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct,~~ On motion, the court may determine classes of creditors and equity security holders ~~pursuant to §§~~ under § 1122, § 1222(b)(1), ~~and~~ or § 1322(b)(1) of the Code for purposes of the plan and its acceptance. The motion is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended to provide that the motion to determine classification of claims and interests is governed by Rule 9014. The other amendments are stylistic.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment Case or a Chapter 13 Individual's Debt Adjustment Case

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(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. A party in interest may object to confirmation of a plan by filing an objection before the plan is confirmed. The objecting party shall serve a copy of the objection ~~An objection to confirmation of a plan shall be filed and served~~ on the debtor, the debtor's attorney, and the trustee~~, and any other entity designated by the court~~ in the manner provided in Rule 9014(c)(2), and shall ~~be transmitted~~ transmit a copy to the United States trustee, before the plan is confirmed ~~confirmation of the plan~~. ~~An objection to confirmation is governed by Rule 9014.~~ Discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C). If no objection is ~~timely~~ filed, the court may determine, without receiving evidence, that the plan has been proposed in good faith and not by any means forbidden by law ~~without receiving evidence on such issues~~.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under ~~pursuant to~~ § 1229 or § 1329 ~~of the Code~~ is made by motion governed by Rule 9014. Every creditor that would be affected by the

proposed modification shall be treated as an entity listed in Rule 9014(c)(1) **[, but a respondent is not required to serve the response on any creditor unless the court directs otherwise]**. The motion shall include a copy or summary of the proposed modification **[and a list of the names and addresses of the creditors affected by the modification]**. ~~shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity~~

~~designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.~~

COMMITTEE NOTE

Subdivision (f) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection under Rule 3015(f) is not an administrative proceeding under Rule 9014, service of the objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C).

Deletion of the phrase "any other entity designated by the court" from the entities entitled to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving the objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on another entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

Subdivision (g) is amended to provide that a request to modify a chapter 12 or chapter 13 plan after confirmation is an administrative proceeding governed by Rule 9014. The movant is required to serve all creditors that would be affected by the proposed modification.

The other amendments are stylistic.

Rule 3019. Modification of Accepted Plan Before Confirmation in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If on motion the court finds ~~after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court~~ that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted the modification in writing ~~the modification~~, the plan as modified ~~it~~ shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan. Rule 9014 governs the motion.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice is deleted as unnecessary because Rule 9014, which governs motions under this rule, includes a list of entities to be served. See the amendments to Rule 9014(c)(1).

Rule 3020. Deposit; Confirmation of a Plan in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

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(b) ~~OBJECTION TO AND HEARING ON CONFIRMATION~~ CONFIRMATION OF A PLAN IN A CHAPTER 9 OR CHAPTER 11 CASE.

(1) *Objection to Confirmation*. Within the time fixed by the court, any ~~An~~ objection to confirmation of ~~the~~ a plan shall be filed and served in the manner provided in Rule 9014(c)(2) on the debtor, the debtor's attorney, the trustee, the proponent of the plan, and any committee appointed under the Code~~, and any other entity designated by the court, within a time fixed by the court~~. In a chapter 11 reorganization case, ~~Unless the case is a chapter 9 municipality case,~~ the objecting party shall transmit a copy of the ~~every~~ objection ~~to confirmation shall be transmitted by the objecting party~~ to the United States trustee within the time fixed for filing objections. Discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C). ~~An objection to confirmation is governed by Rule 9014.~~

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COMMITTEE NOTE

Subdivision (b)(1) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection to confirmation under Rule 3020(b) is not an administrative proceeding under Rule 9014, service of an objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C).

Deletion of the phrase that provided that the court may designate other entities to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving an objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on any other entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

(1) *Procedures Governing Motion*. Rule 9014 governs a ~~A~~ motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property under ~~pursuant to~~ § 363(e) ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

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(b) USE OF CASH COLLATERAL.

(1) *Procedures Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for ~~authorization~~ authority to use cash collateral ~~shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the~~

~~cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.~~ Every entity having an interest in the cash collateral shall be treated as an entity listed in Rule 9014(c)(1).

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~~(3) *Notice.* Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(c) OBTAINING CREDIT.

(1) *Procedure Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for authority to obtain credit ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured~~

~~creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.~~ The motion shall include ~~be accompanied by~~ a copy of the agreement relating to the credit to be obtained.

****

~~(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, ~~AND~~ OR OBTAINING CREDIT.

(1) *Administrative Proceeding*. ~~*Motion; Service.*~~ Except as provided in Rule 4001(d)(3), Rule 9014 governs a ~~A~~ motion for approval of an agreement:

(A) ~~to provide~~ providing adequate protection~~,~~;

(B) ~~to prohibit or condition~~ prohibiting or conditioning the use, sale, or lease of property~~,~~;

(C) ~~to modify or terminate~~ modifying or terminating the stay provided for in

§ 362~~,~~;

(D) ~~to use~~ using cash collateral~~,~~; or

(E) consenting to the creation of a lien senior or equal to an existing lien or interest in property of the estate ~~between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

(2) Copy of the Agreement. The motion shall ~~be accompanied by~~ include a copy of the agreement.

~~(2) *Objection.* Notice of the motion and the~~

~~time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.~~

~~(3) *Disposition; Hearing*. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.~~

~~(4)~~ (3) *Procedure For Approval of Agreement to Settle a Motion* ~~*Agreement in Settlement of Motion*~~. The court may direct that the procedures prescribed in Rule 4001(d)(1) and (2) do ~~paragraphs (1), (2), and (3) of this subdivision shall~~ not apply, and that an ~~the~~ agreement of the kind listed in Rule 4001(d)(1) may be approved without further notice, if the court determines that a motion made under

Rule 4001(a), (b) or (c) ~~pursuant to subdivisions (a), (b), or © of this rule~~ was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity to be heard for a hearing.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of parties entitled to service of the motion and notice of the hearing is deleted from Rule 4001(a), (b), and (c), because Rule 9014(c)(1) lists the entities that must be served. Other amendments are stylistic.

Rule 6004. Use, Sale, or Lease of Property

(a) NOTICE OF PROPOSED USE, SALE, OR LEASE OF PROPERTY. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given in accordance with ~~pursuant to~~ Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code. The notice may include a date for a hearing to be held if a timely objection is filed.

(b) OBJECTION TO PROPOSAL. Except as provided in Rule 6004(c) or (d) ~~subdivisions (c) and (d) of this rule~~, an objection to a proposed use, sale, or lease of property ~~shall~~ may be filed and served ~~not~~ no less than five days before the date set for the proposed action or within the time fixed by the court. The objection shall be served on the entities listed in Rule 9014(c)(2). If a timely objection is filed and served, the notice sent under Rule 6004(a) is treated as a motion for authority to use, sell, or lease the property, the objection is treated as a response, and Rule 9014 governs the proceeding. If the notice does not include a hearing date, a hearing date shall be included in the objection. ~~An objection to the proposed use, sale, or lease of property is governed by Rule 9014.~~

(c) SALE FREE AND CLEAR OF LIENS AND OTHER INTERESTS. Rule 9014 governs a ~~A~~ motion for authority to sell property free and clear of liens or other interests ~~shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold~~. The notice required by Rule 6004(a) ~~subdivision (a)~~ of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served ~~on the debtor in possession or trustee~~. An objection is treated as a response to a motion under Rule 9014(d)

(d) SALE OF PROPERTY VALUED UNDER $2,500. ~~Notwithstanding subdivision (a) of this rule, when~~ If all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give to all creditors, indenture trustees, committees appointed or elected under the Code, the United States trustee and other persons as the court may direct a general notice of intent to sell ~~such~~ the property other than in the ordinary course of business ~~to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct~~. A party may object to the proposed sale ~~An objection to any such sale may be filed and~~

~~served by a party in interest~~ within 15 days after ~~of the mailing of~~ the notice is mailed~~,~~ or within the time fixed by the court. An objection is governed by Rule 9014.

~~(e) HEARING. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.~~

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COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Although the trustee or debtor in possession who sends a notice of proposed use, sale, or lease of property under § 363(b) does not need to obtain a court order and is not required to file a motion, if a timely objection is filed the notice is treated as a motion and the objection is treated as a response in a proceeding governed by Rule 9014.

The procedure is different if the property is to be sold free and clear of liens and other interests. The trustee or debtor in possession that wants to sell the property must file and serve a motion for authorization to sell it free and clear of liens and other interests. Notice of the proposed sale must be sent to all creditors and others under Rule 2002(a) and (c)(1), and the motion must be served in accordance with Rule 9014(c). An objection to the proposed sale is treated as a response to the motion, which is governed by Rule 9014.

Other amendments, including the rearranging of subdivisions, are stylistic.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

(b) PROCEEDING TO REQUIRE TRUSTEE TO ACT. A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

~~(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. Subdivision (c) is deleted as unnecessary. Rule 9014(c)(1) lists the entities entitled to receive the motion papers and Rule 9034 requires transmittal of the motion papers to the United States trustee.

Rule 6007. Abandoning or Disposing ~~Abandonment or Disposition~~ of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTION ~~OBJECTIONS; HEARING~~. Unless the court directs otherwise ~~otherwise directed by the court~~, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code. A party in interest may file an objection to the proposed abandonment or disposition no later than 15 days after the notice is mailed ~~and serve an objection within 15 days of the mailing of the notice,~~ or within the time fixed by the court. ~~If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.~~ The objection is treated as a motion governed by Rule 9014.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion to require ~~requiring~~ the trustee or debtor in possession to abandon property of the estate. Rule 9014 governs the motion.

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COMMITTEE NOTE

This rule is amended to provide that an objection to a proposed abandonment or disposition of property is governed by Rule 9014. The objection is made by filing and serving a motion in accordance with Rule 9014 before the time for objecting expires. Other amendments are stylistic.

Rule 9006. Time

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(d) FOR MOTIONS RELATING TO A PENDING ADVERSARY PROCEEDING OR ADMINISTRATIVE PROCEEDING ~~-- AFFIDAVITS~~. A written motion of the type described in Rule 9014 (a)(3) or (a)(4), other than one which may be heard ex parte, and notice of any hearing shall be served ~~not~~ no later than five days before the time specified for the ~~such~~ hearing, unless a different period is fixed by these rules or by ~~order of~~ the court. ~~Such an order may for cause shown be made on ex parte application~~. For cause shown, the order fixing a different period may be made on ex parte application. When ~~a~~ the motion is supported by affidavit, the movant shall serve the affidavit ~~shall be served~~ with the motion. ~~, and, except as otherwise~~ Except as provided in Rule 9023, opposing affidavits may be served ~~not~~ no later than one day before the hearing, unless the court permits them to be served at some other time.

****

COMMITTEE NOTE

Subdivision (d) is amended to limit it to motions made within adversary proceedings under Part VII of these rules, and to procedural or dispositive motions relating to pending

administrative proceedings under Rule 9014. The time limits set forth in Rule 9014(d) do not apply if the motion is governed by another rule that fixes different time periods. For example, a motion for summary judgment under Rule 7056, which applies in an administrative proceeding under Rule 9014(l), is governed by the time periods fixed by Rule 56 F.R.Civ.P., rather than by Rule 9014(d).

Rule 9013. Application for an Order ~~Motions: Form and Service~~

(a) SCOPE OF THIS RULE. This rule governs a request for an order relating to any of the following:

(1) payment of income to a trustee under § 1225(c) or 1325(c) of the Code;

(2) joint administration under Rule 1015;

(3) conversion of a case under § 706(a) or § 1112(a);

(4) dismissal of a case under § 1208(b) or § 1307(b);

(5) approval of the appointment of an examiner or trustee in a chapter 11 case under § 1104 and in accordance with Rule 2007.1;

(6) enlargement of time under Rule 9006(b) if the request is made before the original or enlarged period has expired other than an order enlarging the time to take action under Rule 1007(c), 1017(e), 3015(a), 4003(b), 4004(a), 4007(c), 8002, or 9033;

(7) form of, manner of sending, or publication of a notice in a chapter 7, chapter 12, or chapter 13 case;

(8) notice to a committee under Rule 2002(i);

(9) notice under Rule 9020(b);

(10) examination of an entity under Rule 2004;

(11) deferral of the entry of an order granting

a discharge under Rule 4004(c);

(12) reopening a case under § 350(b);

(13) conditional approval of a disclosure statement under Rule 3017.1; and

(14) protection of a secret, confidential, scandalous, or defamatory matter under Rule 9018.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by application. The application shall be in writing, unless it is made orally at a status conference or hearing at which all parties entitled to notice of the application are present. The application shall:

(1) state with particularity the relief sought and the grounds for that relief; and

(2) if in writing, be accompanied by proof of service under Rule 9013(c) and by a proposed order for the relief requested.

(c) SERVICE OF APPLICATION. No later than the time when a written application is filed, the applicant shall serve a copy of the application, any paper filed with the application, and the proposed order on the debtor, the debtor's attorney, the trustee, any committee elected under § 705 or appointed under § 1102, and any other entity required by federal law or these rules, and shall transmit a copy to the United

States trustee. Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

(d) NO RESPONSE REQUIRED; ORDER WITHOUT A HEARING. A response to the application is not required, and the court may order relief without a hearing.

(e) SERVICE OF ORDER. If the court issues an order, the clerk shall serve a copy on the applicant, the entities listed in Rule 9013(c), and any other entity as the court directs.

~~A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9013 is amended to govern a category of procedures, called "applications," that relate to certain enumerated matters which, in most instances, are nonsubstantive and noncontroversial. This rule, as amended, is designed to enable parties to obtain court orders relating to these matters in a relatively short period of time. This rule does not preclude any party from requesting appropriate relief after an application is granted and an order is entered. See, e.g., Rule 9024.

These amendments provide greater detail relating to procedures for obtaining the enumerated types of orders. They are intended to increase uniformity in litigation practice among districts and to reduce the necessity for local rules governing these matters.

In most situations, a request to enlarge a time period under these rules is noncontroversial and may be made under Rule 9013. But the enlargement of time to take certain action under these rules may be controversial and, therefore, warrant the procedural safeguards afforded in an administrative proceeding under Rule 9014. In particular, a request for an order enlarging the time to file a motion to dismiss a chapter 7 case under § 707(b) and Rule 1017(e), to file a chapter 12 plan in accordance with Rule 3015(a), to file an objection to the list of property claimed as exempt in accordance with Rule 4003(b), to file a complaint objecting to discharge under Rule 4004(a), to file a complaint to determine the dischargeability of a debt under § 523(c) and Rule 4007(c), to file a notice of appeal under Rule 8002, or to file an objection to proposed findings of fact and conclusions of law under Rule 9033, is an administrative proceeding governed by Rule 9014. In contrast, a request for an order enlarging the time to file schedules and statements is governed by Rule 1007(c), rather than 9013 or Rule 9014, so that the order may be issued without any notice.

Rule 9014. Administrative Proceeding ~~Contested Matters~~

(a) SCOPE OF THIS RULE. This rule governs any request for an order other than the following:

(1) a petition commencing a case under § 301, 302, or 303 of the Code, or a petition commencing a case ancillary to a foreign proceeding under § 304;

(2) a proceeding or request for relief of the type described in Rule 1006(b), 1006(c), 1007(c), 1010, 1011, 1013, 1017(e)(2), 1018, 2014, 3015(f), 3017, 3020(b), 4001(a)(2), 7001, or 9013(a);

(3) a motion made in an adversary proceeding under Part VII of these rules;

(4) a motion that addresses only a procedural matter relating to, or a dispositive motion within, a pending administrative proceeding, except as provided in Rule 9014(h)(2) or Rule 9014(m);

(5) a motion under Part VIII of these rules or any motion relating to an appeal to the district court or the bankruptcy appellate panel.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by written motion entitled "administrative motion." The motion shall:

(1) state with particularity the relief sought and the grounds for that relief;

(2) be accompanied by proof of service and by a proposed order for the relief requested; and

(3) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits; and

(B) if the value of property is an issue, a valuation report has been prepared, and the movant intends to introduce the valuation report as evidence, a copy of that report, with the name, address, and telephone number of the person who prepared it.

(c) SERVICE OF MOTION AND NOTICE OF HEARING.

(1) Except as provided in Rule 3007 or 9014(f), at least 20 days before the hearing date, the movant shall serve a copy of the administrative motion, a copy of any paper filed with it, and notice of the hearing on the following:

(A) any entity against whom relief is sought;

(B) the debtor;

(C) the debtor's attorney;

(D) the trustee;

(E) any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included in the list filed under Rule 1007(d);

(F) any entity that has a lien on or other interest in property if the lien or interest may be affected by the requested relief; and

(G) any other entity entitled to service by federal law or these rules.

(2) Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit service by electronic means that are consistent with technical standards, if any, that the Judicial Conference establishes.

(3) The notice of the hearing shall conform to any appropriate Official Form and shall include:

(A) the date, time, and place of the hearing;

(B) the time to file a response; and

(C) a statement that if a response is not timely filed, the court may grant the motion without a hearing.

(d) RESPONSE.

(1) A response to an administrative motion may be filed no later than 5 days before the hearing date.

(2) No later than the time when a response is filed, the responding party shall serve a copy of the response on the movant and the entities listed in Rule 9014(c)(1) in the manner prescribed by Rule 9014(c)(2).

(3) A response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits if there is a factual dispute;

(C) if the value of property is an issue, a valuation report has been prepared, and the respondent intends to

introduce the valuation report as evidence, a copy of that report with the name, address, and telephone number of the person who prepared it.

(e) AFFIDAVITS. An affidavit filed in an administrative proceeding shall comply with Rule 56(e) F.R.Civ.P.

(f) INTERIM RELIEF. If a request for interim relief is included in an administrative motion, the movant shall take reasonable steps to provide all parties with the most expeditious service and notice of a preliminary hearing feasible and shall file an affidavit specifying the efforts made. If a response is filed before the preliminary hearing, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice feasible before the preliminary hearing. At the preliminary hearing, the court shall determine the adequacy of the notice under the circumstances. Interim relief may be granted under Rule 4001(b)(2) or Rule 4001(c)(2), to the extent and under the conditions stated in those rules.

(g) ORDER WITHOUT A HEARING. If no response is timely filed, the court may order relief without a hearing to the extent provided in § 102(1), or may notify the movant, and any other entity the court considers appropriate, that a hearing will be held.

(h) DISCOVERY. Unless the court directs otherwise, Rules 26 and 28-37 F.R.Civ.P. apply, except that:

(1) the parties are not required to make the disclosures mandated by Rule 26(a)(1)-(3), F.R.Civ.P., other than as provided in Rule 9014(b) and (d), but the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by discovery methods prescribed by Rule 26(a)(5) F.R.Civ.P.;

(2) the parties are not required to meet in accordance with Rule 26(f) F.R.Civ.P.;

(3) the time periods provided in Rules 30(e), 33(b)(3), 34(b), and 36(a) F.R.Civ.P. are reduced to 10 days or as directed by the court; and

(4) the movant may begin discovery only after a response is filed or a respondent begins discovery. A respondent may begin discovery at any time.

(i) HEARING; STATUS CONFERENCE.

(1) HEARING.

(A) Except as provided in Rule 9014(i)(1)(B) or (3), if a timely response to an administrative motion is filed, the court shall hold a hearing to determine whether there is

a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. No testimony may be taken at the hearing, unless the movant and all respondents consent. If the court finds that there is no genuine issue as to any material fact, it shall order appropriate relief. If the court finds that there is a genuine issue of material fact, it shall conduct a status conference.

(B) On request or on its own initiative and on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify shall be held on the scheduled hearing date.

(2) STATUS CONFERENCE. A status conference under Rule 9014(i)(1)(A) may be held at the time fixed for the hearing, or immediately afterward without further notice to the parties. The attorneys for the movant and for every party against whom relief is sought that filed a timely response, and every party not represented by an attorney,

shall appear and participate at the status conference. The purpose of the status conference is to expedite the disposition of the administrative proceeding. The court may enter a pretrial order requiring the disclosure of information of the type described in Rule 26(a)(1)-(3) F.R.Civ.P., scheduling pretrial discovery, fixing the time for a hearing on factual issues, and otherwise providing for the just, speedy, and economical disposition of the proceeding.

(3) RELIEF FROM AUTOMATIC STAY; PRELIMINARY HEARING ON USE OF CASH COLLATERAL OR OBTAINING CREDIT. If an administrative motion requests relief from an automatic stay of any act against property of the estate under § 362(d), or includes a request for a preliminary hearing as provided in Rule 4001(b)(2) or (c)(2), a hearing at which witnesses may testify may be held at the time fixed for the hearing.

(j) TESTIMONY OF WITNESSES. Rule 43(e) F.R.Civ.P. does not apply at an evidentiary hearing on an administrative motion.

(k) SERVICE OF NOTICE THAT ORDER HAS BEEN ENTERED.

Notice of the entry of any order shall be served in accordance with Rule 9022 on the movant, the entities listed in Rule 9014(c)(1), and any other entity as the court directs.

(l) APPLICATION OF PART VII RULES. Unless the court orders otherwise, the following rules apply in an administrative proceeding: Rules 7009, 7017, 7019-7021, 7025, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The court may at any stage in a particular matter order that one or more of the other rules in Part VII apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures made applicable by the order.

(m) PROCEDURAL OR DISPOSITIVE MOTION RELATING TO PENDING ADMINISTRATIVE PROCEEDING. Rule 7(b)(1) F.R.Civ.P. and Rule 9006(d) apply to a motion that addresses only a procedural matter relating to, or a dispositive motion made within, a pending administrative proceeding.

(n) TRANSMISSION TO UNITED STATES TRUSTEE. A copy of every paper filed and every order entered in connection with an administrative proceeding shall be transmitted to the United States trustee if required by Rule 9034.

(o) RELIEF FROM PROCEDURAL REQUIREMENTS. The court for cause may order that any procedural requirement

provided in this rule shall not apply or shall be amended in a particular proceeding. The court shall give the parties notice of the order to afford them a reasonable opportunity to comply with any amended procedural requirements.

~~In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such~~

~~time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9014 had been limited to the category of disputes called "contested matters." Confusion as to whether a particular motion was a contested matter, rather than a different type of proceeding, and uncertainty as to the procedural requirements relating to a contested matter, have led to the amendment of this rule.

These amendments provide more detailed procedural guidance than provided in the past. This change is intended to increase uniformity in litigation practice among districts and to reduce the number of local rules.

This rule, as amended, governs a proceeding that is not an application (governed by Rule 9013), an adversary proceeding (governed by Part VII), a request to pay the filing fee in installments or to waive the filing fee (governed by Rule 1006), a request for an extension of time to file schedules and statements (governed by Rule 1007(c)), a proceeding commenced on the court's own initiative to dismiss a case for substantial abuse of chapter 7 (governed by Rule 1017(e)(2)), a motion for an order approving the employment of a professional person (governed by Rule 2014), or a request for an order approving a disclosure statement or confirming a plan (governed by Rule 3015(f), 3017, or 3020(b)).

A motion made in either a pending adversary proceeding or in a pending administrative proceeding -- such as a motion for summary judgment, a motion to dismiss, or a motion for a protective order relating to discovery -- is not an administrative proceeding governed by this rule. However, a procedural or dispositive motion relating to a pending administrative proceeding is governed by Rule 9014(m) and a motion relating to discovery is

governed by Rule 9014(h). Any motion made in connection with an appeal to the district court or bankruptcy appellate panel (including a motion for a stay pending appeal, a motion for leave to appeal, or any motion under a rule in Part VIII) is excluded from the scope of Rule 9014.

Rule 9014(a) also clarifies that this rule does not apply to a petition commencing a case under the Code (governed by §§ 301-303 of the Code and Rules 1002-1005, 1010, 1011, 1013, and 1018), or a petition commencing a case ancillary to a foreign proceeding (governed by § 304 of the Code and Rules 1002, 1005, 1010, 1011, and 1018).

Numerous rules require or refer to the filing of a motion for certain relief. Unless the motion to which the rule refers is of the type listed in Rule 9014(a) as being outside the scope of this rule, the motion would commence an administrative proceeding and would be governed by Rule 9014. For example, Rule 3008 provides that a party in interest "may move for reconsideration of an order allowing or disallowing a claim against the estate." A motion requesting reconsideration under Rule 3008 commences an administrative proceeding and is governed by Rule 9014.

The amendments also increase certain time periods relating to these types of proceedings. For example, current Rule 9006(d) -- which formerly applied in contested matters -- provides that a motion and notice of hearing must be served at least 5 days before the scheduled hearing date. In contrast, amended Rule 9014 provides for service at least 20 days before the date scheduled for the hearing. This time period may be enlarged in accordance with Rules 9006(b) and 9013, or reduced in accordance with Rule 9006(c) or Rule 9014(o). The three-day "mail rule" under Rule 9006(f) does not apply with respect to these time periods because the time for acting in accordance with this rule is not triggered by service of any notice or other paper.

The amendments provide that a response may be filed no later than 5 days before the scheduled hearing date. See Rule 9014(d). It is important for practitioners to be aware of Rule 9006(a), which provides that time periods in the rules that are less than 8 days are determined without including in the computation intervening Saturdays, Sundays, and

legal holidays.

Rule 9014(c) requires service of both the administrative motion and notice of the hearing, but there is no requirement that the motion and notice of hearing be in separate documents.

The court may order appropriate relief without a hearing if a timely response is not filed. If the judge wants to hold a hearing nonetheless, subdivision (g) requires that the court notify the movant that a hearing will be held. The court may hold the hearing at the originally scheduled time or on a subsequent date.

A hearing must be held if a response is filed. But, attorneys and unrepresented parties do not have to bring witnesses to the hearing unless (1) the proceeding is for relief from the automatic stay of acts against property of the estate, (2) the proceeding is for preliminary authority to use cash collateral or to obtain credit, or (3) the court gives reasonable notice to the parties that an evidentiary hearing may be held on the date when the hearing is schedule. Otherwise, if a response is filed, the court will hold a hearing only for purposes of determining whether an evidentiary hearing is necessary to resolve questions of fact and, if an evidentiary hearing is not necessary, to resolve the proceeding. If an evidentiary hearing is needed, the court will hold a status conference under Rule 9014(i)(2) to facilitate settlement discussions, set a discovery schedule, schedule an evidentiary hearing, or formulate any other pretrial order designed to expedite the proceeding. It is anticipated that the status conference will be held immediately following the court's determination that there is a genuine issue of material fact and, therefore, attorneys and unrepresented parties should attend the hearing prepared for an immediate status conference. Subdivision (i) does not preclude the court from ordering a status conference under Rule 105(d).

If the court determines based on affidavits that there are genuine issues of material fact, and an evidentiary hearing is held to resolve the issues, witnesses must testify orally in open court in accordance with Rule 9017 and Civil Rule 43(a). Under Rule 9014(j), the court may not resolve these factual issues based on affidavits.

The amendments also require automatic disclosure regarding valuation reports when the value of property is at issue, the report has been prepared, and the party intends to introduce it as evidence. As used in this rule, the term "valuation report" includes a formal appraisal of the property, as well as any less formal written report on the value of the property.

Any party that files a paper in connection with an administrative proceeding is required to transmit a copy to the United States trustee, if the proceeding relates to any of the matters listed in Rule 9034.

Subdivision (o) gives the court discretion to order, for cause and in a particular proceeding, that any procedural requirement under this rule does not apply or is amended. The court for cause shown may enlarge or reduce any time periods prescribed by this rule in accordance with Rule 9006.

Rule 9017. Evidence

Except as provided in Rule 9014(j), the ~~The~~ Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R. Civ. P. apply in cases under the Code.

COMMITTEE NOTE

This rule is amended to conform to Rule 9014(j), which provides that Rule 43(e) F.R. Civ. P. does not apply at an evidentiary hearing in an administrative proceeding. The effect of Rule 9014(j) is that a witness must testify in open court, rather than by affidavit, at an evidentiary hearing in an administrative proceeding governed by Rule 9014.

Rule 9021. Entry of Judgment

Except as otherwise provided ~~herein~~ in this rule, Rule 58 F.R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or ~~contested matter~~ in an administrative proceeding shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) ~~F.R. Civ. P.~~ shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014.

Rule 9034. Transmittal of Pleadings, Motion Papers, Objections, and Other Papers to the United States Trustee

Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, an ~~any~~ entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy ~~thereof~~ to the United States trustee within the time required by these rules for service of the paper:

(a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business;

(b) a rejection, assumption, or assignment of an executory contract or unexpired lease;

~~(b)~~ (c) the approval of a compromise or settlement of a controversy;

~~(c)~~ (d) the dismissal of a case, transfer of a case to another district, or conversion of a case to another chapter;

~~(d)~~ (e) the employment of a professional person ~~persons~~;

~~(e)~~ (f) an application for compensation or reimbursement of expenses;

~~(f)~~ (g) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit;

(h) the appointment of an interim trustee before an order for relief in an involuntary case;

~~(g)~~(i) the election of a trustee or the appointment of a trustee or examiner in a chapter 11 reorganization case;

(j) a review of the appointment of a creditors' committee ;

~~(h)~~(k) the approval of a disclosure statement;

~~(i)~~(l) the confirmation of a plan;

~~(j)~~(m) an objection to, or the waiver or revocation of, the debtor's discharge;

~~(k)~~(n) any other matter ~~in which~~ when the United States trustee requests ~~copies~~ a copy of filed papers or the court orders ~~copies~~ a copy transmitted to the United States trustee.

COMMITTEE NOTE

Several rules have contained provisions requiring that notice of a hearing on a particular matter be transmitted to the United States trustee. See, e.g., Rules 1014, 2001(a), 2007(a), 4001, and 6007. Those provisions have been deleted and replaced with the additional matters added to the list in Rule 9034. In addition, the election of a chapter 11 trustee under § 1104 is added to the list in this rule so that the United States trustee will receive all papers relating to the election. Other amendments are stylistic.

EXHIBIT B

United States Bankruptcy Court
District of Colorado
U.S. Custom House
721 19th Street
Denver, CO 80202-2508

Chambers of:
Donald E. Cordova

(303) 844-2525

February 12, 1998

Professor Alan N. Resnick
Hofstra University School of Law
Hempstead , New York 11550-1090

Re:Introduction letter re Rules 9013 and 9014

Dear Alan:

I write to comment on your proposed letter. I have some difficulty with the notion that a motion filed in a bankruptcy case "commences a new litigation that is unrelated to any pending lawsuit", or that a "motion commences a separate litigation". These motions of which you speak are in fact related to the underlying bankruptcy case which is the litigation, although not in the traditional sense. I view a motion as a request for relief, which is not separate litigation even though the motion may be contested. In traditional litigation the motion is part of the process, but it does not commence new litigation, unless you view contested motions as seperate litigation. In the bankruptcy case, motions also are part of the process.

I don't believe it is necessary to draw the distinction you have made in order to treat "motions" as "administrative proceedings", especially since we have substituted "applications" for "motions" in rule 9013. I would recommend that you merely state that most, if not all, contested motions will be renamed and dealt with as "administrative proceedings" in order to promote uniformity and insure due process. Furthermore the use of the phrase "unrelated to pending litigation" may create ambiguity where none is intended. The intended distinction is between "applications" and "motions" which now are to be treated as "administrative proceedings" in the bankruptcy case. Rule 9014 is not intended to be applicable to motion practice in adversary proceedings.

Finally, I want it to be clear that I am not in favor of the proposed changes. I say this knowing fully well that a great deal of time and effort has gone into making these changes. It

is my belief that uniformity and due process can be achieved more simply and without a wholesale revision of the motion practice. Attorneys have a great deal of difficulty understanding and complying with the present rules. We are, in my opinion, complicating what should be a relatively simple procedure. All that is required is "notice and a meaningful opportunity to be heard". This can be accomplished by inserting a time to respond in the present Rule 9014. I will withhold further comments since the majority of the committee has indicated a willingess to proceed with the changes. Also, I ask that you advise the standing committee that our committee is not unanimous in making the recommended changes.

In closing, I hesitate to send this sour note to you, knowing how hard you and the committee has worked on this project. I do so out my knowledge that we have made it very difficult for attorneys to practice in the bankruptcy courts, unless they specialize. I am mindful of the admonition in Rule 1001- that the rules be construed to secure the "just, speedy, and inexpensive determination of every case and proceeding". I don't believe these proposals will accomplish that.

Respectfully,

EXHIBIT C

collected under 28 U.S.C. section 1930(a)(3)" immediately after "28 U.S.C. section 1930(a)(1)".

(c) No funds provided by this Act shall be expended to fill any bankruptcy judgeship unless such appointee was on a merit selection list or report submitted to the court of appeals by either the judicial council or a subcommittee of the members of the council, in accordance with section 120 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98–353; 98 Stat. 344), section 152 of title 28 of the United States Code, and the Judicial Conference of the United States' Procedures for the Selection and Appointment of Bankruptcy Judges.

(d) REPORT ON BANKRUPTCY FEES.— 28 USC 1930 note.

(1) REPORT REQUIRED.—Not later than March 31, 1998, the Judicial Conference of the United States shall submit to the Committees on the Judiciary of the House of Representatives and the Senate, a report relating to the bankruptcy fee system and the impact of such system on various participants in bankruptcy cases.

(2) CONTENTS OF REPORT.—Such report shall include—

(A)(i) an estimate of the costs and benefits that would result from waiving bankruptcy fees payable by debtors who are individuals, and

(ii) recommendations regarding various revenue sources to offset the net cost of waiving such fees; and

(B)(i) an evaluation of the effects that would result in cases under chapters 11 and 13 of title 11, United States Code, from using a graduated bankruptcy fee system based on assets, liabilities, or both of the debtor, and

(ii) recommendations regarding various methods to implement such a graduated bankruptcy fee system.

(3) WAIVER OF FEES IN SELECTED DISTRICTS.—For purposes of carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall carry out in not more than six judicial districts, throughout the 3-year period beginning on October 1, 1994, a program under which fees payable under section 1930 of title 28, United States Code, may be waived in cases under chapter 7 of title 11, United States Code, for debtors who are individuals unable to pay such fees in installments.

(4) STUDY OF GRADUATED FEE SYSTEM.—For purposes of carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall carry out, in not fewer than six judicial districts, a study to estimate the results that would occur in cases under chapters 11 and 13 of title 11, United States Code, if filing fees payable under section 1930 of title 28, United States Code, were paid on a graduated scale based on assets, liabilities, or both of the debtor.

SEC. 112. For fiscal year 1994 only, grants awarded to State and local governments for the purpose of participating in gang task forces and for programs or projects to abate drug activity in residential and commercial buildings through community participation, shall be exempt from the provisions of section 504(f) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. 42 USC 3754 note.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: INTRODUCTION TO PACKAGE OF PROPOSED AMENDMENTS GOVERNING LITIGATION (RULES 9013, 9014, AND OTHERS)

DATE: FEBRUARY 15, 1998

At the meeting in September, the Advisory Committee requested that I, with Ken Klee's assistance, prepare an introduction to the "litigation package" of proposed amendments that includes complete revisions to Rules 9013 and 9014, as well as proposed amendments to more than 20 other rules. The purpose of the introduction is to summarize and highlight the most significant changes in this lengthy package.

If approved by the Advisory Committee at its March meeting in Little Rock, the introduction will be presented to the Standing Committee with the litigation package in June. If approved by the Standing Committee, it will be published as an introduction to the litigation package for the benefit of the bench and bar.

You will recall that, early in February, I circulated a draft of the introduction that I prepared with Ken's assistance, and I asked for your comments or suggestions by February 12th. I revised the draft to reflect many of the comments that I received. The revised draft is attached to this memorandum as Exhibit A, and a copy showing the changes (with strikeouts and underlining) to the original draft is enclosed as Exhibit B.

EXHIBIT A

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

At the request of the Advisory Committee on Bankruptcy Rules, in 1995 the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system to determine their satisfaction or dissatisfaction with the Federal Rules of Bankruptcy Procedure. The Advisory Committee requested the survey in connection with the work of its Long-Range Planning Subcommittee and for the purpose of identifying areas that are in need of improvement. The survey results indicated general satisfaction with the Rules, but identified motion practice and litigation as areas of significant dissatisfaction.

Part VII of the Rules govern adversary proceedings, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action in district court. For example, an adversary proceeding is commenced by the service of a summons and complaint. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the F.J.C. survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary proceeding. There has been some confusion and criticism regarding procedures that govern these matters, and these are the

troublesome areas identified in the F.J.C. survey results.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important substantive disputes. Motions relating to a pending adversary proceeding -- such as a motion relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor -- may be subject to minor local variation consistent with the flexibility present in district court motion practice.

The local variations in procedure addressed by these proposed amendments are of much greater consequence.

Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current Rules provide little specificity or uniformity as to the procedure governing them. Present Rule 9014 provides that relief is obtained by motion served in the manner provided for service of a summons, that reasonable notice and opportunity to be heard must be afforded, and that a response is not required unless the court orders otherwise. In the absence of a contrary order, certain listed Part VII rules applicable to adversary proceedings -- most relating to discovery or summary judgment -- apply to the motion, and the court may order that other Part VII rules shall apply. Rule 9006(d), which applies to motions generally, provides that, unless the court orders otherwise, at least five days' notice of a hearing must be given and, if the motion is supported by affidavit, the affidavit must be served at least one day before the hearing. These general provisions are often varied or supplemented with greater detail by local rule or court order. The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the present procedures, are desirable for such motions that are unrelated to any pending litigation.

Another criticism addressed by the Advisory Committee is confusion resulting from terminology used in the Bankruptcy

Rules. For example, Rule 9014 governs "contested matters," such as a motion to reject an executory contract or a motion to obtain court approval of a sale of assets. In many instances, "contested matters" are, in fact, uncontested. Other proceedings, such as an "application" for approval of professional fees, are not "contested matters" under the Rules, despite the fact that they are often contested by parties in interest.

The Advisory Committee has spent more than two years studying the Rules relating to litigation in bankruptcy courts and formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. As mentioned above, the Advisory Committee is satisfied that the rules governing adversary proceedings under Part VII are working well. But the Advisory Committee is proposing amendments that would substantially revise other procedures for obtaining court orders unrelated to pending litigation, both for routine administrative matters and for more complex disputes that require greater procedural safeguards.

The most important and fundamental changes would be made to Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), although more than 20 Rules will have to be revised to conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce

substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

(1) Rule 9013 would be replaced with a new rule on "applications." This rule would govern specific types of relief in areas that are routine, nonsubstantive, and rarely contested. For example, Rule 9013 would govern the procedure for obtaining a court order to jointly administer two or more cases, or for an order reopening a closed case. The procedures would be streamlined so as to avoid unnecessary costs or delay.

* The application and a proposed order would be served on specified entities at any time before, or even at, the time when the application is filed with the court; advance notice is not required.
* Although service by first class mail is available, the court by local rule may permit the application and accompanying papers to be served by electronic means.
* A response to the application would not be required and the court may order relief without a hearing.

(2) Rule 9014 would govern motions that are related to the administration of the bankruptcy case or the estate, but are unrelated to any other pending litigation. These motions are often contested and may affect

significant substantive rights of the parties. For example, a motion asking the court to order the appointment of a trustee in a chapter 11 case, requesting relief from the automatic stay, requesting authorization for a debtor in possession to obtain credit, or seeking an order terminating the exclusive period in which the debtor may file a plan of reorganization, would be an administrative proceeding governed by Rule 9014. Certain types of proceedings, such as a chapter 11 confirmation hearing governed by Rule 3020, would be expressly excluded from the scope of the rule so that more appropriate tailor-made procedures could govern. The title of Rule 9014 would be changed from "Contested Matters" to "Administrative Proceedings."

The significant features of an administrative proceeding under the preliminary draft of the proposed amendments to Rule 9014 include the following:

* The proceeding would be commenced by filing and serving a motion.
* The rule would specify the papers that must accompany the motion. A proposed order and, unless the movant is a consumer debtor, one or more supporting affidavits must be included. In certain situations, a copy of a valuation report must be included with the motion papers.

* The motion papers, including notice of the hearing, must be served on specified entities at least 20 days before the hearing date. The court by local rule may permit the papers to be served by electronic means.

* Interim relief, if appropriate, may be ordered on an expedited basis.

* A response to the motion may be served and filed, but no later than five days before the scheduled hearing date. If no timely response is filed, the court may rule on the matter without a hearing or may give notice to the movant that a hearing will be held notwithstanding the absence of a response.

* Discovery methods applicable in adversary proceedings would be available, except that mandatory disclosures required under Civil Rule 26(a)(1)-(3) and the discovery meeting required under Rule 26(f) would not apply. Certain 30-day time periods in the Civil Rules relating to discovery would be reduced to ten days consistent with the expedited nature of administrative proceedings.

* If a timely response is filed, the court would hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a

matter of law. Except for certain types of motions or if the parties otherwise consent, no testimony would be taken at the hearing. Therefore, attorneys and unrepresented parties would not have to bring witnesses to the hearing in most situations. If there is no genuine issue as to any material fact, the court may grant the appropriate relief. If the court finds that there is a genuine issue of material fact, the court would conduct a status conference for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing. Alternatively, on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify will be held on the originally scheduled hearing date.

* Rule 43(e) of the Federal Rules of Civil Procedure provides that where a motion is based on facts not appearing of record the court may hear the motion on affidavits presented by the parties. The Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does

not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of material fact, this provision would require that witnesses appear and testify, rather than give testimony by affidavit.

* To provide flexibility where needed, the court for cause may order that any procedural requirement under Rule 9014 will not apply or will be amended in a particular proceeding. In accordance with Rule 9006, the court also may extend or reduce any time period set forth in Rule 9014.

It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014 would provide greater guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in

bankruptcy court -- which are similar to typical motions made in a civil action in the district court -- would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

This preliminary draft of these proposed amendments has not been approved except for the limited purpose of publication for comment. The Advisory Committee is seeking comments and suggestions from the bench and bar regarding all aspects of these proposed amendments, and is especially interested in receiving comments regarding the highlighted provisions mentioned above. All comments, whether favorable, adverse, or otherwise, will be considered by the Advisory Committee, and further revisions to the preliminary draft may be made before the Advisory Committee finally recommends the adoption of amendments to the Bankruptcy Rules relating to litigation and motion practice.

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TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

TO: Standing Committee

FROM: Daniel R. Coquillette, Reporter

DATE: December 1, 1997

RE: Federal Rules of Attorney Conduct

1. Charge

At our last meeting, I was asked by the Committee to draft uniform federal rules that would supersede the complex thicket of local rules now governing attorney conduct in the federal courts. This follows two invitational conferences of experts, on January 9-10, 1996 in Los Angeles and on June 18-19, 1996 in Washington, which focused on this problem. There were also seven special reports, five by this reporter and two by Marie Leary of the Federal Judicial Center. These are now available printed together as Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), hereafter "Working Papers." (I strongly recommend that you keep this useful volume at hand in reviewing what follows. If you need an extra copy, please call.)

In drafting the attached rules, I had important assistance from Bryan A. Garner, John K. Rabiej, and Alan N. Resnick, Reporter to the Bankruptcy Advisory Committee. I am most grateful. Errors are my own.

These rules are now being reviewed by the Style Sub-Committee, under the regular procedures. If the Standing Committee approves of a version of this draft, the rules will be sent next to the relevant advisory committees for review at their spring meetings. The final draft would then come back to this Committee at its June meeting for a vote on publication.

2. Basic Structure

I have attached just one "rule system," but it does, in fact, offer the Committee four options:

1. To accept the complete package, which establishes a narrow core of uniform federal rules, the ten "The Federal Rules of Attorney Conduct." All other matters would be governed by current state standards, the so-called "dynamic conformity" model;

2. To adopt only some of the ten proposed uniform Federal Rules of Attorney Conduct, i.e. only the conflict of interest rules;

3. To accept only the new uniform rule that establishes a state standard, with no core of uniform federal standards at all. (This would mean adopting only Rule 1 of the Federal Rules of Attorney Conduct);

4. To adopt none of the above, and leave the matter to the present system of local rules.

There is one option I have not included. Based on my extensive studies and discussions with the Advisory Committees on Appellate Rules and Bankruptcy Rules, I would strongly recommend that district courts and appeals courts be treated alike, and that bankruptcy courts, and other special courts, be treated separately. See Working Papers, supra, 235-292 (appeals courts); 293-334 (bankruptcy courts). Thus, these proposed new rules cover just district courts and appeals courts.

3. New Fed. R. Civ. P. 83 (c)

At the moment, attorney conduct in the district courts is governed by local rules promulgated pursuant to Fed. R. Civ. P. 83. It is thus logical to start there. I have drafted a new subdivision (c) which would provide that the standards of attorney conduct in the district courts are established by the ten Federal Rules of Attorney Conduct, together with other uniform rules. (Such as Fed. R. Civ. P. 11.) This supersedes the existing local rules. The ten Federal Rules of Attorney Conduct are incorporated by Rule 83 (c) as Fed. R. Civ. P. Appendix 1, just as the Appendix of Forms is incorporated by Rule 84. Like the Appendix of Forms, the Federal Rules of Attorney Conduct would go through the full Rules Enabling Act process established by 28 U.S.C. § 2072 (b).

There is also a practical advantage with this structure. On being admitted to the bar of a federal district court or appeals court, a lawyer would be handed a small pamphlet containing the ten Federal Rules of Attorney Conduct. These rules would always govern where relevant. Otherwise, Rule 1 of the Federal Rules of Attorney Conduct directs the attorney to the current standards for the state where the district court is located or, as in the case of a court of appeals, to a choice of law rule selecting the appropriate state standard.

It has been suggested by the Reporter to the Criminal Rules Advisory Committee, Professor David Schlueter, that a parallel change should be made to the Federal Rules of Criminal Procedure. This would assure that identical rules should govern civil and criminal proceedings-- a fundamental assumption of the ABA Model Rules. (There are certain exceptions. See ABA Model Rule 3.8: "Special Responsibilities of a Prosecutor") Professor Schlueter suggests that:

> "A possible candidate for that new provision might be existing Rule 57, Rules by District Courts, which in some respects already parallels Civil Rule 83. I would recommend that the new language already proposed for

Civil Rule 83 simply be added to what would become a new subdivision (d) in Criminal Rule 57, as follows:

Rule 57. Rules by District Courts

* * * * *

(d) ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. §§ 2072 and 2075."

As Professor Schlueter correctly observes, this would be a matter for the Advisory Committee on Criminal Rules.

4. New Fed. R. App. P. 46

Of course, the courts of appeals already have a uniform rule governing attorney conduct, Fed. R. App. P. 46. This rule establishes the notoriously vague "conduct unbecoming a member of the bar" standard. After In re Snyder, 472 U.S. 634 (1985), courts of appeals have adopted many different local rules to give Rule 46 some specificity of content. See Working Papers 239-240, and cases cited. (In re Snyder is set out in full at Working Papers 265-271.) Thus the advantages of uniformity have been lost.

The new Fed. R. App. P. 46 would adopt the Federal Rules of Attorney Conduct, except for matters arising before other courts. There the standards of the other court will be applied. (Of course, under the new Fed. R. Civ. P. 83 (c) district courts will also follow the Federal Rules of Attorney Conduct, but not necessarily bankruptcy courts.) Under Rule 1 of the Federal Rules of Attorney Conduct, the appeals court will have a choice of law rule selecting an appropriate state standard, unless the conduct falls within the ambit of the other Federal Rules of Attorney Conduct. See Fed. R. Attny. Conduct 1 (a) (2).

There are in fact very few cases involving attorney conduct in the courts of appeals, and most of those involve matters arising in the district courts. There is every reason to amend Fed. R. App. P. 46 to track the district court rule. See Working Papers, supra, 237-247.

5. The Federal Rules of Attorney Conduct (Fed. R. Attny. Conduct)

Eight of the ten Federal Rules of Attorney Conduct closely follow the substance of the ABA Model Rules, which have already been adopted in the majority of state and federal courts. (Some stylistic changes have been made by Bryan Garner to conform these rules with the Guidelines for Drafting and Editing Court Rules (1996). See Working Papers, supra, 45-77. The exceptions are Rule 1 and Rule 10. Rule 1 sets up

the "dynamic conformity" with state standards, and is closely modeled on Model Local Rule 4 of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. It also contains a choice of law rule, which closely follows ABA Model Rule 8.5.

Rule 10 is based on the most recent negotiations between the Department of Justice and the Conference of Chief Justices relating to "Communication with Persons Represented By Counsel," Tentative Working Draft, July 1, 1997. It is different from ABA Model Rule 4.2. Nearly 12% of all controversies between 1990 and 1996 in federal court relating to attorney conduct concerned communications with represented parties. See Working Papers, supra, 201-205.

Four of the other rules relate solely to conflict of interest standards. See Rules 3, 4, 5 and 6, tracking ABA Model Rules 1.7, 1.8, 1.9 and 1.10. These rules together account for 44% of all attorney conduct controversies in the federal courts. See Working Papers, supra, 100-102, 107-116, 189-210. They are also closely cross-referenced to each other. The Committee may wish to add provisions to Rule 6 permitting some "screening." Otherwise state standards will apply, which usually limit any screening to former public officers or employees. See ABA Model Rule 1.11.

Three of the remaining rules concern the related subjects of confidentiality, candor toward the tribunal, and truthfulness in statements to others. See Rules 2, 7, and 9, tracking ABA Model Rules 1.6, 3.3, and 4.1. These rules are also cross-referenced to each other. While there rules together account for only 6% of all attorney conduct controversies in federal courts, they all relate to issues that are central to the judicial process. See Roger C. Cramton, Memorandum to Participants of the Special Conference, 2 (Jan. 8, 1996).

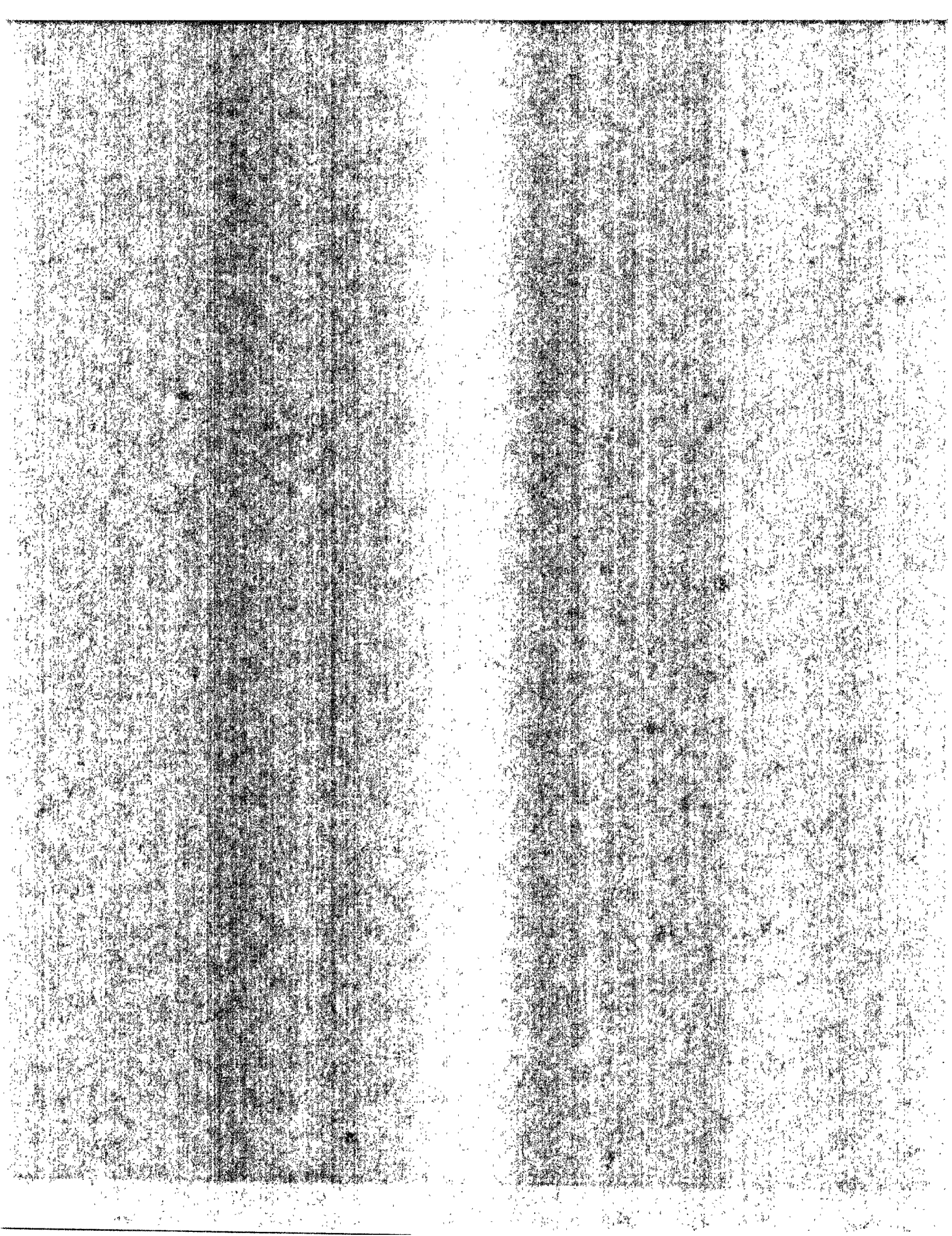
The last rule, Rule 8, is the "Lawyer as Witness" rule. It tracks ABA Rule 3.7, and cross-references Rules 3 and 5. This rule accounts for a surprising share of federal court attorney controversies between 1990 and 1996-- over 9.5%. See Working Papers, 203. It is also an issue which directly confronts the tribunal.

Altogether, Rules 2-10 account for nearly 72% of the attorney conduct issues raised in federal courts from 1990-1996. See Working Papers, supra, 201-205. This leaves only 28% of the issues previously governed by local rules for determination by reference to state standards under Rule 1. Of course, since many of the state standards are also based on the ABA Model Rules, the actual uniformity would be even greater.

6. Conclusion

The Standing Committee is mandated by Congress to "maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073 (b). These rule changes replace nearly one hundred differing local rules with a single set of ten rules. These follow the standards already adopted in a majority of state and federal courts. The new rules are also limited to matters particularly concerning the federal courts and, indeed,

account for nearly 72% of all federal attorney controversies from 1990-1996. For all the rest, Rule 1 refers the court to dynamic conformity with appropriate state standards. If you have any questions, do not hesitate to call me at 617-552-8650 or FAX 617-576-1933.



FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an attorney connected with proceedings before that court; and

(2) *Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072, govern any other act or omission by an attorney.*

NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § 2072.*

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie,* in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics,* 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See D.R. Coquillette, *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct,* Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created,* 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 3 (Jan. 8, 1996). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) **Standards for Attorney Conduct.** Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) **Conduct in Proceedings Before District Court.** For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the state authority responsible for adopting rules of attorney conduct of the state in which the district court sits; and

(2) **All Other Conduct.** For any other act or omission by an attorney admitted to practice before a district court or court of appeals, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; but if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) **Sanctions.** For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) **Applicability.** Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement), republished in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no

application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, for disclosures required by law or court order, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 almost in its entirety. There is one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. (The ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal rule comports with or avoids conflict with forty-one jurisdictions, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference, 2* (Jan. 8, 1996). In addition, an exception for disclosures "required by law or court order" has been added. See ABA Code of Professional Responsibility DR-4-101 (C) (2). Finally, the rule

provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer must not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation; when representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety, with small stylistic changes. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116, 189-210.

This Rule, and Rules 5, 6 and 8, do not prevent a trial judge from disqualifying an attorney when necessary to protect the integrity of a judicial proceeding, despite client consent to the representation. See Wheat v. United States, 486 U.S. 153 (1988).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Until the representation of a client ends, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf.

(f) A lawyer must not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Nor may a lawyer settle a claim for such liability with an unrepresented person or former client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for small stylistic changes and cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116. DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not later:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts the substance of ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of

Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c), or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from later representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for small stylistic changes and cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer must take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and a cross reference to these rules. To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2-3 (Jan. 8, 1996). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of

the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer's disqualification would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for small stylistic changes and a cross reference to these rules. Between 1990-1995, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) **General Rule.** A lawyer who is representing a client in a matter must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by:

(1) constitutional law, statute, or an agency regulation having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:

(1) the communication occurs prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

(A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or

(B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or

(C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not seperately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding

the organization with respect to proof of the matter.

(2) The term "control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d) **Limitations on Communications.** When communicating with a represented person pursuant to this Rule, a lawyer must not:

(1) inquire about information regarding litigation strategy or legal arguments for counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b) (2) (D).

NOTE

This rule is based on the tentative outcome of negotiations between the Department of Justice and the Conference of Chief Justices, "Discussion Draft, December 19, 1997," with the addition of some technical stylistic changes. As such, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "Comment." See "Discussion Draft, December 19, 1997," "Comment," pp. 1-6.

The Conference of Chief Justices considered this "Discussion Draft" at its regular Midwinter Meeting on January 25-29, 1998. At the request of officials of the American Bar Association and others, the Conference postponed the matter to its next meeting, scheduled for August 2-6, 1998. See Memorandum of February 6, 1998 from Chief Justice Thomas R. Phillips, President, Conference of Chief Justices. Obviously, if the Conference of Chief Justices, the Department of Justice, and the American Bar Association can agree on a draft rule, it will be the presumptive candidate for the final version of Rule 10.

From 1990-1995, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases* (1990-95) *Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104. See id., 115-116, 199-200, 209-210.

STUDY OF RECENT BANKRUPTCY CASES (1990-1996) INVOLVING RULES OF ATTORNEY CONDUCT

TO: Committee on Rules of Practice and Procedure, Judicial Conference of the United States

FROM: Daniel R. Coquillette, Reporter

DATE: May 11, 1997

CONTENTS

APPENDICES

I. INTRODUCTION

This Committee is currently considering two options for changing local rules governing attorney conduct in the federal district courts. "Option one" would be the adoption of a model local rule similar to Model Local Rule IV of the Federal Rules of Disciplinary Enforcement, first proposed by the Committee on Court Administration and Case Management in 1978. (This would be recommended by the Judicial Conference to the federal courts for adoption by each court individually pursuant to 28 U.S.C. § 2071.) "Option two" is the adoption of nationwide uniform rules of attorney conduct pursuant to the Rules Enabling Act, 28 U.S.C. § 2072-2074. These uniform rules would apply to specific "core" areas where problems frequently arise in federal district courts, leaving all other areas to be governed by state standards. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995; Study of Recent Federal Cases Involving Rules of Attorney Conduct, January 9, 1996; and Supplement to Study of Recent Federal Cases Involving Rules of Attorney Conduct (1990-1995), May 14, 1996.

This memorandum examines how such changes in the federal district courts would effect the bankruptcy courts and what, if anything, should be done to improve rules of attorney conduct in the bankruptcy courts. At the request of the Committee, I have conducted three separate bankruptcy studies. The first study determined the number of reported bankruptcy cases focusing on local rules of attorney conduct and categorized each case by the specific rule involved. The second study traced the sources of local rules currently governing attorney conduct in each district of the bankruptcy court system. The final study researched reported cases and law reviews discussing the application of these rules in conjunction with applicable provisions of the Bankruptcy Code, especially § 327.[1]

[1] Some districts have already made efforts to improve the administration of attorney discipline in bankruptcy court. For example, the Central District of California, by a general order, has established procedures by which bankruptcy judges can refer disciplinary problems to the Clerk of Court. See General Order 96-05, U.S. Bankruptcy Court C.D. Ca.

I am, once again, most deeply indebted to my talented and industrious research assistants, James J.G. Dimas and Thomas J. Murphy. Their hard work and intelligence has been vital to this entire series of reports, and they can take great pride in them on the eve of their graduation and entry to the "real world." In addition, I have benefited greatly from conversations with members of the Advisory Committee on Bankruptcy Rules. Of particular help has been the Chairman, the Honorable Adrian G. Duplantier, and Gerald K. Smith. Gerald Smith has attended every one of our task force meetings, and is a leading expert on attorney conduct rules in bankruptcy proceedings. The Committee's Reporter, Professor Alan N. Resnick, and Patricia S. Channon, Senior Attorney, Bankruptcy Judges Division, Administrative Office of the U.S. Courts, have also been of invaluable assistance. Particularly important was Patricia Channon's prior study of local rules in the bankruptcy courts, on which I have relied heavily. Any recommendations are, however, my own. In addition, any revisions to the Bankruptcy Rules, or any model local rules designed for bankruptcy proceedings, should be considered by the Bankruptcy Advisory Committee before action is taken.

II. METHODOLOGY AND FINDINGS:

A. "Study I": Reported Bankruptcy Cases Involving Rules of Attorney Conduct (1990-1996). See Appendices I, II.

The first study ("Bankruptcy Case Study") researched reported cases concerning local rules of attorney conduct, and categorized each case by the specific rule involved. The purpose of this study was to determine which kinds of attorney conduct are most important to the bankruptcy courts. This study was modeled after previous studies done for this Committee on local rules of attorney conduct in the federal district courts and federal courts of appeals. See Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, December 1, 1995; Supplement to Study of Recent Federal Cases (1990-1995)

Involving Rules of Attorney Conduct, May 14, 1996. (Collectively, the "Federal Case Studies")

As in the prior studies, an extensive computer search was designed, using the Descriptive Word Index of the Federal Practice Digest and the Westlaw data base. The search employed thirty five West Digest key numbers that closely tracked attorney conduct rules, as well as key words, phrases and numbers relating to these rules. A date restriction of January 1, 1990 to March 23, 1996 was used to allow for adequate comparison with the previous Federal Case Studies. The resulting search produced ninety-three reported bankruptcy cases involving local rules of attorney conduct.

Devoted research assistants then read each of the ninety-three cases. They prepared a painstaking written analysis of each case, including a summary of the underlying facts, the attorney conduct in question, the relevant standards of attorney conduct cited, the relevant key numbers assigned by West Publishing and the court's eventual decision. See Illustration I, Appendix I. At this point, a decision was to be made as to which "category" of rule was chiefly involved in each dispute. When the local standards were not based on the ABA Model Rules of Professional Conduct ("Model Rules"), the standards were "translated" into the applicable ABA Model Rule categories of Chart I, Appendix II using a system similar to the comparative table on page 128 of West's Selected Statutes, Rules and Standards of the Legal Profession (1995 ed.). Of course, this was a "rough fit," but it permits comparing "apples with apples" -- and a review of individual cases showed that the "rough fit" was more than adequate for the purposes of this study.

The results of the Bankruptcy Study show that ABA Model Rules 1.7, 1.8, 1.9, 1.10 and 1.11 or standards analogous to those rules were central to 53% of reported bankruptcy cases involving issues of attorney conduct (49 cases of the 93). The next largest category involved safekeeping of client property (ABA Model Rule 1.15 or its equivalents) accounting for 13%, or 12 cases. The third largest category involved attorney's fees (equivalent to ABA Model Rule 1.5) containing 9%, or 8 cases. Combined,

these three categories account for 75% of all reported bankruptcy cases. The next highest category involved "Lawyer as a Witness" (ABA Model Rule 3.7) with 4%, or only 4 cases.

These results were compared with the prior studies of federal district courts and courts of appeals (the "Federal Case Studies"). The frequency of "Conflict of Interest" rules was consistent with the results of the prior studies, with 53% of the reported bankruptcy cases involving such conflicts, as opposed to 46% of the other reported federal cases. But the "Communications with Represented Parties" Rule (ABA Model Rule 4.2) and the "Lawyer as Witness" Rule (ABA Model Rule 3.7) were significantly less prevalent in the Bankruptcy Study than in the prior Federal Case Studies: 4% and 1% respectively in the Bankruptcy Study, as opposed to 10% each in the Federal Case Studies. Conversely, cases involving "Attorney's Fees" (ABA Model Rule 1.5) constituted 9% of the bankruptcy cases, as opposed to 5% of the federal cases, and cases involving "Safekeeping of Client Property" (ABA Model Rule 1.15)[2] involved 13% of the bankruptcy cases, as opposed to 1% of the federal cases. Not surprisingly, in light of the Federal Case Studies, most ABA Model Rules, or their equivalents, never feature in reported bankruptcy decisions. Almost all bankruptcy cases involving attorney conduct involve the small "core" group of rules

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[2] ABA Model Rule 1.15, "Safekeeping Property," is far more important in bankruptcy courts than it is in other federal courts. The text is as follows:

> "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

mentioned above. See Chart I, Appendix II; see also Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, December 1, 1995; Supplement to Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, May 14, 1996.

B. "Study II": Sources of Local Rules Governing Attorney Conduct in Bankruptcy Courts. See Appendix III.

The second study ("Bankruptcy Rule Study") traced the sources of the local standards governing attorney conduct in each bankruptcy court. The purpose was to determine how closely the bankruptcy courts follow the local rules of attorney conduct used by their corresponding district courts, which in turn would reveal how widespread the impact of changes in the federal district courts would be in the bankruptcy court system. This study was built upon the excellent research of Patricia S. Channon, "Professional Responsibility Rules in the Local Rules of Bankruptcy Courts," and a previous report done for this Committee on local rules regulating attorney conduct in the federal district courts and courts of appeals. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995.

The results of this study reveal that most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct. See Chart II, Appendix III, Infra. Over seventy-three (73) percent of the ninety-four bankruptcy courts have either explicitly or implicitly adopted the local rules of attorney conduct of their respective federal district courts. Thirty-two (32) of the ninety-four (94) bankruptcy courts have no local rule at all governing attorney conduct. (These courts still require that the attorney be admitted to the local federal district court, which presumably implies that the attorney is governed by the federal district court's rules of attorney conduct, if any.[3])

[3] Where the local rules of a bankruptcy court are silent on attorney conduct, we have assumed that the rules of the federal district court apply. See e.g. In re Glenn Elec. Sales Corp., 99 B.R. 596, 598 (D. N.J. 1988)

Nineteen (19) of the bankruptcy courts explicitly adopt the standards of attorney conduct employed by the local federal district court. Eighteen (18) others adopt all the rules of the local federal district court generally. Thus, sixty -nine (69) of the bankruptcy courts explicitly or implicitly adopt district court standards. Additionally, three (3) bankruptcy courts use district court rules in combination with other standards, meaning that over seventy-seven (77) percent of the bankruptcy courts could automatically import changes made to district court attorney conduct rules.

The remaining bankruptcy courts use other standards. Four (4) courts have local rules authorizing disciplinary enforcement, but fail to state the standard to be applied. Eight (8) bankruptcy courts refer to the rules of attorney conduct as promulgated by the state's highest court. Three (3) courts refer to a combination of state and ABA standards. Two (2) courts, the Bankruptcy Courts for the Eastern and Western Districts of Arkansas, adopt the Uniform Rules of Disciplinary Enforcement, first promulgated by the Committee on Court Administration and Case Management in 1978. One court (1), the Bankruptcy Court for the Southern District of Georgia, refers to the "current canons of professional ethics of the American Bar Association."

As discussed in the prior reports, there is a growing "balkanization" of rules governing attorney conduct in the federal district courts. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995. It appears that the bankruptcy court system has, for the most part, "imported" this problem by adopting the differing rules of attorney conduct of their respective federal district courts. See Chart II, Appendix III. See also Knopfler v. Schraiber, 103 B.R. 1001, 1003 (Bankr. N.D. Ill 1989) (holding that a federal court may consider both the Model Code and the Model Rules as standards governing attorney conduct); In re Consupak, Inc., 87 B.R. 529, 550 (Bankr. N.D. Ill. 1988) (holding that a federal court may consider both the Model Code and the Model Rules as

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(holding that when local rules of bankruptcy court are silent on issue of attorney conduct, federal district court's local rules apply).

standards governing attorney conduct); In re Glenn Elec. Sales Corp., 99 B.R. 596, 598 (D.N.J. 1988) (disqualified law firm argues Model Code improperly invoked by District Court in Model Rules jurisdiction).

C. "Study III": Application of Rules for Attorney Conduct in Conjunction with the Bankruptcy Code. See Appendices IV, V.

The third and final study examined the application of local rules of attorney conduct in conjunction with the applicable provisions of the Bankruptcy Code, especially, § 327. See 11 U.S.C. § 327(a). The purpose was to consider what effects, if any, the options considered by this Committee would have on the application of Bankruptcy Code.

The bankruptcy system is unique in American jurisprudence and presents unique ethical issues. This is particularly true in the area of conflict of interest regulation. As revealed by our prior studies, conflict of interest issues frequently arise in federal district courts, even in ordinary civil litigation where there are only two parties. See Study of Recent Federal Cases Involving Rules of Attorney Conduct, January 9, 1996, and the other studies cited at Section I, supra. The bankruptcy arena is far more complicated. There are rarely just two diametrically opposed adversaries, and frequently dozens, or even hundreds of parties with shifting alignments and differing interests that can change over time. See Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process," 97 Commercial L.J. 149, 150 (1992), set out in Appendix V, infra. "[T]here are ordinarily a number of parties whose interests and alliances are constantly in a state of flux during the case." Id., 150. According to Professor Meltzer:

> "Bankruptcy involves shifting relationships: Today's enemy is tomorrow's friend and vice versa. Thus bankruptcy is rich in the potential for conflict, but it is also rich in the potential for cooperation. The parties need to work together even when they are at sword's points. This fact makes it extra difficult to identify just when a conflict exists."

Id. at 151, quoting, Ayer, "How to Think About Bankruptcy Ethics," 60 Am. Bankr. L.J. 355, 386-87 (1986).[4]

§ 327 of the Bankruptcy Code is a statutory prescribed ethical rule governing conflict of interests for attorneys and other professional persons in the bankruptcy context. The statute permits the Bankruptcy Trustee to only employ professional persons (including attorneys) "that do not hold or represent an interest adverse to the estate" and are "disinterested persons." 11 U.S.C. § 327(a). The Bankruptcy Code does not define the words "hold or represent an interest adverse to the estate," but caselaw has defined this provision to include : 1. "the possessing or asserting of any economic interest that would tend to lessen the value of the bankruptcy estate" or 2. "possessing a predisposition under circumstances that render such a bias against the estate." See In re Roberts, 46 B.R. 815, 827-29 (Bankr. D. Utah 1985), *aff'd in part, rev'd in part,* 75 B.R. 402 (D. Utah 1987) (en banc).

The Bankruptcy Code does define "disinterested person." See 11 U.S.C. § 101(14). The definition lists five categories of individuals who are not "disinterested." Examples of such individuals includes creditors, equity security holders, insiders and investment bankers for any outstanding security of the debtor. 11 U.S.C. § 101(14). The definition section also possesses a "catch-all" provision which some courts have interpreted to require an attorney to be free from "the slightest personal interest which might be

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[4] For example, conflict of interest is inherent in the representation of a debtor in possession (DIP) during a chapter 11 reorganization. Unless a trustee has been appointed (not the usual situation), the DIP is the debtor itself. 11 U.S.C. § 1101. Section 1107 of the Bankruptcy Code imposes on the DIP most of the duties of a trustee. Nowhere is there any reference to duties to the owner of the debtor. See Jay Lawrence Westbrook, "Fees and Inherent Conflicts of Interest," 1 Am. Bankr. Inst. L. Rev. 287, 290 (1993). Nor is the Bankruptcy Code clear on whether any duty is owed to creditors. Id. Three cases from the Northern District of Texas, however, provide that the DIP owes a duty of loyalty to creditors. See Diamond Lumber, Inc. v. Unsecured Creditors' Comm. of Diamond Lumber, Inc., 88 B.R. 773 (N.D. Tex. 1988); In re Kendavis Indus. Int'l, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988); In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986). This can create conflict of interest. While the DIP is not charged with a duty to the owners of the debtor, the DIP is very often the owner or managers employed by the owner. Charging the DIP with a duty that conflicts with its own interest passes this conflict along to the attorneys that represent the DIP.

reflected in their decisions." See In re Tinley Plaza Assocs. L.P., 142 B.R. 272, 277-78 (Bankr. N.D. Ill. 1992)[5].

Among the bankruptcy courts, application of § 327 is far from uniform. See the extensive discussion in Marcia L. Goldstein et al., "Ethical Considerations for Bankruptcy Professionals: Disinterestedness, Conflicts of Interest, and Retainers," C995 ALI-ABA 397 (May 4, 1995); William Kohn, "Deciphering Conflicts of Interests in Bankruptcy Representation," 98 Commercial L. J. 127 (1993). For example, there is a split of authority regarding the application of § 327 for "potential" conflicts of interest. Some courts have held that a "potential conflict" is a contradiction in terms, finding that all conflicts are actual. See In re Kendavis, 91 B.R. at 753-54 ("The concept of potential conflicts of interest is based on a mistaken interpretation of the Bankruptcy Code."); In re BH & P, Inc., 103 B.R. 556, 563-64 (Bankr. N.D. Texas 1989) (holding that "[t]he terms 'actual' and 'potential' conflict merely describe different stages in the same relationship" because the prospect of future conflict could "exert a subtle influence" leading to a more active conflict.) On the other hand, the Court of Appeals for the First Circuit has rejected a literal reading of § 327(a) and held that there is no per se rule against employment of counsel where there is only a "potential" conflict. See In re Martin, 817 F.2d 175, 180 (1st Cir. 1987). The First Circuit pointed out a practical reason for this conclusion. "[T]o interpret the law in such an inelastic way would virtually eliminate any possibility of legal assistance for the debtor in possession, except under a cash-and-carry arrangement or on a pro bono basis." Id., at 180. See the extensive discussion in Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in

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[5] The "catch-all" provision defines a "disinterested person" as one who:

> "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph."

11 U.S.C. § 101(14)(E).

the Bankruptcy Process," 97 Commercial L. J. 149 (1992), 154-158, set out as Appendix V, infra.

To make matters more complex, cases applying § 327 also frequently involve the conflict of interest rules of the ABA Code of Professional Responsibility ("Model Code") and the ABA Model Rules of Professional Conduct. See e.g., SLC Ltd. v. Bradford Group West, Inc., 999 F.2d 464, 467 (10th Cir. 1993) (Attorney who had represented debtor's general partner disqualified under the Utah version of the Rules of Professional Conduct.); In re F & C Intern., Inc., 159 B.R. 220, 222-23 (Bankr. S.D. Ohio 1993) (Court denied motion of expanded employment for special counsel of DIP under § 327 of Bankruptcy Code and Canon 5 of the ABA Code).

Courts have also applied these rules in a variety of ways, contributing to a wide ranging set of interpretations of § 327. For example, some courts have imported the consent exceptions of the ABA Code or ABA Model Rules into the Bankruptcy Code, and others have not. See e.g. In re Dynamark, Ltd, 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991) (after holding that attorneys did not hold or represent an adverse interest and were disinterested under § 327, the court stated that "although consent to representation by the parties is not necessarily sufficient by itself to overcome a lack of disinterestedness, this court takes judicial notice that [the client creditor] has submitted a written waiver of any conflict that exists or may exist"). But see In re Envirodyne Indus., Inc. 150 B.R. 1008, 1016 (Bankr. N.D. Ill. 1993) (holding § 327 does not allow waiver of conflicts of interest); In re Diamond Mortg. Corp. of Illinois, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990) ("certain conflicts that a client could waive after full disclosure outside of the bankruptcy context, such as simultaneous representation of the client and the client's creditors, are prohibited by the Bankruptcy Code itself from being waived.").[6] Other courts have

[6] At least one author has argued that the adoption of the consent provisions of the ABA Model Rules and the ABA Code into § 327 may be beneficial. See Karen J. Brothers, "Disagreement among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help," 138 U. Pa. L. Rev. 1733, 1751 (1990). For example, conflicts often arise when the debtor's pre-bankruptcy attorney is retained by the trustee or DIP. It

imported the vague "appearance of impropriety" aspirations of Canon 9 of the ABA Code in construing the requirements of § 327. See e.g. In re 419 Co., 133 B.R. 867, 869 (Bankr. N.D. Ohio 1991) (holding that § 327 covers "both actual and potential conflicts of interest in order to avoid even the appearance of impropriety."). This despite the intent of the drafters of the ABA Code that only the mandatory "Disciplinary Rules," not the Canons, should be enforced by sanction. See ABA Code, "Preamble and Preliminary Statement," 1. (1969).

At least one law review article has suggested that the conflict of interest standards of the ABA Model Rules are consistent with § 327, while the standards employed by the ABA Code are not. See William Kohn, "Deciphering Conflicts of Interest in Bankruptcy Representation," 98 Commercial L. J. 127, 139-140, set out as Appendix VI, infra. According to Kohn, Congress rejected a per se rule against "potential" conflicts of interest when it amended § 327 to require an "actual conflict of interest." Id. at 140. He also argues that the ABA Code contains Canon 9 which bars even "the appearance of professional impropriety," while the ABA Model Rules do not contain such a per se prohibition and therefore are more consistent with Congressional intent. See id, at 139-40. Kohn would apparently favor a uniform rule covering conflict of interest in the bankruptcy courts based on the ABA Model Rules, and would regard that as consistent with the Bankruptcy Code.

Professor Jay Lawrence Westbrook also sees practical problems in a "per se" bar against "potential" conflicts of interest in bankruptcy cases. See Jay Lawrence Westbrook, "Paying the Piper: Rethinking Professional Compensation In Bankruptcy," 1 Am. Bankr. Inst. L. Rev. 287 (1993), 288-304. He argues that a "per se" rule against "potential"

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has been suggested that disqualifying the debtor's pre bankruptcy attorney is disadvantageous because of such counsel's likely knowledge of the situation and the debtor's confidence in such counsel. Id. at 1751. One possible remedy would be to employ a standard similar to Rule 1.7, allowing the pre-bankruptcy attorney to continue representation upon disclosure and consent, with the additional requirement that parties in interest would also need to consent because the attorney would actually be representing the bankruptcy estate. Id. at 1756.

conflicts will leave debtors unrepresented or represented by inferior lawyers who are willing to face the risk of disqualification because they cannot find other work. Id. at 289. Professor Westbrook would most likely support a uniform rule for bankruptcy conflict of interest based on the ABA Model Rules because those model rules lack a "per se" prohibition against "potential" conflicts of interest.

There are many other disagreements and policy disputes concerning the proper relationship between the Bankruptcy Code provisions, particularly § 327, and local rules governing attorney conduct in the bankruptcy courts. This is true whether the bankruptcy rules are based on the ABA Code, the ABA Model Rules, or on entirely different standards. See the full discussion in Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process," 97 Commercial L. J. 149 (1992), set out in full at Appendix V, supra. Whatever position is taken on the individual disputes, one thing is certain. The conditions in bankruptcy practice are sufficiently different from that in other federal courts as to require separate analysis and, quite possibly, special rules of attorney conduct.

III. CONCLUSIONS

The first study ("Bankruptcy Cases") establishes that the rules of attorney conduct commonly litigated in the federal district courts are also among those most frequently invoked in the bankruptcy courts. Thus, rule reform for the federal district courts could also benefit the bankruptcy system. On the other hand, bankruptcy courts have a unique professional "culture" and a strong statutory environment. Rules appropriate for district courts cannot be automatically "carried over" with assured success. Whether the ultimate decision is to proceed with a model local rule, or with uniform rule making pursuant to the Rules Enabling Act, 28 U.S.C. § 2072-2074, the Committee should carefully consider which rules should be applied to the bankruptcy court system. For example, ABA Model

Rule 1.15 "Safekeeping of Client Property" is far more important in bankruptcy courts than in district courts[7].

The second study ("Bankruptcy Rules") indicates that seventy-seven percent of the bankruptcy courts have, explicitly or implicitly, adopted the local rules of attorney conduct used by their respective district courts. Thus, unless special care is taken, proposed changes in federal district court rules could technically carry over to most of the bankruptcy courts, even if there is no direct action on bankruptcy rules. To do this in an unreflective way would be a bad mistake. If new district court rules are inappropriate for the conditions of bankruptcy practice, they will be ignored in the bankruptcy courts. This would be of no real assistance to the bankruptcy bar. Specific, and different model local rules of attorney conduct may be required for bankruptcy courts.

Finally, the third study ("Bankruptcy Code") demonstrates that simply changing the rules of attorney conduct in the bankruptcy courts will not automatically produce consistent standards, particularly as to conduct also governed by the Bankruptcy Code. Bankruptcy courts are highly "balkanized" in their interpretation of § 327 of the Bankruptcy Code. Adopting carefully drafted uniform federal rules, however, could lead to more consistent application of statutory standards by curbing the casual use of the old ABA Canon 9 and the unpredictable disqualification of lawyers with "potential" conflicts of interest under § 327 and under the vague "catch-all" provision of 11 U.S.C. § 101(14). See Section II (C), supra. A well crafted model local rule, specially designed for bankruptcy courts, could do the same.

Initially, the Standing Committee set out to review local rules governing attorney conduct in the district courts. After the three extensive "Federal Cases" studies cited in Section I, supra, it became clear that standards for attorney conduct in district courts had become extremely "balkanized." But any attempt to restore uniform standards in the district

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[7] For text of Rule 1.15, see footnote 2, supra.

courts is bound to effect bankruptcy practice, due to the numerous "carry over" local rules described at Section II (B), supra. Unlike courts of appeals, where there are relatively few cases and no apparent barriers to adopting the same kind of rules as district courts, the bankruptcy courts are subjected to a complex statutory system, which includes conflict of interest criteria, and other standards directly governing attorney conduct. See Section II (C), supra. See also Study of Recent Cases (1990-1997) Involving Federal Rule for Appellate Procedure 46 (May 10, 1997).

Discussion with members of the Bankruptcy Advisory Committee, particularly the Honorable Adrian G. Duplantier and Gerald K. Smith, and the Reporter, Alan N. Resnick, suggest that the Standing Committee should specifically request the Bankruptcy Advisory Committee for recommendations. In addition, the Federal Judicial Center should undertake an empirical study of bankruptcy courts similar to the very helpful "Study of Standards of Attorney Conduct and Disciplinary Procedures in Federal District Courts" that the Center is now completing at the Standing Committee's request. Final recommendations could take the form of a different model local rule for bankruptcy courts, or of a uniform federal rule that made special allowance for the conditions of bankruptcy practice.

One practical first step would be for this Standing Committee to decide how to proceed with the district courts: whether to proceed with a model local rule ("option one"), or to proceed with some limited uniform rulemaking under the Enabling Act ("option two). That decision would give the Bankruptcy Advisory Committee the context necessary to make its own recommendations. No final action on new district court rules should be taken until specific provisions for bankruptcy practice are also ready.

APPENDIX I

Illustration I - Standard Form for Located Cases (1990-1996)

NAME OF CASE: _____

CITATION: _____

RELEVANT KEY NUMBERS: _____

FACTS/ATTORNEY CONDUCT AT ISSUE: _____

HOLDING: _____

RULES CITED: _____

APPENDIX II

Chart I - Break Down of Recent Bankruptcy Cases (1990-1996) by ABA Model Rules of Professional Conduct

TOTAL NUMBER OF CASES CLASSIFIED BASED ON MODEL RULES: BANKRUPTCY COURTS FROM JAN. 1, 1990 THROUGH MAR 23 1996

Rule	Subject matter	Total	
1.1	Competence	3	
1.2	Scope of Representation	3	
1.3	Diligence	0	
1.4	Communication	0	
1.5	Fees	8	
1.6	Confidentiality of Information	1	
1.7	Conflict of Interest: General	20	
1.8	Conflict of Int. Prohib. Trans.	8	
1.9	Conflict of Interest: Fmr. Client	13	
1.10	Imputed disqualification (Firm)	7	
1.11	Govt. to private employment	1	
TOTALS IN ABOVE FIVE CATEGORIES (CONFLICT OF INTEREST)		⇨	49
1.12	Former Judge or Arbitrator	1	
1.13	Organization as Client	1	
1.14	Client Under a Disability	0	
1.15	Safekeeping Property	12	
1.16	Declining / Terminating Repr.	2	
1.17	Sale of Law Practice	0	
2.1	Advisor	0	
2.2	Intermediary	0	
2.3	Eval. for use by 3rd Persons	0	
3.1	Meritorious Claims/Contentions	1	

Model rule	Subject matter	Total
3.2	Expediting Litigation	0
3.3	Candor Toward the Tribunal	2
3.4	Fairness to opposing party	1
3.5	Impart. & Decorum of Tribunal	0
3.6	Trial Publicity	0
3.7	Lawyer as Witness	4
3.8	Special respons. of Prosecutor	1
3.9	Advocate / Non adjudicative	0
4.1	Truth in Statements to Others	0
4.2	Comm. w. Pers. Rep. Couns.	1
4.3	Dealing w/ Unrep. Person	0
4.4	Respect for Rts. of 3rd Persons	0
5.1	Resp. of Partner or Supervisor	0
5.2	Resp. of Subordinate Lawyer	0
5.3	Resp. Nonlawyer Assist.	2
5.4	Professional Independence	0
5.5	Unauthorized Practice of Law	1
5.6	Restr. on Rt. to Practice	0
5.7	Resp. Reg. Law Rel. Practice	0
6.1	Voluntary Pro Bono Publico	0
6.2	Accepting Appointments	0
6.3	Member in Legal Svces. Org.	0
6.4	Law reform / Client Interests	0
7.1	Comm. Conc. Lawyer's Svces.	0
7.2	Advertising	0

Model rule	Subject matter	Total
7.3	Dir. Contact w/ Prospective Cl.	0
7.4	Comm. of Fields of Practice	0
7.5	Firm Names & Letterheads	0
8.1	Bar Admission & Disc. Matters	0
8.2	Judicial & Legal Officials	0
8.3	Reporting Prof. Misconduct	1
8.4	Misconduct	0
8.5	Disc. Auth.: Choice of Law	0
Totals		93

APPENDIX III

Chart II - Sources of Federal District Court and Bankruptcy Court Local Rules of Professional Conduct

SOURCES OF FEDERAL DISTRICT COURT & BANKRUPTCY COURT LOCAL RULES ON PROFESSIONAL CONDUCT[1]

DISTRICT	DISTRICT COURT[2]	BANKRUPTCY COURT[3]
M.D.AL.	ABA Rules and State rules (r)	Adopted District Court rules generally[4]
N.D.AL.	ABA Rules and State rules (r)	Adopted District Court rules generally
S.D.AL.	ABA Rules and State rules (r)	ABA Rules and State rules (r)
D.AK.	State Rule Based on ABA Model Rules	Adopted District Court rules generally
D.AZ.	State Rule Based on ABA Model Rules	No local rule[5]
E.D.AR.	Uniform Federal rules of Disciplinary Enforcement	Uniform Federal Rules of Disciplinary Enforcement
W.D.AR.	Uniform Federal rules of Disciplinary Enforcement	Uniform Federal Rules of Disciplinary Enforcement

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[1]The text of these local rules may be located in Federal Local Court Rules, Lawyers Cooperative Publishing, 1995 and Bankruptcy Local Court Rules Service, Callaghan & Company 1989.

[2]Sources of district court rules drawn from memorandum from Daniel R. Coquillette to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, dated Jan. 2, 1995, concerning Local Rules Regulating Attorney Conduct (attached).

[3]Sources of bankruptcy court rules drawn from memorandum from Patricia S. Channon to Gerald K. Smith, dated Mar. 27, 1996, concerning Professional Responsibility Rules in the Local Rules of Bankruptcy Courts, and Bankruptcy Local Rules Service, Callaghan & Co., 1989.

[4]Where a Bankruptcy Court is listed as having "Adopted District Court Rules Generally," it is not possible to determine from the local bankruptcy rules whether the district court rules contain provisions concerning attorney conduct and professional responsibility. See Channon Memo.

[5]Where Bankruptcy Court is listed as having "no local rule," the court still requires that an attorney must be admitted to the District Court. This usually means being a member in good standing of the state bar. Presumably, state rules apply. See Channon memo, p. 1.

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
C.D.CA.	CA. Rules of Prof. Conduct	Adopted District Court Rules[6]
E.D.CA.	Refers to ABA Code and CA Rules	Adopted District Court Rules
N.D.CA.	CA. Rules of Prof. Conduct	Incorporated into District Court Rules
S.D.CA.	Refers to ABA Code and CA. Rules	Adopted District Court Rules generally
D.CO.	State Rule Based on ABA Model Rules	No Local Rule
D.CT.	State Rule Based on ABA Model Rules	No Local Rule
D.DE.	Model Federal Rules of Disciplinary Enforcement	Adopted District Court Rules generally
D.D.C.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally.
M.D.FL.	State Rule Based on ABA Model Rules	ABA Rules and State Rules
N.D.FL.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.FL.	State Rule Based on ABA Model Rules	Atty. must read and remain familiar w/ Fla. Bar's Rules of Prof. Conduct. No explicit statement on whether these rules apply or govern.
M.D.GA.	ABA rules and GA. Rules (c)	No Local Rule
N.D.GA.	State Rule Based on ABA Code	Adopted District Court Rules
S.D.GA.	Old ABA Canons	LBR 505(d), "Current canons of prof. ethics of the ABA"
D. Guam	Refers to ABA Model Code and Model Rules	Adopted District Court Rules Generally
D.HI.	State Rule Based on ABA Model Rules	No Local Rule

[6]Bankruptcy Courts listed as having "Adopted District Court rules" state they have adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase. See Channon memo.

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
D.ID.	State Rule Based on ABA Model Rules	LBR 9010(g), Rules of Prof. Conduct adopted by S.Ct. of ID.
C.D.IL.	State Rule Based on ABA Model Rules	No Local rule
N.D.IL.	Unique Standing Order	Adopted District Court Rules generally
S.D.IL.	State Rule Based on ABA Model Rules	Adopted District Court Rules
N.D.IN.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.IN.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
N.D.IA.	No Local Rule	Modified standards
S.D.IA.	No Local Rule	Adopted District Court Rules generally
D.KS.	State Rule Based on ABA Model Rules	Adopted District Court Rules
E.D.KY.	State Rule Based on ABA Model Rules	No Local Rule
W.D.KY.	State Rule Based on ABA Model Rules	LBR 3(b)(2)(E), Stds. of Prof. Conduct adopted by KY S.Ct.
E.D.LA.	State Rule Based on ABA Model Rules	No Local Rule
M.D.LA.	State Rule Based on ABA Model Rules	Rules of Professional Conduct of LA. State Bar Assoc.
W.D.LA.	State Rule Based on ABA Model Rules	Adopted District Court Rules
D.ME.	State Rule Based on ABA Code	No Local Rule
D.MD.	State Rule Based on ABA Model Rules	LBR 42(k). Counsel are "encouraged to be familiar" with the "Discovery Guidelines of the Maryland State Bar."
D.MA.	State Rule Based on ABA Code	No Local Rule
E.D.MI.	State Rule Based on ABA Model Rules	Adopted District Court Rules Generally

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
W.D.MI.	State Rule Based on ABA Model Rules	Local rule authorizing discipline of attorneys which does not state standard to be applied.
D.MN.	State Rule Based on ABA Model Rules	No Local Rule
N.D.MS.	No Local Rule	Adopted District Court Rules
S.D.MS.	No Local Rule	Adopted District Court Rules
E.D.MO.	State Rule Based on ABA Model Rules	No Local Rule
W.D.MO.	No Local Rule	Adopted District Court Rules
D.MT.	Refers to ABA Code	Adopted District Court Rules
D.NE.	State Rule Based on ABA Code	Adopted District Court Rules
D.NV.	State Rule Based on ABA Model Rules	No separate bkrtcy. court rules; only bkrtcy. specific rules in Dist. Ct. Rules.
D.N.H.	State Rule Based on ABA Model Rules	No Local Rule
D.N.J.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.N.M.	State Rule Based on ABA Model Rules	No Local Rule
E.D.N.Y.	State Rules and ABA Code	No Local Rule
N.D.N.Y.	Refers to ABA Code	No Local Rule
S.D.N.Y.	State Rules and ABA Code	No Local Rule
W.D.N.Y.	State rule based on ABA Code	Local rule which does not state standard to be applied
E.D.N.C.	State rule based on ABA Model Rules	No Local Rule
M.D.N.C.	State rule based on ABA Model Rules	No Local Rule
W.D.N.C.	State rule based on ABA Model Rules	No Local Rule

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
D.N.D.	State rule based on ABA Model Rules	Adopted District Court Rules generally
D.N.M.I.	Refers to ABA Model Rules	No Local Rule
N.D.OH.	State Rule Based on ABA Code	Adopted District Court Rules
S.D.OH	Model Federal Rules of Disciplinary Enforcement	LBR 4, Code of Prof. Resp. adopted by OH S.Ct.
E.D.OK.	State Rule Based on ABA Model Rules	No Local Rule
N.D.OK.	State rule based on ABA Model Rules	No Local Rule
W.D.OK.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.OR.	State Rule Based on ABA Code	No Local Rule
E.D.PA.	State Rule Based on ABA Model Rules	Local rule which does not state standard to be applied
M.D.PA.	State Rule Based on ABA Model Rules	Local rule which does not state standard to be applied
W.D.PA.	State Rule Based on ABA Model Rules	Adopted District Court Rules
D.P.R.	Refers to ABA Code	Adopted District Court Rules
D.R.I.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.S.C.	State Rule Based on ABA Model Rules	Dist. Ct. Rule 2.0,08., SC Code of Prof. Resp.
D.S.D.	No Local Rule	Adopts District Court rules generally
E.D.TN.	State Rule Based on ABA Code	LBR 2(c), Code of Prof. Conduct adopted by S.Ct. of TN.
M.D.TN.	Refers to ABA Code	Adopts Dist. Ct. Rule and has local bankruptcy rule that asserts jurisdiction to enforce standards of conduct.
W.D.TN.	State Rule Based on ABA Code	Refers to ABA Code and District Court rules as they relate to attorney conduct
E.D.TX.	State Rule Based on ABA Model Rules	No Local Rule

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
N.D.TX.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.TX.	State Rules and ABA Code	Adopted District Court Rules
W.D.TX.	State Rule Based on ABA Model Rules[7]	Adopted Dist. Ct. Rules and references "litigation standard" announced in local case and states that it applies
D.UT.	State Rule Based on ABA Model Rules	LBR 4, Code of Prof. Resp. adopted by OH S. Ct.
D.VT.	State Rule Based on ABA Code	No Local Rule
E.D.VA.	State Rule Based on ABA Code	LBR 105(I), Canons of Prof. Ethics of the ABA & the VA State Bar
W.D.VA.	State rule based on ABA Code	No Local Rule
D.V.I.	. Refers to ABA Model Rules	No Local Rule
E.D.WA.	State Rule Based on ABA Model Rules	No Local Rule
W.D.WA.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
N.D.W.V.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.W.V.	State Rules and ABA Code	No Local Rule
E.D.WI.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
W.D.WI.	No Local Rule	No Local Rule
D.WY.	State Rule Based on ABA Model Rules	No Local Rule

[7]ABA Code noted.

APPENDIX IV

Chart III - Break Down of Recent Federal Cases (1990-96) by ABA Model Rules of Professional Conduct

TOTAL NUMBER OF CASES CLASSIFIED BASED ON MODEL RULES: FEDERAL DISTRICT AND APPEALS COURTS FROM JAN. 1, 1990 THROUGH MAR. 23, 1996

Rule	Subject matter	Civil	Criminal	Total
1.1	Competence	2	0	2
1.2	Scope of Representation	4	3	7
1.3	Diligence	1	3	4
1.4	Communication	1	0	1
1.5	Fees	24	1	25
1.6	Confidentiality of Information	10	5	15
1.7	Conflict of Interest: General	77	26	103
1.8	Conflict of Int. Prohib. Trans.	9	1	10
1.9	Conflict of Interest: Fmr. Client	81	5	86
1.10	Imputed disqualification (Firm)	20	4	24
1.11	Govt. to private employment	3	10	13
TOTALS IN ABOVE FIVE CATEGORIES (CONFLICT OF INTEREST)		191	46	237
1.12	Former Judge or Arbitrator	0	0	0
1.13	Organization as Client	6	0	6
1.14	Client Under a Disability	0	0	0
1.15	Safekeeping Property	3	1	4
1.16	Declining / Terminating Repr.	7	1	8
1.17	Sale of Law Practice	0	0	0
2.1	Advisor	0	0	0
2.2	Intermediary	0	0	0
2.3	Eval. for use by 3rd Persons	0	0	0
3.1	Meritorious Claims/Contentions	9	3	12

Rule	Subject matter	Civil	Criminal	Total
3.2	Expediting Litigation	0	0	0
3.3	Candor Toward the Tribunal	9	4	13
3.4	Fairness to opposing party	13	0	13
3.5	Impart. & Decorum of Tribunal	4	4	8
3.6	Trial Publicity	0	3	3
3.7	Lawyer as Witness	40	9	49
3.8	Special respons. of Prosecutor	1	5	6
3.9	Advocate / Non adjudicative	0	0	0
4.1	Truth in Statements to Others	0	2	2
4.2	Comm. w. Pers. Rep. Couns.	41	19	60
4.2 Cases Involving DOJ		0	17	17
4.3	Dealing w/ Unrep. Person	4	3	7
4.4	Respect for Rts. of 3rd Persons	2	1	3
5.1	Resp. of Partner or Supervisor	0	0	0
5.2	Resp. of Subordinate Lawyer	0	0	0
5.3	Resp. Nonlawyer Assist.	0	0	0
5.4	Professional Independence	4	0	4
5.5	Unauthorized Practice of Law	6	1	7
5.6	Restr. on Rt. to Practice	1	0	1
5.7	Resp. Reg. Law Rel. Practice	0	0	0
6.1	Voluntary Pro Bono Publico	0	0	0
6.2	Accepting Appointments	0	0	0
6.3	Member in Legal Svces. Org.	0	0	0
6.4	Law reform / Client Interests	0	0	0
7.1	Comm. Conc. Lawyer's Svces.	1	0	1

Rule	Subject matter	Civil	Criminal	Total
7.2	Advertising	1	0	1
7.3	Dir. Contact w/ Prospective Cl.	2	0	2
7.4	Comm. of Fields of Practice	1	0	1
7.5	Firm Names & Letterheads	0	0	0
8.1	Bar Admission & Disc. Matters	0	0	0
8.2	Judicial & Legal Officials	2	2	4
8.3	Reporting Prof. Misconduct	1	0	1
8.4	Misconduct	4	3	7
8.5	Disc. Auth.: Choice of Law	6	1	7
Totals		400	120	520

APPENDIX V

Peter E. Meltzer, Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process, 97 Com. L.J. 149, (1992).

WHOM DO YOU TRUST? EVERYTHING YOU NEVER WANTED TO KNOW ABOUT ETHICS, CONFLICTS AND PRIVILEGES IN THE BANKRUPTCY PROCESS[1]

PETER E. MELTZER*

OVERVIEW

In most instances, when there is a dispute between parties in a bankruptcy proceeding, there tends to be a "winner" and a "loser." For example, one party obtains relief from the automatic stay or one party prevents it; one party confirms a plan of reorganization or one party prevents it.

In cases involving ethical issues or conflicts of interest however, this is often not the case. Instead, the world is divided into losers and loss avoiders. For example, in the case of attorneys, the best they can hope for is to be permitted to represent a debtor or a committee, or to collect fees which are due. In the case of creditors or shareholders, they hope to serve on a reorganization committee. Both debtors and creditors hope to retain counsel of their choice.

It follows, therefore, that the only time an attorney might develop an expertise in this area is in an involuntary fashion—*i.e.*, he or she is dragged into an ethics issue with nothing to gain, other than maintenance of the status quo. In these cases, the question is not what they *want* to know about ethics and conflicts, but rather, what they *have* to find out about it (hence the title of the article). Despite this, it is important that all bankruptcy practitioners be cognizant of the law in this area, so as to avoid

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The author would like to express his gratitude to Leon Forman for his thoughts and suggestions on an earlier draft of this article and for his general inspiration. The author would also like to thank Ellen McDowell and Sheila Oliver for their invaluable assistance in the development of this article.

1. With apologies to Ken Klee.

being drawn into difficult situations, where the best result is loss avoidance. This article aims to serve that purpose.

I. INTRODUCTION

Three Canons of the Code of Professional Responsibility provide as follows:

Canon 4: "A lawyer should preserve the confidences and secrets of a client."
Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."
Canon 9: "A lawyer should avoid even the appearance of professional impropriety."[2]

Rules respecting ethical issues, conflicts of interest and privileges in bankruptcy can rarely be mechanically applied without consideration of the facts and circumstances involved in each particular case. A major reason for this is that, unlike ordinary civil litigation, bankruptcy cases rarely involve only two parties with diametrically opposed interests throughout the duration of the proceedings. Instead, there are ordinarily a number of parties whose interests and alliances are constantly in a state of flux during the case. This fact explains, in some measure, why the Model Rules are not as easily applied to a party's conduct in bankruptcy proceedings as they might be in other contexts.[3]

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2. The American Bar Association Code of Professional Responsibility was originally adopted in 1969. It was amended several times, with the last amendments being adopted in 1980. In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct (hereinafter "Model Rules"). The Model Rules were amended in 1987 and again in 1989.

Although the Model Rules do not contain the equivalent of the "canons" found in the Model Code, the ideas expressed therein are repeatedly found in the Model Rules as well. For example, Model Rule 1.6(a) provides that, except in certain instances, "a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation." Model Rule 1.7 echoes Canon 5 by providing in part that "a lawyer shall not represent a client if the representation of that client will be directly adverse to another client." Canon 9 of the Model Code does not have a specific equivalent in the Model Rules, although its theme is found throughout not only the Model Rules, but also the case law involving ethical issues in bankruptcy cases.

Moreover, it does not appear that the Model Rules have created any results which would have differed if interpreted under the Model Code. *See, e.g., In re Roberts*, 46 B.R. 815, 836-837 (Bankr. D. Utah 1985), *aff'd in part, rev'd in part*, 75 B.R. 402 (D. Utah 1987) ("it is doubtful whether the impact [of the Model Rules] will be very great. . . . The new Rules of Conduct do not greatly alter the present law on conflicts of interest as that law has developed in recent years).

3. In fact, it has been observed that the Code of Professional Responsibility focused too closely on general civil litigation, as distinct from the other activities of lawyers. *See, e.g.*, Brown and Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VALPA REP. 453 (1976); Brown and Dauer, *Professional Responsibility in Nonadversary Lawyering: A Review of the Model Rules*, 1982 AM B FOUND RESEARCH J. 519 (1982).

One commentator has aptly described this difficulty as follows:

> Bankruptcy involves shifting relationships: Today's enemy is tomorrow's friend and vice versa. Thus bankruptcy is rich in the potential for conflict, but it is also rich in the potential for cooperation. The parties need to work together even when they are at sword's points. This fact makes it extra difficult to identify just when a conflict exists.
>
> . . . The typical bankruptcy case involves the debtor with a multiplicity of creditors, with different interests at stake. Some may be secured, others unsecured; some large, others small; some may have claims that are dischargeable, others not; some may have taken preferences, others not. In the nature of things, then, bankruptcy is a multi-party, rather than a two party, event.
>
> The problem of shifting relationships is less obvious, but probably more aggravating. The difficulty is that alliances shift in the middle of the case, depending on the issue. Creditors may be allied against the debtor, in, say, trying to bring the debtor to heel. But creditors and debtor may be allied with each other in trying to maximize the return from the estate. Meanwhile, one creditor may find himself at odds with others where, for example, one has a security interest (or a preference or a nondischargeable claim and the other not). And not only may these facts split the creditor body; they may force the debtor into alliance with one or more creditors, as against the others.[4]

The Bankruptcy Code contains a number of provisions which are aimed towards defining the parameters of ethical conduct in bankruptcy practice. While the words "ethics" and "conflicts" do not appear in the Code, there are instead various sections which describe what types of professionals may be employed by a debtor or a committee. The difficulty, however, is that the relevant provisions are all subject to varying interpretations, leading to the result that there is virtually no sub-issue in the field of bankruptcy ethics upon which one cannot find at least two courts reaching diametrically opposed conclusions.[5] Uniformity of opinion is practically non-existent. Accordingly, except for the poor lawyer whose employment or fees may be at stake as a result of a possible conflict, this tends to be a fascinating area of study.[6]

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4. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM BANKR. L.J. 355, 386-87 (1986). *See also*, Stranko, *Attorney Conflicts of Interest in Bankruptcy Proceedings*, 9 J. LEGAL PROFESSION 229, 229-30 (1984).

5. *See, e.g.*, Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help*, 138 U. PA L. REV. 1733 (June 1990).

6. Despite this, it has been observed that issues of ethical conduct as they apply specifically to bankruptcy proceedings receive little attention in law schools. These issues tend to escape the focus of both the standard bankruptcy course and the standard ethics course, because in both cases, time is usually too limited to allow for any significant discussion of issues which combine the two areas of study. *See, e.g.*, Boshkoff, *As We Forgive Our Debtors in the Classroom*, 65 IND L.J. 65, 78 (Winter 1989) (an article which discusses appropriate means of teaching bankruptcy in law school, and which takes its title from a 1981 study of personal bankruptcy filings in Illinois, Texas and Pennsylvania by Elizabeth War-

Based on the foregoing, any attempt to offer guidance as to what forms of conduct will or will not be appropriate in all situations is probably inadvisable, and such an endeavor will not be undertaken here. Instead, the discussion herein is intended to provide examples of some of the types of ethical, confidentiality and conflict of interest issues which can arise in bankruptcy cases, as well as some of the considerations which courts weigh in resolving those problems.

Finally, while a number of commentators have suggested proposed revisions to the relevant statutory provisions,[7] the controversial portions of these provisions have nevertheless not been substantially changed since the enactment of the Bankruptcy Code in 1978. Therefore, this article will focus on the existing state of the law, in terms of current judicial interpretation of the relevant statutory provisions, rather than on a hypothetical idealized state of the law, based on suggested amendments to those troublesome provisions.

II. ETHICAL CONSIDERATIONS AND CONFLICTS OF INTEREST REPRESENTING DEBTORS UNDER THE BANKRUPTCY CODE

A. INTRODUCTION

An attorney's relationship with a debtor may be such as to require disqualification whenever he or she is not in a completely impartial position with respect to that debtor, even if there were no intentional misconduct by the attorney. In describing the sanction of disqualification, one commentator elaborated on this theme as follows:

> [S]ituations also arise in which Courts see disqualification as a uniquely appropriate remedy; here the emphasis tends to shift away from the culpability of the attorney's conduct. Courts frequently point out that the decision to disqualify an attorney does not require a finding of improper, or even morally blameworthy, conduct. Breach of a prophylactic rule is, at least in some cases, not wrongful conduct in and of itself. Disqualification in these cases is justified as a protection for the rights of parties before the

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ren and Jay Westbrook, entitled "As We Forgive Our Debtors"); Ayer, *The Responsibilities of the Lawyer in Bankruptcy Practice*, NORTON BANKR L. AND PRAC, Monograph No. 1 (1988).

7. McCullough, *Attorneys' Fees in Bankruptcy: Toward Further Reform*, 95 COMM L.J. 133 (1990); Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help.*, 138 U PA L. REV. 1733 (June, 1990); Williams, *Bankruptcy Code Section 327(a)—New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO. L REV. 309 (1988); Grensky, *The Problem Presented By Professionals Who Fail To Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc*, 62 AM BANKR L J. 185 (1988); Flowers, *Attorney Fees: Handling Bankruptcy Without Getting There Yourself*, 84 W VA L REV. 669 (1982).

court and not as punishment for errant attorneys.[8]

An example of a case using disqualification in this manner is *Matter of Roger J. Au and Son, Inc.*[9] There the court held that an attorney could not represent a debtor in bankruptcy since he was also an officer and director of that company. The fact that his role was "uncompensated, largely ceremonial and undertaken as a convenience to facilitate the signing of documents and the recordation of corporate minutes" was deemed to be irrelevant. In justifying its decision to disqualify the law firm involved, the court stated:

> The court has not rendered, and will not render a moral judgment on the conduct of [the disqualified attorneys]. Yet, the court cannot abdicate its role of insuring that all of the parties in this case are guaranteed fair treatment in the reorganization process.[10]

This trend is common to those courts which have addressed the issues of ethical considerations and conflict of interests regarding representation of debtors under the Bankruptcy Code. That is, the law firm's intent is often not as significant as the actual effect, whether actual or apparent, of its representation.

It should also be noted that this does not tend to be a particularly fact-intensive area of bankruptcy law. Whenever a case has involved what may loosely be termed an "ethics issue", courts have tended to look to "ethics cases" in a general way to support their reasoning. Thus, whenever one court has expressed its beliefs as to what constitutes "fair and equitable" in the bankruptcy ethics process generally, that expression will often provide support for other courts, even when the factual situations presented in the specific cases are dissimilar. For example, a case where an attorney represented both a debtor and one of its creditors might be used to support a case where an attorney represented a debtor and insider, which might in turn be used to support a case where an attorney represented affiliated debtors. In these cases, specific facts tend to give way to more general concepts of jurisprudential propriety and equity.

Despite this overlap, an effort has been made herein to preserve the significance of factual distinctions between cases. That is, cases involving, for example, representation of affiliated debtors are discussed in conjunction with cases sharing that characteristic, even if the analyses contained in those cases ignored the distinction.

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8. *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV L REV. 1244, 1473-74 (1981).

9. 65 B.R. 322 (Bankr. N.D. Ohio 1984), *aff'd* 64 B.R. 600 (N.D. Ohio 1986).

10. 65 B.R. at 336.

B. OVERVIEW OF RELEVANT CODE PROVISIONS AND THE "ACTUAL VS. POTENTIAL CONFLICT" DEBATE: MAY AN ATTORNEY HOLDING A CLAIM FOR PREPETITION SERVICES REPRESENT A DEBTOR POSTPETITION?

In many instances, an attorney will file a bankruptcy petition on behalf of one of its clients while it is still owed fees by that client for prepetition services. This situation brings into play several Bankruptcy Code provisions, which it is appropriate to consider. First, Section 327(a) of the Bankruptcy Code states that the trustee, with the court's approval, may employ one or more attorneys "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duty under this title."[11] This section is, of course, the initial focus of numerous cases involving conflicts of interest in bankruptcy generally, and not merely those relating to the issue discussed in this section.

Section 327 has frequently been interpreted, particularly under earlier Code cases, to require court approval prior to the commencement of professional services on behalf of the estate.[12] Moreover, because the section only references a "trustee", which would include a debtor-in-possession,[13] but not a mere debtor, it has also been held to be inapplicable in Chapter 7 proceedings.[14]

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11. Although framed conjunctively, these conditions have been applied disjunctively by the courts, so that failure to meet either will result in disqualification. *See, e.g., In re Pierce*, 809 F.2d 1356, 1362 (8th Cir. 1987); *In re Michigan General Corp.*, 78 B.R. 479, 482 (Bankr. N D. Tex. 1987); *In re Leisure Dynamics, Inc.*, 32 B.R. 753, 754 (Bankr D. Minn.), *aff'd*, 33 B.R. 121 (D. Minn. 1983).

12. While there are cases which have held to the contrary, in many jurisdictions professionals who proceed to perform services for the estate without prior court approval do so at their peril. In recent years however, the trend has been away from the *per se* approach towards a more flexible case-by-case analysis that considers the circumstances of each case. The practice of automatic denial of compensation has been criticized by some commentators as being unduly harsh, particularly where there has been significant benefit to the estate. *See generally*, McCullough, *Attorneys' Fees in Bankruptcy: Toward Further Reform*, 95 COMM L J. 133, 138-39 (1990); Grensky, *The Problem Presented By Professionals Who Fail to Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc*, 62 AM BANKR L J. 185 (1988) and the cases collected at pp. 189-90; Flowers, *Attorney Fees: Handling Bankruptcy Without Getting There Yourself*, 84 W. VA L REV. 669, 672 (1982).

13. Section 1107(a) provides in relevant part that "a debtor in possession shall have all of the rights . . . of a trustee serving in a case under this chapter."

14. *See, e g., In re Trinsey*, 115 B.R. 828, 832 (Bankr. E.D. Pa. 1990) ("The weight of authority clearly establishes that [§327] does not apply to a Chapter 7 debtor desiring to retain counsel on its own behalf"); *In re Andy Gibb Organization, Inc.*, 81 B.R. 699, 699 (Bankr. S D. Fla. 1987); *In re Graham*, 74 B.R. 963, 966-67 (S.D. Ind. 1987) ("There is nothing in the Bankruptcy Code authorizing or requiring the appointment of counsel for a debtor [in a Chapter 7 case]."); *In re Spencer*, 48 B.R. 168, 171 (Bankr. E.D.N.C. 1985); 2 *Collier on Bankruptcy*, ¶327.07 (15th ed. 1991) at 327-83 ("Under the Code, as under prior law, court approval is not necessary for the appointment of an attorney for the debtor

Section 1107(b) in turn provides as follows:

> Notwithstanding Section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

Accordingly, based on Section 1107(b), it is clear that the mere fact of prior representation of a debtor does not, by itself, disqualify an attorney from also representing the debtor in possession. Finally, the phrase "disinterested person" is defined in Section 101(13) as, *inter alia*, a person that "is not a creditor, an equity security holder, or an insider."[15] Therefore, under Section 327(a) an attorney holding a claim against the debtor would not, at least under the literal terms of the statute, be a disinterested person. However when a person is a shareholder of the debtor, the issue is not so clear.[16]

Based on the foregoing, many courts considering this issue have held that law firms holding claims against debtors are not, *ab initio*, disinterested, and thus may not represent those debtors.[17] These courts have es-

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in a liquidation case or an attorney for the debtor out of possession in a reorganization case").

15. Under §101(31) of the Code, "insider" includes, but is not limited to, (a) with respect to an individual debtor, (1) a relative or general partner of the debtor, (2) a partnership in which the debtor is a general partner, and (3) a corporation of which the debtor is an officer, director, or person in control, (b) with respect to a corporate debtor, (1) an officer, director or person in control of the debtor or a relative of such person, and (2) a partnership in which the debtor is a general partner, and (c) with respect to a partnership debtor, a general partner of the debtor or a relative of the general partner.

Although the section does not specifically include a shareholder of a corporation as an insider, courts have had to wrestle with this area in addressing various conflict of interest issues. Some of these issues, such as whether an insider can represent a debtor in bankruptcy or whether an insider can simultaneously represent a debtor and an insider of the debtor, are discussed below.

16. *See, e.g., In re Intech Capital Corp.*, 87 B.R. 232 (Bankr. D. Conn. 1988) (law firm disqualified for holding 4 percent of debtor's outstanding equity securities); *Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 505-06 (Bankr. S.D. Ohio 1990) (debtor was permitted to employ Shearson, Lehman Hutton as a financial advisor despite the fact that Shearson owned 20,343 shares of equity securities of the debtor); *In re O'Connor*, 52 B.R. 892 (Bankr. W.D. Okla. 1985) (withdrawal by debtor's counsel not required where partners of the firm held an "infinitesimal" .0077 percent equity interest in debtor).

17. Those cases favoring a strict interpretation of the relevant statutory provisions regarding conflicts of interest include *In re Pierce*, 809 F.2d 1356 (8th Cir. 1987); *In re Jaimalito's Cantina Assoc., L.P.*, 114 B.R. 1 (Bankr. D.C. 1990); *In re Graybill Corp.*, 113 B.R. 966, 970-71 (Bankr. N.D. Ill. 1990); *In re Watervliet Paper Co.*, 96 B.R. 768, 770 (Bankr. W.D. Mich. 1989); *In re Pulliam*, 96 B.R. 208, 213 (Bankr. W.D. Mo. 1986); *Matter of Crisp*, 92 B.R. 885, 895 (Bankr. W.D. Mo. 1986); *In re Kendavis Industries International, Inc.*, 91 B.R. 742, 753-54 (Bankr. N.D. Tex. 1988); *Matter of Boro Recycling, Inc.*, 67 B.R. 3 (Bankr. E.D.N.Y. 1986); *In re Gray*, 64 B.R. 505, 507-08 (Bankr. E.D. Mich. 1986); *In re Estes*, 57 B.R. 158, 163 (Bankr. N.D. La. 1985); *Matter of Patterson*, 53 B.R. 366, 372 (Bankr. D. Neb. 1985); *In re Anver Corp.*, 44 B.R. 615 (Bankr. D. Mass. 1984); *Matter of Cropper Co. Inc.*, 35 B.R. 625, 631-32 (Bankr. M.D. Ga. 1983); *In re B.E.T. Genetics*, 35 B.R. 269, 272-74 (Bankr. E.D. Cal. 1983).

sentially adopted a *per se* analysis which does not require inquiry into the facts of each given case. This is based in part on the notion expressed by some courts that a "potential conflict" is a contradiction in terms, and thus cannot exist.[18] Therefore a conflict of interest is necessarily actual and prevents employment, notwithstanding Section 1107(b) of the Code.[19]

The absolute prohibition on representation by attorneys who may also be creditors has by no means found universal approval among the courts, particularly in recent years. In *In re Martin*,[20] the First Circuit observed that it would be nonsensical to interpret Section 327(a) literally in every case:

> After all, any attorney who may be retained or appointed to render professional services to a debtor in possession becomes a creditor of the estate just as soon as any compensable time is spent on account. Thus, to interpret the law in such an inelastic way would virtually eliminate any possibility of legal assistance for a debtor in possession, except under a cash-and-carry arrangement or on a pro bono basis.[21]

Based on the foregoing, the First Circuit held that the inquiry must, by necessity, be "case-specific." Factors to consider, according to the court, include: (1) the reasonableness of the arrangement; (2) whether it was negotiated in good faith; (3) whether the security demanded (if any) was commensurate with the predictable magnitude and value of the foreseeable services; (4) whether the security was a needed means of ensuring the engagement of competent counsel; (5) whether there are telltale signs of overreaching; (6) the nature and extent of any conflict of interest; (7) the likelihood that the potential conflict might turn into an ac-

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Some commentators have criticized the harshness of these cases on grounds that they force attorneys with claims for pre-petition services to "choose between waiving the pre-petition fee claim or referring the Chapter 11 case to another attorney." Williams, *Bankruptcy Code Section 327(a)—New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO L. REV. 309, 317 (1988).

18. *See, e.g., In re Kendavis Industries International, Inc., supra*, n. 17, 91 B.R. at 754. *See also, In re BH & P, Inc.*, 103 B.R. 556, 563-64 (Bankr. D.N.J. 1989) (court stated that the terms "actual" and "potential" conflict "merely describe different stages in the same relationship" and thus should not be treated differently); *In re Michigan General Corp.*, 78 B.R. 479, 484 (Bankr. N.D. Tex. 1987), *aff'd in part, reversed and remanded in part on other grounds sub nom. Diamond Lumber v. Unsecured Creditors' Committee*, 88 B.R. 773 (N.D Tex. 1988) ("This Court is skeptical that there can be a mere 'potential' conflict of interest in a bankruptcy situation.").

19. By virtue of §1107(b), the courts adopting the *per se* rule have held that while counsel's pre-petition representation of a debtor does not, by itself, prevent employment of that counsel post-petition, that section is inapplicable where counsel is attempting to preserve a claim for pre-petition services during the bankruptcy. *See, e.g., In re Jaimalito's Cantina Assoc., L.P.*, 114 B.R. 1 (Bankr. D.D.C. 1990); *In re Watervliet Paper Co., Inc.*, 96 B R. 768, 771-74 (Bankr. W.D. Mich 1989); *In re Roberts*, 75 B.R. 402, 407-09 (D. Utah 1987).

20 817 F.2d 175 (1st Cir. 1987).

21. *Id.* at 179.

tual one; (8) whether or not the potential conflict may influence the attorney's subsequent decision making; (9) the appearance of the arrangement to other parties in interest; (10) whether the existence of the security interest threatens to hinder or delay effectuation of a plan; and (11) whether fundamental fairness might be unduly jeopardized.[22]

It should be noted that the *Martin* case actually dealt with the specific issue of whether attorney's fees may be secured by an asset of the estate (and thus is discussed in the following section as well). Because of this, it may be arguable that its holding is limited to that particular situation, and not the case where the attorney is a pre-petition creditor of the debtor. Despite this however, several courts have interpreted *Martin* more broadly, namely as applying to any situation where an attorney may be, by strict reading of the statute, a "disinterested person."[23] This would include all claims which an attorney may have against a debtor, whether prepetition, postpetition, secured or unsecured.

Under this broad reading, *Martin* and its progeny[24] must be consid-

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22. *Id.* at 182.

23. Query whether it should make any difference whether the "potential" conflict arises from holding a claim for pre-petition services or from taking a security interest in a debtor's assets to secure post-petition services.

24. *See, e.g., In re Vanderbilt Associates, Ltd.*, 117 B.R. 678 (D. Utah 1990); *Matter of Carter*, 116 B.R. 123, 126 (Bankr. E.D. Wis. 1990); *Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990); *In re Microwave Products of America, Inc.*, 104 B.R. 900, 904 (Bankr. W.D. Tenn. 1989); *In re Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340 (Bankr. N.D. Ga. 1989); *In re Watson*, 94 B.R. 111, 115 (Bankr. S.D. Ohio 1988) (although espousing the more flexible *Martin* standard, counsel was nevertheless disqualified. However, this appeared to be based less on the existence of a claim against the debtor for prepetition services than on the fact that counsel took a security interest in the debtor's assets to secure that pre-petition claim shortly before filing for bankruptcy); *In re Viking Ranches, Inc.*, 89 B.R. 113, 115 (Bankr. C.D. Cal. 1988) (§1107(b) should be read as authorizing employment of counsel with a pre-petition claim on grounds that the term "employment" as used in that section does not distinguish between previously compensated services and services for which the attorney remains a creditor); *In re Best Western Heritage Inn Partnership*, 79 B.R. 736, 740 (Bankr. E.D. Tenn. 1987).

One of the first Bankruptcy Code cases to address this issue, *In re Heatron*, 5 B.R. 703 (Bankr. W.D. Mo. 1980), is of particular interest. There the Court permitted the appointment of an attorney for the debtor who held a prepetition claim against the debtor. The Court acknowledged that the attorney was not disinterested under Section 327(a) of the Code, but stated that the attorney's interest "does not offset the value afforded by the attorney's experience and familiarity with the Debtor." *Id.* at 705.

For many years, *Heatron* was either ignored completely or specifically not followed, as courts were generally following the rule favoring absolute prohibition on representation of a debtor by a creditor. *See, e.g., In re Glenn Electric Sales Corp.*, 89 B.R. 410, 415 (Bankr. D.N.J. 1988) (court declines to follow *Heatron* "which is more frequently distinguished and criticized than followed"); *In re Roberts*, 75 B.R. 402, 407 (D. Utah 1987) ("better reasoned cases contradict *Heatron*"); *Matter of Patterson*, 53 B.R. 366, 372 (Bankr. D. Neb. 1985). One commentator, though seemingly approving of the flexibility favored by the Court in *Heatron*, nevertheless criticized the case as an "aberration" which "ignores the clear, unambiguous language of the Code." Williams, *Bankruptcy Code Section 327(a) — New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO L REV. 309, 315-16 (1988).

ered as being in conflict with the line of cases discussed above which have espoused a *pro se* prohibition on these situations. Instead, these courts have held that a conflict which is merely potential and not actual is insufficient to disqualify an attorney.[25]

An exception to the general rule prohibiting representation of trustees or debtors in possession when the proposed attorney holds a prepetition claim against the debtor is set forth in Section 327(e) of the Bankruptcy Code. That section provides:

> The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which such attorney is to be employed.

It should be noted that there is no "disinterestedness" requirement in Section 327(e). Attorneys hired for a "specified special purpose" need not be disinterested, but need only meet the "no adverse interest" requirement as to the matter for which they are to be employed. The legislative history states that this subsection "will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the progress of that other litigation."[26]

C. MAY A LAW FIRM'S FEE FOR POSTPETITION SERVICES TO THE DEBTOR BE SECURED BY AN ASSET OF THE ESTATE?

As we have seen, *In re Martin*[27] was one of the first appellate cases to consider conflicts on a case by case basis, and not to disqualify counsel or disallow fees merely because of a potential conflict. In *Martin* however, the law firm had not, unlike the previous cases, performed prepetition services for the debtor. However, when the debtors were unable to obtain the retainer required by the law firm to represent them in bankruptcy,

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Once the judicial pendulum began swinging towards a case-by-case approach however (instigated in large part by the *Martin* case), courts suddenly began citing *Heatron* with approval. *See, e.g., Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990) (*Heatron* is among the courts engaging in the "better analysis" of balancing "the risk and gravity of the potential conflict of interest with the costs that the estate and perhaps the public would incur in the event of disqualification of the professional.").

25. As stated in *Martin* itself, "horrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in counsel being sent away to lick his wounds." 817 F.2d at 183.

26. H.R. No. 95-595 (95th Cong. 1st Sess. 328 (1977)).

27. 817 F.2d 175 (1st Cir. 1987).

the debtors provided the law firm with a promissory note which was secured by a second mortgage on real estate which they owned. Both the Bankruptcy Court and the District Court held that the attorneys from the law firm were not "disinterested persons" and that the Bankruptcy Court should not have approved debtor's counsel as attorney for the debtor in possession until counsel had divested themselves of their interest in the debtor's real estate.

On appeal, the First Circuit reversed. The Court held that a balance must be struck, based on the facts of each case, as to whether the law firm's activity should be prohibited:

> We realize that any attorney—other than one working purely as a volunteer—has a financial interest in the matters entrusted to his care, so in that sense, there is always some danger that the lawyer's judgment will be shaded by his own economic welfare. Yet, that risk, standing alone, seems acceptable. At the opposite pole, we find it strikingly evident that §327(a) would be drained of its meaning if bankruptcy counsel were free, willy-nilly, to set aside for themselves the most promising assets of the estate as a precondition to handling a Chapter 11 proceeding. That risk is, of course, anathema.
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> Once this tension is acknowledged, it is a small step to recognize that §327(a) will not support, either by its terms or by its objectives, a bright-line rule precluding an attorney at all times and under all circumstances from taking a security interest to safeguard the payment of his fees. It will sometimes be difficult to obtain competent counsel in anticipation of the bankruptcy proceeding unless the lawyer's financial well-being can be assured to some extent. . . . Conversely, the fundamental objectives of Chapter 11 may be thwarted if property essential to a reorganization is tied up by an attorney's lien, or if a particular security arrangement (or the perception which it naturally engenders) impairs fair treatment either of creditors or of administrative expense claimants. Reason requires that a balance be struck.[28]

Most cases which have addressed this issue have reached the same result as the *Martin* court, at least with respect to security interests intended to secure post-petition services.[29]

Not all courts have adopted the *Martin* analysis however. In *In re*

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28. *Id.* at 181.

29. *See, e.g. In re Robotics Resources R2, Inc.*, 117 B.R. 61, 63 (Bankr. D. Conn. 1990); *Matter of Carter*, 116 B.R. 123, 127 (E.D. Wis. 1990); *Matter of K and R Mining, Inc.*, 105 B.R. 394, 397 (Bankr. N.D. Ohio 1989); *In re Shah International, Inc.*, 94 B.R. 136, 138 (Bankr. E.D. Wis. 1988). It should be noted however that courts have looked far less kindly on the taking of security interests to secure pre-petition non-bankruptcy services. *See, e.g., In re Pierce*, 809 F. 2d 1356 (8th Cir. 1987); *In re Thompson*, 116 B.R. 679, 681 (Bankr. W.D. Ark. 199); *In re Watson*, 94 B.R. 111 (Bankr. S.D. Ohio 1988); *In re Automend*, 85 B.R. 173, 176 (Bankr. N.D. Ga. 1988); *In re Roberts*, 46 B.R. 815, 849 (Bankr. D. Utah 1985). As with many cases involving bankruptcy ethics, the courts in this latter group of cases appeared just as influenced by the general conduct of counsel in the bankruptcy proceeding as by the act of taking security to protect a fee.

Whitman,[30] when the debtor lacked funds to pay a retainer for legal services, he agreed to provide his law firm with a security interest in his dental equipment. This payment arrangement was never disclosed to the Bankruptcy Court. When the firm subsequently foreclosed on the equipment, it retained a portion of the auction proceeds to pay its postpetition legal fees.

In requiring the law firm to return the sale proceeds to the trustee, the Court stated:

> The firm's foreclosure on the equipment, although with the consent of the debtor, and payment to itself of a fee of over $5,000 is an example of overreaching. The foreclosure deprived the debtor of his ability to sell his major asset—his dental practice—and deprived his creditors of the hope of receiving a dividend in the Chapter 13 case. Moreover, at this point, the law firm had not yet rendered services approaching the value of $5,000. In arranging this sale, the law firm had in mind its own best interests rather than the best interest of the debtor and creditors.[31]

D. MAY A LAW FIRM WHICH IS AN "INSIDER" REPRESENT THE DEBTOR POSTPETITION?

At first glance, it would appear that representation of a debtor by an insider would be prohibited by a literal reading of the Bankruptcy Code. Recall that Section 327(a) prohibits a "disinterested person" from representing a debtor, and "disinterested person" is defined to include an insider.[32] Nevertheless, in this area some courts have looked past the Code terms and instead focused on whether the law firm's interest as an insider is sufficiently significant to color the attorney's independent and

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30. 51 B.R. 502 (Bankr. D. Mass. 1985).

31. *Id.* at 507. The tenor of the remainder of the Court's opinion indicates that it was offended by counsel's overall conduct and failure to disclose relationships. This may have been a factor in its decision. However, the same result was reached at the appellate level in *In re Pierce*, 809 F. 2d 1356, 1362 (8th Cir. 1987). In that case, although the Court was again displeased by counsel's failure to disclose a mortgage taken to secure postpetition services, the Court made it clear that the taking of the mortgage itself was an independent ground for denial of fees, even apart from the failure to disclose.

32. Section 101(13). *See also* Section II. B., *supra*. Some courts have held the disinterestedness requirement for attorneys which is contained in §327(a) should apply with less stringency to debtors-in-possession than to trustees. In *In re Covey*, 57 B.R. 665 (Bankr. D.S.D. 1986), the Court stated: "The trustee is required to be aloof from all connection with the debtor and its management. To require less of the trustee's attorney, who would be active in furthering the debtor's duties, would be illogical. The debtor-in-possession, however, is certainly not aloof from the debtor nor the management of the estate—the debtor-in-possession *is* the debtor, managing the estate." 57 B.R. at 666. *See also Indian River Homes, Inc. v. Sussex Trust Co.*, 108 B.R. 46, 51 (D. Del. 1989); *In re Best Western Heritage Inn Partnership*, 79 B.R. 736, 740 (Bankr. E.D. Tenn. 1987) ("a disinterested trustee should have a disinterested attorney. It does not follow that a debtor-in-possession should have a disinterested attorney.").

impartial judgment required to handle the case.[33] For example, in *In re Covey*,[34] the Court held that the fact that the attorney in question was a nephew of the debtor was insufficient to disqualify him from representing the estate. The Court reasoned that the attorney's familiarity with the affairs of the debtor and the debtor's confidence in, and ability to work with, an attorney of his own choosing, were more significant considerations.[35]

Similarly, in *In re PHM Credit Corp.*,[36] an attorney's partners were not only officers and directors of both the debtor and its parent, but also shareholders of the debtor. The law firm also represented the indenture trustee for the debtor's mortgage-backed bonds. Notwithstanding these potential conflicts, the bankruptcy court allowed the law firm to represent the debtor, subject to certain curative measures not authorized by the Code, including the forced resignation of the attorneys as officers of the debtor. The court noted that the firm had peculiar familiarity with the debtor's affairs, and that the trustee had taken "a hypertechnical position which ignored the case's fundamental economic realities."[37] Though seemingly reluctant to do so, the District Court affirmed, holding that the lower court had not abused its discretion.[38]

On the other hand, in *In re GHR Energy Corp.*,[39] the court disqualified a law firm when one of its attorneys was an officer of the debtor. Rather than considering whether the attorney's interest was sufficient to alter his independent judgment, the court simply relied on the Bankruptcy Code's requirement that a "disinterested person" (which excludes an insider) represent the estate.[40]

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33. *See, e.g., In re Jartran*, 78 B.R. 524, 526 (Bankr. N.D. Ill. 1987).

34. 57 B.R. 665 (Bankr. D.S.D. 1986).

35. The court in *Covey* may have been influenced by what it perceived to be the looser disinterestedness requirement which is applicable to counsel for debtors-in-possession. *See* n. 7, *supra*.

36. 110 B.R. 284 (E.D. Mich. 1990).

37. *Id.*, at 287.

38. Several cases have specifically declined to follow the *PHM Credit* case. *See In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Middleton Arms, L.P.*, 119 B.R. 131, 135 (M.D. Tenn. 1990), *aff'd*, 934 F.2d 723 (6th Cir. 1991). Further, in addressing the "economic realities" argument in an affiliated debtor context, one court stated: "what may be acceptable in a commercial setting, where all of the entities are solvent and creditors are being paid, is not acceptable when those entities are insolvent and there are concerns about intercompany transfers and the preference of one entity and its creditors at, perhaps, the expense of another." *In re Amdura Corp.*, 121 B.R. 862, 866 (Bankr. D. Colo. 1990).

The mere fact that an entity owns shares in a debtor does not, by itself, render that entity an "insider" for purposes of §101(31) of the Code. However, the definition of "insider" includes a "person in control of the debtor", which could be considered to include a significant shareholder, regardless of the degree of day-to-day control exercised over the affairs of the company. Courts have typically not used shareholder status as a means to disqualify counsel, at least where a small percentage of shares were at issue. *See* n. 10, *supra*.

39. 60 B.R. 52 (Bankr. S.D. Tex. 1985).

40. *See also, In re Petralex Stainless, Ltd.*, 78 B.R. 738, 744-45 (Bankr. E.D. Pa. 1987);

Finally, in the recent case of *In re Marquam Investment Corp.*,[41] a law firm's claim for fees for representing a debtor was disallowed on the theory that members of the firm were insiders of the debtor, and that the firm had to be construed as donating its services. In that case, debtor's counsel was also its president and major shareholder. The firm filed a plan which provided for payment of prepetition legal fees. In disallowing these fees, the Ninth Circuit noted that there was no evidence that the debtor agreed to pay for any of these legal services, and that the firm had never billed for its services prior to the bankruptcy.[42]

E. MAY AN ATTORNEY WHO FORMERLY REPRESENTED A CREDITOR OF THE DEBTOR REPRESENT THE DEBTOR IN BANKRUPTCY?

Section 327(c) of the Bankruptcy Code provides as follows:

> In a case under chapter 7, 11, or 12 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove of such employment if there is an actual conflict of interest.[43]

Thus, in *In re Flanigan's Enterprises Inc.*,[44] a law firm's former representation of one of the debtor's creditors, which had been fully disclosed,

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In re Coastal Equities, Inc., 39 B.R. 304 (Bankr. S.D. Cal 1984) (impermissible conflict of interest existed when member of law firm representing debtor had personal investments in debtor and was partner with the debtor in real estate projects); *In re Leisure Dynamics, Inc.* 33 B.R. 121 (D. Minn. 1983) (law firm could not represent debtor when certain of its members were officers, directors and shareholders of the debtor); *Matter of Roger J. Au and Sons, Inc.* 65 B.R. 322 (Bankr. N.D. Ohio 1984).

41. 942 F.2d 1462 (9th Cir. 1991).

42. One might argue that the *Marquam Investment* case does not necessarily prohibit the employment of insiders as counsel for a debtor. The Court appeared to base its decision on the specific evidence before it, which indicated that, prior to the bankruptcy, the firm had not intended to be reimbursed for its legal services. Moreover, the extent to which the firm was attempting to collect for post-petition services is not clear, although it clearly performed post-petition services for the debtor. However, the Court never even mentioned §327 of the Code in its opinion, indicating that it was not focusing on the issue of employment itself, but rather the allowability of fees.

43. Section 327(c) was amended pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984. Prior to the 1984 Amendments, this section specifically prohibited the concurrent representation of the trustee and a creditor regardless of whether or not an actual conflict existed. Representation of a creditor prior to appointment as counsel for the debtor was not prohibited however. The former section provided:

> In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent, in connection with the case, a creditor.

44. 70 B.R. 248 (Bankr. E.D. Fla. 1987).

was deemed an insufficient conflict of interest to disqualify the firm. If a creditor objects however, and the court finds that such representation involves an actual, rather than theoretical, conflict of interest, employment may be denied.

Despite Section 327(c), most courts have not permitted simultaneous representation of both the creditor and the debtor in possession. Thus, in *In re Georgetown of Kettering, Ltd.*,[45] the Sixth Circuit reversed an award of fees from the debtor's estate to an attorney representing the debtor who had also represented an unsecured creditor. The fact that the creditor's claim was subsequently disallowed did not serve to obviate the conflict.[46]

In *In re Oatka Restaurant and Lounge, Inc.*,[47] a state court action was commenced against the debtor prior to bankruptcy. The lawsuit alleged that the debtor had served alcoholic beverages to an intoxicated person who thereafter caused the death of a woman. The debtor, as defendant in the lawsuit, impleaded and named as a third party defendant the woman's husband, on the theory that his intoxication was somehow the supervening cause of the woman's death, and that if the debtor was liable to the plaintiff, then the third-party defendant should be liable to the debtor. The third party defendant was represented by the same law firm who sought to represent the debtor in bankruptcy.

The court held that this was an impermissible conflict of interest under Section 327(c). The Court noted that the law firm was seeking to earn a fee from the debtor while endeavoring (albeit indirectly) to deprive the bankruptcy estate of a valuable recovery. In view of this actual conflict, the court denied the application to employ the law firm.[48]

It should also be noted that courts have not hesitated to deny compensation for simultaneous representation of a debtor and creditors even though there has been no creditor objection and even though Section 327(c) would appear to specifically contemplate such an objection. In *In re Ochoa*,[49] the Court noted that "even absent creditor objection (assuming full disclosure of the facts), the Court is not prohibited from *sua sponte* inquiry into an apparent conflict of interest."[50]

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45. 750 F.2d 536 (6th Cir. 1984).

46. Although the Sixth Circuit was construing §327(c) prior to its amendment in 1984, the amended statute would not likely have changed the result.

47. 73 B.R. 84 (Bankr. W.D.N.Y. 1987).

48. *See also, In re AOV Industries, Inc.*, 797 F.2d 1004, 1011 (D.C. Cir. 1986) (attorneys represented creditor prior to debtor's bankruptcy case, and then represented debtor while still employed by the creditor); *In re Cody*, 122 B.R. 520, 525-26 (Bankr. N.D. Ohio 1990); *In re Chicago South Shore and South Bend R.R.*, 101 B R. 10, 14 (Bankr. N.D. Ill. 1989); *In re Lee Way Holding Co.*, 100 B.R. 950, 960 (Bankr. S.D. Ohio 1989); *In re Ochoa*, 74 B.R. 191, 195 (Bankr. N.D.N.Y. 1987) (fees denied where law firm simultaneously represented debtor and one of its major creditors); *In re Paine*, 14 B.R. 272 (Bankr. W.D. Mich. 1981).

49. 74 B.R. 191 (N.D.N.Y. 1987).

50. In areas of ethical conduct, perhaps more than in other areas of bankruptcy law, courts have *sua sponte* critically examined any ethical conduct which they consider ques-

A recent case involving a court's *sua sponte* consideration of this issue is *In re Amdura Corp.*[51] In that case, debtors' counsel also represented the debtors' major secured lender, even though counsel had not represented the bank in connection with its loans to the debtors.[52] In holding that counsel was not disinterested as required by Section 327(a) of the Code, the court rhetorically asked: "How can counsel fairly and fully advise the Debtors in negotiating with [the Bank] and in drafting a plan if they are unable, or at least unwilling, to espouse positions detrimental to the interests of the bank?"[53]

F. MAY A LAW FIRM SIMULTANEOUSLY REPRESENT THE DEBTOR AND AN INSIDER OF THE DEBTOR?

The Bankruptcy Code does not precisely resolve this issue. Although a "disinterested person" is forbidden, under Section 327(a) of the Code, from representing the estate, an attorney representing an insider is not necessarily a "disinterested person" for purposes of Section 101(13) of the Code. The most relevant subdivision of that section is Section 101(13)(E) which provides that a disinterested person "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor . . ."

Although the Bankruptcy Code does not explicitly address this issue, courts have been particularly stringent in preventing attorneys from simultaneously representing debtors and insiders of the debtor. In so doing, reference is often made to Canon 9 of the Code of Professional Responsibility which forbids "even the appearance of impropriety." Courts typically reason that the possibility of the debtor having a differing agenda from that of its directors, officers, or general partners—particularly where guarantees may be involved—is simply too great to allow such dual representation, even if the conflict is not yet considered actual.

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tionable. *See, e.g., In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Vanderbilt Associates, Ltd.*, 111 B.R. 347, 353 (Bankr. D. Utah 1990), *rev'd on other grounds*, 117 B.R. 678 (D. Utah) ("Even though no party in interest has objected, it is incumbent upon the court to make an independent determination if appointment is appropriate"); *In re Anver Corp.*, 44 B.R. 615, 617 (Bankr. D. Mass. 1984) (Bankruptcy Court denied compensation to law firm which was a creditor for pre-filing services and an insider of the debtor, despite the fact that neither the debtor, nor the creditors' committee had raised any objection).

51. 121 B.R. 862 (Bankr. D. Colo. 1990).

52. The problems raised by the fact that counsel was attempting to represent multiple affiliated debtors in the first place is discussed below at Section II. G.

53. *In re Amdura Corp., supra*, 121 B.R. at 867. The Court also noted that counsel's sensitivity to the Bank's interests would be particularly heightened by the fact Continental was admitted to be "the hand that feeds" Winston and Strawn. *Id.*

For example, in *In re Chou-Chen Chemical, Inc.*,[54] an attorney simultaneously represented the debtor and one of the debtor's major shareholders. The bankruptcy court held that this conflict was sufficiently significant to require denial of all attorney fees for services performed on behalf of the estate.[55]

The prohibition on such dual representation is not absolute however (as so little in this area tends to be). In *Matter of FSC Corporation*,[56] the court held that an impermissible conflict of interest did not exist when a law firm simultaneously represented a Chapter 11 corporate debtor and certain of the debtor's former officers and directors. The Court held that defense of the officers against a suit for securities fraud and misrepresentation was essential to the debtor's efforts to reorganize.[57]

When an attorney formerly represented an insider of the debtor, but had ceased to do so prior to attempting to represent the debtor, courts have been somewhat more lenient. Here, "it is not sufficient to merely

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54. 31 B.R. 842 (Bankr. W.D. Ky. 1983).

55. Similar cases in which a law firm was disqualified or denied compensation due to simultaneous representation of a debtor and one of its insiders include: *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986) (attorney represented both debtor and one of its directors); *In re Freedom Solar Center, Inc.*, 776 F. 2d. 14 (1st Cir. 1985) (attorney represented debtor and new corporation owned by shareholder of debtor which intended to purchase certain of debtor's equipment); *In re Neidig Corp.*, 113 B.R. 696 (D. Colo. 1990); *In re Watson Seafood and Poultry Co., Inc.*, 40 B.R. 436 (Bankr. E.D.N.C. 1984) (attorney represented debtor and his law firm represented stockholder of the debtor); *Matter of Baldwin-United Corporation*, 45 B.R. 378 (Bankr. S.D. Ohio. 1983) (law firm was not permitted to represent debtors for specific insurance purposes while also representing certain nonmanagement directors of the debtors); *In re Coastal Equities, Inc.*, 39 B.R. 304 (Bankr. S.D. Cal. 1984) (attorney represented both debtor and individual who was president and sole shareholder of debtor); *In re Sambos Restaurants*, 20 B.R. 295 (Bankr. C.D. Cal. 1982) (attorney represented corporate debtor in possession and law firm represented a corporation owning all issued and outstanding preferred stock of the debtor).

The general theme of the foregoing cases is also applicable to partnership debtors and their general partners. In *In re D.L. Enterprises*, 89 B.R. 107 (Bankr. C.D. Cal. 1988), in reducing requested fees, the Court stated: "An attorney is at peril when simultaneously representing a partnership and its general partner. The attorney will always be suspect in the eyes of creditors and limited partners as sometimes subordinating the interests of the partnership to benefit the general partner. An attorney who does that is just asking for trouble." 89 B.R. at 110-11. *See also In re W.F. Development Corp.*, 905 F.2d 883, 884 (5th Cir. 1990), *cert. denied sub nom. W.F. Development Corp. v. Office of U.S. Trustee*, 111 S. Ct. 1311 (1991); *In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Kuykendahl Place Associates, Ltd.*, 112 B.R. 847, 850 (Bankr. S.D. Tex. 1989) ("The duty and loyalty of the attorney is to the debtor and not to the partners or individuals that control the partners of the debtor.").

56. 33 B.R. 212 (W.D. Pa. 1983).

57. Similarly, in *In re Stamford Color Photo, Inc.*, 98 B.R. 135 (Bankr. D. Conn. 1989), the court permitted the simultaneous representation of a debtor-in-possession and its president and sole officer. In so doing, the Court opted for the standard set forth by the First Circuit in *In re Martin* (n. 20, *supra*) to the effect that a potential conflict is insufficient to disqualify counsel absent some showing of an actual conflict. The Court also noted that the president in this case was not involved in his own bankruptcy proceeding, as was the case in some cases which have prohibited such dual representation.

identify a conflict of interest arising from prior representation, but the moving party must demonstrate that the conflict must be materially adverse to the estate, its creditors or security holders."[58] Moreover, the party seeking to disqualify opposing counsel carries the burden of establishing that counsel's continuing representation would violate the Model Rules.[59]

Finally, on a somewhat related issue, it has been held that a debtor is not entitled to "hybrid representation" whereby he represents himself *pro se* while represented by counsel at the same time.[60]

G. MAY ONE LAW FIRM REPRESENT AFFILIATED DEBTORS?

A difficult problem arises in dealing with representation of multiple debtors in Chapter 11 reorganizations. On one hand, if cases are consolidated for administrative purposes, it may not seem logical to require a chief executive officer to have to consult with a different attorney when dealing with each one of the affiliated companies. On the other hand, if the affiliates have claims against each other, as will often be the case, many of these affiliates will be in a debtor-creditor relationship which, at least theoretically, is adversarial.

In spite of the clear possibilities for denial of multiple representation in such cases, one commentator has suggested that "employment of professionals in Chapter 11 multiple corporation cases should be interpreted to allow the widest possible latitude in order to permit flexibility in operation of the businesses. Special problems requiring special treatment should be dealt with as they are raised by parties in interest."[61]

Despite the obvious chances for the existence of a conflict of interest when one attorney represents multiple affiliated debtors, such representation is not unusual. However, courts have tended to view this situation more strictly when one debtor in bankruptcy is a creditor of another. In fact, courts have typically disqualified law firms in such situations whether the conflict is actual or merely potential.[62] For example, in *In re*

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58. *In re Quakertown Glass Co.*, 73 B.R. 468, 469 (Bankr. E.D. Pa. 1987). *Accord Cle-Ware Industries, Inc. v. Sokolsky*, 493 F.2d 863 (6th Cir. 1974); *In re Hurst Lincoln Mercury, Inc.*, 80 B.R. 894, 897 (Bankr. S.D. Ohio 1987); *In re Guy-Apple Mason Contractor, Inc.*, 45 B.R. 160, 167-68 (Bankr. D. Ariz. 1984). In permitting representation in these cases, courts often focus on the perceived wasteful expense to the estate of introducing new counsel to the case.

59. *See, e.g., Kroungold v. Triester*, 521 F.2d 763 (3rd. Cir. 1975).

60. *See, e.g., In re Trinsey*, 115 B.R. 828, 832-34 (Bankr. E.D. Pa. 1990).

61. Shapiro, *Ethics and Professional Responsibilities*, ALI-ABA Course of Business Bankruptcies: Recent Developments and Trends (1987).

62. *See, e.g., In re Al Gelato Continental Desserts, Inc.*, 99 B.R. 404 (Bankr. N.D. Ill. 1989) (disqualification and sanctions for simultaneous representation of corporate debtor and its president, who was also a debtor, and who was a substantial unsecured creditor of the corporate debtor); *In re Lee*, 94 B.R. 172 (Bankr. C.D. Cal. 1988) (individual debtor's

Michigan General Corporation,[63] in response to the argument that it would be too expensive to retain separate counsel for each debtor, the Bankruptcy Court stated:

> There is no showing that the services of [the law firm] would be economical. Whether reasonable fees would be sought is only part of the problem. When counsel lacks undivided loyalty, any fee made may be excessive. It is no economy to forego maximizing the value of an individual estate because an unrevealed or competing interests would be thereby impaired. It is false economy to burden that estate with the expense of attorney fees spent in an effort to maintain the group if there is no concomitant benefit.[64]

The Court also noted that a motion had been filed for substantive consolidation which may "vitally affect substantive rights of parties in interest." The Court feared that "the question of whether [substantive consolidation] would be in the best interests of a single estate and its creditors alone may very well have been considered secondary to other, ostensibly larger interests."[65] Based on the foregoing and on the Court's obvious annoyance with the law firm's lack of disclosure of the potential conflict of interest, the Court ordered the law firm to immediately cease its representation of the estates and it denied the firm all compensation.

A contrary (though arguably distinguishable) result was reached in *In re O.P.M. Leasing Services*.[66] In this case, a single trustee and his attorney were appointed to oversee five related Chapter 11 reorganization cases. A full disclosure of potential conflict of interests was made to the Court. The Court held that the mere fact of multiple representation was insufficient to disqualify an attorney unless an actual conflict could be

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offer to waive claim against corporate debtor was unavailing as any such claim was an asset of the estate under §541 of the Bankruptcy Code, and thus belonged to the creditors of the individual debtor); *In re Star Broadcasting, Inc.*, 81 B.R. 835 (Bankr. D.N.J. 1988); *In re Hoffman*, 53 B.R. 564 (Bankr. W.D. Ark. 1985). Of course, as discussed above, many courts have held that a conflict cannot be potential anyway, particularly when one debtor is a creditor of another.

In *In re Lee*, *supra*, the Court adopted the presumption that it is improper, in related cases, to appoint (1) a single trustee, (2) a single creditors' committee, (3) the same counsel for the trustees, committees or debtors-in-possession under any one or more of the following circumstances:

> (a) Where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in guaranties and subordination agreements);
>
> (b) Where there is a substantial overlap of creditors;
>
> (c) Where the affairs of the respective debtors appear to be substantially entangled;
>
> (d) Where assets have been transferred from one debtor to another in transactions that do not appear to be at arm's length;
>
> (e) Where piercing of the corporate veil of one of the debtors is necessary to protect the rights of creditors of another debtor. 94 B.R. at 180.

63. 77 B.R. 97 (Bankr. N.D., Tex. 1987).
64. *Id.*, at 103.
65. *Id.*, at 104.
66. 16 B.R. 932 (Bankr. S.D.N.Y. 1982).

shown. The Court stated:

> The rule is that mere allegations of a conflict of interest on the part of a trustee and/or his counsel, constitute an insufficient basis for disqualification, particularly where there is no actual or potential injury to the estates or interests of creditors. . . . Here the conflict is decidedly more apparent than real and there is no impropriety in the same attorney representing multiple related debtors under the guidance of a single trustee.[67]

The "wait and see" approach has also been adopted in several other cases, most of which have approved the employment of one attorney for multiple debtors.[68] Often courts are influenced by considerations of economy to the estate and the familiarity with all aspects of the debtor's condition which a single attorney can bring to the case.

The *Michigan General* case appears to be in the minority to the extent that it seems to advocate an automatic prohibition upon representation of multiple related debtors by one attorney. However, that the Court was clearly displeased with the law firm's failure to disclose the potential conflict (calling it a "matter of greatest significance") and it may well have grounded its holding on this consideration.[69] For the most part however, the most commonly applied rule seems to be that one attorney can represent separate but related debtors as long as no actual conflict of interest is shown to exist.[70]

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67. *Id.*, at 941.

68. In *In re Vanderbilt Associates, Ltd.* 117 B.R. 678 (D. Utah 1990), a law firm sought approval to represent two limited partnerships in Chapter 11 bankruptcy proceedings, although they had the same general partner (who had separate representation). The Bankruptcy Court held that such dual representation was impermissible, due in part to the fact that, under §723(a) of the Code, each partnership debtor might have a claim against the common general partner. The District Court reversed however, holding that, by virtue of §103(b) of the Code, subchapters I and II of Chapter 7 (which include §723(a)) were applicable only in a case under Chapter 7, and thus would not apply to a Chapter 11 proceeding. Although the Bankruptcy Court identified several other conflicts raised by the dual representation, the District Court considered them all to be potential only, and not actual.

Other cases allowing representation of affiliated debtors include *In re International Oil Company*, 427 F.2d 186, 187 (2nd Cir. 1970); *Katz v. Kilsheimer*, 327 F.2d 633 (2nd Cir. 1964); *In re Guy Apple Mason Contractor, Inc.*, 45 B.R. 160, 166 (Bankr. D. Ariz. 1984); *In re General Coffee, Inc.*, 39 B.R. 7, 8 (Bankr. S.D. Fla. 1984); *In re Iorizzo*, 35 B.R. 465, 468 (Bankr. E.D.N.Y. 1983); *In re Concept Packaging Corp.*, 7 B.R. 606, 609 (Bankr. S.D.N.Y. 1980).

69. While not citing *Michigan General*, the court in *In re Amdura Corp.*, 121 B.R. 862 (Bankr. D. Colo. 1990), though expressing sympathy for the plight of affiliated debtors with common counsel, also appeared to advocate a *per se* prohibition on such multiple representation. The Court stated that "the realities of the commercial world where one attorney at one firm routinely provides legal representation to an entire corporate family" must give way to the mandates of the Bankruptcy Code and its requirement that each debtor be treated as a separate corporate entity with its own assets and obligations to creditors. The Court also appeared to have been influenced by the inter-corporate obligations which existed in that case.

70. As with other areas involving conflicts of interest, courts have examined the issue of

H. DO THE BANKRUPTCY CODE AND BANKRUPTCY RULES APPLY WHEN A THIRD PARTY IS FUNDING COUNSEL FEES?

In some cases, potential debtors and attorneys have arranged for payment or guarantee of counsel fees by third parties (typically, but not always, an insider of the debtor such as an officer, shareholder or general partner). This frequently occurs because the debtor may not have the funds to pay a retainer to prospective counsel. Does such an arrangement permit circumvention of the requirements of Sections 327(a) and 329 of the Code, Bankruptcy Rule 2014(a) concerning disclosure?[71]

Some courts address this issue by focusing on the preliminary issue of whether these provisions are applicable at all. Generally, they have held that, while third party payments are permissible, they do not allow avoidance of the requirements which would otherwise be applicable if the debtor itself were funding counsel fees. In *In re BOH! Ristorante, Inc.*,[72] counsel fees were paid by the debtor's ex-wife. No court approval was sought for employment as required by Section 327(a). The Court first noted that payment of all fees is initially subject to court review under Section 329(a), regardless of source.[73] The Court then held that an attorney for a debtor should be subject to all of the disinterestedness requirements of Section 327(a) as well, even if the fees were paid by a third party.

The result in *BOH! Ristorante* can be justified on several bases. First, Bankruptcy Rule 2014(a) specifically requires, in connection with a

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representation of multiple debtors on their own initiative. For example, in *In re Michigan General, supra*, the law firm attempting to represent multiple debtors was eventually disqualified after "the Court became concerned" about the multiple representation. There was no evidence of any objection to this representation by a reorganization committee or any party in interest.

71. The parameters of an attorney's disclosure requirements as set forth in Bankruptcy Rule 2014(a) are discussed in the following section.

72. 99 B.R. 971 (9th Cir. BAP 1989).

73. Section 329(a) of the Code provides as follows:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

See also, In re Walters, 868 F.2d 665, 668 (4th Cir. 1989); *In re Land*, 116 B.R. 798, 805 (D. Colo. 1990); *In re Furniture Corporation of America*, 34 B.R. 46, 46 (Bankr. S.D. Fla. 1983).

Section 329(a) of the Code represents a change from Section 60(d) of the Bankruptcy Act which restricted review of attorney's fees to "any payment . . . by the bankrupt." Based on this provision, a number of courts declined to review third party funding arrangements in bankruptcy proceedings. *See, e.g., In re O'Bannon*, 484 F. 2d 864 (10th Cir. 1973); *In re D.H. Overmyer Telecasting Co.*, 77 B.R. 128, 170 (Bankr. N.D. Ohio 1987).

court order approving employment under Section 327, that an employment application set forth "any proposed arrangement for compensation." Thus, the drafters of the Code appeared to be contemplating the possibility of third party payment in connection with a Section 327(a) order. Moreover, there does not appear to be any logical reason why the dual Section 327(a) requirements of "no adverse interest" and disinterestedness should *not* apply simply because the fees are not being paid by the debtor.

One issue which can arise in third party payment situations regards the extent to which the third party funds are considered property of the estate. In *In re BOH! Ristorante, Inc., supra*, the Court found that the ex-wife's payment was intended purely as a gift to the debtor. Therefore, despite the finding as to the applicability of Section 327(a), the Court held that estate funds were not involved. Thus, counsel fees were denied under Section 329(b) only to the extent they were "excessive."[74]

By contrast, in *In re Land*,[75] even though *BOH! Ristorante* was cited with approval as to the applicability of Section 327(a) in these cases, the Bankruptcy Court made a factual finding that the third party funder did have an expectation of repayment, and that the payments made should be considered estate property. In this case, the Court considered full denial of fees to be appropriate.[76]

Other cases have implicitly assumed the applicability of Section 327(a), and jumped directly to the issue of whether counsel may be employed at all when there is a third party funder or guarantor. These cases do not focus on Section 327, but instead consider the relationship of the funder to the debtor to decide whether or not that relationship creates an impermissible conflict of interest. Some cases have advocated a *per se*

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74. 99 B.R. at 974. Section 329(b) provides:

> If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
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> (1) the estate, if the property transferred —
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> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

In *Matter of Hargis*, 887 F.2d 77 (5th Cir. 1989), an attorney was paid for post-petition services with life insurance proceeds received by the debtor more than 180 days after the bankruptcy filing. The Fifth Circuit first noted that these proceeds were not property of the estate by virtue of 11 U.S.C. §541(a)(5)(C). Then, in reversing both the Bankruptcy Court and District Court, the Fifth Circuit held that §329(b) was essentially inapplicable to this situation, and that the lower court had no authority to order disgorgement of counsel fees pursuant to this section. *Id.*, at 79. This holding was despite the fact that the attorney was considered to have made improper disclosures. The Court did indicate, however, that the bankruptcy court could have disqualified counsel altogether if it so chose, presumably on account of non-compliance with §327. *Id.* at n. 1.

75. 116 B.R. 798 (D. Colo. 1990).

76. *See also In re Trinsey*, 115 B.R. 828, 834-36 (Bankr. E.D. Pa. 1990) (fees paid by a debtor corporation of which individual debtor was sole shareholder were disallowed).

prohibition on employment where fees were paid or guaranteed by a creditor or insider,[77] while others have advocated a more flexible case-by-case approach.[78]

An example of the latter line of cases is *In re Kelton Motors, Inc.*,[79] in which the Court engaged in a thorough examination of the propriety of third party funding generally. The Court first noted the possible tension created by this situation:

> Many small corporations facing the threshold of the Bankruptcy Court depend upon their key, and many times solvent, insiders to fund the debtor's bankruptcy attorney for the latter's undertaking of vital pre- and post-bankruptcy representation. We counterbalance this pragmatic view with an obligatory uncharitable view, such an arrangement may be leaving the proverbial fox in charge of the hen house. We must be assured the Orwellian eye, the scowling mien, and the inquiring mind of debtor's counsel is focused where it should be —on the debtor's interests.[80]

The Court then proceeded to condition third party funding on a number of conditions precedent, including (1) full disclosure, (2) consent by the debtor, and (3) independent counsel for the funder. Of course, the requirement of separate counsel can lead to anomalous results.[81]

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77. In *Matter of Global International Airways Corp.*, 82 B.R. 520 (Bankr W.D. Mo. 1988), a law firm sought compensation for services rendered to a Chapter 11 debtor. The Court found that the CEO had paid the initial retainer, a fact not disclosed in the original application. The Court concluded that the CEO's payment to the debtor's attorney created a conflict of interest:

> [T]he substance of the transactions are clear. The applicant law firm had been paid, or [was] in the process of being paid, by [the CEO] at the times in question and owed [its] primary allegiance to him, not to the bankruptcy estate from which they now have the temerity to seek recompense on the contention that they have rendered services 'in aid of administration of the estate.' 82 B.R. at 523.

Accord, In re Glenn Electric Sales Corp., 89 B.R. 410, 417-18 (Bankr. D.N.J. 1988); *In re Marine Power and Equipment Co., Inc.*, 67 B.R. 643, 651 (Bankr. W.D. Wash. 1986); *In re WPMK, Inc.*, 42 B.R. 157, 163 (Bankr. D. Ha. 1984) ("an attorney representing a debtor should not receive payment, either directly or indirectly, from any of the creditors"); *In re 765 Associates*, 14 B.R. 449, 451 (Bankr. D. Ha. 1981) ("an attorney representing a general partnership should not render advice to the general partners nor receive compensation from a corporation controlled by a general partner."). *See also In re Senior G and A Operating Co., Inc.*, 97 B.R. 307 (Bankr. W.D. La. 1989) (a case reaching the same result as the foregoing cases even though the insider had merely guaranteed the debtor's counsel fees).

78. *See, e.g., In re Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340, 345 (Bankr. N.D. Ga. 1989); *In re Tiffany Square Assoc.*, 103 B.R. 337, 339 (Bankr. N.D. Ga. 1989) (counsel fees paid by a subsidiary of the debtor which held a controlling interest in the debtor's major unsecured creditor); *In re Olson*, 36 B.R. 74, 76 (Bankr. D. Neb. 1983).

79. 109 B.R. 641 (Bankr. D. Vt. 1981).

80. 109 B.R. at 658.

81. In Section II. F. above, we discussed the difficulties which can arise when attorneys attempt to represent both a debtor and one of its insiders. If the insider then attempts to pay for the fees of debtor's counsel, the problems may only be compounded. In *A Feast For Lawyers*, Sol Stein's angry—and often enlightening — diatribe against the bankruptcy pro-

I. WHAT ARE THE PARAMETERS OF AN ATTORNEY'S DUTY TO DISCLOSE POTENTIAL CONFLICTS?

Bankruptcy Rule 2014(a) requires that any application for employment disclose "any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, [and] any other party in interest."

Not surprisingly, there have been a significant number of cases which have addressed the scope of an attorney's disclosure duty. Also not surprisingly, courts get very upset when they feel that counsel has been less than candid in disclosing potential conflicts. In fact, courts typically analyzed this issue entirely separately from the issue of whether or not a conflict of interest actually existed in the first place. As stated by one Court: "Failure to disclose the facts giving rise to a conflict of interest may be grounds for denial of compensation wholly apart from the act of representing conflicting interests."[82]

Virtually every court addressing this issue has emphasized the importance of the disclosure obligation, and the more, the better. Accordingly, the easy advice would be to have counsel disclose all affiliations with the debtor and/or its creditors and any other information which could conceivably indicate the presence of a potential conflict. Moreover, in theory, the easy advice is the right advice. In practice, however, the matter is obviously not that simple. First, attorneys who are aware of potential conflicts may have far more interest in being employed than in satisfying the judge's definition of appropriate ethical conduct. Thus, there is a natural incentive either to comply with this provision in a minimal way, or to avoid it altogether, even at the risk of sanctions.[83]

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cess generally and Chapter 11 specifically, the author recognizes the initial appeal — but ultimate inadvisability — of this tactic:

> One temptation that besets a lot of executives in closely held companies is to use their own instead of a company's money for a retainer, which is a real no-no. What's important to recognize is that it's a mighty temptation for someone who has lived life as a CEO to solve a financial problem out of its own resources. After all, he will surely get it back . . .
>
> Wrong. For one, the executive lending the money may never see it again. Two, there's a chance that that executive will have to hire another lawyer to represent his personal interests as they may differ from the company's interests (believe me, I've been there), and he will then be in the peculiar position of having paid with his own money the lawyer who may be opposing him in court. *A Feast for Lawyers*, at p.9.

82. *In re Guy Apple Masonry Contractor, Inc.*, 45 B.R. 160, 163 (Bankr. D. Ariz. 1984). *Accord, In re Pierce*, 809 F.2d 1356, 1363 (8th Cir. 1987); *In re Al Gelato Continental Desserts, Inc.*, 99 B.R. 404, 409 (Bankr. N.D. Ill. 1989); *In re BES Concrete Products, Inc.*, 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988); *In re Sixth Avenue Car Care Center*, 81 B.R. 628, 632 (Bankr. D. Colo. 1988); *In re Gray*, 64 B.R. 505, 508 (Bankr. E.D. Mich. 1986); *In re S and T Industries, Inc.*, 63 B.R. 656, 657 (Bankr. W.D. Ky. 1986); *In re Coastal Equities, Inc.*, 39 B.R. 304 (Bankr. S.D. Cal. 1984).

83. As stated by one commentator: "Because attorneys may be denied the opportunity to represent their client from the outset, many downplay their prior dealings and bury the

Second, although courts often pay lip service to the possibility of denying fees for failure to disclose, this sanction is rarely imposed in practice when the court ultimately finds that no conflict of interest or other ethical violation existed.[84] Thus, while there is evidence that non-disclosure or inappropriate disclosure may affect the severity of the sanction, it does not appear to create the sanction by itself.[85]

III. DEBTORS AND ISSUES OF CONFIDENTIALITY

A. INTRODUCTION

The attorney-client privilege applies just as fully when a corporate or individual debtor is in bankruptcy as when it is outside of bankruptcy.[86] There is nothing in the general privilege rules which would create an exception to their existence merely because an entity has filed for bankruptcy. Further, the question of whether the privilege attaches in any given case is a question of fact which cannot be decided in the abstract.[87]

The only relevant Bankruptcy Code provision regarding this issue is Section 542(e) which states:

> *Subject to any applicable privilege*, after notice and a hearing, the court may order an attorney, accountant or other person that holds recorded information, including books, documents, records, and papers relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee. (emphasis added).

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information in the back pages of their application. Since sanctions are neither uniform nor absolute, these underhanded practices many times pay off." Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help*, *supra*, n. 5, at 1737. Of course, in many other cases, there is no disclosure of potential conflicts at all, frequently on the theory that, in the attorney's own opinion, no conflict existed in the first place.

84. Several courts have interpreted the *Guy Apple Masonry* case, *supra*, n. 82, as automatically requiring denial of compensation merely because of non-disclosure. These courts have then proceeded to criticize that result, instead espousing a flexible case-by-case standard dependent on the facts of each case. *See, e.g., In re Roberts*, 75 B.R. 402, 412 (D. Utah 1987); *In re Ochoa*, 74 B.R. 191, 194 (Bankr. N.D.N.Y. 1987). These cases appear to have misread *Guy Apple Masonry* however, because the court in that case did not appear to favor such automatic denial in the first place.

85. By the same measure, when there has been full disclosure in cases where a conflict does exist, courts may appreciate that disclosure, but there is little evidence to suggest that they will change their findings of fact or conclusions of law merely because of the disclosure.

86. *See, e.g., In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, 385 (2nd Cir. 1982). While outside the scope of this article, those interested in the scope of the accountant-client privilege in bankruptcy are referred to Bankruptcy Judge Guy Cole's article, *State-Created Accountant-Client Privilege in Bankruptcy Proceedings*, Bankruptcy Update 1990, 64th Annual Meeting of the National Conference of Bankruptcy Judges, at 8-3.

87. *See, e.g., Trammel v. United States*, 445 U.S. 40, 47 (1980); *Matter of Baldwin-United Corporation*, 38 B.R. 802, 804 (Bankr. S.D. Ohio 1984).

The legislative history to this section states that the duty of an attorney or the professional to turn over papers to the trustee "is subject to any applicable claim of privilege, such as the attorney-client privilege."[88]

While it is clear that the attorney-client privilege may exist in bankruptcy in the first instance, the more difficult issue involves the scope of the privilege as against a trustee in bankruptcy. The legislative history to Section 542(e) states that "the extent to which the attorney-client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case-by-case basis."[89]

B. WHAT EFFECT DOES THE APPOINTMENT OF A TRUSTEE IN BANKRUPTCY HAVE ON THE ATTORNEY-CLIENT PRIVILEGE?

In the Supreme Court case of *Commodity Future Trading Commission v. Weintraub*,[90] the Commodity Future Trading Commission was investigating whether the debtor, Chicago Discount Commodity Brokers ("CDCB"), had engaged in certain securities violations. As part of its investigation, the Commission sought certain testimony from Gary Weintraub, the former attorney to the debtor. Weintraub appeared for his deposition but refused to answer many questions on the grounds of CDCB's attorney-client privilege.

In response to Weintraub's assertion of the privilege, the Commission obtained a letter from the trustee for the debtor in which the trustee waived "any interest I have in the attorney/client privilege possessed by [CDCB] for any communications or information occurring or arising on or before [the date of my appointment as receiver]."[91]

The issue before the court was whether the trustee had the power to waive pre-bankruptcy communications between the debtor and its attorney. The Supreme Court held that the trustee could waive the pre-bankruptcy attorney-client privilege. The Court first noted that, outside of bankruptcy, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."[92] The Court also noted that Section 542(e) was not dispositive. After citing the legislative history to this section, the Court concluded that the "subject to any applicable privilege" clause was "merely an invitation for judicial determination of privilege questions."[93]

In analyzing the relative powers and duties of the trustee versus that of the debtor's directors, the Court concluded that the trustee has "wide-ranging management authority over the debtor" while, in contrast, "the

88. *See* H. R. No. 95-595, 95th Cong. 1st Sess. 369-70 (1977).
89. 124 Cong. Rec. H11, 097 (September 28, 1978); S17, 413 (October 6, 1978).
90. 105 S. Ct. 1986 (1985).
91. *Id.*, at 1990.
92. *Id.*, at 1991.
93. *Id.*, at 1992.

powers of the debtor's directors are severely limited."[94] The Court found that to give the debtor's directors the sole power to waive the privilege "would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors."[95]

Based on these considerations, the Court concluded that "vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code."[96]

The *Weintraub* case may well have the harmful effect of chilling communications between officers and directors of a debtor and the debtor's counsel. Since the attorney may be forced to disclose the substance of conversations with insiders of the debtor if a trustee is appointed who waives the attorney-client privilege, the insiders will be understandably reluctant to discuss anything with the attorney which could be prejudicial to them personally if disclosed at a later date.[97]

A number of interesting privilege issues have arisen as a result of the *Weintraub* case, as parties attempt to maneuver themselves inside or outside the parameters of that decision. First, some corporate officers have attempted to argue that the attorney in question represented them personally as well as the debtor, presumably on the theory that the trustee's waiver power would not extend to this situation. Obviously, whether or not such an implied relationship exists depends on the facts of each case. However, the courts confronted with this argument thus far have not found the existence of an implied relationship.[98]

Second, does the trustee's waiver power apply when an attorney is engaged specifically to give bankruptcy advice?[99] In *Gekas v. Pipin*,[100] the

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94. *Id.*, at 1993.

95. *Id.* The Court also stated that it would be "extremely difficult" for the trustee to conduct its inquiry into the prior affairs of the debtor

> if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. *Id.*, at 1993-94.

96. *Id.*, at 1994. A number of courts have since relied on *Weintraub* in allowing a trustee to waive the attorney-client privilege. *See, e.g., In re Blinder, Robinson and Co., Inc.*, 123 B.R. 900, 906 (Bankr. D. Colo. 1991); *In re Cumberland Investment Corp.*, 120 B.R. 627, 628 (Bankr. D.R.I. 1990).

97. For a general discussion of this issue, *see* Jacobs, *Treatment of the Corporate Attorney-Client Privilege in Bankruptcy*, 35 AM. U L. REV. 773 (Spring 1986).

98. *See, e.g., United States v. Keplinger*, 776 F. 2d 678 (7th Cir. 1985) (Court acknowledged that although the subjective belief of the individual must play some role in the analysis, there must be some "minimal reasonability" to that belief); *In re Cumberland Investment Corp.*, 120 B.R. 627 (Bankr. D.R.I. 1990).

99. Recall that *Weintraub* did not involve pre-petition communications between bankruptcy counsel and corporate management.

debtor's president argued that it did not, partly on the grounds that "shifting control of the privilege will impede the candid flow of information needed for the attorney to afford proper bankruptcy counseling."[101] The District Court rejected this argument however, opining that the *Weintraub* Court would have reached the same result even if confronted with this twist on its facts.

Third, if the trustee *wants* to assert the privilege, may it do so even if its corporate predecessor could not? In *Pryor v. Schneider*,[102] the defendants, former shareholders of the debtor corporation, sought to depose the lawyer who represented the debtor and one of the defendants. The Chapter 7 trustee asserted the attorney-client privilege on behalf of the lawyer. The Court first noted that the corporation itself could not have asserted the privilege since "the joint representation exception to the attorney-client privilege applies and neither party may assert the privilege against the other as to any communication made with respect to that transaction."[103] The Court then held that if the corporation itself could not assert the privilege, then the trustee could not do so either.

Finally, although it does not appear to have yet come before the courts, another issue which arises in light of the *Weintraub* case regards control of the privilege in a Chapter 11 case where there is no trustee. Although the debtor presumably controls the privilege, its control is in its capacity as debtor-in-possession and not in its capacity as a prepetition debtor. In theory, the debtor-in-possession has the obligation to retain or waive the privilege only as it may serve the interests of other creditors, and not its own interest.

In view of the obvious lack of incentive for a debtor-in-possession to waive the privilege when it would merely benefit other parties, but would not inure to its own benefit, one commentator has stated:

> I doubt that debtors in possession (or their counsel) can be depended upon to sacrifice their own interests to the interests of the creditors in these cases. But at the very least, it would seem that counsel for the debtor in possession is under a duty to warn her client that this 'privilege' which he may enjoy will vanish if there is ever a trustee.[104]

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100. 69 B.R. 671 (N.D. Ill. 1987).

101. *Id.*, at 673.

102. 106 B.R. 352 (E.D.N.Y. 1989).

103. *Id.* at 353.

104. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM BANKR. L.J. 355, 389 (1986).

IV. REORGANIZATION COMMITTEES AND CONFLICTS OF INTEREST

A. SERVING ON THE COMMITTEE

1. Introduction

Section 1102 of the United States Bankruptcy Code, provides for the appointment, by the United States Trustee, of a committee of creditors and/or equity security holders.[105] A creditors' committee "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee."[106] Section 1103(c) of the Bankruptcy Code provides that a committee appointed under Section 1102 may:

(1) consult with the trustee or debtor-in-possession concerning the administration of the case;
(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections

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105. Section 101(10)(A) of the Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Section 101(5)(A) in turn defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."

By virtue of the forgoing, the mere fact that a claim may be disputed does not, by itself, prevent a creditor from sitting on a committee. *See, e.g., In re Grynberg*, 10 B.R. 256, 257 (Bankr. D. Col. 1981).

106. Section 1102(b)(1). Section 1102(b)(2) makes a similar provision for equity committees. Prior to 1984, the definition of "person" under the Code excluded governmental units: " 'Person' includes individual, partnership and corporation, but does not include governmental units." This meant that agencies such as the Federal Deposit Insurance Corporation could not sit on creditors' committees. *See, e.g., Matter of Baldwin-United Corp.*, 38 B.R. 802, 806 (Bankr. S.D. Ohio 1984). However the Bankruptcy Amendments and Federal Judgeship Act of 1984 added the following proviso to the definition of "person":

> *Provided, however*, that any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title. §101(41).

With the dramatic increase in bank and savings and loan failures in the late 1980's and early 1990's, this amendment has taken on added significance. Without it, agencies such as the Resolution Trust Corporation (which did not even exist as of the 1984 Amendments) and the FDIC would continue to be barred from committee participation as was the case in *Baldwin-United*. Of course, governmental units not falling within the exception have continued to be excluded from committees even after the 1984 Amendments. *See, e.g., In re VTN, Inc.*, 65 B.R. 278, 279 (Bankr. S.D. Fla. 1986).

of a plan;
(4) request the appointment of a trustee or examiner under §1104 of this title; and
(5) perform such other services as are in the interest of those represented.

The common theme running through the cases addressing the obligations of parties serving on reorganization committees is that such parties must fulfill their fiduciary obligations to the class of creditors or interest holders which they have been selected to represent. In assuring that committee members are able to fulfill these obligations, courts have been particularly wary of allowing committee members to be placed in a position whereby they might be subject to conflicting loyalties or interests. For example, in *In re Johns-Manville Corp.*,[107] the court stated:

> [I]t is well-established that a holder of a claim or an equity interest who serves on a committee undertakes to act in a fiduciary capacity on behalf of the members of the class he represents. The Supreme Court has cautioned that the 'whole body of law' imposes 'the most rigorous responsibilities for fair dealing' on fiduciaries who represent the rights of others. *Young v. Higbee Co.*, 324 U.S. 204 (1945).
>
> In the case of reorganization committees, these fiduciary duties are crucial because of the importance of committees. Reorganization committees are the primary negotiating bodies for the plan of reorganization. They represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituent's interest. Empowered by Section 1103(c) [of the United States Bankruptcy Code] committees . . . [are given] . . . a wide and important array of authority indicating the intent to create a significant and central role for committees in carrying out a reorganization.
>
> Accordingly, individuals constituting a committee should be honest, loyal, trustworthy and without conflicting interests, and with undivided loyalty and allegiance to their constituents. Conflicts of interest on the part of representative persons or committees are thus not to be tolerated. Thus, where a committee representative or agent seeks to represent or advance the interest of an individual member of a competing class of creditors or various interests or groups whose purposes and desires are dissimilar, this fiduciary is in breach of his duty of loyal and disinterested service.[108]

The cases addressing the issue of which entities are entitled to serve on reorganization committees bear out the themes discussed in the *Johns-Manville* case.

2. May One Person Serve on Separate Committees in a Single Case or Jointly Administered Proceeding?

In certain cases there may be multiple committees, such as a creditors'

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107. 26 B.R. 919 (Bankr. S.D.N.Y. 1983).
108. 26 B.R. at 924-925.

committee and an equity security holders' committee. Other times, there may be affiliated debtors, each having its own committee. These situations raise the question of the extent to which a single individual may serve on more than one committee within a single bankruptcy proceeding. The only reported case which appears to have directly addressed this issue is an early Bankruptcy Code case, *Matter of Proof of the Pudding, Inc.*[109] There, the Bankruptcy Court, in denying such dual representation, stated that "[t]hose creditors serving on more than one committee will be called on to represent ofttimes competing interests. Their attempts to reconcile these competing interests could very well be to the detriment of other creditors and the respective debtors."[110] While there were multiple debtors in *Proof of the Pudding*, it would seem that the Court's holding would be equally applicable in a case involving a single debtor having multiple committees. However, the more difficult issue—and one which tends to link many of the cases involving ethical considerations in bankruptcy—is whether a potential conflict of interest in this situation should be tantamount to a *per se* prohibition on dual membership, or whether each case should be analyzed on its own merits.[111]

3. Do Separate But Related Debtors Require Separate Committees?

The Bankruptcy Code neither mandates nor precludes multiple creditors' committees in a proceeding involving related debtors.[112] However, under Section 1102(a)(1), in addition to the unsecured creditors' committee, the bankruptcy court "may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate."[113] Here the guideline should be to assure adequate representation of all creditor and equity groups. Although the Code suggests that committees will "ordinarily" consist of the seven largest claim or interest holders,[114] this is not a requirement.[115]

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109. 3 B.R. 645 (Bankr. S.D.N.Y. 1980).

110. *Id.*, at 649. The *Proof of the Pudding* case was cited with approval in *In re White Motor Credit Corp.*, 18 B.R. 720 (Bankr. N.D. Ohio 1980).

111. For example, in *White Motor*, the Court reached its decision only after demonstrating that actual, and not merely hypothetical, conflicts of interest existed. In *Proof of the Pudding*, on the other hand, the Court did not attempt to demonstrate the specific conflicts which may have existed. The mere potential for such a conflict was sufficient to require that there be no overlapping creditor representation on separate committees. The *per se* approach versus the case-by-case approach is further discussed above at Section II.B.

112. *See, e.g., In re Salant Corp.*, 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985).

113. Similarly, §1102(a)(2) provides that "on request of a party in interest, the court may appoint additional committees of creditors or equity security holders if necessary to assure adequate representation of creditors or of equity security holders."

114. 11 U.S.C. §1102(b).

115. Prior to the enactment of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, there was a §1102(c) which provided that the bankruptcy court could change the size or membership of a committee "if the membership of

There has been some disagreement among the cases regarding the appropriate interpretation of Section 1102 in cases involving affiliated debtors. Most have held that the court ultimately has discretion both as to the number and size of the committees, depending on the facts of each case. For example, in *In re ORFA Corp. of Philadelphia*,[116] a parent company and two subsidiaries were in Chapter 11. The Court was presented with a motion to appoint a creditors' committee for one of the subsidiaries, even though a committee already existed to serve all three entities. The Court denied the motion largely on the ground that there was insufficient evidence that the three debtors had ever been viewed as distinct entities.[117]

Similarly, in *In re Salant*,[118] the Office of the United States Trustee appointed a single creditors' committee composed of seventeen creditors of three affiliated debtors. A union group applied to have a separate Employee Creditors' Committee appointed on the grounds that the interests of the non-management employees were too diverse from the interests of the general trade and institutional creditors to be adequately represented by the creditors' committee. The Court held that the employees' claims were not large enough to warrant a separate committee. Instead, the Court exercised its option to add three employees to the existing committee.[119]

Despite the foregoing cases, some courts have held that in cases involving multiple debtors, separate committees are either required *per se*, or at least presumptively required. In *In re White Motor Credit Corp.*,[120] the Court stated that "as a matter of law," Section 1102 of the Code requires that each case have its own court-appointed creditors' committee.[121]

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such committee [was] not representative of the different kinds of claims or interests to be represented." This provision became unnecessary when authority to appoint committees was vested with the United States trustee and not the bankruptcy court.

116. 121 B.R. 294 (Bankr. E.D. Pa. 1990).

117. *Id.*, at 297.

118. 53 B.R. 158 (Bankr. S.D.N.Y. 1985).

119. *See also, In re McLean Industries, Inc.*, 70 B.R. 852, 861-62 (Bankr. S.D.N.Y. 1987). A number of cases, while not involving multiple debtors, or requests for additional committees specifically for that reason, have nevertheless emphasized the bankruptcy court's discretion in this area. Not coincidentally, requests for multiple committees have arisen in some of the largest bankruptcy cases yet filed in this country. These cases (most of which have denied requests for additional committees in single creditor cases) include *In re Sharon Steel Corp.*, 100 B.R. 767 (Bankr. W.D. Pa. 1989); *In re Public Service Company of New Hampshire*, 89 B.R. 1014 (Bankr. D.N.H. 1988); *In re Johns-Manville*, 68 B.R. 155, 163 (S.D.N.Y. 1986); *In re Baldwin-United Corp*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983); *In re Shaffer-Gordon Associates*, 40 B.R. 956, 958-59 (Bankr. E.D. Pa. 1984); *In re Daig Corp.*, 17 B.R. 41 (Bankr. D. Minn. 1981). In *In re Texaco, Inc.*, 79 B.R. 560, 562 (Bankr. S.D.N.Y. 1987), there was a single general unsecured creditors committee for three related debtors, although the Court did not specifically discuss the propriety of this procedure. The issue of the permissibility of conflicts among creditors within a committee is discussed more fully in the following section.

120. 18 B.R. 720 (Bankr. N.D. Ohio 1980).

121. *Id.*, at 722. The Court opined that "creditors of one debtor cannot be presumed to

A case finding broader support than *White Motor* is *In re Parkway Calabasas Ltd.*.[122] In that case, the Court was frustrated by the lack of opposition to the debtors' motion for substantive consolidation, which operated to the detriment of one of the debtors. Accordingly, *sua sponte*, the Court stated in dictum that there must be a presumption against the appointment of a single committee or trustee in multiple debtor cases in any of the following circumstances:

> (a) Where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in guaranties and subordination agreements);
> (b) where the affairs of the respective debtors (as reflected in inter-debtor accounts, jointly owned assets, guarantees, subordination agreements, or shared officers, directors or owners) appear to be substantially entangled;
> (c) where assets have been transferred from one debtor to another in transactions that are not at arm's length;
> (d) where piercing of the corporate veil of one of the debtors is necessary or advisable to protect the rights of creditors of another debtor.[123]

4. May Creditors Within a Committee Have Interests Which Conflict With Those of Other Committee Members or of the Debtor?

A related, but conceptually distinct, issue from that addressed in the previous section is the extent to which a creditor or interest holder in a single-debtor proceeding may serve on a committee when such creditor has views which are either (a) opposed to other committee members regarding the debtor's fate (even if all such creditors are similarly situated) or (b) opposed to the debtor's own views regarding reorganization strategy.[124] Most courts (though not all, as will be seen) have held that opposing interests within a committee or between the debtor and the committee member are acceptable, so long as the committee members fulfill their fiduciary duty to those they represent. Thus, in *Matter of Schatz Federal Bearings Co. Inc.*,[125] in allowing the debtor's labor union to serve on the creditors' committee, the court stated:

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have a material or other qualifying interest in the assets or future of an affiliated debtor." *Id.* The only cases which have cited *White Motor* have both declined to follow its holding. *See In re ORFA Corp. of Philadelphia, supra*, n. 116; *In re McLean Industries, Inc.*, 70 B.R. 852, 861-62 (Bankr. S.D.N.Y. 1987), *supra*, n. 119.

122. 89 B.R. 232 (Bankr. C.D. Cal. 1988).

123. 89 B.R. at 835, n. 3. The *Parkway Calabasas* case has since been cited with approval in several cases, including *In re BH and P, Inc.*, 103 B.R. 556, 570-72 (Bankr. D.N.J. 1989) (Court added intra-debtor claims as a fifth circumstance where it would be presumptively inappropriate to have common fiduciaries or professionals), *aff'd*, 119 B.R. 35 (D.N.J. 1990).

124. The issue of whether a competitor of the debtor may sit on a committee is discussed in the following section.

125. 5 B.R. 543 (Bankr. S.D.N.Y. 1980).

> [I]n many instances the interests of creditors who are also members of the Official Creditors Committee are not parallel to one another, or to the debtor. Some creditors may desire to continue the debtor's business as a source of supply or as a customer, while others may wish to liquidate the debtor rather than accept anything less than a 100% distribution.[126]

Courts have also allowed creditors to serve on committees even when they have an articulated antipathy towards the debtor's reorganization efforts. For example, in *In re M.H. Corporation*,[127] an attorney representing several committee members in a Chapter 11 reorganization stated, at a meeting of creditors, that "he and his clients would object to any plan the debtor proposes, and would just as soon see the case proceed as a Chapter 7 liquidation, for they feel that the debtor would not live up to anything."[128] When the debtor objected to the presence of this attorney on the creditors' committee, the Court (after noting that a debtor does not have standing in the first place to challenge the composition of a creditors' committee) held that as long as any committee member was representative of certain creditors, its appointment to the committee would not be denied.[129]

Some courts have allowed creditors with conflicting interests to serve on a committee only so long as the conflict with the debtor was merely speculative and not actual. For example, in *Matter of Enduro Stainless, Inc.*,[130] the Court, relying on *In re Altair Airlines*,[131] held that the United Steelworkers Union was entitled to be appointed to the unsecured creditors' committee. The Court noted that to deny the Union's motion

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126. *Id.*, 5 B.R. at 548. *Accord, In re Altair Airlines Inc.*, 727 F.2d 88, 90 (3rd Cir. 1984) ("Conflicts of interest [among committee members] are not unusual in reorganizations. Materialman creditors, for example, may sometimes prefer to forego full payment for past sales in hopes of preserving a customer, while lenders may prefer liquidation and prompt payment"); *In re Sharon Steel Corp.*, 100 B.R. 767, 777 (Bankr. W.D. Pa. 1989); *In re Public Service Company of New Hampshire*, 89 B.R. 1014, 1019 (Bankr. D.N.H. 1988) ("The existence of strong and diverse views is not per se a disqualification for service on a creditors' committee in a chapter 11 proceeding."); *In re McLean Industries, Inc.*, 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987); *In re Northeast Dairy Co-Op Federation*, 59 B.R. 531, 533 (Bankr. N.D. N.Y. 1986); *Matter of Baldwin-United Corp.*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983).

127. 30 B.R. 266 (Bankr. S.D. Ohio 1983).

128. *Id.*, at 267. In this regard, it has been held that a committee has standing to object to a plan of reorganization even when the committee's constituent members vote in favor of the plan. *See In re Central Medical Center, Inc.*, 122 B.R. 568, 570-71 (Bankr. E.D. Mo. 1990).

129. *Accord, In re Microboard Processing, Inc.*, 95 B.R. 283, 286 (Bankr. D. Conn. 1989) (debtor's inability to negotiate with certain committee members regarding formulation of a plan was insufficient grounds to justify their removal from the committee); *In re Daig Corp.*, 17 B.R. 41, 43 (Bankr. D. Minn. 1981) ("[T]he creditors' committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposely intended to represent the different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relations with the debtor may be supportive and friendly.").

130. 59 B.R. 603 (Bankr. N.D. Ohio 1986).

131. 727 F.2d 88 (3rd Cir. 1984).

based upon the mere possibility of conflicting loyalties "would result in disqualification of almost every creditor."[132]

The Court then stated however, that "the Union may not act through the committee to further only its self-interests, but until such actions are brought to the Court's attention, the Court will not deny its application based on mere assumptions."[133] Apparently the Court was not persuaded that an actual conflict of interest already existed, despite the fact that the union: (a) was unavailable for negotiations with management; (b) had met with a competitor regarding an employee buy-out of the plant; (c) had indicated that it was considering requesting the appointment of a trustee; (d) would probably oppose any rejection of the labor contract; and (e) was involved in pending NLRB litigation against the debtor. The Court stated that it "should not deny a creditor a position on a creditors' committee based upon speculation."[134]

On the other hand, some courts, albeit under unique circumstances, have found that potential conflicts with the debtor were sufficient to warrant keeping a creditor off a committee in formation. For example, in *In re Allied Delivery Systems Co.*,[135] the Court held that the obvious hostilities existing between the debtor and the union constituted sufficient grounds to deny the union's application for appointment to the creditors' committee.[136] In *In re Charter Co.*,[137] the court removed a holder of preferred shares in the debtor from the unsecured creditors' committee due to a high likelihood of a conflict of interest with the committee. However, the court expressed doubt as to whether one's status as an equity security holder, even as to preferred shares, bestowed upon such person the status of "creditor" in the first place.[138]

5. May a Competitor of the Debtor Serve on a Creditors' Committee?

Occasionally, a creditor has interests which are "adverse" to the debtor, not merely because of the indebtedness, but also because of the creditor's status as a competitor of the debtor. As with virtually all areas in the murky world of conflicts in bankruptcy, one can find different courts reaching differing conclusions here as well. In *In re Wilson Foods Corporation*,[139] FDL Foods Company, a creditor of the debtor, moved to

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132. *Id.*, at 605.

133. *Id.*

134. *Id. See also In re Richmond Tank Car Co.*, 93 B.R. 504 (Bankr. S.D. Tex. 1988 (court allowed a creditor with a disputed claim who was engaged in state court litigation with the debtor to sit on the creditors' committee, though the court implied that removal might become appropriate if an actual, as opposed to potential, conflict of interest arose).

135. 52 B.R. 85 (Bankr. N.D. Ohio 1985).

136. In *Allied Delivery*, the union had filed an unfair labor practices charge against the debtor prior to the bankruptcy filing.

137. 44 B.R. 256 (Bankr. M.D. Fla. 1984).

138. *Id.*, at 258.

139. 31 B.R. 272 (Bankr. W.D. Ok. 1983).

be placed on the creditors' committee. The debtor objected on grounds that FDL was a significant competitor of the debtor in the pork processing business and that FDL's inclusion on the committee would "impair its willingness and ability to deal candidly with the committee . . . [and] . . . would impair reorganization [since the debtor] would need to protect confidential matter provided to the committee."[140]

The Bankruptcy Court agreed with the debtor:

> Whoever FDL might select as its representative would need to serve conflicting interests between two constituencies — the Wilson creditors on one hand and the FDL shareholders on the other. Conflicting interest and divided loyalties have no place on a committee of creditors.[141]

In *In re Plant Specialties, Inc.*,[142] however, the Court allowed a competitor of the debtor to serve on the creditors' committee. The court distinguished *Wilson Foods* on the grounds that the stockholder of the competing corporation in *Plant Specialties* owned all of the stock in his company "so that he would not face the pressure from shareholders that concerned the *Wilson Foods* court."[143] The Court also stated that "in many cases it can be advantageous to the debtor to have a competitor on the creditors' committee. [The competitor], because of the familiarity with the industry, may have insight into the affairs of the debtor which will be beneficial to the reorganization efforts, and thus to both the debtor and the creditors."[144]

One other court has also permitted competitors of the debtor to sit on the creditors' committee. In *In re Map International, Inc.*,[145] the court stated that "it is well established that the mere fact of competitor status is insufficient to disqualify a creditor from serving on the creditors' committee. Rather, the party seeking to exclude a creditor bears the burden of proving that the creditor's appointment will be detrimental to the debtor's reorganization efforts."[146]

6. May a Lawyer Serve on a Reorganization Committee?

The issue of a lawyer's ability to serve on a committee can arise either

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140. *Id.*, at 272.
141. *Id.*
142. 59 B.R. 1 (Bankr. W.D. La. 1986).
143. *Id.*, at 2.
144. *Id.* Of course, it takes somewhat of a leap of faith to conclude that the competitor will use such familiarity to the debtor's advantage. Depending on the ethics of the party involved, the size of the creditor/competitor's claim may be a factor in this determination.
145. 105 B.R. 3 (Bankr. E.D. Pa. 1989).
146. *Id.*, at 4. Calling this proposition "well established" is a bit of an overstatement since so few cases have addressed this issue. Moreover, *Collier* notes that direct proof of abuse of position is not required for removal: "If there is a significant degree of competition between the debtor and the committee member in a case in which the committee would have access to confidential information, the committee member should be removed." 5 *Collier on Bankruptcy*, §1102.01[6] (15th ed. 1991) at 1102-21.

when the lawyer has its own claim for prepetition services, or when the lawyer has no independent claim of its own, but is representing a client. With respect to the former situation, it may appear, at first blush, that there should be no reason an attorney should not be as free to protect its interests as any other creditor. However, other creditors are not bound by the Code of Professional Responsibility which requires a lawyer to "preserve the confidences and secrets of a client."[147] In *In re Featherworks Corporation*,[148] the Court permitted a law firm which had represented the debtor prepetition to be on the unsecured creditors' committee, despite the court's concern that such a situation could place the firm in an inherently compromising position. The debtor's objections were on grounds other than the attorney-client privilege however, and thus the case should not be construed as holding that the attorney-client privilege is subordinate to Section 1102 of the Code. The Court did note an exception to the lawyer's privacy obligations to his client when the lawyer has not been paid for services. More specifically, under D.R. 4-101(C)(4), a lawyer may reveal confidences and secrets where it is necessary in order to establish or collect a fee.[149]

When an attorney has no claim of its own, it has generally been held that that attorney may still serve on a creditors' committee on behalf of a creditor.[150] The Courts have reasoned that any conflicting loyalties on the part of the attorney would exist to an equal degree if the creditor itself sat on the committee. Similarly, *In re M.H. Corporation*,[151] the Court stated that, although it ordinarily encouraged business persons to sit on the committee, an attorney could serve in their place if the creditors so desired.

When an attorney sits on a committee while representing a client, he must be careful not to use the committee as a conduit for advancing his client's own interests at the expense of the class he represents. A classic

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147. Canon 4, Code of Professional Responsibility. The Ethical Considerations also note that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment" (EC 4-6) and that "a lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client, and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." (EC 4-5).

148. 25 B.R. 634 (Bankr. E.D.N.Y. 1982), *aff'd*, 36 B.R. 460 (E.D.N.Y. 1984)

149. *Id.*, at 644. After all, while ethics are worthy, the line must be drawn somewhere. Payment of counsel fees seems as good a place as any.

On a related note, §702(a) of the Code provides that any creditor may vote for a candidate for trustee in Chapter 7 proceeding unless the creditor is an insider. A few courts have held that an attorney is an insider for purposes of this provision (notwithstanding that an attorney would not ordinarily fit within that term as defined in §101(31) of the Code), and thus may not vote for a trustee. *See, e.g., Matter of Montagna*, 31 B.R. 10, 11 (Bankr. W.D Pa 1983); *Beale v. Snead*, 81 F.2d 970 (4th Cir. 1936), *cert. denied*, 298 U.S. 685 (1936); *In re Deena*, 114 F. Supp. 260, 268-69 (D. Me. 1953).

150. *See, e.g., Matter of J.L.N. Distributors, Inc.*, 330 F.2d 825 (2nd Cir. 1964); *Arrow Dairy Co. v Chase Superior, Inc.*, 116 F.2d 573 (2nd Cir. 1941).

151. 30 B.R. 266 (Bankr. S.D. Ohio 1983).

example of such conduct occurred in the Johns-Manville bankruptcy.[152] An attorney who sat on the Asbestos Committee sought to advance a state court action which had been instituted prepetition on behalf of his client. The Court first held that by proceeding with the state court litigation, the attorney was in violation of the automatic stay granted by Section 362 of the Bankruptcy Code. However, the Court was far more perturbed by the breach of the attorney's fiduciary responsibilities. In imposing sanctions against the attorney, the Court stated:

> Mr. Sweeney is taking actions which are designed to benefit his client Doan and/or his own private interests in particular as opposed to benefitting all members of the asbestos claimants class which he represents as a committee member and fiduciary. The interests of one asbestos litigant in one action can divert substantially from the interests of all asbestos claimants. . . . As a member of the Asbestos Committee, Mr. Sweeney has access to all sorts of confidential information regarding, *inter alia*, the details of proposed reorganization plans and the debtor-in-possession's operations, which information is not intended to be used in fostering the rights of private litigants outside the context of protecting these creditors as a group in these bankruptcy proceedings. This confidential position should not be so misused by Mr. Sweeney. Indeed, it may be viewed that, in this regard, Mr. Sweeney is using his fiduciary capacity to foster his own self-interest as a private attorney, a breach of loyalty which is to be condemned.[153]

Similarly, in the recent case of *Matter of Celotex Corp.*,[154] the court was advised that, while an asbestos personal injury creditors' committee was composed of the claimants themselves, the actual functioning members of the committee were the claimants' respective attorneys. In refusing to condone this practice, the Court stated:

> [A] creditors' committee has a fiduciary duty to its constituency. Committee counsel has a fiduciary duty to the committee and the creditors it represents. Because in this case committee participation is not by the appointed members but by their legal representatives, an anomaly arises. Each legal representative who sits on the committee has a fiduciary duty to its own client/member as well as a fiduciary duty to the committee and each of its constituents.[155]

7. May Insiders of the Debtor Serve on the Reorganization Committee?

"Insiders" of the debtor are those parties who might logically be ex-

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152. *In re Johns-Manville Corp.*, 26 B.R. 919 (Bankr. S.D.N.Y. 1983).

153. *Id.*, at 926. *See also, A.H. Robins Co. v. Piccinin*, 788 F. 2d 994, 1015 (4th Cir. 1986) ("[T]he Committee is not authorized to represent the individual interests of any claimant, as distinguished from the individual interests of all claimants.").

154. 123 B.R. 917 (Bankr. M.D. Fla. 1991).

155. *Id.*, at 921-922.

pected to be privy to certain confidential information and might have certain loyalties which conflict with those of other creditors having only an arms-length relationship with the debtor. Because of these concerns, most courts addressing this issue have precluded insiders from serving on reorganization committees.[156]

However, in *In re Vermont Real Estate Investment Trust*,[157] an unsecured creditor was held eligible for an appointment to the creditors' committee despite her status as an insider by virtue of her marriage to the former president and executive manager of the debtor. The court noted that, despite the creditor's status as an insider, she had still satisfied the necessary prerequisites for appointment to the unsecured creditor's committee, namely that she was (a) a creditor, (b) holding a claim, (c) which was unsecured.[158]

8. May a Partially Secured Creditor Serve on an Unsecured Creditors Committee?

In *In re Walat Farms, Inc.*,[159] a creditor held security for its claim, but the creditor was significantly undersecured. The debtor objected to the creditor's motion to be placed on the unsecured creditors' committee on grounds that the nature of the claim was so different from that of other unsecured creditors that it would be inappropriate to place the creditor on the committee. The Bankruptcy Court agreed with the debtor that a conflict of interest was possible, such as in a situation where the bank, wearing its secured creditor hat, moved for relief from the stay in a single-asset proceeding. This would mean that a member of the committee was making reorganization impossible.[160]

Under the facts of this case however, no actual conflict had been shown to exist. Using the "wait until the potential conflict becomes an actual conflict" approach,[161] the Court allowed the creditor to be ap-

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156. *See, e.g., In re Swolsky*, 55 B.R. 144, 146 (Bankr. N.D. Ohio 1985); *In re Glendale Apartments, Ltd.*, 25 B.R. 414, 415. (Bankr. D. Md. 1982); *In re Daig*, 17 B.R. 41 (Bankr. D. Minn. 1981); *In re Penn-Dixie Industries, Inc.*, 9 B.R. 941, 944-45 (Bankr. S.D.N.Y. 1981); *In re Realty Associates Securities Corp.*, 56 F. 1008 (E.D.N.Y 1944), *aff'd* 156 F.2d 480 (2nd Cir. 1946); *In re International Railway Co.*, 86 F. Supp. (W.D.N.Y. 1949).

157. 20 B.R. 33 (Bankr. D. Vt. 1982).

158. *See also, In re Nyack Autopartstores Holding Co., Inc.*, 98 B.R. 659, 661 (Bankr. S.D.N.Y. 1989) ("An insider is not precluded by 11 U.S.C. §1102(b)(1) from appointment to the committee if the insider holds one of the seven largest claims against a debtor."). The maxim that the three elements cited in *Vermont Real Estate* are necessary for appointment to a committee was first set forth in *In re Bennett*, 17 B.R. 819, 820 (Bankr. D.N.M. 1982), and has been restated by several courts since then. However, such a principle is peculiar since a creditor, by definition, has a claim, either against the debtor or against the estate. *See* §101(10) of the Code and n. 105, *supra*. Thus, one of the three requirements is superfluous.

159. 64 B.R. 65 (Bankr. E.D. Mich. 1986).

160. *Id.*, at 69-70.

161. *See* n. 24, *supra*.

pointed to the unsecured creditors' committee.[162] The Court noted that the Advisory Committee Note to Official Bankruptcy Form No. 9, the "list of creditors holding twenty largest unsecured claims," states that a "secured creditor should be listed among the twenty largest unsecured creditors only if that creditor's claim is sufficiently undersecured so as to fall within that category."[163]

B. REPRESENTATION OF REORGANIZATION COMMITTEES

1. Introduction

One of the prime considerations involved in representing parties in interest, including reorganization committees in bankruptcy, is that "a lawyer should avoid even the appearance of professional impropriety."[164] Therefore, even when an actual conflict of interest has not yet been shown to exist, courts may frequently disqualify an attorney from representing a reorganization committee (or, for that matter, debtors) where there is a mere appearance of a conflict.

A leading example of this situation is described in *Woods v. The City National Bank & Trust Co. of Chicago*.[165] In that case, the attorney for the bondholders' committee was also counsel to the indenture trustee. In denying counsel fees, the Supreme Court stated:

> Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules is apposite here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil [which] results but their tendency to evil in other cases." Furthermore, the incidence of a particular conflict of interests can seldom be measured with any degree of certainty. . .
>
> A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary

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162. The Court indicated that if a clear conflict did arise, it could reconsider the issue of the propriety of the secured creditor's appointment to the unsecured creditors' committee.

163. *See also*, 5 *Collier on Bankruptcy* ¶1102.01[2] at p. 1102-10 ("Neither §1102(c)(1) nor §1102(b)(1) prohibits the appointment to the §1102(a)(1) committee of persons holding both unsecured claims and secured claims or ownership interests.").

Walat Farms appears to be the only Code case which has specifically addressed this issue, although its holding was cited with approval in *In re Sharon Steel Corp.*, 100 B.R. 767, 778-79 (Bankr. W.D. Pa. 1989). In a case decided under the Bankruptcy Act of 1898, *In re Ascot Textile Corp.*, B.L.R. ¶64, 427 (S.D.N.Y. 1972), the court permitted a creditor whose collateral was of trivial value to serve on the unsecured creditors' committee.

164. *See* Canon 9 of the Code of Professional Responsibility, n. 2, *supra*, and accompanying text.

165. 312 U.S. 262 (1941).

> loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries at a higher level than that trodden by the crowd.[166]

The *Woods* case presaged the prohibition of "even the appearance of professional impropriety" now found in Canon 9 of the Code of Professional Responsibility. While *Woods* did not address conflicts of interest involving representation of debtors, the pronouncements of that case are often cited in conflict of interest cases which do involve debtors.

2. May One Attorney or Law Firm Simultaneously Represent (a) More than One Committee or (b) a Committee and an Individual Creditor?

Section 1103(b) of the Code provides as follows:

> An attorney or accountant employed to represent a committee appointed under §1102 of this title, may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

The second sentence of Section 1103(b) was added pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984.[167] Prior to the 1984 Amendments, it was generally held that Section 1103(b) constituted an absolute prohibition to simultaneous representation by an attorney or law firm of either two committees or one committee and an individual creditor.[168]

The effect of the 1984 Amendments was to weaken the absolute prohibition on simultaneous representation by counsel (1) for a creditors' committee and (2) for creditors in a matter adverse to the interests of other creditors in the case. However, the Amendments did not alter the prohibition of counsel representing an individual creditor and a commit-

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166. *Id.*, at 268-269 (citations omitted). The *Woods* case has rightly been called the "seminal conflict of interest case", and is constantly cited as the benchmark conflict of interest case in bankruptcy opinions. *See In re Florida Peach Corporation of America*, 110 B.R. 589, 592 (Bankr. M.D. Fla. 1990).

167. Pub. L. 98-353, 98 Stat. 358, 384. Prior to the 1984 Amendments, §1103(b) read as follows: "A person employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity in connection with the case."

168. *See, e.g., In re Broadcast Management Corp.*, 36 B.R. 519, 520 (Bankr. S.D. Ohio 1983) (court noted that the legislative history indicates that §1103(b) was designed to avoid even potential conflicts of interest and that "the language of the section essentially states a *malum prohibitum* rule which allows for no exceptions."); *In re Saxon Industries, Inc.*, 29 B.R. 320 (Bankr. S.D.N.Y. 1983); *Matter of Combustion Equipment Associates*, 8 B.R. 566 (Bankr. S.D.N.Y. 1981); *Matter of Proof of the Pudding*, 3 B.R. 645 (Bankr. S.D.N.Y. 1980).

tee if the creditor hired counsel to litigate issues potentially adverse to other committee members.[169]

As a result of the 1984 Amendments, most courts now hold that the facts of each case must be independently examined to ascertain whether multiple representation would be appropriate. As stated by one court:

> Where the representation does not entail an actual or potential conflict of interest or present an appearance of impropriety, §1103(b) is not to be interpreted to preclude a committee from engaging counsel of its choice and one in whom it has confidence will best serve the interests of the creditors represented by the Committee.[170]

Moreover, once a law firm has formally stated that it has complied with Section 1103(b), the burden of proof thereunder is on the party alleging a conflict.[171]

The second sentence of Section 1103(b) probably has no effect on cases such as *Woods v. City National Bank and Trust Co., supra.* An indenture trustee stands in a far different position relative to a reorganization committee than do the constituents that the committee purports to represent. Moreover, the mere fact that there is no longer a *per se* prohibition on simultaneous representation of a committee and one of its members does not mean that such dual representation cannot be prohibited under the facts of any given case.

Notwithstanding the 1984 Amendments, *Collier* suggests a strict interpretation of Section 1103(b):

> In many cases, the objecting party will not be able to prove that a conflict between the committee and the creditor or creditors represented by counsel to the committee is inevitable. It should be sufficient for the objecting party to establish that it is likely a conflict will arise. In such cases, the integrity of the committee process should be protected.
>
> In those cases in which a conflict is likely to arise in the future, permitting counsel for the committee to serve until the conflict is fully manifest may disable the committee at a crucial juncture in the reorganization process. It is unrealistic to expect that a committee can efficiently and effectively find

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169. *See Matter of Oliver's Stores, Inc.*, 79 B.R. 588, 594 (Bankr. D.N.J. 1987); *In re Grant Broadcasting of Philadelphia, Inc.*, 71 B.R. 655 (Bankr. E.D. Pa. 1987).

170. *In Red Lion Capital Group*, 44 B.R. 684, 689 (Bankr. S.D.N.Y. 1984). *Accord In re Rusty Jones, Inc.*, 107 B.R. 161, 163 (Bankr. N.D. Ill. 1989); *In re Heck's Inc.*, 83 B.R. 410, 417 (Bankr. S.D. W. Va. 1988); *In re Roberts*, 46 B.R. 815, 825 (Bankr. D. Utah 1985) ("Multiple representation by attorneys is acceptable unless a creditor objects on grounds that additional circumstances exist which create in those other entities or creditors an interest adverse to that of the committee."); *In re Technology for Energy Corp.*, 53 B.R. 32, 35 (Bankr. E.D. Tenn. 1985); 5 *Collier on Bankruptcy*, ¶1103.03 (15th ed. 1991) at p. 1103-8 ("With respect to attorneys and accountants, the committee may appoint such professional persons to represent the committee so long as any other party represented by such attorney or accountant in connection with the case does not have an adverse interest to the interests represented by the committee.").

171. *See, e.g., In re AOV Industries*, 798 F.2d 491 (D.C. Cir. 1986).

replacement counsel in the middle of a reorganization case. One possible approach to the problem of potential versus actual conflicts is the consent of the individual creditors to the continued representation of the committee by counsel in the event a conflict arises.[172]

3. May a Reorganization Committee Employ More than One Law Firm?

Section 1103(a) of the Bankruptcy Code provides that a committee "may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents to represent or perform services for such committee." Despite this apparently broad authorization for a committee to employ more than one professional, the legislative history states that "this will be the exception, and not the rule; cause must be shown to depart from the normal standard."[173]

In *In re The Bible Speaks*,[174] the Court held that the mere fact that six creditors were evenly divided in their vote for counsel was insufficient to warrant the employment of more than one law firm. The complexity of the case and geographical considerations were also deemed insufficient. The Court did not give any examples as to when "cause" would exist.

In cases which have approved co-counsel, fee applications have often been reduced due to unnecessary duplication of work product.[175]

4. May Separate Committees Retain Separate Professionals Even if Their Work Product May Overlap?

As noted above, Section 1102(a) clearly contemplates the creation of multiple committees in appropriate cases.[176] Section 1103(a) in turn provides that such committees may employ "one or more attorneys, accountants, or other agents, to represent or perform services for such committee." As also noted above, despite this section, one committee may

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172. 5 *Collier on Bankruptcy*, ¶1103.03 at p. 1103-9, 10 (15th ed. 1991). One recent case in this area is in *Matter of XGW Excavating Co., Inc.*, 111 B.R. 469 (Bankr. D.N.J. 1990). There, the Court denied the fees of the attorneys for the unsecured creditors' committee due to its concurrent representation of an undersecured creditor. The Court did allow fees for the period before which the attorneys were notified of the potential conflict by debtor's counsel. *See also In re South Pacific Island Airways*, 68 B.R. 574 (Bankr. D. Haw. 1986) (denial of fees warranted where attorney for creditors' committee did not advise court of potential conflict of interest arising from prior representation of debtor on matters relating to bankruptcy proceeding).

173. H.R. No. 95-595, 95th Cong., 1st Sess. 402 (1977), U.S. Code Cong. and Admin. News 1978, pp. 5787, 6358.

174. 67 B.R. 426 (Bankr. D. Mass. 1986).

175. *See, e.g., In re Yankee Seafood*, 53 B.R. 285, 286 (Bankr. D.R.I. 1985); *In re Sapolin Paints*, 38 B.R. 807, 814-15 (Bankr. E.D.N.Y. 1984).

176. *See*, Section IV.A.3, *supra*.

ordinarily not hire more than one attorney or accountant.

When there are multiple committees however, Section 1103(b) becomes relevant in that it prohibits any person employed to represent a committee from representing any other entity having an adverse interest in connection with the case.[177] Because of this section, the Bankruptcy Court in *In re Saxon Industries, Inc.*,[178] permitted two committees to each employ its own accountant. The Court held that this result was required by Section 1103(b), which was intended to prevent even the possibility of a conflict of interest.[179] The Court did note, however, that the accountants should confer with one another to the extent necessary to avoid duplicative work and wasteful additional costs.

In sum, while one committee will ordinarily be limited to the employment of one attorney, one accountant, and so forth, separate committees may be able to employ their own professional persons if necessary to prevent possible conflicts.

V. REORGANIZATION COMMITTEES AND ISSUES OF CONFIDENTIALITY

A. DOES THE ATTORNEY-CLIENT PRIVILEGE EXIST AS TO COMMUNICATIONS BETWEEN A COMMITTEE AND ITS COUNSEL?

The attorney-client privilege does not attach to all communications between an attorney and his client, but only as to those communications which fall within the parameters of the rule. Thus, the privilege applies only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate; and (b) in connection with this communication is acting as lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client; (b) without the presence of strangers; (c) for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services; or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[180]

The issue of whether communications between a creditors' committee and its counsel fall within the privilege was discussed in *Matter of Bald-*

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177. *See* Section IV.B.2, *supra*.

178. 29 B.R. 320 (Bankr. S.D.N.Y. 1983).

179. *Id.*, at 321.

180. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). *See also Foseco International Ltd. v. Fireline, Inc.*, 546 F. Supp. 22-24 (N.D. Ohio 1982).

win-United Corp.[181] The Court held that the privilege was absolute at least as to those third parties *not* represented by the creditors' committee:

> While we are cognizant of the fiduciary responsibilities which a creditors' committee owes to those it represents, we are unconvinced that the attorney/client privilege is inherently antagonistic to those responsibilities. The purposes underlying the privilege have no less applicability to a creditors' committee than they do to any other entity at least when disclosure of privileged communications is sought by those who are not represented by the committee or who stand in an adversarial relationship with it. If the committee cannot engage in full and frank communications without fear of disclosure to such outsiders, then its work may be seriously hampered to the detriment of those it represents.[182]

When disclosure of communications is sought by those parties who *are* represented by the creditors' committee, the Court held that the privilege should be more narrowly construed. The Court cited with approval *Valente v. Pepsico, Inc.*,[183] in which the Court stated: "A fiduciary owes the obligation to his beneficiaries to go about his duties without obscuring his reasons from the legitimate inquiries of the beneficiaries." The *Baldwin-United* Court held that this situation was analogous to those where shareholders have sought disclosure of privileged information from a corporation in shareholder derivative suits. In these cases many courts have held that the privilege is available to the corporation "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."[184]

The Court in *Baldwin-United* held that the *Garner* doctrine struck the appropriate balance between the creditor's right to information and the committee's need for confidentiality but that

> because of the nature of the relationship, the creditor's dependence upon the committee for information and the underlying purpose of a creditors' committee, we believe that the committee should bear the burden of establishing good cause for not disclosing privileged information to its constituent creditors.[185]

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181. 38 B.R. 802 (Bankr. S.D. Ohio 1984).

182. *Id.*, at 804-05. *See also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). *But see In re Christian Life Center First Assembly*, 16 B.R. 35 (Bankr. N.D. Cal. 1981) (privilege could not be asserted by counsel to the creditors' committee as against counsel for the Defense Committee in the face of charges of misconduct by the creditors' committee or its attorney).

183. 58 F.R.D. 361, 370 (D. Del. 1975).

184. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-4 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

185. 38 B.R. at 805.

B. WHAT DUTY OF CONFIDENTIALITY IS OWED BY A CREDITORS' COMMITTEE TO A DEBTOR WITH RESPECT TO INFORMATION PROVIDED BY THE DEBTOR TO THE COMMITTEE?

To the extent a creditors' committee faithfully fulfills its obligations to its constituents and exercises its rights under Section 1103(c) of the Bankruptcy Code, it will necessarily be privy to a steady flow of information both confidential and public, concerning the debtor's affairs. As stated in *Matter of Baldwin-United Corporation*, "such committees are established not merely to represent the creditors in negotiation of a plan, but to provide them with ready access to information regarding the debtor's affairs."[186]

Based on the committee's responsibility to learn all aspects of the debtor's business affairs, it is important that the debtor not be dissuaded from providing such information. Clearly one disincentive would be a fear of public disclosure of information.

While there may be some dispute among the courts whether a competitor of the debtor may serve on the creditors' committee,[187] it would nevertheless seem essential that a privilege be applied as to communications between the committee and the debtor.[188] If the debtor does not have full assurance that all information provided to the committee will remain confidential, it will be dissuaded from providing the free flow of information which would allow the committee to make reasoned decisions which would be of greatest benefit to the constituents represented by the committee. This would also prevent the committee from fulfilling its obligations to its constituent body from fully investigating all aspects of the debtor's affairs.

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186. 38 B.R. at 804. *See also In re Wilson Foods Corporation*, 31 B.R. 272 (Bankr. W.D. Ok. 1983) ("the duties of a committee require that it dig deep into all aspects of the debtor and its business affairs. 11 U.S.C. §1103(c)."); *In re Western Management, Inc.*, 6 B.R. 438 (Bankr. W.D. Ky. 1980) ("There is no indication in the record that the unsecured creditors committee has met, investigated, monitored or in any other manner attempted to fill its statutory responsibility.")

187. *See* Section II. A.8., *supra*.

188. Wigmore has stated that a privilege against disclosure applies generally if four conditions are met: (1) the communications must originate in a confidence that they will not be disclosed; (2) the confidentiality element must be essential to the satisfactory maintenance of the relation between the parties; (3) the relation must be one which the community believes should be sedulously fostered; and (4) the injury caused to the relationship would outweigh the benefits of disclosure. *See Wigmore on Evidence*, §2285 at p. 527 (1961).

C. TO WHAT EXTENT ARE NEGOTIATIONS BY CREDITORS' COMMITTEE MEMBERS WITH OUTSIDE THIRD PARTIES PERMISSIBLE REGARDING THE SALE OF THE COMMITTEE MEMBER'S CLAIMS TO SUCH THIRD PARTIES?

An issue related to that of the privilege between a creditors' committee and a debtor is whether a committee member can negotiate with third parties regarding the sale of claims against the debtor. Under the strictest interpretation of the fiduciary duties which a creditors' committee owes to a debtor, it is arguable that virtually any form of conversation with an outside party regarding the sale of claims represents impermissible negotiation. This is because the mere acceptance or rejection of an offer, or the type of response given to an offer, will, by itself, convey to the prospective purchaser information regarding the committee member's views about the debtor.

For example, if the purchaser knows that the committee member would not accept an offer for a particular percentage of the committee member's claim, that knowledge may set a benchmark to purchase other claims. Participation in the negotiations arms prospective purchasers with new information and more comfort on their risk and gives them the ability to make a more informed judgment about the value of claims generally. Such conduct could therefore be considered to be a breach of the committee member's duty of confidentiality towards the debtor and other creditors.

VI. ROLE OF THE UNITED STATES TRUSTEE

On October 27, 1986, Congress enacted the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 (the "1986 Act"). Aside from adding a new Chapter 12, which concerns adjustment of debts of family farmers, the 1986 Act provides for the installment of a United States Trustee in all judicial districts in the United States. Section 586(a)(3) of Title 28, as amended by the 1986 Act, provides that each United States Trustee within the region for which such Trustee is appointed shall—

> supervise the administration of cases and trustees in cases under Chapter 7, 11 or 13 of title 11 by, whenever the United State trustee considers it to be appropriate—
>
> (A) monitoring applications for compensation and reimbursement filed under §330 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to any of such applications;
>
> . . . . .
>
> (E) monitoring creditors' committees appointed under Title 11;
>
> . . . . .
>
> (H) monitoring applications filed under §327 of title 11 and, whenever

> the United States Trustee deems it to be appropriate, filing with the Court comments with respect to the approval of such application. . .

Based on the foregoing provisions, it would seem clear that the United States Trustee is empowered with the right to notify the Court of any of the potential ethical or conflict of interest problems which may arise. However, one issue which arises in light of this right of the United States Trustee is whether the Bankruptcy Court is relieved of its burden (or privilege, depending on one's perspective) of raising objections, *sua sponte*, to fee applications, unethical practices or conflicts of interest.

It appears that Congress did not intend for the powers and duties of the bankruptcy court to be altered by the provisions of the 1986 Act, at least as they relate to this issue. This is evidenced by a new sentence which was added to Section 105(a) of the Bankruptcy Code pursuant to the 1986 Act:

> 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.

The Official Comment to this portion of the 1986 Act indicates that the addition of the foregoing sentence to Section 105(a) "effectively abrogates the rule of *In re Gusam Restaurant*, 737 F.2d 274 (2nd Cir. 1974), which held that when a Code provision required a request by a party in interest (*see, e.g.*, Section 327(c) of the Bankruptcy Code) the Bankruptcy Court could not act *sua sponte*." Accordingly, it would seem that while the 1986 Act provides the United State trustees with the power to notify the court of any of the potential ethical or conflict of interest problems discussed herein, the Act does not, by its terms, prevent the Bankruptcy Court from raising these issues, or fee application issues, on its own initiative.[189]

The trustee's powers under Section 586(a)(3) are essentially limited to a monitoring role. Thus, when trustees have attempted to act beyond the specific rights granted to them under that section, the courts have stepped in to prevent such action. For example, in *In re Sasson Jeans, Inc.*,[190] a Chapter 7 trustee, appointed by the United States Trustee, prosecuted two contempt actions against the former president of the debtor. These actions led to two certifications of contempt being issued by Bankruptcy Judge Lifland. The president then challenged these certi-

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189. It should also be noted that, notwithstanding the 1986 Act, there appears to have been no abatement in the willingness of courts to raise possible ethical issues, *sua sponte*, since that time. The same is true for fee requests. *See, e.g., In re Temple Retirement Community, Inc.*, 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989) (while acknowledging the trustee's authority to monitor fee applications, the court nevertheless stated that "[i]f the Court fails to review fee applications *sua sponte*, the public interest will in all likelihood go begging.").

190. 104 B.R. 600 (S.D.N.Y. 1989).

fications to the District Court for the Southern District of New York.

In setting aside the certifications, the District Court held that the Trustee was an "interested party" and thus not properly appointed to prosecute the contempts.[191] The Court stated: "[T]he United States trustee's duties consist largely of supervising and monitoring ongoing bankruptcy proceedings. Moreover, [§586(a)(3)] suggests that enforcement and prosecution are not among the trustee's duties."[192]

VII. CONCLUSION

Based on the foregoing discussion, it is clear that there can never be an ironclad rule which will determine, in all instances, whether an attorney, debtor, creditor or other party in interest in a bankruptcy proceeding is engaged in unethical conduct, is representing conflicting interests, or has violated a privilege. Moreover, even if one attempts to develop a rule of general applicability for a given situation, there can be no assurance that other courts will follow it. In summarizing his article on bankruptcy ethics at the 1986 National Conference of Bankruptcy Judges, former Bankruptcy Judge John D. Ayer asked simply:

1. Does it pass the smell test?
2. Is it fair?[193]

While such a test will not, by itself, solve any of the issues addressed herein, it does provide a general overview of the kind of analysis which courts should attempt to undertake in considering the facts and circumstances of each particular case.

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191. This was the holding of the Supreme Court in *Young v. United States ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 107 S. Ct. 2124 (1987).

192. 104 B.R. at 608.

193. *See, In re Flanigans Enterprises, Inc.*, 70 B.R. 248, 254, n.3 (Bankr. S.D. Fla. 1987).

APPENDIX VI

William Kohn, Deciphering Conflicts of Interests in Bankruptcy Representation, 98 Com. L. J. 127 (1993).

DECIPHERING CONFLICTS OF INTEREST IN BANKRUPTCY REPRESENTATION

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Attorney disqualification in bankruptcy is governed by two separate sources of law. The first is the Bankruptcy Code itself, the second is the ethical rules that govern the conduct of attorneys appearing before the court.[1] Any policy concerning possible conflicts of interest with regard to the representation of various parties in a bankruptcy case must therefore be analyzed with respect to the Bankruptcy Code, Bankruptcy Rules, the Code of Professional Responsibility, the Rules of Professional Conduct, and case law thereunder. The representation of each party in a bankruptcy case has its own unique conflicts of interest problems, and therefore, the representation of each party must be analyzed with respect to all other parties in the bankruptcy case. Conflicts of interest arise from taking an adverse position with respect to a former client and from the concurrent representation of clients with adverse interests.

I. GENERAL LAW REGARDING CONFLICTS OF INTEREST WITH RESPECT TO CONCURRENT AND FORMER REPRESENTATION

A. STANDARD OF CONDUCT

The Code of Professional Responsibility ("Code") has long been the established norm governing the standard of attorney conduct in federal courts.[2] To date, however, thirty-six states, the District of Columbia, and the Virgin Islands have replaced the Code with the more recently formu-

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1. *In re Vanderbilt Assocs., Ltd.*, 117 B.R. 678, 680 (D. Utah 1990).
2. *Ruff v. Ivey*, 102 B.R. 868 (Bankr. M.D. Fla. 1989).

lated Model Rules of Professional Conduct ("Model Rules").[3] The local rules of federal district courts typically adopt the standard of conduct which has been adopted by the highest court of the state in which the court sits.[4] Bankruptcy courts then follow the standard of conduct adopted by the district courts.[5]

Even with the advent of the Model Rules, the Code of Professional Responsibility has not diminished in importance. In jurisdictions which have adopted the Model Rules, courts continue to employ the canons, ethical considerations, and disciplinary rules of the Code of Professional Responsibility.[6] The primary reason for the Code's continued vitality stems from the fact that there has not been a substantial amount of case law decided under the more recent Model Rules. Judges are familiar with the Code and therefore continue to quote its provisions in addition to the applicable provisions of the Model Rules. Several decisions have explicitly stated that federal courts can consider both the Code and the Model Rules when evaluating the professional conduct of attorneys.[7] Other decisions have gone further, stating that the Code and Model Rules lack the force of law and merely provide guidelines which the court is not bound to follow.[8] Irrespective of the applicable standard of conduct and the weight accorded thereto, attorneys are well advised to consider both the Code and the Model Rules when analyzing possible conflicts of interest with regard to representation of various parties in a bankruptcy case.[9]

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3. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983, and submitted to the states for consideration thereafter. The states which have adopted the Model Rules are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Please note that each state's version of the Model Rules may differ from the Model Rules promulgated by the American Bar Association.

4. *See, e.g.*, N.D. Ind. LR DE-IV; S.D. Ind. Dis. Enfor. R. IV.

5. *See* 28 U.S.C.A. § 151 (West Supp. 1993).

6. *See, e.g., Monon Corp. v. Wabash Nat'l Corp.*, 764 F. Supp. 1320 (N.D. Ind. 1991); *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 777 F. Supp. 690 (C.D. Ill. 1991).

7. *Knopfler v. Schraiber*, 103 B.R. 1001, 1003 (Bankr. N.D. Ill. 1989); *In re Consupak, Inc.*, 87 B.R. 529, 549 (Bankr. N.D. Ill. 1988); *Jones v. City of Chicago*, 610 F. Supp. 350, 355 (N.D. Ill. 1984). *But see In re Glenn Elec. Sales Corp.*, 99 B.R. 596 (D.N.J. 1988) (disqualified law firm argues Code improperly invoked by district court in Model Rules jurisdiction).

8. *See Greater Rockford Energy and Technology Corp.*, 777 F. Supp. at 693; *American Motor Club, Inc. v. Neu*, 119 B.R. 394, 398 (Bankr. E.D.N.Y. 1990) (Code of Professional Responsibility not binding on bankruptcy court in regard to disqualification).

9. Significant difference concerns fact that "appearance of professional impropriety" standard of Canon 9 under the Code was not included in the Model Rules.

B. CODE OF PROFESSIONAL RESPONSIBILITY

The majority of states have replaced the Code of Professional Responsibility with the Model Rules as the governing standard of attorney conduct. Nonetheless, an understanding of the conflicts of interest requiring disqualification of counsel under the Code is beneficial because of the lack of precedent under the Model Rules. Disciplinary Rule 4-101, *inter alia*, states:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[10]

Canon 5 is probably the most applicable part of the Code of Professional Responsibility and deals with conflicting representation of clients which may impair an attorney's independent professional judgment. Disciplinary Rule 5-105 states:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.[11]

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10. Model Code of Professional Responsibility DR 4-101 (1980).
11. Model Code of Professional Responsibility DR 5-105.

The Ethical Considerations of Canon 5 provide further guidelines. Ethical Consideration 5-15 states that a lawyer must always weigh carefully the possibility that his judgment may be impaired or his loyalty divided if offered representation from multiple clients having even potentially differing interests, and that "[a] lawyer should never represent in litigation multiple clients with differing interests."[12] On the other hand, Ethical Consideration 5-15 also states:

> [T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client . . . .[13]

Ethical Consideration 5-16 states that even in instances where a lawyer is justified in representing multiple clients, "he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[14] Ethical Consideration 5-17 provides examples of situations involving potentially differing interests, *i.e.*, where a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and multiple beneficiaries of an estate of a decedent.[15] "Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."[16]

Probably the most controversial conflicts provision of the Code is Canon 9, which provides that "[a] lawyer should avoid even the appearance of professional impropriety."[17] Courts sometimes use this nebulous test in deciding motions to disqualify counsel for conflicts of interest. Generally, however, courts have not disqualified counsel based solely on Canon 9, holding instead that the more specific Canon 4 duty of confidentiality and Canon 5 provisions concerning interference with the lawyer's judgment are controlling.[18]

Though the "appearance of impropriety" standard has been dropped by the Model Rules, it has not been forgotten by the courts. In *Monon Corp. v. Wabash National Corp.*,[19] a district court in Indiana held that the "appearance of impropriety" standard under Canon 9 required disqualification of the attorney representing a defendant who claimed that

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12. Model Code of Professional Responsibility EC 5-15.
13. *Id.*
14. Model Code of Professional Responsibility EC 5-16.
15. Model Code of Professional Responsibility EC 5-17.
16. *Id.*
17. Model Code of Professional Responsibility Canon 9.
18. For a good description of the analysis required concerning disqualification of counsel under Canons 4, 5, and 9, *see Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980).
19. 764 F. Supp. at 1320.

an invention lacked the conditions of patentability where the same attorney had previously made initial determinations for plaintiff that the invention was patentable and had drafted claims for a patent application. The court referred to Model Rule 1.9 in its decision but relied explicitly on Canon 9 in its holding.

Another case applying the appearance of impropriety standard in a Model Rules jurisdiction is *In re Glenn Electric Sales Corp.*,[20] in which a district court in New Jersey upheld a bankruptcy court's disqualification of counsel. The district court did not resolve whether the bankruptcy court improperly applied Canon 9, but held instead that the Bankruptcy Rules in and of themselves incorporate considerations which are equivalent to Canon 9's "appearance of impropriety" standard.

C. RULES OF PROFESSIONAL CONDUCT

In the area of conflicts, the Model Rules of Professional Conduct substantially reflect the prior Code of Professional Responsibility and relevant case law. The Model Rules as adopted by the states are typically known as the Rules of Professional Conduct ("Rules").

Disciplinary Rule 4-101 concerning protection of confidences or secrets of the client has been revised as Rule 1.6, "Confidentiality of Information":

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[21]

Also, Rule 1.8(b) provides:

> A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation,

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20. 99 B.R. at 596. *But see In re Peck*, 112 B.R. 485 (Bankr. D. Conn. 1990) (bankruptcy court in Model Rules jurisdiction holding that the mere appearance of impropriety is not alone sufficient basis for granting disqualification).

21. Model Rules of Professional Conduct Rule 1.6 (1992).

except as permitted or required by Rule 1.6 or Rule 3.3.[22]

Rule 1.6 enlarges the principle of confidentiality in that it imposes confidentiality on information relating to representation even if it is acquired before or after the relationship existed. The Rule does not require the client to indicate what information is confidential as does Disciplinary Rule 4-101. However, Rule 1.6 permits a lawyer to disclose information where impliedly authorized in order to carry out the representation, whereas under the Code the lawyer could not disclose confidences unless the client first expressly consented after disclosure. Rule 1.8(b) also allows a lawyer to use confidential information to the actual disadvantage of the client if the client consents after "consultation."

Canon 5 of the Code has been reformulated as Rule 1.7, "Conflict of Interest: General Rule":

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[23]

Rule 1.7 combines Sections (A), (B) and (C) of Disciplinary Rule 5-105 and expressly states their implications. Rule 1.7 requires that when the lawyer's other interests are involved, not only must the client consent after consultation but also, independent of such consent, the representation reasonably appear not to be adversely affected by the lawyer's other interests. The same constraints seem to be implicitly required by Disciplinary Rule 5-105(C). The Comment to Rule 1.7 states that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."[24] However, "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."[25] The Comment states that a possible conflict does not itself preclude the representation:

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22. Model Rules of Professional Conduct Rule 1.8(b).
23. Model Rules of Professional Conduct Rule 1.7.
24. Model Rules of Professional Conduct Rule 1.7 cmt.
25. *Id.*

> The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.[26]

The Comment recognizes that a client may consent to representation notwithstanding a conflict, but when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such consent from the client. The Comment to Rule 1.7 further states that when more than one client is involved, the question of conflict must be resolved as to each client and the clients must receive enough information to make an informed decision.[27] The Comment recognizes that there are circumstances in which a lawyer may act as an advocate against a client:

> For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. . . . The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.
>
> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[28]

The Comment further recognizes that conflicts of interest in contexts other than litigation sometimes may be difficult to assess, but relevant factors to consider are: 1) the duration and intimacy of the lawyer's relationship with the client or clients involved; 2) the functions being performed by the lawyer; 3) the likelihood that actual conflict will arise; and, 4) the likely prejudice to the client from the conflict if it does arise.[29] "The question is often one of proximity and degree."[30]

Finally, the Rules adopted existing case law concerning disqualifying conflicts of interest in former representation by codifying the "substantially related" test.[31] Rule 1.9, "Conflict of Interest: Former Client" states:

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Model Rules of Professional Conduct Rule 1.9. There is no counterpart to Rule 1.9 under the Code. However, case law developing the "substantially related" rule relies princi-

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client consents after consultation.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.[32]

The Comment to Rule 1.9 points out that disqualification from subsequent representation is for the protection of clients and can be waived by them. However, a waiver is effective only if there is disclosure of circumstances, including the lawyer's intended role on behalf of the new client.[33]

D. FORMER REPRESENTATION

Prior to the enactment of Rule 1.9, courts relied on the common law "substantially related" test when considering whether the former representation of one party disqualified counsel from representing another party.[34] Courts in Model Rules jurisdictions continue to cite case law developing the "substantially related" test because of the lack of precedent under Rule 1.9.[35] The "substantially related" test requires a three-

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pally on Canon 4 of the Code, which provides that "a lawyer should preserve the confidences and secrets of a client," and Canon 9, which provides that a lawyer should "avoid the appearance of professional impropriety." *See infra* note 33.

32. Model Rules of Professional Conduct Rule 1.9.

33. Model Rules of Professional Conduct Rule 1.9 cmt.

34. *See Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983); *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Novo Terapeutisk Laboratorium A/S, v. Baxter Travenol Lab., Inc.*, 607 F.2d 186 (7th Cir. 1979); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Flo-Con Systems, Inc. v. Servsteel, Inc.*, 759 F. Supp. 456 (N.D. Ind. 1990); *Knopfler*, 103 B.R. at 1001; *In re Sharpe*, 98 B.R. 337 (Bankr. N.D. Ill. 1989); *Ruff*, 102 B.R. at 868; *General Elec. Co. v. Industra Prods. Inc.*, 683 F. Supp. 1254 (N.D. Ind. 1988).

35. *See In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992); *Monon Corp.*, 764 F. Supp. at 1320; *In re Peck*, 112 B.R. at 485.

part analysis:

> First, the court must factually reconstruct the scope of the prior legal representations. Second, the court must determine what confidential information may reasonably be inferred to have been provided to a lawyer representing a client in such matters. Third, the court must decide whether that information is relevant to the current litigation.[36]

Case law has established that a conclusive presumption of shared confidences exists when a law firm changes sides on a "substantially related" matter.[37] With regard to the "substantially related" test, the Seventh Circuit has stated as follows:

> [A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them.[38]

A law firm which changes sides on a "substantially related" matter must therefore be disqualified, whether or not it sets up screens or "Chinese walls," and regardless of whether confidential information is actually exchanged.[39]

Attorneys can engage in representation adverse to their former clients as long as the matters embraced within the pending representation are not substantially related to matters in which the attorneys represented their former clients.[40] Disqualification may only be granted "upon a showing that the relationship between issues in the prior and present cases is patently clear. Put more specifically, disqualification has been granted or approved recently only when the issues involved have been 'identical' or 'essentially the same.' "[41] Doubts as to the existence of a conflict of interest should be resolved in favor of disqualification.[42] Guidelines to determine whether two controversies are substantially re-

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36. *In re Sharpe*, 98 B.R. at 341 (*citing LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 256 (7th Cir. 1983)).

37. *See In re American Airlines, Inc.*, 972 F.2d at 614; *Analytica, Inc.*, 708 F.2d at 1266; *Flo-Con Systems, Inc.*, 759 F. Supp. at 460; *Ruff*, 102 B.R. at 870; *General Elec. Co.*, 683 F. Supp. at 1259.

38. *Analytica, Inc.*, 708 F.2d at 1266.

39. *Id.* at 1267-68.

40. *See supra* note 33.

41. *In re Peck*, 112 B.R. at 490 (*quoting Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2nd Cir. 1978)); *see also Market Square Assocs., Ltd. v. Garfinkle*, 19 B.R. 111, 113 (S.D.N.Y. 1982).

42. *Westinghouse Elec. Corp.*, 588 F.2d at 225; *Ruff*, 102 B.R. at 870; *In re Whitney-Forbes, Inc.*, 31 B.R. 836, 838-39 (Bankr. N.D. Ill. 1983).

lated include:

> 1. the similarities between the two factual situations;
> 2. the legal questions posed;
> 3. the nature and extent of the attorney's involvement in the case including the type of work performed and the attorney's possible exposure to the formulation of policy or strategy;
> 4. the time period within which the actions in issue took place;
> 5. the existence of common defendants or plaintiffs; [and]
> 6. the possibility of a taint on the underlying trial due to the attorney's conduct.[43]

E. CONCURRENT REPRESENTATION

While the "substantially related" test is customarily applied in conflicts of interest situations presented by former employment, conflicts of interest arising out of concurrent representation "must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients."[44]

A significant case under Canon 5 of the Code bearing on the propriety of concurrent representation is *International Business Machines Corp. v. Levin* ("*IBM*").[45] The decision is relevant because Rule 1.7 largely incorporates the provisions of Canon 5. In *IBM*, the Third Circuit found a disqualifying conflict of interest where a law firm represented the plaintiff in an anti-trust suit against a defendant which that same law firm represented in unrelated labor matters. The court held that IBM was a present client of the law firm even though the law firm had no specific assignment on hand the day the complaint was filed and despite the fact that the law firm worked on a fee for services basis and was not under any retainer agreement with IBM. While the law firm had obtained consent from the plaintiff for its continued representation of defendant in labor matters, no disclosure of the dual representation was made to the defendant, nor was any consent given by defendant. The law firm argued that because the multiple representation involved two entirely unrelated areas there would be no adverse effect on the exercise of independent professional judgment on behalf of defendant and, therefore, DR 5-105(A) and (B) were not applicable. The court disagreed with this narrow view of "adversely affected" in clauses (A) and (B) of DR 5-105 and stated that clause (C) makes it clear that situations entailing the likelihood of an adverse effect include circumstances where the adverse

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43. *In re Olson*, 21 B.R. 123, 127 (Bankr. D. Neb. 1982) (*citing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754-56 (2nd Cir. 1975)); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

44. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2nd Cir. 1976); *see also Westinghouse Elec. Corp.*, 588 F.2d at 229; Model Rules of Professional Conduct Rule 1.7 cmt.

45. *International Business Machs. Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978).

effect is relatively minor. "In those cases the multiple representation may take place if the attorney believes in good faith that he can adequately represent both clients and if the consent of the clients is obtained."[46] The court stated that "it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter,"[47] and that a serious effect on the relationship may follow if the client learns from a third party that he is being sued in a different matter by the attorney. In finding a disqualifying conflict of interest, the court stated as follows:

> Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.[48]

The Third Circuit concluded that the law firm was obligated under the circumstances to disclose fully to the defendant the facts of its representation of plaintiffs and obtain the defendant's consent.

At least one circuit court has expressly adopted the holding in *IBM*.[49] Additionally, the holding in *IBM* is consistent with the Rules of Professional Conduct, which have been adopted by a majority of the states. Rule 1.7 provides that representation "directly adverse" to another client is prohibited unless there is disclosure and consent. With respect to application of Rule 1.7, the Comment thereto provides as follows:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.[50]

A recent district court decision in *SWS Financial Fund A v. Salomon Bros. Inc.*[51] seems to limit the application of *IBM* and Rule of Professional Conduct 1.7 by failing to adopt a per se rule of disqualification when counsel undertakes concurrent representation of clients with adverse interests without complying with the disclosure and consent provisions of Rule 1.7. The court in *Salomon Bros.* refused defendant's motion to disqualify plaintiff's law firm in a suit for various security law violations where the same law firm represented defendant without a retainer agreement over a thirteen month period by answering commodity law questions as they arose. Despite the fact that the law firm had not

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46. *Id.* at 280.
47. *Id.*
48. *Id.* (*quoting Cinema 5, Ltd.*, 528 F.2d at 1386).
49. *See Unified Sewerage Agency of Wash. County, Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981).
50. Model Rules of Professional Conduct Rule 1.7 cmt.
51. *SWS Fin. Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992).

performed any legal work for defendant in almost five months, the court found that the defendant was a current client.[53] After determining that the law firm had failed to comply with the disclosure and consent provisions of Rule. 1.7, the court stated that it was "unaware of any Seventh Circuit authority which requires disqualification upon a showing that a law firm has violated an ethical rule governing conflicts of interest."[54] The court acknowledged that disqualification is a "drastic measure which courts should hesitate to impose except when absolutely necessary."[55] In denying disqualification, the court stated as follows:

> Were this court to rule that disqualification was mandated by [the law firm's] breach of Rule 1.7 in this case, the implications would be overwhelming. Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means of purposefully creating the potential for conflicts. With simply a minor "investment" of some token business, such clients would in effect be buying an insurance policy against that law firm's adverse representation.[56]

With respect to its decision, the court recognized that failure to disqualify a law firm after finding a conflict of interest "may be viewed by some as a departure from the norm."[57] In defense of its decision, the court contends that "[t]he legal world is changing, however, and courts must be sensitive to the complexities and multiplicities of interests that come into play when enormous corporations and monster law firms interact in a dynamic legal economy."[58]

II. BANKRUPTCY CONSIDERATIONS

Application of the conflicts of interest prohibitions contained in the Code of Professional Responsibility and the Rules of Professional Conduct takes on an added dimension in bankruptcy. "Unlike other forums and battlefields, where the lines of conflict are clearly drawn, in bankruptcy court, interested parties face proceedings with multiple litigants where the parties' interests, positions and relationships may change several times from pre-filing to post-filing and even thereafter."[59] "[C]ertain conflicts that a client could waive after full disclosure outside of the bankruptcy context, such as simultaneous representation of the client and client's creditor, are prohibited by the Bankruptcy Code itself from

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52. *Id.* at 1397-98 (*citing International Business Machs. Corp.*, 579 F.2d at 271).
53. *Id.* at 1400.
54. *Id.* (*quoting Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982)).
55. *Id.* at 1402.
56. *Id.* at 1403.
57. *Id.*
58. *In re Flanigan's Enters., Inc.*, 70 B.R. 248, 250 (Bankr. S.D. Fla. 1987).

being waived."[59] Other representations which have a built-in appearance of conflict, such as simultaneous representation of an individual creditor and the creditors' committee, are allowed by the Bankruptcy Code.[60]

In an attempt to maintain the integrity of the bankruptcy process and assure that counsel devotes undivided loyalty to the client, conflicts of interest rules have been "more strictly applied in the bankruptcy context than in other areas of the law, at least insofar as professionals retained by the estate are concerned."[61] "It is universally recognized that attorneys are prohibited from representing actual conflicts of interest in bankruptcy."[62] However, a split of authority exists on whether potential conflicts of interest should lead to automatic disqualification.[63] One line of cases applies a rigid, strict constructionist rule, whereby the potential for conflict or "appearance of impropriety" constitutes a disqualifying conflict of interest.[64] With regard to the trustee or debtor in possession, one court has stated as follows:

> It is the duty of counsel for the debtor in possession to survey the landscape in search of property of the estate, defenses to claims, preferential transfers, fraudulent conveyances and other causes of action that may yield a recovery to the estate. The jaundiced eye and scowling mien that counsel for the debtor is required to cast upon everyone in sight will likely not fall upon the party with whom he has a potential conflict: Any potential conflict or interest represents a potential to overlook an asset or defense of the estate.[65]

"Other courts are more flexible in their interpretation and application of the amorphous term conflict of interest, preferring to analyze potential conflicts on a case-by-case basis."[66]

"A more flexible approach appears to be supported by the statutory scheme as enunciated by Congress in the Bankruptcy Code itself."[67] The structure of the Code suggests that an actual conflict is required, see 11 U.S.C. Section 1129 (confirmation of plan); 11 U.S.C. Section 1102 (equity security holders' committees); 11 U.S.C. Section 329(b) (other en-

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59. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990); *see In re Amdura Corp.*, 121 B.R. 862, 865 (Bankr. D. Colo. 1990).

60. *In re Flanigan's Enters., Inc.* 70 B.R. at 250-51.

61. *In re Rusty Jones, Inc.*, 134 B.R. 321, 346 (Bankr. N.D. Ill. 1991); *see also In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 90.

62. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 90.

63. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 91 (collecting cases); *In re H & K Developers v. Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340, 343 (Bankr. N.D. Ga. 1989) (collecting cases).

64. *See In re 419 Co.*, 133 B.R. 867 (Bankr. N.D. Ohio 1991); *In re Butterfield Ltd. Partnership*, 131 B.R. 67 (Bankr. E.D. Mich. 1990).

65. *In re Butterfield Ltd. Partnership*, 131 B.R. at 69.

66. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 91; *see also In re Dynamark, Ltd.*, 137 B.R. 380 (Bankr. S.D. Cal. 1991); *In re Peck*, 112 B.R. at 485; *In re Lee Way Holding Co.*, 102 B.R. 616 (S.D. Ohio 1988); *H & K Developers*, 103 B.R. at 344.

67. *H & K Developers*, 103 B.R. at 344; *see also In re Lee Way Holding Co.*, 102 B.R. at 621.

tity may pay debtor's attorney's fees); Section 11 U.S.C. Section 327(c) (counsel may represent creditor). "To hold otherwise would fly in the face of Congressional direction, for Congress clearly rejected the per se approach in favor of an actual-conflict-of-interest approach"[68] when it amended the language of Bankruptcy Code Section 327(c) to require an "actual conflict of interest."[69] The cases applying the rigid rule in contrast rely primarily upon Canon 9 of the Code of Professional Responsibility, as opposed to some special provisions in the Bankruptcy Code.[70]

In the Seventh Circuit, the choice between the competing strains of cases appears to have been made. Even independent of the special implications in the language of the Bankruptcy Code, the Seventh Circuit requires an actual conflict.[71] This approach is further supported by the fact that all states in the Seventh Circuit have adopted the Model Rules, which do not incorporate the "appearance of professional impropriety" language of Canon 9. The approach taken by the Seventh Circuit is explained in *General Electric Co. v. Industra Products, Inc.* as follows: "The Seventh Circuit first stresses that disqualification is a drastic measure which should not be imposed unless absolutely necessary. Moreover, motions for attorney disqualification must be reviewed with extreme caution to avoid their misuse as techniques of harassment."[72]

In applying the Seventh Circuit's standard, the court in *General Electric* asked whether "*any* attorney" representing the challenged party could act differently.[73] This standard was applied in *In re Nephi Rubber Products Corp.*[74] In *Nephi*, a law firm which represented seventeen creditors of the debtor's estate, including the largest unsecured creditor, on unrelated matters and which also represented the majority of the debtor's officers and directors on unrelated matters, was chosen to represent the debtor in a Chapter 11 case. A fifty percent shareholder of the debtor moved for disqualification pursuant to Bankruptcy Code Section 327, arguing that the law firm was not disinterested and that it represented interests adverse to the estate. Violation of Rules 1.7 and 1.9 of the Rules of Professional Conduct was also alleged, but not considered by the court in reaching its decision denying disqualification. The court held that each potential disqualification case must be considered "on its own particular facts in order to reach a fair result."[75] The court reasoned that "[i]f a party will suffer great prejudice by disqualification of its counsel and if another attorney would need to take the same steps to

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68. *In re Lee Way Holding Co.*, 102 B.R. at 621.
69. 11 U.S.C.A. §327(c) (West 1993).
70. *See In re Kendavis Ind. Int'l, Inc.*, 91 B.R. 742 (N.D. Tex. 1988).
71. *See, e.g., Freeman*, 689 F.2d at 720-22.
72. 683 F. Supp. at 1258 (citations omitted).
73. 683 F. Supp. at 1261.
74. *In re Nephi Rubber Prods. Corp.*, 120 B.R. 477 (Bankr. N.D. Ind. 1990), *aff'd, Cypher v. Nephi Rubber Prods. Corp.*, Nos. S90-432, S90-579, Slip. Op. (N.D. Ind. April 10, 1991).
75. *Id.* at 481.

represent the client, the court may find that disqualification should be denied."[76] In denying disqualification the court stated that it was "not convinced that any other attorney would have or should have acted any differently in representing [the debtor]."[77] The movant failed to show that the law firm had an actual conflict of interest.[78] The court found that the law firm had appropriately accepted appointment by a majority of the debtor's directors, limited its representation in the proceeding to the debtor, and not favored the interests of other clients through its legal advice to the debtor.[79]

A. REPRESENTATION OF TRUSTEE

1. Bankruptcy Code

Bankruptcy Code Section 327 provides the terms under which a trustee may select counsel to represent the trustee or for other specified purposes:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
>
> (b) If the trustee is authorized to operate the business of the debtor under section 721, 1202 or 1108 of this title, and if the debtor has regularly employed attorneys . . . the trustee may retain or replace such professional persons if necessary in the operation of such business.
>
> (c) In a case under chapter 7, 11 or 12 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
>
> . . . .
>
> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.[80]

To represent a trustee, the attorney must not hold or represent an interest adverse to the estate, and he must be disinterested.[81] A "disinter-

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76. *Id.* at 482 (*citing General Electric Co.*, 683 F. Supp. at 1261).

77. *In re Nephi Rubber Prods. Corp.*, 120 B.R. at 482, *aff'd, Cypher v. Nephi Rubber Prods. Corp.*, Nos. S90-432, S90-579, Slip. Op. (N.D. Ind. April 10, 1991).

78. *Id.* at 483.

79. *Id.*

80. 11 U.S.C.A. §327 (West 1993).

81. 11 U.S.C.A. §327(a); *In re Roberts*, 46 B.R. 815, 822 (Bankr. D. Utah 1985), *aff'd*

ested person" is defined in Bankruptcy Code § 101(14) as a person that:

> (A) is not a creditor, an equity security holder, or an insider;
> . . . .
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor . . .
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason.[82]

While not defined in the Bankruptcy Code, "adverse interest" has been held to mean:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or
> (2) to possess a predisposition under circumstances that render such a bias against the estate.[83]

The Bankruptcy Code, therefore, allows a law firm which represents a creditor in an unrelated matter to represent the trustee provided there is no actual conflict of interest.[84] The procedures for obtaining court approval of counsel in a bankruptcy case are outlined in Bankruptcy Rule 2014(a), "which requires among other things that the application for employment contain a detailed disclosure of the attorney's connections with the debtor, creditors and any other party in interest."[85] Further restrictions on appointment of counsel are provided by Bankruptcy Rule 5002, which prohibits an attorney from representing a trustee if the attorney or any member of his firm is a "relative of the bankruptcy judge approving the employment."[86] The importance of proper disclosure has been described as follows:

> Ineffective or insufficient disclosure is not a minor problem. It goes to the heart of the integrity of the bankruptcy system, of counsel, and of the courts. . . . Appearances count. Even conflicts more theoretical than real will be scrutinized. The disclosures must appear in the application and declaration required by Bankruptcy Rule 2014(a). It is not sufficient that the information might be mined from petitions, schedules, section 341 meeting testimony, or other sources. The burden is on the person to be employed to come forward and make full, candid, and complete disclosure. Negligent

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In part, modified in part, rev'd on other grounds, 75 B.R. 402 (D. Utah 1987).

82. 11 U.S.C.A. §101(14) (West 1993).

83. *In re Tinley Plaza Assocs.*, 142 B.R. 272, 277 (Bankr. N.D. Ill. 1992); *In re 419 Co.*, 133 B.R. at 869; *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 94.

84. 11 U.S.C.A. §327(c).

85. *In re Interstate Distribution Ctr. Assocs. (A), Ltd.*, 137 B.R. 826, 831 (Bankr. D. Colo. 1992) (*quoting In re Land*, 116 B.R. 798, 803 (D. Colo. 1990)).

86. Bankruptcy Rule 5002(a).

> omissions do not vitiate the failure to disclose. . . . Regardless of whether there is an actual conflict, the existence of an arguable conflict must be fully disclosed in plain and public view, if only to be explained away.[87]

2. Concurrent and Former Representation of Unsecured and Secured Creditors

Prior to amendment in 1984, 11 U.S.C. Section 327(c) specifically prohibited the concurrent representation of a creditor and the trustee in the same bankruptcy case.[88] Bankruptcy Code Section 327(c) previously read as follows:

> (c) In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent in connection with the case, a creditor.[89]

Amended § 327(c) no longer contains a per se bar to the concurrent representation of a creditor and the trustee in the same bankruptcy case; an actual conflict of interest is now required.[90] Former representation of creditors does not generally prohibit representation of the trustee.

Despite the clear language of the statute, some courts continue to hold that a potential conflict or the appearance of impropriety is enough to disqualify counsel from representing the trustee.[91] Such a holding is in accord with the Code of Professional Responsibility, but contra to the Rules of Professional Conduct, which have abandoned the appearance of impropriety standard as unworkable. Generally, however, counsel is disqualified under the Rules of Professional Conduct when concurrently representing the trustee and a creditor on related matters.[92] No case law discovered has yet determined whether the more liberal federal standard under Bankruptcy Code Section 327(c) preempts the Code of Professional Responsibility or Rules of Professional Conduct as adopted by the states.

While acknowledging that strict construction of amended Section 327(c) may allow simultaneous representation of a creditor while representing the trustee or debtor-in-possession, at least one court has held that such representation always results in a disqualifying conflict.[93] In

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87. *In re Interstate Distribution Ctr. Assocs. (A), Ltd.*, 137 B.R. at 832 (alteration in original) (citations omitted).

88. *See, e.g., In re AOV Idus., Inc.*, 797 F.2d 1004, 1011 (D.C. Cir. 1986).

89. 11 U.S.C.A. §327(c) (West 1979) (amended 1984).

90. 11 U.S.C.A. §327(c).

91. *See In re BH&P Inc.*, 949 F.2d 1300, 1313 (3rd Cir. 1991); *In re Glenn Elec. Sales Corp.*, 99 B.R. at 596. *But see In re Lee Way Holding Co.*, 102 B.R. at 622 (holding that prior representation of creditor could not per se sustain a claim of "appearance of impropriety").

92. *See* Model Rules of Professional Conduct Rule 1.7.

93. *In re Greater Pottstown Community Church*, 80 B.R. 706 (Bankr. E.D. Pa. 1987).

Pottstown, counsel for a Chapter 7 debtor who concurrently represented creditors in proceedings against the debtor was denied compensation. With regard to Section 327(c), the court held as follows:

> [E]ven as amended, Section 327(c) does *not* authorize any apparent or actual conflicts. Further, we believe that a prohibited apparent or actual conflict arises perforce when (1) counsel for the trustee represents a creditor simultaneously; and (2) counsel for a debtor or DIP, whose interests are necessarily diverse from those of a creditor, as opposed to an independent trustee, has represented a creditor in the past or, what is even more clearly objectionable, purports to represent a creditor in the same proceeding in which he represents the DIP.[94]

The court relied primarily on an Editor's Comment in Norton's *Bankruptcy Law & Practice* referring to Bankruptcy Code Section 327(c). The Comment provides that "the Code allows counsel to represent the trustee under Section 327(c), even though counsel was previously employed by a creditor, but further representation of the creditor by that attorney in connection with the Title 11 U.S.C. case is improper and forbidden."[95]

There is an alternative to disqualification. Bankruptcy Code Section 327(e) allows a trustee to appoint special counsel, even a law firm which has represented the debtor. Courts have held that a law firm representing a creditor may also serve as special counsel to the trustee.[96] The court in *Fondiller v. Robertson* allowed a law firm representing a creditor to represent the trustee as special counsel to investigate and recover assets fraudulently conveyed from other creditors with which the law firm had no connection.[97] The court noted that former Section 327(c), which would require an attorney to sever his relationship with creditor clients connected with the case if he were general counsel to the trustee, did not apply where the attorney represented the trustee in a special limited capacity that presented no conflicting interest between the trustee and the creditor clients of the attorney. Additionally, under Section 327(a), the law firm was disinterested because it was not one of the disqualified parties listed in what is now Section 101(14) and since it did not hold or represent any interest adverse to the estate with respect to its duties as special counsel.[98]

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94. *Id.* at 711 (*quoting* W. Norton, Bankruptcy Law & Practice, Bankruptcy Code 124 (1987-88)).

95. *Id.*

96. *See, e.g., Fondiller v. Robertson*, 15 B.R. 890 (Bankr. 9th Cir. 1981), *appeal dismissed*, 707 F.2d 441 (9th Cir. 1983); *Roberts v. Harris*, 101 B.R. 210 (Bankr. E.D. Cal. 1989).

97. *Fondiller*, 15 B.R. at 890; *see also Reigle v. Ogle*, 58 B.R. 516 (Bankr. E.D. Pa. 1986).

98. *Fondiller*, 15 B.R. at 891. *But see In re Roberts*, 46 B.R. 815, 829 (Bankr. D. Utah 1985), *aff'd in part, modified in part, rev'd on other grounds*, 75 B.R. 402 (D. Utah 1987) (holding list of disqualified parties in what is now Bankruptcy Code § 101(14) is not exhaustive).

3. Former Representation of Creditors' Committee

Several cases have presented the issue of whether counsel to the creditors' committee in a Chapter 11 case can subsequently be appointed to represent the trustee in the same converted Chapter 7 case.[99] The courts in *Market Response Group* and *Codesco* both held that a law firm's prior representation of a creditors' committee did not disqualify the law firm from representing the trustee in the same proceeding. Under the Bankruptcy Code, the creditors' committee possesses a plethora of power with respect to the trustee: it can petition the court to appoint an interim trustee to take possession of the property of the estate and to operate the business under Section 303(g); it may circumvent the appointment of any trustee by bringing forth evidence that the trustee is unqualified pursuant to Section 321; it may petition for removal of the trustee under Section 324; and Section 702, Section 703, Section 1104 and Section 1105 "bring the election and removal of a trustee totally within the realm of the creditors' committee's choice."[100] The creditors' committee freely consults with its attorney on strategy to secure a plan which best favors the creditors or to secure a sale which brings the greatest amount of proceeds upon liquidation.[101] The court in *Codesco* noted that there existed a valid concern that previously disclosed confidences might be misused to the detriment of the estate if counsel for the creditors' committee becomes counsel for the trustee.[102] Both courts stressed that Canons 5 and 9 also applied, making it obligatory that the respective law firm in each case exercise independent judgment in the representation of clients and avoid even the slightest appearance of professional impropriety.[103]

The court in *Codesco* found that the purpose of pre-amended Bankruptcy Code Section 327 was to prevent even the appearance of a conflict by prohibiting an attorney employed by the trustee from representing a creditor in connection with the case.[104] However, the court acknowledged that there also exists the highly regarded principle that the trustee should have wide latitude in determining who shall be employed to perform legal services for the estate and held that "[o]nly in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel . . . ."[105] The court in *Codesco* found that it cannot be stated categorically that the interests of counsel for the creditors' committee in an aborted Chapter 11 case and those of an attorney for the trustee in a

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99. *See, e.g., In re Market Response Group, Inc.*, 20 B.R. 151 (Bankr. E.D. Mich. 1982); *In re Codesco, Inc.*, 18 B.R. 997 (Bankr. S.D.N.Y. 1982).

100. *In re Market Response Group, Inc.*, 20 B.R. at 152.

101. *Id.*

102. *In re Codesco, Inc.*, 18 B.R. at 1001.

103. *In re Market Response Group, Inc.*, 20 B.R. at 152; *In re Codesco, Inc.*, 18 B.R. at 999-1000.

104. *In re Codesco, Inc.*, 18 B.R. at 999.

105. *Id.* (*quoting In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934)).

Chapter 7 case are in conflict because both fiduciary positions strive to protect the interests of unsecured creditors generally.[106] Furthermore, the potential argument that the attorney for the trustee may be required to review the administrative claims and conduct of the attorney for the creditors' committee is an argument that has been rejected because the attorney for the creditors' committee is required to account to the court, not to the trustee.[107]

The problem in *Codesco* was that the attorneys for the creditors' committee in the Chapter 11 case advised against the plan, which might imply that the attorneys hoped for appointment as trustee's counsel if the case were converted for failure to obtain approval of a plan. The court stated such an implication was pure speculation.[108] The attorneys in the case knew that if all secured claims were sustained there would not be sufficient funds for their fees, so they had a strong motive to question the status of each secured claim. However, such tension between counsel for the trustee and counsel for the secured creditors is proper and is not sufficient reason for disqualification of a trustee's chosen counsel.[109] The conclusion to be drawn from these cases is that wide latitude in the absence of a direct conflict exists for appointment by the trustee of counsel of his choice.

4. Former Representation of Debtor

The trustee may hire an attorney that has represented the debtor for specified purposes, other than to generally represent the trustee, if such attorney will not represent or hold any adverse interest to the debtor or the estate.[110] In *Hassett v. McColley*, the trustee and his attorney had been administering the Chapter 11 case of a parent corporation and its subsidiary. A motion to disqualify trustee's attorney arose over an adversary proceeding instigated by the trustee to recover certain stock from a third party wherein it was possible that a question could arise as to the ownership of the stock between the parent company and its subsidiary. The court noted that DR 5-105 (C) and Ethical Considerations 5-14, 5-15, 5-16 and 5-19 allowed for multiple representation under prescribed circumstances and found that full disclosure of potential conflicts had been made by counsel to both the parent corporation and the subsidiary as well as to the court.[111] The court found a unity of interest between the parent and subsidiary companies in the recovery of the stock from the

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106. *Id.* at 1000.

107. *Id.* (*citing In re Eloise Curtis, Inc.*, 326 F.2d 698 (2nd Cir. 1964)).

108. *Id.* at 1001.

109. *Id.*

110. 11 U.S.C.A. §327 (e); *see In re G & H Steel Service, Inc.*, 76 B.R. 508 (Bankr. E.D. Pa. 1987); *Hassett v. McColley*, 5 Collier Bankr. Cas. 2d (MB) 1503 (Bankr. S.D.N.Y. 1982).

111. *Hassett*, 5 Collier Bankr. Cas. 2d (MB) at 1514.

third party.[112] If a conflict arose as to the ownership between the two companies, the court stated that the trustee could then appoint special counsel to resolve the ownership question.[113]

Representation of the trustee may also conflict with prior representation of a debtor's officers or partners individually. In *In re Philadelphia Athletic Club, Inc.*,[114] the court disqualified attorneys chosen by the trustee who previously represented two individuals in a struggle for control over a Chapter 11 debtor. In their representation of those clients, the attorneys attacked debtor's plan, accused debtor of fraud and caused the court to remove debtor as debtor-in-possession. The trustee moved to employ these same attorneys as its general counsel and they subsequently withdrew from representing the two individuals. Debtor objected, claiming the attorneys had an interest adverse to the interests of debtor. In disqualifying the attorneys from representing the trustee, the court held that it was not sufficient that the attorneys actually were disinterested because the appearance of being interested could not be avoided.[115] (Note that this result would not be reached under the Rules of Professional Conduct, absent more than an "appearance of professional impropriety.") The court stated that a reasonable person would conclude that the attorneys' prior clients would be given preferential treatment by the attorneys as trustee's counsel, to the detriment of others, and that an attorney for the trustee should not place himself in a position where he may be required to choose between a conflicting interest or his duties.[116] The result reached by the court was unusual because a trustee typically seeks to save the estate money by employing counsel familiar with the debtor. Special counsel could have been employed by the trustee to review the claims or other liabilities of the attorneys' prior clients.

B. REPRESENTATION OF DEBTORS

1. Concurrent and Former Representation of Unsecured and Secured Creditors

"A debtor in possession stands in the shoes of a trustee in every way"[117] and can therefore exercise the rights and duties of a trustee.[118] Much of the previous discussion concerning representation of a trustee is relevant in that attorneys for the debtor-in-possession must be disinterested and hold or represent no adverse interest.[119] "Only the concurrent

112. *Id.* at 1512.
113. *Id.* at 1512-13.
114. *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328 (E.D. Pa. 1982).
115. *Id.* at 335 (*citing* Model Code of Professional Responsibility Canon 9).
116. *Id.*
117. *In re Watson*, 94 B.R. 111, 114 (Bankr. S.D. Ohio 1988).
118. 11 U.S.C.A. §1107(a) (West Supp. 1993).
119. 11 U.S.C.A. §327(a); *see, e.g. In re Michigan Gen. Corp*, 77 B.R. 97 (Bankr. N.D. Tex. 1987) (law firm disqualified from representing Chapter 11 debtor in consolidated case

representation of conflicting interests disqualifies an attorney from representing a debtor-in-possession."[120] Counsel for the debtor can therefore concurrently represent a secured or unsecured creditor in an unrelated transaction, provided no actual conflict or adverse interest exists.[121] Note, however, that some courts disregard the language of Bankruptcy Code Section 327(c), which requires an actual conflict, and disqualify counsel based solely on potential conflicts or the appearance of impropriety.[122] However, an attorney would not be disqualified from representing the debtor-in-possession solely because he represented the debtor before the commencement of the case.[123] In fact, that is the usual practice.

Therefore, representation of the debtor even if the attorney represented unsecured or secured creditors in other matters is allowable, as long as those other matters are not substantially related to the bankruptcy case. However, if the attorney prepared the security agreements between the secured creditor and the debtor, or if the attorney represented a creditor with respect to any matter which the debtor might litigate in a bankruptcy proceeding, then representation should not be considered. The same would apply if the attorney formerly represented officers or directors of the debtor, if it is likely that the debtor will be litigating against these individuals. Even in this situation, the creditors' committee or trustee rather than debtor's counsel could have responsibility for investigating and litigating issues involving the officers and directors.

2. Concurrent and Former Representation of Creditors' Committee and Trustee

Because of the obvious adverse interests in concurrent representation and the fact that prior representation of either the creditors' committee or trustee would concern substantially related matters, no subsequent or concurrent representation of the debtor would be possible.[124]

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where partner of law firm served on boards of directors of corporations controlling related Chapter 11 debtors).

120. *In re Dynamark, Ltd.*, 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991) (citing *In re McKinney Ranch Assocs.*, 62 B.R. 249 (Bankr. C.D. Cal. 1986)) (law firm retained by debtor-in-possession was disinterested even though firm currently represented largest secured creditor in case on unrelated transactions); *see also In re Roberts*, 75 B.R. 402 (Bankr. D. Utah 1987) (simultaneous representation of wholly-owned corporation and its principals in separate Chapter 11 proceedings did not constitute conflict of interest).

121. *See In re Dynamark, Ltd.*, 137 B.R. 380 (Bankr. S.D. Cal. 1991); *In re Flanigan's Enters., Inc.*, 70 B.R. 248 (Bankr. S.D. Fla. 1987).

122. *See, e.g., In re Status Game Corp.*, 102 B.R. 19 (Bankr. D. Conn. 1989).

123. 11 U.S.C.A. § 1107(b) (West 1979).

124. *See, e.g.*, 11 U.S.C.A. § 1103(b) (West Supp. 1993).

C. SECURED CREDITOR REPRESENTATION

1. Concurrent and Former Representation of Debtor

Again, because of obvious adverse interests, concurrent representation of a secured creditor and debtor in the same case is generally prohibited.[126] (Since we are assuming representation of the creditor in the debtor's bankruptcy case, there exists little likelihood that there could be representation of the debtor on an "unrelated" matter.) Furthermore, representation of a secured creditor would probably be precluded if counsel formerly represented the debtor. Debtor would likely have grounds to disqualify the law firm from undertaking representation. Since all matters concerning the debtor will be under scrutiny in a bankruptcy case, the "substantially related" test is typically met.[126] Given the chance that debtor's confidences may be used against him and the overall appearance of impropriety, disqualification becomes all the more likely.[127]

2. Concurrent and Former Representation of Other Secured Creditors

Canons 4, 5 and 9 of the Code of Professional Responsibility would not require disqualification for concurrent representation of other secured creditors in the same bankruptcy case without a showing that the attorney's independent professional judgment on behalf of a client would likely be adversely affected by such multiple employment. Rule of Professional Conduct 1.7 would allow multiple representation if representation of each creditor was not limited by the attorney's representation of other creditors. Of course, full disclosure might be necessary to each client concerning the implications and possible conflicts of such multiple representation, and representation should not be undertaken until each client consents.[128] If there is a likelihood of an adversary proceeding between the creditors, the attorney should not engage in multiple representation.[129] If there is little likelihood of a dispute over collateral, the concurrent representation of secured creditors should be allowable.[130]

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125. *See* Model Code of Professional Responsibility DR 5-105; Model Rules of Professional Conduct Rule 1.7; *In re Kujawa*, 112 B.R. 968 (Bankr. E.D. Mo. 1990).

126. *See supra* part I, section D; Model Rules of Professional Conduct Rule 1.9.

127. *See* Model Code of Professional Responsibility Canon 9, DR 4-101; Model Rules of Professional Conduct Rules 1.6, 1.8(b); *Securities Investor Protection Corp. v. Blinder, Robinson & Co.*, 123 B.R. 900 (Bankr. D. Colo. 1991), *appeal dismissed, Intercontinental Enters., Inc. v. Keller*, 132 B.R. 759 (Bankr. D. Colo. 1991).

128. *See* Model Code of Professional Responsibility DR 5-105, EC 5-16; Model Rules of Professional Conduct Rule 1.7.

129. *See* Model Code of Professional Responsibility Canon 9, DR 5-105, EC 4-5, EC 5-15; Model Rules of Professional Conduct Rule 1.7; *International Business Machs. Corp.*, 579 F.2d at 271.

130. *See* Model Rules of Professional Conduct Rule 1.7 cmt.

Conflicts arise where there is a dispute with regard to the same collateral securing each claim. If an attorney prepared the relevant documentation for both secured creditors, the attorney should probably not represent either creditor because of the appearance of impropriety that would exist with respect to the confidences of the party not represented.[131] However, if the attorney was not involved in the preparation of the relevant documentation for either secured creditor, the attorney could represent one creditor without violating the Code of Professional Responsibility. There would be no multiple representation, yet the attorney could represent the chosen secured creditor without danger of the appearance of any identifiable impropriety, i.e., using the other creditor's confidences against him.[132] Note, however, that such representation may require disclosure and consent under Rule of Professional Conduct 1.7.

3. Concurrent and Former Representation of Unsecured Creditors, Creditors' Committee, and Trustee

Because the interests of unsecured creditors and secured creditors may be adverse, DR 5-105 and Model Rule 1.7 would possibly not allow general concurrent representation in the same bankruptcy case. If representation of the unsecured creditor was specifically limited to filing a proof of claim (in many cases, unsecured creditors rely on a trustee or creditors' committee to scrutinize the claims of secured creditors), representation of the secured creditor concurrently may be appropriate. The issue under DR 5-105(C) is whether or not it is "obvious" that an attorney could adequately represent both the secured and unsecured creditor. Under Rule of Professional Conduct 1.7, the issue would be whether the representation is directly adverse to, or limited by, representation of the unsecured creditor.

An attorney cannot concurrently represent both a secured creditor and the creditors' committee in the same case because of the above-described responsibility of the committee. Also, Bankruptcy Code Section 1103(b) most likely prohibits such representation. Finally, the concurrent representation of a secured creditor and the trustee in the same bankruptcy case, while possible under Bankruptcy Code Section 327(c), is generally prohibited.[133]

In considering whether representation should be undertaken, there is always the question of whether former representation of another creditor, the creditors' committee or the trustee would preclude the representation of a secured creditor. If the attorney's former representation included matters which were substantially related to the secured creditor's inter-

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131. *See* Model Code of Professional Responsibility Canon 9, DR 4-101, EC 4-5; Model Rules of Professional Conduct Rules 1.6, 1.8(b).

132. *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

133. *See* Model Code of Professional Responsibility DR 5-105; Model Rules of Professional Conduct Rule 1.7.

ests in the bankruptcy case, then employment by the secured creditor should not be accepted. Otherwise no appearance of impropriety would exist and employment could be accepted.

D. UNSECURED CREDITOR REPRESENTATION

1. Concurrent and Former Representation of Secured Creditors, Debtor, and Trustee

For reasons previously discussed, general representation of an unsecured creditor would generally not be permissible if counsel was already representing a secured creditor or the debtor or the trustee in the same bankruptcy case. The concurrent representation of a secured creditor in an unrelated matter would be allowable as long as there was no potential for the commencement of an action by one party against the other. Former representation of a secured creditor or debtor or trustee would disqualify counsel from representing an unsecured creditor only if the former representation was substantially related to a matter in the bankruptcy case. Of course, this would obviously mean that former representation of the debtor would most likely disqualify counsel from representing an unsecured creditor in debtor's bankruptcy case. Former representation of the trustee or secured creditor would be disqualifying only if so indicated by the substantially related test.

2. Concurrent and Former Representation of Other Unsecured Creditors

As to the representation of other unsecured creditors in the same bankruptcy case, the conflicts involved would invoke DR 5-105 and Rule 1.7 concerning multiple employment and full disclosure. There would seem to be little likelihood of conflict in this situation. It should be noted, however, that Bankruptcy Rule 2019 requires full disclosure to the court, including a recital of pertinent facts and circumstances in connection with each employment.

E. CREDITORS' COMMITTEE REPRESENTATION

1. Concurrent Representation

Bankruptcy Code Section 1103(b) reads as follows:

> An attorney . . . employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an

adverse interest.[134]

The language of Bankruptcy Code Section 1103 clearly supports the concurrent representation of individual unsecured creditors and the creditors' committee as long as there is no adverse interest involved in such concurrent representation.[135] Because of the inherent adverse interest involved in the concurrent representation of the creditors' committee and the trustee or debtor-in-possession, debtors, or a secured creditor, such concurrent representation is generally prohibited.

2. Former Representation of Secured and Unsecured Creditors, Trustee, and Debtor

Former representation of a secured creditor would disqualify counsel from representing the creditors' committee only if the matters advised on for the secured party were substantially related to the matters in dispute in the bankruptcy case. Counsel for the creditors' committee is duty bound to scrutinize the claims of secured creditors and if counsel prepared documentation relating to the extension of credit on behalf of a particular creditor, he should be disqualified from serving as creditors' committee counsel, unless the court would appoint special counsel to review that creditor's position and handle any resulting litigation.

Since the interests of unsecured creditors and the creditors' committee are the same, there would be little chance that counsel's former representation of a particular unsecured creditor would disqualify him from representing the creditors' committee.

With respect to counsel for the trustee and counsel for the creditors' committee, they would also share a common goal, i.e., to increase the size of the estate available for unsecured creditors. Therefore, former representation of the trustee would not necessarily disqualify counsel from subsequently representing the creditors' committee.[136]

Former representation of the debtor would likely disqualify counsel from representing the creditors' committee because of the substantial relationship of matters in dispute and the chance that confidences might be revealed in the bankruptcy case.[137] However, where the subject matter of the former representation is too remote from the bankruptcy action and where a sufficient showing is made to rebut the presumption that confidential information passed to the attorney during the prior representation, a request for disqualification may be denied.[138]

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134. 11 U.S.C.A. § 1103(b).

135. *See In re Whitman*, 101 B.R. 37 (Bankr. N.D. Ind. 1989).

136. *See In re Market Response Group, Inc.*, 20 B.R. at 151.

137. *See* Model Code of Professional Responsibility DR 4-101; Model Rules of Professional Conduct Rules 1.6, 1.8(b); *In re Davenport Communications Ltd. Partnership*, 109 B.R. 362 (Bankr. S.D. Iowa 1990); *In re Market Response Group, Inc.*, 20 B.R. at 151.

138. *See In re Allied Artists Pictures Corp.*, 5 Bankr. Ct. Dec. (CRR) 636, 638 (Bankr. S.D.N.Y. 1979).

III. CONCLUSION

Because of the overlay of bankruptcy considerations to traditional conflicts analysis, each potential conflict must be carefully considered in light of the information contained in this article. The appendix following this article summarizes the relevant considerations for deciphering the conflicts of interest which frequently occur in bankruptcy representation.

APPENDIX

The conflicts chart on the following pages attempt to put in shorthand form the answer, or at least the possible considerations, concerning conflicts of interest which arise in a bankruptcy case by the concurrent representation of two clients or the subsequent representation of a client concerning the same matters involved in the former representation of another client.

The chart should be read as follows: The entity corresponding to each Roman numeral is the party that is requesting representation of the law firm in a bankruptcy case. Whether or not representation may be undertaken is then answered with respect to each of the other possible entities involved in a bankruptcy case where those entities are (A) currently being represented or (B) were formerly represented. The possible conflicts are further divided according to whether the representation of entities currently or formerly represented was related or unrelated to the particular bankruptcy case in which representation is being requested. The chart indicates whether representation of the party requesting representation would not be possible ("No") or would be possible ("Yes") and other possible restrictions thereon. In shorthand form, the chart indicates the authority for the position taken as to whether representation would be possible as being the Bankruptcy Code (e.g., 327(a), 1103(b)), certain disciplinary rules of the Code of Professional Responsibility (e.g., 4-101, 5-105) or the Rules of Professional Conduct (e.g., 1.7, 1.9). Further explanation of the information contained in the chart is provided in the legend at the end of this appendix. Additional considerations are represented as follows: The indicator "SR" is used to denote case law which has developed the "substantially related" test concerning conflicts with respect to former representation and is explained more fully in the legend; the acronym "*IBM*" refers to a specific Court of Appeals decision more fully explained in the legend; the phrase "not same entity" is used in certain instances with respect to conflicts concerning the trustee to distinguish instances where an individual, who also acts as trustee, is represented or has been represented in his individual capacity and where the attorneys involved may be representing another entity in a bankruptcy case where said individual is acting as trustee.

It should be noted that Canon 9, which requires counsel to avoid even the appearance of impropriety, may also be relevant in certain situations. However, it is not included in this chart because courts generally have not disqualified counsel based solely on Canon 9, holding instead that the more specific language of Canons 4 and 5 controls.

CONFLICTS CHART

I. TRUSTEE - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	N/A	N/A	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**	N/A
2. Debtor	No, 327(a); 5-105; 1.7	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 327(a); 5-105; 1.7	N/A	Yes, SR (not adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 327(c); 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; 327(c)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 327(c); 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 327(c); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART				
II. DEBTOR-IN-POSSESSION - PARTY REQUESTING REPRESENTATION				
PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor	N/A	N/A	Yes, 1107(b)	Yes, 1107(b); 327(b)
2. Trustee	N/A	N/A	Yes, (rare)	N/A
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

III. DEBTOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	N/A	N/A	Yes, SR (similar interest); 1.9	N/A
2. Trustee	No, 327(a); 5-105; 1.7	Yes, 327(a); 5-105*; 1.7*; (not same entity); *IBM*; may require disclosure and consent)	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	Yes (not same entity)
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

IV. CREDITORS' COMMITTEE - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
2. Debtor	No, 1103(b) (adverse interest)***; 5-105; 1.7	No, 5-105; 1.7; 4-101 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 1103(b) (adverse interest)***; 327(a); 5-105; 1.7	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, SR (similar interests); 1.9	Yes, (not same entity)
4. Secured Creditor	No, 1103(b) (adverse interest)***; 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 1103(b); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	Yes, 1103(b) (no adverse interest)***; 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 1103(b); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

V. SECURED CREDITOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 5-105; 1.7 [Possible, 327(c)]	N/A	No, 4-101; 1.6; 1.8(b)	N/A
2. Debtor	No, 5-105; 1.7	No, 5-105; 1.7; 4-101; 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, (not same entity)
4. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	N/A
5. Other Secured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
6. Unsecured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

VI. UNSECURED CREDITOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 5-105; 1.7 [Possible, 327(c)]	N/A	No, 4-101; 1.6; 1.8(b)	N/A
2. Debtor	No, 5-105; 1.7	No, 5-105; 1.7; 4-101; 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, (not same entity)
4. Creditors' Committee	Yes, 1103(b) (no adverse interest)***; 5-105*; 1.7*; (may require disclosure and consent)	N/A	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	N/A
5. Secured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
6. Other Unsecured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART LEGEND

* 5-105 If representation is likely to adversely affect the lawyer's independent professional judgment in behalf of a client, the lawyer must obtain the consent of each party after full disclosure, and it must be obvious that the lawyer may represent each party adequately.

1.7 A lawyer shall not represent a client if the representation of that client will be directly adverse to, or limited by, the representation of another client, unless the lawyer reasonably believes there will be no adverse effect and each client consents after consultation.

** 4-101 A lawyer may only reveal confidences of secrets of his client or use such confidences or secrets to his advantage or to the advantage of a third person if such client consents after full disclosure. Of course, if no confidences or secrets are to be revealed, no disclosure or consent would be necessary.

1.6; 1.8(b) A lawyer shall not reveal information relating to the representation of a client or use such information to the disadvantage of a client unless the client consents after consultation.

*** Section 1103(b) of the Bankruptcy Code allows the concurrent representation of the creditors' committee and another entity in the bankruptcy case as long as such entity does not have an adverse interest. Specifically, the concurrent representation of particular unsecured creditors is allowed unless an adverse interest exists.

SR *Substantially Related Test*: Without full disclosure and consent by the former client, a lawyer may not represent an interest adverse to a former client if the matters embraced by the present representation are substantially related to the matters embraced by the former representation. This test has been formulated as Rule 1.9 of the Rules of Professional Conduct. Rule 1.9 implicitly has application only where the proposed current representation is adversarial with respect to the former representation. It should not apply where there is no materially adverse interest.

IBM Refers to *International Business Machs. Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978), where the court held that counsel was obligated under DR 5-105 to disclose and obtain consent from both parties for representation in situation where concurrent representation of parties with adverse interests involved two entirely unrelated areas.

The holding in *IBM* is consistent with Rule of Professional Conduct 1.7, which provides that representation "directly adverse" to another client is prohibited unless there is disclosure and consent. The Comment to Rule 1.7 provides that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."

Note: Any employment of attorneys by a trustee or debtor-in-possession requires certain disclosures to the court pursuant to Bankruptcy Rule 2014, including the attorneys' connection with the debtor, creditors or any other party in interest.

If multiple representation of creditors is undertaken in a Chapter 11 proceeding, Bankruptcy Rule 2019 requires that the attorneys file a verified statement with the clerk disclosing each creditor represented, said creditors' claims and "the pertinent facts and circumstances in connection with the employment."

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Little Rock, Arkansas
March 26-27, 1998
Volume 2

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Little Rock, Arkansas
March 26-27, 1998
Volume 1

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26-27,1998
Winrock International Conference Center
Morrilton, Arkansas

Introductory Items

1. Welcome and introduction of guests. (Oral)

2. Approval of minutes of September 1997 meeting.

3. Report on the January 1998 meeting of the Committee on Rules of Practice and Procedure. (This will be an oral report.)

4. Report on the January 1998 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

5. Report on recent meetings of the Advisory Committee on Civil Rules. (This will be an oral report.)

Action Items

6. Preliminary Draft of Proposed Amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 published in August 1997. (Materials: Reporter's memorandum dated 2/22/98; the proposed amendments; summary of public comments received; letters received from commentators.)

7. The "Litigation Package" — proposed amendments to Rules 9013 and 9014, and related proposed amendments to 25 other rules. (Materials: Reporter's memorandum dated 2/18/98; the proposed amendments; letter from the Hon. Donald E. Cordova dated 2/12/98; § 111(d) of Pub. L. No. 103-121.)

8. Proposed Draft of Introduction to the "Litigation Package." (Materials: Reporter's memorandum dated 2/15/98; revised draft of Introduction; revised draft showing changes from previous draft.)

9. Rules of Attorney Conduct. (Materials: memorandum dated 2/11/98 from Prof. Daniel R. Coquillette, Reporter to the Standing Committee, to the Hon. Alicemarie H. Stotler, Chair of the Standing Committee, on Federal Rules of Attorney Conduct; memorandum dated 12/1/97 from Prof. Coquillette to the Standing Committee; draft of suggested revisions to Fed. R. App. P. 46; draft of suggested revisions to Fed. R. Civ. P. 83; draft of suggested

Federal Rules of Attorney Conduct; Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct.)

10. Notice to Governmental Units. (Materials: Reporter's memorandum dated 2/16/98; proposed amendments to Rule 2002(j); proposed amendments to Rules 1007 and 5003; memorandum dated 2/2/98 from J. Christopher Kohn; Recommendation 4.2.1 of the National Bankruptcy Review Commission; § 503 of H.R. 3150; § 405 of H.R. 3150.

11. Report of the Forms Subcommittee: Proposed Revisions to Official Forms 1 and 7 Relating to Notice to Governmental Units. (Materials: proposed Official Form 1, Voluntary Petition; proposed Exhibit "C" to the Voluntary Petition; proposed Official Form 7, Statement of Financial Affairs.)

12. Bankruptcy Rule 9020, Contempt Proceedings. (Materials: Reporter's memorandum dated 2/24/98; letter from the Hon. A. Thomas Small dated 2/14/97; 1983 version of Rule 9020; decision in Matter of Terrebonne Fuel and Lube, Inc.; memorandum of J. Christopher Kohn dated 2/11/98; excerpt from the Report of the Proceedings of the Judicial Conference of the United States, March 1996, and materials on expanding contempt authority of federal magistrate judges.)

13. Report of the National Bankruptcy Review Commission. (Materials: Reporter's memorandum dated 2/15/98.)

14. Bankruptcy Rules 4003(b) and 1017(e)(1) and Motions to Extend Time. (Materials: Reporter's memorandum dated 8/6/97; decision in In re Laurain; letter from the Hon. Steven W. Rhodes to the Hon. Paul Mannes dated 6/4/97.)

15. Rule 9022, Notice of Judgment or Order. (Materials: letter from Richard G. Heltzel dated 7/14/97.)

16. Consideration of Whether Proposed Amendments to Rules 2002(a)(6), 2002(g), and 2002(j), (previously approved by the Advisory Committee), should be published for comment. (Materials: drafts of Rules 2002(a)(6), 2002(g), and 2002(j).)

17. Rule 9009, Forms. (Materials: memorandum dated 2/18/98 to bankruptcy clerks of court concerning delay in implementing new official forms; examples of § 341 notices containing local variations.)

Information Items

18. Report on Revisions to Official Form 6, Schedule E, Creditors Holding Claims Entitled to Priority, and Official Form 10, Proof of Claim, Resulting from the Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code. (Materials:

announcement published in the Federal Register on 2/12/98; revised Official Forms 6E and 10, effective 4/1/98.)

19. Reports on the Status of the Electronic Case Files Initiative, the Electronic Courtroom Project, and other Technology Issues. (Materials: These will be oral reports.)

20. Report on the Federal Judicial Center Study of Alternative Dispute Resolution Programs in Bankruptcy Courts. (Materials: to be distributed separately.)

21. Additional Subcommittee Reports [if any]. (Oral)

Administrative Matters

22. Status of All Subcommittees. (Materials: list of existing subcommittees and their members.)

23. Discussion of dates and locations for March 1999 and September/October 1999 meetings. (Oral)

10

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: NOTICE TO GOVERNMENTAL UNITS

DATE: FEBRUARY 16, 1998

At the Advisory Committee meeting in September 1997, the following action was taken regarding the government noticing proposals:

(1) Proposed amendments to Bankruptcy Rule 2002(j) were approved. These amendments require that the particular department, agency, or instrumentality of the United States through which a debt is owed to the federal government be identified in the address of the notice that must be sent to the United States Attorney. I enclose the approved draft as Exhibit A for your information.

(2) Proposed amendments to Rules 1007 and 5003 were referred back to the Subcommittee on Government Noticing for further revision in accordance with the following:

(a) Rule 1007(m)(1) is to provide that a failure to comply with its requirements will not affect the validity of notices if the governmental unit has notice or actual knowledge of the matter in time to participate. The Advisory Committee instructed the Subcommittee to track the language of section 523(a)(3) of the Bankruptcy Code to the extent possible.

(b) Rule 1007(m)(2) is to be a safe harbor provision. That is, if the debtor uses the mailing address in the clerk's register, it is conclusively presumed to be a proper address. But if the debtor uses a different address, then it may be sufficient nonetheless if the governmental unit has notice or actual knowledge of the matter in time to participate.

(c) The clerk shall be required to include only one address in the register for each department, agency, or instrumentality. Also, the clerk shall update the register once each year.

(3) Proposals for amendments to the Statement of Financial Affairs and the suggestion to require early disclosure of harmful environmental hazards were referred to the Subcommittee on Forms.

Since the September meeting, the Subcommittee on Government Noticing, chaired by Judge Small, met by telephone conference to consider revised drafts of proposed amendments to Rules 1007(m) and 5003(e). The Subcommittee also considered a memorandum submitted by J. Christopher Kohn, dated February 2, 1998, in which he expressed opposition to the proposed amendments that were being considered by the Subcommittee. At the conclusion of the discussion, the Subcommittee voted to recommend to the Advisory Committee that it approve the proposed amendments to Rules 1007 and 5003 that are attached to this memorandum as Exhibit B. It also suggested, and Chris agreed, that Chris' memorandum be included in the agenda materials for the March Advisory Committee meeting. A copy of the memorandum is enclosed as Exhibit C.

The Subcommittee on Forms, chaired by Henry Sommer, also met by telephone conference since the September meeting. The report of the Forms Subcommittee is included in the agenda materials as a separate item.

I also want to inform the Advisory Committee about the recommendations of the National Bankruptcy Review Commission regarding government noticing. A copy of the

NBRC's Recommendation 4.2.1 is enclosed as Exhibit D. In reading this recommendation, it is important to note that the "Advisory Committee" mentioned in the recommendation is the Tax Advisory Committee that was formed under the auspices of the Commission, not the Advisory Committee on Bankruptcy Rules.

I also enclose for your information a copy of section 503 of H.R. 3150 (the Gekas-Moran bill entitled "Bankruptcy Reform Act of 1998"). That section, which is enclosed as Exhibit E, is entitled "Effective Notice to Government." In addition, I enclose as Exhibit F, a copy of section 405 of the bill ("Giving Creditors Fair Notice in Chapter 7 and 13 Cases") which, although not directly related to governmental units, deals with notices to creditors. This bill was filed within the past two weeks and I have no indication as to whether it is likely to be enacted.

EXHIBIT A

Reporter's Note: The following amendments to Rule 2002(j) were approved by the Advisory Committee in Williamsburg in September, 1997.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

****

(j) NOTICES TO THE UNITED STATES. Copies of notices required to be mailed to all creditors under this rule shall be mailed:

(1) in a chapter 11 reorganization case in which the Securities Exchange Commission has filed either a notice of appearance in the case or a written request to receive notices, to the Securities and Exchange Commission at any place the Commission ~~designates~~ has designated in the notice of appearance or the written request ~~, if the Commission has filed either a notice of appearance in the case or a written request to receive notices~~;

(2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.;

(3) in a chapter 11 case, to the District Director of Internal Revenue for the district in which the case is pending;

(4) if the papers filed in the case disclose a stock interest of the United States, to the Secretary of

the Treasury at Washington, D.C.,; and

~~(4)~~ (5) if the papers in the case disclose a debt to the United States other than for taxes, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debtor ~~became~~ is indebted. ~~; or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C~~. The department, agency, or instrumentality shall be identified in the address of the notice mailed to the United States attorney.

****

COMMITTEE NOTE

Subdivision (j) is amended to require that the address of any notice mailed to the United States attorney under Rule 2002(j) identify the particular department, agency or instrumentality through which the debtor is indebted to the United States. This requirement may be satisfied by including in the address either the name or an acronym commonly used to identify the department. For example, this requirement may be satisfied by addressing the notice to "United States Attorney (SBA)" if the debt is owed through the Small Business Administration. If the debtor is indebted to the United States through more than one department, agency or instrumentality, each should be identified in the address.

Other amendments to Rule 2002 are stylistic.

EXHIBIT B

PROPOSED AMENDMENTS TO RULES 1007 AND 5003
RECOMMENDED BY THE SUBCOMMITTEE ON
GOVERNMENT NOTICING

Draft Dated 2/16/98 (Not Approved by the Advisory Committee)

Rule 1007. Lists, Schedules, and Statements; Time Limits

****

(m) IDENTIFICATION OF GOVERNMENTAL UNIT.

(1) If the debtor lists a governmental unit as a creditor in any list or schedule filed under Rule 1007, the debtor shall identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. Any failure to comply with this paragraph shall not invalidate the legal effect of any notice if the governmental unit had notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate in it.

(2) If the governmental unit listed as a creditor is the United States or the state or territory in which the court is located -- or is a department, agency, or instrumentality of the United States or that state or territory -- and the address stated in the list or schedule

conforms to the mailing address for the governmental unit designated in the register kept by the clerk under Rule 5003(e), the address is conclusively presumed to be the proper address, but the statement of a different address does not invalidate the legal effect of any notice if the governmental unit had notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate in it.

COMMITTEE NOTE

Governmental units, including federal, state and municipal governments, may have difficulty or may experience delay in identifying the particular department or agency through which a debt is owed. To facilitate earlier and more effective participation by governmental units who are creditors in bankruptcy cases, Rule 1007(m)(1) has been added to require the debtor to identify in the lists and schedules filed under this rule the particular department, agency, or instrumentality of the governmental unit through which the debtor is indebted, if the debtor knows this information.

The lists and schedules frequently are used by clerks and others to generate addresses for notice purposes. If the debtor fails to identify an agency or department of a governmental unit, and notices are given based on the lists and schedules, the failure to comply with Rule 1007(m)(1) will not affect the validity of any notice given to the governmental unit if the governmental unit has notice or actual knowledge of the material information included in the notice in time to participate

in the case or proceeding.

If a governmental unit has filed a statement designating a mailing address for notice purposes under Rule 5003(e), the address may be found in a register in the clerk's office. If the United States or the state or territory in which the court is located is listed as a creditor in the lists or schedules, the debtor may consult the clerk's office to determine whether a mailing address is listed in the register and should use that mailing address in preparing the lists and schedules. Use of the address in the register assures the sender that the notice is properly addressed.

Although the mailing address in the register is conclusively presumed to be a proper address for notice purposes, the sender's failure to use that address does not invalidate the legal effect of any notice if the governmental unit has notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate.

Rule 5003. Records Kept By the Clerk

****

(e) *Register of Federal and State Governmental Units.* The United States or the state or territory in which the court is located may file a statement designating its mailing address. The clerk shall keep, in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a register that includes these mailing addresses, but the clerk is not required to include in the register more than one mailing address for each department, agency, or instrumentality of the United States or the state or territory. If more than one address for a department, agency, or instrumentality is included in the register, the clerk shall also include information that would enable a user of the register to determine the circumstances when each address is applicable, and mailing notice to only one applicable address is sufficient to provide effective notice. The clerk shall update the register annually, effective January 2 of each year. The mailing address in the register is conclusively presumed to be a proper address for the governmental unit, but the use of a different mailing address does not invalidate the legal effect of any notice if the governmental unit had notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate in it.

~~(e)~~ (f) *Other Books and Records of the Clerk.* The clerk shall also keep ~~such~~ any other books and records as may be required by the Director of the Administrative Office of the United States Courts.

COMMITTEE NOTE

Subdivision (e) is added to provide a source where debtors, their attorneys, and other parties may go to determine whether the United States or the state or territory in which the court is located has filed a statement designating a mailing address for notice purposes. By using the address in the register -- which must be available to the public -- the sender is assured that the mailing address is proper. But the use of an address that differs from the address included in the register does not invalidate the legal effect of any notice if the governmental unit had notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate.

The register may include a separate mailing address for each department, agency, or instrumentality of the United States or the state or territory, but may not include addresses of municipalities or other local governmental units.

Although it is important for the register to be kept current, debtors, their attorneys, and other parties should be able to rely on mailing addresses listed in the register without the need to continuously inquire as to new or amended addresses. Therefore, the clerk must update the register, but only once each year.

To avoid unnecessary cost and burden on the clerk and to keep the register a reasonable length, the clerk is not required to include more than one mailing address for a particular agency, department, or instrumentality of the United States or the state or territory. But if more than one address is included, the clerk is required to include information so that a person using the register could determine when each address should be used. In any event, the inclusion of more than one address for a particular department, agency, or instrumentality, does not impose on a person sending a notice the duty to send it to more than one address.

EXHIBIT C

U.S. Department of Justice

Civil Division

Commercial Litigation Branch

J. Christopher Kohn
Director

P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Voice: (202) 514-7450
Fax: (202) 514-9163
chris.kohn@usdoj.gov

February 2, 1998

MEMORANDUM

TO: Subcommittee on Government Notice
Advisory Committee on Bankruptcy Rules

CC: Hon. Adrian G. Duplantier
Patricia S. Channon, Esq.
Prof. Alan N. Resnick

FROM: J. Christopher Kohn
Director
Commercial Litigation Branch

RE: Revised Drafts of Amendments to Rules 1007(m) and 5003

Alan Resnick, in his October 6, 1997 memorandum, presented revised drafts of proposed Rules 1007 and 5003. The revisions are intended to insure that a debtor's failure to comply with the rules will not affect the validity of notices if the governmental unit has notice or actual knowledge of the noticed matter in time to participate. To accomplish this revision, Alan tracked as closely as possible the language of section 523(a)(3) of the Code which affords such protection for discharges only and for individuals only. The proposal would expand these protections to cover all notices and all debtors and thus, ironically, provide disincentives to (or, at the least, minimal incentives for) the use of the address matrix. As formulated, the cure for the malady of inadequate notice to governmental units has now become more problematic than the malady itself. I have an alternative proposal but will first discuss the several reasons why the current proposal seems unwise.

First, as noted, the proposal will provide minimal if any incentive to use the address matrix. Business can go on as usual, with one exception -- debtors will be provided broader protection than the Code presently permits when they do not use an appropriate address. Section 523(a)(3) provides:

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --
>
> * * *

> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit --
>
> > (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection [dealing with claims based on such improper conduct as false statements, fraud, and malicious injury], timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
> >
> > (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request; . . . (Emphasis added.)

As can be seen, this provision only excuses actual notice in the case of discharge and is available only to individuals. Under the current proposal, individual debtors will be free to continue to use alternative addresses but will enjoy expanded protection for all matters (not simply discharges) so long as "actual knowledge" by the governmental unit of the matter noticed can be shown. Thus, sending notice to the Internal Revenue Service at its service center -- even if the IRS has designated another address -- may continue to suffice and have a binding effect for all matters, not just discharges. In addition, persons other than individuals, who are not covered by section 523(a)(3), would now enjoy its protections and not just for discharges but for all matters. But see In re Maya Construction Co., 78 F.3d 1395, 1399 (9th Cir. 1996)(burden is on the debtor to give formal notice; a creditor who is not given notice, even if he has actual notice of the case, does not have a duty to investigate and inject himself into the proceedings); In re Spring Valley, 863 F.2d 832, 833-34 (11th Cir. 1989)(same; also emphasizing that section 523(a)(3) applies only to "individual debtors" and not corporations). In short, this approach defeats the purpose of the address matrix and arguably makes matters worse.

Second, as you know, the Rules Enabling Act, 28 U.S.C. 2075, authorizes the Supreme Court to prescribe rules of practice and procedure but specifically admonishes that "Such rules shall not abridge, enlarge, or modify any substantive right." Here, Congress has specifically and narrowly addressed the substantive effects of notice and actual knowledge and has chosen to confine the provisions of section 523(a)(3) to individuals and to discharges.

I recognize that bankruptcy rules are presumed not to modify substantive rights, e.g., In re Decker, 595 F.2d 185, 189 (3rd Cir. 1979), but here, where Congress has explicitly defined a class of debtors' rights with respect to one subject area, and the rules would expand both the class and the affected rights, that presumption seems inappropriate.

Third, the proposal seems unnecessarily beneficent to debtors when one considers other rules governing notice. For example, Rule 2002(g) permits creditors, equity security holders and indenture trustees to designate an address either through a filed request or through use of a different address in a proof of claim. Otherwise, the address to be used is that shown in the list of creditors or the schedules, whichever is filed later. Thus, any of four addresses, which could change periodically during a case, might be required. Yet the rule affords no immunity to a debtor who fails to provide required notice similar to that suggested for the current proposal (which entails only one address).

Fourth, whether a "governmental unit had notice or actual knowledge of the case or proceeding that is the subject of the notice in time to participate in it" provides an invitation to litigation -- something the address matrix was designed to avoid. Disputes will arise regarding the responsibilities of the person receiving notice or having knowledge (is telling the clerk at the post office stamp window sufficient to put the Postal Service -- or, for that matter, the United States -- on notice of a case?), and the sufficiency of the time required "to participate" in the notices case or proceeding.

In sum, the current proposal goes well beyond providing a "safe harbor" that assures effective service if designated addresses are employed. It imposes no duty on the debtor to comply with the rule by utilizing the designated addresses and, indeed, rewards those who do not. We have drafted alternative language which seemingly strikes a better balance, addressing the Committee's concern that a debtor not be punished for an inadvertent failure to use a designated address, while still recognizing a debtor's duty to comply with the rules:

> A notice that does not comply with this paragraph shall have no effect unless the debtor demonstrates that a good faith effort was made to comply with its provisions and that an officer of the governmental unit who is responsible for the matter or claim implicated had actual knowledge of the case or the deadline or event being noticed in time sufficient to allow the governmental unit to protect its rights.

We urge that the Subcommittee support this alternative. Thank you.

EXHIBIT D

RECOMMENDATION 4.2.1 OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION

BANKRUPTCY: THE NEXT TWENTY YEARS

National Bankruptcy
Review Commission
Final Report

October 20, 1997

The following Proposals were adopted by the Commission at its May 1997 and June 1997 meetings. While many of the Proposals adopted by the Commission were Recommendations by the Advisory Committee, on occasion the Commission rejected the Recommendation of the Advisory Committee and either rejected the Proposal outright or adopted one of the competing Proposals.

4.2.1 Clarify provisions of the Bankruptcy Code on providing reasonable notice to governmental units.

The NBRC has agreed with the Recommendation of the Advisory Committee that notice provisions in the Bankruptcy Code must be clarified as those provisions relate to governmental units. There is a consensus that the government should not lose its rights against the debtor or the bankruptcy estate in a bankruptcy case because of the debtor's failure to provide notice reasonably calculated to reach the proper representatives of the government. Although the details as to what constitutes reasonable notice are not self-evident, the NBRC notes that the Advisory Committee has reviewed the Tax Related Information items contained in the Justice Department's letter of March 7, 1997, to the Advisory Committee on Bankruptcy Rules (Appendix IV) and generally finds these requests reasonable. The NBRC follows the Advisory Committee suggestions that the Congress consider three parts to any Proposal on notice to the government.

First, notice to the government must be reasonably calculated to reach the proper representatives of the government and must reasonably identify the debtor. Without a reasonably targeted notice requirement under the Bankruptcy Code or Rules, one can continue to expect the government to experience special difficulties because of the large and diffuse nature of governmental units and the difficulty governments may have in identifying claims and interests in the bankruptcy case. Improved notice would enhance the fairness and efficiency of the bankruptcy process. Improved notice should also reduce inadvertent violations of the automatic stay and reduce costs associated with the bankruptcy case.

Second, to facilitate proper notice, the Congress should recommend some mechanism to provide sufficient information to permit a debtor to properly identify the relevant federal, state, or local governmental authority for purposes of providing reasonable notice under the circumstances. For example, a debtor's attorney may be aware of the governmental department to provide notice regarding state sales tax in Nevada, where that attorney practices, but may be unaware of the department with sales tax responsibility in Georgia, a state where the client has done business. However, there is a strong belief among the majority of the Advisory Committee members that a national central registry for all government units is impractical. When one considers the vast array of local governmental units, one quickly envisions reams of phone book-like volumes of listings that may quickly become outdated. Presently, there is

no logical entity to support such a system. The consensus of the Advisory Committee is that the bankruptcy clerks' offices compile and maintain the registry (that would presumably be available nationally on PACER). A district or local approach, as opposed to a national registry, should lead to more manageable lists. The clerk's offices are capable of organizing a notice list into appropriate subdivisions (federal agencies, state agencies, local governmental agencies) in an effort to make the district registries user-friendly. The creation and maintenance of a local registry provides a necessary resource to aid in giving adequate notice. If a governmental unit is not listed in the registry, the debtor would be expected to provide reasonable notice and would be protected if the debtor made a good faith effort to provide reasonable notice.

Third, failure to provide reasonable notice should result in some sanction, including exception to any bar date and the nondischargeability of tax claims where the debtor has not provided notice in a manner consistent with the applicable Bankruptcy Code section or Rule.

Finally, the NBRC adopts the Advisory Committee's Recommendation that all notice issues affecting governmental units should be taken up as one overall Proposal with amendments coming in the form of changes to the Bankruptcy Rules. Although it may be more appropriate for the Rules Committee to address the notice issues, the NBRC wants to emphasize that reasonable notice is a key consideration running throughout the Proposals in the Tax Section of this Report.

4.2.2 Amend the Bankruptcy Code to prescribe that to the extent that a tax claim presently is entitled to interest, such interest shall accrue at a stated statutory rate.

The Bankruptcy Code does not specify the interest rate to which tax claims are entitled over the life of a Chapter 11 reorganization plan. Emerging judicial consensus is that a market rate of interest must be determined and that the statutory rate is relevant to that determination, but not binding. The NBRC has agreed with the Recommendation of the Advisory Committee that judicial resources are wasted litigating the issue of what rate of interest is appropriate for tax claims entitled to interest in bankruptcy. Therefore, the NBRC adopts the Recommendations of the Advisory Committee that the Bankruptcy Code be amended to provide for interest at a stated statutory rate where the claim is in fact entitled to interest. This Proposal is not intended to enlarge the universe of claims entitled to interest in bankruptcy. It is also the consensus of the NBRC to provide the same stated statutory rate for all governmental units in the bankruptcy case. Finally, the NBRC adopts as the appropriate rate the fixed federal deficiency rate under IRC § 6621(a)(2), without regard to IRC § 6621(c), be employed.

EXHIBIT E

SECTION 503 OF H.R. 3150 (GEKAS-MORAN BILL) ON EFFECTIVE NOTICE TO GOVERNMENT

personal property of the estate, if the applicable period for contesting or redetermining that amount under any law (other than a bankruptcy law) has expired.".

SEC. 502. ENFORCEMENT OF CHILD AND SPOUSAL SUPPORT.

Section 522(c)(1) of title 11, United States Code, is amended by inserting ", except that, notwithstanding any other Federal law or State law relating to exempted property, exempt property shall be liable for debts of a kind specified in section 523(a) (1) or (5) of this title" before the semicolon at the end of the paragraph.

SEC. 503. EFFECTIVE NOTICE TO GOVERNMENT.

(a) EFFECTIVE NOTICE TO GOVERNMENTAL UNITS.—Section 342 of title 11, United States Code, as amended by section 405, is amended by adding at the end the following:

"(g) If a debtor lists a governmental unit as a creditor in a list or schedule, any notice required to be given by the debtor under this title, any rule, any applicable law, or any order of the court, shall identify the department, agency, or instrumentality through which the debtor is indebted. The debtor shall also identify (with information such as a taxpayer identification number, loan, account or contract number, or real estate parcel number, where

applicable) and describe the underlying basis for the governmental unit s claim. If the debtor s liability to a governmental unit arises from a debt or obligation owed or incurred by another individual, entity, or organization, or under a different name, the debtor shall identify such individual, entity, organization or name.

"(h) The clerk shall keep and update quarterly, in the form and manner as the Director of the Administrative Office for the United States Courts prescribes, and make available to debtors, a register in which a governmental unit may designate a safe harbor mailing address for service of notice in cases pending in the district. A governmental unit may file a statement with the clerk designating a safe harbor address to which notices are to be sent, unless such governmental unit files a notice of change of address.".

(b) ADOPTION OF RULES PROVIDING NOTICE.—The Advisory Committee on Bankruptcy Rules of the Judicial Conference shall, within a reasonable period of time after the date of the enactment of this Act, propose for adoption enhanced rules for providing notice to State, Federal, and local government units that have regulatory authority over the debtor or which may be creditors in the debtor's case. Such rules shall be reasonably calculated to ensure that notice will reach the representatives of the governmental

unit, or subdivision thereof, who will be the proper persons authorized to act upon the notice. At a minimum, the rules should require that the debtor—

"(1) identify in the schedules and the notice, the subdivision, agency, or entity in respect of which such notice should be received;

"(2) provide sufficient information (such as case captions, permit numbers, taxpayer identification numbers, or similar identifying information) to permit the governmental unit or subdivision thereof, entitled to receive such notice, to identify the debtor or the person or entity on behalf of which the debtor is providing notice where the debtor may be a successor in interest or may not be the same as the person or entity which incurred the debt or obligation; and

"(3) identify, in appropriate schedules, served together with the notice, the property in respect of which the claim or regulatory obligation may have arisen, if any, the nature of such claim or regulatory obligation and the purpose for which notice is being given.".

(c) EFFECT OF FAILURE OF NOTICE.—Section 342 of title 11, United States Code, as amended by subsection

(a) and section 405, is amended by adding at the end the following:

"(i)(1) A notice that does not comply with subsections (d) and (e) shall have no effect unless the debtor demonstrates, by clear and convincing evidence, that timely notice was given in a manner reasonably calculated to satisfy the requirements of this section was given, and that—

"(A) either the notice was timely sent to the safe harbor address provided in the register maintained by the clerk of the district in which the case was pending for such purposes; or

"(B) no safe harbor address was provided in such list for the governmental unit and that an officer of the governmental unit who is responsible for the matter or claim had actual knowledge of the case in sufficient time to act.

"(2) No sanction under section 362(h) of this title or any other sanction which a court may impose on account of violations of the stay under section 362(a) of this title or failure to comply with section 542 or 543 of this title may be imposed unless the action takes place after notice of the commencement of the case as required by this section has been received.".

EXHIBIT F

SECTION 405 OF H.R. 3150 (GEKAS-MORAN BILL) ON GIVING CREDITORS FAIR NOTICE IN CHAPTER 7 AND 13 CASES

cial records, files and all other papers, things or property belonging to the debtor as the auditor requests and which are reasonably necessary to facilitate an audit to be made available for inspection and copying.

"(4) The report of each such audit shall be filed with the court, the Attorney General, and the United States Attorney, as required under procedures established by the Attorney General under paragraph (1). If a material misstatement of income or expenditures or of assets is reported, a statement specifying such misstatement shall be filed with the court and the United States trustee shall give notice thereof to the creditors in the case and, in an appropriate case, in the opinion of the United States trustee, requires investigation with respect to possible criminal violations, the United States Attorney for the district.".

(b) EFFECTIVE DATE.—The amendments made by this section shall take effect 18 months after the date of the enactment of this Act.

SEC. 405. GIVING CREDITORS FAIR NOTICE IN CHAPTER 7 AND 13 CASES.

Section 342 of title 11, United States Code, is amended—

(1) in subsection (c)—

(A) by striking ", but the failure of such notice to contain such information shall not invalidate the legal effect of such notice"; and

(B) by adding the following at the end: "If the credit agreement between the debtor and the creditor or the last communication before the filing of the petition in a voluntary case from the creditor to a debtor who is an individual states an account number of the debtor which is the current account number of the debtor with respect to any debt held by the creditor against the debtor, the debtor shall include such account number in any notice to the creditor required to be given under this title. If the creditor has specified to the debtor an address at which the creditor wishes to receive correspondence regarding the debtor's account, any notice to the creditor required to be given by the debtor under this title shall be given at such address. For the purposes of this section, 'notice' shall include, but shall not be limited to, any correspondence from the debtor to the creditor after the commencement of the case, any statement of the debtor's intention under section 521(a)(2) of this title, notice of the commencement of any proceeding in the case to which the creditor is a party, and any notice of the hearing under section 1324.";

(2) by adding at the end of section 342 the following:

"(d) At any time, a creditor in a case of an individual debtor under chapter 7 or 13 may file with the court and serve on the debtor a notice of the address to be used to notify the creditor in that case. Five days after receipt of such notice, if the court or the debtor is required to give the creditor notice, such notice shall be given at that address.

"(e) An entity may file with the court a notice stating its address for notice in cases under chapters 7 and 13. After 30 days following the filing of such notice, any notice in any case filed under chapter 7 or 13 given by the court shall be to that address unless specific notice is given under subsection (d) with respect to a particular case.

"(f) Notice given to a creditor other than as provided in this section shall not be effective notice until it has been brought to the attention of the creditor. If the creditor has designated a person or department to be responsible for receiving notices concerning bankruptcy cases and has established reasonable procedures so that bankruptcy notices received by the creditor will be delivered to such department or person, notice will not be brought to the attention of the creditor until received by such person or department. No sanction under section 362(h) of this title

or any other sanction which a court may impose on account of violations of the stay under section 362(a) of this title or failure to comply with section 542 or 543 of this title may be imposed on any action of the creditor unless the action takes place after the creditor has received notice of the commencement of the case effective under this section.".

SEC. 406. TIMELY FILING AND CONFIRMATION OF PLANS IN CHAPTER 13.

Title 11, United States Code, is amended—

(1) by inserting in section 1321 after "plan" the following:

"on or before 30 days after the filing of the petition unless the court, after notice and hearing, orders otherwise."; and

(2) in section 1324 by adding at the end the following:

"Such hearing shall be held within 45 days of the filing of the plan, unless the court, after notice and hearing, orders otherwise.".

SEC. 407. DEBTOR TO PROVIDE TAX RETURNS AND OTHER INFORMATION.

Section 521 of title 11, United States Code, is amended—

(1) by inserting "(a)" before "The";

(Official Form 1) (9/97)

FORM B1

United States Bankruptcy Court
_____District of_____

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):

Location of Principal Assets of Business Debtor (if different from street address above):

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other _____

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101

☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 13
☐ Chapter 9 ☐ Chapter 12
☐ Sec. 304 - Case ancillary to foreign proceeding

Filing Fee (Check one box)

☐ Full Filing Fee attached

☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s): **FORM B1,** Page 2

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	**Relationship:**	**Judge:**

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all property owned by or in possession of the debtor, whether real property or personal property, that, to the best of the debtor's knowledge, poses a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or has possession of any property that poses a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee that immediate precautionary action may be necessary and will permit any person selected as trustee to evaluate the risks of accepting appointment in the case.

Form 7
(Rev. 1/95)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ **DISTRICT OF** _____

In re: _____, Case No. _____

(Name) Debtor (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - ~~15~~ 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions ~~16 - 21~~ 18 - 25. **If the answer to any question is "None," or the question is not applicable, mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the ~~two~~ six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or ~~person in control~~ owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any person in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

---

1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (if more than one)

There are no proposed changes to pages 2 through 5
or to page 12 (signature page) of the form.

13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

---

14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

---

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

16. SPOUSES AND FORMER SPOUSES. If the debtor resides or resided in a community property state or territory (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the six-year period immediately preceding the commencement of the case, identify the name and social security number of the debtor's spouse and of any former spouse who resides or resided with

the debtor in the community property state.

NAME SOCIAL SECURITY NUMBER

~~16~~ 17 . Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was an officer, director, partner, or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the **~~two~~ six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the two years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the **~~two~~ six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the ~~two~~ **six years** immediately preceding the commencement of this case.

NAME	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES ~~OF OPERATION~~

[Insert] TAXPAYER I.D. NUMBER

b. Identify any business listed in response to subdivision a., ~~b., or c.,~~ above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the ~~two~~ six years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

*(An individual or joint debtor should complete this portion of the statement **only** if the debtor is or has been in business, as defined above, within the ~~two~~ six years immediately preceding the commencement of this case.)*

~~17~~ 18 . Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the **~~six~~ two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS DATES SERVICES RENDERED

None b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy

☐ case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

~~18~~19 . Inventories

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

~~19~~20 . Current Partners, Officers, Directors and Shareholders

None a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the

partnership.
☐

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

~~20~~21 . Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

~~21~~22 . Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

---

23. TAX CONSOLIDATION GROUP. If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION TAXPAYER IDENTIFICATION NUMBER

---

24. PENSION FUNDS. If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PENSION FUND TAXPAYER IDENTIFICATION NUMBER

---

25. ENVIRONMENTAL INFORMATION.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in

violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

* * * * * *

COMMITTEE NOTE

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse, affiliates that may file or have filed combined tax returns with the debtor, the status of the debtor's contributions to any employee pension plan, and environmental issues. In addition, every debtor is required to state on the form whether the debtor has been in business within the six years prior to filing the case. Any debtor that has been in business during that period, which has been enlarged from the two-year period previously specified, also must answer the eight questions on the form that are addressed only to business debtors.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9020 - CONTEMPT

DATE: FEBRUARY 24, 1998

Bankruptcy Rule 9020, which governs contempt proceedings, provides as follows:

Rule 9020. Contempt Proceedings

(a) CONTEMPT COMMITTED IN PRESENCE OF BANKRUPTCY JUDGE. Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

(b) OTHER CONTEMPT. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(c) SERVICE AND EFFECTIVE DATE OF ORDER; REVIEW. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.

(d) RIGHT TO JURY TRIAL. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

In his letter of February 14, 1997, Judge A. Thomas Small requested that the Advisory Committee consider amending Rule 9020. A copy of Judge Small's letter is attached as Exhibit A. In particular, Judge Small believes that the provisions in Rule 9020(c) that delay for at least 10 days the effectiveness of a civil contempt order, and that render the order subject to de novo review by the district court, should be changed so that a bankruptcy judge's civil contempt order may be effective immediately and will be subject to only traditional appellate review. Judge Small writes that "the circuit courts have now recognized the bankruptcy court's civil contempt authority, and Rule 9020 is an unnecessary hindrance to the exercise of that power."

I agree with Judge Small that Rule 9020 should be amended. I suggest that the following key aspects of the rule be changed (among other more minor revisions):

(1) The rule should distinguish between civil and criminal contempt. With respect to civil contempt, the bankruptcy judge should have the power to issue an appropriate order, effective immediately and subject to traditional appellate review.

(2) With respect to criminal contempt, the rule should treat the proceeding in the same way that a non-core proceeding is conducted under Rule 9033, except that the bankruptcy judge should file a proposed order as well as proposed findings of fact and conclusions of

law. To avoid challenges to the bankruptcy judge's authority to enter an order of criminal contempt, I would suggest that the district judge enter the order [the current rule permits the bankruptcy judge to enter the order, subject to de novo review].

I offer the following draft of proposed amendments to Rule 9020 for the Committee's consideration at the September meeting:

Rule 9020. Contempt Proceedings

(a) CONTEMPT COMMITTED IN ~~PRESENCE OF~~ BANKRUPTCY JUDGE'S PRESENCE ~~JUDGE~~. A bankruptcy judge may determine summarily a contempt ~~Contempt~~ committed in the judge's presence ~~of a bankruptcy judge may be determined summarily by a bankruptcy judge~~. ~~The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.~~ Rule 9020(c) applies to the order of contempt.

~~(b) OTHER CONTEMPT. Contempt committed in a case or proceeding pending before a bankruptcy judge, except when determined as provided in subdivision (a) of this rule, may be determined by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the~~

~~United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.~~

(b) OTHER CONTEMPT. Contempt committed in a case or proceeding pending before a bankruptcy judge, but not in the presence of a bankruptcy judge, may be determined only after a hearing on written notice allowing a reasonable time for preparation of the defense. Rule 9020(c)applies to the order of contempt.

(1) NOTICE. The notice of the hearing may be given on the court's own initiative or on application of the United States attorney, and may be served by the clerk, the United States attorney, or by an attorney appointed by the court for that purpose. The notice shall state the essential facts constituting the contempt charged, describe the contempt as criminal or civil, and state the time and place of the hearing.

(2) HEARING. Unless the district court withdraws the proceeding under 28 U.S.C. § 157(d), a bankruptcy judge may preside at the hearing. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the entity charged.

~~(c) SERVICE AND EFFECTIVE DATE OF ORDER; REVIEW. The clerk shall serve forthwith a copy of the order of contempt on the entity named therein. The order shall be effective 10 days after service of the order and shall have the same force and effect as an order of contempt entered by the district court unless, within the 10 day period, the entity named therein serves and files objections prepared in the manner provided in Rule 9033(b). If timely objections are filed, the order shall be reviewed as provided in Rule 9033.~~

(c) ORDER AND REVIEW.

(1) CIVIL CONTEMPT. If the contempt is civil, the bankruptcy judge may issue an order of contempt. Upon entry of the order, the clerk shall serve, in the manner provided in Rule 7004, a copy of the order and notice of its entry on any entity held in contempt. Appellate review of the order is governed by Part VIII of these rules.

(2) CRIMINAL CONTEMPT. If the contempt is criminal, the bankruptcy judge may file a proposed order of contempt, including proposed findings of fact and conclusions of law. The clerk, in the manner provided in Rule 7004, shall serve forthwith on the entity charged a copy of the proposed order and a notice stating that the entity charged may file an objection within 10 days after the date of service. The clerk shall note the date of service on the docket.

The district court, without further notice or hearing, may issue the order of contempt as proposed, unless a timely objection to the proposed order is filed within the time and in the manner provided in Rule 9033(b) and (c). If a timely objection is filed, the district court shall review the proposed order as provided in Rule 9033(d).

(d) RIGHT TO JURY TRIAL. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists. A bankruptcy judge may preside at a jury trial under this rule to the extent provided in 28 U.S.C. § 157(e).

COMMITTEE NOTE

This rule is amended to recognize that a bankruptcy judge may issue an appropriate order holding an entity in civil contempt. See, e.g., Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); In re Hardy, 97 F.3d 1384 (11th Cir. 1996); In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996). In contrast to the current rule, the amended rule permits a bankruptcy judge to issue an order of civil contempt that becomes effective immediately, whether the contempt is determined summarily because it is committed in the presence of the bankruptcy judge or is determined after a hearing under subdivision (b). The provision that delays the effect of a civil contempt order for 10 days is deleted. In addition, a civil contempt order is no longer subject to de novo review by the district court, but will be subject to traditional appellate review under 28 U.S.C. § 158.

The case law is less clear regarding a bankruptcy judge's power to hold a person in criminal contempt. See, e.g., In re Ragar, 3 F.3d 1174 (8th Cir. 1993) (upholding criminal contempt order entered by bankruptcy judge where order was stayed for 10 days to provide an opportunity to object in district court); Matter of Hipp, Inc., 895 F.2d 1503, 1509 (5th Cir. 1990) (bankruptcy judge does not have power to punish

for criminal contempt). Under the present rule, a bankruptcy judge's order of criminal contempt is not effective for 10 days so that the defendant may file an objection in the manner provided in Rule 9033. The amendments make the procedures applicable to criminal contempt orders more consistent with non-core proceedings under Rule 9033. The bankruptcy judge may preside at the hearing, but instead of issuing an order that is not effective for 10 days, the bankruptcy judge files a *proposed* order, including proposed findings of fact and conclusions of law, and, unless a timely objection is filed by the defendant, the district judge then enters the order as proposed 10 days later.

The rule is amended further to clarify that, where a right to trial by jury exists, the bankruptcy judge may preside at the trial only to the extent permitted under 28 U.S.C. 157(e), which was added as part of the Bankruptcy Reform Act of 1994.

Other amendments to this rule are stylistic or for the purpose of clarification.

Background and Discussion

The Bankruptcy Reform Act of 1978 added § 1481 to title 28 to govern jurisdiction of the bankruptcy court. Section 1481 provided that a bankruptcy court "may not ... punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." To implement this provision, Rule 9020 (then titled "Criminal Contempt Proceedings") was promulgated in 1983 (the rule was modeled after former Rule 902).

As promulgated in 1983, Rule 9020 dealt only with criminal contempt. In essence, it provided that a bankruptcy judge may punish a person for criminal contempt (without any delay in the effectiveness of the order), but that if the bankruptcy court thought that it did not have the power to punish the contempt,

"the judge may certify the facts to the district court." A copy of the 1983 version of Rule 9020 is attached as Exhibit B for your information.

Section 1481 was repealed in 1984 and, since then, there has been no statutory provision that specifically mentions the powers of a bankruptcy judge regarding contempt. In view of this void, Rule 9020 was changed to its present form in 1987 [the rule was amended again in 1991, but only for a minor stylistic change]. As noted by Judge Small, the present rule delays the effectiveness of any contempt order (whether civil or criminal) for at least 10 days and provides for de novo review by the district court. The reason for this change is reflected in the 1987 Committee Note, which includes the following:

> "The United States Bankruptcy Courts, as constituted under the Bankruptcy Reform Act of 1978, were courts of law, equity, and admiralty with an inherent contempt power, but former 28 U.S.C. § 1481 restricted the criminal contempt power of bankruptcy judges. Under the 1984 amendments, bankruptcy judges are judicial officers of the district court, 28 U.S.C. § 151, 152(a)(1). **There are no decisions by the court of appeals concerning the authority of bankruptcy judges to punish for either civil or criminal contempt under the 1984 amendments. This rule, as amended, recognizes that bankruptcy judges may not have the power to punish for contempt.**"

Since 1987, courts have widely recognized the inherent power of a bankruptcy judge to issue a civil contempt order. Although an early decision of the Ninth Circuit, In re Sequoia Auto Brokers, Ltd., 87 F.2d 1281 (9th Cir. 1987), held that a bankruptcy judge does not have the inherent power to hold a person in contempt, the Ninth Circuit has since changed its

position. See In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996) (the court of appeals commented that its decision in Sequoia has been superseded by subsequent developments).

Most recently, the Fifth Circuit held that a bankruptcy judge has inherent power to issue a civil contempt order. In Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997) (copy attached as Exhibit C), the court of appeals upheld the bankruptcy judge's power to hold a creditor in civil contempt for violating a discharge injunction when it attempted to collect on a preconfirmation debt in state court. The court of appeals agreed with "the majority of circuits which have addressed this issue and find that a bankruptcy court's inherent power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105." The court then quoted § 105(a) of the Code, which provides:

> "(a) 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 prevent an abuse of process."

Other decisions recognizing the inherent civil contempt power of a bankruptcy judge include, among others, In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996); In re Hardy, 97 F.3d 1384 (11th Cir. 1996); In re Skinner, 917 F.2d 444 (10th Cir. 1990).

In view of the post-1987 judicial decisions that recognize

the bankruptcy judge's power to hold a person in civil contempt (a recognition that did not exist when the rule was amended in 1987), I think that it is appropriate for Rule 9020 to be amended to permit the bankruptcy court to issue civil contempt orders that (a) are effective immediately, and (b) are not subject to de novo review.

On the other hand, courts have not widely recognized a bankruptcy judge's power to hold a person in criminal contempt. In Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d 609, 613 n.3 (5th Cir. 1997), the court noted in a footnote that "[a]lthough we find that bankruptcy judges can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt." See also, Matter of Hipp, Inc., 895 F.2d 1503 (5th. Cir. 1990). Compare In re Ragar, 3 F.3d 1174 (8th Cir. 1993), which upheld a criminal contempt order that was stayed for 10 days to give the defendant the opportunity to object in accordance with Rule 9033(b).

There is an inconsistency between the treatment of criminal contempt under present Rule 9020, and the treatment of non-core matters under Rule 9033. Under Rule 9020, the bankruptcy court enters a contempt order, but it is not effective for 10 days so that objections in accordance with Rule 9033(b) may be filed. In contrast, under Rule 9033 and 28 U.S.C. § 157(c)(1), a bankruptcy court in a non-core matter may only submit proposed findings of fact and conclusions of law (rather than enter an order), and the district court enters any order. I suggest that the Committee

consider amending Rule 9020 to be more consistent with Rule 9033 when the proceeding involves criminal contempt. That is, the bankruptcy judge should only submit a proposed order, including proposed findings of fact and conclusions of law. Any order of criminal contempt should be entered by the district court. This amendment would not significantly change the current procedures, but should avoid any jurisdictional challenge to the order of criminal contempt based on the lack of a bankruptcy judge's criminal contempt powers.

Constitutional Concerns Raised by J. Christopher Kohn

In his memorandum dated February 11, 1998, Chris Kohn raises Article III constitutional concerns with respect to the suggested amendments to Rule 9020. These concerns have caused Chris to oppose the suggested amendments. A copy of the memorandum is attached as Exhibit D.

The memorandum explains how the suggested amendments to Rule 9020 may make it more difficult for the Justice Department to defend the constitutionality of the bankruptcy court system under title 28, as amended by the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA). Chris explains how the suggested amendments to Rule 9020 may weaken the "adjunct" status of the bankruptcy court, and writes that "[a]lone, this might not prove fatal to the bankruptcy court system; however, this change would add to other recent adjustments in the role of the district courts (e.g., authority granted bankruptcy judges to conduct jury trials; expansion of Bankruptcy Appellate Panels, which

substitute for district court review) and the cumulative effect could be troublesome."

Aside from the effect of the suggested amendments to Rule 9020 on the ability to defend the constitutionality of the bankruptcy court system under BAFJA, Chris focuses on the narrower question of whether it is constitutional for bankruptcy judges to have civil contempt power under the Marathon decision (apparently assuming that the overall bankruptcy court system is constitutional). On this issue, Chris does not take the position that giving bankruptcy judges civil contempt power is clearly unconstitutional. Rather, he states that it is unclear whether the Department of Justice would be successful in defending it.

Whenever bankruptcy judges are given additional power, there is a risk that it will be the straw that breaks the camel's back with respect to the constitionality of the current jurisdictional system. But, in view of recent court of appeals decisions holding that bankruptcy courts currently have civil contempt power as an inherent power of the court or under section 105(a) of the Code, the suggested amendments to Rule 9020 could be viewed as conforming to the current state of the law, rather than a change in the power of the bankruptcy court. If the proposed amendments are viewed as giving bankruptcy courts additional power that they did not enjoy previously, the Advisory Committee should consider whether it agrees with Chris that the constitutional issues he raises justifies not going forward with them.

Magistrate Judges and Contempt Power

Chris also mentions in his memorandum that constitutional analysis regarding the bankruptcy court system frequently invokes analogies to magistrate judges (who are not Article III judges), and he notes that Congress has not granted magistrate judges independent contempt authority. Under 28 U.S.C. 636(e), magistrate judges must certify facts of alleged misconduct to the district court where the contempt order is entered.

Although magistrate judges do not have the power to enter contempt orders at this time, it is interesting to note that the Judicial Conference has supported giving magistrate judges limited contempt powers. For your information, I enclose as Exhibit E the following materials relating to the expansion of contempt authority of magistrate judges:

(1) a section of the Report of the Proceedings of the Judicial Conference of the United States, dated March 12, 1996, which includes the Judicial Conference's approval of a recommendation that magistrate judges be given limited criminal and civil contempt powers;

(2) John Rabiej's letter of September 26, 1997, regarding H.R. 2294 (Federal Courts Improvement Act of 1997), and section 305 of the bill that would give magistrate judges limited contempt powers consistent with the Judicial Conference's recommendation;

(3) A letter from Hon. Philip M. Pro, Chairman of the Magistrate Judges Committee of the Judicial Conference, to Andrew Fois, Assistant Attorney General, dated October 29, 1997, and an enclosed memorandum of the same date from Douglas A. Lee, Senior Attorney, Magistrate Judges Division of the Administrative Office of United States Courts, in support of expanded contempt authority for magistrate judges and addressing Article III constitutional concerns raised by the Department of Justice.

(4) Report of the Subcommittee on Magistrate Judge Contempt Authority (a subcommittee of the Magistrate Judges Committee of the Judicial Conference), dated December 1995, which addresses Article III constitutional concerns.

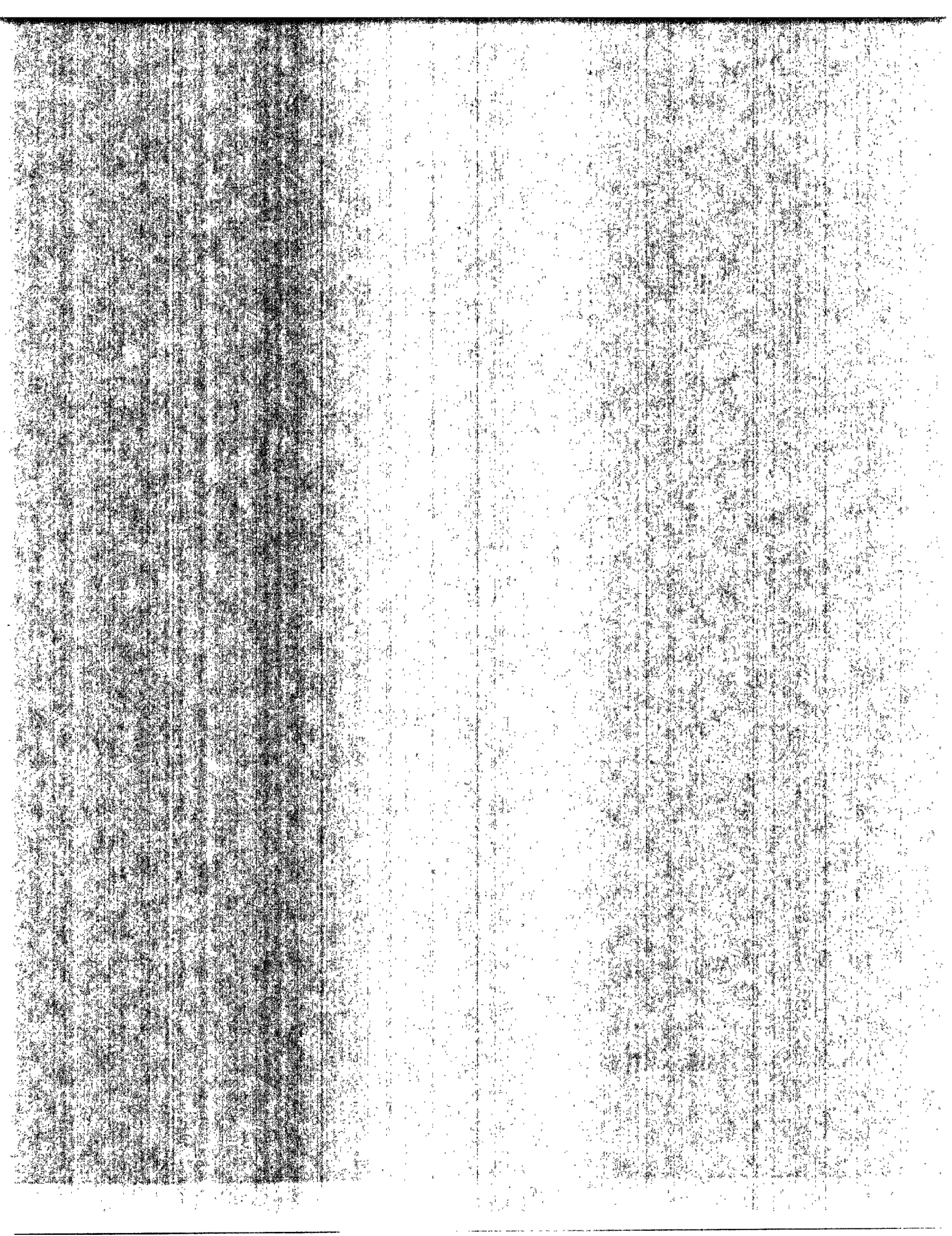

EXHIBIT A

United States Bankruptcy Court

Eastern District of North Carolina

A. Thomas Small
Chief Judge
919-856-4603
Fax 919-856-4693

Post Office Drawer 2747
Room 220
Century Station
300 Fayetteville Street Mall
Raleigh, North Carolina 27602

February 14, 1997

The Honorable Adrian G. Duplantier
Chair, Advisory Committee
on Bankruptcy Rules
Senior U.S. District Judge
Eastern District of Louisiana
United States Courthouse
500 Camp Street
New Orleans, LA 70130

Dear Adrian:

I am writing to call your attention to a problem with Bankruptcy Rule 9020. Specifically, the problem is that Rule 9020(c) provides that contempt orders entered by bankruptcy judges are not effective for 10 days, and if objections are filed, are subject to de novo review.

If a bankruptcy judge enters a coercive civil contempt order, e.g., to turn over the keys or pay a fine of $100 per day, the order is, at best, not effective for 10 days, and at worst, not effective at all until it has been reviewed de novo by the district court.

Rule 9020 was probably adopted at a time when there was considerable doubt as to the contempt authority of bankruptcy judges, and the Rule was an attempt to expand that authority. However, the circuit courts have now recognized the bankruptcy court's civil contempt authority, and Rule 9020 is an unnecessary hindrance to the exercise of that power.

I hope you agree that this issue merits the attention of the Committee.

Very truly yours,

Tom

A. Thomas Small

ATS:lw

cc: Peter G. McCabe
Alan N. Resnick

EXHIBIT B

1983 VERSION OF RULE 9020

1983 Version of Rule 9020

Advisory Committee Note

This rule provides the procedure for invoking the court's power under § 107 of the Code.

Rule 9019.

COMPROMISE AND ARBITRATION

(a) Compromise. On motion by the trustee and after a hearing on notice to creditors, the debtor and indenture trustees as provided in Rule 2002(a) and to such other persons as the court may designate, the court may approve a compromise or settlement.

(b) Authority To Compromise or Settle Controversies Within Classes. After a hearing on such notice as the court may direct, the court may fix a class or classes of controversies and authorize the trustee to compromise or settle controversies within such class or classes without further hearing or notice.

(c) Arbitration. On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration.

Advisory Committee Note

Subdivisions (a) and (c) of this rule are essentially the same as the provisions of former Bankruptcy Rule 919 and subdivision (b) is the same as former Rule 8-514(b), which was applicable to railroad reorganizations. Subdivision (b) permits the court to deal efficiently with a case in which there may be a large number of settlements.

Rule 9020.

CRIMINAL CONTEMPT PROCEEDINGS

(a) Procedure.

(1) Summary Disposition. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481 may be punished summarily by a bankruptcy judge if he saw or heard the conduct constituting the contempt and if it was committed in his actual presence.

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The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(2) Disposition After a Hearing. Criminal contempt which may be punished by a bankruptcy judge acting pursuant to 28 U.S.C. § 1481, except when determined as provided in paragraph (1) of this subdivision, may be punished by the bankruptcy judge only after a hearing on notice. The notice shall be in writing, shall state the essential facts constituting the criminal contempt charged and describe the contempt as criminal and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense. The notice may be given on the court's own initiative or on application of the United States attorney or by an attorney appointed by the court for that purpose. If the contempt charged involves disrespect to or criticism of a bankruptcy judge, that judge is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Certification to District Court. If it appears to a bankruptcy judge that criminal contempt has occurred but the court is without power under 28 U.S.C. § 1481, to punish or to impose the appropriate punishment for the criminal contempt the judge may certify the facts to the district court.

(b) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Advisory Committee Note

Section 1481 of Title 28 provides that a bankruptcy court "may not . . . punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment." Rule 9020 does not enlarge the power of bankruptcy courts.

Subdivision (a) is adapted from former Bankruptcy Rule 920 and Rule 42 F. R. Crim. P. Paragraph (1) of the subdivision permits summary imposition of punishment for contempt if the conduct is in the presence of the court and is of such nature that the conduct "obstruct[s] the administration of justice." See 18 U.S.C. § 401(a). Cases interpreting Rule 42(a) F. R. Crim. P. have held that when criminal contempt is in question summary disposition should be the exception: summary disposition should be reserved for situations where it is necessary to protect the judicial institution. 3 Wright,

Federal Practice & Procedure—Criminal § 707 (1969). Those cases are equally pertinent to the application of this rule and, therefore, contemptuous conduct in the presence of the judge may often be punished only after the notice and hearing requirements of subdivision (b) are satisfied.

If the bankruptcy court concludes it is without power to punish or to impose the proper punishment for conduct which constitutes contempt, subdivision (a)(3) authorizes the bankruptcy court to certify the matter to the district court.

Subdivision (b) makes clear that when a person has a constitutional or statutory right to a jury trial in a criminal contempt matter this rule in no way affects that right. See Frank v. United States, 395 U.S. 147 (1969).

The Federal Rules of Civil Procedure do not specifically provide the procedure for the imposition of civil contempt sanctions. The decisional law governing the procedure for imposition of civil sanctions by the district courts will be equally applicable to the bankruptcy courts.

Rule 9021.

ENTRY OF JUDGMENT; DISTRICT COURT RECORD OF JUDGMENT

(a) Original Entry of Judgment of Bankruptcy Court. Subject to the provisions of Rule 54(b) F. R. Civ. P.: (1) on a general verdict of a jury, or on a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign and enter the judgment without awaiting any direction by the court; (2) on a decision by the court granting other relief, or on a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. Entry of the judgment shall not be delayed for the taxing of costs.

(b) District Court Record of Judgments of Bankruptcy Courts. On certification by the clerk of the bankruptcy court to the clerk of the district court of a copy of a judgment of the bankruptcy court for the recovery of money or property, the clerk

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EXHIBIT C

In the Matter of TERREBONNE FUEL AND LUBE, INCORPORATED, Debtor.

PLACID REFINING COMPANY, Appellant–Cross–Appellee,

v.

TERREBONNE FUEL AND LUBE, INC., Appellee–Cross–Appellant.

No. 96–30508.

United States Court of Appeals, Fifth Circuit.

March 27, 1997.

Bankruptcy court held creditor in contempt for violating Chapter 11 debtor's discharge injunction by pursuing preconfirmation debt in state court. On appeal following remand, 158 B.R. 71, 20 F.3d 1169, the United States District Court for the Eastern District of Louisiana, A.J. McNamara, J., 194 B.R. 1002, upheld award, and creditor appealed. The Court of Appeals held that: (1) contempt proceedings were civil, as opposed to criminal; (2) bankruptcy court had authority to conduct civil contempt proceedings; and (3) creditor was not denied due process in contempt proceedings.

[48]

Affirmed.

See also 681 So.2d 1292.

1. Contempt ⇐3, 4

Contempt proceedings are classified as either civil or criminal: if purpose of order is to punish contemnor or to vindicate authority of court, order is viewed as "criminal"; if, on other hand, purpose of contempt order is to coerce compliance with order or to compensate another party for contemnor's violation, order is considered to be "civil."

See publication Words and Phrases for other judicial constructions and definitions.

2. Bankruptcy ⇐2465.1

Contempt proceedings against creditor for pursuing preconfirmation reconventional demand in state court, based upon preconfirmation claim against Chapter 11 debtor, in violation of discharge injunction were "civil," rather than "criminal" in nature, where purpose of sanction was to compensate debtor for costs and expenses in defending reconventional demand.

3. Bankruptcy ⇐2134

Bankruptcy courts have statutory authority to conduct civil contempt proceedings. Bankr.Code, 11 U.S.C.A. § 105.

4. Bankruptcy ⇐2134

Bankruptcy court's power to conduct civil contempt proceedings and issue orders in accordance with outcome of those proceedings lies in bankruptcy court general powers provision. Bankr.Code, 11 U.S.C.A. § 105.

5. Bankruptcy ⇐2126, 2134

Bankruptcy court can issue any order, including civil contempt order, necessary or appropriate to carry out Bankruptcy Code provisions. Bankr.Code, 11 U.S.C.A. § 105.

6. Bankruptcy ⇐2134

Bankruptcy courts lack power to hold persons in criminal contempt. Bankr.Code, 11 U.S.C.A. § 105.

7. Bankruptcy ⇐2187

Bankruptcy court's decision to impose sanctions is discretionary.

8. Bankruptcy ⇐3784

Court of Appeals reviews exercise of bankruptcy court power to impose sanctions for abuse of discretion.

9. Bankruptcy ⇐2187, 2464

Automatic stay ended upon Chapter 11 plan confirmation, so that bankruptcy court properly sanctioned creditor under Chapter 11 plan confirmation provision, rather than under automatic stay. Bankr.Code, 11 U.S.C.A. §§ 362, 1141.

10. Bankruptcy ⇐2465.3
Constitutional Law ⇐306(4)

Creditor was not denied due process in bankruptcy court contempt proceedings arising from creditor's pursuit of state court reconventional demand against Chapter 11 debtor for preconfirmation debts, in violation of discharge injunction, though bankruptcy court did not strictly follow bankruptcy contempt proceeding rule; creditor received constitutionally required notice and opportunity to be heard before being sanctioned. U.S.C.A. Const.Amend. 5; Bankr.Code, 11 U.S.C.A. § 1141; Fed.Rules Bankr.Proc.Rule 9020, 11 U.S.C.A.

James G. Burke, Jr., Robert D. Hoffman, Jr., Burke & Mayer, New Orleans, LA, for Appellant–Cross–Appellee.

C. Berwick Duval, II, Patricia P. Reeves, Duval, Funderburk, Sundbery & Lovell, Houma, LA, for Appellee–Cross–Appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before REYNALDO G. GARZA, SMITH and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Placid Refining Company and Terrebonne Fuel and Lube have been engaged in an eleven-year battle originating from a fuel purchase agreement between them. Although a number of legal issues have been presented to both state and federal courts over the years, presently before this court is an appeal from a bankruptcy court's order finding Placid Refining Company in contempt

[49]

for violating a post-confirmation injunction against bringing actions stemming from pre-confirmation debts.

Background

As previously recognized by the many courts which have addressed various issues in this action, the procedural history of this case is a tangled one. It all started on April 28, 1985, when Terrebonne Fuel and Lube, Inc. ("Terrebonne"), a wholesale fuel distributor, entered into a diesel fuel purchase agreement with Placid Refining Company ("Placid"), whereby Placid agreed to sell Terrebonne up to 50,000 barrels of diesel fuel per month on credit with payments be made within 65 days of shipment. This agreement was for a term of one year. Placid secured Terrebonne's commitment with three separate security agreements consisting of: 1) a chattel mortgage on Terrebonne's inventory; 2) assignment of Terrebonne's accounts receivable; and 3) signatory rights on Terrebonne's bank account. These three agreements, collectively, acted as collateral. In order for Terrebonne to purchase the diesel it had to maintain and certify that 85% of the total certified value of this combined collateral exceeded the sum of its existing debt to Placid plus the price of the diesel to be purchased. Terrebonne made such certifications through borrowing base reports that were submitted weekly to Placid.

According to Placid, at the expiration of the agreement, Terrebonne owed it over $1 million of which $500,000 was past due. Placid contends that when it tried to exercise the lien against Terrebonne's bank account, Terrebonne sought protection under Chapter 11. Terrebonne did, in fact, file for Chapter 11 on May 1, 1986. On April 16, 1987, the bankruptcy court, over Placid's objections, confirmed Terrebonne's proposed reorganization plan which provided for payment of Placid's debt over five (5) years. On April 24, 1987, three days before the order of confirmation became final, Terrebonne filed an equitable subordination complaint against Placid alleging that Placid had forced it into bankruptcy by not delivering the quantities of fuel provided for in the agreement. Placid moved to dismiss this complaint on the grounds of res judicata.

On June 29, 1989, the bankruptcy court dismissed Terrebonne's complaint holding that it failed to state a claim for equitable subordination and because the matters raised therein were not "core" proceedings. Thus, the bankruptcy court declined to exercise jurisdiction over the claim. No appeal was taken from this ruling.[1]

Following the refusal of the bankruptcy court to exercise jurisdiction over what it viewed as a breach of contract claim arising under state law, Terrebonne brought its action in Louisiana state court. Placid reasserted its res judicata claim arguing that the reorganization plan was final and therefore barred Terrebonne's state claim. Placid then sought leave to file a reconventional demand, a pleading identical to a counter claim, alleging that Terrebonne had overinflated its excess positive collateral in the weekly base borrowing reports. Placid sought damages for, *inter alia*, fees and expenses incurred in the bankruptcy proceeding. Terrebonne objected to Placid's request to file this reconventional demand on numerous grounds, but the state court granted Placid's request.

In response to the filing of this reconventional demand, Terrebonne went to bankruptcy court on February 16, 1993, seeking to hold Placid in contempt for seeking damages from pre-confirmation actions in state court. Placid, in response, asked the court to order Terrebonne to dismiss its state court claims, again, on res judicata grounds. On March 22, 1993, the bankruptcy court signed its order holding Placid in contempt and ordered Terrebonne to submit evidence of the cost and expense it incurred in the matter, stating that it would designate the amount of sanctions after submission of this information. In the meantime, Placid, be-

1. We subsequently noted that the bankruptcy court erred in determining that Terrebonne's claims against Placid were not "core" proceedings. *See In re Terrebonne Fuel and Lube, Inc.*, No. 93-3553 at p. 6, 29 F.3d 626 (5th Cir. April 4, 1994). However, we refused to re-visit that holding then and we refuse to re-visit that holding now since neither party appealed from that ruling.

lieving to be in compliance with the contempt order, moved the state court for leave to strike all references to pre-confirmation damages from its reconventional demand and informed the state court that the only damages it was seeking were those that arose post-confirmation. In addressing Placid's response requesting a dismissal on a res judicata basis, the bankruptcy court refused to entertain Placid's request on the grounds that the matter was neither a "core" proceeding nor "related to" the bankruptcy case. Although Placid appealed this ruling on March 24, 1993, it did not obtain a stay of the bankruptcy court's order pending appeal.

The state court matter went to trial and on March 29, 1993. At the conclusion of this trial, a judgment in favor of Terrebonne was returned in the amount of $500,000. Placid filed a suspensive appeal to the state court proceeding on May 5, 1993. Cognizant of the state court's final judgment on the merits, the district court dismissed as moot (on res judicata grounds) Placid's appeal of the bankruptcy court decision. We subsequently affirmed the district court. *See In re Terrebonne Fuel and Lube, Inc.*, No. 93-3553 at p. 6 (5th Cir. April 4, 1994).

In response to Placid's pursuit of a suspensive appeal in state court [2], Terrebonne filed a second motion in bankruptcy court to hold Placid in contempt for continuing to prosecute a claim of damages arising out of pre-confirmation conduct. After extensive discovery and a hearing on the merits held on January 7, 1994, the bankruptcy court entered an order holding Placid in contempt and awarded Terrebonne $18,357.48 for costs and fees associated with the defense of the reconventional demand. The district court affirmed this decision, Placid timely filed its notice of appeal, and Terrebonne filed its notice of cross appeal requesting the court to increase the sanction imposed on Placid for having to defend itself against Placid's appeal.

2. It appears as though the state court appeals are complete. The intermediate court reversed the trial court, holding that Terrebonne's claim was barred by res judicata, but it was in turn reversed by the Louisiana Supreme Court. *See Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 666 So.2d 624 (La.1996). On remand to address the merits, the intermediate court rendered judgment in favor of Placid on its reconventional demand. *See Terrebonne Fuel & Lube, Inc. v. Placid Refining Co.*, 681 So.2d 1292 (La. App. 4 Cir.1996), *writ denied*, —— So.2d ——, 1996 WL 733100 (La., December 13, 1996).

Analysis

The thrust of Placid's argument is that, notwithstanding the fact that the bankruptcy court committed error in 1989 by dismissing Terrebonne's adversary complaint as a "non-core" proceeding, its actions were not violative of any order, standing or specific, of the bankruptcy court. However, before we reach the "core" of Placid's argument we must first address one very important issue. We must determine whether the bankruptcy court had the authority to conduct contempt proceedings in this case. If we conclude that the court did have authority then we can review the substantive issues addressing the exercise of that authority raised by both Placid and Terrebonne.

I. Contempt proceedings

[1, 2] Contempt proceedings are classified as either civil or criminal, depending on their primary purpose. *Lamar Financial Corp. v. Adams*, 918 F.2d 564, 566 (5th Cir. 1990). If the purpose of the order is to punish the party whose conduct is in question or to vindicate the authority of the court, the order is viewed as criminal. *Id.* If, on the other hand, the purpose of the contempt order is to coerce compliance with a court order or to compensate another party for the contemnor's violation, the order is considered to be civil. *Id.* We are convinced that the contempt proceedings in this case were civil in nature, as the clear purpose of the sanction imposed upon Placid was to compensate Terrebonne for the costs and expenses in defending Placid's reconventional demand.

[3] While we have not yet specifically addressed the issue of whether the bankruptcy courts have the statutory authority to conduct civil contempt proceedings, many other Circuits have. *In Re Walters*, 868 F.2d 665, 669 (4th Cir.1989) ("A court of bankruptcy has authority [under § 105] to

issue any order necessary or appropriate to carry out the provisions of the bankruptcy code."); *In Re Rainbow Magazine, Inc.*, 77 F.3d 278, 284 (9th Cir.1996) ("There can be little doubt that bankruptcy courts have the inherent power to sanction vexatious conduct [under § 105]."); *In Re Skinner*, 917 F.2d 444, 447 (10th Cir.1990) (holding that Congress granted bankruptcy courts civil contempt power under 11 U.S.C. § 105.); *In Re Hardy*, 97 F.3d 1384, 1389 (11th Cir.1996) ("Section 105 grants statutory contempt powers in the bankruptcy context."); *See also In Re Power Recovery Systems, Inc.*, 950 F.2d 798, 802 (1st Cir.1991) ("Bankruptcy Rule 9020(b) specifically provides that a bankruptcy court may issue an order of contempt if proper notice of procedures are given.").

[4–6] We agree with our brethren in their ultimate determination. Moreover, we assent with the majority of the circuits which have addressed this issue and find that a bankruptcy court's power to conduct civil contempt proceedings and issue orders in accordance with the outcome of those proceedings lies in 11 U.S.C. § 105. This section provides in pertinent part:

> (a) 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 prevent an abuse of process.

The language of this provision is unambiguous. Reading it under its plain meaning, we conclude that a bankruptcy court can issue any order, including a civil contempt order, necessary or appropriate to carry out the provisions of the bankruptcy code.[3] We find that an order, such as the one entered by the bankruptcy court, which compensates a debtor for damages suffered as a result of a creditor's violation of a post-confirmation injunction under 11 U.S.C. § 1141, was both necessary and appropriate to carry out the provisions of the bankruptcy code.

II. Issues raised by the parties

[7, 8] In light of this finding, we now summarily address the substantive issues in the case. Although the bankruptcy appellate process makes this court the second level of review, we perform the identical function as the district court. We review a bankruptcy court's finding of fact for clear error, *see Matter of Haber Oil Co.*, 12 F.3d 426, 434 (5th Cir.1994), and decide issues of law *de novo*. *Matter of Oxford Management, Inc.*, 4 F.3d 1329, 1333 (5th Cir.1993). Where the district court has affirmed the bankruptcy court's factual findings, we will only reverse if left with a firm conviction that error has been committed. *See Id.* The bankruptcy court's decision to impose sanctions is discretionary, therefore we review the exercise of this power for abuse of discretion. *See Shipes v. Trinity Indus.*, 987 F.2d 311, 323 (5th Cir.), *cert. denied*, 510 U.S. 991, 114 S.Ct. 548, 126 L.Ed.2d 450 (1993).

Given the facts briefed on appeal, the facts in the record, oral arguments, and an adequately prepared opinion by the district court, we find that the issues raised by both Placid and Terrebonne do not merit prolonged discussion.

[9] We find that appellant's contention that the bankruptcy court erred in imposing sanctions under 11 U.S.C. § 362(h) is inapplicable to the case at hand. The automatic stay under § 362 terminated upon confirmation of the 1987 plan of reorganization. Since Placid did not file its state reconventional demand until 1993, its claim was governed under 11 U.S.C. § 1141, the post-confirmation discharge injunction. Hence, § 362 is inapposite and the bankruptcy court correctly sanctioned Placid under § 1141.

[10] We find that the lower court was correct in finding that Placid was not denied due process under Bankruptcy Rule 9020. Although the bankruptcy court did not strictly follow this rule, Placid was given the con-

3. Although we find that bankruptcy judge's can find a party in civil contempt, we must point out that bankruptcy courts lack the power to hold persons in criminal contempt. *See Matter of Hipp, Inc.*, 895 F.2d 1503, 1509 (5th Cir.1990).

stitutionally required notice and an opportunity to be heard before being sanctioned. *See International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, ———, 114 S.Ct. 2552, 2557–2558, 129 L.Ed.2d 642 (1994).

We find that the lower court did not abuse its discretion in actually holding Placid in contempt.

Finally, we deny Terrebonne's request for an increase in the sanctions for having to pursue this matter on appeal.

Conclusion

Based on the foregoing reasons, the order of the bankruptcy court holding Placid in contempt is hereby AFFIRMED. Furthermore, Terrebonne's request in its cross-appeal that the amount of sanctions be increased is DENIED.

EXHIBIT D

U.S. Department of Justice

Civil Division

Commercial Litigation Branch

J. Christopher Kohn
Director

P.O. Box 875
Ben Franklin Station
Washington, D.C. 20044-0875

Voice: (202) 514-7450
Fax: (202) 514-9163
chris.kohn@usdoj.gov

February 11, 1998

MEMORANDUM

TO: Prof. Alan N. Resnick

FROM: J. Christopher Kohn

RE: Rule 9020 -- Contempt Procedures

At our September meeting, we were unable to discuss Item 9, a proposal to amend Rule 9020, in essence, to treat civil contempt proceedings as core matters in which the bankruptcy court's contempt order would be immediately enforceable and subject only to deferential review by the district court. After the meeting, I mentioned to you that I have concerns, principally related to Article III considerations. I would like to share them in advance of the March meeting.

As you know, in Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982), the Supreme Court found the 1978 Code's grant of jurisdiction to bankruptcy judges unconstitutionally broad because it conferred Article III authority on judges who lack the life tenure and salary security of Article III judges. Congress responded by passing the Bankruptcy Amendments and Federal Judgeship Act of 1984 (BAFJA), Pub. L. No. 98-353, 98 Stat. 333. BAFJA vests jurisdiction over bankruptcy cases in the district courts and allows the district courts to refer cases to the bankruptcy courts, which are expressly made units of the federal district courts. 28 U.S.C. §§ 151, 157, 1334. *See* In re Clay, 35 F.3d 190, 193 (5th Cir. 1994). BAFJA specifies the so-called "core matters" as to which bankruptcy judges may issue final orders and reserves other matters for final decision by the federal district court.

Whether this new system achieves a constitutional result has been debated in the courts and academia, although the decisions to date have upheld the constitutionality of BAFJA.[1] In defending

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[1] *See, e.g.*, Mankin v. Munn, 823 F.2d 1296 (9th Cir. 1987), (continued...)

BAFJA, the Department of Justice relies upon two propositions.[2] First, we assert that most, if not all, core issues concern "public rights" and thus can be adjudicated by an Article I court -- the bankruptcy court -- with little or no involvement by an Article III court. Second, we argue that, even if core matters concern "private rights," the bankruptcy court can adjudicate them because it is an "adjunct" of the district court. How successful we would be in defending the proposed amended Rule 9020 under either theory is unclear.

Under the first theory, our defense would likely be subject to risks that are similar to those faced by the system as a whole. Several courts of appeals have endorsed the bankruptcy court's exercise of contempt power, utilizing the "public rights" analysis. *See, e.g.*, In re Skinner, 917 F.2d 444, 448-50 (10th Cir. 1990); In re Walters, 868 F.2d 668, 669-70 (4th Cir. 1989); Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986). *But cf.* In re Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281 (9th Cir. 1987). However, the ultimate outcome of the "public rights" analysis is not free from doubt. Although civil contempt does not involve a Marathon-like state-created cause of action, it also does not "arise between the government and others", the narrow characterization of the doctrine of "public rights" endorsed by the plurality in Marathon (458 U.S. at 69) and by Justice Scalia's concurrence in Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 65 (1989). I recognize, and we have successfully advocated, the broader view of "public rights," i.e., that it can encompass broadly the restructuring of debtor-creditor relations, but that is where the debate lies. *See generally* William S. Parkinson, "The Contempt Power of the Bankruptcy Court, Fact or Fiction: The Debate Continues," 65 **Am. Bankr. L. J.** 591, 621 (1991) (concluding that bankruptcy courts may not constitutionally exercise contempt powers "because contempt proceedings involve issues between two private parties -- matters which are squarely within the definition of 'private rights' which must be adjudicated by an agency with Article III status").

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[1](...continued)
cert. denied, 485 U.S. 1006 (1988); In re Rheuban, 128 B.R. 551, 563 (Bankr. C.D. Cal. 1991) (listing cases that have so held); Credithrift of America v. Lawson, 52 B.R. 369 (E.D. Kentucky 1985). *But see* St. George Island v. Pelbam, 104 B.R. 429, 430 (Bankr. N.D. Fla. 1989) (suggesting that the Supreme Court "undoubtedly feels that Congress did not cure all the constitutional ills" in enacting BAFJA).

[2] The United States may intervene in disputes between private parties to defend the constitutionality of any Act of Congress. 28 U.S.C. § 2403(a).

The second argument, based on the "adjunct" theory, would be more difficult. The Marathon plurality rejected it as applied to the prior bankruptcy system because the 1978 Act improperly vested "all essential attributes of judicial power of the United States in the 'adjunct' bankruptcy court." Marathon, 458 U.S. at 85. The plurality emphasized several of these "attributes of judicial power." First, the bankruptcy courts could adjudicate "not only traditional matters of bankruptcy, but also 'all civil proceedings arising under title 11.'" *Id.* Second, the bankruptcy courts were not merely fact finding tribunals but could "exercise 'all of the jurisdiction' conferred by the Act on the district courts." *Id.* Third, they "exercise[d] all ordinary powers of district courts, including the power to preside over jury trials, the power to issue declaratory judgments, the power to issue writs of habeas corpus, and the power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11." *Id.* (citations omitted)(emphasis added). Fourth, bankruptcy court judgments were subject to review only under the "clearly erroneous" standard (the standard which would apply under the current proposal). *Id.* Finally, bankruptcy courts could issue final, binding, and enforceable judgments (which would also be true under the current proposal). *Id.* at 85-86. The plurality concluded that "the 'adjunct' bankruptcy courts created by the [1978] Act exercise jurisdiction behind the facade of a grant to the district courts, and are exercising powers far greater than those lodged in the adjuncts approved" in prior Supreme Court cases. *Id.* at 86; *see also* Commodity Futures Trading Comm'n v. Schor 478 U.S. 833, 851 (1986).

In describing the constitutional significance of the "adjunct" status of the bankruptcy courts, the Department relies upon a combination of the procedural safeguards enacted in BAFJA. These include the appeal of core adjudications to the district court, the *de novo* review of non-core matters (including, under current Rule 9020, civil contempt orders), the district court's authority to refer core matters to the bankruptcy court and to withdraw the reference, and the appointment of bankruptcy judges by the courts of appeal. 28 U.S.C. §§ 151, 152(a), 157, & 158. The courts have found these safeguards indicative of the bankruptcy courts' adjunct status in upholding BAFJA.[3] Modifying Rule 9020 as proposed would

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[3] *See, e.g.*, In re Hester 899 F.2d 361, 367 (5th Cir. 1990) ("The bankruptcy court functions as an adjunct of the district court and, indeed, the constitutionality of the bankruptcy court's jurisdiction rests on that fact and on the careful supervision that the district court is bound to provide over the bankruptcy court."); In re General American Communications Corp. 130 B.R. 136, 155 (S.D.N.Y. 1991); In re Production Steel, Inc., 48 B.R. 841, 845 (continued...)

diminish the role of district courts and thus weaken the "adjunct" status of the bankruptcy court. Alone, this might not prove fatal to the bankruptcy court system; however, this change would add to other recent adjustments in the role of the district courts (e.g., authority granted bankruptcy judges to conduct jury trial; expansion of Bankruptcy Appellate Panels, which substitute for district court review[4]) and the cumulative effect could be troublesome.

Looking narrowly at the contempt power, it arguably is among the "essential attributes of judicial power" emphasized by the Marathon plurality in striking down the 1978 Act. Marathon, 458 U.S. at 85 (discussing 1978 Act's granting bankruptcy courts "power to issue any order, process, or judgment appropriate for the enforcement of the provisions of Title 11"). Those circuit courts that have addressed the constitutional issue since Marathon find support for bankruptcy court civil contempt authority. *See, e.g.*, In re Skinner, 917 F.2d 444, 448-50 (10th Cir. 1990); In re Walters, 868 F.2d 668, 669-70 (4th Cir. 1989); Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289, 292 (4th Cir. 1986). *But cf.* In re Sequoia Auto Brokers Ltd., Inc., 827 F.2d 1281 (9th Cir. 1987). However, as noted above, these decisions are predicated primarily upon the "public rights" doctrine, rather than the "adjunct" status of bankruptcy courts. An exception is Skinner, where the court also addressed the "adjunct" theory, citing the current provisions of Rule 9020 (917 F.2d at 450 n.7) and noting that "the delegation of civil contempt power to bankruptcy courts does not 'impermissibly remove[ ]... 'the essential attributes of the judicial power' from the Article III district courts and...vest[ ] those attributes in a non-Article III adjunct,' since the district courts retain the power of de novo review of the bankruptcy courts' findings of fact and conclusions of law in civil contempt proceedings." Skinner, 917 F.2d at 450 (quoting Marathon; citation omitted). This statement, of course, suggests that, absent *de novo* district court review, the exercise of civil contempt power by bankruptcy courts could raise "adjunct" concerns.[5]

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[3](...continued)
(M.D. Tenn. 1985).

[4] Some recent legislative proposals, consistent with the recommendation of the Bankruptcy Review Commission, would eliminate altogether district court appeals from bankruptcy court core matter decisions. Instead, such appeals would be lodged directly in the courts of appeals. *E.g.*, H.R. 3150, 105th Cong., 2d Sess. § 412 (1998).

[5] *See generally* Laura B. Bartell, "Contempt of the Bankruptcy
(continued...)

Finally, an analysis of the constitutionality of the bankruptcy court system frequently invokes analogies to the magistrate judge system. In this regard, Congress has not granted magistrate judges independent contempt authority. Instead, the magistrate judge must "certify the facts [constituting the alleged misconduct] to a judge of the district court" where evidence is heard and the contempt order is entered. 28 U.S.C. 636(e).

Because of these Article III concerns, I recommend that the proposed amendment to Rule 9020 not be adopted.

cc: Hon. Adrian G. Duplantier
Hon. A. Thomas Small
Patricia S. Channon

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[5](...continued)
Court -- a New Look," **1996 U. Ill. L. Rev.** 1, 56 (concluding that affording bankruptcy courts contempt powers would "insidiously undermine" the Constitutional foundation of BAFJA).

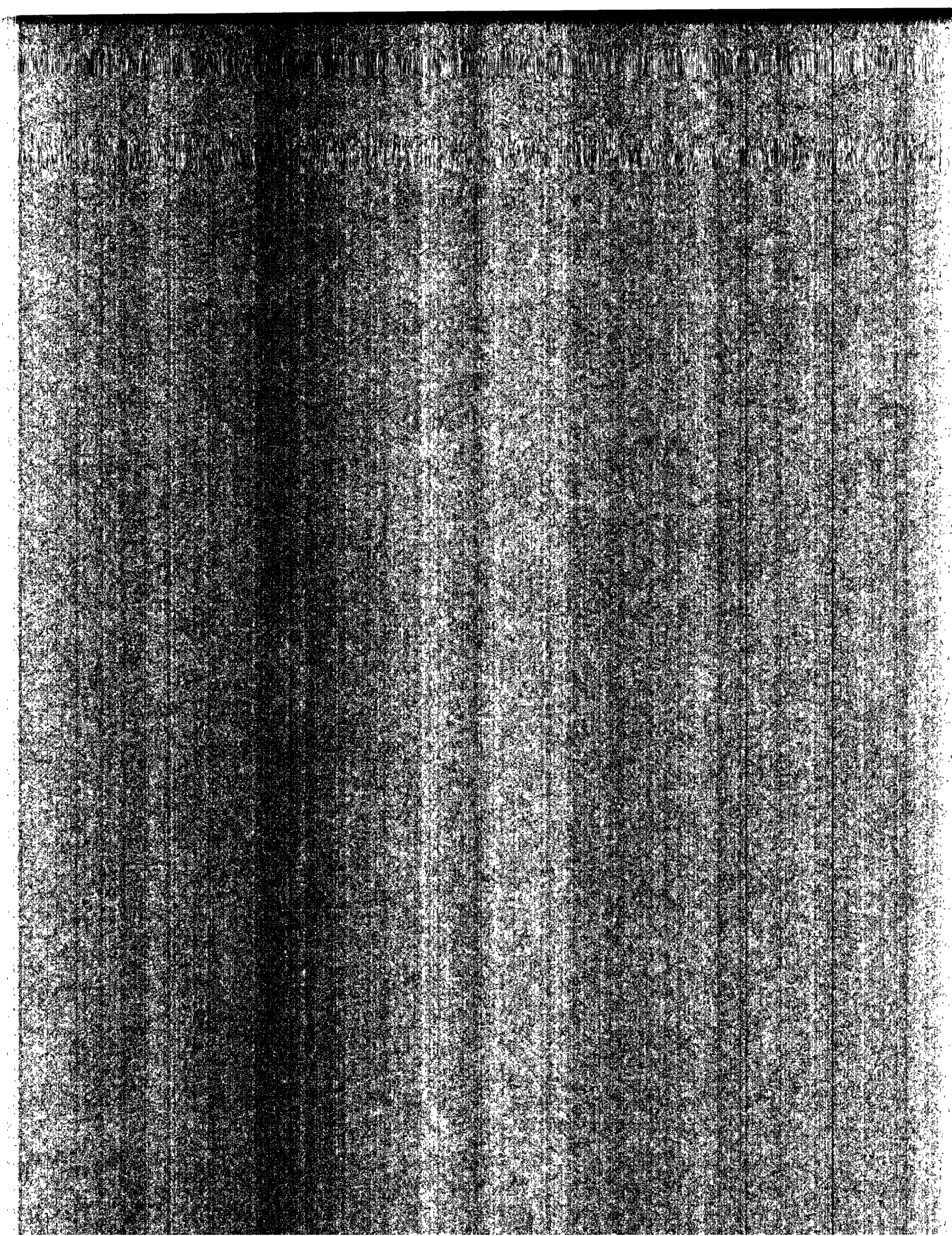

EXHIBIT E

MATERIALS ON EXPANDING CONTEMPT

AUTHORITY OF MAGISTRATE JUDGES

REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

MARCH 12, 1996

WASHINGTON, D.C.

JUDICIAL CONFERENCE OF THE UNITED STATES
CHIEF JUSTICE WILLIAM H. REHNQUIST,
PRESIDING
LEONIDAS RALPH MECHAM, SECRETARY

March 12, 1996

CONTEMPT AUTHORITY

Consistent with Recommendation 66 of the *Long Range Plan for the Federal Courts*, the Judicial Conference slightly modified and then approved a recommendation of the Magistrate Judges Committee that an amendment of 28 U.S.C. § 636(e) be endorsed to provide that—

a. Magistrate judges be given summary contempt authority for criminal contempts that occur in their presence, limiting the penalties that the magistrate judge may impose to 30 days' imprisonment or a $5,000 fine;

b. Magistrate judges be given contempt authority in civil consent cases under 28 U.S.C. § 636(c) and misdemeanor cases under 18 U.S.C. § 3401, thereby authorizing magistrate judges in such cases:

(1) To exercise the full civil contempt authority of the district court; and

(2) To recommend for prosecution, and to punish after notice and hearing under Federal Rules of Criminal Procedure 42(b), criminal contempts that constitute disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command in such cases, limiting the penalties that the magistrate judge may impose to 30 days' imprisonment or a $5,000 fine;

c. Appeals from magistrate judges' contempt orders be heard by the court that will hear the appeal of the final order on the merits of the case, either the court of appeals under 28 U.S.C. § 636(c)(3), or the district court under 28 U.S.C. § 636(c)(4) or 18 U.S.C. § 3402. In any other proceeding in which a magistrate judge presides under 28 U.S.C. § 636(a) or § 636(b), or any other statute, the appeal of a magistrate judge's summary contempt order shall be to the district court;

d. Magistrate judges be authorized to certify more serious criminal contempts, and other criminal contempts occurring outside the magistrate judge's presence in any other cases or proceedings arising under § 636(a) or § 636(b), or any other statute, to the district court for further contempt proceedings; and

e. Magistrate judges be authorized to certify all civil contempts in any other cases or proceedings arising under § 636(a) or § 636(b), or any other statute, to the district court for further contempt proceedings.

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K RABIEJ
Chief
Rules Committee Support Office

September 26, 1997

MEMORANDUM TO CHAIRS AND REPORTERS OF THE ADVISORY RULES COMMITTEES

SUBJECT: *Federal Courts Improvement Act of 1997*

For your information, Judge Stotler requested that I send to you a copy of the Federal Courts Improvement Act of 1997 (H.R. 2294). A hearing is scheduled for October 9, 1997, before the House Judiciary Subcommittee on Courts and Intellectual Property. Judge Philip Pro, chairman of the Committee on the Administration of the Federal Magistrate Judges System, will testify on the provisions governing magistrate judges' contempt powers.

It is unlikely that further action on the bill will take place this year. In the past, the controversial provisions have been stripped from such "Court Improvements" bills at the end of the Congressional session and considerably scaled-down versions were eventually passed immediately before adjournment.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette

105TH CONGRESS
1ST SESSION

H. R. 2294

To make improvements in the operation and administration of the Federal courts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1997

Mr. COBLE (by request) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To make improvements in the operation and administration of the Federal courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Courts Improvement Act of 1997."

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—FEDERAL COURTS STUDY COMMITTEE RECOMMENDATIONS

TITLE II—JUDICIAL FINANCIAL ADMINISTRATION

TITLE III—JUDICIAL PROCESS IMPROVEMENTS

TITLE IV—JUDICIARY PERSONNEL ADMINISTRATION, BENEFITS, AND PROTECTIONS

TITLE V—CRIMINAL JUSTICE ACT AMENDMENTS

(d) APPOINTMENT OF COMMITTEES.—Until the amendments made by subtitle A of title II of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 become effective in a judicial district and apply to a case, the bankruptcy administrator appointed to serve in the district shall appoint the committees of creditors and equity security holders provided in section 1102 of title 11. The bankruptcy administrator shall appoint the committees notwithstanding the references in those sections of title 11 to appointments by the court.

SEC. 305. MAGISTRATE JUDGE CONTEMPT AUTHORITY.

Section 636(e) of the Federal Magistrates Act (28 U.S.C. 636) is amended in its entirety as follows:

"(1) CONTEMPT AUTHORITY.—A United States magistrate judge serving under this chapter shall have within the territorial jurisdiction prescribed by his or her appointment the power to exercise contempt authority as set forth in this section.

"(2) SUMMARY CRIMINAL CONTEMPT AUTHORITY.—A magistrate judge shall have the power to punish summarily by fine or imprisonment such contempt of his or her authority constituting misbehavior of any person in the magistrate judge's presence so as to obstruct the administration of jus-

tice. The order of contempt shall be issued pursuant to the Federal Rules of Criminal Procedure.

"(3) ADDITIONAL CRIMINAL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), and in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, the magistrate judge shall have the power to punish by fine or imprisonment such criminal contempt constituting disobedience or resistance to the magistrate judge's lawful writ, process, order, rule, decree, or command. Disposition of such contempt shall be conducted upon notice and hearing pursuant to the Federal Rules of Criminal Procedure.

"(4) CIVIL CONTEMPT AUTHORITY IN CIVIL CONSENT AND MISDEMEANOR CASES.—In any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), and in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, the magistrate judge may exercise the civil contempt authority of the district court. This subsection shall not be construed to limit the authority of a mag-

istrate judge to order sanctions pursuant to any other statute, the Federal Rules of Civil Procedure, or the Federal Rules of Criminal Procedure.

"(5) CRIMINAL CONTEMPT PENALTIES.—The sentence imposed by a magistrate judge for any criminal contempt set forth in subsections (2) and (3) of this section shall not exceed the penalties for a Class C misdemeanor as set forth in 18 U.S.C. 3581(b)(8) and 3571(b)(6).

"(6) CERTIFICATION OF OTHER CONTEMPTS TO THE DISTRICT COURT.—Upon the commission of any such act—

"(A) in any case in which a United States magistrate judge presides with the consent of the parties under 28 U.S.C. 636(c), or in any misdemeanor case proceeding before a magistrate judge under 18 U.S.C. 3401, that may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this section, or

"(B) in any other case or proceeding under 28 U.S.C. 636(a) or (b), or any other statute, where—

"(i) the act committed in the magistrate judge's presence may, in the opinion of the magistrate judge, constitute a serious criminal contempt punishable by penalties exceeding those set forth in subsection (5) of this section, or

"(ii) the act that constitutes a criminal contempt occurs outside the presence of the magistrate judge, or

"(iii) the act constitutes a civil contempt,

the magistrate judge shall forthwith certify the facts to a district judge and may serve or cause to be served upon any person whose behavior is brought into question under this subparagraph an order requiring such person to appear before a district judge upon a day certain to show cause why he or she should not be adjudged in contempt by reason of the facts so certified. The district judge shall thereupon hear the evidence as to the act or conduct complained of and, if it is such as to warrant punishment, punish such person in the same manner and to the same extent as for a contempt committed before a district judge.

"(7) APPEALS OF MAGISTRATE JUDGE CONTEMPT ORDERS.—The appeal of an order of contempt pursuant to this section shall be made to the court of appeals in cases proceeding under 28 U.S.C. 636(c). In any other proceeding in which a United States magistrate judge presides under 28 U.S.C. 636(a) or (b), 18 U.S.C. 3401 or any other statute, the appeal of a magistrate judge's summary contempt order shall be made to the district court.".

SEC. 306. CONSENT TO MAGISTRATE JUDGE AUTHORITY IN PETTY OFFENSE CASES AND MAGISTRATE JUDGE AUTHORITY IN MISDEMEANOR CASES INVOLVING JUVENILE DEFENDANTS.

(a) AMENDMENTS TO TITLE 18.—

(1) Section 3401(b) of title 18, United States Code, is amended by striking "that is a class B misdemeanor charging a motor vehicle offense, a class C misdemeanor, or an infraction," after "petty offense".

(2) Section 3401(g) of title 18, United States Code, is amended—

(A) by striking the first sentence and inserting in lieu thereof the following: "The magistrate judge may, in a petty offense case involving a juvenile, exercise all powers granted to

COMMITTEE ON THE ADMINISTRATION OF THE MAGISTRATE JUDGES SYSTEM
of the
JUDICIAL CONFERENCE OF THE UNITED STATES
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HONORABLE R. E. LONGSTAFF
HONORABLE MILDRED E. METHVIN
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HONORABLE HARVEY E. SCHLESINGER
HONORABLE WALTER S. SMITH, JR.
HONORABLE ARTHUR D. SPATT
HONORABLE G. THOMAS VAN BEBBER

HONORABLE PHILIP M. PRO
CHAIR

(702) 388-6942
FAX (702) 388-6955

October 29, 1997

Mr. Andrew Fois
Assistant Attorney General
Office of Legislative Affairs
United States Department of Justice
Washington, DC 20550

Dear Mr. Fois:

In accordance with our telephone conversation on Monday, please find enclosed a memorandum prepared by the Magistrate Judges Division of the Administrative Office of the United States Courts regarding Section 305 of H.R. 2294, the "Federal Courts Improvement Act of 1997." The memorandum addresses the constitutional concerns you have noted in your proposed letter to Chairman Coble regarding vesting United States magistrate judges with limited contempt authority as provided under Section 305.

As Chair of the Judicial Conference Committee on the Administration of the Magistrate Judges System, I testified on October 9, 1997, before Chairman Coble's House Subcommittee on Courts and Intellectual Property in support of H.R. 2294. In my testimony on behalf of the Judicial Conference, I stressed the importance of Section 305 to the efficient operation of the magistrate judges system.

I fully appreciate your responsibility to inform Congress of the position of the Department of Justice regarding the Federal Courts Improvement Act of 1997. I think, however, the enclosed memorandum fairly satisfies the concerns regarding Section 305 you have raised in the draft of your proposal letter to Chairman Coble.

If you would like to discuss the matter further, I will be happy to do so at your earliest convenience.

Sincerely,

PHILIP M. PRO
United States District Judge

Enclosure

cc: Mr. Leonidas Ralph Mecham
Mr. Michael W. Blommer
Mr. Thomas C. Hnatowski

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: October 29, 1997

FROM: Douglas A. Lee, Senior Attorney, Magistrate Judges Division

SUBJECT: Memorandum Supporting Expanded Contempt Authority for United States Magistrate Judges

TO: Honorable Philip L. Pro, Chairman, Magistrate Judges Committee
Thomas C. Hnatowski, Chief, Magistrate Judges Division

In a draft letter to the Honorable Howard Coble, Chairman of the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives, Andrew Fois, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice, expressed the Department's views on the Federal Courts Improvement Act of 1997, H.R. 2294, and the Alternative Dispute Resolution and Settlement Encouragement Act, H.R. 2602. You asked me to address the Department's comments concerning section 305 of the Federal Courts Improvement Act of 1997, which would amend the Federal Magistrates Act, 28 U.S.C. § 636(e), to provide magistrate judges with expanded contempt authority.[1] Although the

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[1] The proposed amendment to § 636(e) would replace the existing statute with the following provisions:

a. Magistrate judges be given summary contempt authority for criminal contempts that occur in their presence, limiting the penalties that the magistrate judge may impose to 30 days' imprisonment or a $5,000 fine.

b. Magistrate judges be given contempt authority in civil consent cases under 28 U.S.C. § 636(c) and misdemeanor cases under 18 U.S.C. § 3401, thereby authorizing magistrate judges in such cases:
   (1) To exercise the full civil contempt authority of the district court;
   (2) To recommend for prosecution, and to punish after notice and hearing under Fed. R. Crim. P. 42(b), criminal contempts that constitute disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command in such cases, limiting the penalties that the magistrate judge may impose to 30 days' imprisonment or a $5,000 fine.

c. Appeals from magistrate judges' contempt orders be heard by the court that will hear the appeal of the final order on the merits of the case, either the court of appeals under 28 U.S.C. § 636(c)(3), or the district court under 18 U.S.C. § 3402. In any other proceeding in which a magistrate judge presides under 28 U.S.C. §§ 636(a) or (b), or any other statute, the appeal of a magistrate judge's summary contempt order shall be to the district court.

d. Magistrate judges be authorized to certify more serious criminal contempts, and other criminal contempts occurring outside the magistrate judge's presence in any other cases or proceedings arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings, and

e Magistrate judges be authorized to certify all civil contempts in any other cases or proceedings

Department does not oppose the provision, it suggests that "giving contempt power to non-Article III judges raises some constitutional concerns." This memorandum addresses the concerns raised in Mr. Fois' letter.

A. Providing Magistrate Judges With a Limited Expansion of Contempt Authority Would Not Violate Article III of the Constitution.

There are several arguments that support the view that granting magistrate judges expanded, but limited, contempt authority would not violate Article III of the Constitution. To understand these arguments, one must first examine the reasoning used by federal courts to analyze Article III concerns.

When federal courts examine whether or not a delegation of authority to a non-Article III tribunal or judicial officer violates Article III of the Constitution, they generally apply a "two interest" approach exemplified by the Supreme Court's analysis in *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In *Schor*, the Court articulated the view that Article III protects two distinct interests: (1) the "structural" interest of maintaining an "independent judiciary within the constitutional scheme of tripartite government,"[2] and (2) the "personal" interest of individual litigants in preserving their "right to have claims decided before judges who are free from potential domination by other branches of government."[3] The structural perspective safeguards the inherent interest of each branch of the government under the Constitution in preserving its power and equal status with the other branches. The personal view, by contrast, protects individual parties' separate interest in having an independent judiciary available to decide their disputes. As expressed in *Schor* and other cases, both interests must be adequately protected for a congressional delegation of authority to a non-Article III court or judicial officer to pass muster under Article III.

The "two interest" Article III analysis has been used several times by federal courts to evaluate whether provisions of the Federal Magistrates Act comply with the Constitution.[4] Under this analysis, the proposal to provide magistrate judges with limited contempt authority would not impinge on either the "structural" or the "personal" interests protected by Article III

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arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings.

2 *Schor* at 848 (quoting *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 583 (1985)).

3 *Id.* (quoting *United States v. Will*, 449 U.S. 200, 218 (1980)).

4 *See Peretz v United* States, 501 U.S. 923 (1991) (the consensual referral of felony voir dire to a magistrate judge under 28 U.S C. § 636(b)(3) did not violate Article III) ; *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984) (the consensual referral of civil cases to magistrate judges under 28 U.S.C. § 636(c) did not violate Article III); *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F 2d 537 (9th Cir)(en banc), *cert denied*, 469 U.S. 824 (1984) (same).

and therefore would not violate the Constitution. The following sections examine arguments concerning each interest in turn.

1. "Structural" Interest Under Article III

The "structural" analysis invokes the separation-of-powers principles embodied in the Constitution that focus on the balance of authority between the three branches of the federal government. The Supreme Court has recognized as a primary concern that one branch of the government not attempt to gain power from or reduce the power of another branch:

> The doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers "built into the tripartite Federal Government ... a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[5]

The "structural" interest protected by Article III reflects the Judicial Branch's concern in protecting its authority from being eroded or reduced by the Executive or Legislative Branches. As the Supreme Court stated in *Schor*, "Article III, § 1 safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts 'to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating' constitutional courts...."[6]

Viewed in this context, congressional authorization of limited contempt authority to magistrate judges would not impinge on the basic authority of the federal courts to adjudicate cases and controversies, nor would it otherwise "emasculate" the district courts. Providing magistrate judges with limited authority to maintain basic order and decorum in district court proceedings in which they preside and to enforce their own orders would not expand Congress' authority at the Judiciary's expense, but would merely provide these judicial officers with a basic tool to perform their statutory functions more effectively. In addition, providing magistrate judges with limited contempt authority would not undermine the basic supervisory authority the district courts presently have over magistrate judges.

The district court's supervisory power over magistrate judges under the Federal Magistrates Act has been found to be a linchpin in holding that the Act does not violate Article III of the Constitution.[7] Justice Blackmun emphasized the various ways that district judges maintain supervisory control over magistrate judges in his concurring opinion in *United States v. Raddatz*, 447 U.S. 667 (1980), which upheld the nonconsensual referral of suppression motions

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5 *Clinton v. Jones*, 117 S.Ct. 1636 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

6 *Schor* at 850.

7 *See United States v. Raddatz*, 447 U.S. 667, 685-686 (1980); *Peretz v. United* States, 501 U.S. 923, 938-939 (1991); See *also A Constitutional Analysis of Magistrate Judge Authority*, 150 F.R.D. 247, 258-260 (1993).

to magistrate judges under 28 U.S.C. § 636(b)(1)(B).[8] Justice Blackmun's conclusion in his *Raddatz* opinion about the Magistrates Act applies equally to the present proposal to provide magistrate judges limited contempt authority: "[T]he only conceivable danger of a 'threat' to the 'independence' of the magistrate comes from within, rather than without, the judicial department."[9]

In *Peretz v. United States*, 501 U.S. 923 (1991), the court later used the reasoning set forth in Justice Blackmun's *Raddatz* concurrence to conclude that the consensual referral of voir dire to a magistrate judge in a felony case did not violate Article III primarily because the district court maintained supervisory control over the magistrate judge.[10] The Supreme Court has thus emphasized repeatedly the importance of the district court's supervisory authority when considering whether magistrate judge authority violates Article III of the Constitution. In none of these cases, however, has the Court mentioned contempt authority as a key component of the district court's supervisory authority, or as a significant factor necessary to uphold the constitutionality of the Federal Magistrates Act.

The basic foundation of district judge control over magistrate judges would not be significantly altered if magistrate judges were given limited contempt authority. The present statutory requirement that contempt matters be certified to a district judge under 28 U.S.C. § 636(e) is only one small aspect of the many ways Congress placed magistrate judges under the supervisory authority of the district court. Magistrate judges would continue to be selected, appointed, reappointed and removed by the district court.[11] District judges would continue to control the delegation of duties to magistrate judges, including the power to withdraw cases from magistrate judges under various circumstances.[12] In addition, appeals of all decisions made by magistrate judges will remain to Article III courts.[13]

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8 As Justice Blackmun observed in his concurring opinion in *United States v. Raddatz*, 447 U.S. 667, 685-686 (1980):

> T]he magistrate himself is subject to the Art. III judge's control. Magistrates are appointed by district judges, § 631(a), and subject to removal by them, § 631(h). In addition, district judges retain plenary authority over when, what, and how many pretrial matters are assigned to magistrates, and '[e]ach district court shall establish rules pursuant to which the magistrates shall discharge their duties.' § 636(b)(4). ... Under these circumstances, I simply do not perceive the threat to the judicial power or the independence of judicial decisionmaking that underlies Art. III.

9 *Id.* at 685 (1980).

10 *Peretz v. United States*, 501 U.S. 923, 938-939 (1991).

11 28 U.S.C. § 631 (1994).

12 28 U.S.C. § 636 (1996).

13 28 U.S.C. §§ 636(b), (c) & (e) (1996)

It is also important to note that this proposal would not give magistrate judges contempt authority identical to the contempt authority exercised by district judges. The limited penalties that magistrate judges could impose in contempt situations would differentiate magistrate judge contempt authority from that of Article III judges. While subject to the doctrine of judicial restraint, Article III judges may impose potentially unlimited terms of imprisonment or fines upon entities who commit contumacious acts. By contrast, the proposed amendment to § 636(e) would impose strict limits on the penalties a magistrate judge could order in contempt situations. Imprisonment for a summary contempt committed in the magistrate judge's presence, and for criminal contempts that constitute disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command in civil consent cases under 28 U.S.C. § 636(c) and misdemeanor cases under 18 U.S.C. § 3401, could not exceed 30 days incarceration and a fine could not exceed $5,000. These proposed penalties equal the maximum penalties that may be imposed on individuals in Class C misdemeanor cases.[14]

In addition, the magistrate judge would still be required to certify more serious criminal contempts and all civil contempt matters in cases outside their dispositional authority to the district court for further proceedings. Such restricted contempt penalties would give magistrate judges an effective tool to impose order in their courtrooms and to enforce their orders that would be constitutionally distinguishable from Article III contempt authority.

Under these circumstances, the proposed legislation to provide magistrate judges with limited contempt authority would not undermine or disrupt the basic supervisory authority that the district courts have over magistrate judges. This proposal would thus not violate the separation-of-powers concerns protected by Article III of the Constitution.

2. "Personal" Interests Protected By Article III

The proposal to grant magistrate judges limited contempt authority must also satisfy the "personal" interests protected by Article III. It might be argued that the proposal does not adequately protect individuals' "personal" interests under Article III because those affected by a magistrate judge's exercise of contempt authority will not have consented to the magistrate judge's actions. There is, however, existing statutory precedent for Congress to provide magistrate judges with nonconsensual dispositional authority in criminal matters that arguably does not offend the Constitution.

As noted above, the maximum penalties that a magistrate judge could impose for criminal contempts under the proposed amendment to § 636(e) would be up to 30 days imprisonment or up to a $5,000 fine, penalties equivalent to those that may be imposed on an individual for a Class C misdemeanor under Title 18.[15] In October 1996, Congress passed the Federal Courts

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[14] 18 U.S.C. § § 3559(a)(8) and 3571(b)(6)(1994).

[15] *Id*

Improvement Act of 1996, which provides that magistrate judges have final dispositional authority over certain Class B misdemeanor offenses, all Class C misdemeanor offenses, and all infractions without the defendant's consent or waiver of Article III adjudication.[16] It has long been argued that because petty offense cases were not recognized as "crimes" at common law, fewer constitutional protections, such as trial by jury and adjudication by an Article III judge, were required.[17] Consistent with this view, Congress amended the Federal Magistrates Act in 1996 to authorize magistrate judges dispose of certain petty offense cases without the defendants' consent. The legislative history of the Federal Courts Improvements Act of 1996 sets forth the Senate Judiciary Committee's view that there were no constitutional impediments to providing magistrate judges with final dispositional authority in petty offense cases without the parties' consent.[18] In addition, at least one court has held that the nonconsensual referral of a petty offense case to a magistrate judge for final disposition under the amended 18 U.S.C. § 3401 does not violate Article III of the Constitution.[19]

It follows that if the nonconsensual referral of certain Class B misdemeanor offenses, all Class C misdemeanor offenses, and all infractions to magistrate judges for final disposition does not offend the Constitution, the summary imposition of limited criminal contempt penalties by magistrate judges, as proposed in section 305 of the Federal Courts Improvement Act of 1997, would also withstand constitutional scrutiny. The Supreme Court has declared that a "criminal contempt is a petty offense unless the punishment makes it a serious [offense]...."[20] Viewed in this context, granting magistrate judges summary nonconsensual criminal contempt authority with penalties limited to those for Class C misdemeanors would not offend the "personal" interests embodied in Article III of the Constitution.

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16 18 U.S.C. § 3401(b) (1996).

17 *See* H.R. Rep. No. 287, 96th Cong., 1st Sess. 18 (1979); *Hearings on Proposals to Reform the United States Commissioner System Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 90th Cong., 1st Sess. 246-260 (Memorandum of Subcommittee Staff) (1967); Frankfurter & Corcoran, *Petty Offenses and the Constitutional Guarantees of Trial By Jury*, 39 Harv. L. Rev. 917 (1926). *See also District of Columbia v. Colts*, 282 U.S. 63 (1930) and *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (both cases stating that the right to a jury trial may not apply to petty offenses since such offenses were not considered crimes at common law).

18 S. Rep. No. 366, 104th Cong., 2d Sess. 28 (1996).

19 *United States v. McCrickard*, 957 F.Spp. 1149 (E.D.Ca. 1996).

20 *Bloom v. Illinois*, 391 U.S. 194, 198 (1968).

B. Decisions Cited By the Department of Justice Do Not Contradict the Argument That A Limited Expansion of Magistrate Judge Contempt Authority Would Not Offend Article III of the Constitution

The Department of Justice notes that the issue of giving non-Article III judges contempt authority "raises some constitutional concerns." The cases cited by the Department to illustrate this point, however, do not undermine the previously stated arguments that providing magistrate judges with limited criminal contempt authority by statute would not violate the Constitution.

For example, the Department of Justice notes correctly that the Seventh Circuit in *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037 (7th Cir. 1984), discussed contempt authority in its analysis of the constitutionality of the authority of magistrate judges to dispose of civil cases with the consent of the parties under 28 U.S.C. § 636(c). The *Geras* panel, however, stopped short of stating that contempt authority is a power that may only be wielded by Article III judges or that contempt authority could not be provided in a limited form to magistrate judges. The court's contempt discussion in *Geras* is dicta that describes contempt authority as a clear line "for present purposes at least" for differentiating Article III judges from magistrate judges.[21] The court applied reasoning similar to that used by the Ninth Circuit in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir.) (*en banc*), *cert. denied*, 469 U.S. 824 (1984), to hold ultimately that the supervisory authority of the district court over magistrate judges provides sufficient protection of separation of powers interests embodied by Article III to conclude that § 636(c) does not violate the Constitution.[22] Under these circumstances, the *Geras* decision does not provide a compelling argument against a limited statutory expansion of magistrate judge contempt authority.[23]

The Department of Justice also observes that Congress has provided United States Tax Court judges and judges of the United States Court of Veterans Appeals with contempt

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21 *Geras* at 1044.

22 It is also interesting to note that Judge Posner's dissenting opinion in *Geras*, although concluding overall that 28 U.S.C. § 636(c) violates Article III, nonetheless makes the significant point that contempt authority is not an important or compelling distinction between district judges and magistrate judges, "[Contempt authority] is about as crucial as the robe....[T]here is little practical difference between a presiding judge and a presiding magistrate so far as the contempt power is concerned." *Geras* at 1049.

23 It should be noted that the Ninth Circuit Court of Appeals recently cited the *Geras* opinion when it held, in *Bingman v. Ward*, 100 F.3d 653 (9th Cir.1996), *cert. denied*, 117 S.Ct. 1473 (1997), that magistrate judges do not have statutory authority to adjudicate criminal contempts. The court mentioned the *Geras* decision in dicta suggesting that contempt authority may only be exercised by Article III judges. It must be emphasized, however, that the constitutional arguments expressed by the *Bingman* panel are dicta, and thus have limited precedential value on the issue of whether magistrate judges could be given limited contempt authority by Congress without violating the Constitution

authority.[24] Congress has also provided contempt authority to other non-Article III judges, including immigration judges[25] and military court-martial judges.[26] Although the Department cites dicta in one case concerning bankruptcy judge contempt authority that questions the validity of the Tax Court's statutory contempt authority, it appears that none of these legislative grants of contempt authority have been challenged on constitutional grounds[27].

Bankruptcy judges are another group of non-Article III judicial officers that have been granted limited contempt authority by Congress.[28] The Department observes correctly that courts of appeals have expressed conflicting views on the extent to which bankruptcy judges may use their contempt power, particularly whether they may exercise criminal contempt authority.[29] Courts have also split on whether bankruptcy judges may exercise civil contempt authority.[30]

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24 *See* 26 U.S.C. § 7456(c) (1994) (United States Tax Court judges); and 38 U.S.C. § 7265 (1994) (United States Court of Veterans Appeals).

25 8 U.S.C. § 1229a(b)(1) (1996).

26 10 U.S.C. § 848 (1994).

27 In *Jones v. Derwinski*, 1 Vet. App. 596 (1991), the United States Court of Veterans Appeals noted in dicta that it had been given statutory contempt authority by Congress and it may also exercise the inherent contempt authority of the federal courts even though it is an Article I tribunal. *See also Ebert v. Brown*, 4 Vet. App. 434 (1993) (court acknowledges its statutory contempt authority, but declines to exercise it in the case at bar); *In re Matter of Cox*, 10 Vet. App. 361 (1997) (court cites its statutory contempt authority as evidence that court has authority to issue a writ of mandamus under the All Writs Act).

28 *See* 11 U.S.C. § 105(a) (1994) and Fed. R. Bank. P. 9003.

29 For example, the Eighth Circuit in *In re Ragar*, 3 F.3d 1174 (8th Cir. 1993), held that bankruptcy judges may exercise limited criminal contempt authority, subject to de novo review by the district court, under 11 U.S.C. § 105(a) without violating Article III of the Constitution:

> If core proceedings may be assigned to non-Article III judges without offense to the Constitution, and if those judges may decide motions necessarily arising from the administration of such proceedings, such as motions to disqualify attorneys, it follows that the same judges have at least the power to recommend to the district courts that persons violating orders of disqualification be held in criminal contempt. ... In short, we hold that the Bankruptcy Court's action was authorized by 11 U.S.C. § 105(a), and that no violation of the Constitution occurred. *Id.* at 118.

For a contrary view on the criminal contempt authority of bankruptcy judges *see In re Sequoia Auto Brokers Ltd., Inc.*, 827 F.2d 1281 (9th Cir. 1987).

30 For an example of a court concluding that bankruptcy judges may exercise civil contempt authority, *see In re Walters*, 868 F.2d 665 (4th Cir. 1989), where the court stated, "we are of opinion the delegation of civil contempt power to the bankruptcy courts by 11 U.S.C. § 105(a) does not offend the Constitution as in violation of separation of powers." *Id* at 670. *See also In re Skinner*, 917 F.2d 444 (10th Cir 1990) (bankruptcy judge may exercise civil contempt authority under 11 U.S.C. § 105(a); such authority does not violate Article III).

All of these decisions, however, interpret a statutory contempt scheme that is very different from the one proposed for magistrate judges in section 305. The contempt authority exercised by bankruptcy judges is derived from general language in 11 U.S.C. § 105(a) that gives bankruptcy judges authority to "issue any order...that is necessary to carry out the provisions of [the bankruptcy statutes]." Because Congress has not specified what contempt authority bankruptcy judges may exercise, courts have been required to interpret implicit limits to bankruptcy judge contempt authority from the general language of section 105(a). By contrast, the proposal to amend 28 U.S.C. § 636(e) sets forth a specific statutory scheme with explicit limits on the contempt authority magistrate judges may wield. Accordingly, cases discussing bankruptcy judge contempt authority provide little guidance on the issue of whether an expansion of magistrate judge contempt authority would offend the Constitution.

C. Conclusion

For all the above reasons, section 305 of the Federal Courts Improvement Act of 1997, which would amend the Federal Magistrates Act, 28 U.S.C. § 636(e), to provide magistrate judges with expanded, but limited, contempt authority, does not offend Article III of the Constitution.

Agenda C-2
December 1995
Action

REPORT OF THE SUBCOMMITTEE ON MAGISTRATE JUDGE CONTEMPT AUTHORITY

I. SYNOPSIS

A. Purpose

At its June 1995 meeting, the Magistrate Judges Committee formed a Subcommittee, consisting of the Honorable Frank J. Polozola, chair, the Honorable Walter E. Black, the Honorable Arthur D. Spatt, and the Honorable John F. Moulds, to prepare specific proposals to expand magistrate judge contempt authority.

This report sets forth the recommendations of the Subcommittee to expand the contempt authority of United States magistrate judges.

B. Conclusion

The Subcommittee recommends that the Judicial Conference endorse:

(1) Amendment of 28 U.S.C. § 636(e) to provide magistrate judges with summary contempt authority for criminal contempts that occur in their presence, limiting the penalties that the magistrate judge may impose to 30 days imprisonment or a $5,000 fine.

(2) Amendment of 28 U.S.C. § 636(e) to provide magistrate judges with additional contempt authority in civil consent cases under 28 U.S.C. § 636(c) and misdemeanor cases under 18 U.S.C. § 3401, thereby authorizing magistrate judges:

(a) to exercise the full civil contempt authority of the district court;

(b) to recommend for prosecution, and to punish after notice and hearing under Fed. R. Crim. P. 42(b), criminal contempts that constitute disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command in such cases, limiting the penalties that the magistrate judge may impose to 30 days imprisonment or a $5,000 fine;

(3) Amendment of 28 U.S.C. § 636(e) to provide that appeals from magistrate judges' contempt orders are to be heard by the court that will hear the appeal of the final order on the merits of the case, either the court of appeals under 28 U.S.C. § 636(c)(3), or the district court under 28 U.S.C. § 636(c)(4) or 18 U.S.C. § 3402. In any other proceeding in which a magistrate judge presides under 28 U.S.C. §§ 636(a) or (b), or any other statute, the appeal of a magistrate judge's summary contempt order shall be to the district court.

(4) Amendment of 28 U.S.C. § 636(e) to provide that magistrate judges shall have the authority to certify more serious criminal contempts, and other criminal contempts occurring outside the magistrate judge's presence in any other cases or proceedings arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings.

(5) Amendment of 28 U.S.C. § 636(e) to provide that magistrate judges shall have the authority to certify all civil contempts in any other cases or proceedings arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings.

The Subcommittee further recommends that the Magistrate Judges Committee adopt a resolution requesting that the Federal Judicial Center provide magistrate judges with education about the contempt power of the federal courts, particularly the differences between criminal and civil contempt authority, at such time as Congress enacts legislation to expand magistrate judge contempt authority.

II. DISCUSSION

A. Background

At its June 1995 meeting, the Magistrate Judges Committee discussed contempt power for magistrate judges, agreeing in principle on several issues concerning the expansion of magistrate judge contempt authority.

1. June 1995 Positions of the Magistrate Judges Committee

a. Long Range Plan

To address concerns raised by a member of the Judicial Conference, and to clarify the contempt authority under consideration for magistrate judges, the Committee agreed at its June 1995 meeting that Recommendation 68 of the *Proposed Long Range Plan for the Federal Courts (March 1995)* should be revised to state as follows:

> Magistrate judges should be vested with a limited contempt power to punish summarily for misbehavior committed in their presence, and to punish for disobedience or resistance to their lawful orders in civil cases referred to them for disposition with the consent of the parties.

The revised recommendation was adopted by the Judicial Conference as part of *the Long Range Plan for the Federal Courts* at its September 1995 session.

b. Specific Contempt Positions

The Committee agreed in principle to the following positions to provide guidance for the Contempt Subcommittee and the Magistrate Judges Division staff.

Summary Contempt Authority. The Committee agreed that magistrate judges should be provided with summary contempt authority *in any case or proceeding* to punish misbehavior that occurs in the presence of the magistrate judge, regardless of litigant consent. After considering a proposal that magistrate judges be given authority only to detain contemnors pending further contempt proceedings before the district court, the Committee agreed that magistrate judges should have the authority to sentence, rather than detain, contemnors for misbehavior in their presence.

Additional Contempt Authority in Civil Consent Cases. The Committee agreed that magistrate judges should be provided with additional contempt authority *in cases where the parties have consented to the magistrate judge's authority under 28 U.S.C. § 636(c)* to punish for disobedience or resistance to the magistrate judge's order.

Appeals from Magistrate Judge's Contempt Order. The Committee agreed that magistrate judge summary contempt orders in nonconsensual proceedings should be heard on appeal in the district court. The Committee also agreed that appeals of magistrate judge contempt orders in civil consent cases should be heard by the same court that would hear the appeal of the final order on the merits, either the court of appeals under 28 U.S.C. § 636(c)(3) or the district court under 28 U.S.C. § 636(c)(4).

2. Background Materials Considered by the Subcommittee

At the request of the Subcommittee's chairman, the staff of the Magistrate Judges Division prepared several background papers on different aspects of contempt authority. These papers are included as attachments to this report:

> **Attachment A** -- "Background Paper: Contempt Authority of District Judges, Magistrate Judges, and Bankruptcy Judges"

Attachment B -- "Background Paper: Magistrate Judge Sanction Authority Under Fed. R. Civ. P. 11 & 37, and District Court's Inherent Sanction Power"

Attachment C -- "Background Paper: The Right to a Jury Trial in Criminal Contempt Proceedings"

B. Recommendations Concerning Magistrate Judge Contempt Authority

The Subcommittee proposes several specific recommendations to expand magistrate judge contempt authority as set forth below. The Subcommittee also asked the staff of the Magistrate Judges Division to prepare draft statutory language encompassing the Subcommittee's recommendations. Proposed draft statutory language is set forth in **Attachment D**.

1. Summary Criminal Contempt Authority

The Subcommittee reaffirms the full Committee's view that summary criminal contempt authority should be provided to magistrate judges in all cases and proceedings. Summary criminal contempt authority is necessary to maintain order and to protect the court's dignity in response to contumacious behavior by witnesses, parties, counsel, and others present at court proceedings. *See* Attachment A. When presiding over cases or proceedings as the primary judicial officers for the district court, magistrate judges need appropriate immediate authority to control activity in their courtrooms.

Felony initial appearances under Fed. R. Crim. P. 5, detention hearings under the Bail Reform Act, 18 U.S.C. § 3142, and evidentiary proceedings in case-dispositive matters under 28 U.S.C. § 636(b)(1(B) are typical situations where magistrate judges preside routinely on behalf of the district court without the litigants' consent. The need for power to immediately vindicate the court's authority in the face of disruptive behavior exists whenever a magistrate judge presides for the district court, regardless of litigant consent. The Subcommittee concludes that whenever magistrate judges preside on behalf of the district court, they should be provided with summary criminal contempt authority to punish misbehavior occurring in their presence. This proposal is consistent with the revised recommendation 68 of the *Long Range Plan for the Federal Courts*, now adopted by the Judicial Conference.

Limits on Penalties

The Subcommittee recognizes that providing magistrate judges with unlimited criminal contempt authority would raise constitutional concerns. In particular, the imposition of significant penalties for serious contempts would trigger the defendant's right to trial by jury under the Sixth Amendment of the Constitution. *See* Attachment C. Authorizing magistrate judges to impose unlimited penalties for criminal contempts would raise the possibility that magistrate judges might preside over jury trials of serious criminal offenses without the defendant's consent. Such situations

would be contrary to congressional intent in enacting the Federal Magistrates Act and would raise significant concerns under Article III of the Constitution.

The Subcommittee believes, however, that such constitutional problems would be resolved by placing appropriate limits on the penalties magistrate judges may impose in criminal contempt cases. Limitations on potential penalties would differentiate magistrate judge contempt authority from that of Article III judges. While tempered by doctrines of judicial restraint, an Article III judge may impose theoretically unlimited terms of imprisonment or fines upon entities who commit contumacious acts. *See* Attachment A. By contrast, the proposed amendment to § 636(e) would impose limits on the penalties a magistrate judge could order in contempt situations. Imprisonment for a summary contempt committed in the magistrate judge's presence could not exceed 30 days incarceration (the maximum term of imprisonment for a Class C misdemeanor), and a fine could not exceed $5,000. Such restricted contempt penalties would give magistrate judges an effective tool to impose order in their courtrooms that would also be constitutionally distinguishable from Article III contempt power.

The Magistrate Judges Committee and the Judicial Conference have long sought amendment of the Federal Magistrates Act to eliminate the necessity for the defendant's consent to magistrate judge jurisdiction in petty offense cases.[1] It has long been argued that since petty offense cases were not recognized as "crimes" at the common law, fewer constitutional protections, such as trial by jury and adjudication by an Article III judge, were required.[2] It stands to reason that if the nonconsensual referral of petty offense cases to magistrate judges for final disposition would not offend the Constitution, the imposition of criminal contempt penalties by a magistrate judge in civil consent cases and misdemeanor cases would also pass constitutional scrutiny, provided those penalties did not exceed those for petty offenses (*i.e.*, 6 months imprisonment). The Supreme Court has declared that a "criminal contempt is a petty offense unless the punishment makes it a serious [offense]...." *Bloom v. Illinois*, 391 U.S. 194, 198 (1968). Viewed in this context, granting magistrate judges criminal contempt authority that is limited to petty offense penalties would arguably not offend the Constitution.

The Subcommittee concludes that magistrate judges should be authorized to imprison an individual for a summary criminal contempt up to 30 days, the maximum incarceration penalty for a Class C misdemeanor. *See* 18 U.S.C. § 3581(b)(8). In addition, magistrate judges should be authorized to impose criminal contempt fines up to $5,000.

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1 *See, i.e.*, [1991] JUDICIAL CONFERENCE OF THE U.S. REP. 66.

2 *See* H.R. Rep. No. 287, 96th Cong., 1st Sess. 18 (1979); *Hearings on Proposals to Reform the United States Commissioner System Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee*, 90th Cong., 1st Sess. 246-260 (Memorandum of Subcommittee Staff) (1967); Frankfurter & Corcoran, *Petty Offenses and the Constitutional Guarantees of Trial By Jury*, 39 Harv. L. Rev. 917 (1926). *See also District of Columbia v. Colts*, 282 U.S. 63 (1930) and *Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) (both cases stating that the right to a jury trial may not apply to petty offenses since such offenses were not considered crimes at common law).

2. Additional Contempt Authority in Civil Consent Cases Under 28 U.S.C. § 636(c), and Petty Offense and Misdemeanor Cases Under 18 U.S.C. § 3401

The Subcommittee agrees that magistrate judges should be provided with further expanded contempt authority in civil consent cases under 28 U.S.C. § 636(c). This view is consistent with Recommendation 68 of the *Long Range Plan for the Federal Courts*, adopted by the Judicial Conference at its September 1995 session. The Subcommittee further agrees that magistrate judges should also have expanded contempt authority in petty offense and misdemeanor cases under 18 U.S.C. § 3401.

a. Civil Contempt Authority

The Subcommittee agrees that the need for civil contempt authority exists in both civil consent cases under 28 U.S.C. § 636(c), and misdemeanor cases under 18 U.S.C. § 3401. In these cases, the magistrate judge serves as the primary judicial officer for the district court. The district court's civil contempt power exists to enforce compliance with the court's orders. *See* Attachment A. The Subcommittee notes that magistrate judges in many courts already exercise considerable sanction authority under Fed. R. Civ. P. 11, 26, and 37. *See* Attachment B. In cases where the magistrate judge presides as the trial judge, the Subcommittee concludes that magistrate judges need civil contempt authority to enforce their orders and judgments.

The Subcommittee reaffirms the view that when a civil case is referred to a magistrate judge for final disposition with the parties' consent, the district judges' involvement with the case should end. The Judicial Conference has endorsed this principle by adopting Recommendation 24 of the *Long Range Plan for the Federal Courts*, which states that appeals in civil consent cases should only be heard by the court of appeals. Granting magistrate judges full civil contempt authority in civil consent cases would further this view by eliminating the need for district judges to become involved in civil contempt disputes arising in a case that is otherwise handled completely by the magistrate judge.

Constitutional and due process concerns appear to be less significant in civil contempt matters. For example, there is no constitutional right to a jury trial in civil contempt proceedings. *See* Attachment C. The Subcommittee concludes that magistrate judges should be authorized to exercise the district court's full civil contempt power in civil consent cases under 28 U.S.C. § 636(c), and in misdemeanor cases under 18 U.S.C. § 3401.

b. Criminal Contempt Authority

In addition to civil contempt authority, the Subcommittee believes that magistrate judges should be authorized to punish misbehavior occurring outside their presence that constitutes

disobedience or resistance to the magistrate judge's lawful order in civil consent and misdemeanor cases. Such criminal contempt authority is necessary to enforce the magistrate judges' orders and to vindicate the magistrate judge's (and the court's) authority over cases tried by magistrate judges.

The Subcommittee believes that the arguments favoring limits on summary criminal contempt penalties magistrate judges may impose also apply to additional criminal contempt authority in civil consent and misdemeanor cases. Penalty limits should resolve any constitutional doubts about extending the authority to magistrate judges to enforce their orders in civil consent cases and misdemeanor cases. Therefore, the Subcommittee proposes that the maximum prison sentence a magistrate judge may impose for a criminal contempt occurring in a civil consent or misdemeanor cases should be limited to 30 days, and the maximum fine should be limited to $5,000.

3. Appeals from Magistrate Judges' Contempt Orders

The Subcommittee reaffirms the view expressed by the Magistrate Judges Committee at its June 1995 meeting that an appeal of a magistrate judge's contempt order in a civil consent cases should be heard by the same court that hears the appeal of the final order on the merits of the case. A statutory amendment expanding magistrate judge contempt authority should provide that in civil consent cases under § 636(c), an appeal from a magistrate judge's contempt order would be heard either by the court of appeals under 28 U.S.C. § 636(c)(3), or by the district court under 28 U.S.C. § 636(c)(4). In misdemeanor cases under 18 U.S.C. § 3401, an appeal of a contempt order would be heard by the district judge under § 3402.

4. Other Criminal Contempts Certifiable to the District Court

The Subcommittee recognizes that some contumacious conduct is so egregious as to require more severe punishment. In such situations, the Subcommittee agrees that the certification procedure set forth in § 636(e) should be retained. Under this proposal, if a magistrate judge concludes that the contempt is sufficiently serious that a 30-day incarceration or $5,000 fine would be inadequate punishment, the magistrate judge would have the option to certify the contempt to the district court for further contempt proceedings.

The Subcommittee also agrees that other criminal contempt matters arising in nonconsensual matters that do not occur in the magistrate judge's presence should also be handled through the present certification procedure under 28 U.S.C. § 636(e). Where disobedience constituting a criminal contempt does not occur in the magistrate judge's presence and does not require immediate action to preserve the court's authority, the need for magistrate judges to exercise contempt authority in nonconsensual situations is less compelling. Such contempts should continue to be handled by a district judge, with the facts constituting the contempt certified by the magistrate judge.

5. Other Civil Contempts Certifiable to the District Court

The reasoning above related to criminal contempts in nonconsensual matters that do not occur in the magistrate judge's presence also applies to civil contempt situations that arise in nonconsensual matters. In addition, magistrate judges already wield considerable civil sanction authority in nonconsensual matters, thereby lessening the need for expanded civil contempt authority in such situations. *See* Attachment B. Such civil contempts should continue to be handled by a district judge, with the facts constituting the contempt certified by the magistrate judge.

6. Expanded Judicial Education on Contempt Authority

Members of the Subcommittee acknowledge that contempt authority is often a subtle and confusing subject, particularly the differences between criminal and civil contempt authority. If Congress provides magistrate judges with expanded contempt authority, the Subcommittee agrees that the Magistrate Judges Committee should request that the Federal Judicial Center provide magistrate judges with training on the contempt authority of federal courts, focusing particularly on the differences between civil contempt authority and criminal contempt authority.

III. CONCLUSION

The Subcommittee recommends that the Judicial Conference endorse:

(1) Amendment of 28 U.S.C. § 636(e) to provide magistrate judges with summary contempt authority for criminal contempts that occur in their presence, limiting the penalties that the magistrate judge may impose to 30 days imprisonment or a $5,000 fine.

(2) Amendment of 28 U.S.C. § 636(e) to provide magistrate judges with additional contempt authority in civil consent cases under 28 U.S.C. § 636(c) and misdemeanor cases under 18 U.S.C. § 3401, thereby authorizing magistrate judges:

(a) to exercise the full civil contempt authority of the district court;
(b) to recommend for prosecution, and to punish after notice and hearing under Fed. R. Crim. P. 42(b), criminal contempts that constitute disobedience or resistance to the court's lawful writ, process, order, rule, decree, or command in such cases, limiting the penalties that the magistrate judge may impose to 30 days imprisonment or a $5,000 fine;

(3) Amendment of 28 U.S.C. § 636(e) to provide that appeals from magistrate judges' contempt orders are to be heard by the court that will

hear the appeal of the final order on the merits of the case, either the court of appeals under 28 U.S.C. § 636(c)(3), or the district court under 28 U.S.C. § 636(c)(4) or 18 U.S.C. § 3402. In any other proceeding in which a magistrate judge presides under 28 U.S.C. §§ 636(a) or (b), or any other statute, the appeal of a magistrate judge's summary contempt order shall be to the district court.

(4) **Amendment of 28 U.S.C. § 636(e) to provide that magistrate judges shall have the authority to certify more serious criminal contempts, and other criminal contempts occurring outside the magistrate judge's presence in any other cases or proceedings arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings.**

(5) **Amendment of 28 U.S.C. § 636(e) to provide that magistrate judges shall have the authority to certify all civil contempts in any other cases or proceedings arising under §§ 636(a) or (b), or any other statute, to the district court for further contempt proceedings.**

The Subcommittee further recommends that the Magistrate Judges Committee adopt a resolution requesting that the Federal Judicial Center provide magistrate judges with education about the contempt power of the federal courts, particularly the differences between criminal and civil contempt authority, at such time as Congress enacts legislation to expand magistrate judge contempt authority.

ATTACHMENT A

BACKGROUND PAPER: Contempt Authority of District Judges, Magistrate Judges, and Bankruptcy Judges

I. Contempt Defined

A contempt of court is the disregard of judicial authority. "The power to punish for contempts is inherent in all courts." Ex parte Robinson, 19 Wall. 505, 510 (1874); Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991). *See also* Wright & Miller, *Federal Practice and Procedure*, § 2960, p. 581.

Contempt authority is considered essential to the administration of justice by federal courts. The Supreme Court stated in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 (1911) that "the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." Declaring that federal trial courts hold inherent contempt authority, the Court stated thirteen years later, "[t]he courts of the United States, when called into existence and vested with jurisdiction over any subject, at once became possessed of the [contempt] power." Michaelson v. United States ex rel. Chicago, St. P., M., & O.R. Co., 266 U.S. 42, 66 (1924). This contempt authority reaches conduct occurring both in the court's presence and beyond the court's confines, because "[t]he underlying concern that gave rise to the contempt power was not ... merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of the trial." Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798 (1987); Chambers at 44. The contempt authority of federal courts is also needed to ensure "that the Judiciary has a means to vindicate its own authority without complete dependence on other Branches." Young at 796; Gompers at 450.

II. Differences Between Civil Contempt and Criminal Contempt

Distinctions between criminal contempt and civil contempt are often subtle and confusing. The same conduct may result in citations for both civil and criminal contempt. *See* United States v. United Mine Workers, 330 U.S. 258 (1946). Just as a civil contempt citation may be issued in a criminal case, criminal contempt proceedings may arise in a civil case. "The distinction between the two forms of contempt lies in the intended effect of the court's punishment ... Punishment for civil contempt is intended to be either coercive or compensatory, whereas the purpose of criminal contempt punishment is punitive." United States v. Rylander, 714 F.2d 996, 1000 (9th Cir. 1983). *See also* Wright & Miller, *Federal Practice and Procedure*, § 2960, p. 584.

The Court of Appeals for the Ninth Circuit provided a succinct explanation of the differences between civil and criminal contempt in United States v. Powers, 629 F.2d 619 (9th Cir. 1980):

> Punishment for civil contempt is usually considered to be remedial. The penalty is designed to enforce compliance with a court order ... For that reason civil contempt punishment is conditional and must be lifted if the contemnor obeys the order of the court. Shillitani v. United States, 384 U.S. 364 (1966). The term of punishment for civil contempt cannot extend beyond the trial proceedings since at the termination of the trial the contemnor's actions can no longer be purged...
>
> Criminal contempt is established when there is a clear and definite order of the court, the contemnor knows of the order, and the contemnor willfully disobeys the order ... The penalty is punitive in nature. It serves to vindicate the authority of the court and does not terminate upon compliance with the court's order. The punishment is unconditional and fixed. *Id.* at 627.

III. District Judge Contempt Authority

A. Statutory and Procedural Framework

Although it is settled law that federal courts have inherent contempt power, district court contempt authority is subject to statutory limits imposed by Congress. Procedural limits are established through rules of procedure recommended by the Judicial Conference of the United States, proscribed by the Supreme Court, and reviewed by Congress. 28 U.S.C. § 2074. The Supreme Court also exercises restraint over the district court contempt authority through both constitutional review and its supervisory power. Vuitton at 800.

1. Criminal Contempt Statutes

Since 1831, Congress has statutorily limited the criminal contempt power exercised by federal trial courts. Section 401 of Title 18, which is virtually unchanged from its original enactment in 1831, provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as --
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Section 401 provides that the court may punish a contempt "by fine or imprisonment," but may not impose both. *See, e.g.,* In re Bradley, 318 U.S. 50 (1943). At the same time, however, § 401 sets no limits upon the fine or imprisonment penalties the trial court may impose when punishing contemptuous behavior.

Section 402 of Title 18 is an additional statute governing the prosecution of "Contempts constituting crimes." It provides for the criminal prosecution of "any person, corporation or association" for contumacious acts that also constitute criminal offenses under statutes of the United States, or under the laws of any state. The penalty that may be imposed for contempts under this section is limited to no more than six months imprisonment. In addition, the fine that may be imposed upon an individual "to be paid to the United States" may not exceed $ 1,000. Section 402 does not apply to contempts committed in the presence of the court, nor to contempts committed in disobedience of "any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of... the United States," but provides that contempts not covered by the statute "may be punished in conformity to the prevailing usages at law." As a practical matter, the majority of contempt cases involve violations of § 401 rather than § 402.

Section 3691 of Title 18 provides that defendants tried for contempts constituting criminal offenses under any Act of Congress "shall be entitled to trial by a jury." The statute further states that the jury trial right "does not apply to contempts committed in the presence of the court," or to contempts that occur in cases brought or prosecuted by the United States as a party.

Section 3285 of Title 18 sets forth a one-year statute of limitations for commencing a criminal contempt proceedings where the contumacious behavior also constitutes a criminal offense under United States statutes.

The Advisory Committee notes following Fed. R. Crim. P. 42 cite various specific statutes defining criminal contempt (see attachment).

2. Civil Contempt Statute

Only one statute, 28 U.S.C. § 1826, specifically governs civil contempt authority by providing for the incarceration of recalcitrant witnesses in federal proceedings.[1] There are no other statutes explicitly defining or governing the district court's civil contempt authority.

3. Federal Procedural Rules

Rule 42 of the Federal Rules of Criminal Procedure sets forth procedures governing the prosecution of criminal contempts in United States district courts.

A criminal contempt may only be punished summarily, "if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court." Fed. R. Crim. P. 42(a). The rule requires the judge who witnessed the contempt to prepare and sign a written order reciting the facts constituting the contempt, and that the order be entered of record.[2] As a matter of practice, the summary contempt procedures in rule 42(a) apply generally to contemptuous acts occurring under 18 U.S.C. § 401(1).

When the contemptuous misbehavior does not occur in the court's presence, rule 42(b) requires the court to conduct later contempt proceedings with notice to the contemnor, thereby preserving the contemnor's rights to prepare a defense, obtain release on bail, and to have a trial by jury in appropriate situations.[3] Rule 42(b) further requires that where the contempt

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[1] Section 1826(a) of Title 28 states in relevant part:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.

[2] Fed. R. Crim. P. 42(a) states:

> A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

[3] Fed. R. Crim. P. 42(b) states:

> A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United

proceeding involves "disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing, except with the defendant's consent." In proceedings under rule 42(b), the punishment penalty is not fixed until the court enters a verdict or finding of guilt.

Although civil contempt proceedings are governed by the Federal Rules of Civil Procedure, *see* In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979), no specific rule addresses such proceedings, except Fed. R. Civ. P. 4.1(b), which provides for the service and enforcement of civil contempt orders. The district court's civil sanction authority, which resembles contempt authority in many respects, is mentioned specifically in several rules, including Fed. R. Civ. P. 11, 16, 26, and 37.

4. Other Contempt Doctrines

The Supreme Court adheres to the long-standing principle that only "the least possible power adequate to the end proposed" should be used in contempt matters. Anderson v. Dunn, 6 Wheat. 204, 231 (1821); Taylor v. Hayes, 418 U.S. 488 (1974); United States v. Wilson, 421 U.S. 309 (1975). In addition, as a general principle, summary contempt proceedings are looked upon with disfavor and should be limited to "exceptional circumstances" where summary action is "necessary to protect the judicial institution itself." Harris v. United States, 382 U.S. 162 (1965).

When a trial court confronts misbehavior, it should consider whether the use of civil contempt will satisfactorily resolve the situation before it resorts to the more drastic remedy of criminal contempt. *See, e.g.*, Shillitani v. United States, 384 U.S. 364, 371 (1966).

B. Bankruptcy Judge Contempt Authority: 11 U.S.C. § 105(a) & 28 U.S.C. § 157; Bankruptcy Rule 9020

Bankruptcy judges have been provided a form of summary contempt authority through Rule 9020, Federal Rules of Bankruptcy Procedure, adopted in 1987. Under this rule, an order of contempt by a bankruptcy judge is held in abeyance for 10 days pending notification to the affected "entity" of an opportunity to object to the order before an Article III judge.[4] The order

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> States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

[4] Bankruptcy Rule 9020(a) states in relevant part:

> Contempt committed in the presence of a bankruptcy judge may be determined summarily by a bankruptcy judge. The order of contempt shall recite the facts and shall be signed by the bankruptcy judge and entered of record.

of contempt is subject to *de novo* review. If no objection is filed, the contempt order issued by the bankruptcy judge has the same force and effect as an order issued by a district judge.

The extent of bankruptcy judge contempt authority remains the subject of disagreement among courts. Some courts have held that the language of 11 U.S.C. § 105(a),[5] combined with 28 U.S.C. § 157,[6] confers civil contempt authority on bankruptcy judges. *See, i.e.*, In re Skinner, 917 F.2d 444 (10th Cir. 1990). One court has even relied upon 11 U.S.C. § 105 as the basis for providing bankruptcy courts with criminal contempt authority. In re Ragar, 3 F.3d 1174 (8th Cir. 1993). By contrast, however, other courts have held that bankruptcy judges do not have contempt authority under these statutes. *See, i.e.*, In re Hipp, 895 F.2d 1503 (5th Cir. 1990); In re Sequoia Auto Brokers, Ltd., 827 F.2d 1281 (9th Cir. 1987).

C. Magistrate Judge Contempt Authority

Magistrate judges do not have the power to punish persons directly for contempt. Under 28 U.S.C. § 636(e), a magistrate judge may only certify the facts of a person's misbehavior, disobedience, or resistance to a lawful order, and may order the alleged offender to appear before a district judge to show cause why he or she should not be held in contempt of court. Upon review, an Article III judge may impose an appropriate punishment.

Magistrate judges exercise considerable sanction authority under the Federal Rules of Civil Procedure, although courts disagree on the extent of this authority. *See* Attachment B.

The other sections of the rule provide a procedure whereby the contempt order shall become effective in the same fashion as a contempt order of the district court 10 days after service of the order unless the party files objections to the order. If objections are filed, further contempt proceedings are held before a district judge. Rule 9020 does not distinguish between civil and criminal contempt.

[5] Section 105(a) of Title 11 states:

> The [bankruptcy] 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.

[6] Section 157(b)(1) of Title 28 states in relevant part:

> Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, *and may enter appropriate orders and judgments*, subject to review under section 158 of this title (Emphasis supplied).

In August 1990, the Executive Committee of the Judicial Conference opposed legislation that would have provided magistrate judges with limited contempt power. The legislation would have given magistrate judges civil contempt power in matters referred by district judges and criminal contempt power identical to that of Article III judges in cases within magistrate judges' consensual trial jurisdiction. Correspondence to the Executive Committee had stated the position of the Magistrate Judges Committee on the proposed legislation, noting that the limited civil contempt provision was consistent with the Magistrate Judges Committee's earlier position on magistrate judge contempt authority, but that limitations should be imposed on the sanctions magistrate judges could order under their criminal contempt authority. In June 1992, the Magistrate Judges Committee reaffirmed its view that magistrate judges should be granted limited summary contempt power, but declined to recommend that the Judicial Conference seek legislation on the matter.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: REPORT OF THE NATIONAL BANKRUPTCY REVIEW COMMISSION

DATE: FEBRUARY 15, 1998

On October 20, 1997, the National Bankruptcy Review Commission submitted its final report to the President, Congress and the Chief Justice of the Supreme Court. The 1,300-page report (including almost 300 pages of dissenting opinions and separate views of individual Commissioners) contains 172 recommendations. Although some of these recommendations had unanimous or wide support of the Commissioners, others are controversial and were adopted by a divided vote (often 5-4).

I am not able to predict whether, or to what extent, any of the Commission's recommendations will be adopted by Congress. The previous time when there was a Bankruptcy Commission (1970-73), resulting legislation was enacted five years after its report was filed and the legislation varied considerably from the Commission Report. Doubt or uncertainty regarding the adoption of some of the Commission's proposals is heightened by political considerations on certain issues (such as the recommendation to make bankruptcy courts Article III courts), and by the lack of consensus on others (such as the consumer bankruptcy proposals). It also is uncertain as to whether there will be several bills enacted, each addressing one or a few specific recommendations, or whether one comprehensive bill that deals with many recommendations (similar to the comprehensive bankruptcy amendments enacted in 1984) will be enacted.

As of this date, a few bills have been introduced that address many of the issues addressed in the Commission report. These include S.1301 (Senator Grassley), H.R. 3150 (Rep. Gekas), H.R. 3146 (Rep. Nadler), and H.R. 2500 (Rep. McCollum). These bills differ from each other on many issues and it remains to be seen whether any of them will be enacted.

To assist the Advisory Committee, I divided the Commission's recommendations into the following categories:

(1) *Substantive Proposals directed to Congress that would not require Rule amendments.*

Many of the Commission's proposals are substantive and are directed to Congress in the form of recommended amendments to the Bankruptcy Code or title 28 of the United States Code. The proposals in this category do not mention the Federal Rules of Bankruptcy Procedure and, if adopted by Congress, would not require any amendments to the Bankruptcy Rules. For example, the Commission recommends (Recommendation 1.5.2) that a creditor's secured claim in personal property be determined by the property's wholesale value (rather than retail or replacement value). If this standard is adopted by Congress, the Rules would not have to be amended. I am not listing the recommendations in this category because they are numerous and the Advisory Committee does not have to address them.

(2) *Proposals directed to Congress that do not mention the Rules, but that, if adopted, would require Rule amendments.*

A number of substantive proposals are addressed to Congress for legislative change, but, if enacted, would require Rule amendments to conform to the relevant statute. Some of these legislative changes would necessitate only minor revisions to the Rules, while others would require substantial amendment or repeal of certain Rules. For example, the Commission recommended that bankruptcy courts become Article III courts. If this recommendation is adopted, Rule 9033 (Review of Proposed Findings of Fact and Conclusions of Law in Non-Core Proceedings) would have to be repealed because the "core v. noncore" distinction would be eliminated. Other Rules that mention core and noncore proceedings, such as Rules 7008(a) and 7012(b), also would have to be amended. The Commission also recommended that appeals to the district court or bankruptcy appellate panel be eliminated, with appeals from bankruptcy court judgments and orders going directly to the court of appeals. If this change takes place, Part VIII of the Rules (Appeals to District Court or Bankruptcy Appellate Panel) would have to be repealed.

Because of the inability to predict whether any of the Commission's proposals for legislative change will become law, and what the detailed provisions of such law would be, I suggest that the Advisory Committee not do anything at this time with respect to this category of Commission recommendations, except to monitor legislative activity. I am not listing the recommendations in this category because they are numerous and, unless and until Congress acts, the Advisory Committee need not

address them.

(3) ***Proposals that recommend specific amendments to the Bankruptcy Rules, but only if there is related legislation amending the Code.***

Although most proposals are directed only to legislative reform, several of the Commission's recommendations directly address the Bankruptcy Rules in the context of related amendments to the Code. I listed these proposals in Appendix A. For example, the Commission recommends that the Bankruptcy Code be amended regarding small business chapter 11 cases, and also recommends that, *if the legislative proposals are adopted*, the Advisory Committee make related amendments to the Rules. One of these small business proposals (Recommendation 2.5.2) recommends that courts be given authority, after notice and hearing, to waive the requirements for, or simplify the content of, disclosure statements in small business cases where the benefits to creditors of fulfillment of full compliance with Code § 1125 are outweighed by cost and lack of meaningful benefit to creditors. The proposal (on page 635 of the report) continues, in part, as follows:

> "The Advisory Committee on Bankruptcy Rules of the Judicial Conference ('Rules Committee') shall be called upon to adopt, *within a reasonable time after enactment*, uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate...."

I set forth in Appendix A a list of Commission proposals

that specifically suggest Bankruptcy Rule amendments if related legislation is enacted. Again, given the uncertainty as to future legislation, I suggest that the Advisory Committee take a wait-and-see approach for now regarding these proposals, while monitoring legislative activity.

(4) "Stand-alone" proposals that recommend amendments to the Bankruptcy Rules, unrelated to legislative amendments.

The final category of Commission proposals consists of nine recommendations that may be implemented by amending the Rules, whether or not there is related legislation. These proposals need not await legislative activity and may stand alone as recommendations to the Advisory Committee on Bankruptcy Rules. A list of these proposals are set forth in Appendix B. Since these proposals are not tied to legislative activity, I suggest that the Advisory Committee discuss these proposals -- or at least identify which of these proposals it wants to pursue -- at our March 1998 meeting.

APPENDIX A

PROPOSALS THAT RECOMMEND AMENDMENTS TO THE BANKRUPTCY RULES, BUT ONLY IF RELATED LEGISLATION IS ENACTED

1. Partnerships - Rules 1004 and 1007(g). The Commission Report contains comprehensive recommendations relating to partnership bankruptcy cases (pages 371-416 of the report). The first recommendation (Recommendation 2.3.1) that relates to partnerships is that § 101 of the Code be amended to define "general partner" in a manner that includes former, as well as existing, partners who are liable for one or more of the partnership's debts under applicable nonbankruptcy law.

But if this definition is added to the Code, the Commission report recommends (Recommendation 2.3.2) that the Code and Rules be amended to clarify that, notwithstanding the definition that includes former partners, a former partner is not (absent a court order to the contrary) required to consent to a voluntary petition by the partnership, to be served with a petition or summons in an involuntary case against the partnership, or to perform the duties of disclosure or procedural duties imposed on a general partner. To accomplish this clarification, Rule 1004(a) and (b), and Rule 1007(g) would have to be amended. No amendments are necessary unless the recommended definition of "general partner" is added to the Code.

2. Temporarily Enjoining Acts or Proceedings Against Nondebtor General Partners - Rule 7001. As part of its partnership proposals, Commission Recommendation 2.3.14 would give the court the authority under certain circumstances to

temporarily enjoin acts against nondebtor general partners "on motion." The report, recognizing that an adversary proceeding is necessary to obtain injunctive relief (see Rule 7001), recommends that the Rules be changed to dispense with this requirement "in favor of a more expeditious and less cumbersome mechanism for obtaining injunctive relief. Under the Recommendation, while injunctive relief may be limited in scope depending on the circumstances, relief by motion after appropriate notice and a hearing will reduce costs without impinging on the enjoined parties' rights." It appears that this recommendation, as part of the partnership section of the report, is limited to temporary injunctions in partnership cases and is dependant on the adoption of the substantive proposals regarding partnerships.

3. Disclosure by Nondebtor General Partners of Personal Financial Information - Rule 1007(g). Recommendation 2.3.18 (page 413 of the report) suggests that the Code be amended to require nondebtor general partners, within 30 days after entry of the order for relief in a partnership case or within such time as the court fixes, to disclose information regarding the partner's personal financial condition, similar to that provided by the debtor.

The Commission report notes that Rule 1007(g) provides that the court may order a general partner to file a statement of personal assets and liabilities. It also points out that the existing rule makes this disclosure requirement discretionary on the part of the court and the information to be provided under

this rule is limited. If the Commission's recommendation 2.3.18 is enacted into law by Congress, Rule 1007(g) will have to be amended to conform.

4. Local Mediation Programs. The Commission has recommended (Recommendation 2.4.7, pages 489-492) that Congress authorize judicial districts to promulgate local rules establishing mediation programs in which the court may order non-binding, confidential mediation upon its own motion or upon the motion of any party in interest. The Commission recommends that the court be able to order mediation in an adversary proceeding, contested matter, or otherwise, but that courts should not have the authority to order meditation of disputes relating to retention or payment of professionals, or arising in connection with a motion for contempt, sanctions, or other judicial disciplinary matters. The court should have explicit authority to order compensation of mediators who satisfy the district's training requirements or standards. The Commission has recommended that the details of mediation programs be left to local districts.

One aspect of mediation that the Commission believes should be left to legislation is the payment of mediators from assets of the estate. Other aspects could be left to the Judicial Code or the Bankruptcy Rules, but the Commission thinks that most details should be left to local rules. If Congress amends the Bankruptcy Code or title 28 to provide for mediation, the Advisory Committee would have to consider appropriate

amendments to the Bankruptcy Rules to facilitate these mediation programs.

5. Small Business Proposals. The Commission Report includes a section dealing with small business chapter 11 cases (see pp. 609-660). Although many of the recommendations contained in this section are addressed to Congress and would need statutory amendment, a few are expressly directed to the Advisory Committee on Bankruptcy Rules. In addition, the small business proposals are complex and extensive and, depending on the details of any legislation enacted to deal with small business debtors, the Advisory Committee may have to consider other (now unforeseen) Code amendments that may require amendments to the Rules.

The recommendations for Rule changes specifically mentioned in the Commission report "for adoption within a reasonable time after enactment" of the statutory changes (pages 635, 638), include the following.

(a) Standard Forms for Disclosure Statements and Plans. Recommendation 2.5.2 suggests that the Advisory Committee adopt "uniform safe-harbor standard forms of disclosure statements and plans of reorganization for small business debtors, after such experimentation on a local level as they deem appropriate." Parties would not be excluded from using other forms, but using the prescribed form would provide a safe harbor. The Commission believes that the standard forms would be less costly to debtors that cannot afford

"draft-from-scratch" disclosure statements and plans, and would minimize inadvertent failures in disclosing significant information.

(b) Uniform Reporting Requirements. The Commission proposes (Recommendation 2.5.3, page 638) that small business debtors be required to file periodic financial and other reports. "Within a reasonable time after enactment," the Rules should be amended to require "small business debtors to comply with the obligations imposed thereunder." Specifically, the Advisory Committee should be called upon to prescribe uniform reporting as to:

(i) the debtor's profitability, i.e., approximately how much the debtor has been earning or losing during the current relevant recent fiscal period;

(ii) approximate ranges of the debtor's projected cash receipts and cash disbursements (including those required by law or contract and those that are discretionary but excluding prepetition debt not lawfully payable after the entry of the order for relief) over a reasonable period in the future;

(iii) how approximate actual cash receipts and disbursements compare with results from prior reports;

(iv) whether the debtor is or is not (i) in compliance in all material respects with postpetition requirements imposed by the Bankruptcy Code and the Bankruptcy Rules and (ii) filing tax returns and paying taxes and other administrative claims as required by applicable nonbankruptcy law as will be required by the amended statute and rules and, if not, what the failures are, how and when the debtor intends to remedy such failures and what the estimated costs thereof are; and

(v) such other matters applicable to small business debtors as may be called for in the best interests of debtors and creditors and the public interest in fair and efficient procedures under Chapter 11.

(c) Documents to Accompany the Petition. Although it it is not expressly addressed to the Rules, Recommendation 2.5.4 (page 641) appears to be appropriate for the Rules (if Congress passes legislation on small business debtors). It suggests that the debtor be required to append to the voluntary petition for a small business debtor (or within 3 days after the order for relief in an involuntary case), either (A)(i) its most recent balance sheet, statement of operations, and cash-flow statement and (ii) its most recent federal income tax return, or (B) a statement made under penalty of perjury that no such financial statements have been prepared or that no federal income tax return has been filed, or (c) both.

APPENDIX B

"STAND-ALONE" PROPOSALS THAT RECOMMEND AMENDMENTS TO THE BANKRUPTCY RULES, UNRELATED TO LEGISLATIVE AMENDMENTS

1. Rule 9011. The Commission endorsed the amendments to Rule 9011 that became effective on December 1, 1997. These amendments were designed to conform to the 1993 amendments to Civil Rule 11. But the Commission then recommended further amendments to Rule 9011 (see Recommendation 1.1.4, page 112):

> "The Commission, however, recommends to the Rules Committee that the language be changed to make explicit that an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the bankruptcy schedules, statement of affairs, lists and amendments. The schedules are the primary source of substantive information about the debtor's financial affairs, and attorneys generally appear to play a central role in the completion of these documents. They should make reasonable efforts to ensure that the schedules accurately reflect the debtor's assets, income, liabilities, and other relevant information contained therein, whether the debtor is a business or an individual."

Rule 9011, since it was originally promulgated in 1983, excepts lists, schedules, and statements from the papers that an attorney must sign. These documents must be verified by the debtor, but need not be signed by the debtor's attorney.

2. Official Form for Motion for Approval of a Reaffirmation Agreement. The Commission has recommended many changes regarding reaffirmation of debts under § 524(c) and (d) of the Code. See Recommendation 1.3.1 (pages 145-161). For example, the Commission has recommended that reaffirmations of unsecured debts be eliminated. These recommendations require

amendments to the Code.

The Commission's report includes the following as part of its section on reaffirmation agreements:

> "The Commission recommends that the Advisory Committee on Bankruptcy Rules of the Judicial Conference prescribe a form motion for approval of reaffirmation agreements that contains information enabling the court and the parties to determine the propriety of the agreement. Approval of the motion would not entail a separate order of the court."

The Commission included in its report (Annex C to Chapter 1, page 298 of the report) "Proposed Requirements for Motion for Approval of Reaffirmation Agreements." A copy of these proposed requirements is attached to this memo as Exhibit A.

Although the Commission's recommendation that the Advisory Committee prescribe a form for a motion for approval of a reaffirmation agreement is included as part of a package of related proposals on reaffirmations, the Advisory Committee could consider this as a "stand alone" recommendation. That is, regardless of whether Congress changes the Code's provisions on reaffirmations, a new official form could be prescribed to provide a form for reaffirmation motions. Alternatively, the Advisory Committee may wait to see if the Code's reaffirmation provisions will be changed before formulating a new official form.

3. Rule 4004 - Extensions of Time to File Objections to Discharge for Creditors Who Did Not Receive Notice of the Case. The Commission has recommended that "[c]reditors that did not receive notice of a bankruptcy should get an extension of time to

file an objection to or seek revocation of a discharge." (Recommendation 1.4.8, page 227).

Acknowledging that a creditor who does not receive notice of a case because of the failure to schedule that creditor will have its debt excepted from discharge under § 523(a)(3) of the Code, the Commission notes that "The Bankruptcy Code does not provide creditors with parallel protection with respect to objections to the debtor's general discharge under § 727(c)." The report explains this problem as follows:

> "If notice is not provided to a creditor with information that may provide grounds for the denial of the debtor's discharge, that creditor may be time-barred in pursuing the objection. The Federal Rules of Bankruptcy Procedure authorize extensions of time to object to discharge only if the creditor makes an extension motion within the allotted time, thus a creditor omitted from the schedules and unapprised of the bankruptcy until afterwards is unable to object to the discharge. Parties can seek revocation within a year after the discharge, but the grounds for revocation are somewhat more circumscribed, and again, the Code contains no extensions for lack of notice.
>
> One of the key policies underlying the Bankruptcy Code is that only debtors who have acted honestly will be entitled to a discharge under section 727. To this end, the statute expressly authorizes parties in interest to bring relevant information to the court's attention that might indicate that the debtor's discharge should be denied. Although their debts may be excepted from discharge if they did not receive notice of the bankruptcy, creditors with pertinent information cannot perform this broader monitoring function if they are not aware of the bankruptcy proceeding. A creditor omitted from the schedules should have a reasonable period of time after receiving notice of bankruptcy to file an objection to discharge or a motion to revoke discharge." Pp. 227-228 [footnotes omitted].

The Commission recognizes that there may be other views on this issue:

> "Some people might argue that this amendment is unnecessary. The objection-filing deadline (60 days after the first date scheduled for the section 341 meeting) surpasses the average tenure of Chapter 7 individual bankruptcy cases. In addition, the statute already affords a one-year post-discharge period to seek revocation, which provides an adequate time frame in most cases. The legitimacy of the bankruptcy process is premised on adequate notice and disclosure. This recommendation should encourage debtors and their attorneys to be as forthright as possible in listing creditors and in providing accurate information." P. 228.

5. Disclosure of Employment-Related Obligations. The Commission Report contains several related proposals dealing with employee participation in bankruptcy cases (see Recommendation 2.4.9, pp. 501-508). In particular, these proposals are designed "to improve identification of employment-related obligations and facilitate the participation by employee representatives in bankruptcy cases." Several of these proposals are directed to the Executive Office for the United States Trustees (such as those directed to the appointment of committees). But the Commission also suggests changes in several official forms. In particular, the Commission suggests that the official forms for the petition, list of largest creditors, and/or schedules of liabilities should solicit more specific information regarding employee obligations.

> "Notice and disclosure [relating to employee-related obligations] serve two important functions. First, better disclosure of potential liabilities and issues affecting employees and retirees contributes to a more complete view of the issues likely to arise in the bankruptcy and benefits all parties. Second, improved notice and more complete disclosure facilitate participation by employee representatives and employee benefit plans. This, in turn, enhances the prospects for a resolution of plan issues on a consensual basis.

"One way to improve early and more thorough disclosure of employee-related obligations is amending the Official Bankruptcy Forms. As currently drafted, the Official Forms for the petition and schedules do not sufficiently prompt the preparers to include information about employment-related debts. The petition requires the business debtor to estimate the number of employees, but only for 'statistical/administrative' purposes. Creditors holding unsecured claims entitled to priority and other unsecured claims are listed on Schedules E and F, respectively. Schedule E contains a list of the priority claims to be disclosed as they appear in Sections 507(a)(2) through (9) (e.g., 'wages, salaries and commissions,' as described in Section 507(a)(3)), and a category for 'other'. However, common wage-related items such as arbitration and other awards for back pay, accrued but unpaid wages, vacation pay or sick leave in excess of the wage priority, severance pay, and claims arising under the Worker Adjustment and Retraining Notification ('WARN') Act are not referenced anywhere on the schedules, thus increasing the likelihood of omission. Nor are monies owed to employee benefit plans, beyond the amounts constituting priority claims under Section 507(a)(4), listed for disclosure. Thus, the debtor's initial court filings may not adequately reflect whether and to what extent employee interests may be affected by the bankruptcy case.

"Additional instructions on the forms for disclosure of these obligations would assist the preparers in disclosing these debts. In turn, the inclusion of this information would aid the U.S. Trustees in their initial investigations early after the filing of the case. Currently, without better information, the U.S. Trustee may have no reason to solicit information about debts owed to employees and employee benefit plans or related matters such as the likelihood of a company's withdrawal from a pension plan, an event which will give rise to a substantial claim." [Pp. 502-503, footnotes omitted].

6. Rule 2004(a) - Including Examiners. The Commission recommends (Recommendation 2.4.10, p. 509) that the Advisory Committee on Bankruptcy Rules consider amending Rule 2004(a) to provide that "On motion of any party in interest or of an examiner appointed under Section 1104 of title 11, the court may

order the examination of any entity." The recommendation is designed to give an examiner the ability to request a Rule 2004 examination.

> "The ability to acquire information under [Rule 2004] and to use other discovery tools, can be critical to investigating fraud and other misconduct or mismanagement, which are precisely the responsibilities of an examiner. While parties in interest can request a rule 2004 examination, an examiner might not be a party in interest under section 1109 of the Bankruptcy Code. No reported decision has been found denying use of rule 2004 to an examiner, but there is little justification for leaving any ambiguity on the matter. This discovery tool should be available to all examiners in pursuing their investigatory functions." [footnotes omitted].

7. National Admission to Practice. The Commission recommends (Recommendation 3.3.4, pp. 883-888) that an attorney's admission to practice in one bankruptcy court should entitle the attorney to practice in any bankruptcy court without the need for any other admission procedure. This would eliminate the need for special admission or for admission by *pro hac vice* motion. The Commission believes that national admission to practice will reduce the costs of, and thereby increase the rate of, active creditor participation in bankruptcy cases. This recommendation also will assist government attorneys.

This recommendation is not intended to affect local rules that require that the nonresident attorney affiliate with local counsel. It also will not affect requirements under state law governing the practice of law and the maintenance of an office for the practice of law.

This recommendation does not indicate whether it is directed

to Congress for legislative enactment, or to the Advisory Committee for Rules amendment. But it appears to me that this may be a matter for the Rules because it deals with an attorney's admission to practice before the bankruptcy courts.

8. Notice to Governmental Units. The Commission Report contains a separate section on "Taxation and the Bankruptcy Code" in which it recommends (Recommendation 4.2.1, pp. 949-950) that provisions of the Bankruptcy Code on providing reasonable notice to governmental units be clarified.

> "First, notice to the government must be reasonably calculated to reach the proper representatives of the government and must reasonably identify the debtor.... Second, to facilitate proper notice, the Congress should recommend some mechanism to provide sufficient information to permit a debtor to properly identify the relevant federal, state, or local governmental authority for purposes of providing reasonable notice under the circumstances.... The creation and maintenance of a local registry provides a necessary resource to aid in giving adequate notice....
>
> Third, failure to provide reasonable notice should result in some sanction, including exception to any bar date and the nondischargeability of tax claims when the debtor has not provided notice in a manner consistent with the applicable Bankruptcy Code section or Rule."

9. Requests for Tax Determinations Under § 505(b). Section 505(b) gives a trustee the right to request a prompt audit from a taxing authority upon submitting a tax return and, if the taxing authority fails to respond within 60 days, the trustee is discharged from any liability for any taxes beyond the taxes indicated in the return. Presently, the IRS has directed that such requests be sent to the local District Director, but some courts have held that the notice was sufficient if sent to the IRS Service Center. The Commission recommends

(Recommendation 4.2.3, p. 951) that a local or district registry be maintained by bankruptcy court clerks that would provide sufficient information so that the debtor may comply with more stringent notice requirements. "Finally, the NBRC recommends that all notice issues affecting governmental units should be taken up as one overall proposal."

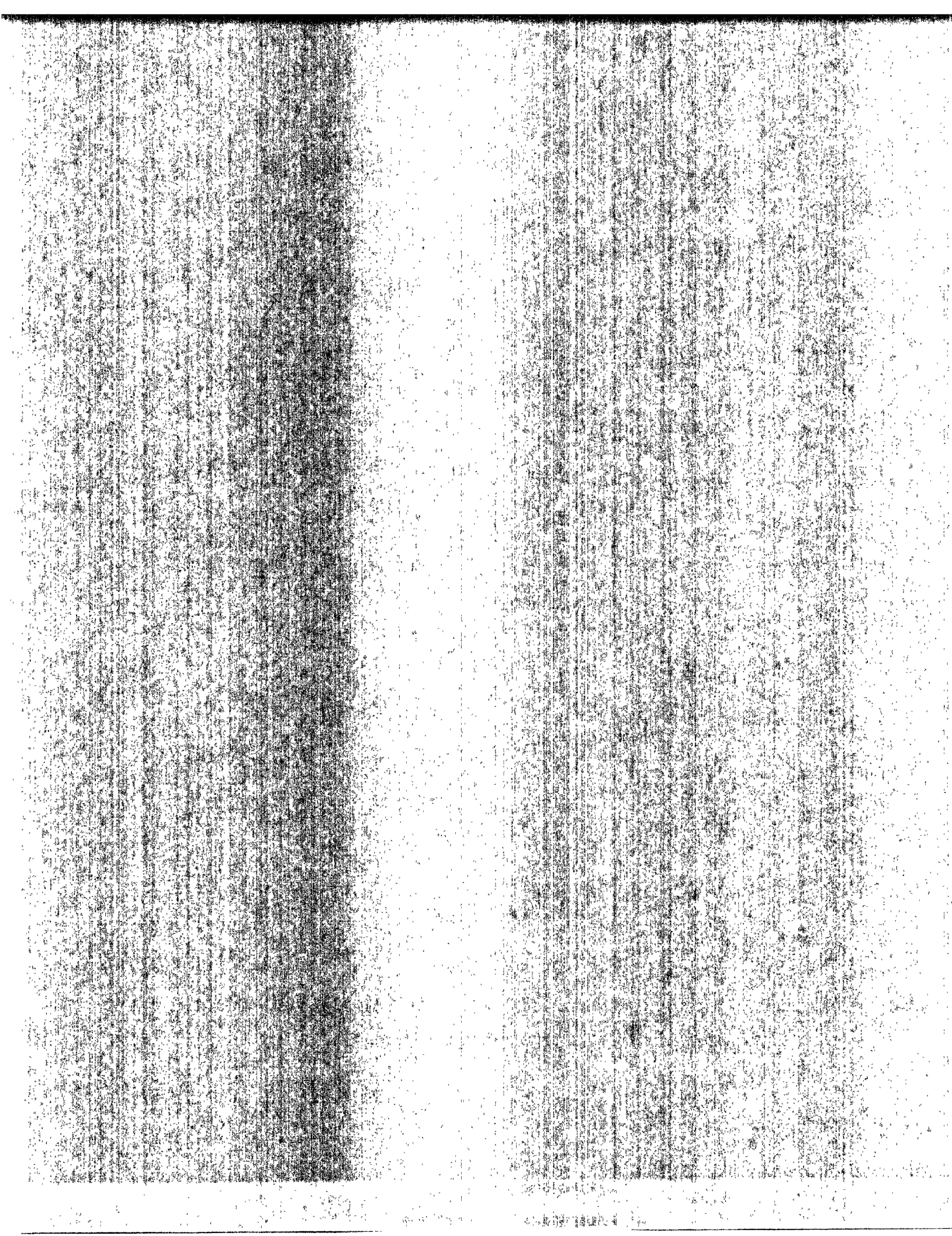

EXHIBIT A

BANKRUPTCY: THE NEXT TWENTY YEARS

National Bankruptcy
Review Commission
Final Report

October 20, 1997

Annex C
Proposed Requirements for Motion for Approval of Reaffirmation Agreements

The motion for approval should include the following information:

- *Name of the parties.*
- *Summary terms of new agreement, including the principal amount, the interest rate (APR), the amount of monthly payment, the date on which payments will commence, the total number of payments, the total amount of payments (interest and principal) if paid according to schedule and the date on which the lien will be released, whether payments were in default as of bankruptcy filing, and ways in which terms differ from original agreement.*
- *Description of security, including manufacturer, year, and model if applicable, value of security and the basis for the parties' determination of that value, and current and anticipated use of collateral.*
- *The effect of the proposed reaffirmation on the debtor, including information on the debtor's monthly income and expenses, whether the agreement will impose an undue hardship on the debtor, the reasons for the debtor entering into this agreement, whether the agreement is in the debtor's best interest, and whether the debtor considered the option of redemption under section 722.*
- *Whether the agreement is part of a settlement of litigation on the dischargeability of this debt under section 523 of the Bankruptcy Code.*
- *Whether the debtor was represented by an attorney during the course of the negotiations on the agreement.*
- *A statement of the parties' understanding that the agreement is entirely voluntary and is not required, that the debtor may rescind the agreement at any time prior to discharge or within 60 days after agreement is filed, whichever is later, and that the agreement will be fully enforceable under state law.*
- *Certification of the parties that they have attached the instrument creating the debt and any security interest or lien along with any documents necessary to show perfection of the interest.*

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULES 4003(b) AND 1017(e)(1) -- EXTENSIONS OF TIME

DATE: August 6, 1997

RULE 4003(b)

Bankruptcy Rule 4003(b) imposes a 30-day time limit for filing an objection to the debtor's list of property claimed as exempt "unless, within such period, further time is granted by the court."

Several courts have construed this phrase to mean that a bankruptcy court has no power to extend the 30-day period after it has expired, whether or not a timely motion for an extension has been filed within the 30-day period. Most recently, the Court of Appeals for the Sixth Circuit in In re Laurain (copy enclosed) held that the bankruptcy court lost jurisdiction to rule on a timely-filed request for an extension when it failed to rule within the 30-day period. In doing so, the Sixth Circuit followed the decisions of two other circuits that held that a bankruptcy court has no power to grant an extension after the 30-day period has expired. See In re Stoulig, 45 F.3d 957 (5th Cir. 1995); In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990).

Chief United States Bankruptcy Judge Steven W. Rhodes (E.D. Mich.), in his letter to Judge Paul Mannes dated June 4, 1997, (copy enclosed) has requested that the Advisory Committee consider amending Rule 4003(b) so that the 30-day time limit may be extended if the request for an extension is filed within the

30-day period, regardless of when the court rules on the request.

If the Committee decides to amend Rule 4003(b) as suggested by Judge Rhodes, I suggest that the rule be amended as follows:

Rule 4003. Exemptions

****

(b) OBJECTIONS TO CLAIM OF EXEMPTIONS. The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after ~~the conclusion of~~ the meeting of creditors held ~~pursuant to Rule 2003(a)~~ under § 341(a) is concluded or within 30 days after ~~the filing of~~ any amendment to the list or supplemental schedules is filed, whichever is later. ~~unless, within such period, further time is granted by the court~~. The court for cause may extend the time for filing objections if, before the 30-day period expires, the trustee or a creditor files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, ~~and to~~ the person filing the list, and the attorney for ~~such~~ that person.

****

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request for an extension of time to file objections to the list of claimed exemptions, whether the court rules on the request before or after the expiration of the 30-day period. The purpose of this amendment is to avoid the harshness of the present rule which has been construed to deprive a bankruptcy court of jurisdiction to grant a timely request for an extension if it has failed to rule on the request within the 30-day period. See In re Laurain, __

F.3d __ (6th Cir. 1997); In re Stoulig, 45 F.3d 957 (5th Cir. 1995); In re Brayshaw, 912 F.2d 1255 (10th Cir. 1990). The amendment also clarifies that the extension may be granted only for cause.

Other amendments are stylistic.

RULE 1017(e)(1)

Judge Duplantier has asked me to review the rules to determine whether there are any other provisions -- similar to Rule 4003(b) -- that deprive the court of the power to grant a timely request for an extension of time due to the court's failure to rule on the request before the time has expired. I found one.

Rule 1017(e)(1) governs the procedure for a United States trustee's motion to dismiss a chapter 7 case for "substantial abuse" under § 707(b). The rule provides that the United States trustee may file the motion not later than 60 days after the first date set for the meeting of creditors "unless, before such time has expired, the court for cause extends the time for filing the motion."

The Committee should consider the following amendments to Rule 1017(e)(1):

Rule 1017. Dismissal or Conversion of Case; Suspension

****

(e) DISMISSAL OF INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. An individual debtor's case may be dismissed for substantial abuse ~~pursuant to~~ under § 707(b)

only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) The United States trustee may not file a motion to dismiss for substantial abuse ~~A motion by the United States trustee shall be filed no~~ later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a), unless, on request filed by the United States trustee before ~~such~~ the time has expired, the court for cause extends the time for filing the motion to dismiss. The movant shall set forth in the motion ~~The motion shall advise the debtor of~~ all matters to be submitted to the court for its consideration at the hearing.

****

COMMITTEE NOTE

This rule is amended to permit the court to grant a timely request filed by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under § 707(b), whether the court rules on the request before or after the expiration of the 60-day period. Other amendments are stylistic.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0155P (6th Cir.)
File Name: 97a0155p.06

No. 96-5093

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: VICTORIA JOHNSTON LAURAIN,
Debtor.

DAVID G. ROGERS, Trustee,
Plaintiff-Appellee,

v.

VICTORIA JOHNSTON LAURAIN,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Middle District of Tennessee

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Decided and Filed May 15, 1997

Before: KENNEDY, CONTIE, and NORRIS, Circuit Judges.

KENNEDY, J., delivered the opinion of the court, in which NORRIS, J., joined. CONTIE, J. (pp. 11-17), delivered a separate dissenting opinion.

OPINION

KENNEDY, Circuit Judge. This appeal presents an issue of first impression in this Circuit: Does a bankruptcy court's failure to rule on a timely filed FED. R. BANKR. P. 4003(b) motion for an extension of time to file objections to a claimed exemption of property from the bankrupt estate divest the bankruptcy court of jurisdiction to grant an extension after the Rule's prescribed thirty-day period expires? The bankruptcy court held that it lost jurisdiction to rule on a timely-filed request for an extension when it failed to rule within the thirty-day period. The District Court reversed. Because we agree with the bankruptcy court, we REVERSE.

I. Facts

The facts of this case are undisputed. Victoria Johnston Laurain (debtor) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on May 16, 1995. Pursuant to a Schedule C filed with the bankruptcy court on June 16, 1995, the debtor claimed various items of personal property exempt. Included among the items was an interest in a contingent and unliquidated claim for personal injuries sustained by the debtor as the result of an "ACTD category" breast implant.

On June 19, 1995, the meeting of creditors took place.[1] On July 18, 1995, David G. Rogers, the debtor's trustee (trustee), filed a Motion to Extend Time to Object to Exemptions of Debtor. In an order signed on July 20, but not entered until July 26, 1995, the bankruptcy court granted an additional 60 days from the entry of the order to file an objection. The debtor filed no objections to this order.

[1]Section 341(a) of the Bankruptcy Code provides: "Within a reasonable time after the order for relief in a case under this title, the United States trustee shall convene and preside at a meeting of creditors." 11 U.S.C. § 341(a).

On August 11, 1995, the trustee filed an objection to the debtor's exemption of the ACTD breast implant claim. On September 12, 1995, the bankruptcy court conducted a hearing on the trustee's objection. At this hearing, the trustee orally requested additional time within which to ascertain the value of the ACTD claim, because both parties had been unable to place a value on the claim. The bankruptcy court took this request under advisement. Counsel for the debtor objected to the request for an additional extension of time.

By an order entered October 3, 1995, the bankruptcy court set aside the July 26 order purporting to extend the objection period, because it found that it had lost jurisdiction to grant an extension on July 19, thirty days after the meeting of creditors was concluded. It therefore denied the trustee's objection and the oral motion for an additional extension of time as untimely.

The trustee appealed. The District Court reversed the bankruptcy court. The court agreed that the literal language of Rule 4003(b) requires that the court grant an extension of time for the filing of objections within thirty days after the conclusion of the meeting of creditors. However, it concluded that such a strict application of the rule was inappropriate and that the drafters really intended only that the filing of a request for an extension of time be made within the prescribed thirty days, but that the court could grant the request after the thirty days had expired.

This timely appeal followed.

II. Discussion

A. Standard of Review

The proper interpretation of Rule 4003(b) is a question of law which we review *de novo*. *See Baker & Getty Fin. Servs., Inc. v. Rafoth*, (*In re Baker & Getty Fin. Servs., Inc.*), 106 F.3d 1255, 1259 (6th Cir. 1997).

B. Trustee's First Request for Additional Time

When a debtor files a bankruptcy petition, all of the debtor's property becomes property of the bankruptcy estate. *See* 11 U.S.C. § 541. However, the debtor is entitled to exempt certain eligible property from the bankruptcy estate. *See id.* § 522(*l*). Section 522(*l*) states the procedure for claiming exemptions and objecting to claimed exemptions as follows: "The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. . . . Unless a party in interest objects, the property claimed as exempt on such list is exempt." Although § 522(*l*) itself does not specify the time for objecting to a claimed exemption, Rule 4003(b) provides in pertinent part:

> The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) . . . unless, within such period, further time is granted by the court.

FED. R. BANKR. P. 4003(b).

Statutes, regulations, and rules of the court must be read in a "straightforward" and "commonsense" manner. *See Bartlik v. United States Dep't of Labor*, 62 F.3d 163, 165-66 (6th Cir. 1995) (en banc). When we can discern an unambiguous and plain meaning from the language of a rule, our task is at an end. *Id.* at 166. Rule 4003(b) unambiguously requires that an extension of time be granted within the prescribed thirty-day period. The Rule can only be read to require that an interested party must file a motion for an extension within the prescribed thirty-day period *and* the court must rule on that motion within the same thirty-day period. Indeed, the rule only implicitly requires that a request for an extension be made within the thirty-day period, while it expressly requires that the court

grant such an extension within that period.[2] Moreover, FED. R. BANKR. P. 9006(b)(3) provides that the court may enlarge the time for taking action under Rule 4003(b) "only to the extent and under the conditions stated in those rules." Thus, Rule 4003(b) should be viewed as jurisdictional. Because Rule 4003(b) is jurisdictional, it does not matter that the debtor did not object when the Bankruptcy Court granted the extension after the thirty-day period had expired.

The Supreme Court has noted that Congress spent nearly ten years overhauling the bankruptcy system and that "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989). Like the bankruptcy statute, the bankruptcy rules also have undergone revisions in the past decade. When Congress approved the change to Rule 4003(b) in 1987[3] and its amendment in 1991, the rule did not alter the requirement that the bankruptcy judge must rule on a motion for an extension within a specific time period. *Compare* [Transfer Binder] Bankr. L. Rep. (CCH) ¶ 20,123, at 20,150 *with* 92 F.R.D. 499, 596 (1982) (preliminary draft of proposed new

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[2] *Collier on Bankruptcy* advises: "The time period for filing objections to exemptions may be extended only by the court and only if the extension is granted within the original time period." 9 COLLIER ON BANKRUPTCY ¶ 4003.03[1], at 4003-9 (15th ed. 1996).

[3] Rule 403(c), the predecessor of Rule 4003(b), provided:

> Any creditor or the bankrupt may file objections to the report within 15 days after its filing, *unless further time is granted by the court within such 15-day period.*

[Transfer Binder] Bankr. L. Rep. (CCH) ¶ 20,123, at 20,150 (emphasis added). The Bankruptcy Code changed the thrust of Rule 403 by making it the burden of the debtor to list his or her exemptions and the burden of the parties in interest to raise objections. *See* FED. R. BANKR. P. 4003 advisory committee's note.

bankruptcy rules) *and* FED. R. BANKR. P. 4003(b). Furthermore, such a focus on timely action by the court is not unique to Rule 4003(b). While some bankruptcy rules provide that only the motion for an extension of time must be filed within a prescribed time period, *see, e.g.*, FED. R. BANKR. P. 4004(b), 4007(c), other rules provide that the court must act within a prescribed time period, *see, e.g.*, FED. R. BANKR. P. 1017(e)(1).

Two circuits have addressed the exact issue presented in this case, and both have held that the bankruptcy court must act within the thirty-day time period. In *Stoulig v. Traina (In re Stoulig)*, 45 F.3d 957 (5th Cir. 1995), the trustee moved for an extension of time two days before the expiration of the thirty-day period. Two months later, the bankruptcy court granted the extension. The Fifth Circuit held that under Rule 4003(b) the bankruptcy court was without jurisdiction to grant an extension of time after the prescribed thirty-day period. *Id.* at 957-58. Similarly, in *Clark v. Brayshaw (In re Brayshaw)*, 912 F.2d 1255, 1257 (10th Cir. 1990), the Tenth Circuit held that "[t]here simply is no room in the wording for construing Rule 4003(b) or Rule 9006(b) to permit granting an extension of time to file objections outside the original thirty-day time limit."

One court has approached Rule 4003(b) differently. In *In re Williams*, 124 B.R. 864 (Bankr. N.D Fla. 1991), the bankruptcy court held that Rule 4003(b) simply requires that a trustee or creditor file a request for an extension of time within the thirty-day period, but that the court can rule on that request after the period has expired. The *Williams* court relied in part on *Southwest Aircraft Services, Inc. v. City of Long Beach, (In re Southwest Aircraft Services, Inc.)*, 831 F.2d 848 (9th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988), a case involving Bankruptcy Code § 365(d)(4). Section 365(d)(4) requires a trustee to assume or reject a lease within sixty days after the order for relief, "or within such additional time as the court, for cause, within such sixty-day period, fixes." 11 U.S.C. § 365(d)(4). The Ninth Circuit considered whether the

bankruptcy court had authority to rule on a timely filed motion for an extension after the sixty-day limit. The court found that the language of the section was ambiguous because it was unclear whether the second term--"within such 60-day period"--modified the term that preceded it or the term that followed it. *See* 831 F.2d at 850. The court adopted the more "liberal" reading, holding that the cause must arise within the sixty-day period, but that the court could grant an extension after the sixty-day period had expired. *Id.* *Southwest Aircraft* is distinguishable, however, because the court's conclusion was premised on the fact that "the meaning of the words of section 365(d)(4) is not entirely clear," *id.* at 849. Here, Rule 4003(b)'s meaning is unambiguous.

The *Southwest Aircraft* and *Williams* courts also relied on cases dealing with the former version of FED. R. CRIM. P. 35, which was widely accepted as unambiguous. Judge Contie, in his dissent, relies on these cases as well. Rule 35 afforded district courts only 120 days within which to act in order to reduce a sentence.[4] Thus, the 120-day limit in Rule 35 applied to the court, not the defendant. *See United States v. Taylor*, 768 F.2d 114, 116 n.3 (6th Cir. 1985). Moreover, FED. R. CRIM. P. 45(b), like FED. R. BANKR. P. 9006(b)(3), provided that "the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." In dictum, the Supreme Court had stated that the 120-day time limit "is jurisdictional and may not be

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[4]The former version of Rule 35 provided in pertinent part:

> The Court may reduce a sentence within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation.

FED. R. CRIM. P. 35(b).

extended." *United States v. Addonizio*, 442 U.S. 178, 189 (1979). Thus, if courts had followed the literal language of Rule 35, district courts would have had no jurisdiction to act on pending sentence reduction motions once the 120-day period expired. However, even after *Addonizio*, a majority of the circuits adhered to the view that the district courts retained jurisdiction for a "reasonable time" beyond the 120-day period to consider timely filed Rule 35 motions. *See, e.g., Diggs v. United States*, 740 F.2d 239, 245 n.9 (3d Cir. 1984); *United States v. DeMier*, 671 F.2d 1200, 1205-1207 (8th Cir. 1982); *United States v. Smith*, 650 F.2d 206, 209 (9th Cir. 1981); *United States v. Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) (en banc); *United States v. Stollings*, 516 F.2d 1287, 1288 (4th Cir. 1975).

This Circuit never ruled on the question whether the time limit in Rule 35 was jurisdictional, although we suggested, in *United States v. Blanton*, 739 F.2d 209, 213 (6th Cir. 1984), that jurisdiction might extend beyond the 120-day period where a timely motion had been filed or a showing of special circumstances justifying delay had been made. *See Taylor*, 768 F.2d at 117 n.3. We cannot reliably say, however, that we would have ultimately agreed with the majority view, and we therefore cannot draw on such precedent to support a more expansive interpretation of Rule 4003(b), assuming that comparing a bankruptcy rule of procedure to a criminal rule of procedure is even appropriate. Moreover, the cases that held the majority view did so because of practical and equitable concerns, not because of constitutional problems with the rule. For example, in *Stollings*, 516 F.2d at 1288, the Fourth Circuit explained that "[w]e need not give the Rule so literal a reading . . . and we can not assume that such a reading was intended when the consequences would be so devastating and arbitrarily fortuitous."

Rule 4003(b) arguably raises due process concerns. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (holding that the plaintiff's due process rights were violated when his property interest, *i.e.* cause of action, was

terminated as the result of a failure to hear and decide his timely filed claim within a specified deadline); *Southwest Aircraft*, 831 F.2d at 853 n.6 ("While here the right that Southwest would lose directly is the right to obtain an extension of time in which to decide whether to assume or reject a lease, because the failure to consider the claim before the statutory deadline effectively deprives the debtor of his leasehold interest in property the *Logan* analysis may well be applicable."). However, as applied here, Rule 4003(b) presents no due process problems, because the trustee was given an opportunity to obtain some form of expedited consideration of his request for an extension. The bankruptcy court stated that "[w]hen trustees find their exemption investigations incomplete near the end of the 30-day period, the 'walk-through' procedure in place in this district provides a dependable means for execution of orders with early, necessary deadlines." Rule 3.8 of the Local Rules of the Bankruptcy Court of the Middle District of Tennessee provides that an emergency motion, defined as "those rare matters requiring action on less than three days' notice", must be filed personally with the clerk or the deputy clerk with a declaration of why emergency action is needed. Thus, in this case, the trustee could have taken steps to ensure timely action on his motion.

We realize that a literal reading of Rule 4003(b) may be impractical and unfair. A judge may be on vacation, ill, or overworked and consequently unable to rule on the motion for an extension within the thirty-day period. But as the Seventh Circuit explained with regard to FED. R. CRIM. P. 35, "if there should be no limit on the time within which the judge can act . . . the rule ought to be rewritten by those who have the authority to do so; the court of appeals do not." *United States v. Kajevic*, 711 F.2d 767, 771 (7th Cir. 1983).

C. Second Request for Additional Time

In view of our holding that the bankruptcy court lost jurisdiction to grant the trustee's first request for an extension of time once the original thirty-day period

prescribed in Rule 4003(b) expired, we do not decide whether the court may grant an additional extension during an extension period.

III. Conclusion

For the foregoing reasons, we REVERSE.

CONTIE, Circuit Judge, dissenting. The bankruptcy court held that it lacked jurisdiction to rule on a timely-filed motion for an extension of time because it failed to rule within the 30-day period provided by Bankruptcy Rule 4003(b). The district court reversed. Because the district court's decision should be affirmed, I respectfully dissent.

I.

When filing a bankruptcy petition, a debtor may exempt certain property from the bankruptcy estate pursuant to 11 U.S.C. § 522. Thereafter, pursuant to Bankruptcy Rule 4003(b), "[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court." Though Trustee Rogers moved for additional time to object to the Debtor's claimed exemptions less than thirty days after the meeting of creditors concluded, the bankruptcy court failed to sign and enter the order granting additional time within the 30-day period.

Unfortunately, it isn't clear whether an order granting an extension of time must be signed and entered prior to the end of the 30-day period, or whether the filing of the motion before the expiration of the 30-day period satisfies Rule 4003(b)'s mandate. Though at least two circuits have construed Rule 4003(b) narrowly to require that an extension *be granted* within thirty days following the conclusion of the meeting of creditors,[1] I believe that those

[1] In *Matter of Stoulig*, 45 F.3d 957 (5th Cir. 1995), the Fifth Circuit held that the bankruptcy court lacked jurisdiction to grant the trustee's timely-filed motion for an extension of time to object to the debtor's claimed exemptions after the 30-day period set forth in Rule 4003(b) expired. Similarly, in *In re Brayshaw*, 912 F.2d 1255 (10th Cir. 1990), the Tenth Circuit held that the bankruptcy court lacked jurisdiction to grant a timely-filed motion for an extension of time after the 30-day period expired.

decisions, and the majority's decision in this action, are wrongly decided.

Unfortunately, little case law exists with respect to Bankruptcy Rule 4003(b) and its 30-day requirement. However, numerous courts have addressed this same issue as it pertains to other statutes and rules. For example, prior to its amendment in 1985, Federal Rule of Criminal Procedure 35(b) provided: "The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction." After numerous courts narrowly construed Rule 35(b) to mean that a judge must act within 120 days,[2] Congress amended Rule 35(b) to clarify its intended meaning:[3]

[2] *See, e.g., United States v. Inendino*, 655 F.2d 108, 109 (7th Cir. 1981) ("Rule 35 does not refer to any time period during which a defendant must make his motion to reduce sentence. It imposes instead a limit on the time during which the sentencing judge may act to reduce the sentence.") (footnote omitted); *United States v. Olds*, 426 F.2d 562, 565 (3d Cir. 1970) ("The Government correctly points out that under Rule 35 a sentencing judge may reduce a lawfu sentence only within 120 days after sentence is imposed.").

[3] Federal Rule of Criminal Procedure 35(b), as amended in 1985, provided:

> A motion to reduce a sentence may be made . . . within 120 days after the sentence is imposed or probation is revoked, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction or probation revocation. The court shall determine the motion within a reasonable time.

Fed. R. Crim. P. 35(b).

> This amendment to Rule 35(b) conforms its language to the nonliteral interpretation which most courts have already placed upon the rule, namely, that it suffices that the defendant's motion was made within the 120 days and that the court determines the motion within a reasonable time thereafter. Despite these decisions, a change in the language is deemed desirable to remove any doubt which might arise from dictum in some cases that Rule 35 only "authorizes District Courts to reduce a sentence within 120 days" and that this time period "is jurisdictional, and may not be extended."
>
> As for the "reasonable time" limitation, reasonableness in this context "must be evaluated in light of the policies supporting the time limitations and the reasons for the delay in each case." The time runs "at least for so long as the judge reasonably needs time to consider and act upon the motion."

Fed. R. Crim. P. 35 (Advisory Committee Note to 1985 amendment) (citations omitted).[4] *See also United States v. Hayes*, 983 F.2d 78, 81 (7th Cir. 1992) ("Furthermore, a jurisdictional interpretation of the one-year time period in Rule 35(b) would create arbitrary and inequitable results by depriving a defendant of a ruling due to circumstances entirely outside his control. . . . A defendant who fully cooperates with governmental authorities should not be penalized by possible tardiness on the part of the Government or the courts."); *United States v. Walgren*, 885 F.2d 1417, 1426-27 (9th Cir. 1989) ("Walgren filed his motion for a new trial [pursuant to Fed. R. Crim. P. 33] within the two-year time limit. The district court, however, decided that its jurisdiction had lapsed because of the delay between the filing of the motion and when the

[4] Though Advisory Committee notes are not binding on courts, *see, e.g., United States v. Abdul-Hamid*, 966 F.2d 1228, 1231 (7th Cir. 1992), they are "analogous to legislative history which we use to clarify legislative intent." *United States v. Hayes*, 983 F.2d 78, 82 (7th Cir. 1992).

motion was finally heard. [Because] the delay was not unreasonable and does not undermine the district court's jurisdiction[,] [t]he district court erred when it dismissed the motion for lack of jurisdiction.").

The Ninth Circuit adopted this same philosophy when it held that a bankruptcy court may grant a debtor's timely-filed motion for an extension of time (under 11 U.S.C. § 365(d)(4)) even after the relevant time period has expired:

> We are asked here to resolve a question of first impression in the circuit courts regarding the interpretation of section 365(d)(4) of the Bankruptcy Code. . . . Under section 365(d)(4), a nonresidential lease is deemed rejected by a debtor-lessee unless that party assumes the lease within 60 days after filing for Chapter 11 protection or within such additional period as is fixed by the bankruptcy court. In the case before us, the debtor-lessee moved, before the initial 60-day period had expired, for an extension of time within which to assume or reject a commercial lease, but the bankruptcy court did not hear the motion until after that period had ended. The court held that the lease was deemed rejected immediately upon the expiration of the sixtieth day, and that it was without authority to grant the timely filed motion for extension. The bankruptcy appellate panel affirmed; we reverse.
>
> . . . .
>
> While the bankruptcy judge declared that he would be inclined to grant the extension motion, he concluded that he no longer had authority to do so, ruling that the lease was deemed rejected pursuant to section 365(d)(4) of the Bankruptcy Code. . . . Under the bankruptcy judge's view, rejection was automatic since the 60-day deadline passed before he had held any hearing or issued any ruling on the motion. The Bankruptcy Appellate Panel affirmed, holding that the language of section 365(d)(4) "is precise and leaves no room for arguing that an extension may be granted or confirmed after 60 days have elapsed."
>
> . . . .
>
> Long Beach's interpretation of section 365(d)(4) would produce fortuitous and inequitable results. It would also require us to assume that Congress intended to take the most unusual and highly questionable step of interfering with the normal operation of the judicial branch by ordering the termination of jurisdiction over a particular issue whenever a court failed to make a ruling within a brief period. In light of those circumstances, we cannot conclude that the more restrictive interpretation of the section accurately reflects the intent of Congress.
>
> Rather, the interpretation we believe best comports with congressional intent is the one that preserves the authority of the bankruptcy court to rule on timely filed motions. It strikes the balance between creditor protection and debtor relief that Congress intended, and is eminently reasonable, fair and sensible. We fully agree with the bankruptcy courts that have previously adopted that view.
>
> For all the above reasons, we hold that if cause for an extension arises within the 60-day period and a motion for an extension is made within that period, a bankruptcy court may, even after the 60-day period has expired, consider the debtor's motion and, if it finds there was sufficient cause at the time the motion was filed, grant the requested extension.

In re Southwest Aircraft Servs., Inc., 831 F.2d 848, 848-53 (9th Cir. 1987) (citations and footnotes omitted), *cert. denied*, 487 U.S. 1206 (1988).

Simply stated, though, "[t]he plain meaning of legislation should be conclusive," *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), an exception exists "in the rare cases [in which] the literal application of

a statute will produce a result demonstrably at odds with the intentions of its drafters." *Id.* (citation and internal quotations omitted) (brackets in original).[5] Because a literal application of Rule 4003(b) fails to account for practical problems such as an ill or vacationing bankruptcy judge who is unable to act on a timely-filed motion within the 30-day period articulated in Rule 4003(b), or a motion that is filed on the thirtieth day, minutes after the bankruptcy judge has gone home, I believe that Congress did not intend the literal and nonsensical interpretation of Rule 4003(b) that the majority adopts. The drafters of Rule 4003(b) intended that objections to claimed exemptions be *filed* within thirty days, not decided within thirty days. *See generally United States v. Mendoza*, 581 F.2d 89, 90 (5th Cir. 1978) ("We hold that if a motion to reduce sentence is properly filed within the 120 days required by [Federal Rule of Criminal Procedure 35], the district court retains jurisdiction for a reasonable time after the expiration of 120 days in those rare circumstances in which it is unable to decide the motion within the 120-day period."). Because Trustee Rogers filed his motion for an extension of time within the 30-day period contemplated by Bankruptcy Rule 4003(b), the bankruptcy court had jurisdiction to decide the trustee's motion.

More importantly, perhaps, I am concerned that the judiciary's independence is threatened by Rule 4003(b), as it is interpreted by the majority. Specifically, I believe that Congress overstepped its bounds by telling bankruptcy judges that they must rule on timely-filed motions within specified time periods.[6] Indeed, an independent judiciary is fundamental to our system of government and is

[5]Questions of statutory interpretation are subject to *de novo* review. *United States v. Hans*, 921 F.2d 81, 82 (6th Cir. 1990).

[6]The Bankruptcy Rules are enacted by the Supreme Court and reviewed by Congress. *See* 28 U.S.C. § 2075 (Congress' delegation of power to the Supreme Court to prescribe bankruptcy procedural rules).

guaranteed by separation of powers principles. *See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982) ("In sum, our Constitution unambiguously enunciates a fundamental principle - that the 'judicial Power of the United States' must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence."). Because one branch of the government is not permitted to encroach on the domain of another branch of government, the district court correctly decided this action.

Accordingly, I would **AFFIRM**.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SUITE 1800
211 W. FORT STREET
DETROIT, MICHIGAN 48226

OFFICE OF
STEVEN W. RHODES
CHIEF UNITED STATES BANKRUPTCY JUDGE

(313) 234-0020

June 4, 1997

Honorable Paul Mannes
Chief U.S. Bankruptcy Judge
385A United States Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Dear Judge Mannes:

Enclosed please find a decision from the United States Court of Appeals for the Sixth Circuit in the case of In re Laurain. The court held that the bankruptcy court did not have jurisdiction to enter an order extending the time to object to an exemption after the 30-day time period under Bankruptcy Rule 4003(b). The court reasoned that this result is required by the plain language of the rule.

I request that your Bankruptcy Rules Advisory Committee consider amending this rule such that the only explicit deadline is that a motion to extend must be filed within the 30 days. As the rule is written and applied in In re Laurain, there can be severe consequences to creditors if a judge is not available to consider a last minute request to extend the objection deadline.

Thank you for your consideration.

Sincerely,

Steven W. Rhodes

Enclosure

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United States Bankruptcy Court

EASTERN DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK

RICHARD G. HELTZEL
CLERK

REPLY TO:

E 8308 U.S. COURTHOUSE
650 CAPITOL MALL
SACRAMENTO, CA 95814
(916) 498-5525

O 1130 12TH STREET
SUITE C
MODESTO, CA 95354
(209) 521-5160

F 2656 U.S. COURTHOUSE
1130 O STREET
FRESNO, CA 93721
(209) 498-7217

July 14, 1997

Professor Alan N. Resnick
Reporter, Advisory Committee of Bankruptcy Rules
121 Hofstra University
Hempstead, NY 11550-1090

Dear Alan:

Last week Pat Channon reminded me that I needed to follow up with you regarding a possible change to FRBP 9022. At the last rules committee meeting, I proposed amending this rule to permit the court to delegate responsibility to the prevailing party to effect notice of entry of judgments or orders. The idea seemed to have the support of several members of the committee.

I offer the following proposed amendment:

Rule 9022.

NOTICE OF JUDGMENT OR ORDER

(a) Judgment or Order of Bankruptcy Judge. Immediately on the entry of a judgment or order, the clerk *or some other person as the court may direct,* shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. *If service of the notice is made by a person other than the clerk, a certificate of service shall be filed with the court in the manner provided for in Rule 7005(d).* Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

Adoption of this amendment would relieve the clerks' offices of workload associated with preparing and mailing copies of judgements or orders, tasks which generally require hand processing. Requiring a certificate of service when service is effected by a person other than the clerk is intended to prevent abuse caused by a party's failure to serve the notice.

Time permitting, I would like to see this suggestion added to the September meeting agenda. If you have any questions, please contact me at (916) 498-5578.

Sincerely,

Richard G. Heltzel
Clerk, U.S. Bankruptcy Court

cc: Judge Adrian G. Duplantier
Peter G. McCabe
Patricia S. Channon

Proposed amendments to Rule 2002 approved by the Advisory Committee in 1997:

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

****

(6) ~~hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500~~ a hearing on any entity's request for compensation or reimbursement of expenses if the request exceeds $1,000;

****

(g) ~~ADDRESSES OF NOTICES.~~ ADDRESSING NOTICES.

A notice required to be mailed under this rule to a creditor, equity security holder, or indenture trustee shall be addressed as such entity, or an authorized agent, ~~may direct~~ has directed in a filed request~~; otherwise,~~. If a request has not been filed, the notices shall be mailed to the address shown ~~in~~ on the list of creditors or the schedule of liabilities, whichever is filed later. If a different address is stated in a proof of claim duly filed, that address shall be used unless a notice of no dividend

under Rule 2002(e) has been given and a subsequent notice of possible dividend under Rule 3002(c)(5) has not been given.

****

(j) NOTICES TO THE UNITED STATES. A copy of any notice ~~Copies of notices~~ required to be mailed to all creditors under this rule shall also be mailed:

(1) in a chapter 11 reorganization case in which the Securities Exchange Commission has filed either a notice of appearance or a written request to receive notices, to the Securities and Exchange Commission at any place the Commission ~~designates~~ has designated in the notice of appearance or the written request ~~, if the Commission has filed either a notice of appearance in the case or a written request to receive notices~~;

(2) in a commodity broker case, to the Commodity Futures Trading Commission at Washington, D.C.;

(3) in a chapter 11 case, to the District Director of Internal Revenue for the district in which the case is pending;

(4) in any case in which the papers filed disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C.; and

~~(4)~~(5) in any case in which the papers filed ~~if the papers in the case~~ disclose a debt to the United States ~~(~~other than for taxes~~)~~, to the United States attorney for the district in which the case is pending and to the department, agency, or instrumentality of the United States through which the debt is owed. ~~debtor became indebted, or if the filed papers disclose a stock interest of the United States, to the Secretary of the Treasury at Washington, D.C~~. The department, agency, or instrumentality shall be identified in the address of the notice mailed to the United States attorney.

****

COMMITTEE NOTE

Paragraph (a)(6) is amended to increase the dollar amount from $500 to $1,000. The amount was last amended in 1987, when it was changed from $100 to $500. The paragraph also clarifies that the notice is required only if a particular entity is requesting more than $1,000 as compensation or reimbursement of expenses. If several professionals are requesting compensation or reimbursement, and only one hearing will be held on all applications, notice under paragraph (a)(6) is required only with respect to the entities that have requested more than $1,000. If each applicant requests $1,000 or less, notice under paragraph (a)(6) is not required even though the aggregate amount of all applications to be considered at the hearing is more than $1,000.

If a particular entity had filed prior applications or had received compensation or reimbursement of expenses at an earlier time in the case, the amounts previously requested or awarded are not considered when determining whether the present

application exceeds $1,000 for the purpose of applying this rule.

Subdivision (g) is amended to require the use of the address stated in a proof of claim if a notice of no dividend has been given under Rule 2002(e), but has been superseded by a subsequent notice of possible dividend under Rule 3002(c)(5).

Subdivision (j) is amended to require that the address of any notice mailed to the United States attorney under Rule 2002(j) identify the particular department, agency or instrumentality through which the debtor is indebted to the United States.

This requirement may be satisfied by including in the address either the name or an acronym commonly used to identify the department. For example, this requirement may be satisfied by addressing the notice to "United States Attorney (SBA)" if the debt is owed through the Small Business Administration. If the debtor is indebted to the United States through more than one department, agency or instrumentality, each should be identified in the address.

Other amendments to Rule 2002 are stylistic.

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LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

GLEN K. PALMAN
Chief
Bankruptcy Court
Administration Division

February 18, 1998

MEMORANDUM TO SELECTED CLERKS, UNITED STATES BANKRUPTCY COURTS

SUBJECT: Status of BANCAP New Forms Release (**INFORMATION**)

I am writing to provide you with an update on the availability of the pending BANCAP new forms release (97BA01, Part A, Noticing). The BANCAP high volume and Genform versions of the revised 341 and chapter 7 discharge notices are presently in testing at three test courts and the Independent Test Center. The BANCAP form files are expected to be ready for distribution in two or three weeks and will be posted to the Technology and Training Support Division's J-Net site. All BANCAP courts will be notified when the files are available. Each form template will be provided in both high volume and Genform/low volume formats which will allow courts to either print notices locally or at the Bankruptcy Noticing Center (BNC).

As indicated in my memorandum of October 29, 1997, the Bankruptcy Noticing Center has made the revised national forms available to all courts for production through the BNC using the court's BANCAP high volume software. Courts that choose to adopt the national forms without modification may do so immediately. The BNC is working to make requested local court modifications to individual courts' high volume form templates, but is currently experiencing a backlog due to the surge in form change requests from courts. Please contact the BNC at (800) BNC-5055 to arrange forms setup and high volume forms testing.

For additional information, contact Gary McCaffrey or your BCAD Regional Administrator on (202) 273-1547.

Glen K. Palman

GLEN K. PALMAN

FORM B9B (Chapter 7 Corporation/Partnership No Asset Case)(9/97) Case Number <#3 cn c18>

UNITED STATES BANKRUPTCY COURT

<#1 di c60>

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

A bankruptcy case concerning the debtor listed below was originally filed under chapter <#57 Oc c3> on <#6 df c18> and was converted to a case under chapter 7 on <#9 DC c18>.

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations.

Debtor (name(s) and address):
<#85 DL c70>
<#113 DA c300>
<#16 d1 c40>
<#17 d2 c40>
<#18 d3 c40>
<#19 d4 c40>
<#20 d5 c40>

<#101 JL c70>
<#114 JA c300>
<#104 J1 c40>
<#105 J2 c40>
<#106 J3 c40>
<#107 Jc c24>, <#108 Jr c2> <#109 JZ c5>-<#110 Jz c5>
<#111 Jy c5> <#112 Jn c10>

Case Number: <#3 Cn c18>	Taxpayer ID Nos.: <#87 Dt c15> <#103 Jt c15>
Attorney for Debtor (name and address): <#21 aN c45> <#22 A1 c30> <#23 A2 c30> <#24 A3 c30> <#25 A4 c30> Telephone number: <#60 ap c14>	Bankruptcy Trustee (name and address): <#26 tN c45> <#27 T1 c30> <#28 T2 c30> <#29 T3 c30> <#30 T4 c30> Telephone number: <#61 tp c14>

Meeting of Creditors:

Date: **<#7 mD c10>** Time: **<#31 mT c8>**

Location: **<#0 mL c160>**

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: <#70 c1 c40> <#71 c2 c40> <#72 c3 c40> <#73 c4 c40> <#74 c5 c40> Telephone number: 334-441-5391	**For the Court:** Clerk of the Bankruptcy Court: <#0 CN c50>
Hours Open:	Date: <#8 dk c18>

* see highlighted change on back

Mobile, AL

The information for each divisional office is:

Dallas Office - Dallas(3) and Wichita Falls(7) divisions
(214)767-0814 8:30a.m. - 4:30p.m.

Amarillo Office - Amarillo(2) division
(806)324-2302 8:30a.m. - 12:00p.m.
1:00p.m. - 4:30p.m.

Fort Worth Office - Fort Worth(4) division
(817)978-3802 8:00a.m. - 5:00p.m.

Lubbock Office - Abilene(1), Lubbock(5) and San Angelo(6) divisions
(806)472-7336 8:00a.m. - 12:00p.m.
1:00p.m. - 4:00p.m.

Request #1: see attachments

The following information should appear on the back side on the bottom of the page for each 341 notice, Forms B9A through B9I, for cases in Dallas(3) or Wichita Falls(7) divisions only:

DIRECT REQUESTS FOR COPIES TO: Court Systems, Inc.
1100 Commerce Street, Room 12A24
Dallas, Texas 75242-1498
(214)651-6000, FAX(214)651-6001

Request #2: see attachments

The following changes are requested for Forms B9A and B9C for the Dallas(3), Wichita Falls(7) and Fort Worth(4) divisions only:

MEETING OF CREDITORS: Date: Time: Location:	**ONLY DEBTORS HAVING NO ATTORNEY MUST ATTEND** DISCHARGE/REAFFIRMATION HEARING: Date: Time: Location:

Replace "Meeting of Creditors:" box on B9A and B9C for these divisions with this box.

Request #3: see attachments

The following changes are requested for Forms B9A and B9C for the Abilene(1), Amarillo(2), Lubbock(5) and San Angelo(6) divisions only:

MEETING OF CREDITORS:	DISCHARGE/REAFFIRMATION HEARING:
Date: Time:	Date: Time:
Location:	Location:

Replace "Meeting of Creditors:" box on B9A and B9C for these divisions with this box.

Request #4: see attachments

Replace the following Discharge of Debtor (Form 18) body text:

It appearing that the debtor is entitled to a discharge, IT IS ORDERED: The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

with the following text:

It appears that a petition commencing in a case under title 11, United States Code, was filed by or against the person named above on <Date>, and that an order for relief was entered under chapter 7 and that no complaint objecting to the discharge of the debtor was filed within the time fixed by the court [or that a complaint objecting to discharge of the debtor was filed and, after due notice and hearing, was not sustained];

IT IS ORDERED THAT:

1. The above-named debtor is released from all dischargeable debts.

2. Any judgment heretofore or hereafter obtained in any court other than this court is null and void as a determination of the personal liability of the debtor with respect to any of the following:

   (a) debts dischargeable under 11 U.S.C. sec. 523;

   (b) unless heretofore or hereafter determined by order of this court to be nondischargeable, debts alleged to be excepted from discharge under clauses (2), (4), (6) and (15) of 11 U.S.C. sec. 523(a);

   (c) debts determined by this court to be discharged.

3. All creditors whose debts are discharged by this order and all creditors whose judgments are declared null and void by paragraph 2 above are enjoined from instituting or continuing any action or employing any process or engaging in any act to collect such debts as personal liabilities of the above-named debtor.

Request #5:

Please include bar code on Form B10, PROOF OF CLAIM.

FORM B9B (Chapter 7 Corporation/Partnership No Asset Case) Case Number <#13 cn c18>

UNITED STATES BANKRUPTCY COURT

<#5 dl c60>

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

A bankruptcy case concerning the debtor listed below was originally filed under chapter <#15 Oc c3> on <#14 df c18> and was converted to a case under chapter 7 on <#16 DC c18>

You may be a creditor of the debtor. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations

Debtor(s) (name(s) and address): <#38 DL c70> <#0 DA c300>	<#45 JL c70> <#0 JA c300>
Case Number: <#13 Cn c18>	Social Security/Taxpayer ID Nos.: <#41 Ds c11>/<#42 Dt c15> <#48 Js c11>/<#49 Jt c15>
Attorney for Debtor(s) (name and address) <#57 aN c45> <#58 aF c45> <#59 A1 c30> <#60 A2 c30> Telephone number: <#61 ap c14>	Bankruptcy Trustee (name and address) <#52 tN c45> <#53 tF c45> <#54 T1 c30> <#55 T2 c30> Telephone number: <#56 tp c14>

Meeting of Creditors

Date: <#19 mD c10> Time: <#20 mT c8> Location: <#21 mL c0>

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive Notice To Do So.

Address of the Bankruptcy Clerk's Office: <#9 c1 c40> <#10 c2 c40> <#11 c3 c40> Telephone number: <#0 CT c14>	For the Court: Clerk of the Bankruptcy Court: <#0 CN c50>
Hours Open: <#0 CH c50>	Date: <#28 dk c18>

Add A New boxed AREA with the following info Here

ABANDONMENTS OF PROPERTY. The Trustee will consider abandonments of property at the 341 Meeting. Any objections to the Trustee's Abandonments shall be filed and hearing thereon requested within 15 days after said meeting.

CREDITORS CLAIMING A SECURITY INTEREST IN DEBTOR'S PROPERTY ARE URGED TO FURNISH THE INTERIM TRUSTEE A COPY OF SECURITY PAPERS AND STATEMENT OF NET BALANCE DUE PRIOR TO 341 MEETING.

FORM B9I (Chapter 13 Case) Case Number <#13 cn c18>

UNITED STATES BANKRUPTCY COURT
<#5 di c60>

Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter <#15 Oc c3> on <#14 df c18> and was converted to a case under chapter 13 on <#16 DC c18>.

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations

Debtor(s) (name(s) and address):	
<#38 DL c70> <#0 DA c300>	<#45 JL c70> <#0 JA c300>
Case Number: <#13 Cn c18>	Social Security/Taxpayer ID Nos.: <#41 Ds c11>/<#42 Dt c15> <#48 Js c11>/<#49 Jt c15>
Attorney for Debtor(s) (name and address) <#57 aN c45> <#58 aF c45> <#59 A1 c30> <#60 A2 c30> Telephone number: <#61 ap c14>	Bankruptcy Trustee (name and address) <#52 tN c45> <#53 tF c45> <#54 T1 c30> <#55 T2 c30> Telephone number: <#56 tp c14>

Meeting of Creditors

Date: <#19 mD c10> Time: <#20 mT c8> Location: <#21 mL c0>

Deadlines

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim:

For all creditors (except a governmental unit):<#23 pc c19> For a government unit: <#78 PG c8>

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan

The plan or summary of the plan will be sent separately.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive Notice To Do So.

Address of the Bankruptcy Clerk's Office:	For the Court:
<#9 c1 c40> <#10 c2 c40> <#11 c3 c40> Telephone number: <#0 CT c14>	Clerk of the Bankruptcy Court: <#0 CN c50>
Hours Open: <#0 CH c50>	Date: <#28 dk c18>

Add the following Here:

OTHER MATTERS. At confirmation the court will conduct a hearing on any objections to debtor's claim of exemptions, and any motion to value collateral or to avoid liens as set forth in the Plan. Objections to the plan, valuation or lien avoidance shall be filed 5 days prior to confirmation.

EXPLANATIONS

FORM B9I (9/97)

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Creditors May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor.
Exempt Propery	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Add the following Here

All creditors and their counsel who file a proof of claim are required to serve by first class mail, a true copy of such proof of claim, and all attachments thereto upon the Debtor's Counsel of Record whose address is shown on the Notice of the Creditors Meeting.

FORM B10 (Official Form 10)

UNITED STATES BANKRUPTCY COURT <#5 DI c60>

PROOF OF CLAIM

Name of Debtor <#38 DL c70> <#45 JL c70>	Case Number: <#13 on c18>

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property): 1111111111111111111111111111111111111111111111 2222222222222222222222222222222222222222222 3333333333333333333333333333333333333333333 4444444444444444444444444444444444444444444 5555555555555555555555555555555555555555555	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope

<#13 on c18>

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated _____

1. **Basis for Claim**
☐ Goods Sold
☐ Services Performed
☐ Money Loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other _____

☐ Retiree benefits as defined in 11 U.S.C. §1114(a)
☐ Wages, salaries, and compensation (fill out below)
Your SS #: _____ _____ _____
Unpaid Compensation for Services Performed
from _____ (date) to _____ (date)

2. **Date debt was incurred:**	3. **If court judgment, date obtained:**

4. **Total Amount of Claim at Time Case Filed:** $_____
☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

5. **Secured Claim.**
☐ Check this box if your claim is secured by collateral (including a right of setoff).
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other _____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. **Unsecured Priority Claim.**
☐ Check this box if you have an unsecured priority claim
Amount entitled to priority $_____
Specify the priority of the claim:
☐ Wages, salaries, or commissions (up to $4000),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3)
☐ Contributions to an employee benefit plan - 11 U.S.C. §507(a)(4).
☐ Up to $ 1,800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8)
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

7. **Credits:** The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.
8. **Supporting Documents:** *Attach copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.
9. **Date-Stamped Copy:** To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571

Move Circled Area

Attachments shall be no larger than 8 1/2 x 11 inches and shall be stapled behind the claim in the upper lefthand corner.

FORM B10
(2/95)

PROOF OF CLAIM

Our Form

United States Bankruptcy Court Southern District of Georgia	Case Number
In re (Name of Debtor)	Creditor Account Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C § 503.

CREDITOR * _____

ADDRESS _____

_____ _____ _____ -
City State Zip

ATTY. FOR CREDITOR _____

ADDRESS _____

*UNLESS INDICATED HERE, PAYMENT WILL BE MADE DIRECTLY TO CREDITOR ☐

Telephone Number and Person to Contact

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Check here if this claim ☐ replaces ☐ amends } a previously filed claim, dated: _____

1. BASIS FOR CLAIM
   - ☐ Goods sold
   - ☐ Services performed
   - ☐ Money loaned
   - ☐ Personal injury/wrongful death
   - ☐ Taxes
   - ☐ Other (Describe briefly)

☐ Retiree benefits as defined in 11 U.S.C. § 1114 (a)

☐ Wages, salaries, and compensations (Fill out below)

Your social security number _____

Unpaid compensations for services performed

from _____ (date) to _____ (date)

2. DATE DEBT WAS INCURRED

3. IF COURT JUDGMENT, DATE OBTAINED:

4. CLASSIFICATION OF CLAIM. Under the Bankruptcy Code all claims are classified as one or more of the following: (1) Unsecured, (2) Unsecured Priority., (3) Secured. It is possible for part of a claim to be in one category and part in another. CHECK THE APPROPRIATE BOX OR BOXES that best describe your claim and STATE THE AMOUNT OF THE CLAIM.

☐ SECURED CLAIM $ _____
Attach evidence of perfection of security interest
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle ☐ Other (Describe briefly)

If the claim is secured by REAL ESTATE/MOBILE HOME, state the amount of any ARREARAGE due on the date this Chapter 13 was filed.

$ _____

☐ GENERAL UNSECURED CLAIMS $ _____
A claim is unsecured if there is no collateral or lien on property of the debtor securing the claim or to the extent that the value of such property is less than the amount of the claim.

☐ UNSECURED PRIORITY CLAIM $ _____
Specify the priority of the claim.

- ☐ Wages, salaries, or commissions (up to $4000)* earned not more than 90 days before filing of the bankruptcy petition or cessation of debtor's business, whichever is earlier – 11 U.S.C. §507(a)(3)
- ☐ Contributions to an employee benefit plan – 11 U.S.C. §507(a)(4)
- ☐ Up to $1800* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. §507(a)(6)
- ☐ Alimony, maintenance, or support owed to spouse, former spouse, or child – 11 U.S.C. §507(a)(7)
- ☐ Taxes or penalties of governmental units – 11 U.S.C. §507(a)(8)
- ☐ Other – Specify applicable paragraph of 11 U.S.C. §507(a)_____

*Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.

5. TOTAL AMOUNT OF CLAIM AT TIME CASE FILED: Net Balance.
$ _____ (Unsecured) $ _____ (Secured) $ _____ (Priority) $ _____ (Total)

☐ Check this box if claim includes prepetition charges in addition to the principal amount of the claim. Attach itemized statement of all additional charges.

6. CREDITS AND SETOFFS: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim. In filing this claim, claimant has deducted all amounts that claimant owes to debtor.

7. SUPPORTING DOCUMENTS: Attach copies of supporting documents, such as promissory notes, contracts, court judgments, or evidence of security interests. If the documents are not available, explain.

8. TIME-STAMPED COPY: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any)

Show Creditor's SS# or Tax ID# and Office Code Here: _____
(Banks show Bank Routing Number)

Mail Executed Proof to CLAIMS CLERK

All creditors and their counsel who file a proof of claim are required to serve by first class mail, a true copy of such proof of claim, and all attachments thereto upon the Debtor's Counsel of Record whose address is shown on the Notice of the Creditors Meeting

Penalty for presenting fraudulent claim: Fine of up to $5,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

Chapter 7 Individual or Joint Debtor No Asset Case
B9A

PAGE 1

1. Replace top with:

   United States Bankruptcy Court - District of South Carolina
   1100 Laurel Street, Columbia, South Carolina 29201

2. Replace 2nd paragraph reference to "at the address listed below" to "at the address listed above".

3. At bottom of the form, replace "Do Not File A Proof of Claim" with "Do Not File A Proof of Claim or Interest".

4. At bottom, left corner, replace "Address of the Bankruptcy" with "Mailing Address of the Bankruptcy". Also, by "Telephone number:" put 1-803-765-5211 and 1-800-669-8767.

5. At very bottom, left corner, replace "Hours Open:" with "Public Business Hours: 9:00 a.m. - 4:30 a.m."

6. In bottom right corner under "For the Court:", remove info found below this box and place our FILE STAMP here.

PAGE 2

1. Place the entire paragraph labeled "DISMISSAL NOTICE" from our present form at the top of the new form - making it the first paragraph on this page.

2. Change the paragraph on the new form titled "Do Not File a Proof of Claim at This Time" to read "Do Not File a Proof of Claim or Interest at This Time". Also, add the words "or interest" to the 3 locations in this paragraph where the words "proof of claim" appear.

3. Place the entire paragraph labeled "MISCELLANEOUS NOTICE" from our present form at the bottom of the new form - making it the last paragraph on this page.

* As before, do not link a proof of claim form to be sent with this form.

FORM B9A (Chapter 7 Individual or Joint Debtor No Asset Case (9/97))

UNITED STATES BANKRUPTCY COURT (1) _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]

or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. (2)

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

(3) Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So.

Address of the Bankruptcy Clerk's Office: (4) Telephone number: Hours Open: (5)	For the Court: Clerk of the Bankruptcy Court: (6) Date:

EXPLANATIONS

FORM B9A (9/97)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Chapter 7 Individual or Joint Debtor Asset Case
B9C

PAGE 1

1. Replace top with:

   United States Bankruptcy Court - District of South Carolina
   1100 Laurel Street, Columbia, South Carolina 29201

2. Replace 2nd paragraph reference to "at the address listed below" to "at the address listed above".

3. In the middle of the form, replace "Deadline to File a Proof of Claim" with "Deadline to File a Proof of Claim or Interest"

4. At the bottom, left corner, replace "Address of the Bankruptcy" with "Mailing Address of the Bankruptcy". Also, by "Telephone number:" put 1-803-765-5211 and 1-800-669-8767.

5. At very bottom, left corner, replace "Hours Open:" with "Public Business Hours: 9:00 a.m. - 4:30 a.m."

6. In bottom right corner under "For the Court:", remove info found below this box and place our FILE STAMP here.

PAGE 2

1. Place the entire paragraph labeled "DISMISSAL NOTICE" from our present form at the top of the new form - making it the first paragraph on this page.

2. Change the paragraph on the new form titled "Claims" to read "Claims or Interest". Also, add the words "or interest" to the 7 locations in this paragraph where the word "claim" appears.

3. Change the paragraph on the new form titled "Liquidation of the Debtor's Property and Payment of Creditors' Claims" to read "Liquidation of the Debtor's Property and Payment of Creditors' Claims or Interest". Also, add the words "or interest" to the 1 location in this paragraph where the word "claim" appears.

4. Place the entire paragraph labeled "MISCELLANEOUS NOTICE" from our present form at the bottom of the new form - making it the last paragraph on this page.

* Link a new proof of claim form to be sent with this form with same input options

FORM B9C (Chapter 7 Individual or Joint Debtor Asset Case) (9/97)

UNITED STATES BANKRUPTCY COURT (1) _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 7 on _____.]

You may be a creditor of the debtor. This notice lists important deadlines. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. (2)

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim: (3)

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: (4)	For the Court: Clerk of the Bankruptcy Court: (6)
Telephone number:	
Hours Open: (5)	Date:

EXPLANATIONS

FORM B9C (9/97)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Liquidation of the Debtor's Property and Payment of Creditors' Claims	The bankruptcy trustee listed on the front of this notice will collect and sell the debtor's property that is not exempt. If the trustee can collect enough money, creditors may be paid some or all of the debts owed to them, in the order specified by the Bankruptcy Code. To make sure you receive any share of that money, you must file a Proof of Claim, as described above.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Chapter 11 Individual or Joint Debtor Asset Case
B9E(ALT)

*** We are not using the official form B9E**

PAGE 1

1. Replace top with:

   United States Bankruptcy Court - District of South Carolina
   1100 Laurel Street, Columbia, South Carolina 29201

2. Replace 2nd paragraph reference to "at the address listed below" to "at the address listed above".

3. In the middle of the form, replace "Deadline to File a Proof of Claim" with "Deadline to File a Proof of Claim or Interest".

4. At the bottom, left corner, replace "Address of the Bankruptcy" with "Mailing Address of the Bankruptcy". Also, by "Telephone number:" put 1-803-765-5211 and 1-800-669-8767.

5. At very bottom, left corner, replace "Hours Open:" with "Public Business Hours: 9:00 a.m. - 4:30 a.m."

6. In bottom right corner under "For the Court:", remove info found below this box and place our FILE STAMP here.

PAGE 2

1. Place the entire paragraph labeled "DISMISSAL NOTICE" from our present form at the top of the new form - making it the first paragraph on this page.

2. Change the paragraph on the new form titled "Claims" to read "Claims or Interest". Also, add the words "or interest" to the 13 locations in this paragraph where the word "claim" appears.

* Link a new proof of claim form to be sent with this form with same input options.

ORM B9E (ALT.) (Chapter 11 Individual or Joint Debtor Case) (9/97)

UNITED STATES BANKRUPTCY COURT (1) _____ District of _____

Notice of Chapter 11 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 11 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 11 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. (2)

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address):	Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim: (3)

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to File a Complaint Objecting to Discharge of the Debtor:

First date set for hearing on confirmation of plan.
Notice of that date will be sent at a later time.

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: (4) Telephone number:	For the Court: Clerk of the Bankruptcy Court: (6)

(1)

EXPLANATIONS

FORM B9E (ALT.) (9/97)

Filing of Chapter 11 Bankruptcy Case	A bankruptcy case under chapter 11 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 11 allows a debtor to reorganize or liquidate pursuant to a plan. A plan is not effective unless confirmed by the court. You may be sent a copy of the plan and a disclosure statement telling you about the plan, and you might have the opportunity to vote on the plan. You will be sent notice of the date of the confirmation hearing, and you may object to confirmation of the plan and attend the confirmation hearing. Unless a trustee is serving, the debtor will remain in possession of the debtor's property and may continue to operate any business.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims (2)	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. You may look at the schedules that have been or will be filed at the bankruptcy clerk's office. If your claim is scheduled and is *not* listed as disputed, contingent, or unliquidated, it will be allowed in the amount scheduled unless you file a Proof of Claim or you are sent further notice about the claim. Whether or not your claim is scheduled, you are permitted to file a Proof of Claim. If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, or you might not be paid any money on your claim against the debtor in the bankruptcy case.
Discharge of Debts	Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. See Bankruptcy Code § 1141(d). A discharge means that you may never try to collect the debt from the debtor except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 1141(d)(3), you must file a complaint with the required filing fee in the bankruptcy clerk's office not later than the first date set for the hearing on confirmation of the plan. You will be sent another notice informing you of that date.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Chapter 12 Individual or Joint Debtor Family Farmer
B9G

PAGE 1

1. Replace top with:

   United States Bankruptcy Court - District of South Carolina
   1100 Laurel Street, Columbia, South Carolina 29201

2. Replace 2nd paragraph reference to "at the address listed below" to "at the address listed above"

3. In the middle of the form, replace "Deadline to File a Proof of Claim" with "Deadline to File a Proof of Claim or Interest".

4. In paragraph heading titled "Filing of Plan, Hearing on Confirmation of Plan", delete first 2 lines including date, time and location. Only leave the remaining two options.

5. At the bottom, left corner, replace "Address of the Bankruptcy" with "Mailing Address of the Bankruptcy". Also, by "Telephone number:" put 1-803-765-5211 and 1-800-669-8767.

6. At very bottom, left corner, replace "Hours Open:" with "Public Business Hours: 9:00 a.m. - 4:30 a.m."

7. In bottom right corner under "For the Court:", remove info found below this box and place our FILE STAMP here.

PAGE 2

1. Place the entire paragraph labeled "DISMISSAL NOTICE" from our present form at the top of the new form - making it the first paragraph on this page.

2. In the paragraph titled "Filing of Chapter 12 Bankruptcy Case", remove the options available in the 2nd to the last sentence. The entire sentence should have no options and read as follows: "A copy or summary of the plan will be sent to you later and you will be sent notice of the confirmation hearing."

3. Change the paragraph on the new form titled "Claims" to read "Claims or Interest". Also, add the words "or interest" to the 8 locations in this paragraph where the word "claim" appears.

* Link a new proof of claim form to be sent with this form with same input options.

UNITED STATES BANKRUPTCY COURT (1) _____ District of _____

Notice of Chapter 12 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 12 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 12 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. (2)

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim: (3)

For all creditors (except a governmental unit): For a governmental unit:

Deadline to File a Complaint to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan (4)

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: (5) Telephone number: Hours Open: (6)	For the Court: Clerk of the Bankruptcy Court: (7) Date:

(1)

Filing of Chapter 12 Bankruptcy Case	A bankruptcy case under chapter 12 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 12 allows family farmers to adjust their debts pursuant to a plan. A plan is not effective unless confirmed by the court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business unless the court orders otherwise. (2)
Creditors May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1201. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims (3)	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

Chapter 13 CASE
B9I

***We have not previously used this form**

PAGE 1

1. Replace top with:

   United States Bankruptcy Court - District of South Carolina
   1100 Laurel Street, Columbia, South Carolina 29201

2. Replace 2nd paragraph reference to "at the address listed below" to "at the address listed above".

3. In the middle of the form, replace "Deadline to File a Proof of Claim" with "Deadline to File a Proof of Claim or Interest".

4. In paragraph heading titled "Filing of Plan, Hearing on Confirmation of Plan", delete the first and second sentences, leaving the paragraph to start with "The hearing on confirmation...".

5. At the bottom, left corner, we would like 2 separate addresses to appear. Replace "Address of the Bankruptcy" with "Claims and Attachments in Duplicate to:" followed by trustee address underneath. Then "All other documents" followed by "US Bankruptcy Court, PO Box 1448, Columbia SC 29202. Also, by "Telephone number:" put 1-803-765-5211 and 1-800-669-8767.

6. At very bottom, left corner, replace "Hours Open:" with "Public Business Hours: 9:00 a.m. - 4:30 a.m."

7. In bottom right corner under "For the Court:", remove info found below this box and place our FILE STAMP here.

PAGE 2

1. In the paragraph titled "Filing of Chapter 13 Bankruptcy Case", remove the options available in the 2nd to the last sentence. The entire sentence should have no options and read as follows: "A copy or summary of the plan will be sent to you later and the confirmation hearing will be held on the date indicated on the front of this notice "

2. Change the paragraph on the new form titled "Claims" to read "Claims or Interest". Also,

add the words "or interest" to the 8 locations in this paragraph where the word "claim" appears.

3. (YOU WILL FIND DIRECTLY FOLLOWING THIS PAGE, OUR PRESENT CHAPTER 13 341 FORM, INCLUDE THE 5 PARAGRAPHS STARTING WITH ROMAN NUMERAL I TO ROMAN NUMERAL V AT THE END OF THE NEW FORM) You should resize the text if you need to and also you may leave out the section in the new form titled "Legal Advice" if you need more room and/or eliminate indenting the paragraphs on this form.

* Link a new proof of claim form to be sent with this form with same input options but include on the form the name of the trustee for the case in top, right corner.

UNITED STATES BANKRUPTCY COURT (1) _____ District of _____

Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines

[The debtor(s) listed below filed a chapter 13 bankruptcy case on _____ (date).]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter _____ on _____ (date) and was converted to a case under chapter 13 on _____.]

You may be a creditor of the debtor. **This notice lists important deadlines.** You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice. (2)

See Reverse Side For Important Explanations.

Debtor(s) (name(s) and address):	Case Number: Social Security/Taxpayer ID Nos.:
Attorney for Debtor(s) (name and address): Telephone number:	Bankruptcy Trustee (name and address): Telephone number:

Meeting of Creditors:

Date: / / Time: ( ) A.M. ( ) P.M. Location:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Proof of Claim: (3)

For all creditors (except a governmental unit): For a governmental unit:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors.

Filing of Plan, Hearing on Confirmation of Plan (4)

[The debtor has filed a plan. The plan or a summary of the plan is enclosed. The hearing on confirmation will be held:
Date: _____ Time: _____ Location: _____]
or [The debtor has filed a plan. The plan or a summary of the plan and notice of confirmation hearing will be sent separately.]
or [The debtor has not filed a plan as of this date. You will be sent separate notice of the hearing on confirmation of the plan.]

Creditors May Not Take Certain Actions:

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, debtor's property, and certain codebtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Address of the Bankruptcy Clerk's Office: (5) Telephone number:	For the Court: Clerk of the Bankruptcy Court: (7)
Hours Open: (6)	Date:

Filing of Chapter 13 Bankruptcy Case	A bankruptcy case under chapter 13 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by the debtor(s) listed on the front side, and an order for relief has been entered. Chapter 13 allows an individual with regular income and debts below a specified amount to adjust debts pursuant to a plan. A plan is not effective unless confirmed by the bankruptcy court. You may object to confirmation of the plan and appear at the confirmation hearing. A copy or summary of the plan [is included with this notice] *or* [will be sent to you later], and [the confirmation hearing will be held on the date indicated on the front of this notice] *or* [you will be sent notice of the confirmation hearing]. The debtor will remain in possession of the debtor's property and may continue to operate the debtor's business, if any, unless the court orders otherwise.
Creditors May Not Take Certain Actions	Prohibited collection actions against the debtor and certain codebtors are listed in Bankruptcy Code § 362 and § 1301. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Claims	A Proof of Claim is a signed statement describing a creditor's claim. If a Proof of Claim form is not included with this notice, you can obtain one at any bankruptcy clerk's office. If you do not file a Proof of Claim by the "Deadline to File a Proof of Claim" listed on the front side, you might not be paid any money on your claim against the debtor in the bankruptcy case. To be paid you must file a Proof of Claim even if your claim is listed in the schedules filed by the debtor.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor.
Exempt Propery	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors, even if the debtor's case is converted to chapter 7. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

(1)

(2)

(3) PLACE INFO ON FOLLOWING HERE

29102-0000 | (or Converted) 10/03/97

TRUSTEE

29202-0000

☐ This is a converted case originally filed under chapter

(date)

Deadline to file a proof of claim: Non-Governmental units FEBRUARY 19, 1998

Governmental units APRIL 1, 1998

TIME AND LOCATION OF MEETING OF CREDITORS

4 MEETING ST ROOM 205 FEDERAL BUILDING NOVEMBER 21, 1997 AT 10:30 AM
ARLESTON SC, 29401-0000

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN

earing on confirmation will be held: DECEMBER 18, 1997 AT 9:00 AM
145 KING ST ROOM 225
CHARLESTON SC, 29401-0000

debtor has filed or will file a plan and related motions. The plan and related motions will be sent separately by the debtor's attorney or the pro se debtor

MMENCEMENT OF CASE. An individual's debt adjustment case under Chapter 13 of the Bankruptcy Code has been filed in this court by the debtor or debtors named above, and an order for relief has been ered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property and debts are available for inspection at the office of the clerk of the kruptcy court.

EDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples rohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing iclosure actions, repossessions or wage deductions. Some protection is also given to certain codebtors of consumer debts. If unauthorized actions are taken by a creditor against a debtor, or a protected ebtor, the court may punish that creditor. A creditor who is considering taking action against the debtor or the property of the debtor, or any codebtor, should review §§362 and 1301 of the Bankruptcy Code and y wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

ETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above in the box labeled "Date, Time, and ation of Meeting of Creditors" for the purpose of being examined under oath. Attendance by creditors at the meeting is welcome, but not required. At the meeting, the creditors may examine the debtor and nsact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further notice to the creditors. Failure of the tor or debtor's attorney to attend the meeting of creditors may also result in dismissal under South Carolina Local Bankruptcy Rule (SC LBR) 2003-1

OOF OF CLAIM. Except as otherwise provided by law, in order to share in any payment from the estate, a creditor must file a proof of claim by the date set forth in the box above. The place to file a proof of either in person, or by mail, is the office of the clerk of the bankruptcy court. Proof of claim forms are available in the clerk's office of any bankruptcy court

RPOSE OF A CHAPTER 13 FILING. Chapter 13 of the Bankruptcy Code is designed to enable a debtor to pay debts in full or in part over a period of time pursuant to a plan. A plan is not effective unless it [illegible] Creditors will be given notice in the [illegible] to confirmation of the proposed plan and related motions must be filed and served in compliance with

CONFIRMATION HEARING. The debtor is required to appear at the Confirmation Hearing. Any objection to confirmation of the proposed plan and related motions must be filed and served in compliance with LBR 3015-1 and SC LBR 9014-1. If objections to confirmation are timely filed, they will be heard at the Confirmation Hearing at the time and place set forth above or at a hearing, separate notice of which will be en by the court. Objections to confirmation may be overruled if the objecting creditor fails to appear and prosecute the objection. If no objection is timely filed in accordance with SC LBR 3015-1 and SC LBR 4-1, the plan may be confirmed and related motions resolved on recommendation of the trustee. Should this happen, the Confirmation Hearing may be cancelled

SECURED CLAIMS. Any creditor that takes possession of its collateral, whether by judicial action, voluntary surrender, or through operation of the plan, will be paid nothing unless a proof of claim for any iciency is filed after disposal of the collateral. This also applies to creditors who may claim an interest in collateral released to another lienholder or collateral on which the stay has been modified by another nholder.

ABANDONMENT. All property of the estate which the trustee considers to be burdensome or of inconsequential value and benefit may be abandoned by the trustee unless the debtor, creditors, or parties in erest object at the meeting of creditors.

PLAN SUMMARY. Pursuant to SC LBR 3015-1, the debtor's attorney or a pro se debtor is required to serve, under separate cover, a copy of the plan on all creditors. SC LBR 3015-1 requires that this plan nform to the form plan set forth in Exhibit 1 to SC LBR 3015-1. This form plan requires periodic payments (usually monthly) by the debtor to the trustee. This form plan also provides for payment of any unpaid fees ed to the debtor's attorney at a specified percentage of payments made to creditors. This form plan also provides for periodic payment (usually monthly) on the allowed secured claims of some secured creditors, llowed by pro rata payment of the allowed amounts of priority claims, and pro rata payment of allowed unsecured claims until a specified percentage of unsecured claims is paid. The plan may contain other ovisions which affect the rights of creditors, therefore, the plan itself should be consulted.

DISMISSAL. This case may be dismissed without further notice or hearing should the debtor fail to comply with SC LBR 1006-1 (Payment of Filing Fee) or SC LBR 1007-2 (Filing of Lists, Schedules, atements or Chapter 13 Plan), or SC LBR 2003-1, (Failure of the Debtor(s) or Attorney for the Debtor(s) to Attend the Meeting of Creditors). Failure to comply with SC LBR 3015-1 may be addressed at the nfirmation hearing in a Chapter 13 case and may result in the dismissal of the case and the imposition of sanctions. If confirmation of a plan is denied, or if payments to the Trustee required by 11 USC 1326(a) are t timely made by the debtor, the case may be dismissed without further notice or hearing, at the confirmation hearing

↑ ↑ I, II, III, IV AND V

Discharge of Debtor
Official Form 18

***BNC Designated code of our form is "DIS"**

PAGE 1

1. Include at top of form:

United States Bankruptcy Court - District of South Carolina
1100 Laurel Street. Post Office Box 1448, Columbia South Carolina 29202.

Use the remainder of the official form, including the back, as is.

THIS WILL REPLACE OUR PRESENT "DIS"

Form B18 (Official Form 18)
(9/97)

(1)

Form 18. DISCHARGE OF DEBTOR

IN A CHAPTER 7 CASE

[Caption as in Form 16A]

DISCHARGE OF DEBTOR

It appearing that the debtor is entitled to a discharge, IT IS ORDERED: The debtor is granted a discharge under section 727 of title 11, United States Code, (the Bankruptcy Code).

Dated: _____

BY THE COURT

_____

United States Bankruptcy Judge

SEE THE BACK OF THIS ORDER FOR IMPORTANT INFORMATION.

(3/97)

EXPLANATION OF BANKRUPTCY DISCHARGE IN A CHAPTER 7 CASE

This court order grants a discharge to the person named as the debtor. It is not a dismissal of the case and it does not determine how much money, if any, the trustee will pay to creditors.

Collection of Discharged Debts Prohibited

The discharge prohibits any attempt to collect from the debtor a debt that has been discharged. For example, a creditor is not permitted to contact a debtor by mail, phone, or otherwise, to file or continue a lawsuit, to attach wages or other property, or to take any other action to collect a discharged debt from the debtor. *[In a case involving community property:]* [There are also special rules that protect certain community property owned by the debtor's spouse, even if that spouse did not file a bankruptcy case.] A creditor who violates this order can be required to pay damages and attorney's fees to the debtor.

However, a creditor may have the right to enforce a valid lien, such as a mortgage or security interest, against the debtor's property after the bankruptcy, if that lien was not avoided or eliminated in the bankruptcy case. Also, a debtor may voluntarily pay any debt that has been discharged.

Debts That are Discharged

The chapter 7 discharge order eliminates a debtor's legal obligation to pay a debt that is discharged. Most, but not all, types of debts are discharged if the debt existed on the date the bankruptcy case was filed. (If this case was begun under a different chapter of the Bankruptcy Code and converted to chapter 7, the discharge applies to debts owed when the bankruptcy case was converted.)

Debts that are Not Discharged.

Some of the common types of debts which are not discharged in a chapter 7 bankruptcy case are:

a. Debts for most taxes;

b. Debts that are in the nature of alimony, maintenance, or support;

c. Debts for most student loans;

d. Debts for most fines, penalties, forfeitures, or criminal restitution obligations;

e. Debts for personal injuries or death caused by the debtor's operation of a motor vehicle while intoxicated;

f. Some debts which were not properly listed by the debtor;

g. Debts that the bankruptcy court specifically has decided or will decide in this bankruptcy case are not discharged;

h. Debts for which the debtor has given up the discharge protections by signing a reaffirmation agreement in compliance with the Bankruptcy Code requirements for reaffirmation of debts.

This information is only a general summary of the bankruptcy discharge. There are exceptions to these general rules. Because the law is complicated, you may want to consult an attorney to determine the exact effect of the discharge in this case.

Billing Code 221001]

JUDICIAL CONFERENCE OF THE UNITED STATES

REVISION OF CERTAIN DOLLAR AMOUNTS IN THE BANKRUPTCY CODE PRESCRIBED UNDER SECTION 104(B) OF THE CODE

AGENCY: Judicial Conference of the United States

ACTION: Notice is provided that various dollar amounts in title 11, United States Code, are increased

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SUMMARY: Section 108 of the Bankruptcy Reform Act of 1994 established the mechanism for the automatic three-year adjustment of dollar amounts in certain sections of the Bankruptcy Code by adding subsection (b) to section 104 of title 11. That provision states:

(b)(1) On April 1, 1998, and at each 3-year interval ending April 1 thereafter, each dollar amount in effect under [the designated sections of the code] immediately before such April 1 shall be adjusted --

(A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and

(B) to round to the nearest $25 the dollar amount that represents such change.

(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) [of the Bankruptcy Code].

(3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments.

Revision of Certain Dollar Amounts in Bankruptcy Code

Notice is hereby given that the dollar amounts are increased in the sections in title 11, United States Code, as set out in the following chart. These increases **do not** apply to cases commenced before the effective date of the adjustments, i.e., April 1, 1998. Official Bankruptcy Forms 6E and 10 also will be amended to reflect these adjusted dollar amounts.

FOR FURTHER INFORMATION CONTACT: Francis F. Szczebak, Chief, Bankruptcy Judges Division, Administrative Office of the United States Courts, Washington D.C. 20544, telephone (202) 273-1900.

Dated: February 3, 1998

Francis F. Szczebak

Chief, Bankruptcy Judges Division

11 U.S.C.	Dollar Amount to be Adjusted	New (Adjusted) Dollar Amount
Section 109(e) - allowable debt limits for filing bankruptcy under Chapter 13	$250,000 (each time it appears) $750,000 (each time it appears)	$269,250 (each time it appears) $807,750 (each time it appears)
Section 303(b) - minimum aggregate claims needed for the commencement of an involuntary bankruptcy		
(1) - in paragraph (1)	$ 10,000	$10,775
(2) - in paragraph (2)	$ 10,000	$10,775
Section 507(a) - priority claims		
(1) - in paragraph (3)	$ 4,000	$ 4,300
(2) - in paragraph (4)(B)(i)	$ 4,000	$ 4,300
(3) - in paragraph (5)	$ 4,000	$ 4,300
(4) - in paragraph (6)	$ 1,800	$ 1,950
Section 522(d) - value of property exemptions allowed to the debtor		
(1) - in paragraph (1)	$ 15,000	$16,150
(2) - in paragraph (2)	$ 2,400	$ 2,575
(3) - in paragraph (3)	$ 400 $ 8,000	$ 425 $ 8,625
(4) - in paragraph (4)	$ 1,000	$ 1,075
(5) - in paragraph (5)	$ 800 $ 7,500	$ 850 $ 8,075
(6) - in paragraph (6)	$ 1,500	$ 1,625
(7) - in paragraph (8)	$ 8,000	$ 8,625
(8) - in paragraph (11)(D)	$ 15,000	$16,150
Section 523(a)(2)(C) - "luxury goods and services" or cash advances obtained by the consumer debtor within 60 days before the filing of a bankruptcy petition, which are considered nondischargeable	$1,000 (each time it appears)	$1,075 (each time it appears)

requested by the United States Trade Representative (USTR). The Commission expects to deliver the results of its investigation to the USTR in two phases. Phase one will be delivered on March 27 and phase two will be delivered on May 1.

Summary

Title: Survey Worksheets for Investigation No. 332–390, Advice Concerning the Proposed Expansion of the Information Technology Agreement.

Summary: Staff of the USITC plans to make telephone contacts with a broad representation of U.S. companies and trade associations. The survey worksheets contain fewer that 10 questions that require responses from industry and are designed to provide staff with a uniform approach and consistent format for recording responses. Information collected will be used to assess U.S. companies views on the possible elimination of duties and the existence of nontariff barriers on certain products.

Need and Use of Information: The responses collected will contribute to the advice and information requested by the USTR on a list of information technology products that are being considered for duty elimination in current Information Technology Agreement negotiations.

Description of Respondents: Firms and trade associations.

Number of Respondents: 1,250.

Frequency of Responses: Reporting—One Time.

Total Burden Hours: 625.

Additional Information or Comment

Copies of agency submissions to OMB in connection with this request may be obtained from Sylvia McDonough, Branch Chief, Electronic Technology, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436 (telephone no. 202–708–4052). Comments should be addressed to: Desk Officer for U.S. International Trade Commission, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 (telephone no. 202–395–7340). Copies of any comments should also be provided to Robert Rogowsky, Director, Office of Operations, U.S. International Trade Commission, 500 E Street, SW, Washington, DC 20436, who is the Commission's designated Senior Official under the Paperwork Reduction Act.

Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal, (telephone no. 202–205–1810).

By order of the Commission.

Issued: February 6, 1998.

Donna R. Koehnke,

Secretary.

[FR Doc. 98–3605 Filed 2–11–98; 8:45 am]

BILLING CODE 7020–02–P

JUDICIAL CONFERENCE OF THE UNITED STATES

Revision of Certain Dollar Amounts in The Bankruptcy Code Prescribed Under Section 104(B) of The Code

AGENCY: Judicial Conference of the United States.

ACTION: Notice is provided that various dollar amounts in title 11, United States Code, are increased.

SUMMARY: Section 108 of the Bankruptcy Reform Act of 1994 established the mechanism for the automatic three-year adjustment of dollar amounts in certain sections of the Bankruptcy Code by adding subsection (b) to section 104 of title 11. That provision states:

(b)(1) On April 1, 1998, and at each 3-year interval ending April 1 thereafter, each dollar amount in effect under [the designated sections of the code] immediately before such April 1 shall be adjusted—

(A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and

(B) to round to the nearest $25 the dollar amount that represents such change.

(2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the **Federal Register** the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) [of the Bankruptcy Code].

(3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments.

Revision of Certain Dollar Amounts in Bankruptcy Code

Notice is hereby given that the dollar amounts are increased in the sections in title 11, United States Code, as set out in the following chart. These increases do not apply to cases commenced before the effective date of the adjustments, i.e., April 1, 1998. Official Bankruptcy Forms 6E and 10 also will be amended to reflect these adjusted dollar amounts.

11 U.S.C.	Dollar amount to be adjusted	New (adjusted) dollar amount
Section 109(e)—allowable debt limits for filing bankruptcy under Chapter 13	$250,000 (each time it appears).	$269,250 (each time it appears).
Section 303(b)—minimum aggregate claims needed for the commencement of an involuntary bankruptcy:	750,000 (each time it appears).	807,750 (each time it appears).
(1)—in paragraph (1)	10,000	10,775.
(2)—in paragraph (2)	10,000	10,775.
Section 507(a)—priority claims:		
(1)—in paragraph (3)	4,000	4,300.
(2)—in paragraph (4)(B)(i)	4,000	4,300.
(3)—in paragraph (5)	4,000	4,300.
(4)—in paragraph (6)	1,800	1,950.
Section 522(d)—value of property exemptions allowed to the debtor:		
(1)—in paragraph (1)	15,000	16,150.
(2)—in paragraph (2)	2,400	2,575.
(3)—in paragraph (3)	400	425
(4)—in paragraph (4)	8,000	8,625.
(5)—in paragraph (5)	1,000	1,075.
	800	850
	7,500	8,075.

11 U.S.C.	Dollar amount to be adjusted	New (adjusted) dollar amount
(6)—in paragraph (6)	1,500	1,625.
(7)—in paragraph (8)	8,000	8,625.
(8)—in paragraph (11)(D)	15,000	16,150.
Section 523(a)(2)(C)—"luxury goods and services" or cash advances obtained by the consumer debtor within 60 days before the filing of a bankruptcy petition, which are considered non-dischargeable.	1,000 (each time it appears).	1,075 (each time it appears).

FOR FURTHER INFORMATION CONTACT: Francis F. Szczebak, Chief, Bankruptcy Judges Division, Administrative Office of the United States Courts, Washington, D.C. 20544, telephone (202) 273–1900.

Dated: February 3, 1998.

Francis F. Szczebak,

Chief, Bankruptcy Judges Division.

[FR Doc. 98–3599 Filed 2–11–98; 8:45 am]

BILLING CODE 2210–01–P

DEPARTMENT OF JUSTICE

Notice of Filing of Settlement Agreement Pursuant to the Comprehensive Environmental Response, Compensation, and Recovery Act ("CERCLA")

In accordance with Departmental policy, 28 CFR 50.7, and Section 122(d)(2) of CERCLA, 42 U.S.C. 9622(d)(2), notice is hereby given that a proposed Settlement Agreement in *In re R.C. Dick Geothermal Corporation,* Chap. 7, Bankr. No. 92–1–1293, and *In re R.C. Dick Geothermal L.P.,* Chap. 7, Bankr. No. 92–1–1294, (Substantively Consolidated) (referred to herein collectively as "R.C. Dick") was filed with the United States Bankruptcy Court for the Northern District of California on January 23, 1998. This Settlement Agreement resolves an Administrative Expense claim filed by the United States against R.C. Dick, pursuant to Section 107(a), 42 U.S.C. 9607(a). The settling debtors were the owners/operators of a facility located on 1,100 acres in a remote location in Northern Sonoma and Southern Mendocino Counties (the "Site") at the time of disposal of hazardous substances. The Settlement Agreement provides that the Trustee, on behalf of the debtor's estate, will pay 50% of any funds remaining in the bankruptcy estate, after the payment of the Trustee's fees and expenses and any other professional fees approved by the Court, to the Hazardous Substance Superfund for response costs incurred by the United States at the Site. In addition, the United States may perfect a lien against the real property owned by the debtor for any unpaid costs incurred with respect to the Site.

The Department of Justice will receive, for a period of thirty (30) days from the date of this publication, comments relating to the proposed Settlement Agreement. Comments should be addressed to the Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, D.C. 20530, and should refer to *In re R.C. Dick Geothermal Corporation,* DOJ #90–11–2–1298.

The proposed Settlement Agreement may be examined at the office of the Region IX office of the Environmental Protection Agency, 75 Hawthorne Street, San Francisco, California 94105; and at the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005, (202) 624–0892. A copy of the proposed Settlement Agreement may be obtained in person or by mail from the Consent Decree Library, 1120 G Street, N.W., 4th Floor, Washington, D.C. 20005. In requesting a copy please refer to the referenced case and enclose a check in the amount of $5.25 (25 cents per page reproduction costs), payable to the Consent Decree Library.

Joel M. Gross,

Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 98–3592 Filed 2–11–98; 8:45 am]

BILLING CODE 4410–15–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Aluminum Metal Matrix Composites (AlMMC) Consortium Joint Venture

Notice is hereby given that, on December 15, 1997, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the Aluminum Metal Matrix Composites (AlMMC) Consortium Joint Venture, has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the identities of the parties to the joint venture, and (2) the nature and objectives of the venture. The notifications were filed for the purpose of limiting recovery of plaintiffs to actual damages under specified circumstances. Pursuant to Section 6(b) of the Act, the identities of the parties to the venture are Aluminum Consultants Group, Inc., Murrysville, PA; Cast Metal Composites, Inc., Cleveland, OH; Delphi Chassis Systems, Dayton, OH; DWA Aluminum Composites, Chatsworth, CA; Metal Matrix Cast Composites, Inc., Waltham, MA; Metrix Composites, Inc., Clinton, NY; and Triton Systems, Inc., Chelmsford, MA. Technologies Research Corporation, Ann Arbor, MI has been engaged to administer the venture on behalf of the participants.

The objective of the venture is to undertake research and development activities focusing on aluminum metal matrix composites.

Constance K. Robinson,

Director of Operations, Antitrust Division.

[FR Doc. 98–3593 Filed 2–11–98; 8:45 am]

BILLING CODE 4410–11–M

DEPARTMENT OF JUSTICE

Antitrust Division

Notice Pursuant to the National Cooperative Research and Production Act of 1993—Semiconductor Research Corporation

Notice is hereby given that, on December 1, 1997, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), the Semiconductor Research Corporation filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing changes in membership. The notifications were filed for the purpose of extending the Act's provisions limiting the recovery of antitrust plaintiffs to actual damages under specified circumstances. Specifically, Suss Advanced Lithography, Inc. d/b/a SAL Corporation, Waterbury, VT; and Tessera, Inc., San Jose, CA have become Affiliate Members of the Semiconductor Research Corporation. No other changes

B6E
(Rev.4/98)

In Re _____, Debtor

Case No._____ (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets, state the name and mailing address, including zip code, and account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H","W","J", or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. Repeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages, salaries, and commissions, including vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4,300* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,300* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $1,950* for deposits for the purchase, lease, or rental of property or services for personal, family, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

B6E
(Rev.4/98)

In Re _____, Debtor

Case No._____ (if known)

☐ **Alimony, Maintenance, or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7).

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

* Amounts are subject to adjustment on April 1, 1998, and every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

FORM B10 (Official Form 10) (4/98)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor	Case Number

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
Name and address where notices should be sent: Telephone number:	☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:_____

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other_____

- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)

  Your SS #: _____ _____ _____

  Unpaid compensation for services performed

  from _____ (date) to _____ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $_____

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other_____

Value of Collateral: $_____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $_____

6. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $_____

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4,300),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $1,950* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
- ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____).

**Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also *Unsecured Claim.*)

Unsecured Claim

If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims.*

Items to be completed in Proof of Claim form (if not already filled in)

Court, Name of Debtor, and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:
Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form.

1. Basis for Claim:
Check the type of debt for which the proof of claim is being filed. If the type of debt is not listed, check "Other" and briefly describe the type of debt. If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:
Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:
If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:
Fill in the total amount of the entire claim. If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges.

5. Secured Claim:
Check the appropriate place if the claim is a secured claim. You must state the type and value of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

6. Unsecured Priority Claim:
Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

7. Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

8. Supporting Documents:
You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available.

Items 19 through 21 will be oral reports.

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SUBCOMMITTEES -- ADVISORY COMMITTEE ON BANKRUPTCY RULES
(March 1998)

Subcommittee on Forms

Chairman: Henry J. Sommer, Esquire

Members: Judge Robert J. Kressel
Professor Charles J. Tabb
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Subcommittee on Local Rules

Chairman: [Vacant]

Members: Judge Eduardo C. Robreno
Judge Donald E. Cordova
Judge A. Jay Cristol
Gerald K. Smith, Esquire
J. Christoper Kohn, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Question for the Committee: can the local rules subcommittee be discharged?

Subcommittee on Style

Chairman: Leonard M. Rosen, Esquire

Members: Judge Donald E. Cordova

Judge Adrian G. Duplantier, ex officio
Professor Alan N.Resnick, ex officio
Peter G. McCabe, ex officio

Subcommittee on Technology

Chairman: Judge A. Jay Cristol

Members: Judge Bernice B. Donald
Professor Kenneth N. Klee
Henry J. Sommer, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio
Richard G. Heltzel, Clerk, ex officio

Subcommittee on Alternative Dispute Resolution

Chairman: Professor Charles J. Tabb

Members: Judge Robert W. Gettleman
Judge Bernice B. Donald
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Subcommittee on Rule 2014 Disclosure Requirements

Chairman: Gerald K. Smith, Esquire

Members: Judge Robert W. Gettleman
Judge Donald E. Cordova
Judge Robert J. Kressel
Professor Kenneth N. Klee
Leonard M. Rosen, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Question for the Committee: should the above subcommittee be renamed "Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements"?

Subcommittee on Litigation

Chairman: Professor Kenneth N. Klee

Members: Judge Robert J. Kressel
Judge A. Thomas Small
R. Neal Batson, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Subcommittee on Rule 2004 Examinations

Chairman: Judge Donald E. Cordova

Members: Judge Eduardo C. Robreno
Judge Robert J. Kressel
Professor Charles J. Tabb
R. Neal Batson, Esquire
J. Christopher Kohn, Esquire

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Question for the Committee: should the subcommittee on Rule 2004 examinations be discharged?

Subcommittee on Government Noticing

Chairman: Judge A. Thomas Small

Members: Judge A. Jay Cristol
J. Christopher Kohn, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Richard G. Heltzel

Judge Adrian G. Duplantier, ex officio
Professor Alan N. Resnick, ex officio

Liaison to Civil Advisory Committee

Judge Adrian G. Duplantier

Liaison to Joint Technology Subcommittee (of Standing Committee)

Judge A. Jay Cristol
Richard G. Heltzel

Professor Alan N. Resnick, ex officio

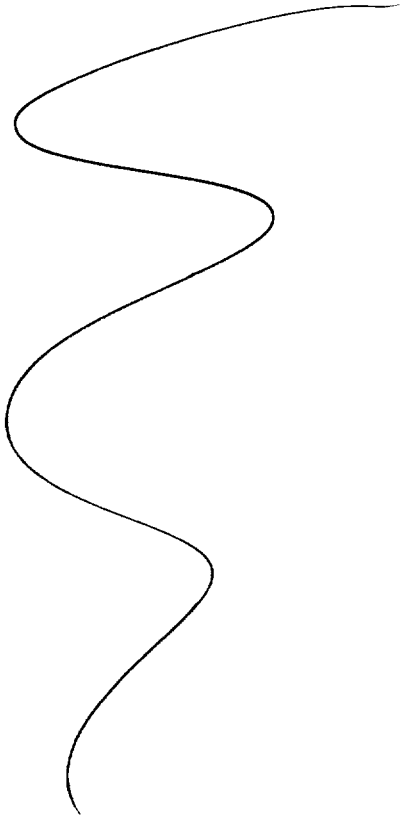
Item 23 will be oral.

Supplemental

Agenda

Book

Materials



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 13, 1998

MEMORANDUM TO MEMBERS OF THE BANKRUPTCY RULES COMMITTEE

SUBJECT: *Additional Agenda Materials for the March 26-27, 1998 Meeting in Morilton, Arkansas*

Attached is a memorandum from Professor Resnick summarizing four comments received after the agenda materials were compiled. I have also attached the four comments (015 through 018.) Comments 001 through 014 are in volume 1 of the agenda book behind tab 6. Please bring the additional materials with you to the meeting.

John K. Rabiej

Attachments

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: ADDITIONAL COMMENTS ON PROPOSED AMENDMENTS PUBLISHED IN 1997

DATE: MARCH 10, 1998

You should have received the two-volume agenda materials for the Arkansas meeting. Item #6 of the materials consists of the Preliminary Draft of Proposed Amendments that were published in August 1997, a summary of the public comments received during the comment period, and copies of the 14 letters received from the bench and bar.

The public comment period ended on February 15th and I prepared my memorandum and summary of the comments on February 22nd. But after the comment period ended and the agenda materials were printed for distribution, we received four more letters. One comment is from the Securities and Exchange Commission, one is from the Deputy Associate Attorney General, and two are from committees of the State Bar of California. Copies of the letters are enclosed and brief summaries are set forth below. I suggest that you read these summaries together with my summary of the other comments contained in Exhibit B of agenda item #6.

(1) Comments Relating to the 7062 Package.

These comments are on those proposed amendments that relate to the application of a ten-day automatic stay of certain orders.

(a) The State Bar of California, Federal Courts Committee (Letter #016) opposes all the amendments included in the Rule 7062 package (i.e., Rules 3020(e), 3021, 4001(a)(3), 6004(g), 6006(d), 7062, and 9014). While not unmindful of the difficulties encountered in applying Rule 7062, "a better remedy would be to extend the scope of [Rule 7062] beyond 'enforcement.'" They believe that the proposed amendments would cause confusion. For example, it believes that the rule for stays in contested matters will be unclear (except where modifications to other rules are being made). "No reason is given for changing current practice which, although not trouble free, is at least known and in most circumstances clear and workable." In addition, there is no justification for shifting the post-order burden. "[A]ll the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. The California Committee on Federal Courts is of the opinion that such a shift is not wanted, warranted, or desirable."

(b) The State Bar of California, Business Law Section (Letter #018) agrees with the proposed amendment to Rule 9014 (deleting the application of Rule 7062) because "the provisions of Rule 62 are frequently not appropriate for orders granting or denying motions." The letter comments that the proposed amendments to Rules 7062 and 9014 "will clarify what has been a consistent source of confusion."

With respect to the ten-day stay being added to Rule 4001(a), it comments that the language "unless the court orders otherwise" could cause confusion, advocates that imposition of the stay should be "the rule" which should not be changed unless an extremely high standard (i.e., irreparable harm) is met, and urges the Advisory Committee to clarify in the committee notes that, absent exigent circumstances, judges should not have discretion to potentially moot an appeal to "get the deal done." Also, the committee note should state that the court may reduce the ten-day period, but may not extend it (except perhaps for extraordinary cause).

With respect to Rule 6006, the letter asks why the current Rule 7062, which was amended in 1991 to make the Rule 7062 ten-day stay inapplicable to §365 orders, is being changed to impose the ten-day stay on such orders. In addition, it asks if "entry of order" is defined (is the paper docket accurate in relation to the Pacer docket; is the "entered" stamp on the order always the date it is entered on the paper docket?).

(2) Comments Relating to Proposed Rule 1017(c) and Rule 2002(a)(4).

(a) The State Bar of California, Federal Courts Committee (Letter #016) supports the proposed amendments to Rules 1017(c) and 2002(a)(4).

(b) The State Bar of California, Business Law Section (Letter #018) suggests

that the list of entities specified in the proposed amendments to Rule 1017(c) (i.e., the entities entitled to receive notice of a motion to dismiss a chapter 7 or chapter 13 case for failure to file a list of creditors, schedule, or statement of financial affairs) should be expanded to include entities who have filed and served a request for special notice in the case. "Although inclusion of 'any other entities as the court directs' may be helpful in securing notice for parties that express an early interest in a case, service on the special notice list will guaranty that such parties receive notice of the motion." The letter also states that it is important that creditors receive notice that the case has been dismissed.

(3) Comments Relating to Rules 4004 and 4007.

(a) The State Bar of California, Federal Courts Committee (Letter #016) supports the proposed amendments to Rules 4004 and 4007.

(b) The State Bar of California, Business Law Section (Letter #018) supports the proposed amendments to Rule 4007(c) and (d). The letter then raises a concern, acknowledging that raising it may not be appropriate at this stage of the process. The rule sets a deadline for filing nondischargeability complaints, and requires that 30-day notice of the deadline be sent. "What happens if the Court fails to give 30 days' notice of the deadline or if the notice gives the wrong deadline? Which aspect of the rule governs? Perhaps this is just a theoretical problem if Courts always give the proper deadline and the proper amount of notice, but we think that there could still be some question as to the deadline given unfortunate facts."

(4) Comments Relating to Rule 2003(d) - Chapter 11 Trustee Elections.

(a) The State Bar of California, Federal Courts Committee (Letter # 016) supports the proposed amendments to Rule 2003(d).

(5) Comments Relating to Rule 7001.

(a)The State Bar of California, Federal Courts Committee (Letter # 016) supports the proposed amendments to Rule 7001, which will make an adversary proceeding unnecessary if injunctive or equitable relief is provided for in a plan.

(b) Francis M. Allegra, Deputy Associate Attorney General of the United States (Letter #015) wrote that the Department of Justice strongly opposes the proposed amendment to Rule 7001. "The proposed amendment jeopardizes unjustifiably the rights of those subject to injunctive or other equitable relief." He notes that important

procedural safeguards under Civil Rule 65 (which applies in adversary proceedings) would be lost. For example, Civil Rule 65(d) requires that an order granting an injunction must set forth the reasons for its issuance, be specific in its terms, and describe in reasonable detail the act or acts restrained. Civil Rule 65 also lists the parties bound by an injunction and Mr. Allegra expresses his concern that plan injunctions, unbound by Rule 65, could be much broader in scope than an injunction issued in an adversary proceeding.

In addition, adversary proceedings have the full procedural protections of a lawsuit and it is "anomalous" to require such protections when a money judgment is sought, but to relax them when an injunction is sought. "Deprived of the opportunity to litigate their rights directly and specifically against the party seeking the injunction, the targets will have their rights weighed in light of the rights of those affected by the plan. Inevitably, the targets' rights will be diluted. A tacit burden shifting can be expected requiring the targets to show effectively that their opposition to the injunctive relief sought is meritorious enough to overcome the totality of the interests dealt with by the plan."

Mr. Allegra also comments that plans are frequently contracts of adhesion and that injunctions included in lengthy plans may not receive proper scrutiny. The federal government would be an appealing target for a debtor seeking protection from a federal creditor or regulator, with a high risk of inadequate notice to affected agencies, particularly in pre-packaged plan scenarios. Finally, the risk of unfairness to targets of injunctions included in plans is "compounded by the procedural and practical barriers to appealing a confirmation order." For example, the appellant may have to post a "prohibitively expensive" supersedeas bond to stay implementation of a confirmed plan.

(c) Richard H. Walker, General Counsel, Securities and Exchange Commission (Letter # 017) wrote that the staff of the SEC opposes the proposed amendments to Rule 7001. Experience to date with such provisions in plans, even in the absence of authorization under the Rules, suggests that ratifying this procedure would impair procedural rights. Injunctions in plans do not carry safeguards present for injunctive relief in an adversary proceeding, such as proper service on the target, the requirement that the relief sought must be specifically described and limited in scope, and use of a balancing-of-interests test. "We have reviewed many plans incorporating injunctions that are not prominently displayed and whose effect is not adequately described in disclosure statements. Such injunctions can readily slip by not only the affected party, but also by the court." Mr. Walker discusses a case (In re Arrowmill Development Corp) in which the plan provided that the discharge injunction would apply to protect equity holders or affiliates. Subsequently, a state court found that even an experienced bankruptcy lawyer would not have recognized the effect of these provisions and that their scope and effect were never made clear during the confirmation process. The bankruptcy court then ruled that these provisions were not effective because they

functioned as a discharge of nondebtors in derogation of §524(e). The court rejected the holding of two circuit courts, which found collateral challenges to a plan injunction barred by res judicata. These cases raise troubling prospects that a party may be enjoined under a plan without procedural safeguards afforded in other contexts. Also, the plan process does not focus on the rights of any one creditor, but is class oriented, which, together with the absence of certain procedural protections, "would raise serious due process concerns."

Mr. Walker also comments that including injunctions in a plan shifts the burden from the debtor to the target of the injunction. "Rather than require full disclosure of the scope of the relief and its effect, the burden is on the creditor to discern it in the often lengthy and jargon-laden plan documents. Rather than require the movant to make the well-established showing of the necessity for the injunctive relief, the burden is on the creditor to come into court and object to the plan, under a statutory scheme that does not accord the same weight to his interests as the injunctive criteria." He also mentions the onerous task in appealing a confirmation order (need for supersedeas bond, mootness by substantial consummation, etc.).

In reviewing plans, the SEC has seen attempts to extinguish law enforcement claims against directors, officers and affiliates. "While we thus far have been successful in persuading plan proponents to drop such provisions, we do not believe that the burden should be shifted to law enforcement authorities to come into bankruptcy court and prove why they should not be enjoined, or risk being foreclosed by a clearly illegal injunction." Finally, "there is no evidence that the current version of Rule 7001 is sufficiently impairing the interests of debtors or others to counterbalance the fairness concerns raised by the proposed amendment."

(6) Comments Relating to Rule 7004(e).

(a) The State Bar of California, Business Law Section (Letter #018) states that "we do not believe that we should recommend any action be taken. The proposed amendment merely seeks to make it clear that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country."

(b) The State Bar of California, Federal Courts Committee (Letter #016) supports the proposed amendments to Rule 7004(e).

U.S. Department of Justice

Office of the Associate Attorney General

97-BK-015

Deputy Associate Attorney General

Washington, D.C. 20530

February 26, 1998

Mr. Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
United States Courts
Washington, D.C. 20544

Subject: **Proposed Amendment to Rule 7001**

Dear Mr. McCabe:

We oppose the proposed amendment to Federal Rule of Bankruptcy Procedure 7001. The proposal would allow parties to obtain injunctive or other equitable relief when the relief is provided in a chapter 9, chapter 11, chapter 12, or chapter 13 plan, without initiating an adversary proceeding. The proposed amendment jeopardizes unjustifiably the rights of those subject to injunctive or other equitable relief.

Federal Rule of Bankruptcy Procedure 7065 makes Rule 65 of the Federal Rules of Civil Procedure applicable only to adversary proceedings and, as such, the protections of Rule 65 would be lost to targets of plan injunctions if the proposed amendment is adopted. Rule 65 has important procedural safeguards. For example, an order granting an injunction must set forth the reasons for its issuance, be specific in its terms, and describe in reasonable detail the act or acts restrained. Fed. R. Civ. P. 65(d). Further, an order granting an injunction is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those in active concert or participation with them who receive actual notice of the order. Id. Hence, plan injunctions, unbounded by Rule 65, could be much broader in scope than an injunction issued in an adversary proceeding.

Adversary proceedings differ from other contested matters in bankruptcy by requiring the full procedural protections of a lawsuit. This proposal relaxes these rights in the case of injunctions and equitable relief, yet retains them for all other forms of direct relief against a party, such as a money judgment. This is an anomalous result -- the need for individualized procedures is as great in the case of injunctive relief as it is in the case of money judgments. Deprived of the opportunity to litigate their rights directly and specifically against the party seeking the injunction, the targets will have their rights weighed in light of the rights of those affected by the plan. Inevitably, the targets' rights will be diluted. A tacit burden shifting can be expected requiring the targets to show effectively that their opposition to the

injunctive relief sought is meritorious enough to overcome the totality of the interests dealt with by the plan.

This power also risks abuse. Plans of reorganization are frequently contracts of adhesion with the plan drafter having broad latitude to craft the details. Injunctions inserted in lengthy and complex plans may not receive the scrutiny -- by the court or by those enjoined -- that would be available through an adversary proceeding. The federal government would be an appealing target for a plan proponent, almost always the debtor, seeking protection from a federal creditor or regulatory restrictions. Such an injunction embedded in a plan of reorganization may not be easily detected. The wide diversity of federal interests potentially affected by a proposed plan creates a higher risk of inadequate notice to affected agencies, particularly in "pre-packaged" plan scenarios. Thus, in effect, the proposed amendment would give plan proponents power to craft new rights by embedding injunctive and other equitable relief in chapter 9, 11, 12, or 13 plans that may not be adequately screened.

This risk, and the concomitant unfairness to the targets, is compounded by the procedural and practical barriers to appealing a confirmation order. Appealing a confirmation order is an order of magnitude more difficult than appealing an order in an adversary proceeding. To protect appellate rights requires staying implementation of the confirmed plan. Critically, the appellant must post a supersedeas bond. *See* Fed. R. Bankr. P. 7062. The bond required to stay a confirmation plan is often prohibitively expensive for potential appellants. If unable or unwilling to post a bond, the plan will go into effect, and the targets' appellate rights will be lost. In addition, the multiple interests implicated in plan will raise the substantive standards for securing a discretionary stay, as the staying court must balance the interests of the appellant with the rights of the other parties affected by the plan. Thus, as a practical matter, many litigants enjoined in a chapter 9, 11, 12, or 13 plan will be foreclosed from appealing the confirmation order.

Injunctive and other equitable relief, like other relief targeted at a particular defendant, should be available only in an adversary proceeding. Only by adherence to the need for a discrete, individualized proceeding will the rights of the targeted defendants be fairly adjudicated, free of the imperatives surrounding plan formation. We strongly oppose this change.

Sincerely yours,

Francis M. Allegra
Deputy Associate Attorney General

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

March 12, 1998

Francis M. Allegra
Deputy Associate Attorney General
U.S Department of Justice
950 Pennsylvania Avenue, N.W.
Room 5236
Washington, D.C. 20530

Re: Proposed Amendments to Rule 7001 of the Federal Rules of Bankruptcy Procedure

Dear Mr. Allegra:

Thank you for your letter of February 26, 1998, commenting on the proposed amendments to Bankruptcy Rule 7001. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Bankruptcy Rules. The committee will meet on March 26-27, 1998, and it will consider all comments submitted on the proposed amendments.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Advisory Committee on Bankruptcy Rules
Professor Daniel R. Coquillette

THE COMMITTEE ON FEDERAL COURTS
THE STATE BAR OF CALIFORNIA

555 FRANKLIN STREET
SAN FRANCISCO, CA 94102-4498
(415) 561-8200

February 17, 1998

97-BK-016

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Re: *Proposed Amendments to the Federal Rules of Bankruptcy Procedure*

Dear Secretary McCabe:

The Committee on Federal Courts of the State Bar of California (the "California Federal Courts Committee"), wishes to make the following comments to the Preliminary Draft of the Proposed Amendments to the Federal Rules of Bankruptcy Procedure circulated in August, 1997.

The California Federal Courts Committee **supports** the proposed amendments to Federal Rules of Bankruptcy Procedure 1017 and 2002(a) (notices of motion to dismiss); 2003 (election of trustees); 4004 and 4007 (deadlines keyed to the meeting of creditors); 7001 (post-confirmation injunctive relief); and 7004(e) (service in a foreign country).

The California Federal Courts Committee **opposes** the proposed substantive portions of the proposed amendments to Federal Rules of Bankruptcy Procedure 1019 and 9006 concerning administrative expense claims. The California Federal Courts Committee believes that a "request" is not a readily known form of pleading and generally will require professional assistance. It will also require time on a court calendar for consideration of the request, even though payment is unlikely to be awarded. In other words, the amendment will increase the expense and efforts of the parties and the court for no beneficial purpose. The California Federal Courts Committee believes that a proof of claim, a simple document familiar to most business people and designed to be completed by a layperson, is a preferred method of having administrative priority claimants assert their rights. The proof of claim can simply lie dormant in the file until the trustee determines whether there will be a distribution to the pre-conversion administrative creditors. If there are sufficient assets in the estate to reach that level, the proofs of claim can be examined and the appropriate objections raised.

The California Federal Courts Committee also **opposes** the proposed substantive amendments to Federal Rules of Bankruptcy Procedure 3020(e), 3021, 4001(a)(3), 6004(g), 6006(d), 7062, and 9014. While the California Federal Courts Committee is not unmindful of the difficulties courts encounter in applying Federal Rule of Bankruptcy Procedure 7062, it believes that a better remedy would be to extend the scope of Federal Rule of Bankruptcy Procedure 7062 beyond "enforcement."

Further, the California Federal Courts Committee is of the opinion that the proposed amendments would create confusion. For example, the rule for stays of orders in contested matters, other than in the limited circumstances where modifications to other rules are being made, is unclear. In addition, with the exception of cash collateral orders, the more important orders entered in a bankruptcy case will be subject to a ten day stay. No reason is given for changing current practice which, although not trouble free, is at least known and in most circumstances clear and workable. The California Federal Courts Committee is of the opinion that without a serious problem of application or a meaningful improvement on the delivery of justice, current practice should remain.

Finally, the California Federal Courts Committee believes that there has been no justification for shifting the post-order burden in proceeding. Under present practice, the losing party in an order exempted from the ten day stay can orally request a stay pending appeal from the trial court. Under the proposed amendments, the prevailing party can ask that the order be made immediately enforceable. Reason would indicate that a judge who would not grant a stay pending appeal would make the order immediately enforceable. Conversely, a judge who is willing to grant a stay pending appeal is also likely to deny a motion to expedite enforceability. Hence, all the proposed amendments do is to transfer the burden of requesting post-ruling relief from the losing party to the prevailing party. The California Committee on Federal Courts is of the opinion that such a shift is not wanted, warranted or desirable.

Thank for the opportunity to comment on the proposed amendments to the Federal Rules of Bankruptcy Procedure. If you have any questions, please contact me at (213)894-2905.

Very truly yours,

THE COMMITTEE ON FEDERAL COURTS

By: 
Dennis Landin
Chair

cc: Monroe Baer
Staff Attorney
State Bar of California

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

March 12, 1998

Dennis Landin
Chair
The Committee on Federal Courts
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. Landin:

Thank you for your letter of February 17, 1998, commenting on all the proposed amendments to Bankruptcy Rules. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Bankruptcy Rules. The committee will meet on March 26-27, 1998, and it will consider all comments submitted on the proposed amendments.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Advisory Committee on Bankruptcy Rules
Professor Daniel R. Coquillette

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

97-BK-017

March 6, 1998

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Amendment to Bankruptcy Rule 7001

Dear Mr. McCabe:

The staff of the Securities and Exchange Commission opposes the proposed amendment to Federal Rule of Bankruptcy Procedure 7001, which eliminates the requirement that an adversary proceeding be commenced to obtain an injunction when such relief is provided in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Experience to date with injunctions incorporated in plans, which has occurred even in the absence of authorization under the Bankruptcy Rules, suggests that ratifying this procedure would impair important procedural rights of those subject to bankruptcy court injunctions.

Under the current version of Rule 7001, a person to be enjoined must be properly served with all supporting papers, the relief sought must be specifically described and limited in scope, and a well-established test weighing the balance of interests must be applied. Injunctions incorporated in plans do not carry such safeguards. We have reviewed many plans incorporating injunctions that are not prominently displayed and whose effect is not adequately described in disclosure statements. Such injunctions can readily slip by not only the affected party, but also by the court that is approving the plan. For example, in In re Arrowmill Development Corp., 211 B.R. 497 (Bankr. D.N.J. 1997), a plan of reorganization provided that the discharge injunction would extend to all liability on each allowed claim with respect to any equity interest holder, and that plan confirmation would discharge all claims against the debtor's equity holders or affiliates. In subsequent litigation by a creditor against a shareholder of the debtor, the state court found that even an experienced bankruptcy attorney would not have recognized the effect of these provisions, and that their scope and effect was never made clear during the confirmation process. The matter was returned to the bankruptcy court, which ruled that the provisions were not effective against the creditor because they function as a discharge of a nondebtor in derogation of 11 U.S.C. § 524(e).

The Arrowmill court expressly rejected the holding of two circuit courts, which had found a collateral challenge to a plan injunction barred by res judicata. See Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987); Monarch Life Ins. Co. v. Ropes and Gray, 173 B.R. 31 (D. Mass. 1992), aff'd, 65 F.3d 973 (1st Cir. 1995). These cases raise the troubling prospect that a party who was enjoined without having had the procedural protections available in any other injunctive setting, would nonetheless be bound. Given that the plan confirmation process does not focus on the rights of any one creditor, but is class oriented, and that plan injunctions are not subject to the limitations of Rule 7065 as to who may be bound, such an outcome would raise serious due process concerns.

Specifically, embedding an injunction in a plan, rather than requiring an adversary proceeding, shifts the burden from the debtor to the party sought to be enjoined. Rather than require full disclosure of the scope of the relief and its effect, the burden is on the creditor to discern it in the often lengthy and jargon-laden plan documents. Rather than require the movant to make the well-established showing of the necessity for the injunctive relief, the burden is on the creditor to come into court and object to the plan, under a statutory scheme that does not accord the same weight to his interests as the injunctive criteria. Appealing a confirmation order is onerous -- if a stay is not obtained or a bond posted, the doctrine of substantial consummation may lead to a forfeiture of appellate rights.

In the course of our investigations, we have reviewed plans that purported to extinguish law enforcement claims against directors, officers and affiliates of the debtor. While we thus far have been successful in persuading plan proponents to drop such provisions, we do not believe that the burden should be shifted to law enforcement authorities to come into bankruptcy court and prove why they should not be enjoined, or risk being foreclosed even by a clearly unlawful injunction. Yet the proposed amendments carry with them this very risk.

There is no evidence that the current version of Rule 7001 is sufficiently impairing the interests of debtors or others to counterbalance the fairness concerns raised by the proposed amendment. Accordingly, we urge that the amendment be rejected.

Sincerely,

Richard H. Walker
General Counsel

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

March 12, 1998

Richard H. Walker
General Counsel
Office of the General Counsel
U.S. Securities and Exchange Commission
Washington, D.C. 20549

Re: Proposed Amendments to Rule 7001 of the Federal Rules of Bankruptcy Procedure

Dear Mr. Walker:

Thank you for your letter of March 6, 1998, commenting on the proposed amendments to Bankruptcy Rule 7001. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Bankruptcy Rules. The committee will meet on March 26-27, 1998, and it will consider all comments submitted on the proposed amendments.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Advisory Committee on Bankruptcy Rules
Professor Daniel R. Coquillette

THE STATE BAR
OF CALIFORNIA

OFFICE OF RESEARCH

555 FRANKLIN STREET, SAN FRANCISCO, CALIFORNIA 94102-4498 (415) 561-8200

March 3, 1998

Peter G. McCabe Secretary
Administrative Office of the United States Courts
Ctee. on Rules of Practice & Procedure
Admin. Office of the U. S. Courts
Washington, DC 20544

97-BK-018

Re: Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure

Dear Mr. McCabe:

Enclosed are the comments of the State Bar of California's Business Law Section and Committee on Federal Courts in response to the September 9, 1997 request of the Administrative Office of the United States Courts on Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure.

These comments are being submitted solely on behalf of the Business Law Section and Committee on Federal Courts; they have not been considered or approved by the Board of Governors of the State Bar of California, and they do not constitute the official position or policy of the State Bar of California.

Thank you for providing us the opportunity to comment. If you have any questions, please feel free to contact me at (415) 561-8373.

Sincerely,

David C. Long
Director, Office of Research

DCL:ec
Enclosures

Copies to:

Ann Ravel
Jeff Gersick
Marie Moffat
Rhonda Nelson
Marie Hogan
Dennis Landin
Monroe Baer
Susan Orloff

C:\WORK_SECREFS\REFLS.97\97-73response.wpd

MEMORANDUM

TO: David C. Long, Director of Research
via facsimile: 561-8216

FROM: *Debtor/Creditor Relations and Bankruptcy Committee*

DATE: February 13, 1998

MATTER: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

RE: **SECRETARY REFERRAL 97-73**

Rule 1017

1017(a) and (b): No comment.

1017(c): We would suggest that the list of entities that receive notice of the motion to dismiss a Chapter 7 or a Chapter 13 case be expanded to include those entities who have filed and served a request for special notice in such a case. Although the motion to dismiss would happen early in the case and various creditors might not have requested special notice at the time the trustee files a motion, creditors that desire to know about all hearings and have filed (and served on the U.S. Trustee) a request for special notice should receive notice of any such motion to dismiss. Although the inclusion of "any other entities as the court directs" may be helpful in securing notice for parties that express an early interest in a case, service on the special notice list will guaranty that such parties receive notice of the motion.

1017(d), (e) and (f): No comment.

Rule 1019

No comment.

Rule 2002

The amendment to this rule would delete the requirement that notice of a hearing on dismissal of a chapter 7 case, based upon the debtor's failure to file required lists, schedules and statements, be sent to all creditors. It would coincide with amendments to Rule 1017 requiring notice to be sent to only certain parties.

Our concern is that, notwithstanding the economic issues and the savings occasioned by elimination of the notice, the fact that a bankruptcy case has been dismissed for any reason is of substantial importance to creditors who may have knowledge of the case and, therefore, believe that the automatic stay is applicable and other ramifications of the bankruptcy are operative.

Rule 2003

No comment.

Rule 3020

No comment.

Rule 3021

As the amendment is one which merely causes Rule 3021 to conform to the proposed amendment to Rule 3020(e) and is stylistic, we believe there is no comment which should be made to this rule. Any amendments affecting Rule 3021 are, by their nature, comments to the amendment to Rule 3020(e).

Rule 4001

Our comments are directed to the proposed amendment of Rule 4001(a)(3) of Federal Rules of Bankruptcy Procedure ("Rule 4001").

The proposed amendment to Rule 4001 makes it clear that any order granting relief from the automatic stay will be stayed automatically for ten days in order to afford losing parties sufficient time to request a stay pending appeal without the need for emergency procedures. The proposed amendment is consistent with the proposed amendments to Rules 3020, 6004 and 6006 which would also expressly provide for an automatic ten-day stay of the effectiveness orders confirming plans (Rule 3020), orders authorizing the use, sale or lease of property other than cash collateral (Rule 6004) and orders authorizing the assignment of executory contracts and unexpired leases (Rule 6006).

The proposed amendments will clarify what has been a consistent source of confusion in the Bankruptcy Courts—the applicability of Rules 9014 and 7062 (which together incorporate the ten-day rule of Rule 62(a) of the Federal rules of Civil Procedure into the Bankruptcy Rules of Procedure) to "contested matters" commenced by motion in the Bankruptcy Court. The principal source of that confusion stems from uncertainty regarding the definition of "contested matters" and, consequently, whether the 10-day stay rule applies in certain contexts (i.e., plan confirmation orders, orders sustaining claims objections, orders authorizing the payment of professional fees). These problems have been mitigated as to certain orders by virtue of the more recent amendments to Rule 7062, which made Rule 7062 expressly inapplicable to orders granting relief from the automatic stay, orders regarding the use, sale or lease of property, orders authorizing borrowings and orders authorizing the assumption and assignment of executory contracts and leases. The proposed amendment to Rule 7062, which will delete the foregoing additional exceptions to Rule 62(a), together with the proposed amendments to each of Rules 3020, 4001, 6004 and 6006 will eliminate the uncertainty regarding applicability of the ten-day stay rule so that parties will not erroneously rely on the automatic stay or mistakenly violate the stay. In addition, imposition of a ten-day

automatic stay during which time the losing party may seek a stay of the order pending appeal will appropriately place the burden on the prevailing party to demonstrate "cause" for modification of the stay, the consequence of which might effectively moot any appeal. Such amendment will further obviate the need for "emergency" oral motions made at the time that an order is entered in situations where the appeal would likely (and unnecessarily) be mooted if such order was not stayed. It would appear that this could have a significant impact on reducing the inevitable burden on the bankruptcy courts of dealing with emergency motions and related pleadings in connection with these types of orders.

Given the apparent intent of the proposed amendment to clarify existing law respecting application of the ten-day stay period, we note that there may be some unfortunate confusion created by virtue of the fact that the proposed amendment would impose the stay automatically "unless the court orders otherwise." It may be assumed that imposition of the stay should be "the rule" and that the "unless the court orders otherwise" exception should be subject to an extremely high standard (*i.e.*, "irreparable harm"). Otherwise, we can envision circumstances where, especially with respect to plan confirmation orders or asset sale orders, bankruptcy courts may begin to routinely lift the stay, *i.e.*, because the failure to do so will cause the proposed buyer "to walk" from the sale. Accordingly, for the benefit of objecting parties, we would urge the advisory committee to provide comments to clarify that, absent exigent circumstances, bankruptcy judges should not be accorded the discretion to potentially moot the appeal of an order just "to get the deal done." On the same note and for the benefit of the debtor, advisory committee comments should further clarify that the bankruptcy court should only use its discretionary power under Rule 4001 to reduce the ten-day stay period, not to extend such period (except perhaps for extraordinary "cause" with a standard tied to the statutory automatic stay provisions of Section 362 of the Bankruptcy Code). Advisory comments on both of these points would not doubt prove useful to bankruptcy judges and practitioners alike.

Rule 4004

No comment.

Rule 4007

We recommend that the Board of Governors approve the proposed amendments to Rule 4007(c) and (d). These amendments clarify that (i) the deadline for filing a complaint to determine dischargeability of a debt under Section 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held and/or concluded on that date; and (ii) any motion for an extension of time for filing a complaint must be filed before the time has expired. The remaining amendments are stylistic and are recommended as well.

We have one substantive comment regarding Rule 4007(c), but do not know whether it is appropriate to make such a comment at this stage in the process. Rule 4007(c) sets the deadline for filing the complaint as 60 days after the first date set for the meeting of

creditors. That will now be a date certain deadline. However, Rule 4007(c) also states that the Court shall give all creditors no less than 30 days' notice of that deadline. What happens if the Court fails to give 30 days' notice of the deadline or if the notice gives the wrong deadline? Which aspect of the rule governs? Perhaps this is just a theoretical problem if Courts always give the proper deadline and the proper amount of notice, but we think that there could still be some question as to the deadline given unfortunate facts.

Rule 6004

No comment.

Rule 6006

6006(d) seems at odds with Federal Rules of Bankruptcy Procedure Rule 7062, which provides that 365 orders are excepted from the general ten-day stay rule. The proposed revision to Rule 6006 must be reconciled with Rule 7062 to avoid confusion. However, the 365 exception to Rule 7062 was just added in 1991. Why the reversal?

In addition, is the "entry of order" a defined, objective event? If this issue comes up in Rule 7062, this may be the time to address it. Most assume the event to mean when the order is "entered" on the docket. The event triggering the ten-day period must be adequately defined and objective so that the parties can easily determine it. Is the "entered" stamp on the order always the date it is entered on the "paper" docket? And is the Pacer docket (being relied upon more and more) also accurate in relation to the "paper" docket and the order itself?

Rule 7001

No comment.

Rule 7004

Specifically regarding the proposed amendments to Rule 7004(e), we do not believe that we should recommend any action be taken. The proposed amendment merely seeks to make it clear that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country. In other words, if a summons is to be served upon any party in the U.S., it must be served within ten days of the date the summons is issued by the clerk. If not, an alias summons must be obtained. Pursuant to the proposed amendment, the ten-day limitation will no longer apply to any summons to be served upon a party outside the U.S. It appears that there is no deadline for service upon a foreign defendant except as otherwise provided by applicable international law.

Rule 7062

Existing law under Rule 7062 of the Federal Rules of Bankruptcy Procedure provides that Rule 62 of the Federal Rules of Civil Procedure apples in adversary proceedings and certain itemized contested matters, including orders terminating the automatic stay, orders resolving cash collateral issues, sales of property pursuant to Section 363 and the assumption and assignment of executory contracts under Section 365. Generally, the operative provisions of Rule 62 provide that a judgment in an adversary proceeding and orders from the itemized contested matters cannot be acted upon until at least ten days after entry of such orders or judgments. Consequently, all such orders and judgments have an automatic ten day stay. The rationale for the automatic ten-day stay is to allow the non-prevailing party to file a notice of appeal.

The proposed amendments to Rule 7062 would delete the application of the ten-day automatic stay to the itemized contested matters, but the ten-day automatic stay would still apply to judgments entered in adversary proceedings. The automatic ten-day stay for orders entered in contested matters would be deleted from Rule 7062. However, the net effect of deleting the ten-day automatic stay for contested matters would be added to other rules of the Federal Rules of Bankruptcy Procedure that address a particular contested matter. Specifically, the following rules of the Federal Rules of Bankruptcy Procedure: Rule 3020 (addressing confirmation of Chapter 9 and Chapter 11 plans); Rule 4001 (addressing orders granting relief from the automatic stay); Rule 6004 (addressing sales of property); and Rule 6006 (addressing assignment and/or assumption of executory contracts and unexpired leases) are all to be amended to provide for the automatic ten-day stay previously provided for in the prior version of Rule 7062. Overall, the proposed change to Rule 7062 of the Federal Rules of Bankruptcy Procedure will be addressed by the corresponding additions to the other rules that deal with the specific contested matters.

Rule 9006

No comment.

Rule 9014

We agree with the Committee Note that the provisions of Rule 62 are frequently not appropriate for orders granting or denying motions, and thus, should not automatically be imposed.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

March 12, 1998

David C. Long
Director, Office of Research
The State Bar of California
555 Franklin Street
San Francisco, California 94102-4498

Re: Proposed Amendments to Rules 1017, 2002, 3021, 4001, 4007, 6006, 7004, 7062, and 9014 of the Federal Rules of Bankruptcy Procedure

Dear Mr. Long:

Thank you for your letter of March 3, 1998, commenting on the proposed amendments to Bankruptcy Rules 1017, 2002, 3021, 4001, 4007, 6006, 7004, 7062 and 9014. A copy of your letter will be sent to the members of the Judicial Conference Advisory Committee on Bankruptcy Rules. The committee will meet on March 26-27, 1998, and it will consider all comments submitted on the proposed amendments.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Alicemarie H. Stotler
Advisory Committee on Bankruptcy Rules
Professor Daniel R. Coquillette

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE.
(904) 232-1852

February 25, 1998

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

From time to time the Committee on Rules of Practice and Procedure has recommended that the terms of its members be extended because the Rules Enabling Act process is such a lengthy one. The Executive Committee is sympathetic to that concern and has recommended that the Chief Justice consider longer terms for members of the Standing and Advisory Rules Committees.

In discussions at the Executive Committee's February 1998 meeting, the question was raised whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process. The Executive Committee would appreciate the Rules Committee's consideration of this issue. If appropriate, a legislative proposal could then be made to the Judicial Conference.

I look forward to seeing you at the Judicial Conference session in March.

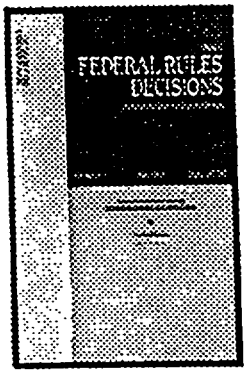
Sincerely,

Wm. Terrell Hodges

bc: Mr. Peter McCabe
Mr. John Rabiej

A SELF–STUDY OF FEDERAL JUDICIAL RULEMAKING

A Report From the Subcommittee on Long Range Planning to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States



Reprinted from
168 Federal Rules Decisions

delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights." [62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar.1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Commit-

62. 28 U.S.C. § 2072(a) & (b).

63. U.S. Const. art. III, § 1.

tee. (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed.R.App.P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly

64. Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev.Litigation 1 (1994).

choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[65]

65. The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

[16] **Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.**

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self–Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

Thomas E. Baker
Alvin R. Allison Professor
Texas Tech University School of Law

Frank H. Easterbrook
Circuit Judge
Court of Appeals for the Seventh Circuit

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end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.