ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Andover, Massachusetts
October 8-9, 1998

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of October 8 - 9, 1998
Rolling Green Inn & Conference Center
Andover, Massachusetts

Introductory Items

1. Welcome and introduction of new members.

2. Approval of minutes of March 1998 meeting. [Materials: Draft minutes.]

3. Report on the June 1998 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Materials: Draft minutes of the meeting.]

4. Report on the June 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 Mass Torts Working Group. (This will be an oral report.)

Action Items

6. Suggested clarifying change to the preliminary draft amendments to Rule 2014. [Materials: Reporter's memorandum dated 9/4/98; letter of Judge James A. Parker, a member of the Standing Committee and chair of its style subcommittee, dated 6/30/98.]

7. Report of the Subcommittee on Contempt. [Materials: Reporter's memorandum dated 8/28/98, proposed amendments to Rule 9020, and Committee Note; Mr. Kohn's memorandum dated 8/14/98; Reporter's memorandum dated 2/24/98.]

8. Proposed draft amendments to Rule 9011, as recommended by the National Bankruptcy Review Commission. [Materials: Reporter's memorandum dated 8/19/98.]

9. Rule 2003(b)(3) and temporary allowance of claims for purposes of voting on a trustee. [Materials: Reporter's memorandum dated 9/1/98; letter of Jeffrey K. Garfinkle, Esq., dated 7/15/98; copy of decision in In re San Diego Symphony Orchestra Association.]

10. Proposed amendments to Rules 2002(c), 3016, 3017, 3020(c), and Official Form 15 to afford procedural protection to entities whose conduct would be enjoined under a plan. [Materials: Reporter's memorandum dated 9/2/98.]

11. Proposed amendments to Rules 4003(b) and 1019(2) to provide a new period for objecting to a debtor's claim of exemptions after conversion to chapter 7. [Materials: Reporter's memorandum dated 8/30/98; letter of Bankruptcy Judge William H. Brown dated 11/4/96, with excerpt from article by Judge Brown.]

12. Report of the Forms Subcommittee on the recommendations of the National Bankruptcy Review Commission concerning reaffirmation agreements. [Materials: to be provided later.]

13. Suggested new rule concerning public companies in bankruptcy and reporting requirements of the Securities and Exchange Commission. [Materials: Reporter's memorandum dated 9/3/98; letter of Daniel J. Demers dated 8/2/98; Division of Corporation Finance, Securities and Exchange Commission, Staff Legal Bulletin No. 2.]

14. Suggested amendments to Rules 1007 and 2002 concerning notices to an infant or incompetent person. [Materials: Reporter's memorandum dated 9/8/98.]

Information Items

15. Reports on the status of the Electronic Case Files Initiative, the Electronic Courtroom Project, and other technology issues. (These will be oral reports.)

16. Additional subcommittee reports [if any]. (These will be oral reports.)

Administrative Matters

17. Appointment of new subcommittee members. [Materials: Current list of subcommittees and their members.]

18. Discussion of dates and locations for September 1999 meeting.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26 - 27, 1998

Winrock International Conference Center
near Morrilton, Arkansas

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
Professor Charles J. Tabb
Professor Kenneth N. Klee
Henry J. Sommer, Esquire
Gerald K. Smith, Esquire
R. Neal Batson, Esquire
J. Christopher Kohn, Esquire, United States
Department of Justice
Professor Alan N. Resnick, Reporter

Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), Bankruptcy Judge Paul Mannes, former chairman of the Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), attended part of the meeting on behalf of that committee.

The following additional persons attended the meeting: Joel Pelofsky, United States Trustee in Kansas City, Missouri, who represented Joseph G. Patchan, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; 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 Judge Tashima, Mr. Pelofsky, and the guests, and welcomed them to the meeting.

The Committee approved the draft minutes of the September 1997 meeting.

The Chairman reported on the January 1998 meeting of the Standing Committee. The Committee had no action items before the Standing Committee at the meeting. There were several topics discussed, however, on which the Standing Committee requested feedback from the Advisory Committees. One of these was whether there should be federal rules on attorney conduct which, the Chairman noted, was on the Committee's agenda for discussion later in the meeting.

Another topic was whether there should be a uniform date of December 1 on which local rules and amendments to local rules would take effect. The Reporter noted that local rules now take effect throughout the year, and an attorney can easily make the mistake of relying on a local rule that was changed a week or month earlier. The advantage of a uniform effective date, its proponents at the Standing Committee argued, is that practitioners would know they could rely on a rule for 12 months. Judge Mannes commented that a uniform date of December 1 sounded like a good idea, because it would mean that the local rules published in the various bankruptcy reference works would be the current ones. Mr. Kohn said he thought there should be provision for emergencies. The consensus was that random timing of local rules amendments is not a very significant problem, but that mandating a uniform effective date would be acceptable if there were provision for emergencies. The Committee noted that in bankruptcy there is the further problem of conforming to an ever-changing statute. Courts may need to prescribe interim rules to govern until conforming amendments to the national rules take effect about three years after statutory amendments are enacted.

The suggestion also was made at the Standing Committee meeting, the Reporter said, that the current procedure whereby local rules must be sent to the circuit council but take effect without any action by those entities should be reversed. In other words, the suggestion was, a local rule should not become effective until the circuit council had reviewed and approved it. The Reporter noted that implementing this suggestion would require amending 28 U.S.C. § 2071. The consensus was that any review and approval responsibility would require more resources

than currently available, and that circuit councils likely would review proposed local rules in the same manner as they review rules under the current review procedure. Judge Gettleman said such a review seems unnecessary when local attorneys participate in the drafting and many people review local rules before a district court prescribes them. The consensus of the Committee was that this proposal is not a good one.

A third topic is whether the rules committees should accept comments on published drafts sent by electronic mail ("e-mail"). The proposal, said the Reporter, is for a two-year experiment. E-mailed comments would receive only truncated response and would not have to be summarized by the reporters. Mr. McCabe noted that Judicial Conference procedures currently require that every written comment be acknowledged and that the author later receive a second letter describing what action was taken on that comment. Judge Kressel said the problem seems to be that the full-blown response may not be warranted for every comment, regardless of how it is transmitted. Professor Resnick said he did not want to become a censor of the comments, but would prefer that all comments be forwarded to the entire Committee. Some members said the Committee should see every comment, but not afford a full work-up to each one. Judge Robreno said the Committee should consider whether it really wants comments or not; he said he believed comments should come from as broad a group as possible. Judge Cordova said it would be best to see whether e-mailed comments actually become burdensome and, if they do, deal with the problem then. The consensus of the Committee was to try e-mail for a period, but treat e-mailed comments the same way written comments are treated now.

Lastly, the Reporter said, the rules committees had received letters from District Judge Terrell Hodges, chairman of the Executive Committee of the Judicial Conference, asking the committees to consider whether the rules process could be shortened, in order to expedite the process of amending rules. The consensus was that there should be an effort to speed up the process.

Judge Robreno reported on the recent meeting and activities of the Advisory Committee on Civil Rules ("Civil Rules Committee"). He noted that the Civil Rules Committee is proposing to revamp the discovery rules to restrict the scope of discovery in various ways, for example by limiting a deposition to one day or seven hours with court permission needed for going beyond that time. Proposed amendments to the discovery rules will be presented to the June 1998 meeting of the Standing Committee with a request that they be published for comment, he said. Judge Robreno also reported that the opt-out under the Civil Justice Reform Act would be ended, so that mandatory disclosure and a pre-discovery meeting of the parties would be required in every district. In addition, he said, the Chief Justice has appointed a group to work under the auspices of the Civil Rules Committee on problems in mass tort litigation. The group involves members of the Bankruptcy Committee and the Committee on Court Administration and Case Management and is to complete its work in one year.

Judge Kressel asked whether the bankruptcy rules should continue to permit opt-out, given the impending change in the civil rules. The Reporter said "the litigation package," to be

considered later in the meeting, would not make mandatory disclosures applicable in administrative motion matters, but that the amendment to the civil discovery rules would apply to adversary proceedings. Mr. McCabe said the Civil Rules Committee is working on a way to exempt simple cases, possibly by proposing an amendment to Rule 16. The overall plan for the civil and bankruptcy rules amendments would involve two litigation amendment packages moving together. Neither committee, however, has yet seen the other's work. It would be a mistake, he said, to publish inconsistent packages, and, therefore, each group needs to review the other's proposals. His preliminary review, he said, indicates that there is no inconsistency between the civil and bankruptcy proposals.

Action Items

Review of Comments to Preliminary Draft Amendments Published August 1997

The Reporter introduced the discussion and noted that the Committee had received 18 comment letters, 14 included in the agenda book and four received late and distributed with a separate memorandum. He also said that in reviewing the proposed amendments, he had discovered a need for a technical, conforming amendment to Rule 9006 that was not part of the published package. The published amendments would delete as unnecessary subdivision (b)(3) of Rule 1017, but Rule 9006 contains a reference to that subdivision. Accordingly, the Reporter recommended that Rule 9006 also be amended to delete the reference. **The Committee approved this recommendation.**

Professor Resnick also explained that the styling process with the Standing Committee had resulted in style differences between Rule 1017(e) as published with the draft amendments and Rule 1017(e) as it is proposed as part of "the litigation package." The Reporter said he planned to use the most recent version in both groups of amendments, avoiding changes to substantive amendments, however.

Most of the comments were directed to the amendments to the Rule 7062 package. Those who opposed the amendments did so on the ground that the amendments will slow down a case. The bankruptcy judges in California and Oregon, in particular, do not want a stay applied to an order lifting the automatic stay. One commentator suggested that a stay should apply only if a matter were really contested, and the Bankruptcy Law Section of the New Jersey State Bar suggested a three-day stay, rather than a ten-day stay. Professor Klee said an agreed order should not need a stay, and that since relief from stay seemed to have drawn the most objections, perhaps a three-day stay could be applied there. Judge Kressel, who chaired the subcommittee that developed the amendments, said the subcommittee had addressed all the matters raised in the comments and had rejected similar suggestions. It is sometimes difficult to know , after the fact, whether a matter was contested, he said. Moreover, people need to be able to ascertain later whether there was a stay in effect, he said. **The consensus was to leave the published draft unchanged.**

The comments were generally favorable on the proposed amendment to Rule 2002(a)(4) to delete the requirement to send notice to all creditors of a hearing on a motion to dismiss a case for failure by the debtor to file schedules and statements, although one writer did not appear to realize that creditors would receive notice if the case actually were dismissed. A member of the Committee, however, noted that Rule 2002(f), which provides for the later notice, does not have a time limit for sending the notice and does not include all entities that may have entered an appearance or filed a request for notice of everything filed. **The consensus, however, was to leave the published draft unchanged.**

The proposed amendments to Rules 4004 and 4007 would make it clear that the deadlines for filing a complaint objecting to discharge or to determine the dischargeability of a debt run from the first date scheduled for the meeting of creditors and not from the date the meeting actually was held, and that a motion to extend the deadline must be filed before the deadline expires. One commentator noted that the amendment also should afford guidance concerning what happens when a court does not rule on a timely filed motion until after the 60-day deadline expires. There is a split of authority on whether the motion becomes moot or the deadline is tolled. **The consensus was that this point should be addressed**, but not in the current proposed amendment, because the proposal had not been published. A member asked if there were a reason why Rule 4004(a) provides for 25 days notice of the deadline in a chapter 11 case and in Rule 4007(d) for 30 days notice in a chapter 13 case. The Reporter said that he was unaware of any reason and that conforming the notice periods also should be addressed at a future meeting.

The proposed amendments to Rule 1019(6) provide that the holder of an administrative expense claim incurred before a case is converted to chapter 7 must file a request for payment under § 503(a) of the Code, rather than a proof of claim. The Reporter noted that the comments on this amendment said that having to file a motion is a burden. In light of the comments, he asked whether the Committee wanted to consider adding to "a request for payment" the phrase "or a written statement requesting payment of an administrative expense." Judge Kressel said there is no requirement for an order to pay an administrative expense; most administrative expense claimants simply send bills that are paid. Professor Resnick responded that there appears to be a common perception that an order is required. Mr. Heltzel suggested permitting administrative expense claimants to use a proof of claim, a suggestion previously considered and rejected by the Committee, or drafting a new form to avoid the motion issue. Mr. Sommer said there is no requirement to file a motion, and the Committee should leave the proposed amendments as they are. He added that an administrative expense has no prima facie validity, like a proof of claim does, and the court may have to determine whether the expense was for the benefit of the estate. A member suggested that the Committee Note include a statement that the rule does not dictate the form of request. Professor Klee said the 90-day filing period prescribed by the rule should be changed to "a date fixed by the court," because in a chapter 11 case the 90-day period prescribed for cases under chapters 7, 12, and 13 does not apply. In order to accommodate the longer filing period afforded to a governmental unit under § 502(b)(9) of the Code, the suggestion was made to change the sentence that addresses claims of governmental units to "within the later of the time fixed by the court or 180 days." **The proposed**

amendment, as changed so that the court would fix the time, was approved without objection. The Reporter inquired whether the Committee thought the proposed amendments could go forward without republication. Professor Resnick said he believed they could. The Chairman requested that the Committee Note also be edited to reflect the discussion.

On the second day of the meeting, the Reporter distributed a revised draft that reflected the changes approved by the Committee. In addition, the Reporter asked whether the Committee would want to withdraw the proposed conforming amendment to Rule 9006(c) that would deprive the court of discretion to shorten the filing period. **The consensus was to withdraw the proposed amendment to Rule 9006 and to delete from the Committee Note the reference to that rule.**

The Reporter said that the proposed amendments to Rule 7001(7) had drawn little comment until after the official comment period had expired, but that the Department of Justice and the Securities and Exchange Commission had sent comments which had arrived recently. Both agencies opposed the proposed amendments as affording opportunities for a plan proponent to obscure the presence of injunctive provisions, sidestep the procedural safeguards otherwise required to obtain injunctive relief, and thereby prejudice one or more parties in the case. Professor Klee said the proposed amendment would not shift the burden to the party against whom any injunctive provision would operate, in terms of the law, although in practice that might be so. He said that in partnership cases, injunctive provisions against non-contributing partners are necessary for the plan to work. Mr. Kohn said steamrolling does happen and that appeal of an order confirming a plan is often impractical for a private creditor, because of the requirement to post a bond. Professor Resnick noted that § 524(g) of the Code, which was enacted as part of the 1994 amendments, ratifies pre-existing channeling injunctions in asbestos cases. Mr. Tenenbaum said that without the procedural safeguards of an adversary proceeding, a plan proponent could bury a moratorium on environmental enforcement or similar provision in a plan, and Mr. Kohn noted that sometimes the person affected is not a creditor, but some third party. Mr. Batson said that sometimes an adversary proceeding is not practical. An example, he said, was the Dalkon Shield case in which there were 250,000 claimants against whom the channeling injunction was to operate.

The Reporter suggested that language could be added to the amendment to the effect that an adversary proceeding is required unless the plan provides "in conspicuous language" for one or more injunctive provisions. A member suggested tracking the language of Civil Rule 65(d) and adding language similar to "and the plan and order confirming the plan are in the form required by Rule 65(d)," but leaving out the part of Rule 65(d) that limits the injunctive effect to the parties to the action. Judge Robreno said he doubted the proposal really would prevent what he called the "drive-by injunction." Mr. Smith said every plan leads to an injunction today, binds everyone, and that it may be difficult to separate what is injunctive in a plan and what is not. Moreover, he said, § 524 says a discharge is an injunction. Professor Klee said the current rule is out of step with what occurs today. **A motion to adopt the amendments to Rule 7001 with the addition of a provision that, if the order confirming the plan includes an injunction it must**

be in the form required by Rule 65(d), carried.

On the second day of the meeting, the Reporter distributed a revised draft that added, starting on line 26, "and the order confirming the plan is in the form required by Rule 65, F.R.Civ.P," with an explanatory sentence also added to the Committee Note. Mr. Sommer said the proposed change was not an improvement, because it is often hard to ascertain what is injunctive. Judge Kressel also opposed the change on the ground that it leaves very unclear what is required or prohibited in a plan. Professor Klee suggested returning to the published draft, with its carve-out for a plan, and making only a stylistic change in line 2 to substitute another word for "Any." The Chairman suggested that the sentence should read: "The following are adversary proceedings:." **A motion to reinstate the published draft of Rule 7001 with the style change suggested carried with no objection.** Mr. Kohn said he remained concerned about specificity and consequences to affected parties and might bring the matter back to the Committee in the future.

The Reporter said the proposed amendments to Rules 1019(1)(b), 2003(d), and 7004(4) drew either no comments or only favorable ones.

There was no opposition to a motion to transmit the package of proposed amendments, as amended further in light of the public comments, to the Standing Committee with a recommendation for their adoption.

"The Litigation Package"

The Reporter introduced the package of amendments, explaining initially that the proposed amendments had been assembled in the agenda book in numerical order, rather than with Rules 9013 and 9014 first, as previously. He noted that the package had been approved, with some changes, at the September 1997 meeting, and subsequently had been reviewed by both the style subcommittee of the Standing Committee and the Committee's own style subcommittee, which met by conference call with the additional participation of Professor Klee. There remained, however, several open questions, he said.

Among the amendments approved at the September 1997 meeting, he said, was the deletion of Rule 9006(d), which governs the time for serving notice of hearings on motions and of any responsive affidavits. The reason for the proposed abrogation was potential conflict with the proposed amendments to Rules 9013 and 9014. Upon reconsideration, however, the Reporter said he believed Rule 9006(d) should not be abrogated but rather limited, so that it would affect only motions made in adversary proceedings and procedural motions and dispositive motions within Rule 9014 administrative proceedings, types of motions that are excluded from the scope of Rule 9014. Some members said they thought the cross-references in the draft amendment were unclear and suggested alternative approaches. Mr. Smith said resolution of the drafting problems should be left to the discretion of the Reporter. **A motion to approve the principle addressed in the draft amendment to Rule 9006(d) was unopposed.**

In addition, the Reporter said, he now believed the substance of Rule 9013, as it exists currently, does not appear in the proposed amendments and needs to be restored. Current Rule 9013 contains the basic requirements for a motion, *e.g.*, a motion "shall state with particularity the grounds therefor," etc. He had changed to the draft amendments to accomplish this objective by incorporating a cross-reference to Civil Rule 7(b)(1) in draft Rule 9014(m). **A motion to approve the amended draft was unopposed.**

The Chairman stated that votes on the above motions would be considered without compromise of the vote to be taken later in the meeting on the litigation package as a whole.

The Reporter next noted that the Committee previously had approved amendments that would provide new procedures for requests for court approval of the employment of professional persons, but had been unable to agree on new language to define the information that must be disclosed by the professional. Although the draft Rule 2014 would not be governed by Rule 9014, and would be a free-standing rule procedurally, the improvements already approved could go forward with the litigation package, leaving to further deliberation the issue of the scope of disclosure by the professional. Professor Klee said the Committee had been frustrated in its attempts to provide guidance in the rule by the language of § 101(14) and § 327(a) of the Code and that he favored going forward with the proposed amendments. Mr. Pelofsky said the United States trustee system especially supports the proposed requirement to supplement initial disclosures. The Reporter said that Mr. Rosen had telephoned with a suggestion that subdivisions (f) and (g) of the draft should be transposed to make it clear that the arrival of a new partner in a firm can necessitate supplemental disclosure. In addition, members suggested substituting "becoming aware of" for "discovering" in line 76 of the draft and inserting in the Committee Note language to make it clear that the intent of the rule is to require supplemental disclosure whether the fact of which the professional became aware occurred before or after the earlier disclosure. **The Committee approved including the amendments to Rule 2014, with the changes noted, as part of the proposed amendments to be published for comment.**

The Reporter stated that the style subcommittee, during its review of the proposed amendments, had noted that Rule 3012 needed substantial stylistic improvement and had requested the Reporter to redraft it. In particular, the subcommittee had noted that the rule erroneously refers to valuation of a claim rather than of property and that the title of the rule also needed to be changed to make a similar correction. Professor Klee said the title should be further changed to read "Valuation of the Estate's Property Securing Lien." **The Committee approved the re-styling of proposed Rule 3012, including Professor Klee's suggestion.**

The Reporter said further that at the September 1997 meeting the Committee had requested that he include a motion to modify a chapter 12 or chapter 13 plan after confirmation under Rule 3015(g) among the proceedings to which proposed Rule 9014 would apply. He said he had drafted amendments to Rule 3015(g) to accomplish that, but had placed in brackets at lines 24 - 26, the language indicating that a response to such a motion does not have to be served on creditors, and at lines 27 - 29, the complementary language to require the movant to include

with the motion the names and addresses of creditors affected by the modification. Mr. Sommer said he favored the language dispensing with service of a response on creditors, but said the rule should require that any response be served on the movant. He suggested inserting in line 25, after the word "creditor," the phrase "other than the movant." **The Committee approved the new draft, including Mr. Sommer's addition, and rejected the bracketed language at lines 27 - 29.**

The Reporter then directed the Committee's attention to the draft subdivision (c) of Rule 1006 which provides a procedure for a court to consider a request for waiver of the filing fee, if applicable law permits such waiver. This provision had been added, the Reporter said, at a time when a pilot program for *in forma pauperis* filing of bankruptcy cases had been in effect in six judicial districts. The pilot program had expired, leaving no authority for waiving the filing fee, and the Reporter recommended deleting the proposed amendment. Mr. Sommer, however, said that the definition of "filing fee" included in the rule covered fees other than the statutory fee prescribed in 28 U.S.C. § 1930(a) and these might be waivable, either under circuit decisions or under the terms of the miscellaneous fee schedule itself. Ms. Channon said that Judicial Conference policy is that no miscellaneous fee can be waived unless explicit authority to do so appears in the fee schedule. In addition, she said, the $15 trustee surcharge fee, which is payable at filing is prescribed in 11 U.S.C. § 330(b)(2) and is not tied to the chapter 7 filing fee as is the $45 trustee fee authorized under § 330(b)(1); rather, it must be paid by the judiciary to the trustee regardless of whether any money is collected. **The consensus was to delete subdivision (c) from the draft.**

The Chairman called for a motion on forwarding the litigation package and amendments to Rule 2014 to the Standing Committee with a request that the proposed amendments be published for comment, which motion was made and seconded. Judge Robreno stated that he incorporated his earlier comments on the amendments. **The motion carried by a vote of 8 to 2, with two members absent from the room. Judge Donald stated that she held Judge Cristol's proxy in favor of the motion, which would make the vote 9 to 2, and Judge Cristol stated on his return that he ratified her action.**

Introduction to the Litigation Package. Professor Resnick explained that this introduction, which the Committee had requested to be added to the package of amendments at the September 1997 meeting, had been drafted by himself and Professor Klee and circulated early for comments from Committee members. He said the introduction had been redrafted to reflect those comments and appeared in the agenda book together with an underline-and-strikeout version to show the changes that had been made.

Judge Robreno asked the purpose of the introduction, whether it was intended to promote support for the amendments or to explain alternatives. The Reporter said the purpose is to explain the package of amendments and how motion practice would be conducted if the amendments are adopted. National rules for motion practice are a new phenomenon and judges and practitioners probably will want some background and history of the amendments, along

with an explanation. For example, he said, the proposed amendments will be published in numerical order, and without some introduction, readers of amendments to Rule 1006 will not know they are reading conforming amendments and that the heart of the package is on page 60 or later, where Rules 9013 and 9014 will appear. Some members requested assurance that the Standing Committee would be informed that the Committee is divided concerning this package, and some wanted the fact of a minority view included in any published introduction. The Chairman said the Standing Committee would hear about the dissenting view, but he did not favor including that information in any published introduction. Other members agreed that no purpose would be served and that comments opposing the amendments and suggesting alternative approaches are certain to be received.

Professor Klee suggested that in line 127 the word "usually" should be inserted before the word "unrelated." Another member suggested that on page 9 of the draft a sentence should be added to highlight that subdivision (o) of Rule 9014, which provides for suspension of any requirement of the rule in a particular case, is not intended as a license to issue a general order or local rule effectively abrogating Rule 9014. The Reporter agreed to add a sentence to the introduction and to the Committee Note to Rule 9014 stating that the requirements of Rule 9014 may not be abrogated by general order or local rule. **The consensus was to forward the introduction, as amended at the meeting, to the Standing Committee with a request that it be published together with the Litigation Package, if the Standing Committee approves the Litigation Package for publication.**

Rule 9020

The Reporter introduced the proposed amendments, which would change the current rule to permit a bankruptcy judge to issue an order in a civil contempt proceeding that would be effective immediately, subject to appellate review. If the matter involved criminal contempt, the amendments would require the bankruptcy judge to submit proposed findings of fact and conclusions of law to the district court, and any order would issue from the district court. Amendments to Rule 9020 initially were proposed by Judge Small, who said, in a letter to the Chairman, that the rule's 10-day stay of the effect of a bankruptcy judge's order of contempt is unnecessary in light of circuit court decisions holding that bankruptcy judges have inherent power to punish for civil contempt. The Chairman said he would prefer a general statement that bankruptcy judges have authority to punish for contempt to the draft rule, which appeared to him to contain much legislating. Judge Gettleman said that subdivision (b)(2) was inappropriately restrictive; sometimes when the contempt involves disrespect or criticism of a judge, he said, the same judge should preside. Judge Tashima noted that civil contempt can involve long periods in jail and agreed with the concerns of the Justice Department about inviting questions regarding how far a bankruptcy judge constitutionally can go. Judge Kressel said the current rule also legislates, and that the line between civil and criminal contempt is not distinct and may have to be drawn by the courts. He suggested abrogating Rule 9020 entirely and stating in a Committee Note that the action does not indicate any lack of contempt authority. Judge Small said he is agreeable to abrogating the rule. Its original intent, he believed, was to increase the authority of a

bankruptcy judge but that the rule now inhibits that authority. **The Chairman appointed a subcommittee to recommend appropriate action concerning Rule 9020 at the next meeting. He appointed Judge Kressel to serve as chair and Judge Robreno, Judge Small, and Mr. Kohn as members.**

Attorney Conduct

The Standing Committee, which has been studying whether there is a need for any federal rule or rules governing attorney conduct in federal courts, has reached the stage of presenting options and draft rules to the various advisory committees and requesting feedback from them, both on the options and the drafts themselves. The materials and draft rules were prepared by Professor Daniel R. Coquillette, Reporter to the Standing Committee. Professor Resnick said the Standing Committee recognizes that bankruptcy proceedings represent a special situation, due in part to the fact that the Bankruptcy Code prescribes a standard for conflicts, and that the Standing Committee is prepared to consider separate rules for bankruptcy. The various alternatives presented center around Professor Coquillette's draft "core" rules. One is to take draft Rule 1, which states explicitly that the rules of the state in which the court is located govern an attorney's conduct in a federal matter. (All details would be left to the various state rules.) A second alternative would be to recommend adoption of Rule 1 plus the additional substantive Rules 2 - 10. Professor Resnick noted that bankruptcy proceedings are carved out of the reach of Rules 2 - 10 in subdivision (c) of Rule 1, so that the Advisory Committee would be free to adapt draft Rules 2 - 10 as necessary or draft entirely new rules of its own.

Concerning the draft rules, a member commented that draft Rule 2 might be acceptable, although the Weintraub[1] case says a trustee can waive a corporate debtor's attorney-client privilege. Draft Rule 3, concerning conflicts, presents deeper problems, a member said, because under its terms an attorney for a debtor in possession could represent an adverse party just by obtaining consent, which would be a violation of the Bankruptcy Code. A possible solution might be to add language stating the rule applies except when it would conflict or be inconsistent with the statute. Draft Rule 4, which covers business transactions by an attorney, also would need to be changed, because 18 U.S.C. § 154 forbids officers of a bankruptcy estate from purchasing property of an estate and offers no "reasonable transaction" exception. The Chairman said the Standing Committee wants a broad response on whether any rules are needed on this subject and , if so, whether the rules should resemble the proposed drafts. In an initial poll, 3 members favored no federal rules on attorney conduct, 7 members favored adopting Rule 1, with an explicit exception for any inconsistency with the Code or other federal law, and 2 favored adopting the full series of "core" rules, with appropriate exceptions for bankruptcy.

A question was raised whether bankruptcy should have its own rules. The Chairman said he doubted people would accept the idea that bankruptcy has different rules. Appropriate exceptions, he believes, would be alright, but not different rules. Judge Robreno asked, if a

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[1]Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985).

"core" rule is so important as to displace a state rule, why is bankruptcy different? Mr. Smith said one reason for core rules in bankruptcy cases is that there is no definition of an adverse interest. For example, he asked, to whom does the attorney for a debtor in possession owe the fiduciary duty: the estate, the corporation, the creditors? Appropriate rules for bankruptcy could fit into Professor Coquillette's framework, he said, but would displace the draft rules, at least to some extent. Mr. Foltz suggested that one approach might be to have different rules for the general counsel for a debtor in possession than for a special counsel. He noted that the client changes over time and cited as an example the fact that under state ethical rules, the attorney cannot use client confidences learned before filing against that now former client; yet the Bankruptcy Code requires the attorney for the debtor in possession to act in the interest of the estate. He suggested drafting bankruptcy rules and then working to convince the states to adopt them. **The consensus was to report to the Standing Committee that the Advisory Committee supports the concept of draft Rule 1 with an exception to the applicability of state rules when they are inconsistent with bankruptcy statutes. In addition, the Advisory Committee would not oppose the "core" federal rules approach (draft Rules 2 - 10) for the civil rules. If that approach is followed, however, more comprehensive study and drafting would be necessary to formulate "core" bankruptcy rules. Such an effort would be a long term project, probably requiring at least three years to complete.**

Notice to Governmental Units

The Reporter reviewed the Committee's actions at the September 1997 meeting by which the Committee had approved amendments to Rule 2002(j) that would 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. Proposed amendments to Rules 1007 and 5003 had been referred back to the subcommittee on government noticing. The chairman of the subcommittee, Judge Small, reviewed the new draft and described the changes made since the September 1997 meeting.

In Rule 5003, the changes related to the registry of addresses to be maintained by the clerk. They would require the clerk to update the registry annually, limit an agency to a single address but give the clerk the option to include more than one address, and provide a safe harbor if the registry address were not used, which the Reporter was to draft by tracking as closely as possible the language of § 523(a)(3) of the Code. In tracking § 523(a)(3), lines 20 -24 of the draft rule extend safe harbor protection to a debtor that used a different mailing address if the governmental unit had notice or actual knowledge of the case or proceeding in time to participate in it. Mr. Kohn, who had circulated a memorandum dated February 2, 1998, to the subcommittee opposing the safe harbor provision, reiterated his objections. He suggested that Rule 5003 should provide a safe harbor only if the registry address is used and that similar proposed amendments to Rule 1007 should not be forwarded. The Reporter suggested as an alternative, changing line 21 of proposed Rule 5003 to say that failure to use the registry address "does not invalidate any notice that is otherwise effective under applicable law," leaving out any mention of actual knowledge. Professor Klee said he thought the concept of actual knowledge in time to

protect the government's rights should stay in the rule. Mr. Kohn said there are decisions in many circuits saying knowledge of the existence of a bankruptcy case is not enough, that a creditor has no obligation to monitor a case continuously, and that due process requires that the creditor receive specific notice of important events such as the claims bar date, which in chapter 11 is not provided by rule but must be set by the court. **A motion to adopt the draft as proposed by the subcommittee passed by a vote of 9 to 2. Mr. Heltzel said the clerk should be able to include in the registry a municipal governmental unit's address, at the clerk's option, and there was no opposition from the Committee to amending the Committee Note to accommodate this request.**

A member raised again the issue of knowledge by the government of the case or proceeding, and alternatives to the draft language were suggested. The Chairman said that using a different address could not invalidate a notice. Any notice that would suffice otherwise should suffice under the rule, he said. Alternatives again were suggested, including "but the failure to use the mailing address in the register does not invalidate the legal effect of any notice," and "but this paragraph does not preclude use of a different mailing address." **On a motion to reconsider the vote on this issue, there was no opposition to amending the draft starting at line 20 to say "but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law."** In conformity with this action concerning Rule 5003, **there was no opposition, with regard to Rule 1007, to changing the final sentence of proposed subdivision (m)(1) to "Failure to comply with this paragraph does not affect the debtor's legal rights." There also was no opposition to deleting proposed subdivision (m)(2) and conforming the Committee Note to the actions taken on the draft rule.**

The question of how to provide notice of potential imminent harm to public health or safety emanating from a debtor's property, together with proposed additional questions to the debtor's statement of financial affairs that are of interest to government agencies had been considered at the September 1997 meeting and referred to the subcommittee on forms. Mr. Sommer, the chairman of the subcommittee, first noted several corrections to the texts of the forms as printed in the agenda book.

Concerning the notice of imminent harm, Mr. Sommer recalled that the Committee had been troubled that placing the information in the statement of financial affairs and then requiring that portion of the statement to be sent to certain government agencies might require an enabling rule change. Accordingly, at the suggestion of the Reporter, the subcommittee now proposed to amend the voluntary petition by adding an "Exhibit C" checkbox to the form and an exhibit to be filed if any imminent danger needed to be reported. Professor Klee expressed concern about Fifth Amendment implications if a debtor's statement might be incriminating. Mr. Sommer said the subcommittee had not discussed the issue, but it seemed no different to him than the debtor's schedules. As with any other matter in a case, he said, a debtor could refuse to answer and let the court treat the matter as it would under § 344 of the Code. Judge Gettleman said he did not view "Exhibit C" as incriminating and believed the question would be a fairly innocent one for almost anyone. **The Committee approved the proposed amendments to the voluntary petition**

(Form 1) and the proposed new "Exhibit C" without opposition.

With respect to the statement of financial affairs, Mr. Sommer said, the subcommittee had considered five new questions and, in the course of addressing them, had amended current question 16 and moved it, and had amended the instructions concerning the obligation to complete the "business questions" portion of the form. Question 16, which asks whether the debtor is or has been "in business," would become question 17 and be answered by every debtor and would cover the full six years prior to filing rather than only two years. The instructions also would be amended to require a debtor to complete the business questions if the debtor is or had been in business, as defined in the form, during the six years prior to filing. Mr. Sommer noted that some of the business questions request information covering six years, and the changes described would assure that all debtors that would be required to answer any question in the business section of the form would know they need to complete it. One of the new questions would be added as (new) question 16 and would address community property owned by a debtor and a nonfiling spouse or former spouse. The subcommittee had approved the question in part but had reserved for consideration by the full Committee the issue of whether a debtor should be required to disclose the Social Security number of a nonfiling spouse or former spouse. Mr. Kohn said a nonfiling spouse's name may change over time and the Social Security number is, therefore, important to creditors of the marital community. Of the remaining questions and amendments as proposed by the subcommittee, Mr. Sommer indicated that questions 17 - 22 were simply renumbered and that questions 16 and 23 - 25 were new. He noted that question 25, which requires various disclosures concerning environmental matters, contains no time limits. **The Committee disapproved requiring disclosure of the Social Security number of a nonfiling spouse in proposed question 16 of the statement of financial affairs (Form 7), but otherwise approved, without opposition, the proposed amendments to the form.**

Mr. Sommer observed that when proposed amendments are published, judges and practitioners tend to comment on the entire form rather than just the portions to be amended. He asked if the Committee would want the forms subcommittee to consider the rest of the statement of financial affairs for possible amendments prior to publication. The Reporter said that the proposed amendments to the forms are part of the larger government noticing package of amendments to the rules and forms. He said there would not be time to consider amendments to the rest of the form before the June 1998 meeting of the Standing Committee and that allowing time for that consideration would, therefore, delay the government noticing package. **The Committee directed that only the amended questions and new questions be published.** For the **new questions, the Committee directed the inserting of a signal such as, "The following question is new,"** rather than using the underline/strikeout format, which would result in the underlining of the entire question.

National Bankruptcy Review Commission Report

The Reporter observed that most of the recommendations that relate to rules involve proposals that would implement recommended amendments to the Code. Until and unless

Congress enacts the legislation, it would be inappropriate for the Committee to propose rules, he said. **The Committee agreed.** Accordingly, the Committee considered only those recommendations that could be characterized as "stand alone" recommendations, those which do not require legislation. In addition, Judge Robreno noted that the Commission's recommendations are not the mandate of Congress and that the Commission itself was deeply divided on many of the recommendations.

The Commission recommended further amending Rule 9011 to require an attorney to make a reasonable inquiry into the accuracy of the information in the debtor's schedules, statement of affairs, lists, and amendments thereto. Judge Tashima noted that this would only make explicit what many think already is implicit in the rule. A member said any amendment should avoid turning a "reasonable inquiry" into an audit of the debtor by the attorney. **The Committee agreed to consider amending Rule 9011 in the manner recommended by the Commission at the Committee's next meeting.**

The consensus was that the Commission's recommendation that an official form be created for a motion for approval of a reaffirmation agreement was a good one, and the Chairman referred the matter to the forms subcommittee.

Concerning the recommendation that a creditor who does not receive notice of the bankruptcy should be afforded an extension of time to file an objection to the debtor's discharge or to seek revocation of the discharge, the consensus was to take no action.

With respect to the recommendation that the petition, list of largest creditors, and schedules of liabilities should require more specific disclosures concerning employee-related obligations, Mr. Sommer said the Committee could add more categories to the schedules but that the information mentioned by the Commission is required under the current schedules. **The consensus was to take no action on this recommendation.**

The Commission recommended amending Rule 2004(a) to include examiners among those who may seek an order authorizing an examination under the rule. The Reporter stated that an examiner usually is appointed for cause and charged with investigating or examining specific matters, while Rule 2004(b) is a "fishing expedition" authorized by a court order. Mr. Batson said an examiner occasionally may need an order to do the job, and Professor Tabb said the authority to issue an appropriate order appears to exist under section 105 of the Code. **The consensus was that no amendment is necessary, but that the Reporter should monitor the cases and bring the issue to the Committee if future developments warrant.**

The Commission recommended 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. Some members thought the Committee could consider this proposal, and whether the bankruptcy rules have the authority to address the matter, as part of the work on the proposals for governing attorney conduct. Others said the subject really could be

addressed only by the district courts. **The consensus was to take no action.**

The Commission also recommended in the section of its report titled "Taxation and the Bankruptcy Code," that notice to governmental units be improved and that a registry of addresses of governmental units be established and maintained by each bankruptcy clerk. The Committee noted that it already had approved publication of proposed amendments to implement both recommendations.

Rules 4003(b) and 1017(e)(1)

Rule 4003(b). The Reporter stated that the amendment's purpose is to permit an extension of time in which to file an objection to a debtor's claim of exemption when a court does not rule on a timely filed motion to extend the time until after the original time for filing an objection has expired. **The Committee approved the Reporter's draft without objection.**

Rule 1017(e)(1). As a companion measure, the Reporter presented an amendment that would also permit a timely filed motion to extend the time to file a motion to dismiss a case under § 707(b) of the Code to be granted after the expiration of the original time to file such a motion. **The Committee approved the Reporter's draft without objection.** Judge Kressel suggested that Rule 4004(c) also should be amended to permit the court to withhold a debtor's discharge while a motion to extend the time for filing a motion to dismiss the case under § 707(b) is pending. **The Reporter agreed to add the suggested amendment to Rule 4004(c).**

Rule 2002(g)

Proposed amendments to this rule were approved by the Advisory Committee in 1997. The Reporter stated that Mr. Rosen, who was unable to attend the meeting but had reviewed the materials, believed the rule to be ambiguous and had suggested changing the order of the sentences, to make it clear that the address in the last-filed document should be used. Professor Klee, although not objecting to changing the order of the sentences, said doing so would not cure the problem if the proof of claim happened to be the first-filed document. Mr. Heltzel said he always would prefer that a separate document be filed for an address change. He said the clerk's office procedure with a proof of claim is to enter the address shown and run a matching program in the computer. If the address is a duplicate, the program will throw out one; if the address is different, the program will retain both and the creditor may receive two notices. As a practical matter, he said, the effect is that the latest address is used. **The Reporter suggested withdrawing this subdivision from the package of rules to be submitted to the Standing Committee with a request for publication and considering revised proposals for amendment at the next meeting. The Committee agreed.** (Other proposed amendments to Rule 2002, however, will go forward.)

Rule 9022

Mr. Heltzel raised his proposal, set forth in a letter to the Reporter dated July 14, 1997, to authorize the court to direct a person other than the clerk to serve notice of the entry of a judgment or order. Mr. Heltzel said he recognized the possible incentive for delay and prejudice to the other party when the appeal time is only ten days. He noted, however, that the person directed to give notice also must file a certificate of service, thus putting any delay in the record, and that the losing party also can monitor the docketing of the order by checking the court's PACER service. Judge Kressel opposed the amendment, because of the prejudice that could result from any delay. Judge Duplantier said that departing from the procedure specified in the civil rules would raise questions among the members of the Standing Committee. **The Committee declined to take any action to amend the rule.**

Rule 9009

The Committee discussed whether Rule 9009 should be amended to remove from the court and the parties the ability to make "alterations as may be appropriate" to the official forms in light of the delay in implementing the amended § 341 notice forms (Official Forms 9A-9I) caused by changes requested by individual courts. A member said some forms, such as the ballot and various other notices used in chapter 11 cases, are intended to be changed as required in every case. It also had appeared, after investigation into the current delays at the Bankruptcy Noticing Center, that the changes being requested are appropriate and that the problem resulted primarily from inadequate planning on the part of the noticing center. Accordingly, **the Committee took no action**.

Official Forms

Ms. Channon reported that the Schedule of Creditors Holding Unsecured Priority Claims (Form 6E) and the Proof of Claim (Form 10) are scheduled to be automatically amended to reflect automatic adjustments to certain dollar amounts in the Bankruptcy Code which appear in those forms. The forms showing the new dollar amounts had been distributed to the courts, to automation staff, and to publishers and software vendors. Recipients of the new forms had commented that the language on the forms stating that the dollar amounts "are subject to adjustment on 4/1/98 and every 3 years thereafter" is very confusing now that the first adjustment has been made. It is unclear, the commentators said, whether the new amounts include the 4/1/98 adjustment. **The consensus was that the language should be clear and that clarity could be achieved by considering the date as part of the automatic adjustment process, so that the date could change with the dollar amounts every three years.**

Technology Developments

Professor Resnick reported that the Standing Committee had established a technology subcommittee with Gene W. Lafitte, Esq., as chairman, representatives from all of the advisory committees, and with the reporters to the advisory committees as *ex officio* representatives. From the Advisory Committee on Bankruptcy Rules, the designated member is Judge Cristol,

and Mr. Heltzel has been appointed a consultant. The role of the new subcommittee is to monitor technological developments and ensure that any amendments to rules that are needed to facilitate appropriate use of technology in court proceedings can be coordinated among all the bodies of federal rules. Ms. Channon reported that five bankruptcy courts now accept electronic filings: the Southern District of New York, the Eastern District of Virginia (Alexandria Division), the Northern District of Georgia, the District of Arizona, and the Southern District of California.

Alternative Dispute Resolution (ADR)

Professor Tabb, who chairs the ADR subcommittee, announced that the final draft of the study of ADR activities in bankruptcy courts by the Federal Judicial Center has been completed. The subcommittee, however, had not had time to consider it and evaluate whether rules amendments should be proposed. Mr. Niemic, who directed the study and drafted the report, said that 31 courts now are engaged in ADR programs. He said the problems identified in the study were confidentiality, which scored higher as a problem for parties than for mediators, and having a mediator who was not disinterested. The bankruptcy estate paid the mediator's fee in 21 percent of the matters referred, and mediators played a role in plan development in nine percent of matters referred. Confidentiality was a problem both when confidential information was disclosed and when the failure to disclose information prevented the judge from knowing something the judge needed to know about the case. Professor Tabb noted that Congress may act on the ADR recommendations made by the National Bankruptcy Review Commission, which would affect any proposals that might be made by the ADR subcommittee.

Subcommittees

The Chairman suggested that two subcommittees appear to have fulfilled their purpose and could be discharged, the local rules subcommittee and the Rule 2004 subcommittee. **The consensus was to discharge both subcommittees.** Judge Cordova said that if the issue of whether to permit an examiner to request an examination under Rule 2004 begins to generate conflicting case law, the subcommittee might need to be reestablished. He also indicated that he would be willing to serve as chairman if the subcommittee were needed again.

Meeting Dates

The Committee chose January 29, 1999, as the date for a public hearing on the amendments being submitted with a request for publication. The hearing would be held in Washington, D.C., and could be extended to January 30, if there are too many witnesses to be heard in one day. The Committee also selected March 18 -19, 1999, as the dates for its next spring meeting. The probable location for the meeting will be the Airlie Conference Center near Warrenton, VA. The Committee also decided to request that the public comment period close on February 1, 1999, to allow sufficient time to review what the Committee expects will be a large number of written comments.

Recognition

Ms. Wiggins thanked Judge Kressel and Professor Klee for reviewing the material prepared by the Federal Judicial Center for a computer-assisted learning program on the bankruptcy rules for use by deputy clerks in bankruptcy courts. She said both members had contributed many hours of time to the project, which now has been completed.

Respectfully submitted,

Patricia S. Channon

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 18-19, 1998
Santa Fe, New Mexico

DRAFT MINUTES

The midyear meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Fe, New Mexico, on Thursday and Friday, June 18-19, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Deputy Attorney General Eric H. Holder, Jr. represented the Department of Justice and attended part of the meeting. He was accompanied by Deborah Smolover and Stefan Cassella of the Department. Judge John W. Lungstrum articipated as a liaison from the Court Administration and Case Management Committee.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; and Mark D. Shapiro, deputy chief of that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Although the Magistrate Judges Committee had recommended that the Conference seek an amendment to the statute, it was suggested during Conference deliberations that the better course would be to follow the rulemaking process and amend Rule 5(c). Judge Stotler emphasized that this procedural matter had demonstrated the need for close coordination with other committees of the Judicial Conference on legislative proposals.

Judge Stotler reported that she had written a letter to Mr. Mecham, Director of the Administrative Office, expressing concern over a growing tendency in the Congress to pursue legislation that would amend the federal rules directly or otherwise circumvent the Rules Enabling Act. She noted, for example, that several provisions in the pending, comprehensive bankruptcy legislation — especially sections dealing with bankruptcy forms — reflected unfamiliarity with the rulemaking process established by the Act.

Judge Stotler said that she had acknowledged to Mr. Mecham the success of the Administrative Office's legislative efforts to protect the rulemaking process and deflect harmful statutory proposals. She had also urged greater interchange and dialog between the Legislative Affairs Office of the Administrative Office and the advisory committees, as well as additional dialog with both members and staff of the Congress.

Judge Stotler noted that Judge Niemeyer would represent the rules committees at the June 29, 1998 meeting of the long range planning committee liaisons of the Judicial Conference. She emphasized that defending the Rules Enabling Act process was a priority goal of the committee's long range planning process. Other long range planning priorities of the committee included restyling the federal rules and addressing the impact of technology on the rules.

Judge Sear reported that he had appeared at Judge Stotler's request on behalf of the committee before the ad hoc committee of the Judicial Conference studying: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training; and (2) the advisability of creating a special mechanism to resolve disputes between the two organizations. He stated that the ad hoc committee had emphasized that the Judicial Conference is the policy-making body for the judiciary, and that the Federal Judicial Center is the judiciary's primary educational body, but that the Administrative Office needs to maintain its own educational programs. He added that an interagency coordinating committee of senior managers of the two agencies had been formed to resolve disputes, but it was not expected that there would be a need for the committee to meet.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 8-9, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 28 bills and three joint resolutions were pending in the Congress that would affect the rules process. Summaries of each of the provisions, he noted, were set forth in the agenda report of the Administrative Office. (Agenda Item 3A) He added that 11 letters had been sent to the Congress on these legislative provisions expressing the views and concerns of the rules committees, and in some cases those of the Judicial Conference.

Mr. Rabiej stated that Judge Davis, chair of the Advisory Committee on Criminal Rules, had testified before the House Judiciary Subcommittee on Crime on proposed legislation that would amend FED. R. CRIM. P. 46 to authorize forfeiture of a bail bond only if the defendant fials to appear as ordered by the court.

He reported that the House had passed H.R. 1252. Section 3 of that legislation, now pending in a separate bill in the Senate, would authorize an interlocutory appeal of a decision to grant or deny certification of a class action. He pointed out that Judge Niemeyer had written to Senators Hatch and Leahy urging that they oppose section 3 on the grounds that: (1) it would achieve substantially the same results as new Rule 23(f) approved by the Supreme Court and due to take effect on December 1, 1998; and (2) it suffered from drafting problems that would introduce confusion and generate satellite litigation. He expressed confidence that if the legislation proceeded further, section 3 would either be eliminated or converted to a provision accelerating the effective date of new Rule 23(f).

Mr. Rabiej noted that S. 1352, introduced by Senator Grassley, would undo the 1993 amendments to FED. R. CIV. P. 30(b) and take away from parties the flexibility to use the most economical method of reporting depositions.

He pointed out that Judge Niemeyer had informed Representative Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, that the Advisory Committee on Civil Rules was planning to publish a proposed abrogation of the copyright rules for comment. At Mr. Coble's request, though, the committee had decided to defer the matter for another year.

Mr. Rabiej reported that the committee had notified Senator Kohl that the advisory committee had completed its discussion of protective orders and had decided to oppose his legislation that would require a judge to make particularized findings of fact before issuing a protective order under FED. R. CIV. P. 26(c). Mr. Rabiej also reported that the Administrative Office was continuing to monitor a bill that would federalize most class actions.

Administrative Actions

Mr. Rabiej reported that the Administrative Office was ready to place proposed amendments to the federal rules on the Internet for public comment. Some members suggested that the bar should be informed through notices in legal journals and newspapers about the opportunity to send comments electronically regarding the amendments on the Administrative Office's home page.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) She noted that the Center had conducted nearly 1,500 educational programs in 1997 that had reached 41,000 participants. The number of people reached, she said, will increase as a result of the new programs being developed for the Federal Judiciary Television Network.

She mentioned that the Center had more than 40 research programs pending and referred specifically to two of them: (1) a study of mass torts, focusing on policy and case management issues in the settlement of mass torts; and (2) a study on the use of expert testimony, specialized decision makers, and case management innovations in the National Vaccine Injury Compensation Program.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 12, 1998. (Agenda Item 5)

Judge Garwood stated that the advisory committee had approved several proposed amendments at its April 1998 meeting. But the committee had decided not to seek authority to publish the proposals for comment. Rather, it would hold them for publication in 1999 or 2000.

Judge Garwood said that a great deal of praise was due to Judge Logan for his prodigious and very successful efforts in achieving a complete restyling of the appellate rules. He noted that the restyled rules had recently been approved by the Supreme Court and would take effect on December 1, 1998.

Professor Schiltz reported that the advisory committee was considering a number of other potential changes in the appellate rules, but it wanted the bar to become familiar with the new, restyled appellate rules before requesting authority to publish any further proposed

amendments. He added that several of the most recent changes approved by the advisory committee were intended to address complaints by the bar about the proliferation of local court rules. The advisory committee had decided to approve certain national provisions in order to promote national uniformity.

He pointed out that the advisory committee was very supportive of the concept of establishing a uniform effective date for all local rules. He added that it had approved a proposed amendment to FED. R. APP. P. 47(a)(1) that would establish an effective date of December 1 for all revisions to local court rules. The amendment would allow a court to establish a different effective date for a specific rule only if there were an "immediate need" for the rule. It would also provide that a local rule may not take effect until it is received in the Administrative Office. He noted, however, that the Administrative Office wanted an opportunity to study the likely administrative and logistical consequences flowing from the proposal.

Professor Schiltz reported that the advisory committee had announced at the last Standing Committee meeting that its priority long-term project was to consider promulgating uniform national rules on unpublished opinions in the courts of appeals. But, he said, that after careful consideration, the matter was removed from the committee's agenda.

Professor Schiltz also reported that the advisory committee at its last meeting had discussed the desirability of: (1) shortening the length of the Rules Enabling Act process; and (2) permitting public comments on proposed rules amendments to be submitted to the Administrative Office electronically through the Internet. He said that the consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, but it did not have specific recommendations to shorten it. With regard to Internet comments, the advisory committee favored the proposal.

He said that the advisory committee had also addressed whether there was a need for national rules governing attorney conduct. He noted that a national standard of conduct was set forth in FED. R. APP. P. 46, that the rule had worked well, and that the advisory committee was not aware of serious problems with attorney conduct in the courts of appeals. He added that the advisory committee would be pleased to appoint members to serve on an ad hoc committee to consider attorney conduct, but the committee had no special expertise in this area. He also pointed out that some members of the advisory committee had expressed reservations regarding the proposed draft national rules on attorney conduct. He noted that they were broad in scope, and some of them went beyond conduct related to federal court proceedings. They governed, for example, conduct in a law office, such as confidentiality of client matters. Members of the advisory committee had also expressed concern as to possible limits on the authority of the rules committee to promulgate rules in this area.

Judge Stotler asked Judge Garwood and Professor Schiltz to share these comments and any other reservations of the advisory committee with the reporters of the other rules committees.

Professor Coquillette noted for the record that he personally did not advocate adoption of the 10 illustrative federal attorney conduct rules. He noted that he had been asked as reporter to prepare them only as a model of what national rules might encompass. He said that any set of national rules that the Standing Committee might adopt could be narrower than the 10 draft rules. He added that there was substantial support for a single national rule or a very small number of national rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of May 11, 1998. (Agenda Item 6)

Rules Amendments for Judicial Conference Approval

Judge Duplantier reported that the advisory committee was recommending that the Judicial Conference approve proposed amendments to 16 rules. The proposals had been published in August 1997. The advisory committee had considered the comments at its March 1998 meeting and was now seeking final approval of the amendments.

Professor Resnick stated that seven of the 16 amendments dealt with the issue of an automatic 10-day stay of certain bankruptcy court orders which, if not stayed, could effectively moot any appeal by the losing party. Three of the amendments dealt with narrowing certain notice requirements. Several of the remaining amendments, he said, involved technical matters.

10-Day Stay Provision

FED. R. BANKR. P. 7062 and 9014

Professor Resnick explained that FED. R. BANKR. P. 7062, which applies to all adversary proceedings, incorporates FED. R. CIV. P. 62 by reference and imposes a 10-day stay on the enforcement of all judgments. The advisory committee would not change this provision.

Bankruptcy Rule 9014 governs contested matters, which are initiated by motion. It specifies that Rule 7062 (and Civil Rule 62) apply to contested matters, unless the court directs otherwise. But Rule 7062 — the adversary proceeding rule — sets forth a laundry list

of specific categories of matters, added piece by piece over the years, that are excepted from the 10-day stay provision, all of them contested matters.

Professor Resnick said that the current structure and interaction of these rules was awkward, and it had caused problems in application. As a result, the advisory committee had appointed an ad hoc subcommittee to take a fresh look at the operation and effect of the 10-day stay on all types of contested matters.

After considerable study, the subcommittee and the full advisory committee concluded that it was appropriate to restructure the rules and separate the procedures for adversary proceedings from those for contested matters. First, it had decided to eliminate from Rule 9014 the reference to FED. R. BANKR. P. 7062 (and Civil Rule 62). Second, it would remove the list of excepted contested matters from Rule 7062. As a result, the rules would provide that orders in contested matters — unlike orders in adversary proceedings — would become effective upon issuance, and there would be no 10-day stay.

The committee decided, however, that there were a few types of contested matters to which the 10-day stay should apply as a matter of policy. Professor Resnick explained that the committee had concluded that it was best to relocate the stay provisions for these matters to the specific rules governing these contested matters.

FED. R. BANKR. P. 3020

Professor Resnick noted that Rule 3020 governs confirmation of a plan. He explained that the law today is ambiguous as to whether the court's confirmation order is stayed automatically. The advisory committee would amend the rule to make it clear that an order confirming a plan is stayed for 10 days after the entry of the order to allow a party to file an appeal. He added, though, that a bankruptcy judge would have discretion not to apply the 10-day stay in an individual case, or to shorten the length of the stay.

FED. R. BANKR. P. 3021

Professor Resnick stated that the proposed change in Rule 3021 was a technical amendment conforming to amended Rule 3020 and the 10-day stay of an order confirming a plan.

FED. R. BANKR. P. 4001

Professor Resnick stated that the proposed amendment to Rule 4001, dealing with relief from the automatic stay under section 362 of the Bankruptcy Code, was the most controversial proposal contained in the package of published amendments. He explained that, under the proposed revision, the parties would have 10 days to file an appeal from a judge's

order granting a motion for relief from the automatic stay unless the judge ordered immediate enforcement.

He noted that the advisory committee had received 13 letters during the public comment period addressing this provision, the majority of which had expressed opposition to the amendment. Several commentators were concerned that it would not be fair to give a debtor — whose request to life the automatic stay under section 362 of the Bankruptcy Code is denied by the court — an additional automatic 10 days enjoyment of the premises or automobile that is the subject of the lift-stay motion. Professor Resnick said that the advisory committee had debated the merits of the matter carefully and had voted to proceed with the amendment on the merits. He added that the moving party may always ask for immediate enforcement of an order lifting the stay, and the court has authority to include a provision for immediate enforcement in its order.

FED. R. BANKR. P. 6004

Professor Resnick explained that Rule 6004 governs court orders authorizing the use, sale, or lease of property. He said that the most common use of the rule involves application by the debtor to sell assets out of the ordinary course of business. He reported that the advisory committee concluded that this was the type of order that should be stayed for 10 days to allow the losing party to file an appeal. The 10-day stay was necessary because otherwise the holder of the property could sell it immediately to a good faith purchaser and effectively moot any appeal.

FED. R. BANKR. P. 6006

Professor Resnick said that the advisory committee proposed a similar provision in Rule 6006. He explained that the assignment of an executory contract was akin to a sale of property under Rule 6004, and an order authorizing the assignment should be stayed for 10 days to allow an appeal before the assignment is consummated.

Professor Resnick said that the proposed amendments to rules 3020, 3021, 4001, 6004, and 6006 were based on considerations of fundamental fairness. The advisory committee was aware of the need for finality of judgments but, on balance, it believed that it was necessary to establish a presumption of a 10-day stay in these discrete categories of contested matters in order to prevent a party's right of appeal from being mooted.

Some of the members expressed concern over the proposed amendments on the ground that they would delay time-sensitive matters and shift the burden from the losing party to the successful moving party. They stated that in ordinary civil litigation, there are not the same time-sensitive considerations as in bankruptcy.

Professor Resnick explained that ordinarily in civil cases there is a 10-day stay of all judgments. The proposed amendments to the bankruptcy rules, however, would provide a general rule that there is no 10-day stay in contested matters. But the above amendments to Rules 3020, 3021, 4001, 6004, and 6006 were designed as specific exceptions to the general rule. Moreover, the moving party can always ask the judge to waive the 10-day stay on the grounds that there is time sensitivity in a given case. In other words, in the specified excepted categories of contested matters the proposed amendments give the losing party 10 days to appeal the judgment, as under FED. R. CIV. P. 62.

The committee approved the proposed amendments to Rules 3020, 3021, 4001, 6004, and 6006 by a vote of 8 to 4. It approved all the other proposed amendments without objection.

B. Other Proposed Amendments

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017 currently provides that when a motion to dismiss is made — either for failure of the debtor to file schedules or for failure to pay the filing fee — the clerk must send notice of the motion to all creditors. He explained that the advisory committee had been asked by the Administrative Office to save money by considering limits on the amount of noticing to be performed by the clerk. The proposed amendment would have the clerk serve notice of the motion only on the debtor, the trustee, and such other entities as the court may direct.

A new subdivision 1017(c) would be added to specify the parties who are entitled to receive notice of the motion to dismiss. Professor Resnick explained that without the new subdivision there would be a gap in the rules, in that there would be no way to ascertain who must receive notice of the motion.

Professor Resnick pointed out, however, that in the new "litigation package" of amendments recommended by the advisory committee for publication, the substance of Rule 1017(c) would be moved to Rule 9014 as part of a general restructuring of the rules dealing with litigation and motion practice. Accordingly, if the litigation package were to become law on schedule, the new subdivision 1017(c) would remain in effect for only one year.

The advisory committee, he said, was very sensitive to the general policy of avoiding frequent changes in the rules, especially when changes are proposed in the same rule. Nevertheless, if the litigation package were not to become law, the change in Rule 1017(c) would be needed permanently.

FED. R. BANKR. P. 1019

Professor Resnick stated that Rule 1019 governs conversion of a case from chapter 11, 12, or 13 to chapter 7. He noted that there is uncertainty in practice as to what document should be filed by one seeking to recover preconversion administrative expenses. Therefore, the advisory committee would amend subdivision (6) to specify that a holder of an administrative expense claim incurred after commencement of the case but before conversion must file a request for payment under section 503 of the Code, rather than a proof of claim. Notice of the conversion would be given to the administrative expense creditors.

He noted that the advisory committee had made a change in the rule following the public comment period by deleting a deadline for filing requests for payment of preconversion administrative expenses that would be applicable in all cases. Instead, the rule would have the court fix the deadline.

FED. R. BANKR. P. 2002

Professor Resnick reported that the proposed change in Rule 2002(a)(4) conformed the rule to the changes proposed in Rule 1017.

FED. R. BANKR. P. 2003

Professor Resnick stated that Rule 2003(d) deals with disputed elections of chapter 7 trustees. He explained that Rule 2007.1 — which governs disputed elections of chapter 11 trustees — was better written and clearer. Accordingly, the advisory committee had chosen to conform the language of Rule 2003 to that of Rule 2007.1.

FED. R. BANKR. P. 4004

Professor Resnick reported that the language of Rule 4004(a) would be amended to clarify that a complaint objecting to discharge must be filed within 60 days after the first date set for the meeting of creditors, whether or not the hearing is held on that date. Rule 4004(b) would be amended to specify that a motion to extend the time for filing a complaint objecting to discharge must be "filed," rather than "made."

FED. R. BANKR. P. 4007

Professor Resnick explained that Rule 4004 governs denial of a discharge, while Rule 4007 governs the dischargeability of a particular debt. He said that the proposed changes in Rule 4007 were parallel to those proposed in Rule 4004.

FED. R. BANKR. P. 7001

Professor Resnick pointed out that under the present rule, a request for injunctive relief requires the filing of an adversary proceeding. But in practice an injunction is often embodied in a chapter 11 plan, and adversary proceedings are not in fact commenced. The advisory committee proposed conforming the rule to the practice and provide explicitly that an adversary proceeding is not necessary to obtain injunctive or other equitable relief, if that relief is specified in a chapter 9, 11, 12, or 13 plan.

Professor Resnick stated that Department of Justice representatives had expressed reservations to the advisory committee that the proposed amendment did not provide adequate procedural protections to all parties that might be affected by injunctive relief. They suggested, for example, that injunctive relief provisions might be embedded in plans that parties would likely not see or recognize in the absence of an adversary proceeding.

Deputy Attorney General Holder and Professor Resnick added that the Department had been discussing the matter with the advisory committee. As a result, its initial objections had now been withdrawn with the understanding that Mr. Kohn of the Department would be presenting the advisory committee at its October 1998 meeting with proposed procedural protections for inclusion in other bankruptcy rules.

FED. R. BANKR. P. 7004

Professor Resnick stated that the proposed change in Rule 7004(e) would provide that the 10-day limit for service of a summons does not apply to service made in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick reported that the proposed change in Rule 9006(b), governing time, was a purely technical amendment that had not been published for public comment. He explained that the rule currently provides that a court may not enlarge the time specified in Rule 1017(b)(3). But since the advisory committee would abrogate Rule 1017(b)(3), the cross-reference in Rule 9006 would need to be eliminated.

The committee approved the proposed amendments without objection. It further voted to approve the amendment to Rule 9006 without publication.

Amendments for Publication

A. Litigation Package

Judge Duplantier reported that the Federal Judicial Center, at the request of the advisory committee, had conducted an extensive survey of the bench and bar in 1995 inquiring as to the effectiveness of the Federal Rules of Bankruptcy Procedure. The survey results had indicated general satisfaction with the rules, but had identified motion practice and litigation in connection with "contested matters" as areas of significant dissatisfaction that needed improvement.

He added that the bar had complained that the national rules had left too many procedures for handling contested matters to local variation. Some of the local rules, moreover, are inconsistent with the national rules. Many local rules, for example, require a response to a motion, even though the national rules do not require a response. In addition, the national rules specify that a motion must be served five days before a hearing on a motion. Local rules, however, often specify different time frames.

The advisory committee, accordingly, undertook to address in a comprehensive manner the problems of litigation and motion practice. Judge Duplantier stated that the project had proven to be very complex and controversial. The committee had appointed a special subcommittee, which worked for two years to produce a package of proposed amendments. In turn, the full advisory committee addressed the proposals at four meetings, and it had approved a package of amendments that it believed would provide substantially better guidance and national uniformity for the bar. He added, however, that two members of the advisory committee had dissented on the proposals, largely on the grounds that they believed that litigation and motion practice should be left to local practice.

Professor Resnick added that the terminology currently used in the Federal Rules of Bankruptcy Procedure is confusing. He pointed out that the proposed amendments would not affect "adversary proceedings," which are akin to civil law suits in the district courts and are governed largely by the Federal Rules of Civil Procedures. Rather, they would govern the handling of proceedings that are presently called "contested matters."

"Contested matters," generally, are proceedings commenced by motion that initiate litigation unrelated to other litigation that may be pending in a bankruptcy case. But they are not akin to the kinds of motions filed in the district courts, which typically involve matters within a pending civil action. Rather, they embrace such subjects as the rejection of an executory contract, relief from the automatic stay, requests to obtain financing, and the appointment of a trustee in a chapter 11 case.

Professor Resnick said that the purpose of the proposed amendments is to provide greater guidance and uniformity in handling these important matters. At the same time, the amendments would allow more routine, non-contested matters to be resolved quickly, and normally without a hearing. The advisory committee's general restructuring would, thus, create three principal categories of bankruptcy proceedings: (1) adversary proceedings, governed by Part VII of the rules; (2) motions, governed by amended Rule 9014; and (3) applications, governed by amended Rule 9013.

The proposed amendments to Rules 9013 and 9014, he said, constituted the heart of the proposed package of amendments.

FED. R. BANKR. P. 9013

The amended Rule 9013 would establish a new category of proceedings called "applications," consisting of the 14 specific categories of matters set forth in subdivision 9013(a). These proceedings are normally non-controversial and unopposed, and the rule would allow them to be handled quickly and inexpensively. Included, for example, are such matters as motions to jointly administer a case and motions for routine extensions of time.

Rule 9014 would be the default rule. Accordingly, if a matter were not specifically listed as an application in subdivision (a), it would be governed by Rule 9014 or another rule expressed designated in Rule 9014(a).

Subdivision 9013(b) sets forth the requirements for requesting relief by application, and subdivision (c) specifies the manner of service. An application need not be served in advance and may be served at the same time that it is presented to the court. Service may be made in any manner by which a motion may be served under the bankruptcy rules, including service by electronic means, if authorized by local rule. Professor Resnick pointed out that the provision for electronic service represented an advance over FED. R. BANKR. P. 5005, which authorizes electronic means only for the filing of papers with the court.

A member of the committee asked why the advisory committee had chosen the term "application," rather than "motion." He pointed out that FED. R. CIV. P. 7 states explicitly that "an application for an order shall be by motion." Professor Resnick responded that the civil rules and the bankruptcy rules simply do not use the same terminology. He noted that a difference is made in bankruptcy between applications and motions. An application, in effect, is something less significant than a motion.

FED. R. BANKR. P. 9014

Professor Resnick explained that Rule 9014, as amended, would create a new category of proceedings called "administrative proceedings." They include more complex matters than applications and are more likely to be contested. Yet they do not require all the procedures of adversary proceedings under Part VII of the bankruptcy rules.

Subdivision 9014(a) carves out certain proceedings from the scope of Rule 9014, including involuntary bankruptcy petitions, petitions to commence an ancillary proceeding under section 304 of the Bankruptcy Code, bankruptcy appeals, adversary proceedings, and motions within adversary proceedings.

Professor Resnick stated that Rule 9014(b) provides that a request for relief in an administrative proceeding must be made by written motion entitled an "administrative motion." Unless made by a consumer debtor, the motion must be accompanied by supporting affidavits.

Rule 9014(c) governs service and provides that a copy of an administrative motion must be served at least 20 days before the hearing date on the motion. A response to the motion must be filed at least five days before the hearing. These dates currently are governed by local rules, which vary substantially from district to district. The proposed amendment to Rule 9014(c) also specifies the entities that must receive notice of the motion. Service may be made by any means by which a summons may be served or by electronic means if authorized by local rule. If the respondent fails to respond to the motion, the court may issue an order without a hearing.

Professor Resnick said that subdivision 9014(h) provides that the discovery provisions of the Federal Rules of Civil Procedure would be made applicable in administrative proceedings, with two exceptions: (1) the initial disclosure provisions of FED. R. CIV. P. 26(a); and (2) the requirement of a meeting of the parties under FED. R. CIV. P. 26(f). In addition, the 30-day time periods specified in the civil discovery rules, *i.e.*, FED. R. CIV. P. 30(e), 33(b)(3), 34(b), and 36(a), would be reduced to 10 days in order to expedite the processing of administrative proceedings.

Under subdivision 9014(i), witnesses would not be brought to an initial hearing. Professor Resnick explained that local rules of court currently contain great variations on this point. Under the proposed national rule, the court would conduct a hearing on the specified hearing date to determine whether there is a material issue of fact or law. The judge at that time would determine whether there is a need for an evidentiary hearing.

The amended rule provides that no testimony may be given at the initial hearing unless the parties consent or there is advance notice. If the court finds that there is an issue of fact,

the hearing becomes a status conference. The evidentiary hearing would be held at a later date. The rule, however, provides exceptions for certain time-sensitive matters, such as relief from the automatic stay and preliminary hearings on the use of cash collateral or obtaining credit.

Professor Resnick pointed out that the proposed new subdivision 9014(j) would make FED. R. CIV. P. 43 inapplicable at an evidentiary hearing on an administrative motion. The advisory committee, he said, had decided as a matter of policy that live testimony, rather than affidavits, should be required at the hearing. He added that new subdivision 9014(l) specifies several of the Part VII adversary proceeding rules that would apply to administrative proceedings.

Finally, subdivision 9014(o) would operate as a safety valve and would authorize the court, for cause, to change any procedural requirements of the rule. But it requires the court to give the parties notice of any proposed changes in the requirements.

OTHER RULES

Professor Resnick reported that the advisory committee had determined that a few proceedings in the bankruptcy courts simply did not fit well into one of the three major categories of adversary proceedings, administrative motions, and applications. Therefore, it had excluded these proceedings from Rule 9014(a) and would have them governed by other specific rules. He offered as examples FED. R. BANKR. P. 2014, which would prescribe special procedures for the employment of an attorney, and FED. R. BANKR. P. 3020, which would govern the confirmation of a chapter 11 plan.

Professor Resnick explained that most of the remaining amendments in the litigation package were conforming changes to accommodate the provisions of Rules 9013 and 9014.

Judge Duplantier asked the Standing Committee to approve:

(1) publishing the proposed litigation package, consisting of amendments to FED. R. BANKR. P. 1006, 1007, 1014, 1017, 2001, 2004, 2007, 2014, 2016, 3001, 3006, 3007, 3012, 3013, 3015, 3019, 3020, 4001, 6004, 6006, 6007, 9006, 9013, 9014, 9017, 9021, and 9034 ;

(2) publishing the accompanying commentary to the amendments, entitled, *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice,* as a guide to bench and bar; and

(3) providing a five-month public comment period from August 1, 1998, to January 1, 1999.

Professor Resnick noted that the litigation package included amendments to 27 different rules. He said that the volume of the changes made it difficult to follow without an explanation focusing on the heart of the changes, set forth in Rules 9013 and 9014. Therefore, the advisory committee's accompanying commentary had been prepared to assist the Standing Committee and the public during the publication period. It was not intended to become a permanent committee note.

The committee approved the litigation package and the accompanying commentary for publication without objection. It also approved the proposed five-month public comment period without objection.

Other Rules Amendments

Judge Duplantier reported that the advisory committee recommended publication of changes in several other rules, three of which deal with providing notice to government entities.

Government Notice Provisions

FED. R. BANKR. P. 1007

Professor Resnick stated that Rule 1007 requires the debtor to file schedules and statements. The proposed amendments to Rule 1007(m) would provide that if the debtor lists a governmental unit as a creditor in a schedule or statement, it must identify the specific department, agency, or instrumentality of the governmental unit through which it is indebted. Failure to comply with the requirement, however, would not affect the debtor's legal rights.

FED. R. BANKR. P. 2002

Professor Resnick stated that when the government is a creditor, the debtor must mail notices both to the pertinent government department and the United States attorney. He noted that the Department of Justice had complained that the United States attorney normally receives notices, but frequently does not know which government agency is involved. Accordingly, the proposed amendment to Rule 2002(j)(5) would require that the appropriate governmental department, agency, or instrumentality be identified in the address of any notice mailed to the United States attorney.

FED. R. BANKR. P. 5003

The proposed amendments to Rule 5003, dealing with records kept by the clerk, would require the bankruptcy clerk to maintain a register of the mailing addresses of federal and state governmental units within the state where the court sits.

Professor Resnick stated that concern had been expressed that if updates to the register were too frequent, lawyers might not have the latest edition at hand. Pending legislation in the House of Representatives would require the clerks to maintain a register and update it quarterly. The advisory committee, however, had decided that annual updates were sufficient.

The proposed amendment would not require the clerk to list more than one mailing address for any agency. But the clerk may do so and include information that would enable a user of the register to determine which address is applicable.

The mailing address listed on the register would be presumed conclusively to be the correct agency address. But failure by the debtor to check the register and use the proper address would not invalidate a notice if the agency in fact received the notice. Thus, the register would serve as a "safe harbor." A debtor who used it would be protected, and a debtor who did not would act at its own peril.

Other Provisions

FED. R. BANKR. P. 1017

The proposed amendment to Rule 1017, dealing with dismissal or conversion of a case, would authorize the court to rule on a timely-filed request for an extension of time to file a motion to dismiss a case for substantial abuse, whether or not it ruled on the request before or after expiration of the 60-day deadline specified in the rule.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6), dealing with notices, would provide an adjustment for inflation. Under the current rule, notice of a hearing on a request for compensation or expenses must be given if the request exceeds $500. The rule has remained unchanged since 1987. The advisory committee would raise the threshold amount to $1,000.

FED. R. BANKR. P. 4003

Professor Resnick said that the proposed amendment to Rule 4003, dealing with exemptions, was very similar to that proposed in Rule 1017. A party currently has 30 days to object to the list of property claimed as exempt by the debtor unless the court extends the time period. Case law has held that the court must actually rule on the extension request within the 30-day period. The amendment would permit the court to grant a timely request for an extension of time to file objections to the list, as long as the request is made within the 30-day period.

FED. R. BANKR. P. 4004

Professor Resnick explained that the proposed change to Rule 4004, dealing with the grant or denial of discharge, is a technical one, designed to conform to the proposed change in Rule 1017(e). It would provide that a discharge will not be granted if a motion is pending requesting an extension of time to file a motion to dismiss the case for substantial abuse.

The committee voted to approve the above amendments for publication without objection.

Proposed Amendments to the Official Forms

OFFICIAL FORMS 1 AND 7

Professor Resnick stated that the reasons for the proposed changes to the Official Forms were set forth at Tab 6D of the agenda book.

The committee voted to authorize publication of the amendments to the Official Forms without objection.

National Bankruptcy Review Commission Recommendations

Professor Resnick reported that the advisory committee was studying the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations, some of which called specifically for changes in the Federal Rules of Bankruptcy Procedure and were addressed to the advisory committee.

Judge Duplantier noted that the Committee on the Administration of the Bankruptcy System was taking the lead for the Judicial Conference in preparing and coordinating responses to the Commission's various recommendations. It had referred a number of recommendations to the Advisory Committee on Bankruptcy Rules, which in turn had decided that it would not take a position on any Commission recommendations that called for substantive changes in the Bankruptcy Code as a precedent to rules amendments. Several of the recommendations, however, called on the advisory committee to make changes in the rules and forms independent of legislative action. The advisory committee concluded that the appropriate response was to recommend that the provisions of the Rules Enabling Act be followed with regard to such rules-related recommendations.

Professor Resnick also pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code. In addition, he said, comprehensive bankruptcy legislation is pending in the Congress that would change many of the substantive

provisions of the Code. He said that legislative enactment of these provisions would require the advisory committee to draft amendments to the bankruptcy rules to implement the statutory changes.

Judge Sear moved to adopt the recommendations of the advisory committee regarding the report of the National Bankruptcy Review Commission. **The committee voted to approve the recommendations without objection.**

Informational Items

Judge Duplantier reported that the advisory committee had considered the issue of establishing a uniform effective date for local rules. It concluded that the issue was not very important, but that if a single date were chosen, it should be December 1 of each year. It also concluded that a safety valve should be provided in the rule to take care of emergencies and newly-enacted legislation.

Professor Resnick reported that the advisory committee had considered the proposal to permit the public to comment on proposed rule amendments by e-mail. It favored implementing the proposal for a trial period, but was of the view that e-mail comments should be treated the same as written comments.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of May 18, 1998. (Agenda Item 7)

Amendments for Judicial Conference Approval

FED. R. CIV. P. 6

Professor Cooper reported that the proposed change to Rule 6, dealing with computing time, was purely technical. He explained that a conforming amendment was needed in Rule 6(b) to reflect the abrogation of Rule 74(a) in 1997. The rule would be amended to delete its reference to Rule 74(a). He added that since the change was technical, there was no need to publish it for public comment.

FORM 2

Professor Cooper reported that paragraph (a) of Form 2 sets forth an allegation of jurisdiction founded on diversity of citizenship. It asserts that the matter in controversy exceeds $50,000. But the governing statute, 28 U.S.C. § 1332, had been amended to raise the

diversity jurisdiction threshold amount to its current level of $75,000. The advisory committee recommended that the language of Form 2 be amended to refer to the statute itself, rather than to any specific dollar amount.

Professor Cooper added that the advisory committee was of the view that this, too, was a technical change that did not require publication.

The committee approved the amendments to Rule 6 and Form 2 without objection and voted to forward them to the Judicial Conference without publication.

Amendments for Publication

Discovery Package

Judge Niemeyer reported that the advisory committee had been debating discovery issues for several years. Among other things, it had considered proposed amendments to FED. R. CIV. P. 26(c) as an alternative to pending legislation that would narrow or restrict the use of protective orders. More importantly, the committee had to address the impact on the district courts of the expiration of the Civil Justice Reform Act of 1990. Specifically, it had to decide whether the 1993 amendments to the civil rules — largely inspired by the Act and authorizing local variations in pretrial procedures — should be continued permanently or amended in certain respects.

The advisory committee had appointed a special discovery subcommittee — chaired by Judge David F. Levi and staffed by Professor Richard L. Marcus as special reporter — to study these issues and to take a comprehensive look at the architecture of discovery itself. Judge Niemeyer said that the subcommittee had been asked to address such matters as whether discovery is too expensive in light of its contribution to the litigation process. And, if it is too expensive, are there changes that could be made that would preserve the existing system, which promotes disclosure of information, yet produce cost savings? He added that the subcommittee had also been asked to consider restoring greater national uniformity to the rules by eliminating or reducing local "opt out" provisions authorized by the 1993 amendments.

Judge Niemeyer reported that the advisory committee had conducted an important conference at Boston College Law School with leading members of all segments of the bar, interested organizations, the bench, and academia. It had also asked the Federal Judicial Center to conduct a survey of lawyers on discovery matters. The data from that survey showed that about 50% of the cost of litigation is attributable to discovery, and that in the most complex cases that percentage rises to about 90%. The lawyers responded that discovery was very expensive, and 83% of them stated that they favored certain changes in the discovery

rules. In particular, they expressed support for providing: (1) greater access to judges on discovery matters; and (2) national uniformity in procedures.

Judge Niemeyer reported that there had been a consensus among the participants at the Boston College conference that:

1. Full disclosure of relevant information is an important element of the American discovery system that should be preserved.

2. Discovery works very well in a majority of cases.

3. In those cases when discovery is actively used, both plaintiffs and defendants believe that it is unnecessarily expensive. Plaintiffs complain that depositions are too numerous and expensive, and defendants complain most about the costs of document production, including the costs of selection, review to avoid waiver of privileges, and reproduction.

4. Where initial mandatory disclosure is being used, it is generally liked and is generally seen as reducing the cost of litigation.

5. National uniformity is strongly supported, and the local rule options authorized by FED. R. CIV. P. 26 should be eliminated.

6. The cost of discovery disputes could be reduced by greater judicial involvement.

7. The costs of document production are attributable in large part to the review of documents necessary to avoid waiver of the attorney-client privilege. Costs could be reduced if there could be a relaxation of the waiver rules for discovery purposes. (The advisory committee, however, was initially of the view that because privileges are generally governed by state law, it might be difficult to address this matter through the federal civil rules.)

8. Discovery costs could be reduced by imposing presumed limits on the length of depositions and the scope of discovery, particularly with regard to the production of documents.

9. An early discovery cutoff date and a firm trial date are the most effective ways of reducing costs. (The advisory committee concluded, however, that this matter could best be addressed by the Court Administration and Case Management Committee and by education of judges, rather than by rule amendments.)

Judge Niemeyer stated that the special discovery subcommittee had considered a wide variety of ideas and had presented the advisory committee with several different options. The central goal was to reduce the costs of discovery without undercutting the basic principles of open disclosure of relevant information. The advisory committee considered all the alternatives and concluded that any package of amendments that it would propose should be designed to enjoy general support from both plaintiffs and defendants.

He added that the political aspects of changes in the discovery rules were very important. Plaintiffs and defendants simply do not agree on some procedural matters. Nevertheless, the advisory committee was of the view that the package it had selected was very well balanced and fairly addressed the concerns of both sides. Judge Niemeyer reported that the advisory committee had chosen to proceed with proposals on which the vote was unanimous or represented a strong majority. On close votes, the committee either dropped the proposal or modified it to satisfy a significant majority.

Judge Niemeyer explained that the package adopted by the advisory committee did not reduce discovery. Rather, it would narrow attorney-managed discovery and make some of it court-managed discovery. The committee's proposal would limit attorney-managed discovery under FED. R. CIV. P. 26(b) to any matter, not privileged, that is relevant to a claim or defense of a party. Broader discovery of matters relevant to "the subject matter involved in the pending action" would still be available to the parties, but only on application to the court.

A proposed amendment to FED. R. CIV. P. 34(b) would authorize the court to limit discovery or require the party seeking discovery to pay part or all of the reasonable expenses incurred by the responding party. Judge Niemeyer reported that the special discovery subcommittee had recommended placing that provision in Rule 26, but the full advisory committee decided to retain it as an amendment to Rule 34. It also decided to include a note on the matter in the publication and invite public comment on the proper placement of the provision.

One of the members expressed strong opposition to the proposed changes, especially the amendment limiting the scope of attorney-managed discovery, and he described the amendments as "revolutionary." He said that they would "throw out" the present discovery system, which was well understood by the bar and had worked very well, and replace it with a system that required judges, rather than lawyers, to make discovery decisions. He also strongly objected to the amendment to Rule 34 authorizing the court to order cost sharing, which he described as "cost shifting." He predicted that defense lawyers would routinely challenge discovery requests by plaintiffs and seek to shift the costs of discovery to the plaintiffs.

Professor Cooper stated that the discovery subcommittee had not been discharged. It would continue to consider other matters, including the advisability of providing limited initial

disclosure of documents without waiving attorney-client privileges in order to reduce the burdens of document production and a presumptive age limit on the production of documents. It would also explore whether it would be practicable to develop discovery protocols or guidelines for various kinds of civil cases.

Professor Cooper also reported that the advisory committee had decided not to proceed further with proposals to amend the protective order provision of FED. R. CIV. P. 26(c).

Several members of the committee complimented the advisory committee and its discovery subcommittee on producing a well-researched, carefully-crafted, and objective package of amendments that, they said, managed to accommodate many difficult and competing considerations and achieve national uniformity. They said that although they might have reservations about individual provisions in the proposed discovery package, they favored publication of all the proposed amendments.

Judge Niemeyer asked Professor Marcus to describe the proposed amendments to each of the rules.

FED. R. CIV. P. 5

Professor Marcus stated that the proposed amendment to Rule 5(d) would provide that discovery materials need not be filed until they are used in a proceeding or the court orders that they be filed. He explained that the rule had been amended in 1980 to authorize a court to order that discovery materials not be filed with the clerk of court. Before that time, they had been filed routinely with the courts.

He reported that by the late 1980's about two thirds of the district courts had promulgated local rules prohibiting the filing of discovery materials generally. The Standing Committee's Local Rules Project had concluded that these rules were inconsistent with the national rules but had suggested consideration of amendment of the national rule. He added that the Judicial Council of the Ninth Circuit had recently recommended that Rule 5(d) be amended to authorize local rules to prohibit the filing of discovery materials, but the advisory committee had decided not to pursue that course of action.

Instead, the advisory committee had decided to propose a national rule that would excuse the filing of discovery materials and supersede existing local rules. The proposed Rule 5(d), which includes disclosures under Rule 26(a)(1) or (2) as well as discovery information, would provide that these materials "need not be filed." The committee note makes it clear that deposition notices and discovery objections would be covered by the rule. But medical examinations under Rule 35 would be unaffected by the amendment. Professor Cooper added that although discovery responses need not be filed under the proposed amendment, they could be filed if a party wished to file them.

Some members of the committee stated that clerks of court were experiencing serious space problems and that the filing of discovery materials would create burdens and costs for the courts. They suggested that the national rule be amended to prohibit the filing of all discovery materials except with court permission. Professor Marcus responded that public access to discovery materials was a controversial matter. Moreover, some lawyers wanted to reserve the opportunity to file certain materials with the clerk.

Judge Niemeyer noted that when Rule 5(d) had been amended in 1980, the press had expressed opposition on the grounds that the amendment would restrict its access to "court records." He added that the advisory committee had been concerned that a national rule banning the filing of discovery materials might provoke similar controversy and impede eventual passage of the amendment. Accordingly, it had decided to make only a modest change that would allow, but not require, parties to file materials.

Several members of the committee stated, however, that there was no requirement that discovery materials be made public, since they are not part of the public record unless actually used in a case. Justice Veasey moved to substitute the words "must not be filed" for the words "need not be filed" in line 7 of the proposed amendment to Rule 5(d). **The committee voted to approve the substitution without objection.**

Two of the members suggested that the proposed amendment include a provision placing an explicit responsibility on attorneys to preserve discovery materials. Other members stated, however, that local rules and case law adequately cover this matter.

The committee approved the proposed amendment for publication with one objection.

FED. R. CIV. P. 26

Professor Marcus reported the advisory committee had decided as a matter of policy to seek national uniformity in the rules regarding initial disclosures under Rule 26(a). He pointed out that mandatory disclosure was a controversial matter among the bench and bar, with strong views expressed both for and against it. He said that the advisory committee had considered three options: (1) to make the current Rule 26(a)(1) mandatory in all districts; (2) to abrogate Rule 26(a)(1) and preclude initial disclosure everywhere; or (3) to fashion a form of disclosure that would be nationally acceptable.

The advisory committee chose the third course. To that end, the proposed amendments to Rule 26(a)(1) would limit a party's disclosure obligation to materials "supporting its claims or defenses." Professor Marcus emphasized that the revised rule would promote national uniformity by eliminating the explicit authority of a court under the current rule to opt out of the disclosure requirements by local rule.

Two members questioned whether the phrase "supporting its claims or defenses" was broad enough to cover information that controverted an opponent's claims or defenses. They noted that this issue had been addressed in the committee note, but suggested that more comprehensive language might be incorporated in the rule itself. Professor Cooper responded that the advisory committee had deliberately chosen the language to be consistent with language already used elsewhere in the discovery rules. He pointed out, for example, that FED. R. CIV. P. 26(b), which defines the scope of discovery, refers only to "claims and defenses." He added that claims and defenses includes denials, but not impeaching materials.

One of the members suggested publishing alternative language on the scope of disclosure and soliciting public comment on the two versions. Judge Niemeyer responded that the advisory committee was of the view that only one version should be published for comment.

Professor Marcus stated that subparagraph 26(a)(1)(E) sets forth a list of 10 categories of civil actions that would be exempt from the initial disclosure requirements of the rule. He explained that discovery would be an unnecessary burden in these types of cases. He also pointed out that, after consulting with the chair and reporter of the Advisory Committee on Bankruptcy Rules, the two bankruptcy exceptions set forth as items (i) and (ii) in the subparagraph were unnecessary. Accordingly, Judge Niemeyer, Professor Cooper, and Professor Marcus suggested eliminating them from the proposed amendment.

Some of the members asked whether the list of exemptions in Rule 26(a)(1)(E) was accurate and complete. Professors Marcus and Cooper responded that the advisory committee expected to use the public comment process to refine the list further. They noted that the publication would flag the issue and ask for public comment on whether the types of civil cases listed were proper for exclusion, whether they were properly characterized, and whether other categories of cases should also be excluded.

Professor Marcus pointed out that the parties would be given 14 days, rather than 10 days, following the conference of attorneys under Rule 26(f) to make the required disclosures. Later-added parties would have to make their disclosures within 30 days, unless a different time were set by stipulation. And minor changes would be made in paragraphs 26(a)(3) and (4) to conform with the proposed changes in Rule 5(d) on the filing of disclosure materials.

Professor Marcus said that the proposed amendments to Rule 26(b)(1) would limit attorney-controlled discovery. But the court would have authority to permit discovery beyond matters related to the claims or defenses of a party. The language would be amended to make it clear that evidence sought through discovery must be relevant, whether or not admissible at trial. He pointed out that a new sentence had been added at the conclusion of paragraph (b)(1) to call attention to the limitations on excessive or burdensome discovery imposed by subdivision 26(b)(2)(i), (ii), and (iii).

Professor Marcus pointed out that the amendments to Rules 26(d) and 26(f), dealing with the timing and sequence of discovery and the conference of the parties, were linked. The language of both provisions would be amended to exclude "low end" cases, *i.e.*, the categories of cases exempted from initial disclosure requirements under Rule 26(a)(1)(E). He added that the amended rule would require that the conference of the parties under Rule 26(f) be held seven days earlier than currently in order to give the court more time to consider the report and plan arising from the conference. The amended rule would no longer require a face-to-face meeting of parties or attorneys, but a court could by local rule or order require in-person participation.

The committee approved the proposed amendments, with the change to Rule 26(a)(1)(E) described above, for publication with one objection.

FED. R. CIV. P. 30

Professor Marcus stated that Rule 30(d)(2) would be amended to limit the duration of depositions. Unless otherwise authorized by the court or stipulated by the parties and the deponent, a deposition would be limited to one day of seven hours. The rule would also be amended to include non-party conduct within the rule's prohibition against individuals impeding or delaying the examination.

Some of the members expressed doubts that a uniform limit on the length of depositions would be effective in practice, especially in multi-party cases. They noted that many variables had to be considered, and attorneys often do not have control over the course of their own depositions. They suggested that time limits on depositions would be difficult to regulate by rule and would best be left to the attorneys and discovery plans. Professor Marcus responded that there had been a strong majority on the advisory committee for making the change. Many attorneys have complained that overlong depositions result in undue costs and delays. Professor Cooper added that Rule 26(b)(2) currently authorizes a court to impose limits on the number and length of depositions. Moreover, a court would retain the power to extend a deposition on a party's request.

One member recommended that the amended rule require that the party taking the deposition notify the deponent 10 days in advance which documents owuld be the sugject of interrogation, that the moving party send the deponent pertinent documents in advance, and that the deponent be required to read the documents before taking the deposition. Some of the members agreed with the substance of the recommendation, but they suggested that the matter was one that should be left to good practice and trial strategy, rather than national rule. Judge Niemeyer added that the member's point was well taken, but that lawyers had told the advisory committee that the problem of unprepared witnesses rarely arose with experienced attorneys. In addition, there was a concern that deponents would be swamped with unrealistic volumes of documents submitted to protect any possible opportunity for use. Therefore, the

advisory committee had decided not to include in the amendments an express requirement that the deponent read certain documents in advance.

The committee approved the proposed amendments for publication by a vote of 6 to 4.

FED. R. CIV. P. 34

Professor Marcus stated that the proposed amendment to Rule 34(b) would provide that when a discovery request exceeds the limitations of Rule 26(b)(2), the court could limit the discovery or require that the requesting party pay part or all of the reasonable expenses of producing it.

One of the members strongly objected to this provision, stating that it would be used routinely by defense counsel to shift costs to plaintiffs, thereby driving many poor or economically-limited litigants out of the court system. He said that it would alter the entire philosophy of federal practice and should be rejected. He added that the courts already had the power to limit discovery and should not be given the authority to impose costs on the parties requesting discovery, except in very large cases.

But another member disagreed, countering that the "discovery" problem was real and needed to be addressed. He said that the proposed advisory committee amendment was neutral and applied equally to defendants and plaintiffs. He added that it was inappropriate to characterize it as an attempt to drive poor litigants out of the court system.

One member observed that the proposed amendments to Rules 26(b) and 34(b) would establish two different regimes of discovery, which might be denominated as "regular discovery" and "supplemental discovery." The former would be self-executing and without cost to the requesting party. The latter, though, would require court approval and could entail the payment of costs by the requesting party. Judge Niemeyer agreed with this characterization.

Judge Niemeyer added that the advisory committee would invite public comment on whether the cost-bearing provision was properly placed as an amendment to Rule 34(b) or should be added to Rule 26(b)(2), dealing with discovery scope and limits.

The committee approved the proposed amendments for publication by a vote of 7 to 3.

FED. R. CIV. P. 37

Professor Marcus pointed out that the proposed change in Rule 37, dealing with sanctions, would add a cross-reference to Rule 26(e)(2). This would close a gap left by the 1993 amendments to the rules and authorize sanction power for failure to supplement discovery responses.

The committee approved the proposed amendment for publication without objection.

Service on the United States

Judge Niemeyer reported that the advisory committee had received a request from the Department of Justice to allow additional time for the government to respond in cases when an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with the performance of official duties. The committee agreed with the Department's position and recommended publishing proposed amendments to Rules 4 and 12.

FED. R. CIV. P. 4

Professor Cooper stated that when an officer of the United States is sued in an individual capacity, the proposed rule would give the officer 60 days in which to answer. Subparagraph 4(i)(2)(A) would govern service in cases when an officer of the United States is sued in an official capacity. Subparagraph 4(i)(2)(B) would govern service of an officer sued in an individual capacity for acts or omissions incurring "in connection with the performance of duties on behalf of the United States." Professor Cooper pointed out that the quoted language had been crafted carefully with the assistance of the Department of Justice and was designed to avoid using existing terms such as "color of office" or "scope of employment" or "arising out of the employment," because these terms had developed particular meanings over time.

Under subparagraph 4(i)(2)(B), when a federal officer or employee is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States, service must be effected on both the officer or employee and the United States. The advantage of requiring service on the United States is that under Department of Justice regulations, the Department ordinarily defends officers sued individually if their acts were committed in the course of business.

Professor Cooper explained that new subparagraph 4(i)(3)(B) would allow a reasonable time to correct a service defect. Thus, if a plaintiff served only the affected officer

or employee, additional time would be provided to correct the defect and effect service on the United States.

Deputy Attorney General Holder stated that the rule was beneficial and would provide a single set of clear and understandable rules to govern all suits against the United States.

FED. R. CIV. P. 12

Professor Cooper stated that the proposed changes to Rule 12, dealing with defenses and objections, would provide that a response is due by the United States or an officer or employee sued in an individual capacity within 60 days after service. He added that the Department of Justice needed 60 days to determine whether to provide representation to the defendant officer or employee. Thus, the response time would be the same, whether the officer or employee were sued in an individual capacity or an official capacity.

The committee approved the amendments to Rules 4 and 12 for publication without objection.

Informational Items

Judge Niemeyer provided the committee with a status report on the work of the Working Group on Mass Torts. He said that the issues raised in mass tort litigation were very complex and controversial, and the working group had conducted meetings with some of the most experienced judges, lawyers, and academics in the country. He added that the group was planning on producing a report that would describe mass-tort litigation and identify problems that may deserve legislative and rulemaking attention. He expressed the hope that the report could also present a preliminary blueprint for action by identifying the legislative and rulemaking steps that might be taken to reduce the problems. He expected that the working group force would file a draft report in time for consideration by the Standing Committee at its January 1999 meeting.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of May 15, 1998. (Agenda Item 8)

Rules Amendments for Judicial Conference Approval

Judge Davis reported that the Standing Committee had approved publication of proposed amendments to eight rules and the addition of one new rule at its June 1997 meeting. The advisory committee had considered the public comments at its April 1998 meeting and

had conducted a public hearing addressing the proposed amendments on Rule 11 pleas and criminal forfeiture.

FED. R. CRIM. P. 6

Judge Davis stated that there were two amendments proposed in Rule 6, dealing with grand juries. The first, in subdivision 6(d), would authorize the presence of interpreters during deliberations to assist grand jurors who are hearing or speech impaired. He explained that under the current rule, no person other than the grand jurors themselves may be present during deliberations.

As authorized for publication by the Standing Committee, the rule had been broader in scope and would have allowed all types of interpreters to be present with the grand jury. But comments were received that it would not be legal to have interpreters assist jurors who do not speak English, since 28 U.S.C. § 1865 requires that all grand jurors and petit jurors speak English. Accordingly, the advisory committee modified the amendment to permit only interpreters assisting hearing or speech impaired grand jurors to be present during deliberations and voting.

The second amendment would modify subdivision 6(f) to permit the grand jury foreperson to return the indictment in open court. The present rule requires that the whole grand jury be present for the return.

The committee approved the proposed amendments without objection.

FED. R. CRIM. P. 11

Judge Davis and Professor Schlueter pointed out that three changes were proposed in Rule 11, governing pleas. The first would make a technical change in subdivision 11(a) to conform the definition of an organizational defendant to that in 18 U.S.C. § 18.

The second change would amend Rule 11(e)(1) to reflect the impact of the Sentencing Guidelines on guilty pleas. It would recognize that a plea agreement may specifically address a particular sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. The proposed change would distinguish clearly between a plea agreement under subparagraph 11(e)(1)(B), which is not binding on the court, and one under subparagraph 11(e)(1)(C), which is binding once it is accepted by the court.

Some members of the committee expressed concern that the proposal would remove the court further from the sentencing process and give greater authority to the United States attorney and defense counsel. They pointed out, for example, that a judge might accept a plea initially, but later be required to reject it when the facts become known. The case, then, would

have to be tried after considerable delay. Professor Schlueter responded that the advisory committee wanted only to address the reality of the current practice, under which the parties reach an agreement with regard to specific guidelines or factors. He added that a judge may always accept or reject such a plea agreement.

Judge Davis stated that the third proposed change, to Rule 11(c)(6), was also controversial, particularly with defense counsel. It would reflect the increasing practice of including provisions in plea agreements requiring the defendant to waive the right to appeal or to collaterally attack the sentence. The amendment would require the court to determine whether the defendant understands any provision in the plea agreement waiving such rights. A majority of the public comments had opposed the amendment, largely on the grounds that it would be seen as an endorsement of the practice of waiving appellate rights.

Judge Davis pointed out that most courts had upheld the kinds of waivers contemplated in the amendment, and the Criminal Law Committee of the Judicial Conference had recommended the provision to the advisory committee. The advisory committee, however, decided to add a sentence to the committee note stating that: "Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers."

The committee approved the proposed amendment to Rule 11(e) by a vote of 11 to 1. It approved the other amendments to Rule 11 without objection.

FED. R. CRIM. P. 24

Judge Davis reported that the proposed change to Rule 24(c), dealing with trial jurors, would give a trial judge discretion to retain alternate jurors if a juror becomes incapacitated during the deliberations. The current rule explicitly requires the court to discharge all alternate jurors when the jury retires to deliberate.

One member pointed out that the committee note set forth certain procedural protections to insulate the alternate jurors during the deliberative process. It stated that if alternates are in fact used, the jurors must be instructed that they must begin their deliberations anew. He recommended that the latter provision be placed in the language of the rule itself.

Judge Davis agreed to insert additional language in the rule. Accordingly, Judge Stotler asked him and Professor Schlueter to draft appropriate text and present it to the committee later in the meeting.

After consultation with the Style Subcommittee and further committee deliberations, Judge Davis and Professor Schlueter suggested adding the following language at the end of

paragraph 24(c)(3): "If an alternate replaces a juror after deliberations have begun, the court shall instruct the jury to begin its deliberations anew."

The committee voted without objection to approve the proposed amendment.

FED. R. CRIM. P. 32.2

Judge Davis reported that the proposed new Rule 32.2 was the heart of a major revamping and reorganization of the criminal forfeiture rules. He noted that the government proceeds in criminal forfeiture on an *in personam* theory. There must be a finding of guilt in order to forfeit property.

He explained that new Rule 32.2 states that no judgment of forfeiture may be made unless the government alleges in the indictment or information that the defendant has an interest in property that is subject to forfeiture in accordance with an applicable statute. Accordingly, a conforming change would be made in Rule 7(c)(2), prescribing the nature and contents of the indictment or information, to make it clear to the defendant that the government is seeking to seize his or her property.

Judge Davis pointed out that paragraph (b)(1) contained the principal change in the criminal forfeiture amendments and had attracted the most comments from the public. The new rule would eliminate any right of the defendant to a jury trial on the forfeiture count. The provision flowed from the decision of the Supreme Court in *Libretti v. United States,* 516 U.S. 29 (1995), where the Court held that criminal forfeiture is a part of sentencing. A defendant, accordingly, is not entitled to a jury trial on the forfeiture count.

The judge would have to make a decision on the nexus of the property to the offense "as soon as practicable after entering a guilty verdict or accepting a plea of guilty or nolo contendere." This language would replace current Rule 32.1(e). Under the current rule, after returning a guilty verdict, the jury is required to hear evidence and enter a special verdict on the forfeiture count. Under the proposed rule, however, the jury would be excused once it has returned a guilty verdict, and the court would proceed right away on its own to decide upon forfeiture of the applicable property. The judge may use the evidence accumulated during the course of the trial or in the plea agreement, and it may take additional evidence at a post-trial hearing.

One of the members expressed concern as to whether the new rule afforded the defendant the opportunity to contest an allegation by the government that the property in question had been purchased with drug proceeds. Judge Davis responded that the court has considerable discretion to take evidence at a hearing and allow both sides to present additional evidence. The judge would not be required to hold a hearing, but would surely do so if a party asked for one. And the judge would have to hold a hearing if there were a dispute as to the

facts. A hearing would be held, for example, if the defendant were to claim that he or she had purchased the property legitimately, without using drug proceeds. Professor Schlueter added that the rule was designed to give the trial judge maximum discretion and therefore did not specify all the steps that the judge must follow.

Judge Davis said that if a third party comes forward to assert an interest in the forfeited property, the court must conduct an ancillary proceeding. It would have discretion to allow the parties to conduct appropriate discovery. At the conclusion of the ancillary proceeding, the court must enter a final order of forfeiture. It would amend the preliminary order of forfeiture, if necessary, to account for disposition of the third-party petition.

Judge Davis stated that proposed Rule 32.2(b) contained two principal provisions. First, the court, rather than the jury, would determine whether there is a nexus between the offense and the property. Second, the court would defer until a later time the question of the defendant's interest in the property. Since *Libretti v. United States* had made it clear that criminal forfeiture is a part of sentencing, it makes sense for the judge, rather than the jury, to decide the ownership questions. He added that in most cases defense counsel currently waives a jury trial on forfeiture issues.

He added that subsection (b)(2) covers the situation when the court decides that the nexus between the property and the offense has been established, but no third party appears to file a claim to the property. In that case, the court may enter a final order forfeiting the property in its entirety. He said that the advisory committee had added a proviso after publication that the court must determine, consistent with the *in personam* theory of criminal forfeiture, that the defendant had an interest in the property.

Subsection (b)(3) states that the government may seize the property, and the court may impose reasonable conditions to protect the value of the property pending appeal.

Subdivision 32(c) would require an ancillary proceeding if a third party appears to claim an interest in the property. Paragraph (c)(4) was added following publication to make it clear that the ancillary proceeding is not a part of sentencing. Therefore, the rules of evidence would be applicable. Although the ancillary proceeding was designed to protect the rights of third parties, the defendant would have a right to participate in it. At the conclusion of the proceeding, the court would be required to file a final order of forfeiture of the property.

Subdivision (d) would authorize the court to issue a stay or impose appropriate conditions on appeal. Subdivision (e) would govern subsequently located property. The court would retain jurisdiction to amend a forfeiture order if property were located later. It also could enter an order to include substitute property.

In conclusion, Judge Davis summarized the sequence of events under the new Rule 32.2 as follows: the jury's verdict, a preliminary order of forfeiture by the court, a third party's petition, an ancillary proceeding, and a final order of forfeiture.

Some members pointed out that a defendant has the right to a jury trial in a civil forfeiture proceeding. They expressed concern about taking away the defendant's right to jury trial in criminal forfeiture proceedings, even though that right might not be constitutionally required under *Libretti v. United States.* One member added that he would vote against the proposal, as written, but would be inclined to support it if it retained the right to a jury trial on the single issue of the nexus of the property to the offense.

The committee rejected the proposed amendment by a vote of 7 to 4.

FED. R. CRIM. P. 7, 31, 32, and 38

Judge Davis said that the advisory committee would withdraw the amendments to these rules because they were part of the proposed criminal forfeiture package and were designed to conform to the proposed new Rule 32.2.

FED. R. CRIM. P. 54

Judge Davis stated that the change in Rule 54, dealing with application of the criminal rules, was purely technical. It would eliminate the current rule's reference to the Canal Zone, which no longer exists.

The committee approved the proposed amendment without objection.

Informational Items

Judge Davis stated that the advisory committee had discussed the draft attorney conduct rules at its April 1998 meeting. Some of the lawyer members on the committee, he said, had expressed opposition to the concept of having another set of conduct rules. The advisory committee agreed to appoint two of its members to serve on the ad hoc attorney conduct committee.

FED. R. CRIM. P. 5

Judge Davis reported that the advisory committee had approved a proposed amendment to Rule 5(c) that would authorize a magistrate judge to grant a continuance of a preliminary examination without the consent of the defendant. But, he added, the advisory committee had voted not to seek publication of the amendment until a later date.

He explained that the proposed amendment would conflict with 18 U.S.C. § 3060(c). Therefore, the advisory committee had recommended at its April 1997 meeting that the Judicial Conference seek a change in the statute. The Standing Committee, however, at its June 1997 meeting decided that it would be more appropriate to propose a change to Rule 5(c) through the Rules Enabling Act process. Accordingly, it remanded the matter back to the advisory committee for further action.

At its October 1997 meeting, the advisory committee considered the issue again. It decided not to pursue an amendment to Rule 5(c) and so advised the Standing Committee. The Magistrate Judges Committee, however, presented the issue to the Judicial Conference at its March 1998 session with a request for a change in the statute.

Judge Davis added that the Judicial Conference had considered the matter, and following the Conference session, the chair of the Executive Committee had asked the advisory committee to consider publishing a proposed amendment to Rule 5(c). As a result, the advisory committee approved an amendment at its April 1998 meeting. But it decided not to seek publication on the grounds that: (1) the proposed amendment itself was not crucial, and (2) the committee had begun restyling the body of criminal rules and wished to avoid making piecemeal amendments in the rules until that process had been completed.

Judge Stotler said that the larger issue debated by the Judicial Conference at its March 1998 session was how best to coordinate proposed rules changes with proposed legislative changes. She emphasized that the debate had underscored the need for the rules committees to work closely with other committees of the Conference in coordinating changes that affect both rules and statutes. She added that the Executive Committee had acquiesced in the advisory committee's decision to defer publication of the proposed amendment to Rule 5(c).

FED. R. CRIM. P. 30

Professor Schlueter reported that the advisory committee had published a proposed amendment to Rule 30 that would permit the court to require the parties to submit pretrial requests for instructions. But, he noted, the Advisory Committee on Civil Rules was considering similar changes to FED. R. CIV. P. 51. Therefore the criminal advisory committee had decided to defer presenting the matter to the Standing Committee until further action is taken with regard to proposed amendments to the civil rule.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of May 1, 1998. (Agenda Item 9)

committee, thus, determined that it was not necessary to set forth any specific procedural requirements in the rule for the trial courts to follow.

Some members expressed concern about the meaning of the terminology "sufficiently based upon," as used in the phrase "the testimony is sufficiently based upon reliable facts or data." Professor Capra explained that the opinion of an expert might be based on reliable information, but it must also be based on sufficient facts or data. The phrase, thus, refers to the quantity, rather than the quality, of the information.

One member questioned whether there was a need to change the rule at all at this point. Professor Capra responded that the advisory committee had been unanimous in favoring amendments to the rule. He noted that the developing case law was inconsistent as to whether *Daubert* applies to all kinds of experts. Moreover, he said, legislation had been introduced in the Congress to modify the rule through legislation. Judge Smith affirmed the need to amend the rule at this point, and she emphasized again that the advisory committee had attempted to change the current rule as little as possible.

FED. R. EVID. 701

Judge Smith reported that the advisory committee would add a clause to the end of Rule 701, which deals with testimony by lay witnesses. The addition would clarify and emphasize the opening clause of the rule, which limits application of the rule to a witness who is not testifying as an expert. The rule then proceeds to state the limits on the testimony of a lay witness. Therefore, the amendment makes it clear that a lay witness may not provide testimony based on scientific, technical, or other specialized knowledge. She added that the advisory committee had been concerned over a growing tendency among attorneys to attempt to evade the expert witness rule by using experts as lay witnesses.

Judge Smith pointed out that representatives from the Department of Justice disagreed with the proposed amendment. They had said that the amendment would conflict with FED. R. CIV. P. 26 and require additional efforts by United States attorneys in providing reports of experts. Ms. Smolover of the Department stated that the agency believed that the amendment would effect a significant change in the law. She added that it attempted to draw a bright line between specialized knowledge and non-specialized knowledge in an area that was especially murky. She proceeded to provide two examples of factual situations where it would be difficult to distinguish specialized knowledge from non-specialized knowledge.

Professor Capra responded that three states currently have evidence rules in place that are similar to the proposed amendment and distinguish sharply between expert and lay testimony. He said that the courts in those states had experienced no difficulties in applying the rules. And, he said, the courts — federal and state — make these kinds of distinctions every day.

Judge Smith added that there may be close calls in some factual situations, but the courts normally handle these distinctions very well. She said that the potential harm that may be caused by attempts to evade Rule 702 greatly outweigh any problems of potential uncertainty in distinguishing between specialized knowledge and non-specialized knowledge in certain cases. Several members of the committee expressed their agreement with Judge Smith on this point.

Judge Stotler asked the trial judges attending the meeting whether they had encountered problems in distinguishing expert testimony from lay testimony. Several of the judges responded that they already applied the law in the manner specified in the proposed amendment, and they had experienced no difficulty in doing so. They expressed strong support for the proposed amendment and stated that it would provide the bar with additional, necessary guidance on distinguishing among categories of proposed testimony and complying with the requirements of FED. R. CIV. P. 26 for an advance written report of expert testimony.

The members proceeded to discuss how the proposed amendment would be applied to a number of hypothetical situations. They generally anticipated few practical problems, but some noted that problems arise with regard to treating physicians. It was pointed out that the committee note to FED. R. CIV. P. 26 states explicitly that a written report of expert testimony is not needed from a treating physician. It was reported by several, though, that some attorneys call treating physicians as observing witnesses under Rule 701, but then attempt to use them as expert witnesses under Rule 702. Professor Capra emphasized that although there are "mixed" witnesses, the committee note accompanying the proposed amendment makes it clear that the rule distinguishes between expert and lay *testimony,* rather than between expert and lay *witnesses.*

FED. R. EVID. 703

Judge Smith reported that the advisory committee had been concerned about a growing tendency to attempt to present hearsay evidence to the jury in the guise of materials supporting expert testimony. Accordingly, the proposed amendment to Rule 703, dealing with bases of opinion testimony by experts, would provide that when an expert relies on underlying information that is inadmissible, only the expert's conclusion — and not the underlying information — would ordinarily be admitted. The trial court must balance the probative value of the underlying information against the safeguards of the hearsay rule, with the presumption that the facts or data upon which an expert bases an opinion or inference will not be admitted.

The committee approved proposed amendments to FED. R. EVID. 701, 702, and 703 for publication without objection.

Informational Items

Professor Capra reported that the advisory committee had approved the suggestion that the use of electronic mail be authorized for transmitting public comments on proposed amendments to the secretary.

He stated that the advisory committee was continuing to consider the impact of computerized evidence on the Federal Rules of Evidence, and it had produced a detailed report on the matter for the chairman of the Technology Subcommittee. The advisory committee had concluded that the courts were simply not having problems in applying the evidence rules to computerized records. Moreover, the committee had determined that it would be very difficult to amend the rules expressly to take account of computerized evidence. It would require changes in many of the rules or the drafting of new and difficult definitional provisions.

Professor Capra noted that Judge Stotler had asked the advisory committee to consider whether FED. R. CIV. P. 44 should be abrogated in light of its overlap with certain of the evidence rules. He explained that the committee had researched the matter in detail, had consulted with the Advisory Committee on Civil Rules, and had concluded that there was not a complete overlap between Rule 44 and the evidence rules. Moreover, there was no indication of any problems in the case law. Therefore, the committee decided not to pursue abrogating the rule.

Professor Capra reported that legislation had been introduced in the Congress to provide for a parent-child evidentiary privilege. The House bill would directly amend FED. R. EVID. 501 to include such a privilege, and the Senate bill would require the Judicial Conference to report on the advisability of amending the Federal Rules of Evidence to include a parent-child privilege. The advisory committee had considered the matter and concluded that the evidence rules should not be amended to include any kind of parent-child privilege.

Professor Capra stated that the proposed privilege would be contrary to both state and federal common law. Moreover, it would not be appropriate to create it by amending the Federal Rules of Evidence, since the Congress had rejected a detailed list of privileges in favor of a common law, case-by-case approach. Professor Capra added that the advisory committee had prepared a proposed response to the Congress to that effect.

Judge Smith said that the Congress had expressed a good deal of interest in privileges in recent years, including a possible rape counselor privilege, a tax preparer privilege, and now a parent-child privilege. She said that she had written to Congress stating that a piecemeal, patchwork approach to privileges would be a mistake. FED. R. EVID. 501 had worked well in practice, and if the Congress were to act at all, it should consider making a comprehensive review of all privileges.

Professor Capra noted that the advisory committee had completed a two-year project to notify the public that certain advisory committee notes to the Federal Rules of Evidence may be misleading. He stated that the report identified inaccuracies and inconsistencies created because several of the rules adopted by the Congress in 1975 differed materially from the version approved by the advisory committee. He stated that the committee's report would be printed by the Federal Judicial Center and would appear in Federal Rules Decisions.

ATTORNEY CONDUCT

Professor Coquillette summarized his May 18, 1998, Status Report on Proposed Rules Governing Attorney Conduct, set forth as Agenda Item 10. He recommended the appointment of an ad hoc committee to work on attorney conduct matters consisting of two members from each of the advisory committees, Chief Justice Veasey, Professor Hazard, and representatives from the Department of Justice.

He stated that the debate, essentially, had come down to two options. The first would be to have a single dynamic conformity rule that would eliminate all local rules and leave attorney conduct matters up to the states. The second would be to adopt a very narrow core of specific federal rules on attorney conduct. He said that there were serious differences of opinion on these options, and the ad hoc committee would seek to reach a consensus on the matter.

Professor Coquillette pointed out that misleading articles had appeared stating that the committee was proposing enactment of the 10 draft attorney conduct rules. He noted that the rules had been drafted only for internal debate and added that American Bar Association officials had been informed that the committee was not making any proposals at this point.

He stated that another misconception had been that the committee was proposing to increase the amount of federal rulemaking regarding attorney conduct. In fact, he said, the committee was trying to accomplish just the opposite. The thrust of the committee's discussions to date had been to reduce the number of local federal court rules and turn attorney conduct matters over generally to the states.

Finally, Professor Coquillette said that the study of attorney conduct would not be completed quickly. Time would be needed to coordinate efforts with the American Bar Association, the American Law Institute, and other bar groups. Time would also be needed to study attorney conduct issues in a bankruptcy context. Accordingly, the only action needed was for the Standing Committee to affirm the appointment of the ad hoc committee.

The committee voted without objection to appoint an ad hoc committee to study attorney conduct matters.

Professor Coquillette noted that the Court Administration and Case Management Committee had provided the committee with a set of principles to govern conduct in alternate dispute resolution proceedings. He said that no action was required on the part of the committee, but pointed out that there is likely to be more activity in this area at the local and national levels.

Professor Coquillette reported that two bills had been introduced in the Congress to govern attorney conduct. He said that the committee should respond to Congressional inquiries by referring to the ongoing attorney conduct project.

LOCAL RULES AND UNIFORM NUMBERING

Professor Squiers reported that about 70% of the district courts had renumbered their local rules, as required by the Judicial Conference. One member suggested that the circuit councils should be asked to assist the remaining courts in complying with the renumbering requirement.

Professor Squiers reported that the Civil Justice Reform Act of 1990 had expired and that many of the provisions contained in the district courts' individual civil justice expense and delay reduction plans had now been incorporated into local rules. The status and legality of other procedural requirements contained in local plans, however, was uncertain.

Judge Stotler praised the efforts of the Local Rules Project and pointed out that it had identified many good local rules that have now been adopted as national rules. She asked whether it would be helpful for the committee to commission a new national survey of local rules in light of the renumbering project, the 1993 amendments to the civil rules, and the expiration of the Civil Justice Reform Act. She suggested that Professor Squiers might consider preparing a specific proposal for committee consideration, including a provision for obtaining appropriate funding for a survey.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the Supreme Court had approved the restyled body of appellate rules with one minor amendment. He said that the restyling project had been successful because of the leadership shown by Judges Stotler and Logan and the hard work and expertise of Professor Mooney and Mr. Garner. Judge Stotler added that a great debt was also due to Judge Robert Keeton, who had initiated the project, and to Professor Charles Alan Wright, Judge George Pratt, and Judge James Parker.

Judge Parker said that the next project would be to restyle the body of criminal rules. He noted that a first draft had been prepared and would be considered by the Style Subcommittee. A final draft would likely be submitted to the Advisory Committee on Criminal Rules by December 1, 1998.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte referred to the docket sheet of technology issues set forth in the agenda book. He pointed out that electronic filing of court papers was the most significant technological development that would affect the federal rules. He noted that Mr. McCabe and his staff had prepared a paper summarizing the rules-related issues that had been raised in the 10 electronic filing pilot courts. He added that the paper would be circulated to the reporters and considered by the advisory committees.

PROPOSALS TO SHORTEN THE RULEMAKING PROCESS

Judge Stotler stated that the Executive Committee of the Judicial Conference had asked the committee to consider ways to reduce the length of the rulemaking process. Each of the advisory committees had discussed the matter and had concurred in principle that there should be some shortening of the process. No specific proposals, however, had been forwarded.

At Judge Stotler's request, Mr. Rabiej distributed and explained a chart setting forth the time requirements for the rules process and setting forth various ways in which the times might be reduced. He noted that some of the suggestions made for shortening the process are controversial. He proceeded to explain each of the proposed scenarios.

Mr. Rabiej stated that proposed amendments are normally presented to the Supreme Court following the September meeting of the Judicial Conference each year. He explained that, except in emergency situations, the Conference does not send proposals to the Court following the March Conference meetings because the justices do not have sufficient time to act on them before the May 1 period specified in the Rules Enabling Act.

One member questioned the need to shorten the process and asked the chair whether a policy decision had been made to shorten the process. She replied that no decision of the kind had been made, but that the Executive Committee had asked the rules committees to consider the issue. She added that the amount of time needed to consider a rule depends largely on the nature of the particular rule.

Another member suggested that it would be better to leave the existing, deliberative process in place, but to consider developing an emergency process that could be used to address special circumstances requiring prompt committee action. Several other members concurred in this judgment and suggested the need to develop a fast track procedure.

Several members noted that the need for accelerated treatment of an amendment usually arises because the Congress or the Department of Justice decides to act on a matter through legislation. They observed that the Congress in several instances has decided not to wait for the orderly and deliberative promulgation of a rule because the process was seen as taking too long. The chair replied that the advisory committees might consider certifying a particular rule for fast track consideration.

One of the participants suggested that consideration be given to eliminating one or more of the six entities that participate in considering an amendment, *i.e.*, advisory committee, public, standing committee, Judicial Conference, Supreme Court, and Congress. Others responded, however, that each entity plays an important part in the process. Therefore, it would be unwise, both substantively and politically, to consider elimination of any of them. Members pointed to the important role played by the standing committee in assuring quality and consistency in the rules and that of the Supreme Court in giving the rules great prestige and credibility.

One member recommended that the committees adopt a fixed schedule for submitting proposed amendments to the rules as packages, such as once every five years. The advisory committees could stagger their changes so that civil rules, for example, might be considered in one year and criminal rules in the next. He advised the committee to accept the inevitability that: (1) emergencies will arise on occasion; and (2) the Congress or the Department of Justice will continue to press for action outside the Rules Enabling Act when they feel the political need to do so. He concluded, therefore, that the committees should establish a firm schedule for publishing and approving rules amendments in multi-year batches, but also take due account of emergencies, political initiatives, and statutory changes.

Judge Stotler suggested that further thought be given to the issue of shortening the length of the rulemaking process and that additional discussion take place at the next committee meeting. She also suggested that further thought be given to the issue of making the chairs of the advisory committees voting members of the Standing Committee.

NEXT COMMITTEE MEETINGS

The committee is scheduled to hold its next meeting on Thursday and Friday, January 7 and 8, 1999. Judge Stotler asked the members for suggestions as to a meeting place so that

the staff could begin making reservations. She also asked the members to check their calendars and let the staff know their available dates for the June 1999 committee meeting.

Respectfully submitted,

Peter G. McCabe
Secretary

Items 4 and 5 will be oral reports.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO RULE 2014

DATE: SEPTEMBER 4, 1998

The Advisory Committee and Standing Committee approved for publication proposed amendments to Bankruptcy Rule 2014 (Employment of Professional Persons) as part of the "Litigation Package." Any public comments received with respect to these proposed amendments will be considered by the Advisory Committee in March 1999.

Rule 2014 would read, in part and as revised by the published amendments, as follows [language not relevant to this memorandum are excluded]:

Rule 2014. Employment of Professional 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:

****

(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.

****

Hon. James A. Parker, District Judge of the District of New Mexico, is a member of the Standing Committee and is chair of its Style Subcommittee. Judge Parker expressed concern that the language of proposed Rule 2014(c) (requiring 10 days' notice of a hearing on a motion for authorization to employ a professional person), and Rule 2014(d) (providing that the court may grant the motion without a hearing in the absence of an objection or request for a hearing) may create a trap for the unwary. "The language of 2014(d) does not state, explicitly, that a person cannot rely on the 2014(c) hearing notice, but instead must file an objection or request to be certain that the hearing scheduled in accordance with 2014(c) will, in fact, be held."

Judge Parker recommends changing Rule 2014(d) to read:

> "To ensure the holding of a scheduled hearing, a person must file an objection or request for hearing at least two days before the scheduled hearing date. If no such objection or request for hearing is filed, the Court may resolve the motion without a hearing."

In reviewing the proposed amendments to Rule 2014 after receiving Judge Parker's suggestion, I compared it to the proposed amendments to Rule 9014 with respect to the notice of

motion and hearing date. I noticed that the proposed version of Rule 9014(c)(3) (published for comment) expressly provides that the notice of motion shall conform to the appropriate Official Form and shall state that the court may grant the motion without a hearing if no timely response is filed. I also noticed that proposed Rule 9014(c)(2) provides for the method of service, but Rule 2014(c) does not (the omission of the method of service provision was not deliberate).

The published version of Rule 9014(c)(2) and (3) reads as follows:

Rule 9014. Administrative Proceeding

****

(c) SERVICE OF MOTION AND NOTICE OF HEARING.

****

(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.

As an alternative to the language suggested by Judge Parker

for Rule 2014(d), I suggest that the Committee consider adding to Rule 2014(c) the kind of provisions, with appropriate variations, that are in proposed Rule 9014(c)(2) and (3). I believe that the additional language would solve the problem raised by Judge Parker (there will be adequate notice that, in the absence of an objection or request, the scheduled hearing may not be held), and also would make Rule 2014(c) consistent with Rule 9014(c)(2) on the method of service.

Accordingly, I suggest that the proposed amendments to Rule 2014(c) be revised as follows(additional language to be added to the published draft is underlined):

Rule 2014. Employment of Professional Person

****

(c) SERVICE OF MOTION AND NOTICE OF HEARING.

(1) 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)~~ (A) the trustee;

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

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

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

(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 the appropriate Official Form and shall include:

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

(B) a statement that the court may grant the motion without a hearing if no objection or request for a hearing is filed at least 2 days before the scheduled hearing date.

For your information, I enclose a copy of Official Form No. 20A (Notice of Motion or Objection), which would be the "appropriate Official Form" referred to in proposed Rules 2014 and 9014.

Form 20A Notice of Motion or Objection

[Caption as in Form 16A]

NOTICE OF [MOTION TO] [OBJECTION TO]

. . . . . has filed papers with the court to [relief sought in motion or objection].

Your rights may be affected. You should read these papers carefully and discuss them with your attorney, if you have one in this bankruptcy case. (If you do not have an attorney, you may wish to consult one.)

If you do not want the court to [relief sought in motion or objection], or if you want the court to consider your views on the [motion] [objection], then on or before (date), you or your attorney must:

[File with the court a written request for a hearing {*or, if the court requires a written response,* an answer, explaining your position} at:

{address of the bankruptcy clerk's office}

If you mail your {request} {response} to the court for filing, you must mail it early enough so the court will **receive** it on or before the date stated above.

You must also mail a copy to:

{movant's attorney's name and address}
{names and addresses of others to be served}]

[Attend the hearing scheduled to be held on (date), (year), at . . . . . a.m./p.m. in Courtroom . . . . . , United States Bankruptcy Court, {address}.]

[Other steps required to oppose a motion or objection under local rule or court order.]

If you or your attorney do not take these steps, the court may decide that you do not oppose the relief sought in the motion or objection and may enter an order granting that relief.

Date: . . . . . Signature: . . . . . .
Name:
Address:

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
ALBUQUERQUE, NEW MEXICO 87103

JAMES A. PARKER
Judge

June 30, 1998

Hon. Adrian G. Duplantier
Chairman, Advisory Committee on Bankruptcy Rules
US District Judge
US Courthouse
500 Camp St.
New Orleans, LA 70130

Prof. Alan N. Resnick
Reporter, Advisory Committee on Bankruptcy Rules
Hofstra University School of Law
121 Hofstra University
Hempstead, NY 11549-1210

Re: ***Bankruptcy Rule 2014(d)***

Dear Judge Duplantier and Professor Resnick:

The Standing Committee approved for publication for public comment the proposed amendment to Bankruptcy Rule 2014(d), among others.

I am concerned that the language of proposed Rule 2014(c) and (d) may create a trap for the unwary. Rule 2014(c) requires service on certain persons of at least ten days' notice of a hearing on a motion for an order authorizing employment of a professional person.

Subdivision (d) grants the Court authority to resolve the motion without the hearing "if no objection or request for a hearing is filed at least two days before the scheduled hearing date." The language of 2014(d) does not state, explicitly, that a person cannot rely on the 2014(c) hearing notice, but instead must file an objection or request to be certain that the hearing scheduled in accordance with 2014(c) will, in fact, be held. Please consider changing Rule 2014(d) to read:

> To ensure the holding of the scheduled hearing, a person must file an objection or request for hearing at least two days before the scheduled hearing date. If no such objection or request for hearing is filed, the Court may resolve the motion without a hearing.

Sincerely,

JAMES A. PARKER

JAP:dm

Dear Alan — Call if you have any questions about this. J.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9020 - CONTEMPT

DATE: August 28, 1998

Last year, Judge A. Thomas Small requested that the Advisory Committee consider amending Rule 9020 so that a bankruptcy judge's civil contempt order would become effective immediately and be subject to traditional appellate review. The Rule now delays for at least 10 days the effectiveness of a civil contempt order and renders the order subject to de novo review by the district court. Judge Small wrote in a letter to the Committee 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."

In response to Judge Small's suggestion, I prepared a memorandum dated February 24, 1998, in which I proposed amendments to Rule 9020 that would provide that a bankruptcy court may issue an order of civil contempt effective immediately and subject to traditional appellate review, but that would treat a criminal contempt proceeding in the manner provided for non-core proceedings. My memorandum discussed the reasons for the proposed draft and addressed concerns raised by Chris Kohn regarding constitutional issues. A copy of my February 24th memorandum is enclosed.

At the March meeting in Arkansas, the Advisory Committee

considered my memorandum and proposed amendments to Rule 9020. The Committee expressed the view that the Rule should avoid dealing with substantive law issues relating to the bankruptcy court's contempt power and, rather than approve the proposed amendments, referred the matter to a new subcommittee for further study. The subcommittee includes Judge Kressel (chair), Judge Robreno, Judge Small, and Chris Kohn.

In a telephone conference on July 23rd, the subcommittee considered four options: (1) do nothing, (2) substantially modify the rule to effect the goals enunciated by Judge Small (which were reflected in the draft in the Reporter's February 24th memorandum); (3) abrogate the rule because it is substantive and leave this issue to the courts; or (4) replace the current rule with a simple statement that a request for an order of contempt is made by motion under Rule 9014. The subcommittee agreed that the fourth option should be adopted and asked me to draft the proposed amendment and a committee note.

In response to the subcommittee's request, I drafted and presented to the subcommittee the following proposed amendment and committee note to Rule 9020 [the committee note set forth below contains minor style and case citation changes made after it was considered by the subcommittee]:

Rule 9020 Contempt Proceedings

Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest.

~~(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.~~

COMMITTEE NOTE

This rule, as amended in 1987, delays for ten days from service the effectiveness of a bankruptcy judge's order of contempt and renders the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt powers. See 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, no decisions of the courts of appeal existed at that time concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeal have held that bankruptcy judges have the power to issue civil contempt orders. See, e.g., Matter of Terribone Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996). Several courts have distinguished between a bankruptcy judge's civil contempt

powers and criminal contempt powers. See, e.g., Matter of Terribone Fuel and Lube, Inc., 108 F.3d at 613, n. 1 ("[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."). For other decisions regarding criminal contempt powers, see, e.g., In re Ragar, 3 F.3d 1174 (8th Cir. 1993); In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990).

To the extent that Rule 9020 delays the effectiveness of civil contempt orders and requires de novo review by the district court, the rule may be unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

The amendments to this rule provide that a motion made by the United States trustee or a party in interest for an order of contempt is governed by the procedural requirements of Rule 9014. This rule, as amended, does not apply to an order of contempt issued sua sponte. These amendments are not intended to extend, limit, or otherwise affect either the powers of a bankruptcy judge to hold an entity in contempt or the role of the district judge regarding contempt orders. Issues relating to contempt powers of bankruptcy judges are substantive and are left to statutory and judicial law development, rather than procedural rules.

The deletion of subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of the right to a jury trial when it otherwise exists.

After circulating this draft, Chris Kohn sent to the subcommittee his memorandum of August 14, 1998, (a copy is enclosed) in which he commented that "a majority of circuits [endorsing bankruptcy court contempt authority] rely not only on section 105 of the Code but, to varying degrees, also on the rule which we propose to repeal (i.e., Rule 9020)." Chris noted that "as at least four circuits have relied upon Rule 9020 to conclude

that bankruptcy courts have contempt authority, we run the risk of cutting the legs out from under these decisions if we now repeal the rule (no matter what we say in our committee note.)... Thus, in an effort to streamline contempt authority, we may jeopardize its very existence."

In response to Chris' memorandum, the subcommittee held another meeting by telephone on August 24th. After a discussion of his concerns, the subcommittee voted to reaffirm its support for the draft circulated by the Reporter (i.e., replacing the rule with a one-sentence statement that Rule 9014 governs contempt motions). The subcommittee also decided to include Chris' memorandum in the agenda materials for the October meeting so that this issue can be discussed by the full Committee.

Reporter's Response to Chris Kohn's Concerns

I agree with the subcommittee's decision to include Chris Kohn's memorandum in the agenda materials and to bring to the Committee's attention the risk that Chris raises (i.e., that appellate courts that have recognized the bankruptcy court's power to issue a contempt order might, as a result of the proposed amendment, rule that bankruptcy courts no longer have such power). But I think that the risk raised by Chris is very low.

First, most circuit courts that have addressed the issue

have upheld a bankruptcy court's civil contempt power based either exclusively or primarily on section 105 of the Code or the court's "inherent powers" and, therefore, it is unlikely that they would conclude that bankruptcy courts will have lost their contempt powers solely because of the suggested amendment to Rule 9020.

Second, it is important to note that the subcommittee is not recommending abrogation of Rule 9020 (which could, arguably, give the impression that contempt power is no longer recognized by the Rules). Rather, the rule will state that Rule 9014 governs these proceedings (i.e., motion filed with the bankruptcy court, etc.).

The following is a brief summary of prevailing appellate case law in a number of circuits:

* ***Fourth Circuit***: In In re Kestell, 99 F.3d 146 (4th Cir. 1996), and In re Walters, 868 F.2d 665 (4th Cir. 1989), the court of appeals based the bankruptcy court's contempt power on section 105 of the Code, with no mention of Rule 9020. Section 105(a) provides that:

> "(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."

* ***Fifth Circuit***: In Matter of Terrebonne Fuel and Lube,

Inc., 108 F.3d 609 (5th Cir. 1997), the court of appeals agreed with "the majority of 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." The court did not rely on Rule 9020 as the source of contempt power.

* ***Eighth Circuit***: In re Ragar, 3 F.3d 1174 (8th Cir. 1993), involved a criminal contempt proceeding, rather than civil contempt, in which the bankruptcy court's order delaying for ten days its effect so that objections could be filed. Upon objection, the district court treated it as a non-core matter. The court of appeals held that this procedure was proper. Although the case involved a criminal contempt, the court's language (citing In re Walters with approval) endorses a bankruptcy court's power to issue orders of civil contempt (with only traditional appellate review) based on section 105(a):

> "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. Such a conclusion attributes to bankruptcy judges no more of 'the judicial power of the United States,' Article III, section 1, than does giving them jurisdiction over core proceedings in the first place. **The reasoning of the Fourth Circuit in *In re Walters*, supra, is persuasive on this point. 868 F.2d at 669-670 (civil contempt). *Walters* holds that bankruptcy courts may enter civil-contempt orders on their own, reviewable only on**

appeal.[emphasis added].

3 F.3d at 1180.

Although the court in Ragar relied heavily on district court de novo review and Rule 9020 in the context of a *criminal* contempt order, it cited with approval the Fourth Circuit's decision in Walters which relied solely on section 105(a)(without mentioning Rule 9020) as the basis for a bankruptcy court's *civil* contempt power subject to only traditional appellate review. If Rule 9020 were amended to provide that a contempt proceeding is governed by Rule 9014, I believe it would be consistent with the language of Ragar for bankruptcy courts to treat civil contempt proceedings as core and criminal contempt proceedings as non-core.

* ***Ninth Circuit.*** In In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996), the court of appeals overruled its earlier decision in In re Sequoia Auto Brokers, Ltd., 827 F.2d 1281 (9th Cir. 1987), in which it held that a bankruptcy court did not have contempt powers. As Chris notes in his memorandum, in *Rainbow Magazine* the Ninth Circuit cited "two significant changes" that now leads it to conclude that bankruptcy courts have contempt power. One is the Supreme Court's decision in Chambers v. Nasco, Inc., 501 U.S. 32 (1991) (holding that district courts have inherent power to sanction bad faith conduct in litigation), which the court of appeals applied to bankruptcy courts (the

court rejected the argument that *Chambers* only applies to Article III courts). The other significant change was the promulgation of Rule 9020 in 1987. Although the court relied, in part, on Rule 9020, I think, based on the court's language, that the application of *Chambers* to bankruptcy courts and section 105(a) would be sufficient, in and of themselves, to give bankruptcy courts civil contempt power (even without Rule 9020). The court of appeals wrote: "*Chambers* instructs us that absent congressional restriction, inherent powers exist within a court as part of the nature of the institution." Id. at 285.

Although *Chambers* involved sanctions rather than a contempt order, the language of the Supreme Court indicates clearly that it recognizes, as one of a federal court's inherent powers, the power to issue a contempt order.

> "It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" [citations omitted]...
>
> In addition, it is firmly established that **'[t]he power to punish for contempts is inherent in all courts.'"** [citation omitted]. This power reaches both conduct before the court and that beyond the court's confines, for '[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 trial.'" [emphasis added][citations omitted].

501 U.S. at 43-44.

Only eight months after the decision in Rainbow Magazine,

the Ninth Circuit in In re Del Mission Ltd., 98 F.3d 1147 (9th Cir. 1996) (Judge Tashima writing for the Court), held that the BAP was in error when, based on § 105(a), it awarded previously incurred appellate fees in a frivolous appeal. The court ruled that "[g]iven that [Appellate] Rule 38 already provides for a discretionary award of fees in frivolous appeals, it would be superfluous to treat § 105(a) as another vehicle to award appellate fees." Id. at 1154. But the court of appeals stated that "[a] bankruptcy court may award damages to a trustee for a violation of the automatic stay under its contempt power pursuant to 11 U.S.C. § 105(a)." Id. at 1152. And, in a footnote, the court commented that "[a]lthough the BAP did not cite to §105(a), it is the authority that authorizes a bankruptcy court to award sanctions for ordinary civil contempt." The court did not rely on Rule 9020 at all as a source of contempt power.

*__Tenth Circuit:__ As Chris points out, the Tenth Circuit in In re Skinner, 917 F.2d 444 (10th Cir. 1990), relies on the limitations (i.e., *de novo* review) of Rule 9020 in upholding the constitutionality of the delegation of civil contempt powers to a non-Article III court. But Skinner was decided before the Supreme Court's decision in *Chambers*, and the Tenth Circuit had decided other contempt cases after Skinner without relying on Rule 9020's limitations.

In In re Courtesy Inns, Ltd., Inc, 40 F.3d 1084 (10th Cir.

1994), the Tenth Circuit held that a bankruptcy court had inherent power to impose sanctions on the debtor's president for filing a petition in bad faith. The court of appeals cited the Supreme Court's decision in *Chambers*, held that the inherent powers of a court confirmed in *Chambers* is not limited to Article III courts, and wrote that: "We believe, and hold, that § 105(a) intended to imbue the bankruptcy courts with the inherent power recognized by the Supreme Court in *Chambers.*" Id. at 1089. As discussed above, the contempt power is one of the inherent powers set forth in *Chambers*.

* ***Eleventh Circuit.*** In In re Mroz, 65 F.3d 1567 (11th Cir. 1995), the court upheld a bankruptcy court's power to impose sanctions on the trustee's law firm (although the matter was remanded for the bankruptcy court to determine whether there was bad faith and who to sanction), even if the law firm is not subject to sanctions under Rule 9011. This case involved sanctions, rather than contempt, but the court of appeals relied on the Supreme Court's decision in *Chambers,* applied the reasoning of *Chambers* to the bankruptcy court, and stated that the inherent powers under *Chambers* include contempt powers. "These incidental powers also include, for example, the power of a federal court to ... punish parties for contempt...." Id. at 1575, n.9. The court did not mention Rule 9020.

In In re Hardy, 97 F.3d 1384 (11th Cir. 1996), the court of

appeals wrote that "Section 105 grants statutory contempt powers in the bankruptcy context.... Section 105 creates a statutory contempt power, distinct from the court's inherent contempt powers in bankruptcy proceedings...." Id. at 1389. The court of appeals quoted the following language from the Supreme Court's opinion in *Chambers*: "[W]hen there is bad-faith conduct in the course of litigation that could be adequately sanctioned under the Rules, the court ordinarily should rely on the Rules rather than the inherent power. But if in the informed discretion of the court, neither the statute nor the Rules are up to the task, the court may safely rely on its inherent power." Id. at 1389 (quoting from 501 U.S. at 50). Rule 9020 was not cited. Although the court of appeals in Hardy did not specifically address whether the bankruptcy court (as distinct from the district court) may exercise contempt powers, it appears that its reliance on § 105(a) as the source is consistent with the bankruptcy court having such power.

* ***First Circuit.*** The risk raised by Chris is most significant in the First Circuit. As Chris mentioned, the First Circuit, in In re Power Recovery Systems, Inc., 950 F.2d 798, 802 (1st Cir. 1991), relied solely on Rule 9020 as the basis for bankruptcy court contempt power. But that case was decided within months after the Supreme Court decided *Chambers*, did not mention inherent powers under *Chambers*, and did not mention §105(a).

U.S. Department of Justice

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August 14, 1998

MEMORANDUM

TO: Hon. Adrian G. Duplantier
Hon. Eduardo C. Robreno
Hon. Robert J. Kressel
Hon. A. Thomas Small
Prof. Alan N. Resnick
Patricia S. Channon, Esq.

FROM: J. Christopher Kohn
Director
Commercial Litigation Branch

RE: Bankruptcy Rules Regarding Contempt

While reviewing the proposed Committee Note, I did what I should have done in advance of our July 23rd teleconference: re-read the appellate decisions endorsing bankruptcy court contempt authority. I was struck by the anomaly that a majority of the circuits rely not only on section 105 of the Code but, to varying degrees, also on the rule which we propose to repeal (i.e., Rule 9020). This leaves me far less comfortable with "Option Four." I now prefer "Option One" -- the "do nothing" alternative.

The First Circuit, in In re Power Recovery Systems, Inc., 950 F.2d 798, 802 (1st Cir. 1991), seems to rely considerably on the existence of Rule 9020. Its entire discussion of the bankruptcy courts' authority consists of:

> It is well-settled that bankruptcy courts are vested with contempt power. . . .[1/] Bankruptcy rule 9020(b) specifically provides

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1/The court cites two authorities: (1) Fernos-Lopez v. U.S. District Court, 599 F.2d 1087, 1090 (1st Cir. 1979), a case construing the bankruptcy courts' contempt authority under the old Bankruptcy Act; and (2) the Advisory Committee Note to old Bankruptcy Rule 920.

> that a bankruptcy court may issue an order of contempt if proper notice of the procedures are given.

Id.

The Eighth Circuit, in upholding a bankruptcy court's criminal contempt authority, likewise relies on the substance of Rule 9020 (although the bankruptcy court had not explicitly invoked it). In re Ragar, 3 F.3d 1174 (8th Cir. 1993). In discussing the Article III aspects of the order, the court observes:

> The bankruptcy judge's determination was reviewable de novo, and it was within the sole and absolute authority of the party aggrieved, here the appellant Brown, to secure such review. Brown had it within his power to prevent the bankruptcy judge's order from becoming effective simply by filing timely objections, which he did. By contrast, if the Bankruptcy Court had issued its own free-standing judgment, subject to review only by appeal, the District Court's review, as to questions of fact, would not have been de novo; it would have been subject to the clearly-erroneous standard, quite a substantial difference. It is significant, we think, that the Ninth Circuit itself in In re Sequoia Auto Brokers, Ltd., Inc., upon which Brown relies, held that what the bankruptcy court should have done was to "certify the facts to the district court to review de novo and determine whether to issue the order" of contempt. 827 F.2d at 1291 (footnote omitted). This is exactly what happened here.
>
> Such a procedure, as the Sequoia court observed, comports with that portion of Bankruptcy Rule 9020, as amended in 1987, that requires that certain contested contempt orders be treated as though they were beyond the bankruptcy judges' jurisdiction, that is as non-core matters. Essentially, that is what was done here, though the Bankruptcy Court did not refer explicitly to Rule 9020.

Id. at 1179.

The Ninth Circuit, in explaining why it was not following In re Sequoia Auto Brokers, Ltd., 827 F.2d 1281 (9th Cir. 1987), in which it held that bankruptcy courts lack inherent contempt powers, said that "two significant changes have occurred." In re Rainbow

Magazine, Inc., 77 F.3d 278, 284 (9th Cir. 1996). One was the Supreme Court's decision in Chambers v. NASCO, Inc., 501 U.S. 32 (1991), which clarified that federal district courts possess inherent power to sanction bad-faith conduct in litigation when that conduct falls outside the scope of Rule 11 and 28 U.S.C. 1927. The other was that, "[i]n 1987, Congress reformed Bankruptcy Rule 9020 [to read in its present form]" and, "[t]hus, the power that we noted did not exist under the Bankruptcy Code prior to 1987 was provided to the bankruptcy courts through the modified version of Rule 9020." 77 F.3d at 284.

Finally, the Tenth Circuit, in In re Skinner, 917 F.2d 444 (10th Cir. 1990), relies explicitly upon the current language of Rule 9020 when concluding that bankruptcy courts may constitutionally exercise contempt power. Specifically, it holds:

> Furthermore, 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," *Marathon*, 458 U.S. at 87, 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.7/
>
> * * *
>
> ---
>
> 7/Pursuant to Bankruptcy Rule 9020, objections to a contempt order must be filed within ten days of its issuance. If a timely objection is filed, the order will be reviewed [in accordance with Bankruptcy Rule 9033(d), governing the standard of review for proposed findings of fact and conclusions of law in non-core cases].

Id. at 450.[2/]

Perhaps all this proves is that Rule 9020 inappropriately

[2/]The Fourth and Fifth Circuits uphold bankruptcy court contempt authority without relying on Rule 9020. In re Kestell, 99 F.3d 146 (4th Circuit 1996); In re Terrebonne Fuel and Lube, Inc., 108 F.3d 609, 613 (5th Cir. 1997)(although, in citing In re Power Recovery Systems as supporting authority, the court parenthetically quotes solely the First Circuit's sentence discussing Rule 9020(b) [quoted above] in describing the case).

delved into the realm of substance in the first place and/or that courts inappropriately rely on rules in making substantive determinations. Nevertheless, as at least four circuits have relied upon Rule 9020 to conclude that bankruptcy courts have contempt authority, we run the risk of cutting the legs out from under these decisions if we now repeal the rule (no matter what we say in our Committee Note). This is especially true for Ragar and Skinner because they rely heavily upon the possibility for *de novo* review. Under Option Four, the deference accorded a contempt order will turn on whether the proceeding is core or non-core. In most instances, it presumably would be considered core in nature meaning that *de novo* review would not apply. See 28 U.S.C. 157(b)(2)(A)("Core proceedings include, but are not limited to -- (A) matters concerning the administration of the estate . . . .") Thus, in an effort to streamline contempt authority, we may jeopardize its very existence.

Assuming we don't let this sleeping dog lie (I only have one of four votes on the sub-committee), I recommend that we delete the third paragraph of the proposed Committee Note. The foregoing cases indicate that the rule may well not be "unnecessarily restrictive." We might add, in the last sentence of the fourth paragraph, after the word "judges," the following: "including when a contempt order becomes effective and whether de novo review is required,". I also have a few other, minor editorial suggestions shown on the attached mark-up.

Thank you.

Attachment

~~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.~~

COMMITTEE NOTE

This rule, as amended in 1987, delays for ten days from service the effectiveness of a bankruptcy judge's order of contempt and renders the order subject to de novo review by the district court. These limitations on contempt orders were added to the rule in response to the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, which provides that bankruptcy judges are judicial officers of the district court, but does not specifically mention contempt powers. See 28 U.S.C. § 151. As explained in the committee note to the 1987 amendments to this rule, ~~there were~~ no decisions of the courts of appeals at that time concerning the authority of a bankruptcy judge to punish for either civil or criminal contempt under the 1984 Act and, therefore, the rule as amended in 1987 "recognizes that bankruptcy judges may not have the power to punish for contempt." Committee Note to 1987 Amendments to Rule 9020.

Since 1987, several courts of appeal have held that bankruptcy judges have the power to issue civil contempt orders. See, e.g., Matter of Terrebone Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997); In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996); In re Hardy, 97 F.3d 1384 (11th Cir. 1996). Several courts have distinguished between a bankruptcy judge's civil

contempt powers and criminal contempt powers. See, e.g., Matter of Terrebone Fuel and Lube, Inc., 108 F.3d at 613, n. 1 ("[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."). For other decisions regarding criminal contempt powers, see, e.g., In re Ragar, 3 F.3d 1174 (8th Cir. 1993); In re Hipp, Inc., 895 F.2d 1503 (5th Cir. 1990).

To the extent that Rule 9020 delays the effectiveness of civil contempt orders and requires de novo review by the district court, the rule may be unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

The amendments to this rule provide that a motion made by the United States trustee or a party in interest for an order of contempt is governed by the procedural requirements of Rule 9014. This rule, as amended, does not apply to an order of contempt issued sua sponte. These amendments are not intended to extend, limit, or otherwise affect either the powers of a bankruptcy judge to hold an entity in contempt or the role of the district judge regarding contempt orders. Issues relating to contempt powers of bankruptcy judges are substantive and are left to statutory and judicial law development, rather than procedural rules.

The deletion of subdivision (d), which provides that the rule shall not be construed to impair the right to trial by jury, is deleted as unnecessary and is not intended to deprive any party of the right to a jury trial when it otherwise exists.

including when a civil contempt order becomes effectiv and whether de novo review is required,

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.

8

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 9011

DATE: AUGUST 19, 1998

Prior to December 1,1997, Bankruptcy Rule 9011 required an attorney to sign papers served or filed in a bankruptcy case (other than a list, schedule, or statement), and provided that:

> "The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase on the cost of litigation or administration of the case."

It was clear that the certification of the attorney under Rule 9011 applied only if the attorney signed the document and that the attorney was not required to sign lists, schedules, or statements. Accordingly, the Rule 9011 certification did not apply to these excluded documents.

In 1997, Rule 9011 was amended to conform to the 1993 amendments to Rule 11 of the Civil Rules. The Rule 9011 amendments conformed in both substance and style to Rule 11, with a few bankruptcy-related exceptions (for example, the 21-day safe harbor provision does not apply to the wrongful filing of a petition). As a result of the 1997 amendments, subdivision (a)

requires that the attorney sign papers (except for lists, schedules, and statements), and subdivision (b) provides:

"(b) *Representations to the Court*. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief."

As a result of these amendments, the certification made by an attorney under Rule 9011(b) appears to apply to lists, schedules, and statements. Subdivision (b) applies to all papers (including lists, schedules, and statements) filed with the court, whether or not signed by the attorney.

During the public comment period for the 1997 amendments to Rule 9011, I became concerned that attorneys would, for the first time, be making Rule 9011 certifications with respect to schedules and statements of financial affairs. This appears to be inconsistent with the exclusion of these documents from the

signature requirements (these documents have been excluded since Rule 9011 was first promulgated in 1983 and would continue to be excluded under Rule 9011(a)). I brought this issue to the attention of the Committee at its March 1996 meeting in Memphis (when the Committee was reviewing public comments to the proposed amendments). In a memorandum to the Committee, I identified the issue and suggested that subdivision (b) be changed to expressly provide that the attorney's certification does not apply to lists, schedules, and statements.

The following appears in the minutes to that meeting:

> "The Reporter stated that in reviewing the preliminary draft he had identified a potential problem arising from a provision in subdivision (b) that was introduced in the process of conforming to Rule 11 of the Federal Rules of Civil Procedure as amended in 1993. Subdivision (a) contains, as it always has, a clause carving out from the requirement of signature by an attorney any list, schedule, or statement; these documents are signed only by the debtor. Subdivision (b) now contains, for the first time, language providing that by presenting a document to the court (by signing, filing, submitting, or later advocating), the attorney is representing that 'reasonable' inquiry has been made that the document does not contain improper material. Subdivision (b), however, does not contain language carving out from the attorney's responsibility in the presenting function a list, schedule, or statement that, under subdivision (a) only the debtor is required to sign. The Reporter said he hoped the rule would be interpreted to hold an attorney responsible only for those documents the attorney signed, but he was concerned about the issue [Reporter's Memorandum dated February 20, 1996].
>
> **The consensus was that sanctioning of an attorney for the contents of a debtor's schedules or statement of financial affairs was unlikely, and the Committee took no action."** [emphasis added]

National Bankruptcy Review Commission Recommendation

In its report, The National Bankruptcy Review Commission endorsed the amendments to Rule 9011 that became effective on December 1, 1997. But the Commission then recommended further amendments to Rule 9011 (see enclosed Recommendation 1.1.4):

> "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."

At the Advisory Committee meeting held in Arkansas in March, the Committee discussed the Commission's recommendation and asked me to prepare a proposed amendment to Rule 9011 to implement it.

I recommend that the Committee consider the following proposed amendments to Rule 9011:

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO THE COURT. By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, <u>list, schedule, statement, amendment thereto,</u> or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,-

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by

a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 7004.

The motion for sanctions may not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b). If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

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

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to

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

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) INAPPLICABILITY TO DISCOVERY. Subdivisions (a)

through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 7026 through 7037.

(e) VERIFICATION. Except as otherwise specifically provided by these rules, papers filed in a case under the Code need not be verified. Whenever verification is required by these rules, an unsworn declaration as provided in 28 U.S.C. § 1746 satisfies the requirement of verification.

(f) COPIES OF SIGNED OR VERIFIED PAPERS. When these rules require copies of a signed or verified paper, it shall suffice if the original is signed or verified and the copies are conformed to the original.

COMMITTEE NOTE

Subdivision (b) is amended to clarify that the certification and responsibilities of an attorney under this subdivision apply with respect to lists, schedules, statements, and any amendments thereto, even though the attorney is not required to sign them under subdivision (a).

9

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: TEMPORARY ALLOWANCE OF CLAIMS FOR VOTING PURPOSES; BANKRUPTCY RULE 2003

DATE: September 1, 1998

In his letter dated July 15, 1998, Jeffrey K. Garfinkle, Esq., has recommended that Rule 2003(b)(3) be amended to permit the court to temporarily allow claims for the purpose of voting for a trustee. A sentence in Rule 2003(b)(3) that expressly provided for such temporary allowance was deleted in 1991 and Mr. Garfinkle suggests that it be restored. A copy of Mr. Garfinkle's letter is attached as Exhibit A.

In considering Mr. Garfinkle's suggestion, I think it would be helpful for the Advisory Committee to consider the history of temporary allowance of claims for voting purposes and the 1991 amendment to this rule.

Temporary Allowance Under the Former Bankruptcy Act

Under the former Bankruptcy Act, creditors had the right to "appoint" a trustee at the meeting of creditors. Section 44(a) provided that the "creditors of a bankrupt ... shall, at the first meeting of creditors ...appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee or if the trustee so appointed fails to qualify ... the court shall make the appointment."

Section 55(b) of the former Act provided that the "judge or

referee shall preside [at the meeting of creditors] and, before proceeding with other business, may allow or disallow the claims of creditors there presented...." [emphasis added]. Section 56(a) provided that "[c]reditors shall pass upon matters submitted to them at their meetings by a majority vote in number and amount of claims of all creditors whose claims have been allowed and who are present...." Section 57(e) provided that "[c]laims of secured creditors and those who have priority may be temporarily allowed to enable such creditors to participate in the proceedings at the creditors' meetings ..., but shall be thus temporarily allowed for such sums only as to the courts seem to be owing over and above the value of their securities or priorities."

Accordingly, the former Act contemplated that judges would, at the meeting of creditors, allow claims for voting purposes to determine voting eligibility. Since such allowance had to be done at the meeting itself, there was no opportunity for parties to fully and finally litigate disputes regarding claims (including depositions, calling of witnesses for testimony, etc.). A provisional or "temporary" determination by the court was necessary and appropriate under the Act.

Consistent with the Act, the former Bankruptcy Rules provided for temporary allowance of claims for voting purposes. Former Rule 204(a)(2) provided that "[t]he bankruptcy judge shall preside over the transaction of all business at the first meeting

of creditors.... He shall, when necessary, determine which claims are entitled to vote at the meeting and shall conduct the election of a trustee...." Former Rule 207 provided as follows:

> "(a) *Right to Vote; Temporary Allowance for Voting Purposes.* Except as hereinafter provided, a creditor is entitled to vote at a meeting if he has filed a proof of claim at or before the meeting, unless objection is made or unless the proof of claim is insufficient on its face. Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may temporarily allow it for that purpose in such amount as to the court seems proper."

In sum, under the former Act and Rules, the bankruptcy judge presided at the meeting of creditors and, in conducting a trustee election, had the authority to temporarily allow or disallow claims right there and then so that the election would not be delayed pending further litigation (discovery, trials, appeals, etc.) over disputed claims.

Allowance of Claims for Voting Purposes Under the Bankruptcy Code and Rules From 1979 to 1991

The former Bankruptcy Act was repealed and replaced by the Bankruptcy Code for cases commenced on or after October 1, 1979. The Code differs from the former Act with respect to eligibility of creditors to vote for a trustee. Section 702(a) and (b) of the Code provide, in relevant part:

> "(a) A creditor may vote for a candidate for trustee only if such creditor --
>
> (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under [various sections of chapter 7 governing distributions];

> (2) does not have an interest materially adverse ... to the interest of creditors entitled to such distribution; and
>
> (3) is not an insider.
>
> (b) At the meeting of creditors held under section 341 of this title, creditors may elect one person to serve as trustee in the case if election of a trustee is requested by creditors that may vote under subsection (a) of this section, and that hold at least 20 percent in amount of the claims specified in subsection (a)(1) of this section that are held by creditors that may vote under subsection (a) of this section." [emphasis added]

The requirement that, for voting purposes, a creditor hold an "undisputed, fixed, liquidated" claim did not exist under the former Act.

Another significant change made when the Code was enacted in 1978 is that, under section 341(c), the bankruptcy judge is expressly prohibited from presiding at the meeting of creditors ("The court may not preside at, and may not attend, any meeting under this section..."). This prohibition is consistent with one of the goals of the 1978 Reform Act, which was to remove the bankruptcy judge from administrative matters and generally to limit the judge's role to the resolution of disputes. The judge should be insulated from information discussed at the meeting of creditors so that he or she would remain impartial and not be tainted by unsubstantiated, inadmissible statements that are frequently made at a creditors' meeting. As indicated in the legislative history to the Code, the Rules would determine who

would preside at the meeting.

When the Bankruptcy Rules were first promulgated in 1983 to implement the new Code, Rule 2003 contained the following relevant provisions:

Rule 2003. Meeting of Creditors or Equity Security Holders

****

(b) ORDER OF MEETING.

(1) The clerk shall preside at the meeting of creditors unless (1) the court designates a different person, or (2) the creditors who may vote for a trustee under § 702(a) of the Code and who hold a majority in amount of claims that vote designate a presiding officer...

****

(3) In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face... Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may, after such notice and hearing as it may direct, temporarily allow it for that purpose in an amount that seems proper to the court."

****

(d) REPORT TO THE COURT. 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, the interim trustee shall serve as trustee in the case." [emphasis added]

The Committee Note to the 1983 version of this rule confirmed that, when presiding at a meeting of creditors, "the clerk is not performing any kind of judicial role." With respect to voting at the meeting, the committee note stated that "[i]f it is necessary for the court to make a determination with respect to a claim, the meeting may be adjourned until the objection or dispute is resolved." Again, the Rule permitted the court to "temporarily" allow the claim for voting purposes. Assuming that the court did not temporarily allow a disputed claim before the election, Rule 2003(d) required the presiding officer to report a disputed election to the court and, if a motion was filed within 10 days, the court would resolve the dispute. The committee note also contained the following suggestion: "For the purpose of expediency, the results of the election should be obtained for each alternative presented by the dispute and immediately reported to the court." By tabulating the votes for each alternative at the initial meeting, it would not be necessary to conduct another election after the court resolves the dispute.

In sum, the Code limits voting eligibility to creditors who hold unsecured claims that are "allowable, undisputed, fixed, [and] liquidated." The Rules, prior to 1991, provided that the court may "temporarily" allow claims for voting purposes. Although these Code and Rules provisions coexisted from 1979 until 1991, more recently at least one court has questioned the

validity of the Rule to the extent that it permitted temporary allowance. In In re San Diego Symphony Orchestra Ass'n, 201 B.R. 978, 980-981 (Bankr. S.D. Cal. 1996), the court wrote:

> "[T]he prior version of Rule 2003(b), which purported to authorize the Court to temporarily allow claims [for voting purposes] may well have been inconsistent with and in derogation of the controlling statute, §702(a)(1). Temporary allowance of a claim presupposes that the claim is disputed in some manner, whether it is not fixed as to liability, or not liquidated in amount. Yet § 702 provides that only undisputed, fixed, liquidated claims may vote. The statute does not authorize temporary allowance of otherwise disputed claims, although Congress has demonstrated it knows how to provide for such temporary allowance if it chooses."

The 1991 Amendments to Rule 2003 Deleting "Temporary Allowance" Authority

In 1986, the Code was amended to implement a new nationwide United States Trustee system. In particular, § 341 was amended to provide that the United States trustee shall preside at the meeting of creditors. Because of the numerous Code provisions that were amended by the 1986 legislation (including the United States Trustee system and the addition of chapter 12 family farmer debt adjustments), the Advisory Committee proposed a substantial package of Rule amendments that became effective in 1991. As Reporter, I was asked to prepare drafts of each Rule that required amendment to conform to the 1986 legislation. These drafts were reviewed by the Advisory Committee during 1988 and 1989.

In his memorandum dated April 27, 1988, Thomas J. Stanton,

Director and Counsel to the Executive Office for United States Trustees, requested that the temporary allowance provision in Rule 2003(b)(3) be amended as follows:

> "Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the ~~court may, after such notice and hearing as it may direct,~~ United States trustee may temporarily allow it for that purpose in an amount that seems proper ~~to the court~~, subject to resolution by the court under subdivision (d) of this rule."

In essence, Mr. Stanton urged the Advisory Committee to amend the Rule so that the United States trustee may temporarily allow claims for voting purposes. In accordance with his suggestion, I drafted language for the Committee's consideration at its May 13-14, 1988, meeting in Chicago. At that meeting, this proposal was rejected. The minutes indicate that "Members King, Shapiro, Mabey and Leavy expressed concern about the United States trustee exercising the judicial function of allowing a claim, especially since a motion to resolve the dispute also is required." The minutes also indicate that "[b]y consensus, the Advisory Committee remanded this issue to the Reporter for reworking along the lines of the instructions for reporting disputed elections now located in the Advisory Committee Note." As mentioned above, the committee note at that time suggested that "the results of the election should be obtained for each alternative presented by the dispute and immediately reported to

the court."

I then redrafted the proposed amendments to Rule 2003(b)(3) as follows, which became part of the package of amendments promulgated in 1991:

> "(3) Right to Vote. In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting if, at or before the meeting, the creditor has filed a proof of claim or a writing setting forth facts evidencing a right to vote pursuant to § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. ~~If the court orders the election of a separate trustee for a general partner's estate under Rule 2009(c)(1) a~~ . A creditor of ~~the~~ a partnership may file a proof of claim or writing evidencing a right to vote for ~~that trustee~~ the trustee for the estate of a general partner notwithstanding that a trustee for the estate of the partnership has previously qualified. ~~Notwithstanding objection to the amount or allowability of a claim for the purpose of voting, the court may, after such notice and hearing as it may direct, temporarily allow it for that purpose in an amount that seems proper to the court.~~ In the event of an objection to the amount or allowability of a claim for the purpose of voting, the United States trustee shall tabulate the votes for each alternative presented by the dispute and, if resolution of such dispute is necessary to determine the result of the election, the tabulations for each alternative shall be reported to the court."

In this draft, the provision for temporary allowance of claims for voting purposes was stricken and replaced by the United States trustee's obligation to tabulate votes for each alternative presented by the dispute. Rule 2003(d), which provides for the court to resolve disputed elections on motion of a party in interest, remained unchanged.

The Committee's discussions on this rule took place more

than 10 years ago, and minutes to the Advisory Committee meetings at that time are sketchy and do not include detailed reports of all discussions. But my recollection is that, since the U.S. trustee was to preside at the election, the Committee's view was that he or she should not have any judicial authority to temporarily allow claims and, in view of the judge's limited role (i.e., to adjudicate disputes when necessary), it made sense to have elections conducted without creditors going to court to have claims allowed for voting purposes before the U.S. trustee conducts the election and determines whether the resolution of disputed claims would be necessary at all. Once it is determined that the election does, in fact, turn on whether particular creditors have the right to vote, and a party in interest cares enough to file a Rule 2003(d) motion to resolve the disputed election, then, and only then, should the court become involved.

Once a Rule 2003(d) motion is made to resolve a disputed election, the question is whether the court may "temporarily" allow the claim for voting purposes. My best recollection (neither supported by, nor contradicted by, statements in the minutes) is that the Committee did consider the fact that § 702(a) requires that the creditor have an "allowable, undisputed, fixed, liquidated" claim for voting eligibility and, therefore, it would be inconsistent with the Code for the Rules to authorize the temporary allowance of a disputed or unliquidated claim.

Either a claim is undisputed or it is not; temporary allowance with a view toward final resolution of the dispute later appears to be inconsistent with the "undisputed" requirement. The temporary allowance language was deleted and it was left to the courts to decide how to resolve the motion to determine the winner of a disputed election in a manner that is consistent with the Code. In any event, my recollection is that the deletion of the sentence permitting temporary allowance was deliberate. The deletion of that language was adopted after publishing the draft (showing the temporary allowance sentence stricken) in 1989. The Committee received two letters commenting on the published changes to Rule 2003, but neither mentioned this aspect of the amendment.

By providing this background to the Committee, I do not mean to suggest that the Advisory Committee should not revisit this issue. It is an important one and, in any event, it has been almost a decade since it was last addressed by the Committee.

As pointed out by Mr. Garfinkle, the deletion of the temporary allowance sentence in 1991 has led courts to conclude that they no longer have the power to temporary allow claims when an election is disputed. See, e.g., In re Centennial Textiles, Inc., 209 B.R. 31, 34 (Bankr. S.D.N.Y. 1997)("In the absence of such authority [to temporarily allow claims], and particularly in view of the deletion of that portion of FRBP 2003(b), this Court

will not estimate creditors' claims for the purpose of qualifying a request for a trustee election or for counting such votes in any election.").

Reporter's Recommendation

The policy argument supporting Mr. Garfinkle's recommendation that Rule 2003 be amended to restore the provision authorizing temporary allowance of claims for voting purposes is attractive. In the absence of authority to temporarily allow a claim for voting purposes, creditors may be deprived of the right to vote solely because of a pending groundless objection.

However, I do not recommend that the Committee take any action with respect to Mr. Garfinkle's suggestion to amend Rule 2003. I personally agree with the court's suggestion in *San Diego Symphony* that temporary allowance is inconsistent with § 702(b) of the Code which denies a creditor of voting rights if the claim is disputed or unliquidated. If the court determines that there is a bona fide dispute regarding the claim, I think that § 702(a) mandates that the creditor's vote not count. If, when entertaining a motion to resolve the disputed election under Rule 2003(d), the court determines that the objection to the claim is frivolous or without merit, I think that the court may find that it is an "undisputed" claim and count the vote. But, in any event, I view this as a matter of statutory construction.

I also want to point out that the present Rule provides that

the court shall resolve a disputed election upon motion; it does not say how or what standards the court should use in deciding the motion. If a court believes it is consistent with § 702 for it to temporarily allow the claim when resolving the motion to resolve the disputed election, there is nothing in the Rules that prevents that. In essence, the Rules leave to the courts, as a matter of substantive law, the standards to be used in deciding a Rule 2003(d) motion.

In fairness to Mr. Garfinkle, his recommendation is supported by the legislative history to the Code. In 1978, Senate and House reports on the legislation stated that: "The Rules of Bankruptcy Procedure also currently provide for temporary allowance of claims, and will continue to do so for the purposes of determining who will be eligible to vote." It could be argued that, based on this legislative history, Congress did not view the requirements of § 702(a) as inconsistent with the court's temporary allowance of claims. Although this legislative history should be considered by the Committee, I remain concerned that restoration of the temporary allowance provision would render the rule inconsistent with the Code.

In the event that the Committee agrees with Mr. Garfinkle and wants to restore the temporary allowance option, I would suggest that the temporary allowance language be placed in Rule 2003(d), rather than Rule 2003(b)(3). Since the court does not

preside at the § 341 meeting and should not become involved until a dispute is reported to the court and a motion is made under Rule 2003(d), I think it belongs in that subdivision. If the Committee wants to restore temporary allowance to the Rule, I would recommend that following amendments [Note: the following draft includes amendments to Rule 2003(d) approved by the Standing Committee in June 1998 for presentation to the Judicial Conference later this month]:

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE.

(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. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. 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. In deciding a timely motion to resolve the dispute, the court may temporarily allow a claim for the purpose of voting in an amount that seems proper to the court notwithstanding an objection to the amount or allowability of the claim.

****

COMMITTEE NOTE

Subdivision (d) is amended to provide for temporary allowance of a claim for voting purposes. If an objection to the amount or allowability of a claim is filed, and the vote of the holder of the claim is significant in resolving a disputed election, the court may, after notice and a hearing, temporarily allow the claim for the purpose of voting. The allowance of the claim for other purposes, including distribution, could be delayed until after

resolution of the disputed election.

If the Committee decides to amend Rule 2003 to provide for temporary allowance of claims for voting purposes, I suggest that it make similar amendments to Rule 2007.1(b)(3)(B) on chapter 11 trustee elections. The language of Rule 2007.1(b)(3)(B) is similar to the language of Rule 2003(d)(as it would be changed by the amendments approved by the Standing Commitee in June 1998). In particular, Rule 2007.1(b)(3)(B) could be amended as follows:

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

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(b) ELECTION OF TRUSTEE.

****

(2) *Manner of Election and Notice.* An election of a trustee under § 1104(b) of the Code shall be conducted in the manner provided in Rules 2003(b)(3) and 2006. Notice of the meeting of creditors convened under § 1104(b) shall be given as provided in Rule 2002. The United States trustee shall preside at the meeting. A proxy for the

purpose of voting in the election may be solicited only by a committee of creditors appointed under § 1102 of the Code or by any other party entitled to solicit a proxy pursuant to Rule 2006.

(3) *Report of Election and Resolution of Disputes*.

****

(B) *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. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of

the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule shall serve as trustee. In deciding a timely motion to resolve the dispute, the court may temporarily allow a claim for the purpose of voting in an amount that seems proper to the court notwithstanding an objection to the amount or allowability of the claim. If a motion for the resolution of the

dispute is timely filed, and the court determines the result of the election and approves the person elected, the report will constitute appointment of the elected person as of the date of entry of the order approving the appointment.

COMMITTEE NOTE

Subdivision (B)(3)(b) is amended to provide for temporary allowance of a claim for voting purposes. If an objection to the amount or allowability of a claim is filed, and the vote of the holder of the claim is significant in resolving a disputed election, the court may, after notice and a hearing, temporarily allow the claim for the purpose of voting. The allowance of the claim for other purposes, including distribution, could be delayed until after resolution of the disputed election.

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July 15, 1998

Professor Lawrence P. King
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Professor Walter Taggart
Villanova School of Law
Garey Hall
299 Spring Mill Road
Villanova, PA 19085

Re: Bankruptcy Rule 2003--Temporary Allowance of Claims

Dear Professors King and Taggart:

I am writing this letter to the Advisory Committee on Bankruptcy Rules. Ken Klee suggested that I send this letter to you as the Reporters to the Advisory Committee on Bankruptcy Rules. This letter deals with the temporary allowance of claims in contested trustee elections and recommends that a revision be made to Bankruptcy Rule 2003.

There have been two recent bankruptcy court decisions, In re San Diego Symphony Orchestra Ass'n., 201 B.R. 978 (Bankr. S.D. Cal. 1996), and In re Centenial Textiles, Inc., 209 B.R. 31 (Bankr. S.D.N.Y. 1997), which have held that bankruptcy courts lack the power to temporarily allowed disputed claims in trustee elections.[1] As Judge Bowie stated in the San Diego Symphony decision:

> [Section 702 of the Code] does not authorize temporary allowance of otherwise disputed claims. . . . [T]o the extent that the prior version of Rule 2003(d) actually granted authority to temporarily allow claims (as distinct from appearing to do so in

[1] I represented the voting Musicians in the San Diego Symphony bankruptcy case. My clients initially appealed this decision, but due to the conversion of the case to Chapter 11, the appeal became moot and was dismissed.

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> derogation of the controlling statute), that authority was withdrawn by amendment. Accordingly, and in light of the express language of section 702(a), the Court has no authority to temporarily allow otherwise disputed claims for voting purposes.

As explained in this letter, the reasoning underlying these decisions is flawed and is contrary to the legislative history of Bankruptcy Code § 702 (which Judge Bowie never even mentioned in his decision) and nearly 100 years of well-developed case law on this exact issue.

Provisional Allowance Of Claims Under the Bankruptcy Act of 1898.

The Bankruptcy Act of 1898 provided for creditors to elect trustees at the creditors' meeting. Almost immediately after the enactment of the Bankruptcy Act of 1898, courts recognized that the need to promptly resolve trustee elections may require "provisional" allowance or disallowance of claims. See In re Malino, 118 F. 368 (S.D.N.Y. 1902) ("in proper cases provisional allowances or disallowances may be made in order that a trustee may be expeditiously selected . . ."); In re Pan American Match Co., 242 F. 995 (D. Mass. 1917) (same); In re Milne, Turnbull & Co., 159 F. 280, 282 (S.D.N.Y. 1908) (referee was correct when he provisionally allowed claim and disallowed objection where objecting party had failed to establish by a preponderance of the evidence that preference had been received).

This "provisional" or "temporary" allowance of claims continued through and including the enactment of the Code. See In re Flexible Conveyor Co., 156 F.Supp 164, 172 (N.D. Ohio 1957) ("claims of secured or priority creditors may be temporarily allowed for such sums as the court may seem to be owing above the value of their security or priorities to enable such creditors to participate in the proceedings"); In re Ira Haupt & Co., 379 F.2d 884 (2nd Cir. 1967)(referee correctly allowed creditors' claims for purposes of voting on trustee election).

Temporary Allowance of Claims Under the Bankruptcy Code.

In 1978, the Bankruptcy Code was enacted. Included in the Code is section 702 which allows creditors to elect their own trustees in chapter 7 bankruptcy cases. Section 702(a) uses the terms "allowable," "liquidated," "fixed" and "undisputed" to determine eligibility of a claim. In using these terms, it appears that Congress intended that bankruptcy courts would make the determinations whether claims were, in fact, "allowable," "liquidated," "fixed" and "undisputed" because these are all undefined descriptive legal conclusions. One of the

procedures for making such determinations is the temporary or "provisional" allowance of claims. As set forth in the legislative history to § 702:

> "The Rules of Bankruptcy Procedure also currently provide for temporary allowance of claims, and will continue to do so for the purposes of determining who will be eligible to vote."

Senate Report No. 95-989, 95th Cong., 2d Sess. 92-93 (1978); See also House Report No. 95-595, 95th Cong., 1st Sess. 378 (1977). This is the only procedure for resolving eligibility questions mentioned anywhere in § 702.

The legislative history to § 702 illustrates that temporary allowance is the procedure Congress contemplated courts would use to resolve eligibility questions. It also shows that temporary allowance of claims for trustee elections is not inconsistent with the Code.

Following enactment of the Code, bankruptcy courts routinely temporarily allowed claims in connection with a Chapter 7 election. See In re Metro Shippers, Inc., 63 B.R. 593, 598 (Bankr. E.D. Pa. 1986) (When there is an objection to the amount or allowability of a claim in connection with a Chapter 7 election, "the court may temporarily allow it for that purpose in an amount that seems proper to the court.") As another bankruptcy court noted: "[T]he provisional allowance of disputed claims for the purpose of expeditiously selecting a trustee has long been recognized." In re Cohoes Ind. Terminal, Inc., 90 B.R. 67, 69 (S.D.N.Y. 1988). Prior to the San Diego Symphony decision there was no reported decision in which a court held that the power to temporarily allow claims was inconsistent with § 702 of the Code probably because the legislative history quoted above said otherwise.

The 1991 Amendment to Rule 2003.

In 1986, the "Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986" (the "1986 Bankruptcy Act") was enacted to make the U.S. trustee permanent and nationwide. The 1986 Bankruptcy Act did not amend § 702 at all.

By virtue of making the U.S. Trustees' program nationwide, substantial revisions of the Bankruptcy Rules were required. During 1988 and 1989, the Advisory Committee on Bankruptcy Rules worked on those amendments. That process included amending Rule 2003.

During the course of the election dispute in the San Diego Symphony bankruptcy case, I obtained a detailed declaration from Peter McCabe, Secretary to the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States. Attached to Mr.

McCabe's declaration are copies of minutes from the Advisory Committee meetings (during 1988 and 1989) at which the revisions to Rule 2003 were discussed and preliminary drafts of the revisions to Rule 2003. I have enclosed for your reference a copy of Mr. McCabe's declaration.

As stated in the Preface to Preliminary Draft of Proposed Amendments to the Bankruptcy Rules (attachment 8 to Mr. McCabe's Declaration) regarding the changes: "Rule 2003, governing meetings of creditors or equity security holders, is amended . . . to conform to the 1986 Act which gives the United States trustee the duty to call and preside at the meetings."

The minutes from the Committee meetings at which the revisions to Rule 2003 were discussed reveal that proposed changes centered around the role of the U.S. Trustee in elections. They also reveal that removing the ability of bankruptcy courts to temporarily allow claims was never discussed or even contemplated. There is only one mention of allowance of claims in any of the Rule Committee meetings. That reference is found in the minutes from the May 13-14, 1988 meeting. Those minutes state:

> "Members King, Shapiro, Mabey and Leavy expressed concern about the United States trustee exercising the judicial function of allowing a claim, especially since a motion to resolve the dispute also is required."

McCabe Declaration, Att. #2. Thus, the only mention to allowance of claims for an election in the minutes is an objection to the U.S. trustee allowing claims--which the Rules Committee viewed a judicial function, not a function of the U.S. trustee's office.

The amendment process was completed in June 1990 and the amendment to Rule 2003 was adopted without change by the Supreme Court on April 30, 1991. McCabe Declaration, ¶¶ 8-9. Based upon my review of the attachments to Mr. McCabe Declaration, there does not appear to have been any intent by the Advisory Committee to delete the temporary allowance powers from Rule 2003(b).

Recommendations.

The temporary allowance of claims provision should be restored to Bankruptcy Rule 2003. This will make Bankruptcy Rule 2003 consistent with the § 702 of the Code and its legislative history. Without this correction, interim trustees or other parties who wishing to deprive creditors of their electoral rights need only assert an objection to the claims of the

voting creditors (which is exactly what happened in the San Diego Symphony case when the interim trustee objected to the claims of 76 creditors on the eve of the election).[2/]

I would be pleased to supply whatever additional information the Committee needs. Or, if the Committee so desires, propose corrective language to Rule 2003.

Very truly yours,

BROBECK, PHLEGER & HARRISON LLP

By
Jeffrey K. Garfinkle

Enclosure

cc: Professor Kenneth Klee (w/enc.)
Professor Alan N. Resnick (w/enc.)

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[2] At a hearing on the claim objections held several months after the San Diego Symphony decision was issued, the bankruptcy judge overruled virtually all of the claim objections.

owner of the property here at issue in the next 180 days who has notice of this order. Upon the recordation of the order in the county recorder's office, this order will operate as an equitable servitude on the property for 180 days.

The Court denies relief as to the four joint owners of the property who are not before the Court on due process grounds, and because an adversary proceeding has not been brought against them. The Court also denies an injunction prohibiting transfer of the property for the next 180 days, because it appears to the Court that such an injunction is unnecessary in view of the relief granted, and because an adversary proceeding is required for injunctive relief.

Counsel is directed to submit an order consistent with this opinion.

In re SAN DIEGO SYMPHONY ORCHESTRA ASSOCIATION, Debtor.

Bankruptcy No. 96–07490–A7.

United States Bankruptcy Court, S.D. California.

Oct. 8, 1996.

Musicians, as creditors of debtor-orchestra, filed motion to resolve disputed election of permanent Chapter 7 trustee. The Bankruptcy Court, Peter W. Bowie, J., held that: (1) bankruptcy court lacked authority to temporarily allow claims for purposes of voting; (2) musicians' claims were "disputed" by virtue of factual disputes as to cessation date of debtor's business, any duty to mitigate, or any entitlement to postpetition wages after prepetition cessation of business, thus precluding musicians from voting their claims; and (3) trustee's preference claim also rendered musicians' claims disputed.

So ordered.

1. Bankruptcy ⇐3004.1

If at least 20% of creditors qualified to vote request election, and at least 20% of amount of such qualified claims actually votes, then candidate who receives majority of amount of such claims actually voted is elected Chapter 7 trustee. Bankr.Code, 11 U.S.C.A. § 702(a).

2. Bankruptcy ⇐3004.1

Bankruptcy court lacks authority to temporarily allow claims for purposes of voting in election of Chapter 7 trustee; amendment to bankruptcy rule, expressly deleting provision authorizing court to temporarily allow claims for that purpose, deprived court of authority to do so, and prior rule appeared to have been inconsistent with and in derogation of controlling statute in any event. Bankr.Code, 11 U.S.C.A. § 702(a); Fed. Rules Bankr.Proc.Rule 2003(b), 11 U.S.C.A.

3. Bankruptcy ⇐3004.1

Base or universe of creditors who are authorized to vote in election of Chapter 7 trustee is not limited to those having filed proofs of claim or other writing before or at meeting at which election is held; instead, courts should look first to debtor's schedules to identify amount of undisputed general unsecured claims, and add to that the amount of any unscheduled proofs of claim to which no objection has been filed. Bankr.Code, 11 U.S.C.A. § 702(a).

4. Bankruptcy ⇐3004.1

For purposes of calculating universe of general unsecured claims eligible to vote for

permanent Chapter 7 trustee, amounts specified in musicians' filed proofs of claim superseded debtor-symphony's scheduled amount for those claims, and thus universe of eligible claims equaled amount of scheduled general unsecured claims plus whatever amounts, if any, were added from musicians' proofs of claim. Bankr.Code, 11 U.S.C.A. § 702(a).

5. Bankruptcy ⇐3004.1

Creditors that voted for interim trustee would be deemed to have not requested election for permanent trustee. Bankr.Code, 11 U.S.C.A. § 702(a).

6. Bankruptcy ⇐3004.1

Musicians' wage claims were "disputed" by virtue of factual disputes as to cessation date of debtor-symphony's business, any duty to mitigate, or any entitlement to postpetition wages after prepetition cessation of business, thus precluding musicians from voting their claims in election of permanent Chapter 7 trustee; objections filed against musicians' claims were not patently unsupportable or frivolous. Bankr.Code, 11 U.S.C.A. § 702(a).

See publication Words and Phrases for other judicial constructions and definitions.

7. Bankruptcy ⇐3004.1

For purposes of determining whether musicians, as creditors of debtor-symphony, were qualified to vote in election of permanent Chapter 7 trustee, musicians' claims would be deemed liquidated since they were based on alleged contractual obligations; contractual obligations would generally be readily calculable, and therefore liquidated. Bankr.Code, 11 U.S.C.A. § 702(a).

8. Bankruptcy ⇐3004.1

For purposes of determining whether musicians, as creditors of debtor-symphony, were qualified to vote in election of permanent Chapter 7 trustee, bankruptcy court could not simply rule on objections filed against musician's claims, since issue was whether musicians held allowable, undisputed, fixed and liquidated claims at time of election; if there was dispute to be resolved over musicians' claims, such claims were disputed and ineligible to request election or vote as of time of election. Bankr.Code, 11 U.S.C.A. § 702(a).

9. Bankruptcy ⇐3004.1

In determining whether claim is "disputed," so as to preclude claimholder from voting in election of permanent Chapter 7 trustee, court need only apply, at most, bona fide dispute assessment, asking whether there are genuine issues of law or fact with respect to contested claim; court is not required to determine outcome of claim objection, or probability or reasonably possibility of outcome. Bankr.Code, 11 U.S.C.A. § 702(a).

10. Bankruptcy ⇐3004.1

Interim trustee's assertion that creditor-musicians received preferential payments within 90 days before debtor-orchestra's bankruptcy filing, as supported by evidence of payments of antecedent debts within the 90 days, was sufficient to make musicians' wage claims "disputed" and thereby disqualify musicians from voting their claims in election for permanent Chapter 7 trustee; interim trustee was not required to prove all elements of preference claim nor rebut anticipated defenses, and trustee could also rely on presumption of insolvency. Bankr.Code, 11 U.S.C.A. § 702(a).

Margaret M. Mann, Luce, Forward, Hamilton & Scripps, San Diego, CA, for Debtor.

David L. Osias, Loraine L. Pedowitz, Allen, Matkins, Leck, Gamble & Mallory, San Diego, CA, for Richard M. Kipperman, Interim Trustee.

Theodore W. Graham, Jeffrey K. Garfinkle, Brobeck, Phleger & Harrison, San Diego, CA, for Unsecured Creditors/Musicians.

James P. Hill, Sullivan, Hill, Lewin & Markham, San Diego, CA, for Ashton F. Pitts, Jr.

MEMORANDUM DECISION

PETER W. BOWIE, Bankruptcy Judge.

By prior separate Order, the Court held that the Musicians' motion to resolve the

disputed election of a permanent Chapter 7 trustee in this case was timely filed. The Court also ruled that the 1991 amendment to Rule 2003(b), expressly deleting the provision authorizing a court to temporarily allow claims for purposes of voting in such an election, deprived the Court of authority to temporarily allow claims as the Musicians had requested. The Court then asked for supplemental briefs centering on the effect of the objections to the Musicians' proofs of claims on their ability to vote some or all of those claims in the trustee election. The Court has reviewed the supplemental pleadings and the cited authorities.

The interim trustee filed objections to the proofs of claims filed by almost all of the Musicians. The objections were the same, and asserted that 1) the portion of the claim which sought future wages beyond the Symphony's cessation of business was not allowable; 2) even if future wages were allowable, each claiming musician had a duty to mitigate those damages; 3) each claiming musician also had a duty to mitigate his or her prepetition wage claim; 4) the priority portion of many claimants was overstated by asserting the maximum of $4,000; and 5) each claim must be denied as long as the musicians retained a preferential security interest in the Symphony library, and preferential payments of antecedent wages made within 90 days of the filing, pursuant to 11 U.S.C. § 502(d). The claim objections were supported by a short declaration of Mr. Kipperman with an attached copy of a letter from the Union representative to the Symphony president discussing how certain payments the Symphony was to make to the Musicians were to be attributed.

[1] The relevant statutory provision is 11 U.S.C. § 702(a), which provides:

> (a) A creditor may vote for a candidate for trustee only if such creditor—
>
> (1) holds an allowable, undisputed, fixed, liquidated, unsecured claim of a kind entitled to distribution under section 726(a)(2), 726(a)(3), 726(a)(4), 752(a), 766(h), or 766(i) of this title;
>
> (2) does not have an interest materially adverse, other than an equity interest that is not substantial in relation to such creditor's interest as a creditor, to the interest of creditors entitled to such distribution; and
>
> (3) is not an insider.

In order for an election to be conducted, at least 20% in amount of the claims in (a)(1) must request the election. If at least 20% do request the election, at least 20% of the amount of the claims in (a)(1) must actually vote. If that second threshold is crossed, then the candidate who receives a majority of the amount of the (a)(1) claims actually voted is elected the trustee. *In re Michelex, Ltd.*, 195 B.R. 993, 998–99 (Bankr.W.D.Mich.1996).

As the statute makes clear, in order to vote, a creditor must hold "an allowable, undisputed, fixed, liquidated, unsecured claim". In the present case, the interim trustee filed objections to virtually all of the claims filed by the Musicians. If by virtue of the filed claims objections those claims are "disputed" within the meaning of § 702(a)(1), then they cannot vote, nor can they be counted in any request for an election. That is the crux of the issue before the Court, and is the focus of the supplemental pleadings.

[2] The Musicians raise the concern that a party in interest might be able to disenfranchise certain creditors by filing objections to their proofs of claim, even if the objections have no merit. Accordingly, the Musicians continue to press their argument that the Court has continuing authority to temporarily allow their claims for purposes of voting notwithstanding the express withdrawal of that authority by the 1991 amendment to Rule 2003(b). The Court disagrees, as already discussed in the separate Order. As also discussed in that Order, the prior version of Rule 2003(b), which purported to authorize the Court to temporarily allow claims, may well have been inconsistent with and in derogation of the controlling statute, § 702(a)(1). Temporary allowance of a claim presupposes that the claim is disputed in some manner, whether it is not fixed as to

liability, or not liquidated in amount. Yet § 702 provides that only undisputed, fixed, liquidated claims may vote. The statute does not authorize temporary allowance of otherwise disputed claims, although the Congress has demonstrated it knows how to provide for such temporary allowance if it chooses. 11 U.S.C. § 502(c). The statute remains the controlling authority, not a revoked and arguably inconsistent Rule provision. *In re Pacific Atlantic Trading Co.*, 33 F.3d 1064 (9th Cir.1994). As the Court previously held, to the extent the prior version of Rule 2003(b) actually granted authority to temporarily allow claims (as distinct from appearing to do so in derogation of the controlling statute), that authority was withdrawn by amendment to Rule 2003(b). Accordingly, and in light of the express language of § 702(a), the Court has no authority to temporarily allow otherwise disputed claims for voting purposes.

[3] As noted, a threshold determination of an election under § 702 is a determination of the base or universe of creditors who are authorized to vote. How to calculate that universe has been considered by several courts, with two emerging lines of authority. One line, represented by *In re Lake States Commodities, Inc.*, 173 B.R. 642 (Bankr. N.D.Ill.1994), holds that the universe is defined by the proofs of claim or other writing filed before or at the § 341 meeting at which the election is held. 173 B.R. at 646. The other line recognizes a broader universe, as discussed in *In re Michelex, Ltd.*, 195 B.R. 993 (Bankr.W.D.Mich.1996). This Court agrees with the *Michelex* court and others that the universe is broader than filed claims or writings. In addition to the reasons stated by the *Michelex* court for its conclusion, there are others. In a Chapter 7 case, the claims bar date does not run until 90 days after the first date set for the meeting of creditors, [Rule 3002(c)], and in many cases notice is given to creditors to not file claims until further notice, while the trustee ascertains whether there are any non-exempt assets which might produce a dividend. To say that the universe of possible voters is limited to those who have filed proofs of claim or other writings is to allow certain creditors to self-select whether there will be an election and who will vote in it, without notice to the balance of the scheduled creditor body. Such a result is contrary to the congressional purpose of ensuring meaningful creditor participation in the process because the fewer claims are filed, the smaller the universe, and the smaller number of votes actually cast would be necessary for an election.

Michelex instructs that courts should look first to debtor's schedules to identify the amount of undisputed general unsecured claims, and to add to that the amount of any unscheduled proofs of claim to which no objection has been filed. There is a potential for abuse by debtors if schedules are improperly filed, whether debts are omitted, improperly classified, listed in incorrect amounts, or scheduled as undisputed or contingent. Courts confronted with such situations will have to devise ways to deal with them, such as requiring the filing of amended schedules. See *Michelex*, 195 B.R. at 1006, and n. 30.

[4] In the present case, the debtor scheduled the claims of the Musicians as priority claims for wages, even though the amounts listed substantially exceeded the statutory ceiling for priority wages. None of the Musician claims were listed on Schedule F as general unsecured claims, even though the balance of the claim exceeding the priority wage cap would be general unsecured. In addition, the amount listed for the Musicians is substantially less than the amounts set out in the individual proofs of claim filed by the musicians.

[5] Debtor originally listed on Schedule F $2,041,262.53 in claims. That Schedule was filed May 31, 1996. It was amended on June 7, 1996 to show a total of $1,286,356.53. The amendment did not change the claims scheduled for the Musicians in Schedule E. Only a small portion of the scheduled unsecured claims filed proofs of claim prior to the first meeting. Of the scheduled unsecured

debt, $1,049,234 did not file proofs of claim. However, proofs of claim, other than the Musicians, were filed with the Court or at the first meeting totalling $682,414.90, including the claim of San Diego National Bank filed at the § 341 meeting. That brings the total of nonsuperseded scheduled general unsecured claims, plus proofs of claim (not including the Musicians) to $1,731,638.90. Because the claims for the Musicians were listed in Schedule E even though many exceeded the cap, the Court would generally treat the amounts scheduled which are in excess of the statutory cap as general unsecured claims and would add that amount to the amended Schedule F total. That amount appears to be $351,858.91. However, the Musicians filed proofs of claim, and proofs of claim generally supersede the debtor's scheduled amount. Consequently, for purposes of calculating the universe of general unsecured claims the universe is $1,731,648.90 plus whatever amounts, if any, are added from the Musicians' proofs of claim. If no amounts are added for the Musicians' claims because they are found to be disputed within the meaning of § 702(a), then claims in the amount of $346,329.78, or 20% of the universe, must have requested an election. The Court agrees that creditors that voted for the interim trustee should be deemed to have not requested an election. *In re Oxborrow*, 913 F.2d 751, 753 (9th Cir.1990). Excluding the claims of the Musicians in their entirety, only $45,741.16 in claims actually requested an election, representing two claimants, neither of whom voted for a particular candidate.

It is noted that if the Musicians' general unsecured claims as determined by the excess from Schedule E were added to the universe of $1,731,648.90, the universe would become $2,083,507.81. Twenty percent of that is $416,701.56, which is more than the sum of $351,858.91 plus $45,741.16. Consequently, if the Musicians' general unsecured claims were allowed as erroneously scheduled, there would be less than 20% of the universe requesting the election, and no election would have been held. For an election to have been properly requested in this case, the Musicians must be permitted to vote some substantial portion of their claims. Accordingly, to resolve the election dispute, the Court must determine whether the Musicians can vote any portion of their proofs of claim.

[6, 7] The issue is whether the Musicians' claims are disputed within the meaning of § 702(a). For purposes of the present discussion, the Musicians' claims are deemed liquidated because they are based on alleged contractual obligations and, generally, contractual obligations are readily calculable, and therefore liquidated. *In re Fostvedt*, 823 F.2d 305 (9th Cir.1985); *In re Loya*, 123 B.R. 338 (9th Cir. BAP 1991).

[8] The Musicians urge that the Court should "simply rule on the claims objections." But that argument, and process, begs the issue. The issue is whether at the time of the election the Musicians held allowable, undisputed, fixed and liquidated claims. For present purposes, the issue is whether there is a dispute to be resolved over the Musicians' claims. If there is, the claims are disputed and ineligible to request an election or vote as of the time of the election.

The few courts which have looked at the issue have recognized that if a timely objection to a claim has been filed, that claim cannot be counted among the § 702(a)(1) claims for purposes either of requesting an election or for voting in one. In *In re Aspen Marine Group, Inc.*, 189 B.R. 859, 862, 863 (Bankr.S.D.Fla.1995), a Chapter 11 case, the court recognized that the standards of § 702 and procedures of Rule 2003 were applicable to a Chapter 11 trustee election under 11 U.S.C. § 1104(b). The court there stated:

> This Court also concludes that the Report correctly tabulated all claims for purposes of voting and of determining the total universe of claims to be counted for the Election. The Report, did not count claims to which objections were pending, and creditors that the Debtor listed as disputed and that had not filed a proof of claim. The Report did, however, count all claims listed in the Debtor's Schedules as

undisputed and non-contingent as eligible to vote, even though such creditors did not file proofs of claims.

The court recognized "that the proper time to compute the universe of voting creditors is at the time of an election." 189 B.R. at 863. The court then reiterated its earlier conclusion:

> This Court finds, therefore, that the Report correctly excluded from voting and from the total claimants all claims to which objections were pending at the time of the Election was and any subsequently filed claims.

Id.

The court in *In re Lake States Commodities, Inc.*, 173 B.R. 642 (Bankr.N.D.Ill.1994), recognized the issue, but did not have to resolve it because no timely objections were filed. The court observed:

> Section 502 and Fed.R.Bankr.P. 2003(b)(3) presume the allowance of the amount on the proofs of claim on file as of the date of the Section 341 meeting for voting purposes.
>
> [This] presumption is overcome if there is an objection to the claim or the claim is insufficient on its face ... The burden of establishing the invalidity of the claim for this purpose is on the objector.
>
> 4 *Collier on Bankruptcy*, ¶ 702.01, p. 702–08 (15th Ed.1994) (citations omitted). Further, any objections must be made at the time the vote is taken.

173 B.R. at 647. The court then posed the rhetorical question: "In other words, due to an objection being filed were any claims deemed not allowable." *Id.* The court concluded no timely objections were made either collectively or to individual proofs of claim.

The discussion in *Collier's*, quoted above, is actually of little utility because as the paragraph in *Collier's* immediately following the quoted language indicates, the text still contemplates the temporary allowance of claims authorized prior to 1991. As already discussed, this Court has concluded that authority to temporarily allow claims for voting purposes under § 702(a) no longer exists.

[9] The interim trustee has borrowed from case law involving the filing of involuntary petitions under 11 U.S.C. § 303. To be a petitioning creditor, the claim must not be "contingent as to liability or the subject of a bona fide dispute ..." § 303(b)(1). The cases have indicated that the court should only look at the contested claim to ascertain whether there are genuine issues of law or fact. If so, the claim is disputed. *In re Lough*, 57 B.R. 993 (Bankr.E.D.Mich.1986), and its progeny. A similar approach is appropriate under § 702, although it can be argued that even less scrutiny is warranted under § 702 because § 702 does not on its face require a bona fide dispute, but only a dispute. The Congress knows how to modify "dispute" with the requirement of "bona fide" when it chooses. Section 303 is an example, as is § 363(f)(4).

At oral argument, counsel for the interim trustee suggested the test was to determine if the objection was non-frivolous. Counsel for the debtor has urged the same standard in the supplemental brief. However the test is labelled, what is clear is that any standard that requires determining the outcome of the claim objection, or the probability, or the reasonable possibility of the outcome goes too far into weighing the merits of the objection. This Court concludes that the test is no more than the bona fide dispute assessment of § 303(b), and it may well be even less than that.

Applying that standard to the objections to the Musicians' claims, the Court first notes that some portion of each Musician's claim is entitled to priority as wages. However, the parties have a factual dispute as to the business cessation date which impacts which 90 days are within the priority period. In turn, that fact determines what portion of the prepetition wage claims in excess of the priority portion are general unsecured claims. That is relevant because priority claims are excluded from the election process under § 702. Consequently, calculation of the

amount of prepetition general unsecured claims cannot be determined until the cessation date is resolved. The interim trustee has also argued that the claimants had a duty to mitigate, and that individual adjustments to claims must be made to recognize dates when claimants did not work.

The substantial majority of the Musicians' claims seek compensation for lost post-petition wages which the Musicians claim they were guaranteed regardless of the cessation of business. The interim trustee has objected on the ground that federal labor law precludes liability for wages after cessation of business. The trustee also asserts that if post-petition wages were recoverable there would be a corresponding duty to mitigate that claim.

By examining the claim and the claim objection, the Court cannot determine the cessation date, any duty to mitigate, or any entitlement to postpetition wages after a prepetition cessation of business. The objections are not patently unsupportable or frivolous. The Court expresses no opinion on their merits, only that they are sufficient to make the claims disputed within the meaning of § 702.

The interim trustee has also objected on the ground that the Musicians' claims are not allowable as long as they retain preferential transfers, as 11 U.S.C. § 502(d) instructs. At the time of the first meeting the Musicians and their Union apparently held a security interest in the Symphony's library, granted within 90 days immediately prepetition. Because eligibility to vote is calculated as of the date of the first meeting of creditors, the existence of that allegedly preferential security interest may have been enough to render those claims unallowable for § 702 purposes. As soon as they learned of the objection, however, the Musicians did everything they could to immediately return any interest they held in the library. Because of the Court's ruling that the Musicians' claims are disputed as already discussed, the Court need not reach whether those efforts to divest the security interest in the library was sufficient or timely to otherwise permit the Musicians to participate under § 702.

[10] The interim trustee also asserted that the Musicians have received preferential payments within 90 days before the filing. The trustee's declaration attached sufficient evidence of payments of antecedent debts within the 90 days to do much more than raise a suspicion of a preference. The interim trustee is not required to prove all the elements of a § 547 claim, but is required to provide some evidence on each. The trustee may rely on the presumption of insolvency found in § 547(f). The claimant may be able to establish one of the recognized defenses to a preference action, but the trustee is not required to provide evidence to rebut anticipated defenses when raising a § 502(d) objection to the allowability of a claim for § 702 election purposes. The trustee has provided sufficient evidence to invoke § 502(d) to dispute the allowability of the Musicians' claims for purposes of a § 702 election. Again, the Court expresses no opinion on the merits or likely outcome of any preference action which might be brought.

There is a final issue raised by the interim trustee which goes to the eligibility of the Musicians' claims to participate in this disputed election. Subsection (a)(2) of § 702 excludes creditors who have an interest "materially adverse ... to the interest of creditors entitled to such distributions...." While there is a paucity of decisions which discuss what might be an interest which is materially adverse, it has been suggested that a creditor with a secured and an unsecured portion of a secured claim might fit that test because of the creditor's usual preference to have as much of its claim defined as secured, and therefore senior in priority as can be accomplished. *In re Michelex Ltd.*, 195 B.R. 993, 1007 (Bankr.W.D.Mich. 1996). It is arguable that the wage claims of the Musicians, although they are subject to a $4,000 cap for priority allowance, may be in a similar position. Moreover, to the extent the Musicians press their claims for postpetition wages, which is a separate type of claim than

held by the balance of the prepetition unsecured creditors, that component of their claims may give them a materially adverse interest sufficient to disqualify them from the § 702 process.

There is another facet to the adverse interest issue, whether raised under § 702(a)(2) or independently. The Congress determined that only creditors with allowable, undisputed, fixed, liquidated unsecured claims should participate in the process of electing the trustee to administer the bankruptcy estate from which they will be paid, if at all. The Congress did not intend that creditors who had disputes with the estate over liability for or the amounts of their claims would be able to participate in the election process. As the interim trustee and the debtor have pointed out, it would be a strange perversion of the intent of § 702 to allow creditors who had disputed claims against the estate to participate in an election to choose their opposition.

For all the foregoing reasons, the Court concludes that the claims of the Musicians are disputed or not allowable within the meaning of 11 U.S.C. § 702, and therefore may not participate in any amount in either requesting or voting in an election under § 702. The Court has determined the universe of claims for requesting an election and without participation of a significant portion of the Musicians' claims, there is not the requisite 20% in amount of claims requesting an election. Because an insufficient amount of claims have requested an election, none has occurred, and the interim trustee remains in office.

IT IS SO ORDERED.

In re Stephen A. BARRACK and Elizabeth A. Barrack, Debtors.

Patrick L. McCRARY, Trustee, Patrick L. McCrary Money Purchase Plan, Plaintiff,

v.

Stephen A. BARRACK and Elizabeth A. Barrack, Defendants.

Bankruptcy No. 95–07783–B7.
Adv. No. 95–90572.

United States Bankruptcy Court, S.D. California.

Oct. 15, 1996.

Judgment creditor sought to have claim excepted from discharge. The Bankruptcy Court, Peter W. Bowie, J., held that debt to creditor, stemming from claim for financial loss based upon oral false representations of financial condition, did not come within discharge exception for willful and malicious injury.

So ordered.

1. Bankruptcy ⇐3353(1.30)

For purposes of excepting debt from discharge, when debtor's material misrepresentation is with respect to debtor's financial condition, claimant must proceed under discharge exception for false financial statements. Bankr.Code, 11 U.S.C.A. § 523(a)(2)(B).

2. Bankruptcy ⇐3355(2.1)

Debtors' debt to creditor, stemming from claim for financial loss based upon oral false representations of financial condition, did not come within discharge exception for willful and malicious injury. Bankr.Code, 11 U.S.C.A. § 523(a)(6).

3. Bankruptcy ⇐2363.1, 3341

In light of general policy favoring "fresh start," exceptions to discharge are to be

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO THE RULES RELATING TO INJUNCTIONS IN A PLAN

DATE: September 2, 1998

In June 1998, the Advisory Committee presented to the Standing Committee for its final approval a proposed amendment to Rule 7001 on adversary proceedings. The proposed amendment to Rule 7001 would recognize that an adversary proceeding is not necessary if a plan provides for injunctive or other equitable relief. The Standing Committee approved the proposed amendment for presentation to the Judicial Conference in September.

At the Advisory Committee meeting in March, Chris Kohn and other Department of Justice officials expressed opposition to the proposed amendment to Rule 7001 because of their concern that it would not provide adequate procedural protections for those whose conduct would be enjoined under a plan. Shortly before the Standing Committee considered the proposed amendment in June, the Department withdrew its opposition to the proposed amendment. However, the withdrawal of its opposition was with the understanding that it would bring to the Advisory Committee for its consideration proposed amendments to other rules designed to protect the rights of persons who would be the subject of plan injunctions.

Accordingly, Chris Kohn and I have been discussing possible

amendments to the Rules designed to provide such procedural protections. Chris faxed me drafts of possible amendments, and I responded with comments and alternative drafts, with a view toward formulating drafts that would assist the Advisory Committee in discussing proposed amendments.

The following proposed amendments are presented to the Advisory Committee for its consideration at the October meeting.

PROPOSED AMENDMENTS REGARDING PLAN INJUNCTIONS

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

* * * *

(c) *Content of Notice.*

* * * *

(3) *Notice of Hearing on Confirmation When Plan Provides for an Injunction*. If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notices required under Rule 2002(b)(2) shall:

(A) include in conspicuous language (bold, italic, or highlighted text) a statement that the plan proposes an injunction;

(B) briefly describe the nature of the injunction; and

(C) identify the entities that would be subject to the injunction.

COMMITTEE NOTE

Subdivision (c)(3) is added to assure that parties receiving notice of a hearing to consider confirmation of a plan under subdivision (b) receive adequate notice of an injunction provided for in the plan if it would enjoin conduct that is not otherwise enjoined by operation of the Code.

This new requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 2002(c)(3) would not apply because that conduct would be enjoined under § 524(a)(2) upon the debtor's discharge. But if a plan provides that creditors will be enjoined from asserting claims against persons who are not debtors in the case, the notice of the confirmation hearing must include the information required under Rule 2002(c)(3) because that conduct would not be enjoined by operation of the Code. See § 524(e).

The requirement that the notice identify the entities that would be subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the notice may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the notice to identify the entities as "all creditors of the debtor" and for the notice to be published in a manner that satisfies due process requirements.

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 3016. Filing of Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

****

(c) *Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the plan and disclosure statement shall state in specific and conspicuous language (bold, italic, or

highlighted text) the act or acts to be enjoined and identify the entities that would be subject to the injunction.

COMMITTEE NOTE

Subdivision (c) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, receive adequate notice of the proposed injunction.

This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. For example, if a plan contains an injunction against acts to collect a discharged debt from the debtor, Rule 3016(c) would not apply because that conduct would be enjoined nonetheless under § 524(a)(2). But if a plan provides that creditors will be permanently enjoined from asserting claims against persons who are not debtors in the case, the plan and disclosure statement must highlight the injunctive language and comply with the requirements of Rule 3016(c). See § 524(e).

The requirement that the plan and disclosure statement identify the entities that would be subject to the injunction requires reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the plan and disclosure statement may describe them by class or category. For example, it may be sufficient for the subjects of the injunction to be identified as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Case

****

(f) *Notice and Transmission of Documents to Entities Subject to an Injunction Under a Plan.* If a plan provides for an injunction against conduct not otherwise enjoined under the Code and an entity that would be subject to the injunction is not a creditor or equity security holder, at the hearing held under Rule 3017(a), the court shall consider procedures for providing the entity with:

(1) at least 25 days' notice of the time fixed for filing objections and the hearing on confirmation of the plan containing the information described in Rule 2002(c)(3); and

(2) to the extent feasible, a copy of the plan and disclosure statement.

COMMITTEE NOTE

Subdivision (f) is added to assure that entities whose conduct would be enjoined under a plan, rather than by operation of the Code, and who will not receive the documents listed in subdivision (d) because they are neither creditors nor equity security holders, are provided with adequate notice of the proposed injunction.

This rule recognizes the need for adequate notice to subjects of an injunction, but that reasonable flexibility under the circumstances may be required. If a known and identifiable entity would be subject to the injunction, and the notice, plan, and disclosure

statement could be mailed to that entity, the court should require that they be mailed at the same time that the plan, disclosure statement and related documents are mailed to creditors under Rule 3017(d). If mailing notices and other documents are not feasible because the entities subject to the injunction are described in the plan and disclosure statement by class or category because they cannot be identified individually by name and address, the court may require that notice under Rule 3017(f)(1) be published.

This rule do not address any substantive law issues relating to the validity or effect of any injunction provided under a plan, or any due process or other constitutional issues relating to notice. These issues are beyond the scope of these rules and are left for judicial determination.

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

****

(c) ORDER OF CONFIRMATION.

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail and not by reference to the plan or other document, the act or acts to be enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.

(2) notice of entry ~~thereof~~ of the order of confirmation shall be mailed promptly ~~as provided in Rule 2002(f)~~ to the debtor, the trustee, creditors,

equity security holders, ~~and~~ other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient for the order to identify the entities as "all creditors of the debtor."

This rule is not intended to affect any determination of whether, or to what extent, a plan may provide for injunctive relief. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

Amendment to official Form 15 (Order Confirming Plan)

[*insert after last paragraph of the form)*

[if appropriate, include statement required under Rule 3020(c)(1) regarding an injunction provided for in the plan]

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: NEW TIME FOR OBJECTING TO EXEMPTIONS AFTER CONVERSION TO CHAPTER 7: BANKRUPTCY RULES 4003(b) AND 1019(2)

DATE: August 30, 1998

Under Bankruptcy Rule 4003(b), the trustee or a creditor has 30 days from the conclusion of the meeting of creditors held under § 341 (or from the filing of an amendment to the list of claimed exemptions or supplemental schedules) to file an objection to claimed exemptions, unless on motion made within that 30-day period the court extends the time.

In Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992), the Supreme Court held that a claimed exemption may not be challenged after the expiration of the time period set forth in Rule 4003(b), even if no legal basis exists for the exemption. But the Supreme Court's decision expressly left open the question (because it was not properly raised) of whether a court may use its powers under §105(a) to deny a claimed exemption that had no basis in law if a tardy objection is filed after the 30-day period. See In re Blanton, 197 B.R. 328, 330 (Bankr. D. Colo. 1996), where the bankruptcy court, emphasizing the Supreme Court's refusal to rule on the application of § 105(a) in this context, wrote that the *Taylor* decision "cannot be read to foreclose this Court from considering the equities of the case" in determining the validity of a claimed exemption where a tardy

objection is made after the expiration of the 30-day period. Despite the lack of certainty regarding a court's use of § 105(a) to deny a claimed exemption where a tardy objection is filed, the 30-day period set forth in Rule 4003(b) is an important deadline which produces finality for debtors regarding their right to keep specified assets as exempt.

Rule 1019(2) lists new time periods for taking certain action when a case under chapter 11, 12, or 13 is converted to a chapter 7 case. The time periods that begin running again after conversion to chapter 7 are the time for filing claims, the time for filing a complaint objecting to discharge, and the time for filing a complaint to obtain a determination of dischargeability of a debt. The time for objecting to claimed exemptions under Rule 4003(b) is not listed as a time period that begins again upon conversion of the case. Therefore, if the 30-day period expires (without extension by the court) before conversion of the case to chapter 7, a trustee or creditor may not file an objection to the claimed exemptions after the case is converted (subject, of course, to the possible application of § 105(a) as discussed above).

Bankruptcy Judge William Houston Brown of the Western District of Tennessee has suggested that the Rules be amended to provide that the trustee and creditors shall have a new opportunity to object to the debtor's claimed exemptions after a

case is converted from one chapter to another. In his letter of November 4, 1996, (copy enclosed), Judge Brown states that: "An additional thirty days from the § 341 meeting of creditors in the converted case would relieve the trustee and creditors of the risk of deception by the debtor." Judge Brown enclosed with his letter relevant pages of a paper he presented at the 1996 annual meeting of the National Conference of Bankruptcy Judges entitled "Exemption Limitations: Political and Ethical Considerations." A copy of the relevant pages are enclosed with this memorandum.

Judge Brown asserts in his paper that:

> "A potential exists for unethical, if not actually fraudulent, behavior in the statutory freedom of conversion from chapter 13 to chapter 7. In light of *Taylor v. Freeland & Kronz* ..., a debtor could engage in the following planning: file for chapter 13 relief, claim exemptions that exceed the applicable monetary limits or that do not exist under applicable law, make little or no effort at confirmation, and then voluntarily convert to chapter 7, at that point taking the position that the sole opportunity for objection to the claimed exemptions had expired in the chapter 13 phase of the case. Confusion in such a scenario may be enhanced by the debtor filing in the wrong venue.... In such a case, creditors and the trustee may not be familiar with the domiciliary state's exemptions, and the risks of oversight, if not deception, are increased."

In his paper, Judge Brown discussed two cases dealing with objections to claimed exemptions after conversion of a case to chapter 7. In <u>In re Brown</u>, 178 B.R. 722 (Bankr. E.D. Tenn. 1995, the case was filed under chapter 11, the trustee's objection to claimed exemptions were untimely, and the case was then converted to chapter 7. The bankruptcy court, citing *Taylor*, observed that

exempt property leaves the bankruptcy estate and conversion does not restore it. Rejecting the application of § 105(a) because that section is limited to allowing a court to take action "to carry out the provisions" of the Code, the court held that conversion of the case does not give the trustee a new 30-day period in which to object to claimed exemptions. This holding is consistent with Rule 4003(b) and 1019(2).

A second case discussed in Judge Brown's paper is In re Havenac, 175 B.R. 920 (Bankr. N.D. Ohio 1994), in which the court held that conversion of the case from chapter 11 to chapter 7 and the holding of a chapter 7 § 341 meeting opened a new objection window. The court did not find anything in the Code or Rules that compelled the result on this issue, although it found that Rule 1019(2) gave some support to the position that conversion does not open a new period for objecting to claimed exemptions. The court took a policy view, finding that "the realities of bankruptcy administration militate in favor of finding a new objection period after a case is converted to chapter 7." Also, a contrary result would encourage "the potential for abuse." Id. at 924.

Judge Brown wrote in his paper that:

> "The conversion problem is significant for the practical reason that chapter 11, 12, or 13 creditors may not see exemptions as a significant focus. At that point, the focus is on the reorganization and feasibility of the debtor's plan. An individual filing for chapter 13 may be aware that the typical creditor's focus in that chapter is

> upon treatment of and proposed payments to that creditor and that little attention is paid by creditors, the trustee, and courts to claimed exemptions. A debtor's attorney is more likely aware of this reality. The practical and ethical issues posed by the case conversion scenario could be remedied by an amendment to the Code providing that a new exemption objection window is opened upon conversion. There is no apparent policy reason for the risks of case conversion to be on the trustee or creditors, and if the debtor is attempting no improper exemption claiming, there is no harm to the debtor from a new objection period."

Id. at 7-40 [footnotes omitted].

Reporter's Recommendation

Judge Brown raises important issues that should be discussed by the Committee. But, at this time, I do not recommend that the Advisory Committee amend the Rules so that a new time period for objecting to claimed exemptions would be triggered by conversion of the case to chapter 7. My reasons are as follows:

(1) I am not aware of any evidence that debtors are, in fact, engaged in the kind of improper conduct described by Judge Brown. Are debtors filing chapter 11, 12, or 13 petitions, intentionally claiming exemptions to which they are not entitled, and converting to chapter 7 thereafter so as to deceive creditors who might otherwise object to the claimed exemptions? Unless there is evidence that indicates that this is a serious problem, I do not think that a rule change to create a new objection period upon conversion of the case is warranted.

(2) The Advisory Committee will be considering at its October 1998 meeting a recommendation of the National Bankruptcy

Review Commission that Rule 9011 be amended to clarify that the debtor's attorney makes Rule 9011 representations to the court with respect to schedules. The list of claimed exemptions is included in the schedules (Schedule C - "Property Claimed as Exempt"). I think that the Rules should assume that attorneys for debtors will not file lists of claimed exemptions without a reasonable basis for them. Rule 9011(b)(2) provides that the attorney represents that, to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, that "the claims...and other legal contentions therein are warranted by existing law or by nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." If Rule 9011 is amended to clarify that it applies to schedules, that should have a deterrent effect on any attorney who might otherwise file knowingly unwarranted exemption schedules and should reduce or minimize the risk of abuse raised by Judge Brown.

(3) The Supreme Court in *Taylor* was not persuaded by the trustee's concern that improper incentives would result from the Court's upholding the 30-day deadline for objections, and that debtors would be encouraged to claim exemptions without an legal basis for them on the chance that trustees and creditors would fail to object in time. The Supreme Court responded to these

concerns by stating that "[d]ebtors and their attorneys face penalties under various provisions for engaging in improper conduct in bankruptcy proceedings." The Court specifically mentioned, among others, Rule 9011 and § 727(a)(4)(B)(authorizing denial of discharge for presenting fraudulent claims). "These provisions may limit bad-faith claims of exemptions by debtors ... To the extent that they do not, Congress may enact comparable provisions to address the difficulties that [the trustee] predicts will follow our decision." 112 S.Ct. at 1648-1649. Again, I am not aware of any evidence that demonstrates that debtors are filing chapter 11, 12 or 13 petitions, engaging in bad-faith claims of unwarranted exemptions, and then converting to chapter 7 as a deliberate scheme to abuse the exemption system.

(4) In general, early finality on exemptions is desirable for consumer debtors so that they will know whether they may keep certain assets (an automobile, home, tools of the trade, etc.) and will be able to plan their lives accordingly. This policy of early finality is the purpose for the 30-day time limit under Rule 4003(b). Unless there is a demonstrated need to do so, I would not recommend extending the objection period or triggering a renewed objection period upon conversion of the case.

If the Advisory Committee agrees with Judge Brown's suggestion and decides to implement a new period for objecting to

claimed exemptions upon conversion of a case to chapter 7, I would recommend the following amendments to Rule 1019(2):

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

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

****

(2) *New Filing Periods.* A new time period for filing claims, an objection to the list of property claimed as exempt, a complaint objecting to discharge, or a complaint to obtain a determination of dischargeability of any debt shall commence under ~~pursuant to~~ Rules 3002, 4003, 4004, or 4007, provided that a new time period shall not commence if a chapter 7 case had been converted to a chapter 11, 12, or 13 case and thereafter reconverted to a chapter 7 case and the time for filing claims, an objection to the list of property claimed as exempt, a complaint objecting to discharge, or a complaint to obtain a determination of the dischargeability of any debt, or any extension thereof, expired in the original chapter 7 case.

COMMITTEE NOTE

This rule is amended to include the time for

objecting to a list of property claimed as exempt under Rule 4003(b) as one of the time periods that begins to run again after a chapter 11, chapter 12, or chapter 13 case is converted to a chapter 7 case.

#2760

reprint 11/18/96

96-BK-B

United States Bankruptcy Court

Western District of Tennessee

Chambers of
Judge William Houston Brown

November 4, 1996

The Honorable Paul Mannes
Chair
Advisory Committee on
Bankruptcy Rules
United States Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Dear Paul:

At the recent annual meeting of the National Conference of Bankruptcy Judges I presented a paper entitled Exemption Limitations: Political and Ethical Considerations. I am sure that you received a copy of that paper in the annual meeting bound materials. If you should need an additional copy of my paper for purposes of this letter, please let me know and I will forward a copy.

In that paper I discussed at pages 7-39 to 7-40 and at page 7-46 the practical and potential ethical problems posed by conversion of cases from one chapter to another and the effect of those conversions upon the opportunity to object to the debtor's claimed exemptions. I suggest in that paper at page 7-46 that Federal Rule of Bankruptcy Procedure 4003(b) should be amended to provide that in the event of conversion of an individual's case from one chapter to another, the case trustee and/or creditors should receive a new opportunity to object to the debtor's claimed exemptions. An additional thirty days from a § 341 meeting of creditors in the converted case would relieve the trustee and creditors of the risk of deception by the debtor.

200 Jefferson Avenue, Suite 675 • Memphis, Tennessee 38103 • Telephone (901) 544-4174

I would suggest that this might be an appropriate topic for your advisory committee to consider in its continuing look at the bankruptcy rules. If I can provide any further information, I would be happy to discuss this matter with you at any time.

Sincerely,

William Houston Brown
United States Bankruptcy Judge

WHB:nc

Exemption Limitations: Political and Ethical Considerations

William Houston Brown*
United States Bankruptcy Judge
Western District of Tennessee
Memphis, Tennessee

I. INTRODUCTION

The purpose of this paper is to examine political and ethical considerations underlying exemption choices by, and limitations imposed upon, debtors in bankruptcy. The paper can not attempt to discuss all possible considerations. Accordingly, the focus will be upon an analysis of significant political and ethical issues that have been identified by legislation, the courts, and many commentators. The paper, of necessity, but only partially, will serve a compilation and review function, discussing or referring to numerous articles by practitioners and professors. Exemptions have been a fertile area for written commentary, in excess of 225 articles[1] having been published since the enactment of the present Bankruptcy Code, the Bankruptcy Reform Act of 1978.[2]

The paper will identify and discuss observed problems with the present exemption laws, and will attempt to put these problems into the context of national bankruptcy policies. Because of the provision in the Bankruptcy Code that permits state legislatures to limit their respective citizens to state exemptions, the paper will focus on discussion of issues presented by that provision known as the "opt out," a term that has been given to the congressional authorization for each state to determine that its citizens may not use the federal exemptions in bankruptcy cases.[3] The paper is not intended to be an exhaustive case analysis; however, selected and illustrative opinions will be identified. Many of the exemption opinions, for example in the area of prebankruptcy planning, are well known and have been examined frequently in published commentary. For that reason, this paper will not attempt to fully discuss those opinions; instead, the paper will focus upon the approaches to exemption issues taken by various appellate and trial courts, as well as upon the commentary on and the practical impacts of those opinions. The primary suggestions for changes to the Bankruptcy Code's exemption provisions also will be reviewed. The ultimate goals of this paper are to focus attention on the opt out as a means by which the various states seemingly determine bankruptcy policies and to encourage discussion of the competing merits of allowing bankruptcy policies to be determined by the state legislatures or by the United States Congress.

*United States Bankruptcy Judge, Western District of Tennessee. The author gratefully acknowledges judicial law clerks who provided research and editing assistance, Rhoda Smith, James E .Bailey, III and Kim Kemodle; a law student at the University of Memphis and judicial extern, Virginia Tvedt, Ed. D., who provided research assistance; and my judicial assistant, Nancy Cannon, who provided research and assistance. I am grateful also to my colleague, David S. Kennedy, Chief Judge, United States Bankruptcy Court Western District of Tennessee for his time in reading a draft of this paper and providing constructive comments.

Constitution to its citizens.[525] That court relied in part upon another Florida court's conclusion that a debtor could forfeit an otherwise allowable exemption as a result of fraudulent prebankruptcy planning.[526]

This opinion, *In re Coplan*,[527] presents not only the issue of prebankruptcy asset conversion, which has been explored previously, but of relocation for the purpose of taking advantage of better state law exemptions. This is a venue issue separate from that presented by debtors who file in an improper venue but where the filings usually occur for reasons unrelated to exemptions. For example, it may be more convenient for a debtor to file in the state where employed rather than where he is a resident, or the case may be filed in the state where the debtor's attorney practices.[528] A debtor's move just before bankruptcy may present venue issues, as the Code requires a filing in a proper venue.[529] As to the relocation in and of itself, the mere act of moving is not fraudulent, but when moving is accompanied by some other indicia of the debtor's intent, inquiry will focus on that intent. An early critic of the opt out pointed out that "popular opinion [held] that debtors do not change domicile in order to obtain the benefit of exemptions, because they cannot afford to do so."[530] While that is no doubt true of most individual debtors, it is equally true that most individual debtors have no incentive to move because they have insufficient assets to attempt to protect. As to more affluent debtors with, for example, significant equity in a home, moving to take advantage of exemptions is an incentive, and according to the reported cases it occurs frequently enough to produce substantial commentary.

It is not surprising that relocation and fraudulent intent often are connected. Under the Bankruptcy Act of 1800, flight to another state with intent to delay or defraud creditors was an act of bankruptcy.[531] Under the Act of 1898, acts of bankruptcy included transfer, concealment, and removal of property with intent to hinder, delay or defraud creditors.[532] There are no acts of bankruptcy in the current Code, but similar actions create grounds for denial of the general discharge.[533]

The overriding issue presented by *Coplan* is one questioning the extent to which debtors may engage in prebankruptcy planning, including relocation, in order to take advantage of state law exemptions, such as homestead.[534] A strictly federal schedule of exemptions would negate the advantage of moving in advance of bankruptcy, because the available exemption would be the same throughout the country. Under the current scheme of opt out, or a choice between federal and state exemptions, the Code implicitly encourages debtors to relocate and to engage in shopping for the forum with the best exemptions. From the standpoint of assurance of a national bankruptcy policy that engenders optimal public confidence, the Congress could and should reduce exemption relocation issues by establishment of a solely federal list of bankruptcy exemptions. Such action would not eliminate exemption forum shopping outside of bankruptcy as individuals could move to an advantageous state and claim nonbankruptcy exemptions, but such congressional action would eliminate bankruptcy as a method of taking advantage of better state exemptions while attempting to obtain the benefits of bankruptcy.

I. Case Conversion

A potential exists for unethical, if not actually fraudulent, behavior in the statutory freedom of conversion from chapter 13 to chapter 7.[535] In light of *Taylor v. Freeland & Kronz*'s[536] holding that an objection to an exemption, including a baseless one, should be filed timely, a debtor could engage in the following planning: file for

chapter 13 relief, claim exemptions that exceed the applicable monetary limits or that do not exist under applicable law, make little or no effort at confirmation, and then voluntarily convert to chapter 7, at that point taking the position that the sole opportunity for objection to the claimed exemptions had expired in the chapter 13 phase of the case. Confusion in such a scenario may be enhanced by the debtor filing in the wrong venue, for example, in Tennessee where the debtor is employed, but claiming exemptions under the domiciliary state's law, for example, Mississippi, Alabama, or Georgia. In such a case, creditors and the trustee may not be familiar with the domiciliary state's exemptions, and the risks of oversight, if not deception, are increased.

The potential for ethical issues in the case conversion scenario is illustrated by two cases taking opposite views on whether a new claims objection date is triggered by the conversion of a case from one chapter to another. *In re Brown*[537] was initially a chapter 11 case in which the trustee's objections to exemptions were untimely, and the case subsequently was converted to chapter 7. The *Brown* court read *Taylor* as an alert for courts to "be wary of modifying the operation of Rule 4003(b) for policy reasons they deem expedient."[538] Following the rationale of *In re Halbert*,[539] the court observed that exempt property leaves the bankruptcy estate and conversion of the case does not restore it.[540] The court distinguished section 105(a) as a means to restore an objection period because that statute by its terms only allows a court to take necessary action "to carry out the provisions" of the Code.[541] The *Brown* court held that the chapter 7 trustee did not receive a new exemption objection period upon conversion of the case.[542]

In contrast, *In re Havenac*[543] was also a conversion from chapter 11 to 7. In the chapter 11 phase the United States trustee adjourned the section 341 meeting indefinitely.[544] No objections to exemptions were filed in the chapter 11 case, but upon conversion the chapter 7 trustee filed objections within thirty days of a new section 341 meeting. The court found a reasonable basis to defer to the United States trustee's discretion and found that the chapter 11 section 341 meeting was never adjourned.[545] As a result of no conclusion of the meeting of creditors, the objection period was never tolled.[546] Assuming that conclusion may be incorrect, the court went on to hold that the case conversion and the convening of a chapter 7 meeting of creditors opened a new objections window. The *Havenac* court found nothing in the Code or Rules to compel the choice of either result, although Rule 1019(2) gave some support to the position that conversion did not open a new period. Taking a policy view, the court found that "the realities of bankruptcy administration militate in favor of finding a new objection period after a case is converted to chapter 7."[547] A contrary holding was seen as an encouragement of "the potential for [debtor] abuse."[548]

The conversion problem is significant for the practical reason that chapter 11, 12 or 13 creditors may not see exemptions as a significant focus.[549] At that point, the focus is on the reorganization and feasibility of the debtor's plan.[550] An individual filing for chapter 13 may be aware that the typical creditor's focus in that chapter is upon treatment of and proposed payments to that creditor and that little attention is paid by creditors, the trustee, and courts to claimed exemptions.[551] A debtor's attorney is more likely aware of this reality. The practical and ethical issues posed by the case conversion scenario could be remedied by an amendment to the Code providing that a new exemption objection window is opened upon conversion. There is no apparent policy reason for the risks of case conversion to be on the trustee or creditors, and if the debtor is attempting no improper exemption claiming, there is no harm to the debtor from a new objection period.

all exemption allowance questions.[597] Acknowledging that the entitlement to discharge is a federal issue, according to Professor Jackson if the debtor acted inappropriately under applicable state law as to an exemption, that inappropriate activity might be considered in weighing entitlement to discharge.[598] Such reliance upon state law is workable only if there are state law guidelines.[599] The discussion in this paper of state fraud exceptions to claims allowance indicates that most states have no such guidelines. It is suggested, therefore, that the result of following Professor Jackson's approach easily could be more litigation over discharge and dischargeability issues because of the further deterioration of federal bankruptcy policies as states either further expanded exemption exceptions or retreated from such legislation. A continued reliance upon state law for the majority of bankruptcy exemptions may be expected to produce continued proliferation of exemptions that have no uniform focus. The state legislatures should not be expected to enunciate bankruptcy policy, and they should not be permitted to do so.

Short of major amendments to the Bankruptcy Code, a relatively minor amendment to the Bankruptcy Rules could cure a potentially large practice and ethical problem. Rule 4003(b) should be amended to provide that in the event of conversion of an individual's case from one chapter to another, the case trustee or creditors would receive a new opportunity to object to the debtor's claimed exemptions. An additional thirty days from a section 341 meeting of creditors in the converted case would relieve the trustee and creditors of the risk of deception. Any risk from a new objections period should be upon the debtor.

On balance, anything short of abolishment of the opt out and the use of exclusively federal exemptions is less than satisfactory, but even that is not totally satisfactory. In the attempt at uniformity, lack of uniformity would be created if the federal exemptions did not take into account that it cost more to live in San Francisco than it does in Union City, Tennessee. To be uniform in fact, exemptions would need to be adjusted for such cost of living differences. This could result in a complex set of federal exemptions allowing for local variations, perhaps with periodic cost of living adjustments.[600] Questions about the reasonableness or appropriateness of the debtor's exemption choices would continue to exist under an exclusively federal list. Allowing for such adjustments in exclusively federal bankruptcy exemptions is preferable to the fragmented approach of the current opt out provision.

VIII. CONCLUSION

If there is a concern for promotion of national bankruptcy policies, if any incentives for filing bankruptcy or for avoiding such filing are to be left to the Congress rather than to the state legislatures, and if there is a desire to reduce the uncertainty over such exemption issues as conversion of nonexempt to exempt property, then a strictly uniform schedule of federal exemptions, possibly with regional cost of living factors, appears to be worthy of congressional consideration. Such legislation would not eliminate all of the litigation over exemptions in bankruptcy nor would it eliminate all questions about appropriateness of particular exemption claims.

It would, however, eliminate needless forum shopping and manipulation of state law exemptions. State-determined fresh start, discharge or exemption policies are not conducive to a bankruptcy system that applies uniformly and nationally to both debtors and creditors, many of whom operate in multi-state economies.

The primary purpose of this paper has been to encourage discussion of proposals for

a balance of federal and state laws as well as the particular judge's interpretation).

521 *Id.* at 20; *see also* Jackson, *Fresh Start Policy, supra* n. 146, at 1445 (the "propriety" of a state exemption is a nonbankruptcy issue).

522 Wetherington, *Eleventh-Hour Conversions, supra* n. 393, at 21 (*citing In re* Thomas, 172 B.R. 673 (Bankr. M.D. Fla. 1994)).

523 *See, e.g., In re* Schwarb, 150 B.R. 470, 472 (Bankr. M.D. Fla. 1992) (concluding that the legislative history, Code language and general equity principles place limits on asset conversion).

524 *See, e.g., In re* Primack, 89 B.R. 954, 958 n. 5 (Bankr. S.D. Fla. 1988).

525 *In re* Coplan, 156 B.R. 88 (Bankr. M. D. Fla. 1993).

526 *Id.* at 90 (citing *In re* Schwarb, 150 B.R. 470 (Bankr. M.D Fla. 1992)).

527 Coplan, 156 B.R. at 88.

528 *See, e.g., In re* Berryhill, 182 B.R. 29 (Bankr. W.D.Tenn. 1995).

529 28 U.S.C. § 1408 (1984).

530 Hertz, *Bankruptcy Code Exemptions, supra* n. 4, at 349.

531 Act of 1800, ch. 19 § 1, 2 Stat 19, 20-21 (repealed by Act of Dec. 19, 1803, ch 6, 2 Stat. 248); *see* Koffler, *The Bankruptcy Clause, supra* n. 24, at 78.

532 Act of 1898, § 3(1).

533 11 U.S.C. § 727(a)(2) (1978); *see also* Tabb, *Scope of Fresh Start, supra* n. 161, at 63 (discussing the historical shifts from acts of discharge to exemptions from discharge).

534 *See* Ponoroff and Knippenberg, *supra* n. 117, at 289 for critique of *Coplan*.

535 11 U.S.C. § 1307(a) (1978) provides: "The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable."

536 503 U.S. at 638.

537 178 B.R. 722 (Bankr. E.D. Tenn. 1995).

538 178 B.R. at 725.

539 146 B.R. 185 (Bankr. W.D. Tex. 1992).

540 178 B.R. 722, 726-27 (citations omitted).

541 11 U.S.C. § 105(a) (1986).

542 178 B.R. at 730.

543 175 B.R. 920 (Bankr. N.D. Ohio 1994).

544 175 B.R. at 921.

545 175 B.R. at 922-23.

546 *See* FED. R. BANKR. P. 4003(b) (requiring filed objections within 30 days of "the conclusion of the meeting of creditors.").

547 175 B.R. at 924.

548 *Id.*

549 *See, e.g., In re* Bergen, 163 B.R. 377, 379-80 (Bankr. M.D. Fla. 1994); Carr v. Weissman (*In re* Weissman), 173 B.R. 235, 236-37 (M.D. Fla. 1994); *In re* Kleinman, 172 B.R. 764, 769 (Bankr. S.D.N.Y. 1994).

550 *See, e.g.*, Alderman v. Martinson (*In re* Alderman), 195 B.R. 106, 109 (Bankr. 9th Cir. 1996) (observing that exemptions serve a limited purpose in chapter 13).

551 *But see* Arnold H. Wuhrman, *"Mining For Gold" In Debtors' Claims of Exemptions*, 8 NACTT QUARTERLY 23 (July 1996) (indicating one chapter 13 trustee's scrutiny of exemptions).

552 18 U.S.C. § 152 (1994).

553 18 U.S.C. § 153 (1994).

554 18 U.S.C. § 157 (1994).

Materials for Item 12 will be sent separately.

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TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PUBLIC COMPANY REPORTING REQUIREMENTS, THE SECURITIES AND EXCHANGE COMMISSION, AND THE BANKRUPTCY RULES

DATE: SEPTEMBER 3, 1998

In his letter dated August 2, 1998, Daniel J. Demers has asked the Advisory Committee to consider the adoption of a new Bankruptcy Rule that would provide for court procedures relating to reporting requirements for public companies in bankruptcy.

In support of his request, Mr. Demers enclosed with his letter a copy of another letter dated July 30, 1998, in which he petitioned the SEC to revoke Bulletin No.2 published by the SEC's Division of Corporate Finance on April 17, 1997. A copy of Bulletin No. 2 is enclosed. The Bulletin deals with financial reporting requirements for issuers of securities that are in bankruptcy. As Mr. Demers claims in his letter to the SEC, the Bulletin "seeks to establish a procedure whereby reporting issuers must adhere to certain reporting standards pursuant to the Securities Exchange Act of 1934."

Mr. Demers takes the position in his letter to the SEC that "[t]he SEC does not have statutory authority to establish such procedures..." He wrote: "In enacting the Bankruptcy Code in 1978, Congress stated unequivocally that it was passing security

law considerations to the Bankruptcy Judiciary by granting flexibility in security law matters to the Bankruptcy Courts." He cites various section of the Bankruptcy Code, as well as legislative history, in support of his position. Mr. Demers wrote that:

> "The Bulletin specifically states that reporting issuers are 'not relieved of their reporting obligations.' This is erroneous. Throughout the Legislative History statements can be found which do in fact specifically relieve reorganizing entities from provisions of the 1934 Act."

Mr. Demers also wrote in his letter to the SEC that "[t]he Bankruptcy Code does not contain any provisions which specifies the SEC to perform any function in bankruptcy proceedings [citation omitted]."

Mr. Demers challenges the SEC's authority to mandate financial reporting for companies in chapter 11. Citing § 1109 of the Code which gives the SEC the right to "raise and appear and be heard on any issue in a case," Mr. Demers asserts that the SEC could *request* financial information and the method of its presentation, but cannot mandate such.

> "It [the SEC] can only ask the Bankruptcy Court to consider the matter and the Bankruptcy Court is the ultimate arbiter in determining the financial information that must be presented. And that is a main crux of this problem: Who asks who? Should the Bankruptcy Court ask the SEC or should the SEC ask the Bankruptcy Court? From a strict reading of the relevant statutes, it appears that it would be the SEC's burden to put forward such a request." (p.2).

Rather than summarize all of the Code provisions and other authorities raised by Mr. Demers in support of his request for a Bankruptcy Rule on this subject, I refer you to his August 2nd letter to Peter McCabe and to his July 30th letter to the SEC. Both are enclosed. I also enclose copies of Mr. Demers' letter to Ms. Nancy Snow of the SEC dated November 14, 1997, in which he asked the SEC to modify a particular rule, and of a letter sent to Mr. Demers by Johnathan G. Katz of the SEC dated February 18, 1998, in response to Mr. Demers' November 14th letter.

As shown by the enclosed letters, Mr. Demers and the SEC disagree on the authority of the SEC, and the application of reporting obligations, with respect to companies in bankruptcy. These questions are substantive law issues that turn on statutory construction and, therefore, I believe they should not be resolved by rulemaking under the Rules Enabling Act. These issues are best left to the courts or Congress to resolve.

The Rules already provide, either by adversary proceeding or contested matter (depending on the relief requested), adequate procedures for litigating disputes with the SEC or any other party with respect to reporting requirements. There is no indication that companies in chapter 11 that want to dispute the SEC's authority or the application of financial reporting requirements are having difficulty in bringing these issues to court for resolution.

With respect to any suggestion that the Bankruptcy Rules should determine financial reporting requirements for securities issuers in bankruptcy, or should provide procedures that require the SEC to request bankruptcy court approval before mandating reporting requirements for a particular debtor, I do not recommend that the Advisory Committee take any action at this time. However, if questions regarding the SEC's authority in this area are resolved by courts or Congress in a manner that makes it clear that the Bankruptcy Rules (rather than federal securities laws, SEC regulations, or the Bankruptcy Code) should determine such financial reporting requirements for companies in bankruptcy, or that the SEC's authority is limited to requesting bankruptcy court approval of financial reporting requirements before they become effective, then the Advisory Committee should consider the matter at that time. In any event, Mr. Demers' request should be discussed at the next meeting of the Advisory Committee.

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August 2, 1998

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

Dear Mr. McCabe:

Attached herewith is the copy of a petition which I recently filed with the Securities & Exchange Commission together with relevant correspondence.

I am hereby formally requesting that the Committee on Rules of Practice and Procedure consider the preparation and adoption of a Bankruptcy Rule which will provide for court procedures for Form 10 public companies reporting requirements. The SEC policy has just recently changed and, in my opinion, the SEC cannot initiate the procedures which effectively over rides pertinent sections of the Bankruptcy Code and Congressional intent.

I believe the attached petition to the SEC will assist you in understanding the problem.

Should you have any questions, please feel free to contact me.

Sincerely

Daniel J. Demers

cc: Pat Channon
Bankruptcy Judges Division (w/encl.)

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July 30, 1998

Jonathan G. Katz
Secretary
United States
Securities and Exchange Commission
Washington, D. C. 20549

Dear Secretary Katz:

This letter is written to formally petition the Securities and Exchange Commission ("Commission" or "SEC") to revoke Bulletin No. 2 ("Bulletin") published by the Division of Corporation Finance dated April 15, 1997. The Bulletin deals with SEC reporting procedures for Reporting Issuers which are under protection of the United States Bankruptcy Code. These procedures have not been formally adopted by the SEC as a Rule, Regulation or Statement of the Commission. Further the Commission has not approved or disapproved the content of the Bulletin. The Bulletin, however, has become, ipso facto, a rule because it purports to give guidance to reporting issuers which are in Chapter 11 proceedings.

The Bulletin seeks to establish a procedure whereby reporting issuers must adhere to certain reporting standards pursuant to the Securities Exchange Act of 1934. The SEC does not have statutory authority to establish such procedures nor does a division of the SEC have the statutory authority to establish a Bulletin which becomes a de facto rule without approval of the Commission.

In enacting the Bankruptcy Code in 1978, Congress stated unequivocally that it was passing security law considerations to the Bankruptcy Judiciary by granting flexibility in security law matters to the Bankruptcy Courts.

The Bulletin specifically states that reporting issuers are "not relieved of their reporting obligations". This is erroneous. Throughout the Legislative History statements can be found which do in fact specifically relieve reorganizing entities from provisions of the 1934 Act. For example, *"...the bill...permits the disclosure statement to be approved without the necessity for compliance with the very strict rules of Section 5 of the Securities Act of 1933, Section 14 of the Securities Exchange Act of 1934, or relevant State securities laws..."* (House Report (Reform Act of 1978) Chapter 5 Reorganization. B. Proposed Disclosure Requirements, 3. Applicability of Other Security Laws). And *"Subsection (d) [of Section 1125] excepts the disclosure statement from the*

requirements of the securities laws (such as Section 14 of the 1934 Act and Section 5 of the 1933 Act), and from similar State securities laws (blue sky laws, for example)." (HR Rep No. 595, 95th Cong. 1st Sess 408-410 (1977)). The controlling language in this quote is "such as" which implies that the exemption from Section 14 of the 1934 Act is not exclusive and is not the only exemption which applies to Debtors as that term is defined under the Bankruptcy Code (11 USC 101(12). In specifying the exemption from Section 14 of the 1934 Act, Congress noted: *"The cost of developing a prospectus or proxy statement for a large company often runs well over $1 million. That cost would be nearly prohibitive in a bankruptcy reorganization. In addition the information normally required under Section 14 may be simply unavailable, because of the condition of the debtor."* (House Report (Reform Act of 1978) Chapter 5 Reorganization. B. Proposed Disclosure Requirements, 3. Applicability of Other Security Laws).

Congress specifically addressed its position on the need for certified audited statements (such as those required for a 10-K) and passed the determination of the issue to the Bankruptcy Court: *"Frequently the debtor's books will be in a shambles at the time of the bankruptcy...If there is no need for the information under the circumstances, reconstruction may be dispensed with, and certified audited financial statements will not be required."* (House Report (Reform Act of 1978) Chapter 5 Reorganization B. Proposed Disclosure Requirements 1 Adequate Information). This determinative authority rests with the Bankruptcy Court and not the SEC. Under Bankruptcy Code Section 1109 the SEC may comment and be heard. Thus the SEC could request that the financial information and method of presentation under Section 1109 but a SEC division cannot mandate such. It can only ask the Bankruptcy Court to consider the matter and the Bankruptcy Court is the ultimate arbiter in determining the financial information that must be presented. And that is a main crux of this problem: Who asks who? Should the Bankruptcy Court ask the SEC or should the SEC ask the Bankruptcy Court? From a strict reading of the relevant statutes, it appears that it would be the SEC's burden to put forward such a request.

Bankruptcy court suzerainty over the 1934 Securities Exchange Act is further confirmed by 11 USC 1142 which reads *"Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court."*

And 11 USC 1145 (3) (c) provides the securities issued pursuant to a Plan of Reorganization *"...is deemed a public offering."* The Legislative History explains that this provision was designed to avoid the transactions being characterized as *"...a 'private placement' which would result in restrictions under Rule 144 of the SEC, on the resale of the securities (HR Rep. No. 595, 95th Cong. 1st Sess 419-421 (1977); S Rep. No. 989, 95th Cong. 2nd Sess 130-132 (1978).*

Section 14 of the 1934 Act details what must be included in a proxy solicitation which includes pertinent information specified under Section 12 of the 1934 Securities Exchange Act. Thus by expressly exempting a Disclosure Statement from the requirements of Section 14, it also excused the information required under Section 12. The information required under Section 12 patterns and

mirrors the information required in a 10-K. The information required under Section 12 further patterns and mirrors the information required under Section 5 of the Securities Act of 1933 which is expressly exempted under the Bankruptcy Code (11 USC Sections 364(f) and 1145(a)).

In enacting the Bankruptcy Code in 1978, Congress recognized and addressed the inherent philosophical differences created by the Code as it related to the nations securities laws. In so doing, Congress granted maximum flexibility to the Bankruptcy Courts in dealing with security law issues. Congress recognized one very important feature of the bankruptcy process- the need to balance the interests of public investors with the rights of bankruptcy claimants. In so doing, the Congress purposely relaxed federal and state security laws and granted to the Bankruptcy Courts extraordinary authority to make security law determinations on a case by case basis. *"If nothing is to change when a company becomes insolvent, then the bankruptcy laws can offer the company little help. The company would be no better off proceeding under the bankruptcy law than under generally applicable law. The compromise proposed...is a reasonable one that accounts for both the interest of the creditors in a successful reorganization, and the interest of the public in preventing securities fraud."* (House Report (Reform Act of 1978) Chapter 5 Reorganization B. Proposed Disclosure Requirements 3 Other Security Laws)

Recognizing the historical propensity of the SEC interfering in the reorganization process by virtue of the SEC's pre-Code manipulative actions (See In Re Yuba Consolidated Industries, Inc., 260 F. Supp. 930 (N. D. Cal. 1966) Congress removed the SEC as an automatic party in interest. Besides determining that the SEC had no financial interest in a reorganizing company, Congress determined that the SEC should no longer be an "advisor and advocate" because of the inherent conflict of interest.

Congress further addressed the concept of *investor fraud* often raised by the SEC during the legislative committee discussions with SEC staff during the deliberations which led to the enactment of the Code. *"...the need for reorganization of a public company today often results from simple business reverses, not from any fraud, dishonesty, or gross mismanagement on the part of the debtor's management. Even if the cause is fraud or dishonesty, very frequently the fraudulent management will have been ousted shortly before the filing..."* (House Report (Reform Act of 1978) Chapter 5 Reorganization B. Proposed Disclosure Requirements V Appointment of a Trustee).

Then too there are practical considerations. In almost every instance, when a company files under Chapter 11, its independent auditors become creditors. Under AICPA guidelines, a CPA firm cannot issue an audit if it is a creditor because the accountant is not truly independent if it is owed money from a previous years audit. The AICPA does relax this rule when the a company is in bankruptcy. Even so, the accountant is not going to work for nothing. Also, often times, a Debtor is forced to hire new accountants and often, the prior accountants refuse to release relevant and necessary work papers because of the non-payment. Additionally a professional cannot be compensated by a company unless the professional is approved by court order.

And, further, the threat by the SEC of effectively de-listing a debtor which does not continue

its reporting obligation, effectively decreases the value of the bankruptcy estate which the bankruptcy courts are charged with preserving. Further a plan which offers to swap debt for equity becomes unworkable because there is no market for the stock once the plan is confirmed. This is another reason behind the adoption of 11 USC 1142 by the Congress in 1978.

Recently regional SEC Reorganization Sections have been soliciting Plans of Reorganization and Disclosure Statements prior to their being filed with the Bankruptcy Court-in effect attempting to, once again, position the SEC as a pre-Code advisor and advocate. Besides increasing the cost of and causing a delay in the reorganization, this activity is also a violation of Congressional intent. Congress determined that the SEC's involvement in bankruptcy proceedings was, in fact, delaying a fast resolution of the reorganization process, increasing the cost factor and thereby affecting not only the ability to reorganize, but the availability of assets to satisfy creditors: *"As has frequently been pointed out in connection with the [pre-1978 Bankruptcy Law requirement of SEC] valuation hearing, or diagnosis of the debtor, the patient may die on the operating table while lawyers are diagnosing."* (Norton Supra Note 2 at 737).

Bankruptcy Rule 2002 (j) provides that the SEC is to be noticed of a Chapter 11 filing and the Section 341 (11 USC 341) hearing time and date. Rule 3017(a) provides that the SEC is to be sent a copy of the Plan of Reorganization and Disclosure Statement *when filed* with the Court together with the notice of the date and time of the adequacy hearing. These two Rules activate notice to the SEC and gives the SEC adequate time to notice that it intends to comment and be heard pursuant to 11 USC Section 1109(a).

SEC staff should not be soliciting Chapter 11 entities and offering to grant advice prior to the filing of the pertinent documents with the bankruptcy court. These SEC Regional office letters of solicitation are an indirect attempt at becoming an advisor and are manipulative of the reorganization process and increase the cost of the reorganization. These regional offices by their mere existence will always interpret security laws pursuant to the federal securities acts (i.e. 1933 and 1934 Acts as amended) and will always ignore the exemptions granted under the Bankruptcy Code. They offer little help to the debtor but instead, like all bureaucrats, strive to protect their bureaucracies turf.

This policy by innuendo indicates that the SEC wishes to pre approve a plan of reorganization and disclosure statement. This can only be interpreted as an attempt at a manipulation of the reorganization process which as previously noted is one of the reasons the SEC was removed as a party in interest in the first place. And in reviewing this policy, the SEC must ask itself whose rules, regulations and laws are the SEC reorganization sections interpreting-The 1933 and 1934 Acts and rules and regulations promulgated thereto or the security laws as they are to be interpreted under the United States Bankruptcy Codes. I suggest to the Commission, that the SEC staff personnel who do wish to review and pre-approve plans of reorganization will always bend their judgement towards the 1933 and 1934 Acts. After all they work for the SEC and were trained to interpret and enforce the nations securities laws. Therefore SEC employees cannot be disinterested while bankruptcy judges can be disinterested-thus the logic behind Congress granting flexibility to

the Bankruptcy Judiciary on a case by case basis.

To put this all in perspective, the Commission needs to understand that prior to the enactment of the Bankruptcy Code in 1978, a Plan of Reorganization with evidence developed at an "approval hearing" was sent to the SEC which then developed an *advisory report*. The purpose of the advisory report was to inform creditors, stockholders and other claimants of the contents of the plan and the SEC's evaluation of the plan. At that time, it was thought, that claimants were *"simply unable to make an intelligent or informed decision without the SEC's report, all of the valuation evidence...and an order of the court finding the plan worthy of consideration and approval. The purpose of the approval hearing, court approval, and SEC report...was public investor protection."* (House Report (Reform Act of 1978), Chapter 5. Reorganizations; III Court Hearing on the Plan and Disclosure; A Current Law *(pre-1978)*.

This policy was abandoned when the Congress enacted the Bankruptcy Code in 1978: *"The premise underlying the consolidated Chapter 11 of the [Bankruptcy] Code is the same as the premise of the securities laws. If adequate disclosure is provided to all creditors and stockholders whose rights are affected, then they should be able to make an informed judgement of their own, rather than having the court or Securities & Exchange Commission inform them in advance of whether the proposed plan is a good plan"* (House Report (Reform Act of 1978), Chapter 5. Reorganizations; III Court Hearing on the Plan and Disclosure; B. Proposed Disclosure Requirements: 3. Applicability of Other Securities Laws.)

The Bankruptcy Code does not contain any provisions which specifies the SEC is to perform any function in bankruptcy proceedings (Newton, *Bankruptcy and Insolvency Accounting* (9th edition)). The SEC on its own volition and without any direction from Congress took it upon itself to monitor bankruptcies and initiated this activity through Corporate Reorganization Release Number 331, in February of 1984. The fact that the SEC took it upon itself to state it would continue to monitor reorganizations by this release does not make it right or legal. The SEC merely asserted a position without any express authorization from the Congress.

Congress further recognized the potential severity of SEC involvement in reorganizations by enacting a "safe harbor" clause: *"The threat of an injunctive proceeding by the SEC may be leverage that could be used to frustrate the disclosure policy contained in the section [1125(d)]..."*(House Report (Reform Act of 1978) Chapter 5 Reorganization B. Proposed Disclosure Requirements 4 Safe Harbor). Similarly to 11 USC 1109, Section 1125 (d) once again reiterates that no government agency (including the SEC) may appeal or seek a review of the adequacy of a Disclosure Statement because *"Two courts should not be second guessing each other in this matter"* (ibid).

Suggestions:

In petitioning the SEC, I would make the following suggestions:

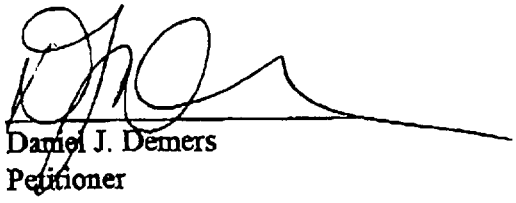
(1) The Commission formerly direct the Division of Corporate Finance to terminate and abandon Bulletin #2.

(2) The Commission extend to Reporting Issuers the same rights the Commission recently agreed to grant to Non-Reporting Issuers, i.e. (Modifications to Rule 15c2-11 (17 CFR Part 240; Release No. 34-39670; File No. S7-3-98; RIN: 3235-AH40; Publication or Submission of Quotations Without Specified Information at page 34) pursuant to my petition dated November 14, 1997.

(3) The Commission direct its regional reorganization sections to cease requesting copies of the Plan of Reorganization from debtors prior to the filing of such documents with the Bankruptcy Court in compliance with Bankruptcy Rule 3017(a).

(3) The Commission direct its staff to begin discussions with the Committee on Rules of Practice and Procedure for the United States Court ("Committee") and seek to achieve the enactment of a Bankruptcy Rule which would delineate what is required by taking all the above into consideration and with specific reference to Bankruptcy Code Section 1142. I am initiating such by forwarding a copy of this petition to the Secretary of the Committee and requesting that the Committee promulgate new Bankruptcy Rules to resolve this dilemma.

Respectfully submitted



Daniel J. Demers
Petitioner

cc: Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544 (W/encl)

Pat Channon
Bankruptcy Judges Division
Suite 4-250
Administrative Office of the United States Courts
Washington, D.C. 20544 (W/Encl.)

DANIEL J. DEMERS
14341 Old Cazadero Road
Guerneville, California 95446

tele: 707.869.3855 fax: 707.869.3887 email: DDemers901@aol.com

November 14, 1997

Sent via fax and by US Mail

Ms. Nancy Sanow
Assistant Director
Office of Risk Management and Control
Division of Market Regulation
Securities & Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Dear Ms. Sanow:

I am currently writing an article for a bankruptcy law journal and am writing this letter to you in an effort to confirm that non-reporting public companies are not obligated to provide audited financial statements under Rule 15c2-11. If you would be so kind as to advise me that this is correct and cite the appropriate rule, regulation or statute, I would be most appreciative.

Due to publishers deadline, I would appreciate it if you would fax me your response to the above--ASAP.

Also, by this letter I hereby formally request that the SEC consider modifying Rule 15c2-11 ("Rule"). As now written, the Rule requires that a non-reporting company supply *(i) the issuers most recent balance sheet and profit and loss and retaining earnings statements ;and,* (ii) ***similar financial information for such part of the two (2) preceding fiscal years as the issuer or its predecessor has been in existence.*** It is the second part (in bold italics) that I believe the SEC needs to address as such pertains to companies emerging from Chapter 11 Reorganizations.

This requirements appears to be inconsistent with AICPA Technical Practice Aids (Sec 10 at 460 (Nov. 1990) also referred to as AICPA SOP 90-7. The AICPA's statement on the issue is as follows:

> *Fresh start financial statements prepared by entities emerging from Chapter 11 will not be comparable with those prepared before their plans were confirmed because they are, in effect, those of a new entity.* ***Thus comparative financial statements that straddle a confirmation date should not be presented.*** *(Bold emphasis added by author).*

I believe that the inconsistency between the AICPA's position and the SEC needs to be corrected. The Rule appears to be in further conflict with Section 1142 (a) of the Bankruptcy Code which reads:

> *"Notwithstanding any otherwise applicable non-bankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan [of reorganization] shall carry out the plan and shall comply with any orders of the court."*

A problem is created because the OTC Bulletin Board is charged with enforcing a Rule which doesn't address or contemplate the problems I have articulated above. The problem further poses the question as to whether or not the Rule is in violation of Section 1109 (a) of the Bankruptcy Code which reads as follows:

> *"The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the [Chapter 11] case."*

I would suggest that the Rule, as written, is in conflict with the Bankruptcy Code and hinders the implementation of confirmed Plans of Reorganization. One of the primary reasons that the SEC was removed as a party in interest in bankruptcy proceedings under the Bankruptcy Code as enacted in 1978 was because Congress believed that the SEC (prior to 1978) was manipulating bankruptcies (see 5 Collier on Bankruptcy (15th ed) 1109-16, 1107-17). I believe the SEC, unintentionally, is effectively manipulating bankruptcy proceedings under the Rule as it is now written and would request the Rule be modified to make provision for the relaxation of prior year financial statements being required for companies emerging from Chapter 11 proceedings.

Thanking you in advance for your assistance, I am

Sincerely

Daniel J. Demers

cc: Paul Hudgins, Esq.

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF
THE SECRETARY

February 18, 1998

Mr. Daniel J. Demers
14341 Old Cazadero Road
Guerneville, California 95446

Re: Petition for Rulemaking, File No. 4-405

Dear Mr. Demers:

This letter responds to the Petition for Rulemaking ("Petition"), dated November 14, 1997, that you submitted requesting that the Securities and Exchange Commission ("Commission") institute rulemaking proceedings to amend Rule 15c2-11 ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act").

The Petition indicates that currently Rule 15c2-11 requires an issuer that is not required to file periodic reports with the Commission ("non-reporting issuer") to supply, in addition to its most recent balance sheet and profit and loss and retained earnings statements, similar financial information for such part of the two preceding fiscal years as the issuer or its predecessor has been in existence. The Petition requests that the Commission relax the requirement regarding the prior year financial statements for non-reporting companies emerging from bankruptcy proceedings pursuant to Chapter 11 of the Bankruptcy Code.[1]

Response:

Rule 15c2-11 governs the initiation or resumption of quotations by a broker-dealer for over-the-counter ("OTC") securities in a quotation medium (other than Nasdaq). The Rule requires broker-dealers to gather and review financial and other information about the issuer before initiating or resuming quotations for the issuer's securities. The Rule specifies the issuer information that a broker-dealer must obtain and review before publishing a quotation for an OTC security and contains information requirements regarding non-reporting issuers.

Among other items of information, for non-reporting issuers the broker-dealer must obtain and review the issuer's most recent balance sheet and profit and loss and retained earnings statements, and similar financial information for such part of the two preceding years as the issuer or its predecessor has been in existence. As you have pointed out, this information requirement

[1] 11 U.S.C. Section 1101 et seq.

may present difficulties for broker-dealers that intend to publish quotations for the securities of a non-reporting issuer emerging from bankruptcy.

On February 17, 1998, the Commission issued a release proposing several amendments to Rule 15c2-11. Under the proposals, a broker-dealer would need to obtain financial information, and the court-approved disclosure statement,[2] from the date a non-reporting issuer emerged from Chapter 11 bankruptcy proceedings if the reorganization plan has been effective less than two years. The Commission is soliciting public comments on the proposals, which must be submitted within 60 days of the date of their publication in the Federal Register. A copy of the release containing the proposals is enclosed for your information.

Based on the foregoing, the Commission has directed me to inform you that the foregoing rulemaking proceeding regarding Rule 15c2-11 appears to respond to your concerns and that it has no plans for further action with respect to your Petition at this time.

By the Commission,

Johnathan G. Katz
Secretary

By: Margaret H. McFarland
Deputy Secretary

[2] 11 U.S.C. Section 1125.

Exerpt From:

SECURITIES AND EXCHANGE COMMISSION

17 CFR PART 240

Release No. 34-39670; File No. S7-3-98

RIN: 3235-AH40

Publication or Submission of Quotations Without Specified Information

AGENCY: Securities and Exchange Commission

ACTION: Proposed Rule

SUMMARY: The Securities and Exchange Commission ("Commission") is publishing for public comment proposed amendments to Rule 15c2-11 ("Rule") under the Securities Exchange Act of 1934 ("Exchange Act"). The Commission is publishing these proposals in response to increasing incidents of fraud and manipulation in the over-the-counter securities market involving thinly traded securities of thinly-capitalized issuers (i.e., "microcap securities"). Rule 15c2-11 governs the publication of quotations for securities that are traded in a quotation medium other than a national securities exchange or Nasdaq. The proposals would require all broker-dealers to review information about the issuer when they first publish or resume publishing a quotation for a security subject to the Rule, document that review, annually update the information if they published price quotations, and make the information available to other persons upon request. In addition, the proposal would enhance the Rule's information requirements for quotations for the securities of non-reporting issuers and ease the Rule's recordkeeping requirements when broker-dealers have electronic access to information about reporting issuers. The Commission is also proposing a number of textual and structural changes in an effort to simplify and streamline the Rule. Finally the Commission is proposing an amendment to Rule 17a-4 under the Exchange Act that would incorporate the record retention requirements currently contained in Rule 15c2-11.

v. Bankruptcy situations

Issuers in Bankruptcy. When the Commission issued a release in 1989 seeking comment on piggyback provisions (among other things), it inquired whether there were situations, such as issuer bankruptcies, that should be addressed if the piggyback provision were eliminated.[52] Many commenters on the 1989 Release argued that it was appropriate to permit broker-dealers to continue quoting the securities of issuers that had filed for bankruptcy because it provided liquidity for these securities. Commenters, including the NASD,[53] suggested that issuers in bankruptcy be designated as such in the quotation system by affixing a special indicator to the security's symbol. The NASD also recommended that this indicator be required on all confirmations of transactions involving the bankrupt issuer's securities and that broker-dealers publishing quotations for these securities be required to obtain, at a minimum, the most recent financial statements on file with the bankruptcy court.

The Commission disagreed with these views and stated that the initiation of any quotations, or indefinite continuation of priced quotations, for securities where the basic information required by the Rule is not available to the marketplace would undercut the prophylactic purpose of the Rule and might even encourage the abuses sought to be prevented.[54]

Commenters also suggested that broker-dealers could satisfy the Rules requirement by reviewing court filings for an issuer in reorganization pursuant to Chapter 11 of the Bankruptcy Code.[55] However, these Chapter 11 filings generally are periodic

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[52] Securities Exchange Act Release No. 27247 (September 14, 1989) 54 FR 39194 ("1989 Release").

[53] See 1992 NASD Letter, supra note 37

[54] 1991 Proposing Release, 56 FR at 19158

[55] 11 USC 1101 et seq.

reports that ordinarily contain only receipts and disbursements.[56] These periodic reports do not provide the type of issuer financial information contemplated by the Rule. In particular, where a bankruptcy issuer meets the criteria for Exchange Act reporting, it would be inconsistent with the public interest and protection of investors to permit broker-dealers to facilitate trading by publishing quotations without reviewing Exchange Act information. Therefore, under the proposals, broker-dealers would not be able to initiate or resume quotations for the securities of issuers in bankruptcy and could not publish priced quotations for those securities as of the annual update requirement, unless they have obtained and reviewed the Rule's required information.

Q37. What difficulties does this position present for broker-dealers quoting securities of issuers that file bankruptcy?

Issuers Emerging from Bankruptcy. The Commission recently received a petition for rulemaking seeking a revision of the financial statement requirements for non-reporting issuers emerging from bankruptcy.[57] In addition to the issuer's most recent financial statements, the Rule currently requires that a broker-dealer review similar financial information that has little bearing on the financial condition of the issuer emerging from a Chapter 11 reorganization. The Commission agrees with the suggestion made in the petition and proposes to amend Rule 15c2-11 to limit a broker-dealer's review to the court-approved disclosure statement[58] for the issuer's plan of reorganization and the issuer's financial information from the date the bankruptcy court confirms the reorganization plan.

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56 See Federal Rule of Bankruptcy Procedure 2015

57 See Letter from Daniel J. Demers to Nancy J. Sanow, Assistant Director, Division of Market Regulation, SEC (November 14, 1997). This petition for rulemaking is available in File No. 4-405 in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C 20549

58 11 U.S.C. 1125. The disclosure statement includes, among other things, a description of the issuer's business plan, a description of any securities to be issued, and financial information.

Division of Corporation Finance

Securities and Exchange Commission

Staff Legal Bulletin No. 2

DIVISION OF CORPORATION FINANCE
SECURITIES AND EXCHANGE COMMISSION

Staff Legal Bulletin No. 2 (CF)

ACTION: Publication of CF Staff Legal Bulletin

DATE: April 15, 1997

SUMMARY: This staff legal bulletin provides the Division of Corporation Finance's views on requests to modify the Securities Exchange Act of 1934 periodic reporting of issuers that are either reorganizing or liquidating under the provisions of the United States Bankruptcy Code.

SUPPLEMENTARY INFORMATION: The statements in this legal bulletin represent the views of the Division's staff. This bulletin is not a rule, regulation, or statement of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved its content.

CONTACT PERSON: For further information please contact Anne M. Krauskopf, Special Counsel, at (202) 942-2900.

I. Background

Issuers are required to file current and periodic reports with the Commission pursuant to Sections 13(a) /1 or 15(d) /2 of the Exchange Act /3 if they have:

* securities listed on a national securities exchange; /4

* securities registered under Section 12(g) /5 of the Exchange Act; or

* a registration statement that has become effective under the Securities Act of 1933. /6

In June 1972, the Commission published Exchange Act Release No. 9660, which addressed how the Exchange Act reporting requirements apply to "[i]ssuers which have ceased or severely curtailed their operations." In the release, the Commission emphasized the importance of Exchange Act reporting in preserving free, fair, and informed securities markets. The Commission stated, however, that "when not inconsistent with the protection of investors, [it] would modify the reporting requirements as they apply to particular issuers."

Companies in bankruptcy are not relieved of their reporting obligations. Neither the United States Bankruptcy Code /7 nor the federal securities laws provide an exemption from Exchange Act periodic reporting for issuers that have filed for bankruptcy. In the release, however, the Commission expressed the general position that, with respect to issuers subject to the jurisdiction of the Bankruptcy Court, it generally would accept reports which "differ in form or content from reports required to be filed under the Exchange Act."

The release also states that, in deciding whether to accept modified Exchange Act reports, the Commission will consider the following: (1) how difficult it is for the issuer to obtain the information necessary to complete those reports; /8 (2) the issuer's financial condition; (3) the issuer's efforts to advise its security holders and the public of its financial condition and activities; and (4) the nature and extent of the trading in the issuer's securities.

The release provides the Commission's general position on accepting modified Exchange Act reports from issuers subject to the jurisdiction of the Bankruptcy Court. An issuer relying on that general interpretive guidance should take all steps possible to inform its security holders and the market of its on-going financial condition and the status of its bankruptcy proceedings, including filing any available information with the Commission.

II. Requests for Modified Exchange Act Reporting

An issuer in bankruptcy may request a "no-action" position from the Division that applies the positions in the release to the issuer's facts. /9 In providing a no-action position, the Division determines whether modified reporting is consistent with the protection of investors. In its request, the issuer should present a clear demonstration of its inability to continue reporting, its efforts to inform its security holders and the market, and the absence of a market in its securities.

Requests often do not provide all of the information necessary for the Division's analysis. This staff legal bulletin identifies factors the Division considers when acting on these requests. This guidance will help issuers prepare requests and make the process more efficient and less costly.

III. Information Required in Requests

A. Information Regarding Disclosure of Financial Condition

The first factor the Division considers is whether the issuer made efforts to inform its security holders and the market of its financial condition. The Division also looks at the issuer's Exchange Act reporting history. The request should include the following information.

1. Whether the issuer complied with its Exchange Act reporting obligations before its Bankruptcy Code filing

Because the issuer's efforts to inform the market of its financial condition are important, an issuer submitting a request should have been current in its Exchange Act reports for the 12 months before its Bankruptcy Code filing. /10 Accordingly, the issuer should discuss its Exchange Act reporting history for that period.

2. When the issuer filed its Form 8-K announcing its bankruptcy filing; whether the issuer made any other efforts to advise the market of its financial condition

The Division considers the timeliness of the issuer's Form 8-K announcing its bankruptcy filing when determining whether to

grant the request. /11 The Division does not have a specific, objective test concerning the timing of the Form 8-K filing. However, the issuer should state the date the Form 8-K was due and filed. If the issuer filed the Form 8-K after the due date, it should explain why. The issuer also should discuss any other efforts that it made to inform its security holders and the market of its financial condition.

3. Whether the issuer is able to continue Exchange Act reporting; whether the information in modified reports is adequate to protect investors

The issuer should discuss the reasons why it is unable to continue Exchange Act reporting. The request should discuss specifically: (1) whether the issuer has ceased its operations or the extent to which the issuer has curtailed operations; (2) why filing periodic reports would present an undue hardship to the issuer; (3) why the issuer cannot comply with the disclosure requirements; and (4) why the issuer believes granting the request is consistent with the protection of investors.

Management of the issuer also should represent, if true, that: (1) the filing of periodic reports would present an undue hardship; and (2) the information contained in the reports filed with the Bankruptcy Court pursuant to the Bankruptcy Code is sufficient for the protection of investors while the issuer is subject to the jurisdiction of the Bankruptcy Court.

B. Information Regarding the Market for the Issuer's Securities

The Division also considers the nature and extent of trading in the issuer's securities. The issuer should discuss in detail the market for its securities. Trading of the issuer's securities on a national securities exchange or the Nasdaq Stock Market is, by itself, sufficient evidence that there is an active market for those securities. The Division will not issue a favorable response to a request for modification of Exchange Act reporting for those securities. /12

Issuers that do not have securities traded on a national securities exchange or the Nasdaq Stock Market should quantify the effect of the Bankruptcy Code filing on the trading in the issuer's securities. /13 This information should demonstrate that there is minimal trading in the securities. /14

The issuer should state the number of market makers for its securities. The issuer also should provide detailed information regarding the number of shares traded and the number of trades per month for each of the three months before the issuer's Bankruptcy Code filing and each month after that filing. /15

General statements in the request that trading has been "minimal" or "insignificant" are not sufficient to enable the Division to reach a conclusion on the request. An unequivocal statement that there is "no trading" in the issuer's securities is sufficient. /16

C. The Timing of the Issuer's Request for Modified Reporting

An issuer should submit its request promptly after it has entered bankruptcy, not when it is preparing to emerge from bankruptcy. /17 The Division will consider a request as submitted

"promptly" if it is filed before the date the issuer's first periodic report is due following the issuer's filing for bankruptcy. /18

IV. Positions Taken by the Division in Granting Requests

A. Reports Required While Bankruptcy Proceedings are Pending

Generally, the Division will accept, instead of Form 10-K and 10-Q filings, the monthly reports an issuer must file with the Bankruptcy Court under Rule 2015. /19 The issuer must file each monthly report with the Commission on a Form 8-K within 15 calendar days after the monthly report is due to the Bankruptcy Court.

Notably, the relief given applies only to filing Forms 10-K and 10-Q. /20 The issuer still must satisfy all other provisions of the Exchange Act, including filing the current reports required by Form 8-K and satisfying the proxy, issuer tender offer and going-private provisions. /21

Issuers reorganizing under the jurisdiction of the Bankruptcy Court must file a Form 8-K to disclose any material events relating to the reorganization. Issuers liquidating under the jurisdiction of the Bankruptcy Court must file a Form 8-K to disclose whether any liquidation payments will be made to security holders, the amount of any liquidation payments, the amount of any expenses incurred, and any other material events relating to the liquidation. /22

B. Reports Required Upon Emergence From Bankruptcy

1. An issuer that is reorganized under its bankruptcy plan

When an issuer's reorganization plan becomes effective, the issuer must file an appropriate Form 8-K. That Form 8-K should include the issuer's audited balance sheet. From then on, the issuer must file Exchange Act periodic reports for all periods that begin after the plan becomes effective. /23

Any post-reorganization filings under the Securities Act or the Exchange Act must include audited financial statements prepared in accordance with generally accepted accounting principles for all periods for which audited financial statements are required even though the issuer may have been subject to bankruptcy proceedings during some portion of those periods. /24

2. An issuer that is liquidated under its bankruptcy plan

After the issuer's liquidation plan becomes effective, the issuer must continue to disclose material events relating to the liquidation on Form 8-K. At the time the liquidation is complete, the issuer must file a final Form 8-K to report that event. /25

C. Effect on Short-Form Registration, Rule 144 and Regulation S

An issuer that has filed modified reports would not be considered "current" in its Exchange Act reporting, with respect to those reports due while its bankruptcy proceedings were

pending, for purposes of: (1) determining eligibility to use Securities Act Form S-2 or S-3; (2) satisfying the current public information requirement of Securities Act Rule 144(c)(1); or (3) satisfying the reporting issuer definition of Rule 902(l) of Regulation S.

D. Availability of Rule 12h-3

Exchange Act Rule 12h-3 provides a means to suspend an issuer's obligation to file periodic reports under Section 15(d) of the Exchange Act. The Division has taken the position that modified Exchange Act reporting in accordance with a grant of a request would be sufficient for purposes of meeting the reporting requirement of Rule 12h-3. /26 Accordingly, an issuer that otherwise satisfies the conditions of Rule 12h-3 may suspend reporting upon emergence from its bankruptcy proceedings if it has been granted relief in response to a request and has satisfied the conditions of that grant.

1/ 15 U.S.C. 78m(a).

2/ 15 U.S.C. 78o(d).

3/ 15 U.S.C. 78a et seq.

4/ See Section 12(b) of the Exchange Act (15 U.S.C. 78l(b)).

5/ 15 U.S.C. 78l(g).

6/ 15 U.S.C. 77a et seq.

7/ 11 U.S.C. 101 et seq.

8/ See Exchange Act Rule 12b-21.

9/ The Division has granted nine no-action requests since January 1995. E.g., Comptronix Corporation (April 4, 1997); Cray Computer Corporation (May 16, 1996); I.C.H. Corporation (May 10, 1996); F&M Distributors, Inc. (May 1, 1996).

10/ Focus Surgery, Inc. (October 3, 1996).

11/ Item 3 of Form 8-K requires the issuer to file a current report on that form within 15 calendar days of specified events related to a bankruptcy filing.

12/ If the issuer remains current in its Exchange Act reporting requirements until trading on a national securities exchange or the Nasdaq Stock Market stops, it may then request modified reporting. F&C International, Inc. (October 15, 1993).

13/ An issuer's securities are not considered to be "traded" on a national securities exchange or the Nasdaq Stock Market if: (1) those securities have been delisted; or (2) trading in those securities on those markets has formally been suspended.

14/ E.g., Sea Galley Stores, Inc. (March 24, 1995) (tabular presentation demonstrated decreased trading volume in the issuer's securities).

15/ If national securities exchange or Nasdaq Stock Market trading stopped during one of these months, the issuer should show separately within that month the information for the periods before and after trading stopped.

16/ E.g., Numerica Financial Corporation (April 1, 1996) (noting that no transfers of issuer stock occurred for a two-year period and that transfer agent was given instructions to prohibit further transfers); F&M Distributors, Inc., supra, and Focus Surgery, Inc., supra (stating there was no trading in the issuer's stock).

17/ Selectors, Inc. (September 18, 1990) and AorTech, Inc. (September 14, 1990).

18/ Focus Surgery, Inc., supra. The staff also will consider a request to be submitted "promptly" if the issuer is current in its Exchange Act reporting after filing its Bankruptcy Code petition and through the date of its request. United Merchants and Manufacturers, Inc. (November 19, 1996).

19/ Fed. R. Bankr. P. 2015.

20/ If, as a result of a "hardship," an issuer wants to file in paper format rather than electronically on EDGAR, it should contact the Division's Office of Edgar Policy at (202) 942-2940.

21/ Transactions in the issuer's securities also continue to be subject to the requirements of the Exchange Act, including the tender offer and short-swing profit provisions.

22/ BSD Bancorp, Inc. (March 30, 1994); Cray Computer Company, supra; I.C.H. Corporation, supra.

23/ Famous Restaurants, Inc. (June 4, 1993); Sea Galley Stores, Inc., supra; Diversified Industries, Inc., supra.

24/ Any requests for relief from financial statement obligations should be sent to the Division's Office of Chief Accountant.

25/ E.g., Cray Computer Company, supra; I.C.H. Corporation, supra.

26/ Union Valley Corporation (November 2, 1993).

14

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: NOTICES TO INFANT OR INCOMPETENT PERSON

DATE: SEPTEMBER 8, 1998

Bankruptcy Rule 7004 governs service of a summons and complaint in an adversary proceeding. Rule 7004(b) provides as follows:

> (b) *Service by First Class Mail.* Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F.R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:
>
> ****
>
> (2) Upon an infant or an incompetent person, by mailing a copy of the summons and complaint to the person upon whom process is prescribed to be served by the law of the state in which service is made when an action is brought against such a defendant in the courts of general jurisdiction of that state. The summons and complaint in that case shall be addressed to the person required to be served at that person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

Under Rule 9014, a motion in a contested matter "shall be served in the manner provided for service of a summons and complaint by Rule 7004..." Therefore, a motion against an infant or incompetent person, if served by mail, must be mailed in the manner provided in Rule 7004(b)2).

Rule 2002 requires that the clerk, or some other person as the court may direct, mail various notices to creditors and other

parties. Notices under Rule 2002 include, among others, notice of the meeting of creditors, notice of the time for filing a proof of claim, notice of the time for voting on a plan, notice of a plan confirmation hearing, and notice of the time for objecting to the debtor's discharge. Rule 2002 does not contain any provision governing the mailing of notices to an infant or incompetent person. Rule 7004(b)(2) is not applicable to Rule 2002 notices.

Ken Klee has suggested that the Rules be amended to require that Rule 2002 notices mailed to an infant or incompetent person be mailed to the legal guardian, parent, or other person who, under state law, would be required to receive service. In essence, the substance of Rule 7004(b)(2) should apply to Rule 2002 notices. Ken asked me to draft and present to the Advisory Committee proposed amendments that would achieve that result.

It is important to note that in most cases the clerk sends the Rule 2002 notices. Of course, there is no way for the clerk to know whether a listed creditor or other person entitled to receive a Rule 2002 notice is an infant or incompetent person. The schedules do not require the identification of creditors or others who are infants or incompetent persons. Therefore, to facilitate the proper mailing of notices consistent with the substance of Rule 7004(b)(2), the clerk would have to be informed of infant or incompetent person status. The best way to inform

the clerk is to require the debtor to identify such persons when listed in schedules or creditor lists.

I offer the following proposed amendments to Rules 1007 and 2002 for the Committee's consideration at the October 1998 meeting:

Rule 1007. Lists, Schedules and Statements; Time Limits

****

(n) *Infants and Incompetent Persons.* If the debtor knows that a person listed on the list of creditors or schedules is an infant or incompetent person, the debtor also shall list thereon the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (n) is added to enable the person required to mail notices under Rule 2002 to mail them to the appropriate guardian or other representative when the debtor knows that a creditor or other person listed is an infant or incompetent person.

The proper mailing address of the representative is determined in accordance with Rule 7004(2)(b), which requires mailing to the person's dwelling house or usual place of abode or at the place where the person regularly conducts a business or profession.

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

****

(p) *Notice to an Infant or Incompetent Person.* If a list or schedule filed under Rule 1007 includes the name and address of a representative of an infant or incompetent person, notices to the infant or incompetent person under this rule shall be mailed in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

COMMITTEE NOTE

Subdivision (p) is added to require that notices to an infant or incompetent person under this rule are mailed to the appropriate guardian or other legal representative in the manner provided for service of a summons and complaint under Rule 7004(b)(2).

The clerk or another person required to mail notices will be aided by the addition of Rule 1007(n). If the debtor knows that a person listed is an infant or incompetent person, the debtor is required to list the name, address, and legal relationship of any person upon whom process would be served in an adversary proceeding against the infant or incompetent person in accordance with Rule 7004(b)(2).

Items 15 and 16 will be oral reports.

SUBCOMMITTEES -- ADVISORY COMMITTEE ON BANKRUPTCY RULES
(June 1998)

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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 Style

Chairman: Leonard M. Rosen, Esquire

Members: Judge Donald E. Cordova
Professor Kenneth N. Klee

Judge Adrian G. Duplantier, ex officio
Professor Alan N.Resnick, ex officio
Peter G. McCabe, ex officio

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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

Appointees to Ad Hoc Working Group on Attorney Conduct (of Standing Committee)

Gerald K. Smith, Esquire
R. Neal Batson, Esquire

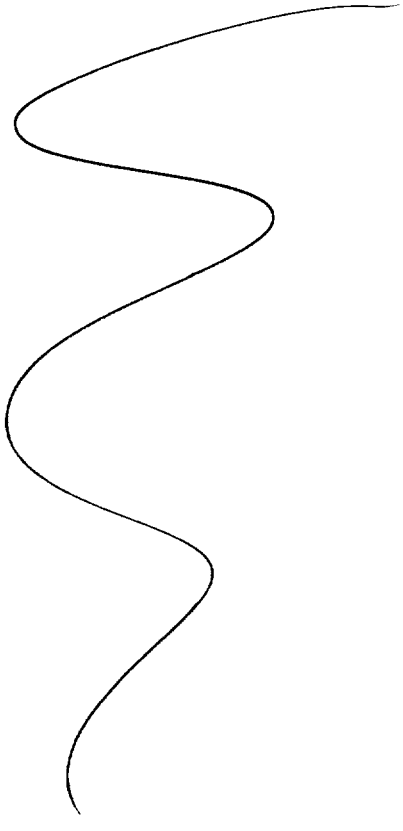
Item 18 will be oral.

Supplemental

Agenda

Book

Materials



TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2002(g)

DATE: October 3, 1998

Under Bankruptcy Rule 2002(g), an address stated by a creditor in a proof of claim form is to be used for notice purposes "unless a notice of no dividend has been given." The purpose of the "unless" clause is so that clerks do not have to spend the time and energy to read proofs of claim after creditors have been informed in a chapter 7 case that there are no assets and that proofs of claim need not be filed.

Last year, Judge Paul Mannes pointed out the following flaw in this provision: If a notice of no dividend is given under Rule 2002(e), but it later appears that there may be assets sufficient to pay a dividend, Rule 3002(c)(5) requires the clerk to notify creditors of that fact and to inform them of the deadline for filing proofs of claim (the deadline is 90 days after mailing the Rule 3002(c)(5) notice). If a Rule 3002(c)(5) notice of a possible dividend is sent, which supersedes the Rule 2002(e) notice of no dividend, then an address listed by the creditor in a proof of claim should be used for mailing purposes. But a literal application of the last sentence of Rule 2002(g) relieves the clerk of the duty to use the mailing address in the proof of claim, despite the fact that the Rule 3002(c)(5) notice has

superseded the Rule 2002(e) notice of no dividend.

The Advisory Committee agreed with Judge Mannes that Rule 2002(g) should be amended to limit the "unless" clause to situations in which a notice of no dividend has been given and was not been superseded by a Rule 3002(c)(5) notice. As a result, in September 1997, the Committee voted to approve the following amendments to Rule 2002(g)(the amendments are stylistic except for the final sentence):

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

****

(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.

****

COMMITTEE NOTE

The final sentence of 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).

At the Committee's March 1998 meeting, this subdivision was again discussed and found to be ambiguous. It was suggested that

the order of the sentences be reversed to make it clear that the last-filed document should control where the creditor files both a proof of claim and a separate request designating its mailing address. But the Committee thought that merely reversing the order would not cure the problem. Recognizing that substantial revisions may be necessary, the proposed amendments to this subdivision were deleted from the package submitted to the Standing Committee in June 1998 and I was asked to prepare another draft for consideration at the next meeting.

In redrafting Rule 2002(g) as shown below, I made two substantive changes that were not mentioned at the meeting. First, I made it clear that the request designating a mailing address must be filed "in the particular case." I do not believe that the Committee intends that a creditor may file one general request that all notices in all cases be mailed to a particular address. With improvements in automation, this will be feasible some day, but I do not think it is today. Second, I revised the rule to permit an equity security holder to designate a mailing address in a proof of interest.

I offer the following draft for consideration at the meeting on October 8-9, 1998:

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

****

~~(g) ADDRESSES OF 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 in a filed request; otherwise, to the address shown in the list of creditors or the schedule, 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 has been given.~~

(g) ADDRESSING NOTICES.

(1) Notices required to be mailed under this rule to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent directs in a request filed in the particular case. If the entity files more than one request designating a mailing address, the notice shall be addressed as directed in the last request filed. For the purposes of this subdivision --

(A) a proof of claim duly filed by a creditor or indenture trustee which states its mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a subsequent notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest duly filed by an equity security holder which states its mailing address constitutes a filed request to mail notices to that address.

(2) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)(1), the notices shall be mailed to the address shown on the list of equity security holders.

COMMITTEE NOTE

Subdivision (g) has been revised to clarify that where a creditor or indenture trustee files both a proof of claim which includes a mailing address and a separate request designating a mailing address, the last paper filed determines the proper address. The amendments also clarify that a request designating a mailing address is effective only with respect to a particular case.

Under subdivision (g), a duly filed proof of claim is considered a request designating a mailing address 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). A duly filed proof of interest is considered a request designating a mailing address of an equity security holder.

The other amendments are stylistic.

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 9, 1998

MEMORANDUM TO RULES COMMITTEES' CHAIRS AND REPORTERS

SUBJECT: *Regulation of Electronic Commerce*

For your information, I am attaching a request to submit a paper on topics relevant to the use of the Internet, which was sent to Judge Stotler by Professor Walter Effross. Judge Stotler replied that she would forward the professor's request to the rules committees' chairs and reporters for their consideration and possible response. The attached material was sent to Judge Stotler and is self-explanatory.

John K. Rabiej

Attachments

AMERICAN UNIVERSITY
WASHINGTON, D.C.

AUG 21 8 41 AM 98

August 17, 1998

Re: Issues in Electronic Commerce

The Honorable Alicemarie H. Stotler
US District Court for the Central District of California
751 W Santa Ana Blvd
Santa Ana, CA 92701

Dear Judge Stotler:

On behalf of the *Administrative Law Review*, a joint publication of American University's Washington College of Law and of the American Bar Association's Section of Administrative Law and Regulatory Practice, I would like to invite you to contribute an article or essay for possible publication in our upcoming special issue on the regulation of electronic commerce and presentation at our March 26, 1999 Symposium on that topic.

Enclosed in addition to the Call for Papers for that conference are two recent articles of mine about commercial aspects of the World Wide Web, as well as a description of the current projects of the ABA's Subcommittee on Electronic Commerce, which I chair. I would welcome any comments on the articles or any suggestions of additional topics for the Symposium or the Subcommittee to address.

Thank you for your consideration.

Respectfully yours,

Walter A. Effross

Walter A. Effross
Associate Professor of Law
(202) 274-4210 effross@wcl.american.edu

Enclosures

Please Post/Circulate

CALL FOR PAPERS
REGULATION OF ELECTRONIC COMMERCE

The Administrative Law Review, a joint publication of American University's Washington College of Law and the American Bar Association's Section of Administrative Law and Regulatory Practice, invites submissions for possible publication in its upcoming Symposium Issue on "Regul@tion$.gov: Coming to Terms With On-Line Commerce."

The Washington College of Law is now planning a full-day conference in April 1999 to accompany the publication of this issue. Speakers are expected to include, in addition to the authors published in the Symposium Issue, members of the regulatory, business, financial, legal, and media communities.

Topics of interest include, but are not limited to:

- Role of Government: Whether and When to Regulate On-Line Commerce
- Historical Lessons on the Regulation of New Media/Technologies
- Consumer Protection Concerns- Security, Privacy, Encryption, and Anonymity
- Regulating On-Line Advertising, Sales, Licenses, and Auctions
- The Regulation of Electronic Cash and Electronic Payment Systems
- Microtransactions and their Regulation
- Should Electronic Agents, Spiders, and "Bots" Be Regulated?
- Regulating On-Line Advertising, Sales, Licenses, and Auctions
- Regulating On-Line Banks, Electronic Cash, Securities Trading, and Insurance Brokers
- Criminal Prosecution and Civil Liability for Cyber-Crimes in Commerce
- Interaction, Compatibility, and Uniformity of State, Federal, and International Statutes and Regulations Concerning On-Line Commerce
- Jurisdictional and Choice-of-Law Issues
- Taxation Concerns

Submissions of any length will be considered. Articles should be received by *The Administrative Law Review* by October 15, 1998, although earlier submissions are welcomed. Authors of papers accepted for publication will be expected to confirm within seven days after acceptance that they will contribute these papers to the Symposium Issue.

Submissions should be made in hard copy to: Administrative Law Review, Symposium on Regulation of Electronic Commerce, Mark Stevenson, Editor-in-Chief, Washington College of Law, 4801 Massachusetts Avenue, N.W., Washington, DC 20016.

Questions can be addressed to Professor Walter A. Effross, (202) 274-4210, effross@wcl.american.edu.

Please Post/Circulate

ABA CALL FOR PARTICIPATION - ELECTRONIC COMMERCE WORKING GROUPS

The American Bar Association's Subcommittee on Electronic Commerce invites judges, practitioners, legal academics, and law students to participate in its existing projects and to suggest new issues for its Working Groups to address.

Because much of the Subcommittee's activity is conducted "virtually"— through e-mail, Web sites, and teleconference calls— active contribution does not require regular attendance at ABA meetings. In short, the Subcommittee offers the opportunity to become involved, to the degree that you wish to contribute and without necessarily leaving your office, in shaping many of the most complex and rapidly-developing areas of today's commercial law.

All members of the Subcommittee must be members of the American Bar Association, its Business Law Section, and the Section's Committee on Cyberspace Law. For information on joining (reduced rates are available for government lawyers and for law students), call (312) 988-5522, e-mail abasvcctr@abanet.org, or visit: <http://www.abanet.org/ members/home.html>. The home page of the Committee on Cyberspace Law is: <http://www. abanet.org/buslaw/cyber/home.html>.

Walter Effross, Subcommittee Chair
Associate Professor, Washington College of Law, American University
effross@wcl.american.edu (202) 274-4210

Working Group on Electronic Contracting

This Working Group is developing a Web page containing a bank of contract clauses designed to address electronic commerce issues. The clauses will be grouped by topic; within each topic, alternative clauses will be compared.

Contact: Prof. Christina Kunz, ckunz@wmitchell.edu; Prof. Jane Winn, jwinn@post.cis.smu.edu

Working Group on the Transferability of Electronic Assets

This Working Group analyzes, on both policy and practice levels, the extent to which transfers of electronic assets (such as promissory notes in electronic form) should enjoy the benefits afforded to transfers of identical paper-based assets, particularly with respect to the transferee's ability to receive a transfer free from adverse claims and defenses.

Contact: Candace Jones, cmjones@hahnlaw.com; Ronald Gross, rgross@jonesday.com

Working Group on Electronic Evidence

This Working Group is involved in: determining whether and how the Federal Rules of Evidence should be revised to take new communication and data storage technologies into account; developing recommendations to practitioners for requesting the production of electronic records; and drafting model policies to minimize the legal effect of "digital degradation" of information stored on magnetic or optical media.

Contact: Rae Cogar, rcogar@ee.net; Prof. Paul Rice, price@wcl.american.edu

"The Legal Architecture of Virtual Stores: World Wide Web Sites and the Uniform Commercial Code"

34 San Diego Law Review 1263-1400 (1998)
[also available at http://legal.web.aol.com/ecommerc/effross.html]

This article, the first of its kind, analyzes both practically and theoretically the ways in which a Web site created to sell goods or license information can be designed to maximize its owner's profit and minimize her commercial liability.

Using such sources as court decisions, academic commentaries, Web-site manuals, current newspaper and magazine articles, the existing Uniform Commercial Code (U.C.C.), and draft proposals for the revision of U.C.C. Article 2 and the creation of U.C.C. Article 2B, the article examines in detail such topics as:

- -- the on-line definition of "merchant" and its legal implications ;
- -- forming a binding contract with a visitor to a Web site;
- -- using "electronic agents";
- -- "unconscionable" provisions in on-line contracts;
- -- the enforceability of "Webwrap" agreements;
- -- providing and disclaiming warranties through Web sites;
- -- commercial aspects of Web-linking arrangements; and
- -- asserting or avoiding jurisdiction based on on-line commerce.

Among the Web sites cited by the article as examples of preferred and questionable practices are those of Fortune 500 corporations as well as those of purveyors of books, clothing, wine, CD's, Beanie Babies, erotic material, narcotics paraphernalia, and term papers. The article concludes with a "Checklist of Commercial Law Issues for Web Site Owners."

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Washington, DC 20016
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"Withdrawal of the Reference: Rights, Rules, and Remedies for Unwelcomed Web-Linking"

49 South Carolina Law Review 651-693 (1998)
[also available at http://legal.web.aol.com/ecommerc/effross.html]

The simplicity of installing a link from a page on one Web site to a page on another has precipitated a complex controversy in the law and culture of the Web: on what legal grounds can the owner of the target site attack an unwanted link from, and possibly the "framing" of its material by, the linking site?

This article examines the few court proceedings to address this issue: the *Shetland Times* case and settlement; the *Ticketmaster v. Microsoft* litigation; the *Washington Post v. Total News* litigation and settlement; and the *ACLU v. Miller* decision.

The article also analyzes in this context the relevance and availability of copyright, trademark, "false light," and "right of publicity" causes of action. It concludes by proposing a simple and inexpensive approach to resolving some Web-linking issues: the creation of a universally-recognized icon/link to indicate whether the owner of a Web page has granted linkage permission to all, none, or specified Web pages of other sites.

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