ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Jackson Hole, Wyoming
September 27-28, 1999

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 27 - 28, 1999
Jackson Lake Lodge
Moran, Wyoming

Introductory Items

1. Approval of minutes of March 1999 meeting. [Materials: Draft minutes of the meeting.]

2. Report on the June 1999 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Materials: Draft minutes of the meeting.]

3. Report on the June 1999 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

Action Items

4. Proposed amendments to Rules 9013, 9014, 1006, and 2004. [Materials: Reporter's memorandum dated 8/16/99; proposed amendments to Civil Rule 5(b) approved for publication.]

5. Proposed amendments to Rule 2014 on employment of professionals, recommendations of Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements. [Materials: from Mr. Smith.]

6. Proposed amendments concerning capacity of infants, incompetent persons, corporations, and other entities to commence a bankruptcy case. [Materials: Professor Morris' memorandum dated 8/23/99.]

7. Suggestion to amend Rules 2002(a) and 2002(h): notices to creditors who have not filed timely claims. [Materials: Reporter's memorandum dated 8/14/99; letter from Judge Arthur J. Spector dated 9/9/97.]

8. Proposed amendments to Rule 9027 on removal and remand. [Materials: Reporter's memorandum dated 8/17/99; letter from Judge Christopher M. Klein dated 5/13/97; article from The American Bankruptcy Law Journal by Helbling & Klein.]

9. Proposed amendments to Rules 4004(c), 2015(a)(5) and 2010, recommended by the Executive Office for United States Trustees. [Materials: Professor Morris' memorandum dated 8/23/99 ; letter from Martha Davis, Esq., dated 7/20/99.]

10. Application of Rules 9019 and 7041 to matters pending in the court of appeals. [Materials: Reporter's memorandum dated 8/19/99; letters from Judge L. Edward Friend, II, to Peter G. McCabe and Samuel W. Phillips dated 7/12/99; Local Rule 33 of the

United States Court of Appeals for the Fourth Circuit; Rules 6 and 33, Federal Rules of Appellate Procedure.]

11. Miscellaneous comments on forms. [Materials: Reporter's memorandum dated 8/17/99; letter from Judge Susan Pierson Sonderby dated 1/8/99 concerning Form 20B, Notice of Objection to Claim; letter from Judge Paul Mannes dated 7/12/99 concerning Director's Form B 240, Reaffirmation Agreement; letter from A. Thomas DeWoskin, Esq., dated 5/17/99 concerning Form 9, Notice of Commencement of Case . . . ("§ 341 Notice"); letter from Joel Tabas, Esq. dated 5/27/99 concerning Form 10, Proof of Claim.]

    Report of the Forms Subcommittee on Form 7, Statement of Financial Affairs. [Materials: Official Form 7, Statement of Financial Affairs.]

12. Suggestion to amend Rule 2002(f)(7) regarding notice of an order confirming a chapter 13 plan. [Materials: Reporter's memorandum dated 8/15/99; letter from Judge Paul Mannes dated 4/28/99.]

13. Service on partnerships, corporations, and unincorporated associations. [Materials: Reporter's memorandum dated 8/17/99; letter from Judge David H. Adams dated 10/8/98.]

14. Proposed amendments to Rules 2003(b) and (d) concerning a creditor's right to vote and the deadline for filing a motion to resolve a disputed election. [Materials: Professor Morris' memorandum dated 8/23/99.]

15. Service of process by United States Marshals. [Materials: Reporter's memorandum dated 8/18/99; letter from Scott William Dales, Esq. dated 4/23/99.]

16. Attorney's fees in chapter 13 cases. [Materials: Reporter's memorandum dated 8/9/99; letter from Wayne R. Bodow, Esq. w/ 2 articles enclosed by him.]

Information Items

17. Form 1, Voluntary Petition. Amendments approved for publication at the March 1999 meeting and being held for combining with publication of other forms.

18. Report of the Technology Subcommittee

19. Progress chart of proposed amendments.

20. Next meeting reminder: March 9 - 10, 2000. Key Largo, Florida

Administrative Matters

21. Discussion of dates and place for September 2000 meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 18 - 19, 1999
Airlie Conference Center, Warrenton, Virginia

Draft Minutes

The following members attended the meeting:
District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Robert W. Gettleman
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Professor Kenneth N. Klee
Gerald K. Smith, Esquire
Leonard M. Rosen, Esquire
R. Neal Batson, Esquire
Eric L. Frank, Esquire
J. Christopher Kohn Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Bernice B. Donald and Professor Mary Jo Wiggins were unable to attend the meeting. Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), and Professor Charles J. Tabb, a former member of this Committee, also attended all or part of the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Esquire, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Professor Jeffrey W. Morris, University of Dayton Law School, Consultant to the Committee; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center ("FJC"). In addition, Marie Leary, Research Division, FJC, and Alan S. Tenenbaum, Environment and Natural Resources Division, United States Department of Justice, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the

office of the Secretary to the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the October 1998 meeting.

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

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

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

Action Items

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

Rule 1007(m). The Committee considered this proposed amendment in light of both the comments received and the pending legislation. The proposed amendment would require a debtor that lists a governmental unit as a creditor to identify, if known to the debtor, any department, agency, or instrumentality of the governmental unit through which the debtor is indebted. The proposed amendment drew six comments. The comments from attorneys for

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

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

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

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

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

"party." The Reporter said that changing "trustee or a creditor" to "party in interest" would not require republication because the change would be conforming the rule to the language used in § 522(l) of the Bankruptcy Code.

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

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

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

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

Official Form 1, Voluntary Petition. The Reporter directed the Committee to the pamphlet containing the preliminary draft amendments for the text of the form. He also noted the comments to the proposed addition of Exhibit "C" that opposed forcing the debtor to admit to liabilities that may be subject to dispute. Judge Kressel suggested changing the phrase "poses a threat . . . of harm" to "may pose a threat . . . harm." Mr. Rosen said using the phrase "may pose" could cause filers to submit a laundry list, because anything "may" pose a threat. Professor Klee said there is no issue if there has been an allegation of environmental threat; in that event, there should be disclosure. Rather, the debate is over whether disclosure should be required if only the debtor knows of the threat, he said. Professor Klee suggested adopting language from the comment, such as "if a governmental agency has determined or alleges that the property poses a threat or which the debtor has admitted might have such characteristics." Mr. Smith said the debtor and the lawyer have a serious duty to disclose imminent potential harm, and Mr. Tenenbaum added that Mr. Foltz earlier had pointed out that restricting the disclosure to government allegations leaves out many potentially harmful situations. [See Minutes of meeting of September 11-12, 1997, pages 10-11, for a report of Mr. Foltz's statement.] Mr. Patchan said the purpose of proposed Exhibit "C" is to alert the trustee to the need for immediate action. **A motion to adopt the proposed form with a change to "may pose" and amended to add also the phrase "or alleged by a government agency" drew a tie vote of 5 to 5, which the Chairman broke by voting in favor. A second motion to change the "may pose" language to "poses or is alleged to pose" carried on a voice vote, overriding the prior close vote.**

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

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

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

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

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

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

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

The second question was whether the Committee should try to develop a package of proposed amendments to provide national uniformity for major issues. Mr. Rosen said he doubted that a clear line exists that could be used to identify matters appropriate for the national rules and said it would not be good for districts to operate under two sets of rules. He said he preferred the approach suggested by Judge Cristol, taking the proposals item-by-item, each on its merits. Mr. Smith said the essential tasks for the national rules are to provide the fundamentals and assure due process. He said in some courts it can be difficult to get a hearing even when there is an objection and a hearing is requested, so that he does not see the fundamentals in place even in his own district.

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

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

Judge Duplantier said that Civil Rule 43(e), which permits a court to decide a motion on affidavits, should apply in a bankruptcy case except when there is a genuine issue of material fact in a contested matter. In the event of a dispute over one or more material facts, whether the

proceeding is a trial or an evidentiary hearing on a motion, the dispute must not be resolved by affidavit, he said, but rather upon oral testimony as required by Civil Rule 43(a). In other words, he said, Civil Rule 43 applies. **The consensus was that the appropriate use of affidavits is an issue the Committee should work on.**

The Committee then considered the question whether to retain the framework of the preliminary draft, with Rule 9013 devoted to "applications" and Rule 9014 to motions with a list of matters to which it does not apply. The alternative would be to retain the structure of the current rules under which Rule 9013 governs motions and Rule 9014 governs contested matters. Judge Roettger noted the amount of opposition to the preliminary draft expressed in the written comments and suggested that any new proposals should avoid too close a resemblance to what was published. Mr. Frank said the Committee needs to decide a basic policy issue of whether the matters included in Rule 9013 and the matters excluded from Rule 9014 should be the Committee's decisions or should be left to local practice and discretion. Mr. Batson said multiple practices among judges in the same district is a problem, but that uniformity such as the Committee proposed in the published draft of Rules 9013 and 9014 is not advisable. Accordingly, he said, "nibbling" at the proliferation of different practices by proposing limited amendments to the national rules may be the best the Committee can do to foster greater uniformity. Judge Gettleman said that each of the district judges in the Northern District of Illinois has an individual website that is used to notify practitioners and parties of the procedures used by each judge.

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

The Committee went through the preliminary draft Rule 9014, subdivision by subdivision, to determine what elements of the proposed rule to retain. **The Committee decided to retain the title "Contested Matters." The Committee deleted from further consideration subdivisions a), b), d), e), f), g), k), l), m), n), and o).** With respect to **subdivision c), the Committee decided to delete the time period for serving a motion but keep the service list,** and to reconsider the specific parties named in the service list. On the

second day of the meeting, **the Committee reconsidered its decision concerning the service list and determined not to retain it.**

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

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

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

will be set. The consensus was that this is one approach that the Committee should consider. Mr. Batson said that in preparing any new proposals, the Committee also should review Rule 9029 for possible amendment, to assure that courts know what they need to cover in their local rules.

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

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

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

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

The first issue was whether to include in the amendments to Rule 3020, governing the order of confirmation, the phrase "and not by reference to the plan or other document." The

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

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

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

Form for Reaffirmation Agreement. Judge Kressel, as chairman of the Forms Subcommittee, said that in light of the Committee's discussion of proposed amendments concerning motion practice and possible action by Congress that probably would affect reaffirmation agreements, he recommended deleting from the proposed form the motion and order that were included in the agenda book for the meeting. There was no objection to the recommendation. Judge Kressel said the Committee also needed to decide whether to propose the form as an official form, publishing it for comment and delaying its effective date until the year 2000, or issuing the form as soon as possible as a procedural form under the authority of the Director of the Administrative Office to publish bankruptcy forms for optional use. Professor Klee said that although both the Senate and the House bill contain provisions on the subject of reaffirmation agreements, he did not expect any new law to have an effective date earlier than October 1, 2000. He said he did not advise waiting to issue the form. **The Committee agreed that the form should be issued as a Director's form and also should be published, so that it ultimately could become an official form, but that publication should be delayed until legislation has been enacted.** Professor

Klee said that sentence at the top of page two of the form which states that the executed form must be filed before it is binding should refer to filing with "the clerk of the bankruptcy court" not simply "the bankruptcy court." Some members said the form is substantive and that issuing it may be ill-advised. Mr. Smith said the phrase "telling the creditor in some other lawful way" in the third paragraph of the section of the form labeled Notice to Debtor is likely to be more confusing than helpful to a lay person. **The Committee agreed to change the sentence to read simply "by notifying the creditor that the agreement is canceled" and approved the form as modified.**

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

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

Professor Morris reviewed the state of the law concerning the capacity of infants and incompetent persons to file a petition in bankruptcy and the considerations surrounding the requirements for filing a petition by a corporation. Professor Klee said that a simpler approach would be simply to say that Civil Rule 17 applies. [Civil Rule 17 currently is incorporated by reference by Rule 7017 and applicable in adversary proceedings.] Professor Resnick said he opposed the provisions concerning filing by a corporation because no problem exists and creating a rule could lead to unintended consequences. Mr. Frank said he thinks the proposed Rule 1004.1, specifying a procedure for a filing by an infant or incompetent person would be a service and that it would fill a gap in the rules. **A motion to postpone consideration of the**

draft amendments until the next meeting and to consider then whether to add to proposed Rule 1004.1 provisions similar to Civil Rule 17(b) was not opposed.

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

Proposed Common Draft Amendments to Permit Electronic Service. The Reporter introduced the draft amendments to the civil rules prepared by Professor Edward H. Cooper, reporter to the Advisory Committee on Civil Rules, following the meeting of the Standing Committee's Subcommittee on Technology. Professor Resnick said the Standing Committee had requested feedback from all of the advisory committees with a view toward achieving uniform language for amendments to be published for comment in the fall of 1999. The draft included proposed amendments to Civil Rules 5(b), 6(e), 77(d), and 4(d). The proposed amendments to Rule 6(e) would extend to electronic service the additional three days for response currently afforded to parties when service is made by mail. The Reporter said he opposed affording the additional three days, but that Professor Cooper favored it as a means to encourage parties to use electronic service. Judge Duplantier said he would favor affording the three extra days for all service other than personal service but realized it would not be easy to draft such a provision. Mr. Rosen and Judge Robreno favored extending the three days to those who are served electronically, as in Professor Cooper's "Alternative 3," and others supported Judge Duplantier's approach. **The Committee agreed that the proposed amendment to Rule 77(d) was satisfactory and that bankruptcy clerks also should be able to serve notice of entry of an order or judgment electronically on consent of the receiving party, but that it would be premature to propose amendments to Civil Rule 4 that would permit a defendant to electronically waive service of a summons and complaint. The Committee agreed to submit for publication an amendment to Rule 9006(f) to extend the three-day extension now afforded when service is effected by mail to all forms of service other than personal delivery, if the proposed amendments to Civil Rule 5(b) are published.**

Information Items

Alternative Dispute Resolution Act of 1998. This law was enacted in October 1998. It provides for a wide array of alternative dispute resolution (ADR) procedures in all district courts and requires the district courts by local rule to make available to parties in civil actions at least one form of ADR. The Act expressly includes adversary proceedings in bankruptcy among the civil actions to which this requirement applies. The law does not require the bankruptcy courts to establish ADR programs, although any court may do so voluntarily. The Administrative Office is on record as interpreting the new law's reference to "adversary proceedings in bankruptcy" to mean only those proceedings as to which the reference has been withdrawn to the district court. Mr. McCabe noted that the judiciary had opposed the bill on the ground that the courts should not have a program mandated on them. Judge Small, in a letter to Judge Duplantier, had raised

the question whether a bankruptcy rule might be needed to cover the situation when an appellate court ADR program results in a settlement of a bankruptcy matter. Rule 9019 requires that all creditors be sent notice of any potential settlement, because the settlement may affect all creditors, and the parties should come back to the bankruptcy court, give notice, obtain approval of the settlement by a bankruptcy judge, and then dismiss the appeal. Judge Small said he was not pushing for a rule at this time but simply bringing the issue to the Committee's attention.

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

Marie Leary of the FJC summarized the survey findings. Of the 77 responding chief bankruptcy judges, 47 (61 percent) said that their courts follow the local rules of attorney conduct of their respective federal district courts. Most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct; only seven percent of bankruptcy courts indicated that they do. Thus, proposed uniformity in district court attorney conduct rules could carry over to most of the bankruptcy courts, even if the proposed changes are not directly aimed at or applied to the bankruptcy courts. Nine percent indicated that their courts have a local bankruptcy rule that adopts standards other than those in the district court's local rules, and 12 percent said they have no local district or bankruptcy rule governing attorney conduct.

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

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

Administrative Matters

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

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

Respectfully submitted,

Patricia S. Channon

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 1999
Newton, Massachusetts

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Boston College Law School in Newton, Massachusetts on Monday and Tuesday, June 14-15, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
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 A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Morey L. Sear was unable to attend. The Department of Justice was represented at the meeting by Deputy Attorney General Eric H. Holder, Jr. and Associate Attorney General Raymond C. Fisher, both of whom attended the Monday portion of the meeting. Neal K. Katyal, Advisor to the Deputy Attorney General, also participated on behalf of the Department. Judge Robert E. Keeton, former chairman of the committee, and Francis H. Fox, former member of the Advisory Committee on Civil Rules, also attended the meeting.

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; Mark D. Shapiro, deputy chief of that office; and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
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
Judge David F. Levi
Professor Edward H. Cooper, Reporter
Professor Richard A. Marcus, Special Reporter
Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Patricia S. Channon, senior attorney from the Bankruptcy Judges Division of the Administrative Office; and Joe S. Cecil and Carol L. Krafka of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica reported that he and Judge Davis had appeared before the Judicial Conference in March 1999 to present the committee's proposed amendments to the criminal rules. He stated that most of the rules had been approved as part of the Conference's consent calendar. But the comprehensive new Rule 32.2, governing criminal forfeiture, had been placed on the Conference's discussion calendar. He added that the members of the Conference had been presented with a letter opposing the rule from the National Association of Criminal Defense Lawyers and a written response from Judge Davis.

Judge Scirica said that he described for the Conference the lengthy and meticulous process that the Advisory Committee on Criminal Rules followed in drafting the new rule, in soliciting comments and input, and in making appropriate revisions in light of the comments received from the public and the Standing Committee. He noted that several members of the Conference stated expressly that they had been very impressed by the careful nature of the work of the committees.

Judge Scirica reported that Judge Davis addressed the Conference on the merits of the proposed criminal forfeiture rule and was asked several penetrating questions. Some members, he said, expressed concern over the rule's explicit reference to the practice in some circuits of allowing courts to issue money judgments in lieu of the forfeiture of specific property connected to an offense. In the end, however, the Conference approved the new rule without change.

Judge Scirica also reported that the Federal Judicial Center was in the process of conducting a study for the Standing Committee to document the procedures used by individual district and circuit courts to obtain financial information from parties for purposes of judge recusal. He noted that Judge Bullock had agreed to serve as the committee's liaison to the Center in connection with the study.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 20 bills had been introduced in the 106th Congress that would have an impact on the federal rules or the rulemaking process. He proceeded to describe four of the most significant bills.

He said that H.R. 771 would undo the 1993 amendments to FED. R. CIV. P. 30(b) and require, in essence, that depositions be taken down by a stenographer. He noted that the 1993 amendments had been designed expressly to save litigation costs by providing the parties with discretion to select the recording means that best suited their individual needs.

He reported that H.R. 755, the "Year 2000 Readiness and Responsibility Act," which had just passed the House of Representatives, would, among other things, federalize all "Y2K" class actions. He said that Judge Stapleton, chairman of the Judicial Conference's Federal-State Jurisdiction Committee, had written to the Congress expressing opposition to the class action provision of the bill on federalism grounds. He added, though, that Judge Stapleton had included in his letter a caveat that the judiciary's opposition to the Y2K legislation should not be construed as opposition to the extension of minimal diversity to every mass tort.

Mr. Rabiej reported that S. 353, the "Class Action Fairness Act of 1999," contained a provision that would undo the 1993 amendments to FED. R. CIV. P. 11, thereby making the imposition of sanctions mandatory for violations of the rule. He noted that several witnesses had testified against a return to the wasteful satellite litigation generated by the pre-1993 rule. He added that the Judicial Conference would continue to oppose repeal of the 1993 amendments, which focus on deterrence, rather than compensation, and provide courts with appropriate discretion to impose sanctions on a case-by-case basis.

Finally, Mr. Rabiej reported that comprehensive bankruptcy legislation had just passed the House of Representatives. H.R. 833, the "Bankruptcy Reform Act of 1999," he noted, contained several objectionable rules-related provisions. The Director of the Administrative Office had written to the Congress seeking deletion or modification of these provisions. But, he noted, except for adding a provision dealing with rules in bankruptcy appeals, the House passed the legislation without correcting the objectionable rules-related provisions.

Administrative Actions

Mr. Rabiej reported that the volume of staff work needed to support the rules committees had increased enormously in the last few years. This, he said, was due in large measure to: (1) increased legislative activity; and (2) the initiation of special projects and studies on such topics as mass torts, class actions, attorney conduct, discovery, and technology. He noted that the increased workload of preparing, printing, and distributing materials and of staffing committee and subcommittee meetings had placed considerable stress on the staff. He added, though, that technological improvements had provided some relief and that agenda books could now be sent to the members by electronic mail.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a brief update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) He referred in particular to the ongoing project to survey the means used by courts to identify financial information about parties in order to avoid potential conflicts of interest for judges.

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 13, 1999. (Agenda Item 5)

He reported that the advisory committee had no action items to present for approval or publication. Nevertheless, the committee was continuing to consider and approve necessary amendments to the appellate rules, and it would seek authority to publish a package of proposed changes at the January 2000 meeting of the Standing Committee.

Judge Garwood pointed out that the advisory committee had considered the proposed draft amendment to FED. R. CIV. P. 5(b) that would authorize service by electronic means. He noted that the committee had some reservations regarding certain specific provisions of the proposal, but it endorsed the approach taken by the Advisory Committee on Civil Rules. The advisory committee, moreover, believed that it was essential to provide the pilot electronic case files courts with legal authority to permit service by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 7, 1999. (Agenda Item 7)

Judge Duplantier reported that the advisory committee had decided not to proceed with the "litigation package" of proposed amendments that it had published for comment in August 1998. But, he said, parts of the package had been returned to the advisory committee's litigation subcommittee for further study, including proposals addressing the use of affidavits at trial and the scheduling of witnesses for hearings.

Judge Duplantier stated that the advisory committee was seeking final approval from the Standing Committee for amendments to five rules and authority to publish amendments to six rules. The advisory committee would also propose amendments to two other rules regarding electronic service, if the Standing Committee decided to publish the proposed amendment to FED. R. CIV. P. 5(b).

Action Items

FED. R. BANKR. P. 1017

Professor Resnick stated that the proposed amendment to Rule 1017(e) would permit the court to grant a timely filed request by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under 11 U.S.C. § 707(b), even if the court actually rules on the request for an extension after the 60-day time limit specified in the rule for filing the motion to dismiss has expired. He added that the rule, as presently written, has been interpreted to require the court to issue its ruling before the end of the 60-day period.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6) was designed by the advisory committee as a cost-cutting measure and would take account of inflation. The current rule requires the clerk of court or other person as directed by the court to send a notice of hearing to all creditors on any application for compensation or reimbursement of expenses that exceeds $500. The proposed amendment would raise the threshold amount — which has not been adjusted since 1987 — to $1,000. The clerk, however, would still have to send notices of applications of $1,000 or less, but only to the trustee, United States trustee, and creditors' committee.

FED. R. BANKR. P. 4003

Professor Resnick noted that the proposed amendment to Rule 4003(b) was similar to that proposed in Rule 1017. It would permit the court to grant a timely-filed request for an extension of time to object to a list of claimed exemptions, whether or not the court actually rules on the request for an extension within the 30-day period specified in the rule.

FED. R. BANKR. P. 4004

Professor Resnick stated that Rule 4004(c)(1) requires the court to issue a discharge by a certain time unless one or more specified events have occurred. The proposed amendment would add an additional exception to the rule. It would provide that a discharge not be granted if a motion is pending for an extension of time to file a motion to dismiss the case for substantial abuse under 11 U.S.C. § 707(b).

FED. R. BANKR. P. 5003

Professor Resnick reported that new subdivision 5003(e) was designed to facilitate the routing of notices to federal and state governmental units. He noted that debtors, especially consumer debtors, frequently provide incomplete or incorrect addresses for governmental creditors. As a result, the appropriate governmental unit may receive a notice too late for it to act in a bankruptcy proceeding.

Professor Resnick stated that the advisory committee had been working with the Department of Justice to devise a reasonable way to improve and expedite the processing of notices to government creditors. As a result, the proposed new Rule 5003(e) would require each clerk's office to maintain, and annually update, a register of addresses of federal and state governmental agencies. The clerk would not be required to include in the register more than one mailing address for each agency.

He noted that the amendment would specify that the mailing address set forth in the register is conclusively presumed to be a correct address. The debtor's failure to use that address, however, would not invalidate a notice if the agency in fact received it. In essence, then, using the address in the register would provide a "safe harbor" for debtors and would encourage use of the register.

Professor Resnick noted that a representative of state governments had urged the advisory committee to go further and require debtors use the register address. The committee, however, rejected that approach because it would be too harsh for consumer debtors. He pointed out, in addition, that the comprehensive bankruptcy legislation that had recently passed the House of Representatives contains a stronger notice requirement. It would require debtors to use the register address and require the clerks of court to update the registry quarterly, rather than

annually. Judge Duplantier stated that if the legislation were to become law, the Judicial Conference would be advised promptly that the pending rule amendment would be mooted.

The committee approved the amendments to Rules 1017, 2002, 4003, 4004, and 5003 without objection.

Rules for Publication

FED. R. BANKR. P. 1007

Professor Resnick said that Rule 1007 instructs debtors as to what they must include in the list of creditors and schedules. The proposed new subdivision 1007(e) would add a requirement that if the debtor knows that a person on the list or schedules is an infant or incompetent person, the debtor must also include on the list or schedules the name, address, and legal relationship of any person on whom service should be made. The amendment would enable the person or organization that mails the notices in the case to send them to the appropriate guardian or other representative of an infant or incompetent person.

FED. R. BANKR. P. 2002

Professor Resnick stated that Rule 7001 currently requires a party to file an adversary proceeding in order to obtain an injunction. Effective December 1, 1999, however, the rule will be amended to specify that an adversary proceeding need not be filed if an injunction is provided for in a plan (i.e., an injunction enjoining conduct other than that enjoined by operation of the Bankruptcy Code itself). He explained that it is relatively common practice today for chapter 11 plans to include injunctive provisions.

Professor Resnick reported that the Department of Justice originally had opposed the amendment to Rule 7001, expressing concern that affected parties would not normally become aware of an injunction in a plan unless they are served with process as part of an adversary proceeding. He noted that some government agencies had also complained that injunctions — some of which might be against the public interest — could be buried in lengthy, complex plans. He added, though, that the Department later withdrew its objection to the Rule 7001 amendment on the understanding that the advisory committee would work with the Department to devise appropriate solutions to the notice problem.

Professor Resnick explained that the proposed new Rule 2002(c)(3) — and companion amendments to Rules 3016, 3017, and 3020 — were designed to ensure that parties who are entitled to notice of a hearing on confirmation of a plan are provided with clear notice of any injunction included in a plan enjoining conduct not otherwise enjoined by operation of the Bankruptcy Code. The notice, for example, would have to be set forth in conspicuous language, such as bold, italic, or highlighted text.

Professor Resnick pointed out that the proposed amendments to Rule 2002(g) deal with a different problem. He explained that the clerk's office typically receives information on the addresses of creditors from three sources: (1) lists provided by the debtor; (2) proofs of claim; and (3) separate requests from creditors designating an address. He said that the proposed amendments would establish priorities or rankings to determine which address governs.

He said that the proposed new paragraph 2002(g)(3) was part of the package dealing with notice to infants and incompetent persons. (See Rule 1007 above.) It would provide that if the debtor lists the name of a guardian or legal representative in the notice, all notices would have to mailed to that guardian or representative as well as to the infant or incompetent person.

FED. R. BANKR. P. 3016

Professor Resnick pointed out that the proposed new subdivision 3016(c) was a companion to the amendment to Rule 2002(c)(3) above — designed to assure that entities whose conduct would be enjoined under a plan are given adequate notice of the proposed injunction. The amendment would require that the plan and the disclosure statement describe all acts to be enjoined in specific and conspicuous language and identify all entities that would be subject to the injunction. Thus, Rules 2002(c)(3) and 3016 together would require specific and conspicuous language regarding the injunction to be included in the notice, the plan, and the disclosure statement.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed new subdivision 3017(f) is also part of the injunction package. He noted that some chapter 11 plans contain injunctions against entities that are not parties in the case. The proposed amendment would require the court to consider procedures for providing appropriate notice to non-parties who are to be enjoined under a plan.

FED. R. BANKR. P. 3020

Professor Resnick pointed out that the proposed amendments to Rule 3020(c) are also part of the injunction package. They would require that the order of confirmation describe in reasonable detail all acts to be enjoined, be specific in its terms regarding the injunction, and identify all entities subject to the injunction. He added that notice of entry of the order of confirmation would have to be provided to all entities subject to an injunction in a plan.

Professor Resnick stated that the Department of Justice was pleased with the package of amendments dealing with injunctions and had worked closely with the advisory committee in preparing them.

FED. R. BANKR. P. 9020

Professor Resnick reported that the advisory committee would delete the current, complex provision on contempt in Rule 9020 and replace it with a single sentence that would simply state that Rule 9014 applies to a motion for an order of contempt. Rule 9020, thus, would provide that a party seeking a contempt order proceed by way of a contested matter, rather than an adversary proceeding.

Professor Resnick explained that the current rule had been drafted soon after the bankruptcy courts had been restructured under the 1984 bankruptcy reform legislation. The 1984 legislation, in effect, deleted the explicit statutory contempt power granted to bankruptcy judges by legislation in 1978. He noted that, as a result of the 1984 legislation, it was unclear whether bankruptcy judges retained contempt power. Accordingly, the advisory committee drafted a rule, which took effect in 1987, specifying that a bankruptcy judge may issue an order of contempt, but the order may only take effect after 10 days. During the 10-day period, the party named in the contempt order may seek de novo review by a district judge.

Professor Resnick explained that a number of court of appeals decisions have been issued since Rule 9020 took effect in 1987, holding that bankruptcy judges do in fact have contempt power — either under 11 U.S.C. § 105 or as a matter of inherent judicial power. Thus, it was the opinion of the advisory committee that Rule 9020 is too restrictive and is no longer needed. He added that the committee note makes it clear that the advisory committee does not take a position on whether bankruptcy judges have contempt power or not. Issues relating to the contempt power of bankruptcy judges are substantive. The rule simply provides the appropriate procedure, i.e., through the filing of a contested matter under Rule 9014.

The committee approved the amendments to Rules 1007, 2002, 3016, 3017, 3020, and 9020 for publication without objection.

Resolution of Appreciation for Professor Resnick

Judges Scirica and Duplantier reported that Professor Resnick had just announced his intention to relinquish the post of reporter to the Advisory Committee on Bankruptcy Rules after 12 years of distinguished service. Judge Duplantier asserted that it would be difficult to imagine anyone doing a better job than Professor Resnick and added that his personal experience in working with him had been immensely gratifying.

The committee unanimously approved the following resolution honoring Professor Resnick:

> Whereas, Alan N. Resnick, Benjamin Weintraub Distinguished Professor of Bankruptcy Law at Hofstra University, has served as Reporter to the Advisory Committee on Bankruptcy Rules for more than eleven years, beginning in late

1987, the Committee on Rules of Practice and Procedure wishes to recognize Professor Resnick for extraordinary service of the highest quality, marked in particular by

- the complete revision of the Federal Rules of Bankruptcy Procedure to accommodate the creation by Congress of a national system of United States trustees to supervise the administration of bankruptcy estates and with statutory authority to raise and be heard on any issue in a case:

- the complete revision of the Official Bankruptcy Forms in conjunction with the revision of the rules;

- the drafting and rapid distribution to the courts following further amendments to the Bankruptcy Code of suggested interim rules for local adoption to provide procedural guidance during the period required to prescribe permanent national rules implementing the statutory changes;

- the drafting of rules to facilitate the use of technology in the giving of notice to parties in bankruptcy cases and initiating the drafting of rules to permit electronic filing of documents in all types of proceedings in federal courts;

- the providing of wise counsel on bankruptcy matters to the committee's working groups on mass torts and on attorney conduct; and

- the concise and lucid presentation to the committee of proposed amendments to the Federal Rules of Bankruptcy Procedure approved by the advisory committee.

And whereas Professor Resnick has requested that he be permitted to relinquish the post of Reporter, a request that the committee has reluctantly granted,

Be it RESOLVED that the committee hereby expresses its gratitude to Professor Resnick for his exemplary drafting of rules and related explanatory materials, for his patient answers to questions from committee members, and for his unfailing collegiality.

Professor Resnick expressed his appreciation for the resolution and the kind words of the chairman. He added that it had been his distinct honor to have served under four remarkable

advisory committee chairs — Judges Lloyd D. George, Edward Leavy, Paul Mannes, and Adrian G. Duplantier — and was grateful to both the standing committee and the advisory committee for the intellectual stimulation and respect that they had provided to him over the past 12 years.

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 11, 1999. (Agenda Item 6)

Action Items

Judge Niemeyer reported that the advisory committee was seeking approval of three separate packages of amendments to the civil rules, dealing respectively with: (1) service on federal officers and employees sued in their individual capacity; (2) admiralty rules; and (3) discovery rules.

1. Service Package

FED. R. CIV. P. 4 AND 12

Judge Niemeyer reported that the proposed amendments to Rules 4 and 12 had been initiated at the suggestion of the Department of Justice and adopted by the advisory committee without opposition. He added that the thrust of the amendments was to entitle a federal officer or employee who is sued in an individual capacity to the same rights as if sued in an official capacity.

Professor Cooper explained that federal officers and employees are frequently sued in an individual capacity for actions that have some connection to their functions as officers or employees of the United States. He noted that it is common for the United States, through the Department of Justice, to assume the burden of defending them and to move to have the government substituted as the defendant. He said that there was some uncertainty in the case law whether the United States, as well as the individual defendant, must be served with process when an officer or employee is sued for acts in connection with employment.

The amendments to Rule 4 would require service on the United States when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. Rule 12 would be amended to provide the same 60-day answer period in an individual-capacity action that the United States enjoys when an officer is sued in an official capacity.

Professor Cooper said that little public comment had been generated by the proposed amendments. The comments received were favorable to the amendments, and several suggested

certain drafting improvements. As a result, the advisory committee made improvements in language after publication. For example, as revised, the amendments now use the term "officer or employee" consistently. Language was also added to make sure that no one reads the rule to mean that when the same individual is sued both in an individual capacity and an official capacity, both the individual and the United States must be served twice — once under subparagraph (a) and once under subparagraph (b).

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

2. Admiralty Package

Judge Niemeyer reported that the proposed changes in the admiralty rules had been developed over a long period of time with the assistance of a special subcommittee chaired by Mark O. Kasanin, Esquire. He noted that the subcommittee had coordinated its work very closely with the Department of Justice and the Rules Committee of the Maritime Law Association.

Professor Cooper reported that the proposed changes in the Supplemental Rules for Certain Admiralty and Maritime Claims were designed to meet two goals. First, they reflected the increasing importance of civil forfeiture proceedings, which generally use admiralty procedure. The amendments adjust the admiralty rules, for the first time, to make certain necessary procedural distinctions between traditional maritime proceedings and civil forfeiture proceedings. Second, the changes would take account of the 1993 reorganization of FED. R. CIV. P. 4. In addition, the rules have been reorganized and restyled for purposes of clarity.

Professor Cooper stated that it was not necessary to describe the proposed amendments in substantial detail because the advisory committee had presented them to the Standing Committee in January 1998, when it sought authority to publish them for public comment. He noted that there had been little comment or testimony on the proposals and that minor drafting changes had been made by the advisory committee in light of the public comments.

SUPPLEMENTAL ADMIRALTY RULE B

Professor Cooper reported that the advisory committee had made a post-publication adjustment in Rule B(1)(d) — and a companion amendment to Rule (C)(3)(b) — to relieve the court clerk of the obligation to deliver process to the marshal. As published, the amendment had provided that the clerk of court must deliver a summons or other process to the marshal for service if the property in question is a vessel or tangible property aboard a vessel. One of the public comments asserted this requirement would occasion delay in cases when time is usually of the essence. It was pointed out, for example, that it was the practice in the Eastern District of New York for the clerk to deliver the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Accordingly, the advisory committee changed the rule to provide broadly that process "must be delivered" to the person making

service, without designating who is to effect the delivery. Professor Cooper added that the Maritime Law Association and the Department of Justice agreed with the change, which was made at three places in the amended rules.

Professor Cooper pointed out that FED. R. CIV. P. 4 had been reorganized and amended in 1993. As part of the reorganization, former Rule 4(e) — which is incorporated in the current Admiralty Rule B(1) — has been replaced by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. The advisory committee decided not to incorporate Rule 4(n)(2) in the revised Admiralty Rule B because maritime attachment and garnishment are available whenever the defendant is not found within the district, including some circumstances in which personal jurisdiction can also be asserted.

Professor Cooper noted that Rule (B)(1)(e) expressly incorporates FED. R. CIV. P. 64 to make sure that elimination of the reference to state quasi-in-rem jurisdiction under former Rule 4(e) is not read as defeating the continued use of state security devices. Thus, paragraph (e) reminds attorneys that it is consistent with the admiralty rules to invoke FED. R. CIV. P. 64, which allows the use of security provisions in the manner provided by state law. Professor Cooper said that a concluding sentence would be added to the committee note to Rule E(8) providing that: "if a state law allows a special, limited, or restrictive appearance as an incident to the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

SUPPLEMENTAL ADMIRALTY RULE C

Professor Cooper explained that the amendments to Rule C were designed in large measure to take into account meaningful distinctions between traditional admiralty and maritime proceedings and civil forfeiture proceedings. In paragraph (2)(c), for example, the complaint in an admiralty or maritime proceeding must state that the property is located within the district or will be within the district while the action is pending. On the other hand, paragraph (2)(d) reflects the variety of civil forfeiture statutes that now allow a court to exercise authority over property outside the district.

Professor Cooper noted that subdivision (6) explicitly provides different procedures for forfeiture proceedings and admiralty seizure proceedings. In a maritime proceeding, for example, fewer classes of people are entitled to appear without moving to intervene, and only 10 days are provided to file a verified statement of right or interest. In civil forfeiture proceedings, a person who asserts an interest or right against the property has 20 days to file a statement.

SUPPLEMENTAL ADMIRALTY RULE E

Professor Cooper stated that Rule E(3) provides that maritime attachment and garnishment may be served only within the district. But in forfeiture cases, in rem process may

be served outside the district if so authorized by statute. He noted that subdivision E(10) is new and makes clear the authority of the court to preserve and prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

FED. R. CIV. P. 14

Professor Cooper pointed out that the only changes in Rule 14 were to replace the term "the claimant" with "a person who asserts a right under Supplemental Rule C(6)(b)(i)."

The committee approved the amendments to Supplemental Admiralty Rules B, C, and E and FED. R. CIV. P. 14 without objection.

3. Discovery Package

Judge Niemeyer reported that the advisory committee had studied discovery in a comprehensive manner over the past three years. The focus of its efforts was not to curb discovery "abuse" per se, but rather to examine broadly the whole architecture of discovery and to ask whether it can be made more efficient and less expensive — while still preserving the fundamental principle of providing full disclosure of relevant information to the litigants. Yet, he added, full disclosure — especially in the age of information technology — may not require the production of each and every document, regardless of the cost of producing it and the likelihood of its actual use in a case. What needs to be produced, he said, is "all the information that matters."

Judge Niemeyer pointed out that the package of proposed amendments to the civil rules was modest and well balanced. It was designed to make discovery cost less and work better. He said that the advisory committee and its discovery subcommittee would continue to study whether additional changes in the rules should be proposed in the future. He noted, for example, that he believed personally that the committee could explore a number of possibilities for establishing a very inexpensive, streamlined process that would result in prompt resolution of uncomplicated cases.

Judge Niemeyer stated that the impetus for considering changes in the discovery rules had come from several sources. He noted, for example, that the American College of Trial Lawyers and other bar groups had urged that the scope of discovery be narrowed. But, he said, the biggest impetus for change had come from the impact of the Civil Justice Reform Act of 1990 on the district courts. The Act urged each court to experiment locally with various procedural devices in an effort to reduce litigation costs and delay. The 1993 amendments to the Federal Rules of Civil Procedure, enacted in part to facilitate the local experiments sanctioned by the Act, allowed courts to "opt out" of certain provisions of the national rules — most notably the provisions on initial disclosure. He added that the combined effect of the Act and the 1993 rules amendments

was a "balkanization" of federal pretrial procedure and the proliferation of local rules and procedures.

Judge Niemeyer reported that the advisory committee was firmly committed to returning to a uniform set of national procedural rules. He noted that the bar had been nearly unanimous in urging the committee to limit "opt outs" and local variations. He added, however, that opposition to the rules amendments would likely come from district judges, who are used to their own, carefully developed — and often very effective — local procedures.

Judge Niemeyer described the lengthy and careful process that the advisory committee had followed in developing the proposed amendments to the discovery rules. He noted that the committee had asked the RAND Corporation to take a fresh look at the enormous data base that it had developed under the Civil Justice Reform Act and to examine particularly the cost of discovery, the satisfaction of attorneys with discovery, and the extent to which discovery is actually used in federal civil cases. In addition, at the committee's request, the Federal Judicial Center polled a scientifically selected cross-section of lawyers and received more than 1,200 responses regarding discovery practice and opinions.

He reported that the advisory committee had received numerous papers from academics on discovery topics. It had conducted two conferences involving judges, lawyers, and law professors, and several of the papers presented at its Boston conference were published in the Boston College Law Review. In addition, the committee sought out and heard the views of practitioners from practically every sector of the legal profession, federal and state judges, law professors, and former rules committee chairs and reporters. He added that he had never witnessed any legislative action or committee action that had involved as much participation, research, input, and support.

Judge Niemeyer reported that the research and input, among other things, had revealed that —

- Discovery accounts for about half of all litigation costs.
- Discovery is actually used in a relatively small percentage of federal civil cases. In 40% of the cases, for example, there is no discovery at all, and in another 25% of the cases, there is only minimal discovery.
- Discovery, however, is used extensively in an important minority of cases. It may cause serious problems in those cases and account for as much as 90% of the litigation costs.
- Both plaintiffs' lawyers and defense lawyers agree by very large margins that discovery costs in general are too high (although they tend to emphasize different factors as the principal reasons for the high costs).

- The bar overwhelmingly supports national uniformity in the rules.

- The bar also overwhelming supports early judicial involvement in discovery, early discovery cut-off dates, and firm trial dates.

Judge Niemeyer stated that the advisory committee had conducted its efforts through a discovery subcommittee chaired by Judge Levi, with the assistance of Professor Marcus as special reporter. He reported that the advisory committee had asked the subcommittee to consider all reasonable proposals for improvement in the discovery process. The subcommittee, he said, had developed and presented the advisory committee with more than 40 possible recommendations for change. The advisory committee, over the course of several meetings, then debated each of the recommendations. It decided to proceed only with those proposals that commanded the support of a strong majority of the committee members. No measure was approved by a close vote.

Judge Niemeyer stated that the advisory committee then published the package of proposed amendments, conducted three public hearings, heard from more than 70 witnesses, and received more than 300 written comments. The committee concluded that the comments, while very informative and helpful, generally addressed the same policy issues and concerns that had been considered thoroughly before publication. Accordingly, the changes made by the committee following publication consisted of language and organizational improvements, rather than substantive changes. The committee, however, amended proposed Rule 30(f)(1) in light of the public comments to delete the requirement that the deponent consent to extending a deposition beyond one day.

Judge Niemeyer reported that three issues in the package had caused the greatest debate during the public comment period and the committee's deliberations: (1) mandatory initial disclosures under Rule 26(a)(1); (2) the scope of discovery under Rule 26(b)(1); and (3) cost bearing under Rule 26(b)(2).

1. Mandatory Initial Disclosures. Judge Niemeyer pointed out that the 1993 rule amendments, which had introduced mandatory initial disclosures, were very controversial. They had generated three dissents on the Supreme Court and came close to being rejected by the Congress. He noted that lawyers had complained strenuously that the revised Rule 26(a)(1) invades the attorney-client relationship by requiring the production of hostile documents and turning over to opposing parties documents that have not been asked for.

Nevertheless, he said, mandatory disclosure has worked well in the districts that have adopted it, and it has been used substantially even in many of the districts that have officially opted out of the national disclosure rule. The empirical data show general satisfaction with disclosure, but they are not conclusive on whether it reduces costs.

Judge Niemeyer explained that the advisory committee was committed to the principle of a single, uniform national rule, without local "opt outs." It therefore had three options: (a) to reject mandatory disclosure altogether; (b) to extend the existing mandatory disclosure regime to all districts; or (c) to mandate disclosure, but in a modified, less controversial form. He stated that the advisory committee decided upon the third course — requiring parties to disclose only information that the disclosing party may use to support its own claims or defenses.

Judge Niemeyer pointed out that most of the criticisms that the advisory committee had received about disclosure were that it would not work in certain kinds of cases. In response, the rule was amended to exclude certain categories of cases from the disclosure requirement. It also allows the attorneys to opt out of disclosure in individual cases. And the rule provides district judges with considerable discretion to dispense with disclosure in individual cases; any party may ensure a ruling by a judge by objecting to the appropriateness of disclosure.

2. Scope of Discovery. Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery. Rather, it would divide discovery into two distinct phases: (1) attorney-managed discovery, generally conducted without court involvement and embracing matters relevant to the claim or defense of any party; and (2) court-managed discovery, embracing — with court approval — any matter relevant to the subject matter involved in the action.

He said that opponents of the change had argued that the proposed amendment would cause substantial litigation regarding the scope of discovery. He agreed that some litigation would in fact occur initially, but the law would soon become clear.

3. Cost bearing. Judge Niemeyer stated that much of the opposition to the proposed amendment to Rule 26(b)(2) had been expressed in terms that it would favor rich litigants at the expense of poor ones. He explained that the present rules give a judge implicit authority to allow a party to obtain discovery that may be burdensome or duplicative, on the condition that the requesting party pay for it. The amended rule, he said, would make that authority explicit, and it would tell judges clearly that they have the tools they need to manage and regulate discovery.

FED. R. CIV. P. 5

Judge Niemeyer explained that the advisory committee had originally proposed — when it sought authority from the Standing Committee to publish the proposed discovery amendments — that Rule 5(d) be amended to provide that discovery and disclosure materials "need not" be filed with the court until they are used in a proceeding. The Standing Committee, however, voted to change "need not" to "must not." Judge Niemeyer said that the rule had attracted very little public comment, and the advisory committee on reflection agreed with the Standing Committee that "must not" is preferable language to "need not."

One of the members argued that discovery material not filed with the court should nevertheless be considered part of the court record. He recommended adding a sentence to that effect in the committee note in order to protect the press and the public. He explained, for example, that these materials, having the status of court records, would be privileged. Therefore, one who published them would be protected in the event of a defamation action. Another member agreed and added that if the materials were court records, they would also be available for public examination. He said that it was important to clarify the status of unfiled discovery materials, and the status should be specified in the rule itself, rather than the committee note.

Judge Niemeyer responded that the advisory committee had not studied this issue. Rather, its principal purpose in amending Rule 5 was to alleviate the storage burdens and costs imposed on clerks' offices. Judge Levi added that the advisory committee also considered the amendment necessary to bring the national rule on filing into conformity with most of the present local rules and practices on the subject.

Professor Marcus pointed out that he had conducted considerable research on whether unfiled materials are "court records" and had concluded that it is a very complicated matter that cannot be addressed properly by simply adding a sentence to the committee note. Several other participants agreed with his analysis.

Professor Hazard recommended that the advisory committee undertake a study of whether unfiled discovery and disclosure materials are, or should be, part of the court record. **Mr. Lafitte moved to have the advisory committee study the issue and report back at the January 2000 meeting of the Standing Committee. The committee approved the motion by consensus without a formal vote.**

The committee approved the amendment to Rule 5 without objection.

FED. R. CIV. P. 26(a)

Judge Levi said that the Rules Enabling Act contemplates a set of national, uniform procedural rules to accompany national substantive law. He noted that the Judicial Conference, in its 1997 final report to Congress on the Civil Justice Reform Act, had asked the rules committees specifically to consider whether the advantages of national uniformity outweigh the advantages of allowing courts to develop their own local alternative procedures in such areas as initial disclosure and the development of discovery plans.

Judge Levi reported that well over half the district courts have some form of disclosure in place. Research conducted for the committee by the Federal Judicial Center, moreover, disclosed that some sort of disclosure had occurred in three-fifths of the federal cases surveyed. The Center study also showed that most of the 1,200 attorneys interviewed who had used disclosure liked it and said that it helps to reduce disputes, enhance settlements, and expedite cases. Judge Levi said that the Center study had confirmed that cases where disclosure occurs are concluded

more quickly than cases without disclosure, and the RAND study came close to saying that attorney hours are reduced when there is disclosure. He added that the Federal Judicial Center had also found that a majority of the lawyers believe that the lack of procedural uniformity among districts causes problems for attorneys.

Judge Levi reported that the discovery subcommittee had been working on discovery for three years, had conducted several conferences with the bar, and had consulted with six major bar organizations. It had heard from both plaintiffs' attorneys and defense attorneys that national procedural uniformity was very important to them. Members of the bar, he said, report that it is difficult to keep up with changes in local rules, and the practical effect of the local rules is to create a preference for local counsel. Judge Levi added that although many of the rules are posted on the Internet, they are not easy to find. Electronic postings, moreover, do not include standing orders and local interpretations of the local rules.

Judge Levi emphasized that national uniformity was a major matter. He noted that it had been a common theme voiced by the lawyers at the subcommittee's Boston College conference. In fact, he said, it was a fundamental premise of the federal rules and the Rules Enabling Act. Discovery and disclosure, he emphasized, are an important part of the pretrial process and should not be handled by different sets of rules determined by geography. Discovery and disclosure can affect notice pleading, motions to dismiss, and motions for summary judgment, and local rules may in certain instances affect the outcome of cases.

Judge Levi said that the subcommittee, in seeking national uniformity, had three options before it. The first was to retain the present disclosure requirements of Rule 26(a)(1), but to eliminate the authority of courts to opt out of the requirements. The second option was to eliminate disclosure entirely from the national rule, effectively preventing any court from using it. He noted that this approach would be very controversial because many courts now require disclosure and have achieved substantial benefits from it. The third choice — which the subcommittee adopted — was to retain disclosure as a national requirement, but to remove the "heartburn" from it by removing the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.

Under the subcommittee's proposal, which the advisory committee eventually approved, parties would only have to disclose matters that support their own claims. Complex, or "high end," cases will be effectively removed from the rule by action of counsel, and eight categories of "low end" cases are explicitly exempted from the rule. The lawyers, moreover, may mutually opt out of the present disclosure requirements, and the court has discretion to dispense with disclosure in any case.

Judge Levi said that the proposal was moderate and based on fundamental fairness. He noted that it was similar to FED. R. CRIM. P. 16 in criminal cases, under which the government turns over documents that it intends to use at trial. Moreover, he said, it was similar to FED. R. CIV. P. 26(a)(3), which deals with documents and witnesses that parties intend to use at trial. He

added that the bar, with some notable exceptions, supports the proposal. He noted that the Litigation Section of the American Bar Association, which had been adamantly opposed to Rule 26(a)(1) in 1993, supported the present proposal. In addition, endorsements had been received from the American College of Trial Lawyers and the Federal Magistrate Judges Association.

Judge Levi reported that many letters had been received from judges during the public comment period opposing any national rule that would impose mandatory disclosure in their districts or prescribe a form of disclosure different from that currently provided in their own local rules. The judges in the Eastern District of Virginia, in particular, expressed concern that the amendments would slow down the "rocket docket" used in that court. In response, the advisory committee added a sentence to Rule 26(f) after publication authorizing a court by local rule to shorten the prescribed period between the Rule 26(f) attorney conference and the court's Rule 16(b) scheduling conference or order.

Judge Levi noted that 10 different federal judges had worked in the advisory committee on the discovery package over the past three years, and all 10 agree that the proposed Rule 26(a)(1) would both achieve national uniformity and benefit civil litigation. He emphasized that the rule provides judges with considerable discretion, but within the context of an overall national rule.

Mr. Schreiber argued against weakening the present mandatory disclosure requirements. He said that hostile information is the key to all discovery and that parties should be required to disclose pertinent information hostile to their clients' interests. He added that the language of the proposed amendment — requiring disclosure of matters "that the disclosing party may use to support its claims" — was meaningless. He said that a party could simply argue at the initial stages of the case that it simply has not yet made up its mind as to whether it will use any particular material in the case.

Mr. Schreiber moved to substitute the word "will" for the word "may." Thus, the amendment would require a party to disclose matters that it "will use to support its claims." Judge Tashima recommended an amendment to the motion to substitute the words "supports its claims or defenses." Judge Tashima said that the term "supports it claims or defenses" will lead to less gamesmanship among attorneys than "may use to support its claims or defenses" **Mr. Schreiber accepted the amendment to his motion.**

Judge Levi responded that the advisory committee had considered both formulations at considerable length. He noted that the agenda binder included a memorandum in which Professors Cooper and Marcus — who had different personal preferences regarding the appropriate terminology — describe the respective advantages and disadvantages of "may use to support" vis a vis "supporting." At Judge Levi's request, each of them presented his respective views orally to the committee.

Judge Levi stated that the advisory committee ultimately concluded that "may use to support" would be easier for lawyers to apply. It also has the advantage of generally tracking the language of Rule 26(a)(3), dealing with pretrial disclosures. In any event, he said, the court has authority to impose appropriate sanctions to prevent gamesmanship on the part of attorneys

The members discussed the merits of the two alternatives, how they compared to similar language in other parts of the Federal Rules of Civil Procedure (including Rule 11), and how lawyers and judges might apply them in practical situations.

The committee rejected Mr. Schreiber's motion by a vote of 8 to 3

Judge Tashima moved to amend Rule 26(a)(1) to allow a court by local rule either: (1) to opt out completely from its mandatory disclosure requirement; or (2) to narrow the categories of disclosure materials.

Some of the members expressed opposition to the motion on the grounds that it would undercut the goal of national uniformity. One member added that if the local bar does not need or want disclosure, the parties will mutually stipulate out of it.

The committee rejected Judge Tashima's motion by a vote of 11 to 1.

Judge Tashima moved to delete from the fifth paragraph of the committee note the sentence reading, "Clients can be bewildered by the conflicting obligations they face when sued in different districts." Professor Cooper agreed that the sentence was not essential. **The committee decided without objection to eliminate the sentence.**

Judge Wilson moved to repeal the 1993 amendments entirely and return to the pre-1993 procedures. He said that the single most important procedural requirement is to encourage judges to resolve disputes decisively and quickly. He added that if a judge is readily accessible to decide disputes, the disputes will arise less frequently and cases will be resolved promptly. He said that judges should also establish early cut-off dates for discovery and set early and firm trial dates.

Judge Levi responded that the 1993 rules authorized mandatory disclosure, and its repeal would deprive courts of the benefits derived from disclosure, as demonstrated by attorney surveys and other empirical data. He said that the present Rule 26(a)(1) proposal was very modest and was necessary to provide the district courts with continuing authority to require disclosure.

Associate Attorney General Fisher stated that the Department of Justice very much favors a uniform set of national procedural rules, although different parts of the Department may have different views as to specific parts of the proposed rules amendments. He said that the central

concept of judge-managed discovery will work if the judges actually make it work by being readily accessible to resolve discovery problems.

Mr. Fisher added that Department attorneys, based on their experience, had identified several other categories of cases that should be exempted from the initial disclosure requirements of Rule 26(a)(1). As examples, he listed forfeiture cases, mandamus cases, FOIA cases, constitutional challenges to statutes, *Bivens* cases, and social security cases. He noted that the advisory committee was not inclined to expand the list at this point, but had promised to consider these suggestions promptly. One of the members responded that the list of exemptions was too long already and that it is generally not sound policy to encourage different procedural rules for different categories of cases. Mr. Fisher responded that the Department supported Rule 26(a)(1), as amended.

The committee rejected Judge Wilson's motion by a vote of 8 to 4.

The committee then approved the proposed amendments to Rule 26(a) by a vote of 11 to 1.

FED. R. CIV. P. 26(b)(1)

Judge Levi stated that the proposed amendment to Rule 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will still be entitled — on request and without court approval — to a very broad range of information, *i.e.,* "any matter . . . relevant to the claim or defense of any party." The change occasioned by the amendment is to assign a portion of the discovery to the courts to manage, as judges for cause may make available "any matter relevant to the subject matter involved in an action."

Judge Levi said that the language of the amended rule is clearer than that of the present rule, which provides insufficient guidelines for limiting overbroad discovery. The district judges and magistrate judges who had reviewed the amendment believe that it will work well. In fact, he said, not a single judge had written or testified against the amendment. He noted that the proposal was supported by the American College of Trial Lawyers, the Litigation Section of the American Bar Association, and the Federal Magistrate Judges Association.

Judge Levi pointed out that the Department of Justice under the Carter Administration had urged the advisory committee to narrow the scope of discovery by removing the "subject matter" criterion. He read from a letter from Attorney General Griffin Bell to Judge Roszel Thomsen, chairman of the Standing Committee, in which the Attorney General reported that he "was particularly pleased with the . . . proposed change in Rule 26 which would narrow the scope of discovery to the 'issues raised.' It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery

has significantly contributed to the delays, complexity, and high cost of civil litigation in the federal courts."

Judge Levi said, however, that the Department of Justice had submitted a memorandum to the committee opposing the proposed amendment, stating that it would have a deleterious effect on the Department's litigation and on civil cases generally.

Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well. The burden, presently, is placed on the defendant to come forward to limit discovery when it is seen as inappropriate or excessive. For the most part, judges do not intervene in the discovery process, and, as a consequence, a broad range of discovery is routinely provided today. The Department believes, however, that the amended rule will shift the burden to plaintiffs and require them to seek judicial intervention to obtain information that they now receive regularly. He added that government attorneys fear that most judges simply will not have the time or inclination to become involved in discovery matters. They fear, moreover, that judges, individually and collectively, will construe the revised language of Rule 26(b)(1) narrowly and deny discovery on the merits. The net result, thus, will be a narrowing of the scope of discovery.

Mr. Fisher said that the amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served. He noted that defendants in these cases often resist producing essential records and information. He said that the Department lawyers, and plaintiffs' lawyers generally, believe that they will face even greater resistance under the amended rule.

Mr. Fisher concluded that the problems that the advisory committee attempted to address through the proposed amendment are important and difficult ones. He expressed the Department's appreciation for the committee's careful and thoughtful work. But, he added, the amendment simply was not needed. He suggested that the principal argument advanced in support of the change is that judges do not take appropriate steps under the current rule to limit the excessive discovery that occurs in some cases. But, he said, the current rule clearly gives judges sufficient authority to take an active role and limit inappropriate discovery requests.

He noted that the Department of Justice believes that there would be a good deal of costly litigation over the meaning of the amendment, at least for a while. There may well be inconsistent interpretations of the new rule, and, as a result, the scope of discovery will effectively be narrowed for some plaintiffs. In short, he said, the proposed amendment attempts to deal with a small group of troublesome cases, but will result in serious negative consequences. He suggested that, rather than recreating the whole landscape of Rule 26(b), the advisory committee should consider removing those troublesome cases from the general operation of the rule and regulating them with special rules.

Judge Niemeyer thanked Mr. Fisher and said that his points were very well taken. But, he said, the advisory committee had considered the same points at great length both before and during the public comment period. He noted that some members of the advisory committee agreed generally with Mr. Fisher's arguments, but a strong majority of the committee supported the proposed amendment. He noted that the advisory committee included in its report to the Standing Committee an April 14, 1999 "dissenting opinion" prepared by Professor Thomas D. Rowe, Jr., a member of the advisory committee.

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

Judge Levi noted that the advisory committee disagreed that the proposed amendment would lead to costly motion practice. He emphasized that discovery disputes are usually decided on an expedited basis. In many courts they are resolved without the filing of written motions, and often by telephone. He added that discovery works well in most cases and will continue to work well under the proposed amendment. But there is a group of cases where it is very contentious and very expensive. He said that the courts need to take an active role in managing these cases, and the amended rule gives judges clear authority and direction to manage them.

Judge Niemeyer said that the discovery rules are designed generally for lawyers and litigants who do not abuse the process. They assume compliance and good faith for the most part. The existing rules, as well as the proposed amendments, expect judges to supervise discovery in those cases where there are problems. Thus, if a defendant "stonewalls" on discovery production in a case, plaintiffs' counsel or the Department of Justice, will have to litigate on the scope of discovery in any event — either under the present rule or the amended rule.

One of the members strongly opposed the proposed amendment to Rule 26(b)(1), calling it — along with the proposed cost-bearing amendment to Rule 26(b)(2) — the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.

Mr. Schreiber questioned why the advisory committee had used the term "for good cause shown," instead of "on motion" or "for reasonable cause." He moved to delete "for good cause shown" and substitute the words "on motion." Thus, judges would have complete discretion to order broader discovery, without being bound to the "good cause" standard.

Judge Levi replied that the committee note states specifically that the good-cause standard is meant to be flexible. One of the members added that the rule had to prescribe a standard beyond that of mere discretion. Another member reminded the committee that "good cause" had been the standard required for the production of discovery documents before 1970.

Mr. Schreiber later withdrew his motion.

The committee approved the amendment to Rule 26(b)(1) by a vote of 10 to 2.

FED. R. CIV. P. 26(b)(2)

Judge Niemeyer noted that the proposed amendment to Rule 26(b)(2), governing cost bearing, had been published as an amendment to Rule 34. The advisory committee relocated it in Rule 26 after publication, but without any change in content. He said that its placement in Rule 26 would emphasize that it applies to all categories of discovery. He added that the proposed amendment would not change the law as it exists, but would make an existing judicial tool explicit. It would give district judges and magistrate judges clear authority to require a party seeking information not otherwise discoverable under Rule 26(b)(2)(i), (ii), or (iii) to pay part or all of the reasonable expenses incurred in its production.

Mr. Fisher stated that the Department of Justice was concerned that the proposed amendment might be applied by the courts to require requesting parties to pay for "court-managed" discovery, vis a vis "attorney-managed" discovery. He recommended inclusion of a clear statement that discovery of "any matter relevant to the subject matter involved in the action" would be provided without charge to the requesting party, in the same manner as discovery of "any matter . . . relevant to the claim or defense of any party."

Judge Niemeyer responded that the proposed amendment did in fact apply equally to both and said that he would be pleased to work on improving the language. Mr. Fisher suggested including in the committee note to Rule 26(b)(1) language from page 74 of the agenda book declaring that the scope-expansion and cost-bearing provisions are not intended to operate in tandem and that ordinarily a request to expand the scope of discovery will not justify a cost-bearing order. Judge Niemeyer agreed to draft appropriate language to that effect, and his language was later incorporated in the revised committee note.

Judge Scirica stated that several public comments had suggested that the amendment would have the effect of distinguishing between plaintiffs who have resources and those who do

not. Judge Niemeyer replied that the amendment would not change the current results. Plaintiffs ordinarily will continue to receive, without charge, every document that relates to their claim or defense or that relates to the subject matter of the action. Cost-bearing will only be applied to discovery requests that are burdensome, duplicative, or unreasonable. Judge Levi added that a judge, in considering cost bearing, is required explicitly to take account of the parties' resources under Rule 26(b)(2). Accordingly, parties with limited resources may actually be treated better than well-healed parties under the amended rule. Moreover, a party who can afford to pay for marginal discovery, and is willing to pay for it, may not in fact receive it because the judge has discretion to deny the request entirely.

One of the members said that the amendment would cause havoc, especially in employment discrimination cases. He predicted that defendants would bring a motion for cost-bearing in every case in an effort to save money for their clients. One of the members responded that the prediction assumed that judges would act foolishly. He said that routinely-made motions will be routinely denied.

Judge Levi added that the cost-bearing amendment, by definition, deals only with material that is marginal to the case and is burdensome, duplicative, or unreasonable. Some members questioned why that type of material should be produced at all. Others responded that the amendment provides judges with a useful management tool and would permit a judge to determine how much a lawyer wants particular material and whether the lawyer is willing to pay for it. Others suggested that the amendment would allow judges to order discovery on condition that the requesting party pay only part of the cost of producing it. They said that it was not clear whether judges may apportion costs under the current rule.

One member asked why local rule authority had been removed from the provision of Rule 26(b)(2) dealing with the number of depositions and interrogatories and the length of depositions, but retained with regard to the number of requests for admissions. Professor Cooper responded that there were several local rules on the subject, and the advisory committee was reluctant to eliminate local rule authority to limit requests for admission without further study of local practices.

Another member pointed out that the committee note to Rule 26 referred to standing orders, as well as local rules, in some places, but not in others. He suggested that the note be reviewed in this respect for consistency of terminology.

The committee approved the proposed amendment to Rule 26(b)(2) by a vote of 11 to 1.

FED. R. CIV. P. 26(d) and (f)

Judge Niemeyer reported that the proposed amendments to Rule 26(f) would require the parties to confer at least 21 days, rather than 14 days, before the court's Rule 16 scheduling

conference or scheduling order. He noted that the advisory committee had made a change in the amendments after publication to accommodate the expedited pretrial procedures used in the Eastern District of Virginia. The change would allow a court by local rule to require that the conference be held less than 21 days before the scheduling conference or order if necessary to comply with its expedited schedule for Rule 16(b) conferences..

Judge Niemeyer pointed out that the amendments would no longer require the attorneys to meet face-to-face, but would allow a court by local rule or order to require that the attorneys attend the conference in person. Several members questioned the wisdom of allowing courts to issue local rules on this subject, especially since the authority of courts to opt out of national requirements was being eliminated in other parts of Rule 26. One added that the requirement for face-to-face meetings should be made in individual cases, rather than by local rule.

Judges Niemeyer and Levi agreed that local rules should be discouraged generally, but they noted that the advisory committee believed that differences in geography and local culture made it appropriate to allow courts to have local variations in this specific instance. They added that several commentators had informed the committee that face-to-face meetings between the attorneys, as required by the 1993 amendments to Rule 26(f), had been instrumental in expediting cases and reducing costs.

One of the members stated that a court should not be allowed by local rule to require out-of-town counsel to appear in person. Professor Cooper replied that the committee note addressed the issue and provided that "a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another."

Judge Kravitch moved to eliminate from the proposed amendments the authority of a court to require face-to-face meetings of counsel by local rule and replace it with language that would authorize a court to require that meetings be held face-to-face, but only by a judge's case-specific order. Her motion was approved by a vote of 8 to 2.

The committee approved the amendments to Rules 26(d) and (f) by a vote of 12 to 0.

FED. R. CIV. P. 30

Judge Niemeyer reported that the proposed amendment to Rule 30(d)(2) would establish a presumptive limit on depositions of one day of seven hours. But a longer period could be authorized by court order or stipulation of the parties. The amendment, he said, was designed to respond to an area cited by commentators — particularly plaintiffs' lawyers — as one of recurring abuse and excess cost. He noted that research by the Federal Judicial Center had demonstrated that depositions are often the single most expensive item of discovery.

Judge Niemeyer stated that the rule provides a norm to guide the bench and bar in measuring depositions. He said that the advisory committee had heard many comments at the

public hearings that the new rule would be effective. He added that the most common response from lawyers was that they have little trouble in reaching accommodations with opposing counsel on making arrangements for depositions. The amendment, he said, tells lawyers what the norm is for a deposition, and they will plan their depositions accordingly. One member added that he had been strongly opposed to the amendment when it had been published, but the consistent testimony from lawyers at the hearings had convinced him that the rule would work well in practice.

Judge Tashima moved to exclude expert witnesses from the operation of the rule. He noted that many expert witness depositions simply cannot be completed within seven hours. He added that the Department of Justice supported his position in this regard, but the Department would go further and also exclude Rule 30(b)(6) witnesses and named parties.

One of the members spoke against the proposed amendment in general, saying that it simply was not necessary. He said that it is easier to demonstrate to a judge that abuse has occurred in a deposition than to convince the judge that additional time is needed for a deposition. Judge Niemeyer replied that many members of the advisory committee had been of the same view, but were convinced by the hearings that the amendment to the rule would be beneficial.

Professor Marcus said that the advisory committee had included additional language in the committee note to guide lawyers and judges as to when it would be desirable to extend the time for the deposition. Mr. Katyal added that the Department of Justice appreciated the additional language in the committee note, but still believed that there was no need to apply the presumptive time limit to depositions of expert witnesses. He said that government attorneys feared that relying on the consent of a party or the court's management to waive the 7-hour limit would not be sufficient.

The committee rejected Judge Tashima's motion by a vote of 7 to 3.

One member said that it was essential that the deponent be required to read pertinent documents in advance in order to avoid wasting time and generating requests for extensions of time. He noted that language to that effect had been included in the committee note, but he would prefer to have a clear requirement included in the rule. He also suggested that the note provide additional direction to the bar regarding time limits for depositions in multiple-party cases. Judge Niemeyer responded that the discovery subcommittee would continue to study these matters, but it is simply not possible to address all potential problems in the rule or the note.

Judge Niemeyer reported that the advisory committee had amended Rule 30(f)(1), without publication, to eliminate the need to file a deposition with the court. The change merely conforms the rule to the published amendment to Rule 5(d), which provides that depositions not be filed with the court.

The committee approved the proposed amendments to Rule 30 by a vote of 10 to 1.

FED. R. CIV. P. 34

Judge Niemeyer reported that the advisory committee had added to Rule 34 a cross-reference to Rule 26(b)(2)(i), (ii), and (iii). He noted that, as published, the cost-bearing provision had been included as part of Rule 34(b), but the committee relocated it to Rule 26(b)(2) after publication. Because cost-bearing concerns often arise in connection with discovery under Rule 34, a reference was needed in Rule 34 to call attention to the availability of cost-bearing in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Some members of the committee questioned the need for the cross-reference in Rule 34. Other members pointed out, however, that although the reference is not essential, it serves as a helpful flag to lawyers.

The committee approved the proposed amendment to Rule 34 without objection.

FED. R. CIV. P. 37

Judge Niemeyer reported that the proposed amendment to Rule 37(c)(1) closes a gap in the current rule and provides that the sanction of exclusion, forbidding the use of materials not properly disclosed, applies to a failure to supplement a formal discovery response.

The committee approved the proposed amendment to Rule 37 without objection.

The committee approved the package of amendments to the discovery rules by a vote of 10 to 0.

Rules for Publication

Electronic Service

FED. R. CIV. P. 5, 6, and 77 and FED. R. BANKR. P. 9006 and 9022

Judge Niemeyer reported that the Advisory Committee on Civil Rules had been asked to take the lead in drafting uniform amendments to the federal rules to authorize service by electronic means. The advisory committee, he said, had worked closely with the Standing Committee's Technology Subcommittee (which includes representatives from each of the advisory committees), and it had generally followed the advice of that subcommittee. He noted that the proposed amendments before the Standing Committee had been circulated to the other advisory committees for comment. Although many of the suggestions from the other committees

had been incorporated in the draft, the advisory committees were not in complete agreement on all parts of the draft.

Professor Cooper pointed out that all the participants agreed that the time for electronic service had arrived, but they also agreed that it was premature to consider making its use mandatory — either by national rule or by local rule. Accordingly, the proposed amendments authorize electronic service with the consent of the party being served. He added that they authorize electronic service only for documents under Rules 5(a) and 77(d), and not for the service of initiating documents and process in a case, such as under FED. R. CIV. P. 4

Professor Cooper said that, as amended, Rule 5(b) specifies that service is complete upon "transmission." He noted that the Advisory Committee on Civil Rules had requested specific comment from the other advisory committees on this point. In response, the Advisory Committee on Appellate Rules asked what should happen if service is transmitted electronically, but the electronic system notifies the sender that the message has not in fact been delivered. As a result, language was added to the committee note specifying that: "As with other modes of service, . . . actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete upon transmission."

Professor Cooper pointed out that new subparagraph 5(b)(2)(D) provides that, if authorized by local rule, a party may make service through the court's transmission facilities. He explained that this provision contemplates eventual enhancements in the courts' electronic systems to allow a party to file a paper with the court and have it served simultaneously on all the required parties. Professor Cooper also pointed out that this is the only reference to local rule authority in the proposed amendments. In addition, a minor amendment would be made to FED. R. CIV. P. 77(d) to conform to the changes proposed in Rule 5(b).

Judge Niemeyer reported that electronic service raises the question of whether the party being served should be allowed additional time to respond, in the same way that FED. R. CIV. P. 6(e) currently provides an additional three days to respond when a party is served by mail. He said that differing views had been expressed on this subject. Accordingly, the Advisory Committee on Civil Rules had prepared a draft rule plus three alternatives for presentation to the Standing Committee. The draft rule would allow an extra three days for all service other than personal service. Alternative 1 would make no change in Rule 6(e), therefore providing no additional time when service is made electronically. Alternative 2 would eliminate Rule 6(e) and the three-day provision entirely. Alternative 3 would amend Rule 6(e) to allow an additional three days if service is made by mail "or by a means permitted only with the consent of the party served." Professor Resnick said that this formulation, which covers electronic service, could conveniently be incorporated by the Federal Rules of Bankruptcy Procedure.

Judge Niemeyer reported that 6 members of the Advisory Committee on Civil Rules had voted against allowing additional time for service by electronic means — or for any other types of proposed consensual service, such as commercial carrier. Professor Cooper added that the

reasoning for this approach is that the rule specifically requires consent, and people will only consent to a type of service in which they have confidence. Accordingly, there is no need to provide them with additional time. He added that the Advisory Committee on Appellate Rules had expressed concern that if additional time were given, it would deter people from using electronic service.

Judge Niemeyer said that 4 members of the advisory committee had voted to allow three days additional time. He noted that those who favored allowing additional time urged that consent will be more likely to be given if it brings with it the reward of additional time. He added that the committee would describe the alternatives and solicit comment from the public on the advisability of applying the three-day rule to electronic service.

Judge Scirica emphasized the importance of publishing a uniform set of amendments if feasible. Professor Cooper agreed, but pointed out some practical differences between civil and appellate practice. Judge Garwood added that the Federal Rules of Appellate Procedure — unlike the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure — presently authorize service by commercial carrier, and that no consent is required from the party being served by commercial carrier. He noted that FED. R. APP. P. 25 and 26 give the party being served an extra three days unless the paper in question is delivered on the date of service specified in the paper.

Judge Garwood said that the time periods should generally be the same in all the federal rules. He would, however, distinguish the issue of the authority to use commercial carriers from the issue of whether an additional three days is provided for a response.

Professor Resnick said that the bankruptcy rules did not have to be amended to authorize electronic service in adversary proceedings because FED. R. CIV. P. 5 is applicable to those proceedings. He added that the Advisory Committee on Bankruptcy Rules believed that an additional three days should be allowed for electronic service, and for all other types of service except personal delivery. Therefore, it had prepared companion amendments to FED. R. BANKR. P. 9006, to extend the three-day "mail rule" to all service under FED. R. CIV. P. 5(b)(2)(C) and (D), and to FED. R. BANKR. P. 9022, to conform to the proposed amendment to FED. R. CIV. P. 77(d). He urged that the proposed amendments to the bankruptcy rules be published together with the proposed amendments to the civil rules.

The committee voted without objection to authorize publication of the proposed amendments to FED. R. CIV. P. 5(b) and 77(d) and to FED. R. BANKR. P. 9006 and 9022. As part of the package, an alternate amendment to FED. R. CIV. P. 6(e) would also be published for comment.

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 12, 1999. (Agenda Item 8)

He reported that the advisory committee had no action items to present. He noted that the committee was deeply involved in the project to restyle the body of criminal rules. The Style Subcommittee of the Standing Committee had prepared a draft of the entire criminal rules, and the advisory committee was close to completing its revision of the first 22 rules.

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, 1999. (Agenda Item 9)

Judge Smith reported that the advisory committee was seeking approval of amendments to seven rules. She noted that she had provided the Standing Committee with a detailed explanation of the proposed amendments at the January 1999 meeting. The advisory committee, she said, had conducted two hearings on the amendments and had received 173 written comments from the public.

FED. R. EVID. 103

Judge Smith said that the proposed amendment to Rule 103 would resolve a dispute in the case law over whether it is necessary for a party to renew an objection or an offer of proof at trial after the court has made an advance ruling on the admissibility of the proffered evidence. She noted that the amendment had been considered by the Standing Committee on several occasions and that improvements in its language had been made. She added that the current proposal had received very favorable support during the public comment period.

Judge Smith pointed out that the proposed amendment, as published, had contained an additional sentence codifying and extending to all cases the principles of *Luce v. United States,* 469 U.S. 38 (1984). In that case, the Supreme Court held that a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. The public comments on the addition, she said, had been negative, and several commentators had expressed concern over the potential and unpredictable consequences of applying *Luce* to civil cases.

Judge Smith said that the advisory committee had decided to eliminate the additional sentence in light of the public comments. But, she added, some members were concerned that elimination of the sentence might be interpreted as an implicit attempt to overrule *Luce.* Ultimately, the advisory committee decided to eliminate the sentence but to include explicit

language in the committee note stating that nothing in the amendment is intended to affect the rule set forth in *Luce*.

The committee approved the proposed amendment to Rule 103 without objection.

FED. R. EVID. 404

Judge Smith reported that Rule 404(a)(1) would be amended to provide that when an accused attacks the character of an alleged victim, the accused's character also becomes subject to attack for the "same trait." She pointed out that the amendment, as published, had been broader in scope, allowing the accused to be attacked by evidence of a "pertinent trait of character." She added that the advisory committee had narrowed the amendment in light of negative public comments and comments from some members of the Standing Committee.

The committee approved the proposed amendment to Rule 404 without objection.

FED. R. EVID. 701

Mr. Holder reported that the litigating divisions of the Department of Justice, the United States attorneys, and other components of the Department had thoroughly reviewed the proposed amendment to FED. R. EVID. 701 and had concluded that it would have a serious and deleterious impact on the Department's civil and criminal litigation. He said that he was grateful that the advisory committee had carefully considered his letter of January 5, 1999, to Judge Smith and had made changes in the amended rule and the accompanying committee note to accommodate the Department's concerns. But, he said, the revised amendments regrettably did not alleviate the core concerns of the Department's lawyers.

Mr. Holder explained that no bright line is presently drawn in Rule 701 between lay testimony and expert testimony. Witnesses are often put on the stand by counsel to testify as to facts, but their testimony inevitably includes opinions based on their occupation or personal experience.

He noted, for example, that the Department of Justice puts witnesses on the stand who testify as to drug transactions, food adulteration, or environmental cleanups. Many of these witnesses would not be considered "experts" in the common or legal use of the term, but their testimony is often based on specialized knowledge. The testimony cannot meaningfully be presented to the court or jury without the witnesses giving their opinions, which are based on specialized knowledge arising from their occupation or life experience.

Mr. Holder said that forcing these people to be considered "experts" under Rule 702 would lead to a number of unfortunate results. Under FED. R. CRIM. P. 16, for example, they would have to file a written summary of their testimony. In civil cases, FED. R. CIV. P. 26(a)(2) may require them to file expert reports. Also by brightening the line between lay and expert

testimony, the amendment, he said, would subject the evidentiary rulings of trial judges to greater appellate review. This result would run counter to the thrust of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael,* 119 S. Ct. 1167 (1999), which confirmed the discretion of trial courts to weigh the reliability of testimony.

Finally, Mr. Holder said that the net effect of the amendment to Rule 701 would be to require the Department under FED. R. CRIM. P. 16 to disclose in advance of trial the identity of fact witnesses whom it intends to call if part of their testimony entails giving their opinion as to matters they have observed. Such disclosure might in a few cases pose a danger to the life or safety of prospective witnesses.

In conclusion, Mr. Holder urged the committee to reject the rule entirely. Alternatively, he recommended that it be deferred for further consideration by the civil and criminal advisory committees.

Judge Smith said that the Department basically objects to brightening the line between Rule 701 lay testimony and Rule 702 expert testimony. But, she said, the line cannot be brightened completely. There will always be some doubt, and judges will continue to have to exercise judicial discretion. She added that in light of the Supreme Court's decisions in *Daubert* and *Kumho,* it was necessary to provide judges and lawyers with some guidelines in this area.

Judge Smith said that there was a widespread belief among the bar that there have been increasing attempts by attorneys to evade the reliability requirements of Rule 702 by proffering experts in the guise of lay witnesses under Rule 701. She added that the proposed amendment to Rule 701 was not intended in any way to change the status of lay opinion or opinion that is based on people's everyday life experiences. Rather, the advisory committee wanted to clarify for the bench and bar how the judicial gatekeeping function should operate. She explained that, as helpful as the *Kumho* decision had been, there still needed to be guidelines set forth in the rules to aid the bench and bar.

Judge Smith pointed out that Mr. Holder's letter of June 9 to the Standing Committee, in discussing FED. R. CIV. P. 26(b)(1), had expressed "grave substantive concerns, shared by the Department, about the Advisory Committee's proposal to modify the most essential element of the federal civil system — the complementary hallmarks of the Federal Rules of Civil Procedure: notice pleading and full discovery of relevant information." She said that full disclosure of information requires that a party give notice to the other party of any specialized knowledge on the part of a witness it intends to call. Only in this way can the court's gatekeeping function be handled properly, with appropriate input from both sides. She said that the basic needs of fairness outweigh the inconvenience of having to disclose more witnesses in some kinds of cases.

Judge Smith reported that the advisory committee had made changes in Rule 701 to ameliorate the concerns of the Department of Justice. She said that the words "within the scope of Rule 702" had been added to the rule after publication to show that witnesses need not be qualified as experts unless they are clearly found to be expert witnesses under Rule 702. She said that the committee had also added several examples to the committee note of the types of lay opinion witnesses who do not need to be qualified as experts. Professor Capra explained that the committee had incorporated the examples from the pertinent case law to help clarify the application of Rules 701 and 702 in light of the concerns of the Department and to assist attorneys in determining in advance how to avoid potential violations of disclosure requirements of the civil and criminal rules.

Mr. Katyal said that the Department's principal concern with the amendment was not that its lawyers would be unable to introduce necessary testimony in court, but that testimony currently admitted under Rule 701 would now be classified as Rule 702 expert testimony. This would require compliance with FED. R. CRIM. P. 16, including pretrial disclosure of the names of witnesses. He noted that the Attorney General has had a long-standing policy on this matter and had written to the Chief Justice in the past firmly opposing proposed amendments to Rule 16 that would have required pretrial disclosure of government witnesses. [PETER - Note: Professor Capra suggests adding a few sentences describing the extensive discussion following DOJ's comments such as other committee member response to DOJ's position e.g. Judge Bullock stated DOJ overstates the case; Judge Tashima said he usually defers to DOJ, but he thinks it goes too far here; etc]

Mr. Katyal said that the United States attorneys and the Criminal Division of the Department of Justice believe strongly that the proposed amendment will threaten the safety of government witnesses and add to litigation costs. He added that *Kumho* did not require the proposed amendment and that the bright line fashioned by the proposed amendment would actually undercut *Kumho*.

Judge Scirica suggested that if the rule were adopted, a United States attorney would in an appropriate case petition the court to protect any witness against whom there was a potential threat. Mr. Katyal said that this course of action had in fact been discussed with the United States attorneys, who responded that the amended rule might not authorize that type of action and the district court might in any event deny the government's request. Judge Smith added that the witnesses covered by the rule were essentially law enforcement witnesses, rather than potentially endangered lay witnesses.

Judge Scirica asked Judges Davis and Niemeyer to comment on Mr. Holder's alternate recommendation that the proposed amendment to Rule 701 be deferred to obtain the views of the criminal and civil advisory committees. Judge Davis responded that the Advisory Committee on Criminal Rules would have no problem with the proposed amendment. He noted that his committee had consistently called for greater pretrial disclosure under FED. R. CRIM. P. 16 than

the Department of Justice has been willing to provide. Judge Niemeyer commented that the Advisory Committee on Civil Rules had not considered the proposed amendment, but that he personally believed that it would be helpful in clarifying the distinction between lay witnesses and expert witnesses.

Mr. Katyal suggested that the committee note be amended to specify that the rule is not intended to require the disclosure of the identity of witnesses if the United States Attorney personally avers to the court that the safety of a witness is at stake, or there are facts that tend to reveal that the safety of a witness may be at stake. Professor Capra responded that the additional language would be inappropriate because Rule 702 is an evidence rule, not a disclosure or discovery rule.

The committee approved the proposed amendment to Rule 701 by a vote of 9 to 1.

FED. R. EVID. 702

Judge Smith reported that the advisory committee had made minor changes in the rule following publication: (1) to delete the word "reliable" from Subpart 1 of the proposed amendment; (2) to amend the committee note in several places to add references to the Supreme Court's decision in *Kumho*, which was rendered after publication; (3) to revise the note to emphasize that the amendment does not limit the right to a jury trial or encourage additional challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

The committee approved the proposed amendment to Rule 702 by a vote of 9 to 0, with 1 abstention.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had made a few minor, stylistic changes following publication.

The committee approved the proposed amendment to Rule 703 by a vote of 10 to 0.

FED. R. EVID. 803 AND 902

Professor Capra pointed out that the proposed amendments to Rules 803(6) and 902(11) and (12) were part of a single package, allowing certain records of regularly conducted activity to be admitted without the need for calling a foundation witness. He pointed out that two new subdivisions would be added to Rule 902 to provide procedures for the self-authentication of foreign and domestic business records. Professor Capra said that the advisory committee had made minor stylistic changes following publication and had added a phrase to specify that the manner of authentication should comply with any Act of Congress or federal rule.

The committee approved the proposed amendments to Rules 803 and 902 without objection.

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

Judge Scirica reported that Professor Coquillette and the subcommittee had accomplished a great deal since the last committee meeting. He noted that the subcommittee had held a meeting in Washington in May 1999 that included members of other Judicial Conference committees and a number of people interested and knowledgeable in attorney conduct matters. He said that recent federal legislation had made government attorneys subject to state ethical regulations, and that Chief Justice Veasey and Professor Hazard had been active in working with the Department of Justice in trying to fashion an acceptable rule to govern the subject matter of Rule 4.2 of the A.B.A. Model Rules of Professional Conduct, *i.e.,* contact by government attorneys with represented parties.

Chief Justice Veasey reported that additional progress had been made in the negotiations on this matter among the chief justices, the Department of Justice, and the American Bar Association. He added that two competing bills were pending in the Senate. One, sponsored by Senator Hatch, would preempt state bars from regulating federal prosecutors. The other, sponsored by Senator Leahy, would single out for Judicial Conference action the issue of government attorneys contacting represented parties. He reported that the Conference of Chief Justices had written to Senators Hatch and Leahy informing them that work was proceeding on trying to reach a compromise. He added that Professor Hazard had been very active and very helpful in the negotiations.

Professor Coquillette said that the subcommittee was planning to hold one additional meeting, in Philadelphia in September.

He reported that there are literally hundreds of local federal court rules purporting to govern attorney conduct. Some of them, he said, just adopt the conduct rules of the state in which the federal court sits. Other local rules adopt the A.B.A. Code, and some adopt the A.B.A. canons. Many courts, moreover, appear to ignore their own rules in practice.

Professor Coquillette said that there appeared to be a consensus that attorney conduct obligations should, as a general rule, be governed by the laws of the states. If there are to be any special rules for federal attorneys, they should be limited to a very small core when clear federal interests are at stake. He noted that Professor Cooper was working on a draft "dynamic conformity" rule that would make state conduct rules applicable in the federal courts, but leave open a narrow door for such matters as Rule 4.2 conduct. He said that the draft would be circulated for comment to the subcommittee and the advisory committee reporters. He added that there was a possibility that a proposed resolution of the matter might be brought before the Standing Committee at the January 2000 meeting.

LOCAL RULES PROJECT

Professor Squiers explained in brief the manner in which she had conducted the original local rules project. She explained that in her original study she had gathered the rules of every court and had placed them in five categories: (1) those that were appropriate local rules; (2) those that were so effective that they should be publicized as model rules for the other courts to consider; (3) those that should be incorporated into the national rules; (4) those that were duplicative of the federal rules; and (5) those that were inconsistent with federal law or the national rules. She added that the courts were provided with the results of this work and asked to take appropriate action. Compliance, she said, was voluntary.

Professor Squiers pointed out that the federal rules had been amended in 1995 to require that local rules be renumbered, and most courts had redrafted their rules to meet that requirement. In addition, she said, the Civil Justice Reform Act had led to the adoption of many new local rules, and that some additional local rules changes had been made to take account of the expiration of the Act.

Professor Squiers reported that she planned to follow the same general approach in the new study of local rules, and she invited the members to provide input and guidance. She pointed, for example, to suggestions that she had received that the judicial councils of the circuits should be involved early in the project since they have the authority to oversee and abrogate local rules.

Some of the members pointed out that some of the judicial councils appeared to be very active in reviewing and acting on local rules, while other councils appeared to be largely inactive in this area. Judge Scirica said that it might be useful for the committee eventually to suggest a model process for the judicial councils to follow in reviewing local rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee's efforts had been directed to assisting the Advisory Committee on Criminal Rules in restyling the body of criminal rules. He noted that the style subcommittee had completed a preliminary draft of all the criminal rules, and that the advisory committee would take action on FED. R. CRIM. P. 1-22 at its June 1999 meeting.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 6 and 7, 2000.

Respectfully submitted,

Peter G. McCabe,
Secretary

Item 3 will be an oral report.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: RULES 9013, 9014, 1006, and 2004

DATE: AUGUST 16, 1999

At its March 1999 meeting, the Advisory Committee decided that it would not go forward with the proposed amendments published last year as the "Litigation Package." But the Committee asked the Litigation Subcommittee to consider the following areas further:

(1) *The appropriate use of affidavits at a hearing in a contested matter*. Can the court conduct a trial by affidavit? Several members of the Advisory Committee expressed the view that the court should not resolve disputed factual issues based on affidavits alone and that the trial should be conducted in the same manner as a trial in an adversary proceeding;

(2) *How does an attorney or party know when to bring witnesses to a hearing?* The consensus was that a party is entitled to reasonable notice of when a hearing is going to be evidentiary in nature so that witnesses should appear; and

(3) *Ex Parte Motions*. The Committee asked the Litigation Subcommittee to consider adding a list of motions that may be made ex parte.

The Committee also asked the Subcommittee to review the proposed amendments to the Rules, other than Rules 2014, 9013, and 9014, included in the Litigation Package to determine if there are any that should be included in the next package of proposed amendments. The proposed amendments to Rule 2014 were referred to the Subcommittee on Rule 2014.

In view of these decisions by the Advisory Committee, I prepared drafts of proposed amendments to Rules 9013 and 9014. In drafting the amendments to Rule 9014, I tried to avoid micro-managing local procedures while imposing general policies. In particular, with respect to the Committee's view that parties should receive reasonable notice of an evidentiary hearing at which witnesses will testify, I included such a requirement but left to local court rule how that is to be accomplished. Some courts may want the initial hearing to always be an evidentiary hearing with witnesses (and to so provide in their local rules), while others may want to treat it as a status conference or require the parties to confer.

I also reviewed the other rules in the Litigation Package and found two "stand alones" which, I believe, should be included in the next package of proposed rule amendments. The proposed amendments to Rule 1006, which were approved by the Advisory Committee, clarify the rules regarding payment of money to bankruptcy petition preparers and attorneys when the debtor wants to pay the filing fee in installments. These amendments are unrelated to any proposed amendments to Rules 9013 or 9014. Similarly, proposed amendments to Rule 2004(c) were approved by the Advisory Committee separately from the Litigation Package, but then were included in the Litigation Package because of other proposed amendments to Rule 2004.

I presented my drafts of proposed amendments to Rules 9013 and 9014, as well as the proposed amendments to Rules 1006 and 2004, to the Subcommittee on Litigation. The subcommittee met by telephone on June 30, 1999, to discuss the drafts. The subcommittee agreed that the proposed amendments to Rules 1006 and 2004 should go forward to the Standing Committee. The subcommittee recommended further revisions to my drafts of Rules 9013 and 9014. I then revised by drafts of amendments to Rules 9013 and 9014 consistent with the

subcommittee's recommendations and circulated the revised drafts to the subcommittee members for their approval on July 6th.

I enclose for the Advisory Committee's consideration at its September 1999 meeting the drafts of proposed amendments to Rules 9013 and 9014 that were approved by the subcommittee. I also enclose the drafts of proposed amendments to Rules 1006 and 2004.

Rule 9013. Motions; Form and Service

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

(b) *Ex Parte Motion.* Unless the court directs otherwise, a motion requesting the following relief may be made and considered without notice or a hearing, except that a copy of the motion shall be served on the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, and shall be transmitted to the United States trustee, no later than the date on which the motion is filed:

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

(2) joint administration of estates under Rule 1015;

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

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

(5) approval of the appointment of an examiner or trustee under

§ 1104(d);

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

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

(8) authorization to mail certain notices only to a committee under Rule 2002(i);

(9) examination of an entity under Rule 2004;

(10) deferral of the entry of an order granting a discharge under Rule 4004(c);

(11) reopening a case under § 350(b);

(12) conditional approval of a disclosure statement in a chapter 11 case in which the debtor is a small business; or

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

[(14) employment of a professional person under Rule 2014.]

COMMITTEE NOTE

This rule is amended to clarify that a written motion, other than one that may be made ex parte, may be considered by the court only after notice and a hearing. See § 102(1) of the Code for the meaning of the phrase "after notice and

a hearing." A notice of motion conforming to Official Bankruptcy Form 20A should be served together with a copy of the motion.

Subdivision (b) has been added to provide a nonexclusive list of motions that may be made and considered by the court ex parte. The matters enumerated in Rule 9013(b), in most instances, are nonsubstantive and noncontroversial. This rule, as amended, is designed to enable parties to obtain court orders relating to these matters in a relatively short period of time. But the rule does not prohibit the court, in its discretion, from directing that notice be served on parties or that a hearing be held before the motion is resolved.

The motions listed in Rule 9013(b) may be made without any notice served before the motion is filed or considered by the court, but the movant is required to provide the debtor, trustee, any committee, and the United States trustee with a copy of the motion not later than the time when the motion is filed so that they become aware of these developments in the case. This rule does not preclude any party affected by the motion from requesting appropriate relief either before or after an ex parte motion is granted and an order is entered. See, e.g., Rule 9024.

In most situations, a request to enlarge a time period under these rules is noncontroversial and may be made ex parte under Rule 9013(b)(6). But the enlargement of time to take certain action under these rules may be controversial and, therefore, warrant the procedural safeguards afforded by notice and an opportunity to be heard. In particular, a request for an order enlarging the time to file a motion to dismiss a chapter 7 case under § 707(b) and Rule 1017(e), to file a chapter 12 plan in accordance with Rule 3015(a), to file an objection to the list of property claimed as exempt in accordance with Rule 4003(b), to file a complaint objecting to discharge under Rule 4004(a), to file a complaint to determine the dischargeability of a debt under § 523(c) and Rule 4007(c), to file a notice of appeal under Rule 8002, or to file an objection to proposed findings of fact and conclusions of law under Rule 9033, are excluded from the list of time enlargement motions that may be heard ex parte under Rule 9013(b)(6).

Other amendments to this rule are stylistic.

Reporter's Notes:

(1) Item #14 is in brackets because, if it is included, an amendment to Rule 2014 also should be made. Rule 2014 refers to an "application" for an order approving employment of a professional, rather than a "motion." Rule 9013 only applies to motions, not applications. Under the current rules, an application and a motion are two different things. So, to list an application as

an ex parte motion does not make sense. The subcommittee recommends that Rule 2014 be amended to use the word "motion" instead of "application." This change should be coordinated with the work of the Subcommittee on Rule 2014.

(2) Ken Klee suggested that the substance of the fourth paragraph of the committee note (listing the enlargement of time motions that are excluded from the ex parte motion list) should be moved to the rule so that the rule would affirmatively prohibit the ex parte treatment of those motions. The subcommittee did not discuss this suggestion (it was made after the telephone meeting), but it should be discussed by the full Committee in September.

Rule 9014. Contested Matters

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

(b) *Service.* The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F. R. Civ. P.

(c) *Application of Part VII Rules.* ~~and, unless the court otherwise directs~~ Unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order. ~~An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

(d) *Testimony of Witnesses.* Testimony of witnesses with respect to disputed factual issues shall be taken under Rule 43(a) F. R. Civ. P. in the same manner as testimony is taken at a trial in an adversary proceeding.

(e) *Attendance of Witnesses.* The court shall provide procedures that enable parties [and witnesses] to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

COMMITTEE NOTE

The list of Part VII rules that are applicable in a contested matter is extended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, and capacity. The discovery rules made applicable in adversary proceedings apply in contested matters unless the court directs otherwise.

Subdivision (b) is amended to permit parties to serve papers, other than the original motion, in the manner provided in Rule 5(b) F.R. Civ. P. When the court requires a response to the motion, this amendment will permit service of the response in the same manner as an answer is served in an adversary proceeding.

Subdivision (d) is added to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken at a trial in an adversary proceeding or at a trial in a district court civil case. Rule 43(a), rather than Rule 43(e), F. R. Civ. P. would govern the evidentiary hearing on the factual dispute. Under Rule 9017, the Federal Rules of Evidence also apply in a contested matter.

Subdivision (e). Local procedures for hearings and other court appearances in a contested matter vary from district to district. In some bankruptcy courts, an evidentiary hearing at which witnesses may testify usually is held at the first court appearance in the contested matter. In other courts, it is customary for the court to delay the evidentiary hearing on disputed factual issues until some time after the initial hearing date. In order to avoid unnecessary expense and inconvenience, it is important for attorneys to know whether they should bring witnesses to a court appearance. The purpose of the final sentence of this rule is to require that the court provide a mechanism that will enable attorneys to know at a reasonable time before a scheduled hearing whether it will be necessary for witnesses to appear in court on that particular date.

Other amendments to this rule are stylistic.

Reporter's Note:

(1) The second sentence of Rule 9014(b) (providing that Civil Rule 5(b) applies to service of papers other than the original motion papers) is unrelated to matters referred to the Ligation Subcommittee. The Reporter added that sentence, with the subcommittee's approval. Under the present rule, Civil Rule 5 is made applicable to adversary proceedings through Bankruptcy Rule 7005, but does not apply in contested matters. This was deliberate to clarify that a motion commencing a contested matter is more in the nature of a summons and complaint to be served on the party, rather than a subsequent pleading that may be served on the party's attorney. But I am not aware of any reason why Rule 5(b) service should not be available for papers subsequent to the original motion. The application of Rule 5(b) to subsequent papers in a contested matter could become more significant because, in June, the Standing Committee approved for publication proposed amendments to Civil Rule 5(b) that will enable parties, by consent, to serve papers electronically. In those courts that require written responses to motions in contested matters, my suggested addition to Rule 9014(b) would enable such responses to be served in the same way that an answer is served in an adversary proceeding (i.e., on the party's attorney). A copy of the proposed amendments to Civil Rule 5(b) is enclosed.

(2) Ken Klee has suggested that Rule 9014(e) should permit witnesses (as well as attorneys) to ascertain whether their attendance is required at a hearing. For that reason, I included the words " and witnesses" in brackets. This suggestion was not discussed by the subcommittee, but should be discussed by the full Committee in September.

Reporter's Note: The following proposed amendments to Rules 1006 and 2004(c) were part of the Litigation Package published last year, but could "stand alone" apart from the remainder of the large Litigation Package.

Rule 1006. Filing Fee

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

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

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

(2) *Action on Application.* Before ~~Prior to~~ the meeting of creditors, with or without notice or a hearing, the court may order the filing

fee paid to the clerk or grant leave to pay it in installments and fix the number, amount, and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable ~~not~~ no later than 120 days after ~~filing~~ the petition is filed. For cause ~~shown~~, the court may extend the time of any installment to a time that is~~, provided the last installment is paid not~~ no later than 180 days after ~~filing~~ the petition is filed.

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

COMMITTEE NOTE

This rule is amended to provide that an application to pay the filing fee in installments may be granted by the court without notice or a hearing.

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

Rule 2004. Examination

(a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.

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

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COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered under Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

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

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 5. Service and Filing of Pleadings and Other Papers

* * * * *

~~**(b) Same: How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the~~

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

~~office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.~~

(b) Making Service.[*]

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on

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[*] Criminal Rule 49 applies the rules governing service in a civil action to service in a criminal proceeding.

mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

* * * * *

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Subparagraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Subparagraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. Subparagraph (D) also authorizes service by nonelectronic means. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in subparagraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. As with other modes of service, however, actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission. The sender must take additional steps to effect service. Service by other agencies is complete on delivery to the designated agency.

Finally, subparagraph (D) authorizes adoption of local rules providing for service through the court. Electronic case filing systems will come to include the capacity to make service by using the court's facilities to transmit all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, making use of the court's transmission facilities to serve the filed paper on all other parties. Because service is under subparagraph (D), consent must be obtained from the persons served.

Service under subparagraph (D) does not allow the additional time provided by Rule 6(e) when service is made by mail under subparagraph (B). Electronic service commonly is effected with great speed. A party should consent to receive service by electronic or other means only as to modes that are trusted to provide prompt actual notice. By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service.

ALTERNATIVE PROPOSAL

The Advisory Committee recommends that no change be made in Civil Rule 6(e) to reflect the provisions of Civil Rule 5(b)(2)(D) that, with the consent of the person to be served, would allow service by electronic or other means. Absent change, service by these means would not affect the time for acting in response to the paper served. Comment is requested, however, on the alternative that would allow an additional 3 days to respond. The alternative Rule 6(e) amendments are cast in a form that permits ready incorporation in the Bankruptcy Rules.*

Rule 6. Time

* * * * *

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

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* Compare proposed amendments to Bankruptcy Rule 9006(f) contained on page 18 of this pamphlet, which extends the 3-day rule to service by electronic means.

MEMORANDUM

DATE: August 16, 1999

FROM: Gerald K. Smith

RE: Proposed Amendments to Rule 2014

TO: Advisory Committee on Bankruptcy Rules

The Subcommittee met and discussed the draft of Rule 2014 which had been circulated to the bench and bar and as a result of that review directed a revision which is attached as Attachment 1. What follows are selected provisions of the memorandum to the Subcommittee.

(1) Proposed Amendments to Bankruptcy Rule 2014.

At the March meeting the proposed amendments to Rule 2014 and the public comments were referred to this Subcommittee. We need to review the comments and make recommendations to the Committee. I have prepared a brief analysis of the comments summarized by Prof. Resnick. It is attached, along with Prof. Resnick's summary, as Attachment 2. I would also like the Subcommittee to consider additional matters, some cosmetic and some significant. For your convenience I attach the relevant statutory and Rule provisions as Attachments 3 and 4.

(a) Cosmetic.

Proposed Rules 2014(a)(6) and (b)(2) should track the language of § 327(a) and § 101(14)(E) by requiring disclosure (1) of any interest the person to be employed has or holds or (2) of any person who is represented that has an interest adverse to the interests of the estate or of any class of creditors or equity security holders.

Rule 2016(b) is ambiguous as to who must make the disclosure. Section 329(a) requires that "any attorney representing a debtor in a case under this title, or in connection with such a case ... shall file with the court a statement of the compensation paid or agreed to be paid ... for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation." This section requires disclosure by an attorney representing a debtor. It is somewhat ambiguous, since it is intended to reach back one year prior to the filing of the bankruptcy case. The ambiguity arises from the reference "representing a debtor." The person represented becomes a debtor only after the petition is filed, in a technical sense. Also, § 329(a) requires that the representation be in connection with a case or in a case. Those representations do not seem to reach back before the petition. However, § 329(a) makes it clear that a reachback is intended since it refers to payments or agreements made within one year of the filing. Unfortunately, the Bankruptcy Rule does not clear this up; if anything, it adds to the

confusion. Bankruptcy Rule 2016(b) requires that "every attorney for a debtor ... shall file ... the statement required by § 329." I believe it would be better to use the language of § 329(a) in place of the first sentence of Rule 2016(b). Alternatively, we could say what is intended -- "an attorney representing a debtor in a case or an attorney who represented a person who became a debtor in a case ... shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with a case by such attorney, and the source of such compensation."

(b) Significant. The Rule should abandon the troublesome requirement to disclose "connections with . . . respective attorneys and accountants" for the debtor, creditors, or any other party in interest. *See* Attachment 5, analysis of *Bennett Funding*. Connection is too general and troublesome situations must be disclosed if the Rule requires the disclosure of (1) of any interest the person to be employed has or holds or (2) of any person who is represented that has an interest adverse to the interests of the estate or of any class of creditors or equity security holders. However, the Rule should be expanded to require disclosure of insider status and insider representation.

We would do a service to all concerned if we define adverse interest and gave guidance as to what a professional must do to determine creditors and other parties in interest represented in unrelated matters. The practice varies around the country. Some firms conflict check every single creditor while others conflict check major secured creditors and the 20 largest unsecured creditors. The Rule should address this important issue. Perhaps in large cases the court should decide the scope of the conflict check.

The Second Circuit decided a case on May 18, 1999 in the *Arochem Corporation* bankruptcy. Judge Meskill's Opinion is worth reading. It is one of a handful of recent cases which almost get it right. It has some very helpful analysis. A copy of the opinion accompanies the material as Attachment 6.

G.K.S.

GKS/spg
Attachments
cc: Patricia S. Channon, Esq.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

Rule 2014. Employment of Professional Person

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

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

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

(3) state the professional services to be rendered;

(4) disclose any proposed arrangements for compensation; and

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

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

(1) state that the person is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion;

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

(3) disclose any interest or relationship relevant to a determination that the person is disinterested;

(4) disclose the person's relationship to the United States Trustee, or any

person employed in the office of the United States Trustee;

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

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

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

(d) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 30 days after becoming aware of any matter that is required to be disclosed under Rule 2014(b), but that has not yet been disclosed, a person employed under this rule shall file a supplemental verified statement concerning the additional matter or matters to be disclosed, serve copies on the entities listed in Rule 9014(__), and, unless the case is a chapter 9 municipality case, transmit a copy to the United State Trustee.

OBJECTIONS IN COMMENTS SUMMARIZED
(PROPOSED RULES AND PROFESSOR RESNICK'S
SUMMARY ATTACHED)

The comments reflect fundamental disagreements as to how disclosure and employment work. By way of example, the New York Bar comment states that "the existing requirement that the movant state to the best of movant's knowledge the proposed professional is 'disinterested' be maintained. This will eliminate imposing upon the movant the task of determining 'adversity,' a standard that courts have had difficulty defining in this context." But in order to swear that the one to be employed is disinterested, the one swearing must reasonably believe, after an appropriate investigation, that the one to be employed "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason." 11 U.S.C. § 101(14)(E).

The comments that disclosure of compensation under Rule 2016 is adequate overlooks the well recognized possibility that fees paid by third parties or agreements to pay fees by third parties may create a conflict or, in the Code's parlance, an adverse interest.

The comments criticizing the scheduling of hearings, notice and interim orders are helpful, but overlook the possible need on the part of a professional to have the court resolve troublesome issues. Perhaps these criticisms can be met by (1) providing for service on committees, trustee, debtor-in-possession and 20 largest creditors in Chapter 11 cases; (2) scheduling a hearing only if the one to be employed requests a hearing to resolve an issue or there is an objection; and (3) providing that an order approving employment will be effective as of the date the application was filed.

Other objections are briefly summarized as follows:

1. Costly
   Delays
   "interim employment order not desirable"

2. Use 9013 "ex parte" - no hearing set - schedule a hearing only if an objection

3. Objections rare - do not schedule

4. Need to list professionals

5. Service list should differ in Chapter 11 case

6. Trustee includes debtor-in-possession

7. Court approves, does not authorize

Rule 2014

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   Proposed change is worse than the present rule. There is no basis for 10-day notice on retention applications, or for serving the 20 largest creditors (it adds to costs and delay, especially in chapter 7 cases, with no discernable benefit). Interim employment orders are not desirable. Professionals who are later not found to be disinterested or who are disqualified will have an order they can use to obtain fees for services they should not have been authorized to perform. "Any professional whose application might be subject to dispute will routinely seek an interim order and then litigate their entitlement to fees." At least provide that any professional whose application is denied shall not be entitled to any fees based on having obtained an interim order.

2. Richard Levin, Esq. (Los Angeles, Cal.) (012):

   Suggests that the word "authorizing" be changed to "approving" in Rule 2014(a) because Code sections 327, 1103, and 1114 permit a court to approve, but not to authorize, employment of a professional person.

3. Hon. Stephen C. St. John and Hon. David H. Adams (Bankr. E.D.Va.) (039):

   (1) The rule appears to require docketing of a hearing on every retention application whether or not an objection is filed. This is burdensome on the clerk; the court should be permitted to schedule a hearing in the event of an objection to employment is filed.

   (2) Rule 2014(f) should be clarified to permit a partner, member or associate of a firm to act provided such counsel is admitted as a member of the bar of a given court. "In our district we have previously experienced concerns because an out-of-state firm will position an attorney admitted in our jurisdiction but have non-admitted counsel sign all pleadings to evade our rule requirement of a local counsel. The ambiguity of this subsection should be clarified to insure our long-standing local rule requirements may not be evaded under the auspices of this proposed Rule."

4. Bankruptcy Judges of C.D. Cal. (21 Judges) (062):

   Rule 2014(c) and (d) require 10 days notice and that court can resolve it without a hearing if no response at least 2 days before the hearing. Objections are rare and requiring scheduling for hearing in all cases will cause already congested calendars to balloon. By the hearing, judges will rarely know whether a response has been filed (it takes time for docketing and routing to the judge) so that many unnecessary hearings will be held. Prefers treating these under Rule 9013 as applications. Also, the proposed amendments delete the list of parties who are considered professionals (the current rule has the list);

suggests the list be restored to reduce confusion as to whom the rule applies.

5. Hon. Leif M. Clark (Bankr., W.D. Tex.) (064):

Agrees Rule 2014 proceedings should be by motion practice, but opposes pre-setting hearing dates (for same reasons stated with respect to Rule 9014), especially with only a 10-day notice provision. It would be simpler to allow relief on the pleadings and afford parties an opportunity to object after the fact. That is how it works in W.D. Tex. With a minimum of bureaucracy.

6. Commercial Law League of America (065):

These are rarely contested and should be Rule 9013 applications. An order approving employment should be deemed effective as of the filing of the application as is provided in the local rules in E.D. Mich. (enclosed with the comment letter). The rule would encourage requests for interim employment orders. Also, the service list should include the trustee, any committee, the 20 largest creditors, and any other entity the court may direct. The notice also should be provided to the debtor. The time to file objections is insufficient (prefers 15 days notice before the hearing date and objections 2 days before the hearing). The "all connections" requirement for disclosure is too broad and vague; additional guidance is needed.

7. Hon. Leslie Tchaikovsky (on behalf of nine Bankr. Judges of N.D. Cal.) (070):

Requirement that notice be served on a committee or the 20 largest unsecured creditors should be limited to chapter 11 cases. Opposes requirement that all applications be set for hearing and then taken off calendar if no objection is filed (inefficient).

8. Bankruptcy Judges and Clerk of District of South Carolina (081):

Opposes a rule that requires a hearing and delays the court's consideration of these applications. Opposes requirement that a hearing be set for all motions to approve employment (causes more work). Two days before the hearing date is too short a time to accommodate the routing of any objection and preparation for a hearing.

9. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

In Rule 2014(a), provide that "trustee" includes debtor in possession in chapter 13 case (as well as in a chapter 11 case). Chapter 13 debtors file motions to employ attorneys in negligent actions or appraisers and brokers. To require the trustee to do it would impose an administrative burden on the trustee. The new language in Rule 2014(d) is helpful, but a slight discrepancy is noted. It only requires that a request for a hearing be filed at least 2 days before the hearing, while a local rule in the district requires filing and service of

objections at least 5 days before the hearing.

10. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

Change Rule 2014(a) to substitute the word "approving" for "authorizing" (to conform to Code section 327(a)).

11. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Supports the proposed requirement for a motion on notice with an opportunity for a hearing to obtain a Rule 2014 order. The entry of retention orders without notice has occasionally precluded parties from a meaningful opportunity to raise good faith issues. Agrees with interim employment provision, but does not agree that shorter time periods should apply when interim employment is authorized. The same time periods should apply to the final hearing, regardless of interim employment. The rule should clearly state that a professional employed on an interim basis under the Rule, but whose employment is not approved at the final hearing, has the right to request compensation for the period employed. Also clarify that employment may be approved retroactive to the date the professional commenced work (some courts do that now, but some do not). Opposes requirement that the professional disclose any interest "adverse" to the estate (requires determination as to what that means), and prefers that the movant state to the best of its knowledge that the professional is "disinterested." Supports the goal of supplemental disclosure, but the proposed rule is vague and does not address concerns of courts and the U.S. trustee. They propose that a professional firm be required to update its original disclosures once every 120 days, and any individual who has actual knowledge of a matter that should be disclosed would be required to do so promptly (they prefer "prompt" rather than the 15-day rule). A black-lined draft showing specific revisions recommended is enclosed with their letter.

12. Hon. David A. Scholl (Bankr., E.D. Pa.) (103):

The appointment of a professional person should not be governed by Rule 9014. Hearings can be scheduled in these few instances where necessary or warranted.

13. Richard B. Herzog, Chair, Rules Committee, Bankr. Section, State Bar of Georgia (106):

Rule 2014(b)(3) requires clarification as to what constitutes a "connection." Are firms required to search every creditor without regard to materiality, determine whether any spouse of a member of a law firm works for a creditor (or their accountant or attorney) without regard to whether the creditor's claim is material, or determine whether any attorney holds an equity interest in any creditor without regard to whether the claim is material?

14. Hon. Christopher M. Klein (E.D. Cal.) (111):

In Rule 2014(b)(1), the statement that the person is eligible to be employed under the Code is a legal conclusion, not a fact. In Rule 2014(e), clarify the effect of an interim employment order that purports to specify compensation terms on the limitation in section 328(a) restricting the court's power to change compensation terms. One possibility is to provide that an interim order may not fix a basis of compensation for purposes of section 328(a).

15. Executive Office for United States Attorneys (115):

Revise Rule 2014(a)(1) to require disclosure of *any* personal or professional services for which employment is sought. Revise the 14-day period for interim employment orders under Rule 2014(e) so that the court may change the time in which it must hold the final hearing. They also suggest that there be clarification of the rate at which paralegals, associates, and other staff can be billed.

16. Gregory S. Clore, Esq. (San Francisco, CA) (116):

It is unclear whether Rule 2014 is governed by Rule 9014. Also clarify that a motion under Rule 2014 must be filed (in addition to being served and transmitted). Questions whether the provisions on interim employment orders are appropriate because they create a more costly and cumbersome two-step process for the employment of professionals. Under the amendments, more first-day motions and orders will be required; the current application process with nunc pro tunc employment orders is more efficient than the interim order process under proposed Rule 2014.

17. Phoenix and Tucson Chapters of the Federal Bar Association (122):

Agrees with goals of decreasing the burden on the debtor when attempting to employ counsel and improving efficiencies relating to employment of professionals. But the proposed rule complicates the process by contemplating that a hearing must always be set. They suggest specific language that contemplates setting a hearing only if there is an objection, and a proposed interim order to accompany the motion. Also, change the time period from 14 to 15 days to add consistency to time frames throughout the rules.

18. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

Delete as redundant the disclosure requirement in proposed Rule 2014(b)(4). Code section 329 only applies to debtor's attorneys and Rule 2016(b) already requires debtors' attorneys to file these disclosures regardless of whether they seek employment in the case. If this is kept in, clarify that it is in addition to, and not in lieu of , the Rule 2016(b) disclosure. Also 2014(b)(4) should be revised to add "for the debtor" after "attorney."

Regarding Rule 2014(e), they question dual procedures for regular employment orders and interim employment orders (5 v. 10 days notice, etc.). The obvious incentive is to ask for interim relief all the time. Suggests eliminating after the first sentence of 2014(e) so that there is only one procedure; or establish a 5-day notice on all 2014 motions and eliminate the interim order provision altogether. Also raises the question of whether interim employment is entitled to compensation if not finally employed. Supports as an "excellent move" Rule 2014(g) (supplemental statements), but suggests clarification that it applies whether the professional has been retained or if the motion for retention is still pending. Any supplemental statement should disclose why the information was not previously disclosed (suggests specific language to achieve this - see page 4 of letter).

19. Peter H. Arkison, Esq. (Bellingham, WA) (132):

These changes will create an administrative nightmare for the routine chapter 7 case, which often has a realtor appointed to sell real estate, an attorney to do legal work related to the sale, and accountant to prepare the tax returns. The employment of these people should be by application under new Rule 9013. It also will create numerous problems in chapter 11 cases where the "first day orders" need substantial legal work and the emergency hearings are held on shortened notice concerning use of cash collateral, etc. Since the Ninth Circuit dimly views *nunc pro tunc* orders, there is the potential for substantial work being done without compensation. Although interim orders try to address this problem, a better solution would be to authorize the employment with the creditors and other parties having the right to object to the employment. Finally, there appears to apter 11 case). Chapter 13 debtors file motions to employ attorneys in negligent actions or appraisers and brokers. To require the trustee to do it would impose an administrative burden on the trustee. The new language in Rule 2014(d) is helpful, but a slight discrepancy is noted. It only requires that a request for a hearing be filed at least 2 days before the hearing, while a local rule in the district requires filing and service of objections at least 5 days before the hearing.

20. Gary B. Rudolph and Radmila A. Fulton on behalf of San Diego Local Rules Subcomm. (137):

These matters should be dealt with as ex parte motions (9013) rather than as motions under Rule 9014. There are timing problems in that the 10-day notice of hearing and 2-day objection deadline do not allow for adequate court preparation. Also opposes the need to set hearing dates for all motions in advance.

21. Karen Cordry, Esq., on behalf of Bankruptcy and Taxation Working Group, National Assoc. of Attorneys General (155):

What does the phrase "unless the case is a chapter 9 case" in Rule 2014(c) except from the coverage of the Rule? Does it mean that the motion need not be served on the U.S.

Trustee, or that 10 days hearing need not be provided, or that no such motion may be filed? The antecedent of this "unless" clause is ambiguous.

22. Hon. Paul B. Snyder (Bankr. W.D. Wash.) (163):

Opposes the amendments because they will add unnecessary burdens of administrative cost and time. The local procedures work well.

23. Judy B. Calton. Esq., on behalf of Advisory Comm. of the E.D. Mich. Bankr. Court (066):

Employment of professionals are rarely contested. Better to treat as an application under Rule 9013. The proposed rule would encourage interim orders.

Rule 2016

1. Richard Craig Friedman, Office of U.S. Trustee (001):

   We are missing an opportunity to incorporate by reference the US Trustee's Guidelines on Fee Applications (under 28 USC 586). At a minimum, since amendments to Rule 2016 come after the promulgation of the guidelines, the rule should state that nothing in the rule shall be read to excuse compliance with the guidelines.

2. Leon S. Forman, Esq. (Philadelphia) (011):

   Opposes subdivision (g) in that, if no response to a fee request is filed, the court may deny or grant it for a reduced amount without a hearing. If this happens, the burden is thrust on counsel to request reconsideration. Due process and fundamental fairness would require the court to give counsel an opportunity to be heard on the court's proposed ruling before it is made final by a formal order. Sometimes an aspect of the fee application can be easily explained at a hearing. This may be especially important for the record if an appeal is taken. Also, the reference to section 102(1) in Rule 2016(g) is unclear; does it mean that the court must hold a hearing to give an opportunity to be heard before making an order in the above situation? Perhaps language could be added providing that an order disallowing the fee request or reducing the amount shall not be made without an opportunity to be heard.

3. James J. Waldron, Clerk (on behalf of N.J. Bankr. Lawyers' Advisory Committee) (087):

   Changes are positive, but time period for responses differs from applicable time period in local rule (which would have to be changed).

4. Hon. Arthur J. Spector (on behalf of the four Bankruptcy Judges in the E.D. Mich.) (092):

   The meaning of Rule 2016(a)(2) is unclear and should be reworded. What practice is it intended to cover?

5. Hon Terrence L. Michael (Bankr. N.D. Okla.) (094):

   The amendments assume that courts are or should hold hearings on the appointment of counsel in every case. That will serve no purpose and will add congestion to the court's docket.

6. Bernard F. McCarthy on behalf of Nat'l. Conference of Bankruptcy Clerks (096):

   Rule 2016 strips the court of the authority to make a determination whether a motion or application needs a hearing. Less efficient and more cumbersome.

7. Bankr. and Reorg. Committee, Assoc. of the Bar of the City of New York (098):

Supports treating Rule 2016 requests for compensation a motion governed by Rule 9014. They note that Rule 2016(a)(1)(C) refers only to attorneys and accountants, while the remainder of the rule addresses all professionals. Recommends clarification that all professionals be included in this rule.

8. Shirley C. Arcuri, Esq., Local Rules Adv. Comm., Bankr. Court, M.D. Fla. (109):

Supports the amendment to Rule 2016(a)(2) providing for equal treatment of fee applications filed by counsel for debtors, trustees, and creditors.

9. Hon. Christopher M. Klein (E.D. Cal.) (111):

This rule assumes counsel will work only on the basis of time and expenses. Counsel are increasingly agreeing to work for fixed fees, contingent fees, or hybrids as permitted under section 328(a). One advantage is that counsel paid on such a basis is not required to keep hourly records or sometimes even records of expenses. In such circumstances, it would not seem necessary to require the motion to account for time and expenses as would be required by Rule 2016(a)(1). The rule should be revised to accommodate the possibility of alternative bases of compensation.

10. Gregory S. Clore, Esq. (San Francisco, CA) (116):

Rule 2016 should provide that a motion under that rule must be *filed* (in addition to being served).

11. Hon. Arthur N. Votolato (D. R.I.) (125):

Opposes advanced scheduling of hearings for all motions (Rule 2016 motions will be governed by Rule 9014 which requires pre-scheduling of hearings for all motions).

12. Martha L. Davis, General Counsel, Executive Office for United States Trustees (131):

The motion for compensation should include a reference to the UST guidelines for fee applications.

13. Peter H. Arkison, Esq. (Bellingham, WA) (132):

There should be a reasonable relationship between the amount of fees requested and the extent of the motion required. The proposed rule could require more time to prepare a fee application to pay an accountant $500 for preparing a tax return than the value of the

work performed. Similarly, an auctioneer or realtor is often paid on a commission basis and they should not be required to detail the time that they have spent in selling the property.

14. Hon. Phillip H. Brandt (Bankr., W.D. Wash.) (140):

Clarify whether the entire motion and supporting papers must be served on all creditors entitled to notice under Rule 2002(a)(7), or just the notice of motion (note that Rule 2016(a) provides that 9014 is applicable, which refers to 9014(c)). It should not require that and the rule should be clarified to provide that entitlement to notice does not equal entitlement to service of the entire motion.

Proposed Rule 2014

The Committee supports the adoption of the requirement that requests for orders retaining professionals be made by motion, on notice, with an opportunity for hearing. The entry of retention orders without notice, on occasion, has precluded parties in interest from having meaningful opportunities to raise good faith disputes about the merits of a proposed retention. However, the Committee believes certain clarifications regarding the notice requirements are needed.

As P.R. 2014 appears to recognize, it is critical for both the professional and client that there be an opportunity for a professional to be retained and compensated on an interim basis. However, the Committee does not agree that the notice and hearing period with respect to professional retention should be shortened where interim retention is approved. As with P.R. 9014, the Committee recommends that the notice requirements for a motion to retain a professional be the same, regardless of whether interim retention has been authorized.

The Committee also believes that professionals who are retained on an interim basis should have the right to seek the allowance of fees and reimbursement of expenses that accrue during the interim period, even if the application for employment is ultimately denied. The right to file an application for the allowance of such fees and expenses is implicit in the proposed amendments to Rule 2014. Nonetheless, to eliminate any uncertainty in this area, the Committee recommends that the amended rules unequivocally indicate that such requests may be made. The Committee also recommends that the rule make clear that courts may authorize the retention of a professional retroactively to the date the professional commenced work. Compared with current practice, if P.R. 2014 is adopted, professionals are more likely to begin work before their retention is approved and to do so for longer periods of time. As such, the need for retroactive retention orders will increase.

In the important area of qualifications for professional employment, the Committee is concerned that the proposed new requirement that the movant disclose any interest "adverse" to the estate would require the movant to determine what "adverse" means. The Committee suggests the existing requirement that the movant state to the best of the movant's knowledge that the proposed professional is "disinterested" be maintained. This will eliminate imposing upon the movant the task of determining "adversity," a standard that courts have had difficulty defining in this context.

Finally as to P.R. 2014, the Committee supports the goal of supplemental disclosure, but believes that the proposed rule is vague, and does not sufficiently address the concerns that have been expressed recently. In order to address these concerns, the Committee proposes that there be a new periodic disclosure requirement applicable to professional firms, and an obligation of prompt supplemental disclosure applicable to individuals. The Committee proposes that a professional firm be required to update its original verified statement at least once every 120 days, and additionally any individual who has actual knowledge of a matter that should be disclosed be required to do so promptly.

(C) trustee, receiver, or agent under applicable law, or under a contract, that is appointed or authorized to take charge of property of the debtor for the purpose of enforcing a lien against such property, or for the purpose of general administration of such property for the benefit of the debtor's creditors;

(12) "debt" means liability on a claim;

(12A) "debt for child support" means a debt of a kind specified in section 523(a)(5) of this title for maintenance or support of a child of the debtor;

(13) "debtor" means person or municipality concerning which a case under this title has been commenced;

(14) "disinterested person" means person that—

(A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

(15) "entity" includes person, estate, trust, governmental unit, and United States trustee;

(16) "equity security" means—

(A) share in a corporation, whether or not transferable or denominated "stock", or similar security;

GENERAL CROSS-REFERENCES: Rules 2002(a)(7), 2002(c)(2), 2013, 2016, 9034

ANNOTATIONS OF SIGNIFICANT DECISIONS:

In re Roco Corp., 64 B.R. 499, 14 Bankr. Ct. Dec. (CRR) 1130 (D.R.I. 1986) (Court may award Trustee less than statutory fee since fee structure sets only a ceiling on Trustee's commissions.) (§ 326)

In re Woodworth, 70 B.R. 361, 15 Bankr. Ct. Dec. (CRR) 712 (Bankr. N.D.N.Y. 1987) (Trustee who discovered $10,000 asset resulting in converting case to Chapter 13 is only entitled to minimum compensation under § 330(b).) (§ 326)

In re Financial Corp. of America, 114 B.R. 221, 20 Bankr. Ct. Dec. (CRR) 936, 23 Collier Bankr. Cas. 2d (MB) 1181, Bankr. L. Rep. (CCH) ¶ 73511 (Bankr. 9th Cir. Cal. 1990) (If case is converted, funds turned over to Chapter 7 trustee by Chapter 11 trustee should be included in determining statutory maximum for Chapter 11 trustee's fee award, even if both trustees are same person.) (§ 326)

West Key No. Digests References: Bankruptcy ⇐3152

11 USC § 327

§ 327. Employment of professional persons.

(a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

(b) If the trustee is authorized to operate the business of the debtor under section 721, 1202, or 1108 of this title, and if the debtor has regularly employed attorneys, accountants, or other professional persons on salary, the trustee may retain or replace such professional persons if necessary in the operation of such business.

(c) In a case under chapter 7, 12, or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court

GENERAL CROSS-REFERENCES

Code §§ 326, 328, 330, 331, 1202, 1302

West Key No. Digests References: Bankruptcy ⇐3151-3205; Records ⇐32

Rule 2014. Employment of Professional Persons.

(a) Application for and Order of Employment. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) Services Rendered by Member or Associate of Firm of Attorneys or Accountants. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.

Advisory Committee Note (1983)

Subdivision (a) is adapted from the second sentence of former Bankruptcy Rule 215(a). The remainder of that rule is covered by § 327 of the Code.

Subdivision (b) is derived from former Bankruptcy Rule 215(f). The compensation provisions are set forth in § 504 of the Code.

Advisory Committee Note (1991)

This rule is amended to include retention of professionals by committees of retired employees pursuant to § 1114 of the Code.

The United States trustee monitors applications filed under § 327 of the Code and may file with the court comments with respect to the approval of such applications. See 28 USC § 586(a)(3)(H). The United States trustee also monitors creditors' committees in accordance with 28 USC § 586(a)(3)(E). The addition of the second sentence of subdivision (a) is designed to enable the United States trustee to perform these duties.

Subdivision (a) is also amended to require disclosure of the professional's connections with the United States trustee or persons employed in the United States trustee's office. This requirement is not intended to prohibit the employment of such persons in all cases or to enlarge the definition of "disinterested person" in § 101(13) of the Code. However, the court may consider a connection with the United States trustee's office as a factor when exercising its discretion. Also, this information should be revealed in the interest of full disclosure and confidence in the bankruptcy system, especially since the United States trustee monitors and may be heard on applications for compensation and reimbursement of professionals employed under this rule.

The United States trustee appoints committees pursuant to § 1102 of the Code which is applicable in chapter 9 cases under § 901. In the interest of full disclosure and confidence in the bankruptcy system, a connection between the United States trustee and a professional employed by the committee should be revealed in every case, including a chapter 9 case. However, since the United States trustee does not have any role in the employment of professionals in chapter 9 cases, it is not necessary in such cases to transmit to the United States trustee a copy of the application under subdivision (a) of this rule. See 28 USC § 586(a)(3)(H).

Editors' Comment

(a) Application for and Order of Employment. Section 327 of the Code expressly authorizes the employment of professional persons in connection with the administration of bankruptcy estates. The Rule dealing with this subject is merely an elaboration on the corresponding provisions of the Code itself. It provides that the application for authorization to employ professional persons must state specific facts showing the necessity for the employment, the name of the person to be employed, the reason for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connection either with the debtor, with creditors, or any other party of interest and with their respective attorneys and accountants.

West Key No. Digests References: Bankruptcy ⇐3008.1-3009, 3011, 3022, 3622

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file with the court an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but

the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

Advisory Committee Note (1983)

This rule is derived from former Rule 219. Many of the former rule's requirements are, however, set forth in the Code. Section 329 requires disclosure by an attorney of transactions with the debtor, § 330 sets forth the bases for allowing compensation, and § 504 prohibits sharing of compensation. This rule implements those various provisions.

Subdivision (a) includes within its provisions a committee member thereof, agent, attorney or accountant for the committee when compensation or reimbursement of expenses is sought from the estate.

Regular associate of a law firm is defined in Rule 9001(9) to include any attorney regularly employed by, associated with, or counsel to that law firm. Firm is defined in Rule 9001(6) to include a partnership or professional corporation.

Advisory Committee Note (1987)

Subdivision (a) is amended to change "person" to "entity." There are occasions in which a governmental unit may be entitled to file an application under this rule. The requirement that the application contain a "detailed statement of services rendered, time expended and expenses incurred" gives to the court authority to ensure that the application is both comprehensive and detailed. No amendments are made to delineate further the requirements of the application because the amount of detail to be furnished is a function of the nature of the services rendered and the complexity of the case.

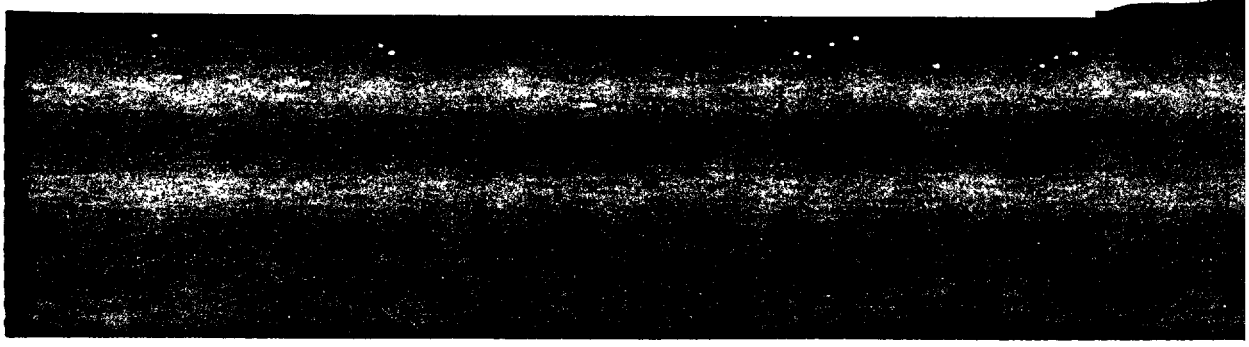
Subdivision (b) is amended to require that the attorney for the debtor file the § 329 statement before the meeting of creditors. This will assist the parties in conducting the examination of the debtor. In addition, the amended rule requires the attorney to supplement the § 329 statement if an undisclosed payment is made to the attorney or a new or amended agreement is entered into by the debtor and the attorney.

Advisory Committee Note (1991)

Subdivision (a) is amended to enable the United States trustee to perform the duty to monitor applications for compensation and reimbursement filed under § 330 of the Code. See 28 USC § 586(a)(3)(A).

Subdivision (b) is amended to give the United States trustee the information needed to determine whether to request appropriate relief based on excessive fees under § 329(b) of the Code. See Rule 2017.

The words "with the court" are deleted in subdivisions (a) and (b) as unnecessary. See Rules 5005(a) and 9001(3).



LEWIS AND ROCA LLP
LAWYERS

Memorandum January 6, 1999

To From Phoenix

FILE Gerald K. Smith

Re: *In re The Bennett Funding Group, Inc.*, 226 B.R. 331 (Bankr. N.D.N.Y. 1998)

The implications of this case as far as disclosure are staggering. It vividly highlights the problems with Rule 2014(a).

In *Bennett Funding*, the trustee had a consulting agreement with Deloitte & Touche (USA) LLP ("Deloitte"). According to the opinion it provided that the trustee would "provide consulting services to Deloitte concerning regulatory and other matters affecting domestic and international capital markets and the financial services industry generally .... [I]t included consulting services [for] legislative, regulatory, administrative or business issues as to which Deloitte may seek ... advice and counsel and that are reasonably acceptable to ... the trustee." *Id.* at 332.

Bennett Funding and related cases have been pending for several years. The trustee filed a third supplemental affidavit on April 16, 1998 stating that he had entered into an agreement with Deloitte in February of 1998 to provide consulting services. At the time of the initial hearing on the trustee's sixth application for compensation, the U.S. Trustee expressed concern as to the adequacy of the disclosure as to the contractual agreement.

According to the Court's opinion, the trustee's search of public records (Deloitte would not disclose its clients) established that Deloitte was the independent auditor of A.G. Edwards, Inc. and American Gaming & Entertainment, Ltd. The opinion only focused on the latter relationship since the trustee was only suing Edwards "for an individual investor." *Id.* at 333, n.3. I do not quite understand this, but it is not important as far as the concerns expressed in this memorandum.

The trustee's disclosure stated that American Gaming is a publicly owned holding company of Shamrock Holdings Group, Inc., a subsidiary of one of the debtors included in the Consolidated Estate. *Id.* at 333. Shamrock owned 40% of the common stock and all of the preferred stock of American Gaming. American Gaming was also indebted to Shamrock in the approximate amount of $65 million.

The U.S. Trustee insisted on disclosure by Deloitte of its private clients since "it is not possible to determine whether there is a potential for conflict for Breeden in representing the Consolidated Estate and in acting as a consultant to Deloitte." *Id.* at 334. The court stated that Rule 2014(a) "requires the Trustee to disclose any connections Deloitte might have with the Debtors, creditors and any other party in interest." *Id.* at 334. The court went on to observe that it was "left without answers to whether, in addition to A.G. Edwards and . . . [American Gaming], any of Deloitte's private clients have ties to the case and to what extent." *Id.* at 335.

The trustee argued that the services he was rendering under the consulting arrangement with Deloitte were services on behalf of Deloitte, not its clients. Deloitte was neither a creditor nor a party in interest in the consolidated cases. Nonetheless, the court observed that

> [t]he question of "whether a professional [in this case, the trustee] has 'either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors -- an incentive sufficient to place those parties at more than acceptable risk -- or the reasonable perception of one,'" . . . cannot be addressed in a vacuum without the benefit of knowing whether Deloitte numbers among its private clients any of the creditors of the estate or defendants in any of the thousands of adversary proceedings commenced by the Trustee in this case.

Id. at 335.

The court concluded that Breeden must either resign as trustee or terminate his consulting arrangement with Deloitte effective as of the date of his consulting agreement.

Under Rule 2014(a), a professional seeking employment must disclose any connection the professional has with a creditor or any party in interest. In addition, the professional must disclose any connection the professional has with any lawyer or any accountant for a creditor or party in interest in the case. Under section 1109(b), party in interest includes an equity security holder. Apparently the drafters of Rule 2014(a) assumed that the person to be employed could determine connections with accountants or attorneys for a creditor, equity security holder or other party in interest. How is this possible? Perhaps the Rules need to be amended to require that

the debtor (or in appropriate cases the trustee) identify the accountants and lawyers of creditors and other parties in interest in the schedules.

Bankruptcy Rule 2014(a) requires a disclosure of connections with the debtor, creditors and any other party in interest and their respective attorneys and accountants. The trustee had a connection with Deloitte, but the trustee could not determine whether Deloitte was an accountant for a debtor, creditor or other party in interest. Without such knowledge, how could the relationship of Deloitte to a creditor or equity security holder or other party in interest create a problem?

I do not intend to belabor the point, but the rule as written is unsound and its application by the U.S. Trustee and the courts is causing unnecessary misery to the courts as well as professionals ensnared in its beguilingly simple language. This reflects badly on courts, lawyers and the bankruptcy system. I attach my recent law review article concerning disinterestedness; it has some of the background of the drafting of the rule and how it evolved. At the very least, we should eliminate the requirement of disclosure of connections with attorneys and accountants, replacing this with the requirement that there be disclosure of any adverse interest. I would also recommend that we define connections or relationships. Surely we can do better than the dictionary definition of connection and relationship:

> Relationship.
>
> **1** : the state of being related or interrelated (entered into the marriage ~) **2** : the relation connecting or binding participants in a relationship: as **a** : KINSHIP **b** : a specific instance or type of kinship **3 a** : a state of affairs existing between those having relations or dealings (had a good ~ with his family) **b** : a romantic or passionate attachment

Webster's Ninth New Collegiate Dictionary (1988), p. 994.

> Connection.
>
> **1** : the act of connecting : the state of being connected: as **a** : causal or logical relation or sequence (the ~ between two ideas) **b** : contextual relations or associations (in this ~ the word has a different meaning) **c** : a relation of personal intimacy (as of family ties) **d** : COHERENCE, CONTINUITY **2 a** : something

that connects : LINK (a loose ~ in the writing) **b** : a means of communication or transport **3** : a person connected with others esp. by marriage, kinship, or common interest (has powerful ~s in high places) **4** : a social, professional, or commercial relationship: as **a** : POSITION, JOB **b** : an arrangement to execute orders or advance interests of another (a firm's foreign ~s) **c** : a source of contraband (as illegal drugs) **5** : a set of persons associated together : as **a** : DENOMINATION **b** : CLAN

Webster's Ninth New Collegiate Dictionary (1988), p. 278.

GKS/spg

BENNETT Disclosure

In re The BENNETT FUNDING GROUP, INC., Debtors.

Bankruptcy No. 96-61376.

United States Bankruptcy Court, N.D. New York.

Sept. 2, 1998.

Chapter 11 trustee filed application for interim compensation, which was opposed by the United States Trustee. Newspaper requested that retainer agreement between trustee and national accounting firm be made matter of public record. The Bankruptcy Court, Stephen D. Gerling, Chief Judge, held that: (1) Chapter 11 trustee had to resign either his position as trustee or his position as consultant with accounting firm due to his inability to perform comprehensive conflicts check to establish his continued disinterestedness, and (2) since retainer agreement was no longer relevant to case, it would not be publicly disclosed.

Ordered accordingly.

1. Bankruptcy ⇐3009

Chapter 11 trustee in consolidated case, who was employed by national accounting firm as consultant, was required to disclose any connections firm might have had with debtors, creditors, and any other party in interest, and this requirement continued to apply throughout case. Fed.Rules Bankr. Proc.Rule 2014(a), 11 U.S.C.A.

2. Bankruptcy ⇐3029.1, 3179

It is critical to the integrity of the bankruptcy process that disclosure of material facts which relate to disinterestedness be timely and thorough.

3. Bankruptcy ⇐3003

It is bankruptcy court, rather than Chapter 11 trustee, that is to make determination of whether trustee is disinterested. Bankr.Code, 11 U.S.C.A. § 1104(d).

4. Bankruptcy ⇐3003, 3007

Chapter 11 trustee, who was retained as required to resign as trustee or as consultant, where accounting firm's policy of never disclosing client relationships with non-public companies made comprehensive conflicts check to establish trustee's continued disinterestedness impossible. Bankr.Code, 11 U.S.C.A. § 1104(d).

5. Records ⇐32

The bankruptcy court, at the request of a party in interest, is required to protect access to papers filed in a case containing trade secrets, or confidential research, development or commercial information. Bankr. Code, 11 U.S.C.A. § 107(b)(1).

6. Records ⇐32

Retainer agreement between Chapter 11 trustee and national accounting firm, which was provided to bankruptcy court for in camera review, would not be disclosed to newspaper that requested it; since court directed trustee to resign either his position as trustee or his position with accounting firm due to his inability to perform comprehensive conflicts check to establish his continued disinterestedness, terms of retainer agreement were no longer relevant to proceedings. Bankr.Code, 11 U.S.C.A. § 107.

Simpson, Thacher & Bartlett (George Newcombe, of counsel), New York City, for § 1104 Trustee.

Wasserman, Jurista & Stolz (Harry Gutfleish, of counsel), Millburn, NJ, for Official Committee Unsecured Creditors.

Guy Van Baalen, Utica, NY, for Assistant U.S. Trustee.

Bond, Schoeneck & King, LLP (James Dati, of counsel), Syracuse, NY, for The Herald Company.

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

STEPHEN D. GERLING, Chief Judge.

Presently before the Court is the Sixth Application for Interim Compensation, Provisional Monthly Payments and Provisional

filed by Richard C. Breeden as chapter 11 trustee ("Trustee" or "Breeden") on April 15, 1998. The Sixth Application was initially heard on May 21, 1998, and adjourned for further argument to June 11, 1998, June 25, 1998 and July 16, 1998.

Opposition to the Sixth Application was interposed by the United States Trustee ("UST") on May 18, 1998. Among other things, the UST expressed concerns with the disclosure by the Trustee of his contractual arrangement with the accounting firm of Deloitte & Touche (USA), LLP ("Deloitte").[1]

At the initial hearing on May 21, 1998, the Court indicated that it would withhold its approval of the Sixth Application until it had an opportunity to review a supplemental application which it required the Trustee to file outlining the contractual arrangements with Deloitte. On June 9, 1998, the Trustee filed what is identified as his Fourth Supplemental Affidavit, in which he acknowledged having entered into the Retainer Agreement to "provide consulting services to Deloitte concerning regulatory and other matters affecting domestic and international capital markets and the financial services industry generally. My consulting services may also include such legislative, regulatory, administrative or business issues as to which Deloitte may seek my advice and counsel and that are reasonably acceptable to me." *See* Trustee's Fourth Supplemental Affidavit at ¶ 8. A copy of the Retainer Agreement, however, is not attached to the Trustee's Fourth Supplemental Affidavit.

On June 11, 1998, the Court heard further argument concerning the Trustee's Sixth Application, in particular his retention by Deloitte. The Court agreed to again adjourn the hearing on the Sixth Application in order to allow the UST and counsel for the Unsecured Creditors Committee ("Committee") to have an opportunity to respond to the Trustee's Fourth Supplemental Affidavit filed with the Court two days prior to the hearing.

The Court directed the Trustee to provide a copy of the Retainer Agreement to it for *in camera* review. Counsel for The Herald Company, the publisher of the Syracuse, New York, newspapers, requested that the Retainer Agreement be made a matter of public record. The UST and the Committee also expressed the view that the Retainer Agreement should be made available to them as well. The Court indicated that anyone objecting to the submission of the Retainer Agreement to the Court for *in camera* review, file papers prior to the adjourned hearing date of June 25, 1998.

On June 22, 1998, the Trustee filed with the Court a copy of the Retainer Agreement for its *in camera* review. At the hearing on June 25, 1998, the parties agreed to again adjourn the matter to July 16, 1998, in order for them to have time to respond to the request by The Herald Company, dated June 18, 1998, that the Retainer Agreement be made available to it based on a common law and First Amendment right of access. The letter requesting access to the Retainer Agreement was filed with the Court on June 19, 1998, but was not served on any of the parties appearing at the prior hearing on June 11th.

At the June 25th hearing, the UST expressed concerns regarding not only information presumably in the Retainer Agreement, but also the fact that it did not appear that the Trustee had performed a conflicts check with respect to Deloitte and its clients.

On July 14, 1998, the Trustee filed what is identified as his "Fourth Supplemental Affidavit" but actually appears to be his "Fifth" in view of the fact that he filed the "Fourth" on June 9, 1998. At the hearing on July 16, 1998, the Court again heard oral argument by the parties, including counsel for the Committee and counsel for The Herald Company. At the conclusion of the hearing, the Court afforded the parties an opportunity to file additional memoranda of law on the following matters: (1) the substantive objec-

1. The disclosure was not made part of the Sixth Application. Instead, the Trustee filed his Third Supplemental Affidavit on April 16, 1998, in which he indicates, *inter alia*, that he entered into an agreement ("Retainer Agreement") with Deloitte allegedly in early February to "make myself available from time to time on a limited basis to consult to Deloitte on issues concerning capital markets, regulatory matters, legislative issues and other issues unrelated to the Bennett bankruptcy or to bankruptcy matters generally." *See* Trustee's Third Supplemental Affidavit at ¶ 3.

tions to the Trustee's Sixth Application, (2) the alleged conflict of interest arising as a result of the Trustee's employment with Deloitte, and (3) the public's right of access to the Retainer Agreement.[2] The matters were submitted for decision on August 6, 1998. Only the second and third matters will be addressed in the Decision herein; the substantive issues raised in connection with the Sixth Application will be addressed by the Court in a separate decision.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of these contested matters pursuant to 28 U.S.C. §§ 1334(b) and 157(a), (b)(1) and (2)(A).

FACTS

On March 29, 1996, The Bennett Funding Group, Inc. ("BFG"), Bennett Receivables Corporation ("BRC"), Bennett Receivables Corporation II ("BRC–II"), Bennett Management & Development Corporation ("BMDC") filed voluntary petitions seeking relief under chapter 11 of the Bankruptcy Code. The Trustee was appointed trustee for each of them on April 18, 1996. On April 19, 1996, Resort Service Company, Inc. ("RSC") and American Marine International, Ltd. ("AMI") filed petitions for relief under chapter 11, and on April 25, 1996, an involuntary chapter 11 case was filed against Aloha Capital Corporation ("Aloha"). The Processing Center, Inc. ("TPC") filed a voluntary chapter 11 petition on April 26, 1996, and on May 10, 1996, the Court entered an order for relief against Aloha. The Trustee's appointment for AMI, RSC, TPC and Aloha was approved by the Court on May 15, 1996. By Order dated July 25, 1997, the Court substantively consolidated all of the Debtors' estates ("Consolidated Estate").

At the time of his appointment as trustee, Breeden was employed as a partner in the accounting firm of Coopers & Lybrand. However, on October 1, 1996, Breeden resigned from his position with Coopers & Lybrand. The Trustee is also a former Chairman of the Securities and Exchange Commission.

According to the Trustee's Fourth Supplemental Affidavit, since February 1, 1998, he has devoted approximately 2½ hours to work for Deloitte. The Trustee further indicates that his obligation to perform services in connection with the Retainer Agreement is limited to 32 hours per month or as the Trustee notes, "the [e]quivalent to working on Saturdays during a particular month." *See* Fourth Supplemental Affidavit at ¶ 11, n. 2. The Trustee also states that "[i]n no event am I obligated to do anything for Deloitte that in my judgment is not consistent with my time commitments to the Bennett case, or that may otherwise be deemed by me to impair in any way my performance in the primary assignment." *See id.* at ¶ 14. In response to concerns over the Retainer Agreement, the Trustee indicates his willingness "to provide a confidential report, filed under seal with the Court, of the approximate time, if any, devoted to Deloitte under the Retainer Agreement in each quarterly fee period." *See id.* at ¶ 17.

With respect to his retention by Deloitte, the Trustee indicates that a conflict check was performed at his request to determine the extent of Deloitte's involvement with parties active in the consolidated case as identified in Schedule "A" attached to the Trustee's "Fifth" Supplemental Affidavit. Trustee's counsel limited its search to publicly available information since Deloitte advised the Trustee that "it considers its client relationships with non-public companies to be highly proprietary, and that it does not ever disclose such relationships with its clients." *See* Trustee's "Fifth" Supplemental Affidavit at ¶ 3.

The search reveals that Deloitte acts as independent auditor to A.G. Edwards, Inc., identified in Schedule "A" as a "broker,"[3]

2. The Committee also raised a question concerning the fees of Trustee's counsel, Simpson, Thacher & Bartlett ("STB"), incurred in connection with the Trustee's employment with Deloitte and the ancillary issues raised by it. The Court appropriate to hold that particular matter in abeyance until it was asked to approve the fee application of STB in connection with those services.

3. Although identified as a broker, there is no

and to American Gaming & Entertainment, Ltd. ("AGEL"), which, according to the Trustee, is a publicly owned holding company of gaming assets. Shamrock Holdings Group, Inc. ("Shamrock"), a subsidiary of the Consolidated Estate and also in bankruptcy, allegedly owns 40% of AGEL's common stock and 100% of AGEL's Series A, C, D & E preferred stock. According to the Trustee, AGEL currently owes approximately $65 million to Shamrock. The Trustee indicates that an adversary proceeding has been commenced against AGEL seeking the recovery of approximately $70 million. *See* Trustee's Supplemental Memorandum of Law at 2.

DISCUSSION

Trustee's Employment by Deloitte

"Disclosure" is at the heart of the matters now before the Court. The Herald Company contends that the Retainer Agreement should be disclosed based on the common-law and First Amendment right of access. The UST asserts that without disclosure by Deloitte of its private clients it is not possible to determine whether there is a potential for actual conflict for Breeden in representing the Consolidated Estate and in acting as a consultant to Deloitte. The UST also raises concerns over the Trustee's piecemeal disclosure of information in connection with his employment by Deloitte, as evidenced by three separate affidavits filed by the Trustee in an effort to clarify his role as a consultant to Deloitte without the need for making the actual Retainer Agreement public. Indeed, it is the Trustee's position with respect to disclosure of his retention by Deloitte that

> I did not seek advance approval for this agreement because I did not know of any legal requirements other than a notice filing, which I made. Given the very limited nature of the Retainer Agreement and my expectation that the actual time devoted to this agreement would be minuscule, and did not in any event result in *any* reduction in my actual hours devoted to the Bennett case, I did not view it as a particularly significant event.

See Fourth Supplemental Affidavit at ¶ 17. Indeed, at the hearing on May 21, 1998, when the relationship with Deloitte first came to light and the Court questioned him concerning the Trustee's delay in disclosing his arrangement with Deloitte, Trustee's counsel stated, "Mr. Breeden knows what the scope of the job is, he doesn't believe there's any conflict whatsoever [with] his time spent on the estate." *See* Transcript of May 21, 1998 hearing at 22.

[1, 2] None of the parties dispute the Trustee's right to engage in other employment. It is also evident from the supplemental affidavits by the Trustee that the time commitment made to Deloitte is limited and should not interfere with the time spent on matters of the Consolidated Estate. However, § 1104(d) of the Code (11 U.S.C. §§ 101–1330) ("Code") requires that a trustee appointed thereunder be a "disinterested person." Rule 2014(a) of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") requires the Trustee to disclose any connections Deloitte might have with the Debtors, creditors and any other party in interest. *See In re Granite Partners, L.P.*, 219 B.R. 22, 35 (Bankr.S.D.N.Y.1998).[4] The disclosure requirements continue to apply throughout the case. *See id.* (citations omitted). Furthermore, the Court is of the opinion that it is critical to the integrity of the bankruptcy process that disclosure of material facts which relate to disinterestedness be timely and thorough. *See In re Martin*, 817 F.2d 175, 182 (1st Cir.1987) (stating that "[t]here must be at a minimum full and timely disclosure of the details of any given arrangement. *** he has a responsibility to leave no reasonable stone unturned in bringing the matter to a head at the earliest practical moment."); *see also In re Blinder, Robinson &*

the Trustee except as trustee for an individual investor. *See id.* at n. 1 and Trustee's Supplemental Memorandum of Law, filed Aug. 6, 1998 at 2.

4. Although *Granite Partners* addressed the employment of trustee's counsel, the case law and analysis relating to professional persons is no less applicable to chapter 11 trustees on the issue of disinterestedness. *See In re Micro-Time Management Systems, Inc.*, 102 B.R. 602, 606 (Bankr. E.D.Mich.1989).

Co., Inc., 131 B.R. 872, 882 (D.Colo.1991) (noting that "the Trustee and the firm deprived the court of the opportunity to address the disinterestedness issue at the earliest possible point in the process and created the impression that they were less than forthright.").[5]

In this case, the Trustee's initial disclosure was neither timely nor thorough. Over two and one half months elapsed before he filed his Third Supplemental Affidavit on April 16, 1998, revealing his retention by Deloitte. The limited information contained therein necessitated his filing not only one but two more supplemental affidavits and even after the "Fifth" Supplemental Affidavit, the Court and the parties remain "in the dark" concerning conflicts that may exist with respect to Deloitte's private clients.

[3] The Trustee appears to believe that the Court and the parties should simply rely on him as a fiduciary to make an independent determination that he remains disinterested. Yet, this is not an appropriate determination for the Trustee to make.

> Such an exercise in *ipse dixit* is not permissible. That the Trustee internalized this decision, rather than presenting the relevant information to the court and other parties for an objective determination of disinterestedness suggests that the Trustee is selective about the information he provides to the court and fails to acknowledge the high fiduciary standard to which he must abide to the point of punctilio.

Blinder, Robinson & Co., 131 B.R. at 883, citing *Securities & Exchange Comm'n v. Schreiber Bosse & Co.*, 368 F.Supp. 24, 26 (N.D.Ohio 1973); *see also Granite Partners*, 219 B.R. at 35 (noting that a professional "cannot usurp the court's function by choosing, *ipse dixit*, which connections impact disinterestedness and which do not."). It is the Court that is "in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls which such a decision entails." *Martin*, 817 F.2d at 182.

[4] Having said that, the Court must evaluate the facts and circumstances presented by the Trustee in determining whether, as the UST suggests, Breeden should resign either from his role as trustee of the Consolidated Estate, or from his position with Deloitte. The Trustee is required to disclose *all* facts that may have a bearing on his disinterestedness. *See Granite Partners*, 219 B.R. at 35. Unfortunately, the Trustee has failed to provide the Court with sufficient information to make a determination concerning his disinterestedness. The limited inquiry made on behalf of the Trustee revealed a relationship between Deloitte and AGEL, an entity being sued by the Trustee for in excess of $70 million. Whether this creates a potential for an actual conflict need not be addressed herein, however. Rather, it is the Trustee's explanation that a full conflicts check was not possible because of Deloitte's policy with respect to its private clients that raises concerns of the Court. The fact of the matter is that the Court is left without answers to whether, in addition to A.G. Edwards and AGEL, any of Deloitte's private clients have ties to the case and to what extent. The Trustee argues that his services are being rendered on behalf of Deloitte, and that Deloitte is neither a creditor nor a party in interest in the case. The question of "whether a professional [in this case, the Trustee] has 'either a meaningful incentive to act contrary to the best interests of the estate and its sundry creditors—an incentive sufficient to place those parties at more than acceptable risk—or the reasonable perception of one,'" *In re Leslie Fay Companies, Inc.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y.1994) (quoting *In re Martin*, 817 F.2d at 180–81), cannot be addressed in a vacuum without the benefit of knowing whether Deloitte numbers among its private clients any of the creditors of the estate or defendants in any of the thousands of adversary proceedings commenced by the Trustee in this case.

5. The court in *Blinder* addressed the retention of a trustee and his counsel pursuant to the Securities Investor Protection Act ("SIPA"), 15 U.S.C. §§ 78aaa–7811. The court noted that "[t]he strictness with which the SIPA disinterestedness standard is viewed is echoed in decisions construing the similar requirements under § 101(14) of the Bankruptcy Code...." *Blinder, Robinson & Co.*, 131 B.R. at 878 and n. 3.

Based on the Trustee's inability to provide a comprehensive conflicts check of Deloitte's clients, the Court concludes that the Trustee should apprise the Court of his decision to either resign his position as Trustee of the Consolidated Estate, or as consultant to Deloitte effective *nunc pro tunc* to the date his employment with Deloitte became effective.[6] The Court wishes to emphasize that it makes no finding herein that the Trustee's position as consultant to Deloitte constitutes a materially adverse interest to that of the Consolidated Estate.

Right of Access to the Retention Agreement

[5] Courts in this country have long recognized the public's right of access to judicial records. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98, 98 S.Ct. 1306, 1312, 55 L.Ed.2d 570 (1978). The strong presumption favoring public access is intended to promote confidence in the judicial process by providing the public with a means to monitor the functioning of our courts. *See In re Amodeo*, 71 F.3d 1044, 1048 (2d Cir.1995). Congress manifested an intent to preserve this right in the context of bankruptcy proceedings by enacting Code 107(a), which provides that "a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." 11 U.S.C. § 107(a). However, the right of the public is not without limitation. *See In re Orion Pictures Corp.*, 21 F.3d 24, 27 (2d Cir.1994). Indeed, Code § 107(b) sets forth certain statutory exceptions whereby the court, at the request of a party in interest, is required to protect access to trade secrets or confidential research, development or commercial information. If it is determined that the information sought to be disclosed fits into any of the specified categories, the Court has no discretion in denying access to it. *See id.* If the information does not represent trade secrets or confidential research, development or commercial information, then whether to permit access to the information is a matter left to the Court's discretion. *See Nixon*, 435 U.S. at 599, 98 S.Ct. at 1312. It requires the Court to examine the relevant facts and circumstances and then to balance the interests of the party opposing disclosure with that of the public. *See id.* at 602, 98 S.Ct. at 1314.

[6] The Trustee, in this case, points out that the Retainer Agreement, although provided to the Court for *in camera* review, has not actually been filed and, therefore, is not part of the public record. Accordingly, the Trustee asserts that neither Code § 107, the common law nor the First Amendment are applicable. In response, counsel representing The Herald Company directs the Court to Fed.R.Bankr.P. 5005(a) which states that "[t]he judge of the court may permit the papers to be filed with the judge." It is the position of The Herald Company that by providing the Court with a copy of the Retainer Agreement for review it was "filed with the judge." However, a further reading of the Rule and the comments to it makes it clear that "filing with the judge" is intended to address the situation in which the Clerk's Office is not open and "time may be of the essence or a deadline or bar date may require the parties to file directly with a bankruptcy judge of the court ... rather that wait until the Clerk's Office opens for business...." *See* Editor's Comment to Fed. R.Bankr.P. 5005. In this case, there was no statutory requirement that the Retainer Agreement be filed and there certainly was no deadline or bar date for "filing" the Retainer Agreement with the Clerk's Office that necessitated its submission to the Court. Rather, the Court required that the Trustee provide it with a copy of the Retainer Agreement in order to ascertain the nature and extent of the Trustee's commitment to Deloitte.

The fact that the Retainer Agreement has not been formally filed with the Clerk's Office does not mean that it is not a judicial record or document. The Court's inquiry, in light of the policy underlying the public's right of access, namely that the public have confidence in the administration of justice, must focus on whether the Retainer Agreement was "relevant to the performance of the judicial function and useful in the judicial

6. Making resignation from Deloitte effective as of

might encourage parties to delay making the

process in order for it to be designated a judicial document." *See United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir.1995).

Because the Court has directed that the Trustee either resign his position as Trustee of the Consolidated Estate or his consultant position with Deloitte based on his inability to perform a comprehensive conflicts check to establish his continued disinterestedness, the terms of the Retainer Agreement are no longer relevant to these proceedings and to the decision herein and need not be considered by the Court.

Based on the foregoing, it his hereby

ORDERED that the Trustee shall apprise the Court within 30 days of the date of this Order whether he intends to resign his position as Trustee of the Consolidated Estates or to resign his position as consultant for Deloitte, and it is further

ORDERED that the request of The Herald Company, as well as that of the UST and the Committee, for access to the Retainer Agreement is denied without prejudice.

In re BENDER READY MIX, INC., Debtor.

Bankruptcy No. 94-11657 B.

United States Bankruptcy Court, W.D. New York.

Oct. 15, 1998.

After submission of Chapter 7 trustee's final report but before trustee's distribution of estate assets, debtor-corporation's former president filed supplemental claim for $100,000 that he paid to settle adversary proceedings brought by trustee to recover allegedly preferential payments from him. Trustee objected. The Bankruptcy Court, Carl L. Bucki, J., held that former president's supplemental claim was timely, even though it was not filed within 30 days of payment of preference settlement.

Objection overruled and supplemental claim allowed.

1. Bankruptcy ⇐2897.1

Bankruptcy rule setting forth 30-day period for filing proofs of claim resulting from judgments has application only to instances in which claim arises from final judgment, not to those in which claim results from settlement. Fed.Rules Bankr.Proc.Rule 3002(c)(3), 11 U.S.C.A.

2. Bankruptcy ⇐2897.1

Supplemental claim filed by Chapter 7 debtor-corporation's former president for $100,000 that he paid to settle adversary proceedings brought by trustee to recover allegedly preferential payments from him was timely, even though it was not made within 30 days of payment of preference settlement; absent entry of final judgment against former president, bankruptcy rules imposed no time limit for timely filing of supplemental proof of claim. Fed.Rules Bankr.Proc.Rule 3002(c)(3), 11 U.S.C.A.

3. Bankruptcy ⇐2897.1

While need for efficient administration may at times require enforcement of time limitations on filing of claims, such concerns should not unduly preempt bankruptcy system's fundamental concern for fairness.

4. Bankruptcy ⇐2157

Unless time limit was clearly expressed, bankruptcy court would not read into the bankruptcy rules a restriction that could, at most, only be inferred.

Hodgson, Russ, Andrews, Woods & Goodyear (Peter A. Muth, of Counsel,) Buffalo, NY, for Claimant.

Zdarsky, Sawicki & Agostinelli, (Mark J. Schlant, of Counsel,) Buffalo, NY, for Trustee.

CARL L. BUCKI, Bankruptcy Judge.

Virtually on the eve of the trustee's final distribution in this Chapter 7 proceeding,

v. Wal-Mart Stores, Inc., 54 F.3d 69, 72–73 (2d Cir.1995) (declining to consider appellant's argument not raised in district court absent a showing of manifest injustice or extraordinary need). Furthermore, this argument—that Carlisle could have mitigated its damages by selling the shares at more than 350 pesetas per share at the time of disclosure of the breach of warranty—is made irrelevant by our decision that the district court should not have relied on the 350 pesetas per share valuation.

V. *CONCLUSION*

For the foregoing reasons, we reverse and remand for a recalculation of damages.

In re AROCHEM CORPORATION, Debtor.

Bank Brussels Lambert, Banque Indosuez, Chase Manhattan Bank, N.A., Swiss Bank Corporation, Victory Holding Company, Crail Fund, Skopbank, Eric Johnson, Sherry L. Hutchison, The Estate of Robert Johnson, and Victory Oil Company, Appellants,

v.

Richard M. COAN, Trustee, Appellee.

Docket No. 98–5009.

United States Court of Appeals, Second Circuit.

Argued Sept. 23, 1998.

Decided May 18, 1999.

Chapter 7 trustee filed application to employ law firm as special counsel in state court action against various defendant creditors, and defendant creditors objected. The Bankruptcy Court, Alan H.W. Shiff, J., 181 B.R. 693, conditionally authorized the retention, and, subsequently, approved revised retention application. Creditors appealed. The United States District Court for the District of Connecticut, Eginton, J., affirmed. On further appeal, the Court of Appeals, Meskill, Circuit Judge, held that, with respect to limited scope of its retention, law firm was a disinterested person and did not hold or represent an interest adverse to bankruptcy estates, notwithstanding firm's past representation of a creditor in litigation against same defendant creditors.

Affirmed.

1. Bankruptcy ⇐3768

Cohen doctrine allows appeal from certain "collateral" orders if they (1) conclusively determine disputed question, (2) resolve important issue completely separate from merits of the action, and (3) are effectively unreviewable on appeal from final judgment.

2. Federal Courts ⇐585.1

In nonbankruptcy cases, orders granting or denying motions to disqualify counsel are not considered "final" and are not immediately appealable.

3. Bankruptcy ⇐3767

Bankruptcy court's order authorizing Chapter 7 trustee's retention of counsel to pursue lawsuits against creditors on behalf of debtors' estates, and district court's order affirming that order, were "final orders" over which Court of Appeals had jurisdiction, since neither lower court suggested that its order would be reconsidered, district court specifically held that bankruptcy court's order was final, and district court did not order any further proceedings in bankruptcy court. Bankr. Code, 11 U.S.C.A. § 327(a); 28 U.S.C.A. § 158(d).

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

4. Bankruptcy ⇐3782, 3786

On appeal from district court's review of bankruptcy court decision, Court of Appeals reviews bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law de novo.

5. Bankruptcy ⇐3029.1

By regulating trustee's ability to hire professionals, Bankruptcy Code provision governing trustee's ability to retain professionals serves important policy of ensuring that all professionals appointed to represent trustee tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities. Bankr.Code, 11 U.S.C.A. § 327.

6. Attorney and Client ⇐21.5(6)

Because law firm was hired as "special" counsel for limited purpose of pressing Chapter 7 trustee's state court action against certain creditors, rather than as general counsel to handle the entire bankruptcy proceeding, any potential conflicts had to be evaluated only with respect to scope of firm's proposed retention, thus requiring court to ask whether, with respect to the special representation it had been hired to undertake, law firm (1) held or represented an interest that was adverse to the estate, and (2) was a "disinterested person." Bankr.Code, 11 U.S.C.A. § 327.

7. Attorney and Client ⇐21.5(6)

Where bankruptcy trustee seeks to appoint counsel only as "special counsel" for a specific matter, there need only be no conflict between trustee and counsel's creditor client with respect to the specific matter itself. Bankr.Code, 11 U.S.C.A. § 327.

8. Attorney and Client ⇐21.5(6)

Where interest of special counsel and interest of bankruptcy estate are identical with respect to the matter for which special counsel is retained, there is no conflict and the representation can stand. Bankr. Code, 11 U.S.C.A. § 327.

9. Bankruptcy ⇐3029.1

Under bankruptcy statute governing employment of professionals, whether an adverse interest exists is best determined on a case-by-case basis. Bankr.Code, 11 U.S.C.A. § 327.

10. Attorney and Client ⇐21.5(6)

Law firm did not personally "hold" any interests adverse to debtors' estates, and, thus, this ground did not serve as basis for disqualifying law firm as special counsel in Chapter 7 trustee's state court action against various defendant creditors, despite law firm's prior representation of another creditor who was embroiled in litigation against defendant creditors and who was a defendant in derivative claims brought on estates' behalf, where law firm was not prepetition creditor of estates, nor did it personally possess any claims or interests contrary to the estates. Bankr. Code, 11 U.S.C.A. § 327.

11. Attorney and Client ⇐21.5(6)

Law firm did not represent any interests adverse to Chapter 7 debtors' estates based on firm's prior representation of creditor who was embroiled in litigation against other creditors and who was a defendant in derivative claims brought on estates' behalf, since law firm had terminated all representation of creditor. Bankr.Code, 11 U.S.C.A. § 327(a).

12. Statutes ⇐198

Congress' use of a verb tense is significant in construing statutes.

13. Attorney and Client ⇐21.5(6)

Counsel will be disqualified due to adverse interests only if it presently holds or represents an interest adverse to bankruptcy estate, notwithstanding any interests it may have held or represented in the past. Bankr.Code, 11 U.S.C.A. § 327(a).

14. Attorney and Client ⇐21.5(6)

Even assuming statute preventing retention of counsel with interests adverse to bankruptcy estate applied to past repre-

sentation, law firm's prior representation of creditor did not create actual conflict of interest with respect to matters within scope of law firm's limited retention as special counsel in Chapter 7 trustee's state court action against various defendant creditors, absent any evidence that creditor's proofs of claim were germane to subject matter of trustee's state court action, or to any other possible aspect of law firm's proposed employment. Bankr. Code, 11 U.S.C.A. § 327(c).

15. Attorney and Client ⇐21.5(6)

Law firm's prior representation of debtors' investment advisor, in advisor's capacity as a target of claims made by estates, did not demonstrate interest adverse to estates so as to warrant firm's disqualification from retention as special counsel in Chapter 7 trustee's state court action against various creditors, where trustee testified that after investigation he concluded there were no viable claims against investment advisor, and there was no evidence that any potential claims against investment advisor were relevant to matters to be litigated in trustee's state court action. Bankr.Code, 11 U.S.C.A. § 327(a).

16. Attorney and Client ⇐21.5(6)

Contention that bankruptcy estate had additional claims against creditor that would be lost if law firm were allowed to represent Chapter 7 trustee did not demonstrate that law firm had adverse interest to estate so as to preclude its retention as special counsel in trustee's state court action against other creditors; law firm was no longer representing creditor, so firm would never be in position of simultaneously suing and defending creditor, and, in any event, trustee made judgment that it was in best interest of estate to sue defendants named in trustee's state action, and to that end align its interest with nondefendant creditor. Bankr.Code, 11 U.S.C.A. § 327.

17. Attorney and Client ⇐21.5(6)

There is no per se ban against bankruptcy estate's retention of special counsel whenever special counsel has previously represented a creditor, but, rather, given the fact-specific nature of parties' interests and their alignments, each case must finally turn on its own circumstances, based on a common-sense divination of adversity or commonality. Bankr.Code, 11 U.S.C.A. § 327.

18. Attorney and Client ⇐21.5(6)
Bankruptcy ⇐3030

Retention of law firm, as special counsel in Chapter 7 trustee's state court litigation against certain creditors, was proper based on identity of interests between trustee and special counsel's former client with respect to the special matter for which special counsel was retained; in their separate state court actions, trustee and special counsel's former client each sought to establish same set of predicate facts in order to prevail over many of the same defendants, and, to extent that former client had interests adverse to bankruptcy estates, by virtue of his status as defendant in derivative or other potential claims, those interests were not within scope of special counsel's representation. Bankr. Code, 11 U.S.C.A. § 327.

19. Bankruptcy ⇐3785.1

Bankruptcy judges' findings on conflict of interest questions are entitled to deference because bankruptcy judge is on the front line, in best position to gauge ongoing interplay of factors and to make delicate judgment calls which such a decision entails. Bankr.Code, 11 U.S.C.A. § 327.

20. Attorney and Client ⇐21.5(6)
Bankruptcy ⇐3177

If bankruptcy court were later to perceive a materially adverse interest on part of debtor's counsel, court has many permissible remedies, including disqualification and disallowance of all or some fees. Bankr.Code, 11 U.S.C.A. § 327.

21. Attorney and Client ⇐21.5(6)

That law firm prosecuted claims against other creditors on first creditor's behalf in first creditor's state court action did not give law firm an interest materially adverse to interest of a class of creditors or equity security holders so as to render law firm disinterested and thus preclude Chapter 7 trustee's retention of law firm to pursue lawsuits against creditors on behalf of debtors' estates; at most, law firm "represented" interests adverse to a class of creditors when it represented first creditor, but, because firm personally did not "have" such an adverse interest, it remained a "disinterested person." Bankr. Code, 11 U.S.C.A. §§ 101(14)(E), 327.

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

22. Bankruptcy ⇐3029.1

Statute defining "adverse interests" of bankruptcy professional is properly read to implicate only the personal interests of the professional whose disinterestedness is under consideration, and, accordingly, to run afoul of the statute, a professional personally must "have" the prohibited interest. Bankr.Code, 11 U.S.C.A. § 101(14)(E).

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

Richard C. Tufaro, Washington, D.C. (Milbank, Tweed, Hadley & McCloy, Washington, D.C., of counsel), for Appellants The Chase Manhattan Bank, Banque Indosuez and Swiss Bank Corporation.

Andrew J. Frackman, O'Melveny & Myers, New York City, for Appellants Victory Oil Co., Victory Holding Co., Crail Fund, Eric C. Johnson, Sherry L. Hutchison and the Estate of Robert Johnson.

William S. Fish, Jr., Tyler, Cooper & Alcorn, Hartford, CT, for Appellants Bank Brussels Lambert and Skopbank.

Jerry J. Strochlic, Gibson, Dunn & Crutcher, New York City, of counsel, for Appellants.

Michael A. Caddell, Houston, TX (Caddell & Chapman, Houston, TX, Timothy D. Miltenberger, Coan, Lewendon, Royston & Gulliver, New Haven, CT, of counsel), for Appellee.

Before: MESKILL, LEVAL and STRAUB, Circuit Judges.

MESKILL, Circuit Judge:

Appeal from an order of the United States District Court for the District of Connecticut, Eginton, *J.*, affirming an order of the United States Bankruptcy Court for the District of Connecticut, Shiff, *C.B. J.*, authorizing the appellee trustee's retention of counsel to pursue lawsuits against creditors on behalf of the debtors' estates.

Affirmed.

BACKGROUND

This dispute grows out of the bankruptcy of AroChem Corporation and AroChem International, Inc. (collectively "AroChem" or the "Estates"), Delaware corporations formed in 1988 to engage in the petrochemical and petroleum business. The Trustee for the bankrupt Estates, appellee Richard M. Coan (Trustee), sought authority to employ the law firm of Caddell & Conwell ("Caddell" or "Caddell Firm") to pursue litigation, on the Estates' behalf, against various creditors and shareholders of AroChem. Appellants, named defendants in the Trustee's lawsuit who object to the retention of Caddell, consist of two groups of AroChem's biggest creditors: the "Bank Group," [1] comprising banks that lent money to AroChem, and the "Victory Group," [2] comprising, for the most part,

1. The Bank Group consists of Bank Brussels Lambert, Banque Indosuez, Chase Manhattan Bank, N.A., Swiss Bank Corporation, and Skopbank.

2. The Victory Group consists of Victory Oil Company, Victory Holding Company, The Crail Fund, Eric C. Johnson, Sherry L. Hutchinson and the Estate of Robert Johnson.

investment bankers who consulted on the creation of AroChem. Two nonparties, William R. Harris (Harris) and Edwin E. Wells (Wells), occupy central roles in the AroChem story, which is discussed briefly below.

In 1987 Wells assisted Harris in obtaining from the Victory Group financing needed to form AroChem. In return, Wells and Victory received a portion of AroChem's common stock and seats on its six-member board of directors. Harris maintained a sixty percent interest in AroChem and served as its president, chief executive officer and director. The Bank Group became involved when its members entered into a revolving credit agreement with AroChem in 1990, under which AroChem could borrow up to $245 million as needed for its business operations.

From the beginning of their relationship, Harris, Wells and the Victory Group disagreed about the operation and management of AroChem. Moreover, from 1989 forward, Wells accused Harris of serious wrongdoing at AroChem and of inflicting serious harm on the company. To that end he wrote letters to members of the Bank Group, before they executed the revolving credit agreement, warning them that Harris was engaging in unauthorized speculative oil trading with AroChem money and that criminal investigative authorities had been notified.

In 1991 the Bank Group discovered that AroChem's assets and net worth had been grossly overstated. In 1992, after an investigation confirmed that AroChem's senior management (including Harris) had engaged in widespread fraud, the Bank Group forced AroChem into involuntary bankruptcy under Chapter 11. The consolidated cases were later converted to Chapter 7 proceedings and Coan was appointed Trustee in August 1992. By the time the fraudulent scheme was uncovered and AroChem was placed in bankruptcy, the banks had lost in excess of $190 million.

In 1992 Harris was convicted of a variety of financial crimes growing out of his activity at AroChem, and he is now serving a 188 month term of imprisonment. *United States v. Harris*, 805 F.Supp. 166, 168 (S.D.N.Y.1992).

Prolific litigation evidences the discord among the players in the AroChem saga. The first lawsuit arose when the shareholder disputes over AroChem's management led Victory to elect to sell its shares. Victory proposed to sell its shares to Wells, who had a right of first refusal under the shareholder agreement. When no agreement was reached, however, Victory attempted to sell its shares to Harris. Wells objected, leading Victory to seek a judicial declaration that Victory was free to sell its shares to Harris. *Victory Holding Co. v. Stetson Capital Corp.*, No. 89–2334 (Apr. 23, 1989) (C.D.Cal.) (Victory Action). Wells asserted counterclaims seeking to compel Victory to sell the shares to him.

In July 1989, while the Victory Action was pending, Harris sued Wells and the Victory Group in the District of Connecticut, accusing Wells of failing to perform his duties as an investment advisor to AroChem and of harming Harris and AroChem by making false accusations. *Harris v. Wells*, No. B 89–391 (D.Conn.) (Harris Action). The following month, Wells brought suit in the District of Connecticut against Harris, other board members and AroChem. *Wells v. Harris*, No. B 89–482 (D.Conn.) (Wells Connecticut Action). Wells alleged that through certain shareholder agreements Harris had caused Wells to lose his equity interest in AroChem, and that Harris was engaging in speculative trading and other activities that were harming Wells and AroChem. In 1990 Harris and Wells each amended their complaints to assert derivative claims on behalf of AroChem and to name additional defendants. The Victory Action, the Harris Action and the Wells Connecticut Action were then consolidated for pretrial purposes before Judge Egin-

ton and the parties filed several counterclaims and cross-claims.

In the spring of 1994, Wells and his corporations retained Caddell, who, on Wells' behalf, brought an action in Texas state court against over fifty defendants, including Harris, the Bank Group and the Victory Group. *Wells v. Chase Manhattan Bank, N.A.*, No. 94–35500 (Dist. Ct., Harris Cty. Tex.) (filed July 19, 1994) (Wells Texas Action).

Between 1992 and 1994, the Trustee liquidated the physical assets of AroChem—primarily its oil refining facilities located in Puerto Rico—and became familiar with AroChem's history. In the summer of 1994, the Trustee began efforts to liquidate AroChem's only remaining assets: its causes of action. In addition to examining derivative causes of action brought by Harris against Wells and Wells against Harris, which the Trustee inherited when the AroChem Chapter 7 petition was filed, the Trustee investigated allegations by Wells that the Bank Group and others were active participants in the wrongdoing at AroChem. This allegation was evidenced by the Bank Group's lending more than $100 million to AroChem despite its awareness of allegations that Harris was engaging in criminal activity there.

In this endeavor, the Trustee instructed general counsel for the AroChem Estates, Coan, Lewendon, Royston & Gulliver, LLC (Coan, Lewendon), to investigate the Estates' potential claims. To this end, Coan, Lewendon reviewed internal records of AroChem as well as accounting records prepared by an independent auditor following the discovery of wrongdoing in 1990, consulted with a forensic accountant about the viability of claims against the Bank Group and the Victory Group, discussed with counsel for Victory the validity of the Victory Group's claims against Wells and others, discussed with counsel for the Bank Group the validity of the Bank Group's claims against Wells and the Victory Group, and discussed with Caddell claims against Wells, the Bank Group, Victory Group and others. Ultimately, counsel analyzed the relative merits of the AroChem Estates' causes of action and presented its recommendations to the Trustee. Counsel's investigation consumed between 150 and 200 hours of attorney time in the summer of 1994.

As a result of the investigation, the Trustee concluded that he should pursue claims against the Victory Group and the Bank Group, as well as other wrongdoers, including Harris, AroChem's accountants, Ernst & Young and AroChem's attorneys, Whitman & Ransom. The Trustee also concluded that although he should not pursue claims against Wells, he should retain the option to do so.

The Trustee also concluded that he would need to retain counsel to bring the Estates' claims against the Bank Group and the Victory Group. Because the Estates had no unencumbered funds, the Trustee was forced to secure counsel willing to represent the Estates in this matter on a contingency fee basis and thereby incur substantial costs.

To that end, both the Trustee and Wells searched for lawyers to represent the Estates. Despite discussions with a number of firms in Massachusetts, Connecticut and New York, the Trustee ultimately "after due diligence, found no ... qualified firm willing to undertake representation of the Estate on terms even remotely as favorable to the Estate." *In re AroChem Corp.*, 181 B.R. 693, 697 (Bankr.D.Conn.1995).

Shortly thereafter, the Trustee met with Wells and representatives of the Caddell Firm, which had just recently filed the Wells Texas Action on Wells' behalf. In no small part because of its familiarity with the case, Caddell offered to represent the Estates in their claims against the Bank Group and Victory Group on a contingency fee basis. Thereafter the Trustee retained Caddell to file a federal action in the Southern District of Texas. *Coan v. Chase Manhattan Bank, N.A.*, No. H–94–3930 (Trustee's Texas Action). The Trust-

ee's Texas Action made factual allegations virtually identical to those alleged in the Wells Texas Action and named more than thirty of the same defendants. Both actions alleged that members of the Bank Group fraudulently or negligently facilitated AroChem's demise by lending AroChem millions of dollars in 1990 despite awareness of the criminal activity in which Harris was engaged at AroChem.

Because 11 U.S.C. § 327 mandates bankruptcy court approval of a trustee's employment of professionals, the Trustee moved the bankruptcy court for permission to retain Caddell. The scope of the proposed retention was limited to representing the Estates in the Trustee's Texas Action, five adversary proceedings and the derivative claims in the Wells Connecticut Action. Aware that Caddell would be pressing similar claims on behalf of both Wells and the Estates, and that the prospect for competing recoveries could lead Caddell into a conflict of interest, the Trustee asked the court to approve an agreement whereby Wells and the Trustee would "pool" their respective claims and share recoveries on a roughly equal basis (Pooling Agreement).

Appellants, AroChem creditors named as defendants in both the Trustee's Texas Action and the Wells Texas Action, objected to the proposed retention, arguing that the Bankruptcy Code prohibited Caddell from representing the Estates. Appellants contended that Caddell had a conflict of interest because it represented Wells, who is (1) an unsecured creditor holding three proofs of claim against the Estates, (2) a plaintiff in lawsuits against numerous co-creditors, (3) a defendant in derivative claims brought by Harris on the Estates' behalf, and (4) a potential target of other claims that could be brought by the Estates. Appellants complained that Caddell unfairly persuaded the Trustee to sue Wells' adversaries, that retention of Caddell would preclude the Trustee from pursuing claims against Wells, and that retention of Caddell would force Wells and the Estates to compete for recoveries. These conflicts, appellants maintained, demonstrated that Caddell ran afoul of section 327(a) of the Bankruptcy Code, which governs a trustee's employment of professionals, because Caddell held and represented interests adverse to the Estates and, moreover, was not a "disinterested person." The overarching theme of appellants' objection is that Wells and his corporations hijacked the Trustee—and the attendant resources of the bankruptcy estate—to advance Wells' personal agenda against the appellants.

After a hearing, the bankruptcy court conditionally authorized the retention, pending approval of the Pooling Agreement. The bankruptcy judge analyzed the application in the context of four questions: whether Wells had claims against the Estates, whether the Trustee had claims against Wells, whether Caddell's representation of Wells might weaken any claims the Trustee might have against Wells, and whether the potential for competition between Wells and the Trustee for recoveries and the resources of Caddell would create a conflict precluding Caddell from jointly prosecuting both actions. *In re AroChem Corp.*, 181 B.R. at 700–01.

As to the first question, the bankruptcy court concluded that Wells' claims against the Estates did not create a disqualifying adverse interest. In particular, Wells' proofs of claim were not relevant to the subject matter of the Trustee's Texas Action and, moreover, Caddell had agreed to discontinue representing Wells if the Trustee objected to the proofs of claim. *Id.* at 701. As to Wells' derivative claims, the bankruptcy court noted that they, too, were not within the scope of Caddell's limited employment and, moreover, that Wells had filed a motion to dismiss those derivative claims. *Id.*

As to the Trustee's claims against Wells, the bankruptcy court first ad-

dressed the Bank Group's[3] contention that Wells might be liable on a breach of fiduciary duty theory based on actions he took during an unsuccessful attempt to seize control of AroChem. *Id.* at 702. In particular, Wells is alleged to have divulged confidential communications of the AroChem board of directors during negotiations with a third-party; the Trustee's view was that Wells was a "whistle-blower" trying to save AroChem from Harris and the Victory Group. *Id.*

As to this claim the bankruptcy court credited the Trustee's conclusion, made "after exploring, as best he could, the complex, extensive, and sometimes obscure web of claims and counterclaims surrounding the collapse of the AroChem financial interests," that the Estates were best served by working with Wells against the Bank Group. *Id.* The court also credited the Trustee's judgment that he had "to either join Wells or litigate against him since he is convinced that he cannot successfully prosecute the Trustee's Texas Action without Wells' full cooperation." *Id.* Finally, the court noted that the Trustee had preserved claims against Wells out of "an abundance of caution," and that Caddell would not represent the Estates in any suits later brought against Wells. *Id.*

The bankruptcy court also concluded that there was no reasonable danger that Caddell's past representation of Wells would weaken any claims the Trustee might have against Wells. *Id.* at 702–03. On this score the court noted that throughout three days of hearings the "Bank Group did not call any witnesses other than Wells and the Trustee to offer any testimony of any potential claim by the Trustee against Wells that might arise out of the Trustee's Texas Action." *Id.* The bankruptcy judge concluded that neither the testimony of Wells and the Trustee "nor any other evidence persuades me that there is any reasonable probability of any such [potential claim]," and that "[t]here is nothing ... but raw speculation to support a claim that a conflict might develop." *Id.* at 703. Further, the bankruptcy court noted that Caddell would withdraw from representing Wells in the event any conflict arose.

Finally, the bankruptcy court noted the potential that "the prosecution of Wells' claim would undermine the vitality of the Trustee's claim against a common defendant," which arguably could divide Caddell's loyalty. *Id.* However, the court credited the Trustee's testimony that although there was a theoretical possibility that the development of facts in the Wells suit might favor judgments in favor of Wells at the Estates' expense, the Trustee knew of no present conflict in that regard and, perhaps most important, did not believe the claims of Wells and the Trustee to be mutually exclusive. Moreover, to the extent the claims were mutually exclusive, the Pooling Agreement would cure the potential for conflict. *Id.*

Indeed, the bankruptcy court was "persuaded by the Trustee's testimony" that the Trustee and Wells would not compete for recoveries. To that end, the court concluded:

> It is apparent that with respect to the Trustee's Texas Action, there is an identity, rather than a conflict, of interest. Caddell has an incentive to vigorously pursue the Wells and the Trustee claims against their common adversaries. By contrast, the Bank Group, whose members are included in those adversary ranks, has an interest in thwarting that action.

Id. Stating the "overarching purpose served by § 327 is the maximization of the bankruptcy estate," the bankruptcy court concluded that the representation was in the best interest of the estate and approved the application, subject to approval of the Pooling Agreement. *Id.*

3. The bankruptcy court used the term "Bank Group" to refer collectively to both the Bank Group and the Victory Group. 181 B.R. at 697.

At the bankruptcy court's urging, the parties attempted to resolve the Pooling Agreement issue before a private dispute resolution service and a mediator. When those efforts failed, the Trustee filed a modified retention application which, among other things, eliminated the Pooling Agreement and provided that Caddell would terminate its representation of Wells in any AroChem related matters, except to the extent approved by the court. Although the Bank Group and the Victory Group maintained their objections, the bankruptcy court approved the revised arrangement without opinion.

The Bank Group and Victory Group then appealed to the district court. While that appeal was pending, Caddell terminated its representation of Wells entirely, confining its relationship with Wells to an agreement to pay any fees that his successor counsel might incur litigating appeals from dismissed claims. The Bank Group and the Victory Group continued to object, arguing that even though Caddell had terminated its representation of Wells, Caddell's prior representation barred its employment under the Code. In an unpublished opinion and order, the district court rejected appellants' arguments and affirmed the bankruptcy court's retention order. This timely appeal followed.

I. *Jurisdiction*

As an initial matter, the Trustee challenges our jurisdiction over this appeal. As explained below, our recent decision in *In re Palm Coast, Matanza Shores Ltd. Partnership*, 101 F.3d 253, 256 (2d Cir. 1996), requires that we hear this appeal.

Appeals from cases originating in the bankruptcy courts are governed by 28 U.S.C. § 158. Section 158(a) vests district courts with appellate jurisdiction over bankruptcy court rulings. While final orders of the bankruptcy court may be appealed to the district court as of right, *see* 28 U.S.C. § 158(a)(1), appeals from nonfinal bankruptcy court orders may be taken only "with leave" of the district court, *see id.* § 158(a)(3).

[1] Orders issued by the district courts acting in their bankruptcy appellate capacity may in turn be appealed to the courts of appeals under three circumstances. First, section 158(d) vests the courts of appeals with jurisdiction over appeals from all "final decisions, judgments, orders, and decrees" of the district court. 28 U.S.C. § 158(d). This "final order" requirement is similar to the general grant of appellate jurisdiction found at 28 U.S.C. § 1291, which vests courts of appeals with jurisdiction over "appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Second, the doctrine enunciated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), allows appeal from certain "collateral" orders if they "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3 are] effectively unreviewable on appeal from a final judgment." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981) (citation and internal quotation marks omitted). Finally, 28 U.S.C. § 1292(b) gives us discretionary jurisdiction over appropriately certified interlocutory orders. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). As the district court has not certified this appeal under section 1292(b), we will have jurisdiction only if either (1) the district court's order was final, and hence appealable under section 158(d), or (2) the district court's order was interlocutory but appealable under *Cohen*.[4]

4. The district court also noted its willingness to grant leave to appeal under section 158(a)(3), which allows a party to appeal from a nonfinal order of the bankruptcy court "with leave" of the district court. Because section 158(d) limits this Court's jurisdiction to appeals over "final" orders, however, a district court order issued under 158(a)(3) is,

A. *Finality Requirements*

Many courts have noted that although section 158(d) limits courts of appeals' jurisdiction to appeals from "final" orders, "the concept of 'finality' is more flexible in the bankruptcy context than in ordinary civil litigation." *Palm Coast*, 101 F.3d at 256 (citing *In re Prudential Lines*, 59 F.3d 327, 331 (2d Cir.1995)); *see In re Devlieg, Inc.*, 56 F.3d 32, 33 (7th Cir.1995) (per curiam) ("[M]yriad are the cases which say that finality is to be interpreted more liberally in bankruptcy cases.").

Properly understood, the relaxed approach to finality in bankruptcy cases is appropriate "[b]ecause bankruptcy proceedings often continue for long periods of time, and discrete claims are often resolved at various times over the course of the proceedings." *In re Chateaugay Corp.*, 880 F.2d 1509, 1511 (2d Cir.1989). This "pragmatic approach to finality" does "not overcome the general aversion to piecemeal appeals," however. *In re Chateaugay Corp.*, 922 F.2d 86, 90 (2d Cir. 1990). We merely seek to avoid a situation where an otherwise "final" order—*e. g.*, an order resolving all of the claims asserted within a discrete adversary proceeding—is rendered "nonfinal" simply because it arises in the context of a bankruptcy proceeding.

B. *Were the Orders Below "Final"?*

[2] In the non-bankruptcy cases, orders granting or denying motions to disqualify counsel are not considered "final" and are not immediately appealable. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 440, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985); *Firestone*, 449 U.S. at 379, 101 S.Ct. 669. Not surprisingly, then, the majority of appeals courts conclude that district court orders reviewing bankruptcy court retention decisions are not "final" orders. *See, e. g., Firstmark*, 46 F.3d at 657–59 (dismissing appeal from district court order affirming bankruptcy court order refusing to disqualify counsel under 11 U.S.C. § 327(a)); *In re Westwood Shake & Shingle*, 971 F.2d 387, 389 (9th Cir.1992) (dismissing appeal from district court order affirming bankruptcy court's appointment of special counsel to debtor's trustee); *In re Delta Servs. Indus.*, 782 F.2d 1267, 1272 (5th Cir.1986) (discerning "no basis for granting greater appealability to orders denying motions to disqualify counsel in bankruptcy cases than to those in ordinary civil cases"); *In re Continental Inv. Corp.*, 637 F.2d 1, 4 (1st Cir.1980) (order denying motion to disqualify counsel not final).

At least two circuits hold to the contrary. *See In re BH & P, Inc.*, 949 F.2d 1300, 1306–07 (3d Cir.1991); *F/S Airlease II, Inc. v. Simon*, 844 F.2d 99, 103–05 (3d Cir.1988); *Committee of Dalkon Shield Claimants v. A.H. Robins Co.*, 828 F.2d 239, 241 (4th Cir.1987). The Third Circuit employs a three-part test to determine whether district courts' appellate orders in bankruptcy cases are appealable, looking to "the impact of the matter on the assets of the bankruptcy estate, the preclusive effect of a decision on the merits, and whether the interests of judicial economy will be furthered." *F/S Airlease*, 844 F.2d at 104. Courts applying those standards have concluded that district court orders reviewing bankruptcy court decisions on conflict issues often are effectively "final" and are properly appealable under section 158(d). *See e. g., In re B H & P, Inc.*, 949 F.2d at 1307; *F/S Airlease*, 844 F.2d at 103.

In this Circuit our inquiry begins and ends with *Palm Coast*. In *Palm Coast*, the bankruptcy court authorized a trustee to retain his own real estate firm as a consultant to the estate under 11 U.S.C. § 327. 101 F.3d at 255. After the district court affirmed the bankruptcy court deci-

by definition, not appealable to the court of appeals under section 158. *In re Chateaugay Corp.*, 922 F.2d 86, 90 (2d Cir.1990).

sion, and the objector appealed, we took jurisdiction and reversed. In addressing jurisdiction, we noted the more flexible standard of finality that applies in bankruptcy cases, noting that orders in bankruptcy cases "'may be immediately appealed if they finally dispose of discrete disputes within the larger case.'" *Id.* at 256 (quoting *In re Johns-Manville Corp.*, 920 F.2d 121, 126 (2d Cir.1990)).

The court then followed the inquiry outlined in *Bowers v. Connecticut Nat'l Bank*, 847 F.2d 1019, 1022 (2d Cir.1988): "'First, we must determine whether the underlying decision of the bankruptcy court was final or interlocutory.... If the decision [of the bankruptcy court] was final, we must then ask whether the district court's disposition independently rendered the matter nonappealable.'" *Palm Coast*, 101 F.3d at 256 (quoting *Bowers*, 847 F.2d at 1022) (alteration in original).

Applying this test, the panel first concluded that the underlying order of the bankruptcy court was final, because "[n]othing in the order of the bankruptcy court or its affirmance by the district court indicates any anticipation that the decision will be reconsidered." *Id.* The panel also cited the district court's conclusion that the bankruptcy court order was a "final order." *Id.* The court further noted that the district court's disposition did not render the matter non-appealable because rather than "direct[ing] further proceedings in the bankruptcy court," the district court merely "affirmed the bankruptcy court's final order." *Id.* The court concluded that "[b]ecause the issue of whether [appellee] can hire his real estate firm was finally decided, the district court's order is appealable under subsection 158(d)." *Id.*

[3] Because, as in *Palm Coast* this case involves the denial of a disqualification motion under 11 U.S.C. 327(a), we apply *Palm Coast*'s reasoning to the orders issued by the bankruptcy and district courts in this case and conclude that they are indeed "final." [5] For one, neither the bankruptcy court nor the district court suggested that its order would be reconsidered. Further, as in *Palm Coast*, the district court specifically held that the bankruptcy court's order was final. Finally, as in *Palm Coast*, the district court did not order any further proceedings in the bankruptcy court. Under this standard, we must hear this appeal.[6]

II. *The Merits*

[4] In an appeal from a district court's review of a bankruptcy court decision, we review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law *de novo*. *In re McLean Industries*, 30 F.3d 385, 387 (2d Cir.1994).

A. *Employment of Professionals Under the Bankruptcy Code: 11 U.S.C. § 327*

Subject to certain restrictions which lie at the heart of this appeal, the trustee of a bankruptcy estate may, subject to bankruptcy court approval, employ professionals "to represent or assist the trustee in

5. Because we assert jurisdiction under section 158(d), we need not address whether the district court's order is appealable under the *Cohen* collateral order doctrine.

6. We are aware that *Palm Coast* may cut against the grain of prior Circuit precedent. *See, e. g., In re Prudential Lines*, 59 F.3d at 331 (restricting notion of "discrete dispute" to something more than "mere[ ] competing contentions with respect to separable issues") (citation and internal quotation marks omitted); *In re Johns-Manville*, 824 F.2d at 179 (declining to exercise jurisdiction over an appeal from an order denying the request of shareholders for official committee status because the order did not "conclusively determine[ ] a separable dispute over a creditor's claim or priority" (internal quotation marks omitted)). Nonetheless, once *Palm Coast* was decided it became binding precedent, *see S & R Co. of Kingston v. Latona Trucking*, 159 F.3d 80, 83 (2d Cir.1998), and we are bound to follow it "unless and until it is overruled by the Court *en banc* or by the Supreme Court," *Jones v. Coughlin*, 45 F.3d 677, 679 (2d Cir. 1995) (per curiam).

carrying out the trustee's duties" under the Bankruptcy Code. 11 U.S.C. § 327(a). The statute governing the trustee's ability to retain professionals is 11 U.S.C. § 327, three subsections of which are relevant here.

Subsection (a) sets out a general, two-part test governing employment of all professionals. Under subsection (a), the trustee may hire only those professionals that (1) "do not hold or represent an interest adverse to the estate," and (2) are "disinterested persons." 11 U.S.C. § 327(a).

Limited exceptions to this broad prohibition are found in subsections (c) and (e). Subsection (c) provides that a person is "not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest." 11 U.S.C. § 327(c). This provision prevents disqualification based *solely* on the professional's prior representation of or employment by a creditor—it "does not preempt the more basic requirements of subsection (a)." *In re Interwest Business Equip.*, 23 F.3d 311, 316 (10th Cir.1994). Thus it "remains important to determine whether the person is disqualified on any other ground, *e. g.*, an interest adverse to the estate." 3 Lawrence P. King, *et al., Collier on Bankruptcy*, ¶ 327.04[7][b], at 327-56 (15th ed. rev. 1998).

Section 327(e) provides:

> The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

11 U.S.C. § 327(e).

[5] By regulating the trustee's ability to hire professionals, section 327 " 'serve[s] the important policy of ensuring that all professionals appointed [to represent the trustee] tender undivided loyalty and provide untainted advice and assistance in furtherance of their fiduciary responsibilities.' " *In re Leslie Fay Companies*, 175 B.R. 525, 532 (Bankr.S.D.N.Y.1994) (quoting *Rome v. Braunstein*, 19 F.3d 54, 58 (1st Cir.1994)).

When evaluating proposed retention, a bankruptcy court "should exercise its discretionary powers over the approval of professionals in a manner which takes into account the particular facts and circumstances surrounding each case and the proposed retention before making a decision." 3 *Collier*, ¶ 327.04[1][a] (citing *In re Harold & Williams Dev. Co.*, 977 F.2d 906, 910 (4th Cir.1992) ("[T]he discretion of the bankruptcy court must be exercised in a way that it believes best serves the objectives of the bankruptcy system. Among the ultimate considerations for the bankruptcy courts in making these decisions must be the protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the bankruptcy proceeding.")).

Appellants argue that Caddell runs afoul of section 327 because, by virtue of its representation of Wells, a creditor who is embroiled in litigation against other creditors and is a defendant in derivative claims brought on the Estates' behalf, Caddell (1) holds or represents an interest adverse to the estate, and (2) is not a "disinterested person." In essence, appellants argue that a trustee may not retain special counsel that has represented one creditor in a suit against another creditor, where the purpose of the retention is to pursue related litigation against the second creditor. Although section 327 might bar such representation under some circumstances, for

the reasons explained below we do not believe that it erects a per se ban on such representation or that, in fact, it bars the retention at issue here.

B. *Distinction Between General and Special Counsel*

[6] As an initial matter, the Trustee contends that because Caddell was hired as "special" counsel for the limited purpose of pressing the Trustee's Texas Action, rather than as general counsel to handle the entire bankruptcy proceeding, any potential conflicts must be evaluated only with respect to the scope of Caddell's proposed retention. We agree.

When the bankruptcy court addressed this issue, it turned directly to subsection 327(e), which permits the trustee to hire, for a "specified special purpose," an attorney who previously represented the debtor, as long as the attorney does not hold or represent an interest adverse to the estate "with respect to the matter on which such attorney is to be employed." 11 U.S.C. § 327(e). After noting that subsection (e) was the only section to address retention of special counsel, the bankruptcy court held that Congress intended, but failed, specifically to include within section 327(e) attorneys that represented creditors, in addition to those who represented the debtor. Accordingly, although explaining that the retention was proper under sections 327(a) and (c), the bankruptcy court purported to apply section 327(e) to the retention issue before it. While this result—which limits conflict inquiry to the scope of proposed counsel's retention—is correct, the bankruptcy court's reasoning is not. By its terms, section 327(e) applies only where the attorney represented the debtor. Because Caddell never has represented the debtor, section 327(e) itself does not apply in this case and we must analyze the proposed retention under sections 327(a) and (c).

[7] We nonetheless believe, in accordance with a number of other courts, that in applying sections 327(a) and (c) we should reason by analogy to 327(e), so that "where the trustee seeks to appoint counsel only as 'special counsel' for a specific matter, there need only be no conflict between the trustee and counsel's creditor client with respect to the specific matter itself." *Stoumbos v. Kilimnik*, 988 F.2d 949, 964 (9th Cir.1993). Like the court in *In re Fondiller*, 15 B.R. 890, 892 (B.A.P. 9th Cir.1981), we "interpret that part of § 327(a) which reads that attorneys for the trustee may 'not hold or represent an interest adverse to the estate' to mean that the attorney must not represent an adverse interest relating to the services which are to be performed by that attorney." *Id.*

[8] Thus, where the interest of the special counsel and the interest of the estate are identical *with respect to the matter for which special counsel is retained*, there is no conflict and the representation can stand. *See, e. g., In re National Trade Corp.*, 28 B.R. 872, 875 (Bankr.N.D.Ill. 1983) (denying motion to disqualify special counsel under § 327(c) because interest of the firm as special counsel was identical to interest of the estate); *In re RPC Corp.*, 114 B.R. 116 (M.D.N.C.1990) (approving retention because " 'the interests of the estate and the firm's clients are identical with respect to the firm's duties as special counsel' ") (quoting *Fondiller*, 15 B.R. at 892). Accordingly, in this case we must ask whether—*with respect to the special representation it has been hired to undertake*—Caddell (1) holds or represents an interest that is adverse to the estate, and (2) is a "disinterested person."

C. *"Adverse Interests" Under Section 327(a)*

The concept of "adverse interests" appears twice in section 327(a). First, the statute provides that counsel may "not hold or represent an interest adverse to the estate;" second, counsel must be a "disinterested person," which means that counsel may not, among other things,

"have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders." 11 U.S.C. § 101(14)(E).

[9] The Bankruptcy Code does not define the phrase "hold or represent an interest adverse to the estate." Many courts employ the definition of *In re Roberts*, 46 B.R. 815 (Bankr.D.Utah 1985), *aff'd in relevant part and rev'd and remanded in part on other grounds*, 75 B.R. 402 (D.Utah 1987):

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or (2) to possess a predisposition under circumstances that render such a bias against the estate.

Id. at 827. *See In re Crivello*, 134 F.3d 831, 835 (7th Cir.1998) (adopting *Roberts* definition); *In re Caldor*, 193 B.R. 165, 171 (Bankr.S.D.N.Y.1996). Whether an adverse interest exists is best determined on a case-by-case basis. *Caldor*, 193 B.R. at 172 (citing *In re BH & P*, 949 F.2d at 1315–16).

1. *Does Caddell "Hold" an Interest Adverse to the Estates?*

[10] Appellants have not produced any evidence to indicate that the Caddell Firm personally "holds" any interests adverse to the Estates. It is not a pre-petition creditor of the Estates, nor does it otherwise personally possess any claims or interests contrary to the Estates. Accordingly, this ground does not serve as a basis for disqualification.

2. *Does Caddell "Represent" an Interest Adverse to the Estates?*

[11] When the bankruptcy court approved the retention, the Caddell Firm still represented Wells in all of his Aro-Chem related litigation, which included Wells' claims against the Estates and derivative claims brought by Harris against Wells on the Estates' behalf. In evaluating the retention question the bankruptcy court accepted Caddell's representations that it would terminate its representation of Wells in the event that any potential conflicts were found or were later to arise. Because Caddell since has terminated all representation of Wells, the question now is whether Caddell's prior representation of Wells establishes that Caddell "represents" an interest adverse to the Estates with respect to the subject matter of Caddell's retention.

[12, 13] At the outset, we note that section 327(a) is phrased in the present tense, permitting representation by professionals "that do not *hold* or *represent* an interest adverse to the estate," and limiting the class of acceptable counsel to those "that *are* disinterested persons." 11 U.S.C. § 327(a) (emphasis added). "Congress' use of a verb tense is significant in construing statutes." *United States v. Wilson*, 503 U.S. 329, 333, 112 S.Ct. 1351, 117 L.Ed.2d 593 (1992); *see Otte v. United States*, 419 U.S. 43, 49–50, 95 S.Ct. 247, 42 L.Ed.2d 212 (1974) (interpreting provision of Internal Revenue Code and according significance to Congress' use of both past and present tenses). Thus, counsel will be disqualified under section 327(a) only if it presently "hold[s] or represent[s] an interest adverse to the estate," notwithstanding any interests it may have held or represented in the past. Because Caddell has terminated its representation of Wells, it no longer represents Wells' interests and therefore survives the first half of the section 327(a) test.

This reasoning finds support in related portions of the Bankruptcy Code, which draw explicit distinctions between current and past relationships. For example, the Bankruptcy Code defines a "disinterested person" as a person that, among other things, "*is not and was not* an investment banker for any outstanding security of the debtor," *see* 11 U.S.C. § 101(14)(B) (emphasis added); "*has not been, within three years before the date of the filing of the*

petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor," *id.* § 101(14)(C) (emphasis added); and "*is not and was not, within two years before the date of the filing of the petition*, a director, officer, or employee of the debtor," *id.* § 101(14)(D) (emphasis added). The Bankruptcy Code thus recognizes a distinction between past and present representation. Because Caddell no longer "represents" Wells, Caddell does not represent any of Wells' interests, whether or not any of those interests might be adverse to the estate. Accordingly, Caddell does not represent any interests adverse to the Estates within the meaning of section 327(a) based on its prior representation of Wells.

Nonetheless, even if section 327(a) did reach past, as well as present representation, Caddell would still not run afoul of the provision, as demonstrated below.

D. *Assuming Section 327(a) Covers Past Representation, Does Caddell Represent An Interest Adverse to the Estates?*

To evaluate this claim, we must inquire whether Wells' interests are adverse to the Estates with regard to the Trustee's Texas Action.

1. *Caddell's Representation of Wells in his Capacity as a Creditor*

[14] Wells is a creditor of AroChem with three proofs of claim pending against the Estates. Although Caddell's past representation of Wells in connection with these claims might mean that Caddell "represented an interest adverse to the estate" within the meaning of 327(a), section 327(c) provides that an attorney will not be disqualified based solely on prior representation of a creditor, unless there is an actual conflict, in which case disqualification is mandatory. 11 U.S.C. § 327(c). Thus, putting aside for now whether other bases for disqualification exist, and keeping in mind the limited scope of Caddell's retention, *see supra* II.B., the bankruptcy court was obliged to disqualify Caddell based on its representation of Wells' creditor interests only if that representation created "an actual conflict of interest" with respect to matters within the scope of Caddell's limited retention.

The bankruptcy court concluded—and the appellants do not seriously dispute—that "any contest arising out of [Wells'] proofs of claim is outside the scope of the [sic] Caddell's specified special employment." *In re AroChem Corp.*, 181 B.R. at 701. The record contains no evidence that Wells' proofs of claim are germane to the subject matter of the Trustee's Texas Action, or to any other possible aspect of Caddell's proposed employment. Because no conflict—actual or potential—arises from Caddell's past involvement with Wells' proofs of claim and its current prosecution of the Trustee's Texas Action, Caddell's representation of Wells in his creditor capacity does not serve as a basis for disqualification.

2. *Caddell's Representation of Wells in His Capacity as a Target of Claims Made by the Estates*

[15] When the AroChem bankruptcy petition was filed, the Trustee succeeded to derivative claims in the Harris Action that accused Wells of failing to perform his duties as an investment advisor to AroChem and of making false accusations against Harris and AroChem. Additionally, the appellants maintain, the Estates have a breach of fiduciary duty claim against Wells based on disclosures of confidential information that he made during an unsuccessful attempt to seize control of AroChem. Appellants claim that as a result of these claims Wells holds an interest adverse to the estate and thus that Caddell "represents" an interest adverse to the estate and is barred from representing the Estates now. The bankruptcy and district courts, however, found that these claims do not create an adversity of interest be-

tween Wells and the Estates with respect to the matters involved in the Trustee's Texas Action. That finding is supported by the record, is not erroneous and will not be disturbed.

In particular, the Trustee testified that after investigation he concluded there were no viable claims against Wells. We note additionally that the derivative claims were not asserted by the Trustee on behalf of the Estates but rather by Harris, and have remained stagnant for years. The Trustee understandably did not wish to align himself with Harris, who was convicted of criminal wrongdoing that led to AroChem's demise.

Most important, however, appellants have failed to offer any evidence that any potential claims against Wells are relevant to the matters to be litigated in the Trustee's Texas Action, so as to create an interest that is adverse to the Estates with respect to that action.

In re Southern Kitchens, 216 B.R. 819 (Bankr.D.Minn.1998), relied on by appellants, demonstrates this point. In that case, the trustee attempted to retain counsel to pursue claims against a secured creditor and former director of the debtor. In its application, counsel failed to disclose that it previously had represented an individual, Gunberg, who was a former director and equity holder of the debtor and who had wrestled with the targets of the trustee's proposed suit for control of the company. *Id.* at 822, 830. Although the Trustee's proposed suit did not name Gunberg as a defendant, the defendants' version of the facts laid the blame for the company's demise at Gunberg's door. *Id.* at 828. Applying section 327(e) (counsel had, in fact, represented the debtor), the court rejected the application because counsel had, by virtue of its representation of Gunberg, represented interests that "were or are adverse to the bankruptcy estate 'with respect to' this adversary proceeding." *Id.* at 827–28. In particular, the court noted that section 327(e) bars retention of "special counsel who, on any matter of substance, represent or have represented a client that is an actual or potential opponent of the estate *in the dispute for which counsel would be engaged.*" *Id.* at 826 (emphasis added).

Because the defendants "clearly [sought] to affix blame to [Gunberg in order] to defeat the Plaintiff's various claims," *id.* at 828, and because there was evidence in the record to support their defense, there was a legitimate chance that counsel's former client was the cause of the very harm the trustee complained of in the suit to be brought by counsel. Resolution of the matters in dispute "could produce a finding that Gunberg harmed the estate in the very sequence of events that is the basis of the estate's causes of action here," which would be enough to establish an adverse interest under section 327(e). *Id.*

The *Southern Kitchens* Court reflected that "courts must be sensitive to the possibility of strategic abuse of disqualification motions," *id.*, and only found the conflict because the record manifested "a meritorious dispute over the reason for the reorganized Debtor's failure, in which a persisting struggle for control of a troubled company was a central incident," *id.* at 828–29. Accordingly, the court concluded, "[b]ecause of the possibility that its former client is liable for the damage that it attributes to the Defendants, [counsel] must be deemed to have represented an interest that is adverse to the estate on the subject matter of the suit it has brought on behalf of the estate." *Id.* at 829.

These findings lie in stark contrast to this case. Despite their generalized complaints, appellants present no evidence that Wells might be responsible for the injuries asserted in the Trustee's Texas Action. There is no evidence that proof of any claims the Estates might have against Wells would run counter to proof the Trustee would need to establish in order to succeed in the Trustee's Texas Action. To the contrary, as the bankruptcy court noted, throughout three days of hearings the

"Bank Group did not call any witnesses other than Wells and the Trustee to offer any testimony of any potential claim by the Trustee against Wells that might arise out of the Trustee's Texas Action." *In re AroChem Corp.*, 181 B.R. at 702–03. The bankruptcy judge then concluded, in a finding affirmed by the district court and consistent with the record, that neither the testimony of Wells and the Trustee "nor any other evidence persuades me that there is any reasonable probability of any such [potential claim]," and that "[t]here is nothing ... but raw speculation to support a claim that a conflict might develop." *Id.* at 703. Absent some evidence that Wells holds an interest adverse to the Estates with respect to the subject matter of the Trustee's Texas Action, there is no basis to disqualify Caddell under section 327(a) on the ground that it represents an interest adverse to the estate.

[16] On a related point, appellants argue that the Estates have additional claims against Wells that will be lost if Caddell is allowed to represent the Trustee. This contention is not persuasive. As an initial matter, Caddell no longer represents Wells, so that firm will never be in the position of simultaneously suing and defending Wells, as appellants suggest. Moreover, as to the ability to pursue Wells, the Trustee acknowledges that Caddell will use Wells as its principal fact witness in the Trustee's Texas Action, and that, as a result, Wells' version of the facts will predominate. But the Trustee, on the advice of his general counsel, made a judgment that it was in the best interest of the Estates to sue the defendants named in the Trustee's Texas Action, and to that end align its interest with Wells. Moreover, in the unlikely event that the Trustee later chooses to pursue Wells—despite the dearth of record evidence to suggest that such claims exist—Caddell will not represent the Estates, and the Estates will be free to secure separate counsel to press the claims.

Appellants also rely on *Meespierson, Inc. v. Strategic Telecom*, 202 B.R. 845 (D.Del.1996). There the debtor sought permission to employ special counsel to pursue lender liability litigation against Meespierson, the debtor's placement agent. *Id.* at 846. Proposed counsel previously had given legal advice to Cahill, a shareholder and creditor of the debtor, advising that any lender liability claims that Cahill might want to advance were better asserted by the debtor. *Id.* at 847.

The district court reversed the bankruptcy court's authorization of the employment, concluding that counsel's prior representation of Cahill—a creditor—meant that Grant "represents an interest materially adverse to the interest of the estate" in violation of sections 101(14)(E) and 327(a). *Id.* at 848. Although the court cited and purported to accept *In re Fondiller*, 15 B.R. at 892, for the proposition that in applying sections 327(a) and (c) to special counsel the court must evaluate conflicts with respect to the scope of special counsel's employment, *see Meespierson*, 202 B.R. at 849, the *Meespierson* Court did not examine or explain how Cahill's interests were adverse to the debtor's with respect to the matter counsel was to prosecute.

[17] Here, in contrast, the bankruptcy court examined the proposed retention and concluded that the interests of Caddell's (now former) client, Wells, were not adverse to the Estates with respect to the matter Caddell was hired to prosecute for the Estates. *Meespierson* sweeps too broadly, suggesting a per se ban whenever special counsel has previously represented a creditor. The statutory scheme does not dictate such a rule, however. Rather, given "the fact-specific nature of parties' interests and their alignments ... 'no general rule of simple application ... can be gleaned.'" *Southern Kitchens*, 216 B.R. at 826–27 (quoting *In re Tidewater Mem. Hosp.*, 110 B.R. 221, 228 (Bankr.E.D.Va. 1989)). Rather, each case "must finally turn on its own circumstances, based on a

common-sense divination of adversity or commonality." *Id.* at 827.

We believe that *In re RPC Corp.*, 114 B.R. 116 (M.D.N.C.1990), provides a closer analogy to this case. There, the Chapter 7 trustee determined that the bankruptcy estate's most valuable asset was its lender liability claim against a bank that had lent funds to RPC. The loans were guaranteed by RPC's CEO, Ross, who himself was defending against the bank in a suit to enforce the guarantee. In that suit Ross was asserting counterclaims identical to the claims RPC sought to advance in its litigation. *Id.* at 117–18.

The trustee sought to retain as special counsel for the estate the same firm that was representing Ross in his suit against the bank. *Id.* at 118. The firm agreed to take the case on a contingency fee basis, and Ross agreed to advance the fees and costs the firm would incur in its representation of the estate in exchange for the firm's promise that it would reimburse him for those advances and his own fees out of the firm's contingency fee. *Id.*

The court noted that while dual representation of the trustee and a creditor might appear to raise conflict of interest concerns, "[t]he naked existence of a potential for conflict of interest does not render the appointment of counsel nugatory, but makes it voidable as the facts may warrant. It is for the court to decide whether the attorney's proposed interest carries with it a sufficient threat of material adversity to warrant prophylactic action." *Id.* at 119 (quoting *In re Martin*, 817 F.2d 175, 182 (1st Cir.1987)) (alteration in original).

The court approved the retention because, as is the case here, " 'the interests of the estate and the firm's clients are identical with respect to the firm's duties as special counsel.' " *Id.* at 120 (quoting *Fondiller*, 15 B.R. at 892). The estate's proposed suit was identical to Ross' suit, the firm had undertaken extensive litigation concerning Ross' claim against the bank and limited retention under the circumstances would "save the estate 'the added expense that would be generated by retention of counsel unfamiliar with the facts and proceedings.' " *Id.* (quoting *In re Iorizzo*, 35 B.R. 465, 469 (Bankr. E.D.N.Y.1983)).

Like here, the bank objected that the estate was forgoing valid claims against Ross because of the relationship between Ross and the estate brought about by the estate's retention of proposed counsel. The court noted that "[t]he slight possibility of those claims, however, will not bar the retention of [chosen special counsel] for the special purpose of pursuing claims against the Bank," and credited the Trustee's decision not to bring suit against Ross, a decision made in advance of the application to appoint special counsel. *Id.*

[18] Retention is proper here for the same reasons it was approved in *RPC*—an identity of interests between the trustee and special counsel's former client with respect to the special matter for which special counsel is retained.

That is, with respect to the matter for which Caddell is being retained—the Trustee's Texas Action—Wells and the Estates share an identity of interests. The Trustee, in the Trustee's Texas Action, and Wells, in the Wells' Texas Action, each seek to establish the same set of predicate facts in order to prevail over many of the same defendants. To the extent that Wells has interests adverse to the Estates, by virtue of his status as a defendant in the derivative or other potential claims, as the bankruptcy court found, those interests are not within the scope of Caddell's representation. Caddell has never represented any interests that are adverse to the Estates with respect to the subject matter of the cases it has been hired to litigate, and as a result does not run afoul of section 327(a) or (c).

Appellants complain that the Trustee chose to file the Trustee's Texas Action only because Wells, through Caddell, "hijacked" the Trustee to protect himself and

advance his personal agenda. But the record shows that the decision to file the Trustee's Texas Action was made by the Trustee on the advice of his general counsel, Coan, Lewendon, not by or on the exclusive advice of Wells or Caddell. Although appellants argue that the Trustee failed to investigate independently the validity of claims made in the Trustee's Texas Action, the record belies this contention. To be sure, during its investigation the Trustee received considerable information from Wells, a principal player in AroChem's complicated history. But Wells and Caddell were not the exclusive source of the Trustee's information. To the contrary, there is record evidence that the Trustee's general counsel reviewed AroChem's internal records; reviewed accounting records prepared by an independent auditor following the discovery of wrongdoing in 1990; consulted with a forensic accountant about the viability of claims against the Bank Group and the Victory Group; discussed with counsel for Victory the validity of the Victory Group's claims against Wells and others; discussed with counsel for the Bank Group the validity of the Bank Group's claims against Wells and the Victory Group; discussed with Caddell claims against Wells, the Bank Group, Victory Group and others; and ultimately made an independent analysis of the AroChem Estates' causes of action. This investigation consumed between 150 and 200 hours of attorney time in the summer of 1994. Caddell was retained after the Trustee's general counsel completed its investigation.

At bottom, appellants' claim that Wells and Caddell "hijacked" the Trustee is an indirect attack on the Trustee's decision to file the Trustee's Texas Action in the first place. Perhaps the Trustee could have chosen to pursue Wells rather than the defendants named in the Trustee's Texas Action. But the bankruptcy court made a finding, for which there is support in the record, that the Trustee made an independent investigation and concluded that the Estates would best be served if the Trustee aligned itself with Wells and pursued the Bank Group and Victory Group instead. Appellants—principal defendants in the suit the Trustee chose to pursue—are understandably displeased with this decision. But their objection here is to the retention of Caddell and that inquiry is guided by section 327(a). On that score the bankruptcy court found no disqualifying adverse interests at play.

[19, 20] Because the bankruptcy court's conclusions on this score are supported by the record and are not clearly erroneous, we should not substitute our judgment for that of the bankruptcy court. Bankruptcy judges' findings on conflict of interest questions are entitled to deference because a bankruptcy judge "is on the front line, in the best position to gauge the ongoing interplay of factors and to make the delicate judgment calls which such a decision entails." *In re Martin*, 817 F.2d at 182. Moreover, if the bankruptcy judge were later to perceive a materially adverse interest, "he has at his disposal an armamentarium of permissible remedies, including ... disqualification [and] disallowance of all or some fees." *Id.* at 182–83 (cited with approval in *In re BH & P*, 949 F.2d at 1313).

E. *Is the Caddell Firm "Disinterested?"*

[21] As noted above, it is not enough under section 327(a) that counsel "not hold or represent an interest adverse to the estate"—counsel also must be "disinterested." The characteristics of a "disinterested person" are set out in 11 U.S.C. § 101(14). In this case the relevant requirement is found in subsection (E), which provides that a disinterested person is one that "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor ... or for any other reason." 11 U.S.C. § 101(14)(E).

As we explained above in connection with section 327(a), Caddell does not personally "hold" any interests adverse to the Estates with respect to the matters it has been hired to litigate. It follows, therefore, as the bankruptcy court found, *see* 181 B.R. at 700, that Caddell does not personally "have" any such interests within the meaning of section 101(14)(E), and it is not rendered "interested" on this basis.

Appellants maintain, however, that because Caddell prosecuted claims against creditors on Wells' behalf in the Wells' Texas Action, Caddell does in fact "have an interest materially adverse to the interest of ... [a] class of creditors or equity security holders" within the meaning of section 101(14)(E). We disagree.

[22] We believe that section 101(14)(E) is properly read "to implicate only the personal interests" of the professional whose disinterestedness is under consideration. *See In re BH & P*, 949 F.2d at 1310 & n. 12. Accordingly, to run afoul of section 101(14)(E), a professional personally must "have" the prohibited interest. At most, Caddell "represented" interests adverse to a class of AroChem creditors when it represented Wells in his Texas Action; because Caddell personally does not "have" such an adverse interest, it remains a "disinterested person" within the meaning of section 101(14)(E).

This reading is supported by section 327(a), which authorizes the trustee to employ professionals "that do not *hold or represent* an interest adverse to the estate and that are disinterested persons." 11 U.S.C. § 327(a). By its terms, section 327 distinguishes between "holding" an interest and "representing" one. Section 101(14)(E), in contrast, refers only to those who "have" disqualifying interests. Like the *BH & P* Court, we do not find this choice of language accidental. *See* 940 F.2d at 1310 n. 12. If "to have" and "to represent" were identical considerations, the trustee never could hire counsel to bring claims against a class of creditors because, once retained, such counsel would "represent," and therefore "have," an interest materially adverse to the interest of a class of creditors, *i.e.*, the estate's interests against the creditors. The anomalous result would be that all such counsel automatically would be "interested" and thus disqualified.

Appellants' citation to *Roger J. Au & Son v. Aetna Ins. Co.*, 64 B.R. 600 (N.D.Ohio 1986), is unavailing. There, the court disqualified counsel that had an actual conflict with the estate. The court opined that any counsel that failed the "disinterested" test because it had an interest adverse to the estate automatically failed the section 327(a) adverse interest test, and thus, for the purpose of such an inquiry, " 'having' an interest adverse to the estate, and 'holding or representing' an interest adverse to the estate are identical considerations." *Id.* at 604.

But a close reading of *Roger J. Au* reveals that it did not hold, as appellants contend, that as a general matter, "holding or representing" and "having" mean the same thing. To the contrary, the court held that within the section 327(a) scheme, "having *an interest adverse to the estate*" is identical to "holding or representing *an interest adverse to the estate.*" *Id.* Thus *Roger J. Au* was correct when it stated that "both prongs of the [327(a)] test are satisfied where counsel is not a 'disinterested person,' " because counsel that fails the disinterested test on the ground that it "has" an interest adverse to the estate automatically fails the first prong of the test because, by definition, it also "holds" such an interest. Have and hold are synonymous.

In contrast, however, if the interest at issue is one adverse to a *class of creditors or equity security holders*, only section 101(14)(E) is involved, and that section employs only the word "have." Because Caddell does not "have" an interest materially adverse to a class of creditors, it is not rendered "interested" on that basis

and does not run afoul of section 101(14)(E).

CONCLUSION

For the reasons set out above, we affirm the findings of the bankruptcy court that, with respect to the limited scope of its retention, Caddell (1) does not "hold or represent an interest adverse to the Estates," and (2) is a "disinterested person." The order authorizing the Trustee to employ Caddell is affirmed.

SPRINT SPECTRUM, L.P., d/b/a Sprint PCS, Plaintiff–Appellant,

v.

Craig WILLOTH, Chairman, Thomas McCune, Craig Litt, William Quinn, and Edward Kerkhoven, Members, Constituting the Town of Ontario Planning Board, and Edward Collins, Code Enforcement Officer for the Town of Ontario, Defendants–Appellees.

Docket No. 98–7442.

United States Court of Appeals, Second Circuit.

Argued Nov. 23, 1998.

Decided May 24, 1999.

Provider of broadband personal communications services (PCS) brought action challenging town planning board's denial of its applications for site plan approval required for construction of three communications towers. Board moved for summary judgment. The United States District Court for the Western District of New York, Michael A. Telesca, J., 996 F.Supp. 253, granted motion. Provider appealed. The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that: (1) provider was not subjected to unreasonable discrimination in violation of Telecommunications Act; (2) provider did not have right, under Act, to construct any communications towers which, in its business judgment, it deemed necessary to compete effectively with other providers; (3) absence of explicit general ban on personal wireless services and board's demonstrated willingness to accept some level of service did not establish board's compliance with Act; (4) board did not violate Act's ban on prohibiting personal wireless services when it denied provider's applications; (5) board was not precluded from considering towers' aesthetic impact as result of inclusion of "utility substations" in local zoning law; (6) evidence supported conclusion that towers would have significant negative aesthetic impact; and (7) provider was not entitled to construct three towers in town under New York law, even if it was entitled to presumption that proposed towers were necessary.

Affirmed.

1. Zoning and Planning ⇐703

Whether local agency's decision regarding construction of wireless communications tower is supported by "substantial evidence," as required by Telecommunications Act, must be determined according to traditional standard used for judicial review of agency actions. Communications Act of 1934, § 332(c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(B)(iii).

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

2. Administrative Law and Procedure ⇐791

Substantial evidence standard requires evaluation of the entire record, including opposing evidence, and requires a decision to be supported by less than a

preponderance but more than a scintilla of evidence.

3. Administrative Law and Procedure ⇐791

Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

4. Zoning and Planning ⇐384.1

Provider of broadband personal communications services (PCS) was not subjected to unreasonable discrimination in violation of Telecommunications Act when, unlike cellular services provider, it was required by town planning board to undergo extensive environmental review process in applying for site plan approvals required for construction of three telecommunications towers, and when board subsequently denied its applications, despite having allowed cellular provider to construct tower consistent with its coverage plan, thereby allegedly preventing PCS provider from matching cellular provider's level of coverage in area; Act allowed some discrimination among providers of functionally equivalent services, and board was permitted to consider proposed tower locations in deciding whether to require more probing inquiry and whether to approve application for tower construction. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

5. Zoning and Planning ⇐14, 384.1

Under Telecommunications Act, local governments may reasonably take the location at which proposed telecommunications tower would be constructed into consideration when deciding whether (1) to require a more probing inquiry, and (2) to approve an application for construction of wireless telecommunications facilities, even though this may result in discrimination between providers of functionally equivalent services. Communications Act of 1934, § 332(c)(7)(B)(i)(I), as amended, 47 U.S.C.A. § 332(c)(7)(B)(i)(I).

6. Zoning and Planning ⇐14

Provider of broadband personal communications services (PCS) did not have right, under Telecommunications Act, to construct any communications towers which, in its business judgment, it deemed necessary to compete effectively with other providers of wireless and nonwireless telecommunications; although Act barred local agencies from prohibiting or having effect of prohibiting provision of personal wireless services, it explicitly preserved right of local governments to deny construction of wireless telecommunications facilities, prohibition was not intended to address ability of PCS provider to compete with land-line services, and mandating approval of all wireless facilities would service as disincentive for development of new technologies, contrary to Act's purposes. Communications Act of 1934, § 332(c)(7)(A), (c)(7)(B)(i)(II), (c)(7)(B)(iii), as amended, 47 U.S.C.A. § 332(c)(7)(A), (c)(7)(B)(i)(II), (c)(7)(B)(iii).

7. Zoning and Planning ⇐384.1

Absence of explicit general ban on personal wireless services and town planning board's demonstrated willingness to accept some level of service, as shown by its earlier approval of construction of cellular services provider's communications tower, did not establish board's compliance with portion of Telecommunications Act that barred local agencies from prohibiting or having effect of prohibiting provision of personal wireless services, so as to sustain board's decision to deny applications of broadband personal communications services (PCS) provider for site plan approvals authorizing construction of three communications towers; town's interpretation of Act, as restricting judicial review to those instances in which municipality either explicitly banned personal wireless services or had acted so as to effectuate general ban, rendered superfluous Act's "having effect" language, in light of other provisions requiring municipalities to consider facility applications on case-by-case basis, and was inconsistent with provisions

6

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS

RE: CAPACITY OF INFANTS, INCOMPETENT PERSONS AND CORPORATIONS

DATE: AUGUST 23, 1999

At the March meeting, the Committee discussed briefly the proposals for the addition of rules setting out the procedure for the commencement of cases by infants and incompetent persons and by corporations. The memorandum distributed with the agenda package for that meeting is attached. The matter was postponed for further consideration at the September meeting. The Committee also requested that consideration be given to the adoption of Rule 17(b) of the Federal Rules of Civil Procedure throughout the Bankruptcy Rules rather than solely in the rules governing adversary proceedings as it currently exists as an alternative to the adoption of the Rules proposed in the attached memorandum.

The two proposals included in the attached memorandum separately address the commencement of cases by infants or incompetent persons, and corporations. FRCP Rule 17(b), on the other hand, governs both categories of entities in a single rule. It essentially provides a choice of law rule for determining the capacity of parties to sue or be sued. It does not define or establish capacity or authority of parties. It simply directs the court to look to the law of an individual's domicile and to the law of the jurisdiction under which a corporation was organized to resolve these capacity issues. That Rule also includes a special provision granting partnerships and unincorporated associations authority to sue or be sued to enforce federal constitutional

rights. Apart from this special authorization, however, the Rule does not grant or recognize any capacity of a party to sue or be sued.

Adopting FRCP Rule 17(b) generally into the Bankruptcy Rules would provide some limited assistance to infants and incompetent persons. It would direct the bankruptcy court to employ the law of the jurisdiction of the debtor's domicile to determine if the debtor has the capacity to commence a case. It would not direct infants or incompetent persons or their representatives to the proper manner for commencing a case. Likewise, corporations would have to determine under the law of the jurisdiction under which it was organized whether it can commence a case. Certainly, the Bankruptcy Rules cannot establish authority or capacity to commence a bankruptcy case. The Rules can, however, set out the manner in which to commence the case. Incorporating FRCP 17(b) into the Bankruptcy Rules would not meet that need.

To the extent that confusion may exist concerning the capacity of an infant or incompetent person to commence a bankruptcy case, the Bankruptcy Rules cannot provide the solution. Whether a particular person or entity is eligible for bankruptcy relief is a substantive matter beyond the scope of the Rules. How that person commences a case, on the other hand, is within the scope of the Rules. Proposed Rules 1004.1 and 1004.2 attempt to set out the manner of commencing a bankruptcy case. Under Rule 1004.1, a representative files the petition on behalf of an infant or incompetent person, and if there is no duly appointed representative, then th ecourt can appoint a guardian ad litem or issue an appropriate order for the protection of the infant or incompetent person. Rule 1004.2 (or the reconfigured Rule 1004 governing partnership and corporate petitions) similarly directs a corporation to file a petition in a particular manner. The

rule does not attempt to establish any authority or capacity for a corporation to commence a bankruptcy case. The Committee Notes to each of the proposed rules specifically reference that there is no intention that the rules create authority to commence a case. Rather, those issues are left to applicable nonbankruptcy law for resolution. Nevertheless, the rules do provide some procedural guidance for persons intending to commence cases on behalf of these entities. Additionally, a rule directed specifically to the commencement of bankruptcy cases by corporations should have the salutary effect of overriding local rules that arguably conflict with Supreme Court precedent on the issue.

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: Jeff Morris

DATE: February 1, 1999

RE: Commencement of Cases by Infants, Incompetent Persons, and Corporations

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Bankruptcy Code §§ 301, 302, 303, and 304 set out the manner of the commencement of bankruptcy cases. Part I of the Bankruptcy Rules provides additional guidance as to the commencement of the cases. Finally, eligibility for relief both generally and as to specific chapters, is governed by § 109 of the Code. Conspicuously absent from the Rules and Code sections, however, is any guidance regarding the capacity of infants, incompetent persons, or corporations to commence cases. Because they present more common issues, this memorandum will consider infants and incompetent persons separate from the discussion of corporations and similar entities.

Infants and Incompetent Persons

The Bankruptcy Rules contain two references to incompetent persons. Rule 1016 provides generally that a pending bankruptcy case of a debtor who becomes incompetent is treated identically to the case in which the debtor dies. Bankruptcy Rule 7017 incorporates Rule 17 of the Federal Rules of Civil Procedure for adversary proceedings only. Under that rule, infants and incompetent persons may proceed by an appointed representative, and in the absence of any representative, the infant or incompetent person may proceed by next friend or guardian ad litem. In fact, the Rule directs the court to appoint a guardian ad litem for unrepresented infants and incompetent persons. Neither Rule 1017 nor 7017, however, apply to the commencement of cases.

There has not been a large number of cases presenting the issue of capacity of infants and incompetent persons to commence bankruptcy cases. Nevertheless, in those few cases in which the issue has been presented, the courts generally have found that these persons have capacity to obtain voluntary bankruptcy relief. The courts have reached this conclusion either by incorporating applicable state law or by finding authorization in the Bankruptcy Rules.

In *Wieczorek v. Woldt (In re Kjellsen),* 53 F.3d 944 (8th Cir. 1995), the Court of Appeals affirmed the dismissal of a bankruptcy case initiated by an individual acting under a durable power of attorney from an incompetent person. The motion to dismiss the case, however, was brought by the duly appointed guardian of the debtor. The court held that under the applicable state law, the guardian had exclusive control over the debtor's property, and the action by the person holding a power of attorney was insufficient to authorize a bankruptcy filing on behalf of that debtor. The court made brief reference to Bankruptcy Rule 7017 and noted that that rule would prohibit the filing

of a suit by a debtor's next friend if a representative had already been appointed. The court did not rely on that provision, however, to conclude that the guardian had authority to act on the debtor's behalf.

The court in *In re Murray*, 199 B.R. 165 (Bankr. M.D. Tenn. 1996), resolved the issue employing a different analysis. In *Murray*, the debtor was seven years old at the time the petition was filed. The petition was signed by the debtor's mother as her next friend. The court reviewed § 109 and concluded that the infant debtor was eligible for relief. The court then focused on whether the debtor had the "capacity" to commence the case. Referring to Civil Rule 17 and supporting authorities, the court noted that "capacity is a procedural question typically controlled by court rules." 199 B.R. at 169. The court then reviewed Bankruptcy Rule 7017 and concluded that it did not provide direct authority for the debtor's mother to commence the case on behalf of the infant. The court did note the irony, however, that if an involuntary petition had been filed against the infant, that the court would be directed by Rule 7017 to appoint the debtor's mother as next friend to act on behalf of the alleged debtor. The court ultimately concluded that it was appropriate to incorporate Federal Rule 17 to permit the debtor's mother to act as her next friend to commence the case. The court reached this conclusion be relying upon Bankruptcy Rule 9029(b) which permits the judge to "regulate practice in any manner consistent with federal law, these rules, Official Forms, and local rules of the district." (A copy of *Murray* is attached.)

Regardless of the route taken, the courts have nearly unanimously found that both infants and incompetent persons are eligible for bankruptcy relief. A contrary finding arguably would be inconsistent with § 109 of the Code. The *Murray* and *Kjellsen* cases, however, demonstrate two different means by which capacity can be found. In *Murray*, the authority is said to reside in the power of the bankruptcy court to regulate practice before it. *Kjellsen*, on the other hand, directs attention to the applicable state law to determine the proper party to bring the action.

In many ways, the commencement of the bankruptcy case is different from the commencement of a civil action. The bankruptcy proceeding likely will result in the adjustment or discharge of obligations owed by the debtor. Civil actions and adversary proceedings within bankruptcy cases, however, resolve disputes or establish rights. In that sense, the commencement of a bankruptcy case is more analogous to the capacity to enter into a contract than it is the capacity to commence a civil action. For that reason, it would seem more appropriate to rely on the applicable state law to resolve whether a particular debtor has capacity to commence a bankruptcy proceeding.

There could be some concern that leaving these matters to state law could result in some infants and incompetent persons being denied access to the bankruptcy courts when it is necessary for them. Indeed, some courts have suggested that denial of access to bankruptcy for these persons on a voluntary basis would be unconstitutional since they are subject to involuntary bankruptcy relief. *In re Zawisza,* 73 B. R. 929 (Bankr. E.D. Pa. 1987). Restrictions on access to bankruptcy relief should not be too difficult to overcome. Generally, the commencement of an action by an infant or incompetent person does confer jurisdiction on a court. It simply presents a procedural

irregularity that is subject to being cured without dismissal of the action. *See, e.g., Canterbury v. Pennsylvania Railroad Co.*, 158 Ohio St. 68, 107 N.E.2d 115 (1952); *Perdrix Machinery Sales, Inc. v. Papp*, 116 Ohio App. 291, 188 N.E.2d 80 (1962).

While capacity to sue is in this sense a procedural matter, it does not necessarily follow that it should be governed by the Bankruptcy Rules. Adopting a rule that would establish a guardian, guardian ad litem, or next friend as the proper party to commence a case on behalf of an infant or an incompetent person could create additional confusion. That would be particularly so when persons in conflicting positions seek to commence a case on behalf of an infant or incompetent person. In that event, it is likely that the court would have to refer back to state law in any event to determine which party has the power to pursue the matter.

The absence of specific directive in the Rules for the commencement of cases by infants and incompetent persons has not led the courts to conclude that bankruptcy relief is unavailable for these persons. Nevertheless, if concern exists that lack of guidance from the Rules might operate to prevent some who need relief from being able to obtain it, the Rules could be amended to add a provision similar to Bankruptcy Rule 7017. Ideally, the new rule would be placed in the Part I along with the Partnership Petition Rule (1004), and any rule that might be added to address corporate petitions could be included in the same location within the Rules. The new rule could provide as follows:

Rule 1004.1

PETITION FOR INFANT OR INCOMPETENT PERSON

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative, a next friend or guardian *ad litem* may file a voluntary petition on behalf of the infant or incompetent person. The court shall appoint a guardian *ad litem* for an infant or

incompetent person or shall make such other order as it deems necessary for the protection of the infant or incompetent person.

COMMITTEE NOTE

This rule is derived from Rule 17(c) F.R. Civ. P. and sets out the manner in which cases are commenced on behalf of infants and incompetent persons. Nothing in this rule is intended to create specific authority for any particular representative. Applicable nonbankruptcy law will govern the scope of the powers of those representatives. The rule fills the gap in the Rules as noted in *In re Murray*, 199 B.R. 165 (Bankr. M.D. Tenn. 1996).

Corporations

Corporations are "persons" [§ 101(41)], and they are eligible for relief under Chapters 7, 11, and 12 of the Bankruptcy Code. As with infants and incompetent persons, however, there is no direction either in the Code or the Rules as to the manner by which corporate bankruptcy proceedings are commenced. Official Form 1 includes a statement that a particular individual is authorized to file a petition on behalf of a corporation. Similarly, Official Form 2 includes a declaration under penalty of perjury that a particular individual has reviewed the documents being filed and that they contain accurate information. Neither of these statements, however, provide any indication as to what person or persons is authorized or empowered to file a bankruptcy petition on behalf of the corporation.

In *Price v. Gurney*, 324 U.S. 100 (1945), the Supreme Court held that the determination of whether a bankruptcy petition was properly filed on behalf of a corporation is made under local law. Specifically, the court held that if "those who purport to act on behalf of the corporation have not been granted authority by local law to institute the proceedings, [the court] has no alternative but to dismiss the petition." 324 U.S. at 106. The courts have continued to follow *Price v. Gurney* in cases decided under the Bankruptcy Code. *See, e.g., Keenihan v. Heritage Press, Inc.*, 19 F.3d 1255 (8th Cir. 1994); *Phillips v. First City, Texas-Tyler, N.A.*, 966 F.2d 926 (5th Cir. 1992); *Dean v. Protho Express, Inc. (In re Protho Express, Inc.)*, 130 B.R. 517 (Bankr. M.D. Tenn. 1991); *In re Quarter Moon Livestock Co.*, 116 B.R. 775 (Bankr. D. Idaho 1990). Typically, the power or authority to file a voluntary petition in bankruptcy is vested in the board of directors of the corporation. **1 Cox, Hazen & O'Neal, CORPORATIONS** at 9.19 (1999). State statutory corporation law usually grants power to the board in general terms and is silent on the issue of the authority of the board of directors, officers, or shareholders to commence bankruptcy proceedings. *See, e.g.*, Del. Code Ann.,

tit. 8, § 141 (Supp.1998)("business affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors...."); N.Y. Bus. Corp. Law § 701 (McKinney 1986); Model Business Corp. Act § 8.01(b); ALI Principles of Corp.Governance § 3.02(b)(6). The bankruptcy court in Idaho considered those arguments in *In re Quarter Moon Livestock Co.*, 116 B.R. 775, 780-81 (Bankr. D. Idaho 1990), and concluded that under the Model Business Corporation Act, as enacted in Idaho, the board of directors was empowered to file a voluntary petition on behalf of the corporation. This power, however, can be limited either by the by-laws or articles of incorporation for the entity.

A number of bankruptcy courts have proceeded under the assumption that the board of directors is the entity with the authority to commence a bankruptcy proceeding on behalf of the corporation. Local rules in the following districts all call for the submission of an appropriate resolution of the board of directors setting out the authority of the officer or agent to commence the proceeding and act on behalf of the corporation: C.D. Cal. Local Rule 1002-1(7)(b)(iii); D. Del. General Order #8(6); M.D. La. Local Rule 201(c); D.Minn. Local Forum 1008-1; S.D. N.Y. Local Rule 1074-1(a); D. Nev. Local Rule 1002(c); and D.R.I. Local Rule 1002-1(f)(1). While these local rules tend to require the filing of a resolution of the board of directors authorizing the filing of a petition, it is likely that the courts would find that a corporate resolution or other official corporate document authorizing a particular entity or officer to file a petition on behalf of the corporation would be sufficient along with the appropriate individual's signature to commence a bankruptcy proceeding on behalf of that corporation. To the extent that these local rules are read to require a resolution of the board of directors when the applicable state law would require some other authority exist for the filing of a bankruptcy proceeding, those rules would seem to conflict with the Supreme Court's decision in *Price v. Gurney* and those other decisions recognizing that state law establishes the authority for a corporation to act.

Some concern could be expressed that states could change their corporation laws to require super majority or even 100% consent by shareholders to the commencement of a bankruptcy case. Other barriers could be enacted to limit a corporation's ability to commence bankruptcy proceedings voluntarily. Any attempt to bar a corporation from obtaining bankruptcy relief is presumably void as against public policy. *See, e.g., In re Tru Block Concrete Prods., Inc.*, 27 B.R. 486, 492 (Bankr. S.D. Cal. 1983)(court notes that it is well settled that "an advance agreement to waive the benefits conferred by the bankruptcy laws is wholly void as against public policy"). There should be no distinction drawn between an individual debtor and a corporate debtor as regards the availability of relief. The mechanics for seeking that relief, however, arguably rest properly with the corporation law itself. Shareholders certainly would have access to the information setting out the authority of one group or another to commence a bankruptcy proceeding for the corporation. It is questionable whether the bankruptcy rules should override that substantive allocation of corporate power. Furthermore, any restrictions that might be placed on the identification of the entity or entities authorized to file a bankruptcy proceeding on behalf of the corporation would have no impact on creditors who might initiate an involuntary case against a corporation. Consequently, it seems prudent to continue the absence of any specific directive in the bankruptcy rules for the manner by which a corporation may commence a voluntary bankruptcy proceeding.

The same standards should govern the commencement of voluntary cases by Limited Liability Companies, Limited Liability Partnerships, and the like. These forms of business entities are established by state law, and the scope of their powers derives from that law. Moreover, the states may create additional types of business entities, and the Bankruptcy Rules would have to be amended each time to reflect those changes if a rule specific to these forms of business were adopted. As with corporations, it seems prudent to leave the issue of the authority to commence cases to the applicable state law.

If the Committee believes that the Bankruptcy Rules should address the topic and provide a specific method for the commencement of corporate cases, then I would suggest the following rule:

RULE 1004.2
CORPORATION PETITION

A voluntary petition filed by a corporation shall be signed by an agent of the corporation and accompanied by a copy of the resolution of the board of directors, minutes of the corporate meeting, or other evidence of the agent's authority to file the petition on behalf of the corporation.

COMMITTEE NOTE

This rule requires that any person filing a bankruptcy petition on behalf of a corporation sign the petition and submit with it a copy of the appropriate document establishing the authority of the signatory to file the petition on behalf of the corporation. This rule does not create authority on behalf of any particular agent or group to file a petition on behalf of a corporation. Those issues are determined by reference to applicable nonbankruptcy law. *See Price v. Gurney*, 324 U.S. 100 (1945).

If interest exists in adding such a rule to the Bankruptcy Rules, it might also be possible to include it as a part of existing Rule 1004. The rule could be renamed Corporate or Partnership Petition, and the foregoing suggestion on corporate bankruptcies could be added as subdivision (c) of existing Bankruptcy Rule 1004. The Rule would appear as follows:

RULE 1004
PARTNERSHIP OR CORPORATION PETITION

* * * * *

(c) CORPORATION PETITION. A voluntary petition filed by a corporation shall be signed by an agent of the corporation and accompanied by a copy of the resolution of the board of directors, minutes of the corporate meeting, or other evidence of the agent's authority to file the petition on behalf of the corporation.

COMMITTEE NOTE

Subdivision (c) is added to this rule to require that any person filing a bankruptcy petition on behalf of a corporation sign the petition and submit with it a copy of the appropriate document establishing the authority of the signatory to file the petition on behalf of the corporation. This rule does not create authority on behalf of an particular agent or group to file a petition on behalf of a corporation. Those issues are determined by reference to applicable nonbankruptcy law. *See Price v. Gurney*, 324 U.S. 100 (1945).

DAYTON/MORRIS MEM

7

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2002(a) AND 2002(h): NOTICES TO CREDITORS THAT HAVE NOT FILED TIMELY CLAIMS

DATE: AUGUST 14, 1999

Bankruptcy Rule 2002(a) lists 20-day notices that must be mailed to the debtor, the trustee, creditors, and indenture trustees. Rule 2002(h) gives the court discretion to order that, in a chapter 7 case, these notices not be mailed to any creditor who has missed the deadline for timely filing a proof of claim. The purpose of Rule 2002(h) is to save the expense of mailing notices to creditors who do not have any economic interest in the case because the deadline for filing a proof of claim has expired.

Judge Arthur J. Spector (Bankr. E.D. Mich.) has recommended that Rule 2002(a) be amended to divide the list of events that require 20-day notices into two separate lists. The first list would include three notices that must be mailed to all creditors (whether or not they timely filed claims). The second list would include the remaining notices that are not to be mailed to creditors who miss the claims deadline. A copy of Judge Spector's letter, including specific language for Rule 2002(a), is enclosed.

The reason for Judge Spector's proposal is to avoid the unnecessary expense of mailing notices to creditors who have no stake in the case because of failing to timely file a proof of claim. Although that is the same purpose behind Rule 2002(h), Judge Spector's proposal would have two additional effects. First, creditors in all bankruptcy cases (chapters 7, 9, 11, 12, and 13) would not receive notices if they miss the deadline for filing claims. Rule 2002(h) gives the court discretion to order that such creditors not receive notices only in chapter 7 cases.

Second, Judge Spector's proposal removes discretion from the court under Rule 2002(h) and automatically deprives creditors of certain notices if they miss the claims filing deadline. Judge Spector's reasoning for making this automatic is that Rule 2002(h) is inadequate today because most courts no longer do their own noticing.

> "[Rule 2002(h)] is very useful in the larger cases, where it saved the clerks lots of money in their postage budgets. These days, however, most courts no longer do their own noticing, but send the paper to be served to the Bankruptcy Noticing Center, which then serves the notice on the parties in interest. The cost of serving notice is now paid for out of the general budget of the Administrative Office of the United States without specific accounting to each district."

Implicit in Judge Spector's letter is that judges are not issuing orders under Rule 2002(h) because their districts are no longer burdened with the costs of noticing. The result, in his view, is that "the current procedure perpetrates a tremendous waste of money." In addition, "many creditors who decide not to participate in the bankruptcy case are perturbed at receiving continual reminders of the case for years after they have written off the debt. The proposal would remove the salt from the wounds while saving the government money."

Judge Spector's proposal could save considerable expense by eliminating notices to those who, in most situations, would receive no distribution in the bankruptcy case because they failed to timely file a claim. But I have several concerns regarding Judge Spector's proposal that should be considered by the Committee. First, under § 502(b) of the Code, as amended in 1994, a creditor has the right to file a proof of claim at any time, even after the deadline for filing claims. If a creditor tardily files a claim, that claim will be allowed nonetheless unless a party in interest files an objection under § 502(b)(9). In certain situations, such as when the creditor is entitled to priority under § 507, a creditor is entitled to a distribution in a case notwithstanding

the failure to file a timely claim and even if a party in interest objects. See § 726(a)(1) (tardily filed priority claim receives payment so long as claim is filed before distributions commence). For example, a late claim for unpaid wages filed by an employee, or by a former spouse for alimony or child support, may be entitled to payment as a priority creditor even if they miss the claims deadline in a chapter 7 case.

In addition, nonpriority creditors may share in the estate notwithstanding the fact that they missed the claims deadline if (1) they did not receive timely notice and had no knowledge of the claims bar date in time to file in a timely manner, or (2) there are sufficient assets to pay all creditors that have filed timely claims, such as when the estate is solvent. Although these situations are rare, missing a claims deadline does not always result in the creditor's loss of all economic interests in the case. Therefore, I question whether creditors who miss the claims deadline should *automatically* forfeit the right to receive notices under Rule 2002(a).

Another concern regarding Judge Spector's proposal is that it would apply in chapter 11 cases. Under Rule 3003, a court fixes the deadline for filing claims in a chapter 11 case, and may extend the deadline for cause shown. If a creditor has an adequate justification for missing the deadline a court may extend it. As discussed above, creditors may file tardy claims and receive a distribution in certain situations (i.e., the estate is solvent, nobody objects, the creditor has priority, etc.). In addition, in a chapter 11 case, the court may (and often does) order that notices under Rule 2002(a)(2) (proposed use, sale, or lease of property), (a)(3) (hearing on approval of a settlement or compromise), and (a)(6) (hearings on applications for compensation) be mailed only to committees (instead of individual creditors). Therefore, I do not think that it is necessary to adopt Judge Spector's proposal for chapter 11 cases.

If the Advisory Committee agrees with Judge Spector's suggestion that Rule 2002(h) is no longer effective in avoiding unnecessary notices because judges are not using it, I suggest that the Committee consider, as an alternative to Judge Spector's proposed amendments to Rule 2002(a), an amendment to Rule 2002(h) that would, in effect, change the default rule. That is, the rule could direct that notices not be sent to creditors who have failed to timely file claims *unless the court orders otherwise*. This suggestion would continue to give the court discretion in this area, but would reduce notices if the court ignores the issue.

In particular, I suggest that the Committee consider the following amendments to Rule 2002(h) as an alternative to Judge Spector's proposed amendments:

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, ~~the court may direct that~~ unless the court directs otherwise, all notices required by subdivision (a) of this rule shall be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted pursuant to Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors pursuant to subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims pursuant to Rule 3002(c)(5), ~~the court may direct that notices~~ unless the court directs otherwise, all notices required by subdivision (a) of this rule shall be mailed only to the entities specified in the preceding sentence.

COMMITTEE NOTE

Subdivision (h) is amended so that, in the absence of a court order directing otherwise, notices required to be mailed to creditors under Rule 2002(a) will not be mailed to creditors that have missed the deadline for filing proofs of claim. The amendments preserve the court's discretion to order that notices be mailed to creditors that have not filed claims in a timely manner in appropriate cases, such as where it appears that the estate is solvent. The court also may order that notices be mailed to a creditor, such as former spouse, who is likely to be entitled to a distribution under § 726(a)(1) of the Code notwithstanding the fact that a proof of claim was tardily filed.

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

ARTHUR J. SPECTOR
UNITED STATES BANKRUPTCY JUDGE

G

97-BK-

111 First Street
Bay City, Michigan 48707
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September 19, 1997

Hon. Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules
Committee on Rules of Practice & Procedure of
the Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed amendment to F.R.Bankr.P. 2002, etc.

Dear Judge Duplantier:

I write not to comment upon the amendments to the rules that have been proposed, but instead to suggest other amendments for consideration in the next round of rules amendments. First, I recommend a new amendment to Rule 2002.

Rule 2002(a) requires that the debtor, the trustee, all creditors (and indenture trustees) be served by mail with notice at least 20 days before a list of proposed actions. Rule 2002(h) permits the court to limit the universe of creditors entitled to notice to those who have already filed a proof of claim or who have an extension of time to do so. This provision is very useful in the larger cases, where it saved the clerks lots of money in their postage budgets. These days, however, most courts no longer do their own noticing, but send the paper to be served to the Bankruptcy Noticing Center, which then serves the notice on the parties in interest. The cost of serving notice is now paid for out of the general budget of the Administrative Office of the United States Courts without specific accounting to each district.

In my experience, it is quite common that creditors fail to file proofs of claim even in asset cases. Therefore, notices of proposed sales of estate property; compromises of preference and other litigation; fee applications; final reports of the trustee, which includes requests for compensation, etc. are all served upon creditors who no longer have an interest in the case. Now that there are over 1.2 million cases filed a year, I submit that the current procedure perpetrates a tremendous waste of money. To save this money, I propose an amendment to Rule 2002, which would require notice to all creditors of

only notices of the first meeting of creditors, the bar date for filing claims, and the bar date for filing objections to confirmation of chapter 12 plans. With respect to the other actions under Rule 2002(a), only creditors who have filed claims or who have an extension to do so would be entitled to notice. The revised rule would like something like this:

Rule 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE

(a) Twenty-Day Notices to Parties in Interest. Except as provided in subdivisions (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days notice by mail of:

(1) the meeting of creditors under §341 of the Code;
(2) the time fixed for filing proofs of claims pursuant to Rule 3003(c); and
(3) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

(a') Except as provided in subdivisions (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors and indenture trustees who filed a proof of claim or whose right to file such a proof of claim has not yet tolled (whether because the deadline has not yet passed or because the creditor's right to file such a claim has been extended), at least 20 days notice by mail of:

(1) a proposed use, sale, or lease of property of the estate other than the ordinary course of business, unless the court for cause shown shortens the time or directs another method of giving notice;
(2) the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent;
(3) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case, unless the hearing is under §707(b) of the Code, or the conversion of the case to another chapter;
(4) the time fixed to accept or reject the proposed modification of a plan; and
(5) hearings on all applications for compensation or reimbursement in excess of $500.

From this change, you can see that creditors who fail to timely file proofs of claim or whose right to file a proof of claim has not been extended, would have no further right to receive notices of administrative proceedings in the case. This makes sense since they no longer have a monetary interest in the results of the case once the deadline for filing proofs of claim has elapsed and they have not participated. I am also sure that many creditors who decide not to participate in the bankruptcy case are perturbed at receiving continual reminders of the case for years after they have written off the debt. This proposal would remove the salt from the wounds while saving the government money. I submit that the committee should consider it in the next round of rules amendments.

On first look, it may seem that requiring the clerk to separate the names of creditors who filed a proof of claim from those that did not -- in essence, making a special service list -- in each asset case will cause confusion and extra work for clerks. But computer technology obviates the need for a clerk to make any decision or action. Presently, when a claim is filed, a clerk makes a computer entry of that fact in Bancap. A simple new command in Bancap to automatically add the creditor's name to a special service list each time a clerk dockets a claim solves this prospective problem. On the day after the claims bar date, the new service list can be electronically sent to the Bankruptcy Noticing Center to replace the original full matrix for purposes of serving all notices which do not require the full mailing list.

On a similar note, I strongly urge the committee to reconsider the various different deadlines in the rules. Many other people have written on the confusing deadline structure in the bankruptcy rules which form a trap for the unwary. The committee should try to standardize one or at most, two deadline periods for use in all procedures. Right now, for example, as we have seen, Rule 2002 provides a general 20-day notice for many things. However, the rule also provides for a 25-day notice for some things and there are other rules which provide for 15 days and 30 days notice for various events. In fact, as I have written to the committee in the past, it is extremely confusing whether the time period for considering plan modifications is really 15 days, 20 days or 25 days. See attached letters dated December 8, 1988 and September 28, 1989. I submit that 15 days is adequate for nearly all purposes and is consistent with the need for expeditious activity in the bankruptcy forum. In those handful of cases where more deliberate consideration is necessary, perhaps a second time limit somewhere around 25 or at most 30 days, might be appropriate. But the plethora of time limits is simply confusing to participants, including lawyers and even judges.

On a final note, many years ago the State of Michigan decided that deadlines in the state judiciary should be fixed in calendar weeks. Therefore, instead of 20 days, the deadline for an activity under Michigan law would be 21 days; instead of 15 days, the deadline would be 14 days. This insures that in most cases the deadline to act falls on a weekday since the triggering act will almost always be a weekday. Such a rule ought to do away with a lot of the confusing case law regarding activities for deadlines which fall on Saturday, Sunday or a holiday. It is also easier to remember such deadlines, especially if you follow my recommendation above.

Please do not hesitate to call or write if you have any questions.

Sincerely,

Arthur J. Spector

Arthur J. Spector
U.S. Bankruptcy Judge

AJS/pey

8

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PROPOSED AMENDMENTS TO BANKRUPTCY RULE 9027: REMOVAL AND REMAND

DATE: AUGUST 17, 1999

Section 1452(a) of title 28 provides for the removal of a claim or cause of action in a civil action pending in a nonbankruptcy forum to the district court for the district where the action is pending if the district court has jurisdiction under 28 U.S.C. § 1334 (the bankruptcy jurisdiction section). Section 1452(b) provides that the court to which the claim or cause of action is removed may remand it on any equitable grounds. A bankruptcy judge's order deciding a remand motion may be appealed to the district court or bankruptcy appellate panel, but remand decisions may not be appealed to the court of appeals or the Supreme Court. Bankruptcy Rule 9027 provides procedures governing removal and remand under 28 U.S.C. § 1452.

Hon. Christopher M. Klein (Bankr. E.D.Cal.) has recommended that the Advisory Committee consider amending Rule 9027 in two respects (see enclosed letter). First, he suggests that Rule 9027(d) be amended to provide a mechanism for transmitting an order of remand to the court from which the claim or cause of action has been removed. Second, he suggests that the Committee focus on the fact that the rule does not provide time limits for removal where the bankruptcy case has been closed before commencement of the action in the nonbankruptcy forum.

Notifying Non-Bankruptcy Courts of Remand Orders

Judge Klein points out that neither 28 U.S.C. § 1452 nor Rule 9027 contains a provision similar to a provision in the general federal removal statute (28 U.S.C. § 1447(c)) which directs

the clerk of the federal court to mail any order of remand to the clerk of the court from which the action has been removed, and which states that that court "may thereupon proceed with such case." In contrast, with respect to remand of a removed action under 28 U.S.C. §1452, Rule 9027 provides only that the remand motion shall be governed by Rule 9014 and served on the parties to the removed action. There is no direction in Rule 9027 that the clerk of the bankruptcy court send a remand order to the court from which it had been removed. "The critical concept," writes Judge Klein, "is that the nonbankruptcy court and the parties to the remanded claim or cause of action need a bright-line authorization to resume proceedings."

Judge Klein recognizes differences between remand in bankruptcy cases and other federal remand situations. First, remand orders of a bankruptcy judge may be appealed to the district court or BAP, while remand orders of district courts in nonbankruptcy situations are not appealable at all. Also, actions removed in nonbankruptcy situations come from state courts, whereas bankruptcy-related actions may be removed from either state or other federal courts.

Judge Klein offers two alternatives for curing this deficiency in Rule 9027. The first alternative is directed to the parties and provides that the parties may proceed in the nonbankruptcy court upon the clerk's receipt of a certified copy of the order of remand, except to the extent that the bankruptcy court has ordered otherwise. See page 3 of Judge Klein's letter. The clerk of the bankruptcy court is not directed to do anything. One advantage of this approach is that a winning party to a remand motion would not have to wait until the clerk mails a certified copy of the remand order to the clerk of the nonbankruptcy court; the party could simply mail the certified copy without relying on the clerk.

The second alternative directs the bankruptcy clerk to mail a certified copy of the remand

order to the clerk of the nonbankruptcy court after the time to file a notice of appeal has expired or the expiration of a stay pending appeal, and provides that the parties may proceed in that court except to the extent that the bankruptcy court orders otherwise.

I prefer the second alternative because (i) it conforms to the procedure provided in the general federal remand statute and I could think of no bankruptcy-related reason to depart from that practice, and (ii) it affirmatively requires that the clerk send a certified copy of a remand order to the clerk of the nonbankruptcy court, rather than relying on the parties to do it, so that the nonbankruptcy court will know that it once again has the case (whether or not the parties are eager to have it proceed). I also prefer that there be a delay in mailing the order so that the losing party would have an opportunity to obtain a stay of the remand order pending appeal.

Based on Judge Klein's recommendation, and for the reasons stated above, I suggest that the Committee consider the following proposed amendment to Rule 9027. The following language is similar to the language suggested by Judge Klein, with some stylistic and substantive revisions.

Rule 9027. Removal

****

(d) *Remand.* A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action. If an order of remand is issued by a bankruptcy judge, ten days after entry of the order or, if the order of remand has been stayed pending appeal, upon expiration of the stay, the clerk shall mail a certified copy of the order to the clerk of the court from which the claim or cause of action was removed. Upon entry of an order of remand issued by a

district judge, the clerk shall promptly mail a certified copy of the order to the clerk of the court from which the claim or cause of action was removed. When the clerk mails the order of remand, the claim or cause of action may proceed in the court from which it was removed except as otherwise directed by the court issuing the order of remand.

COMMITTEE NOTE

Subdivision (d) is amended to require the clerk to mail a certified copy of an order of remand to the clerk of the court from which the claim or cause of action was removed. This amendment conforms in substance to the general federal remand statute, 28 U.S.C. § 1447(c), which requires the clerk of the district court to mail a certified copy of any remand order to the clerk of the state court from which the case has been removed. The amendment clarifies that the claim or cause of action may proceed in the nonbankruptcy court as soon as a certified copy of the order of remand is mailed to the clerk of that court.

The ten-day delay for mailing a certified copy of an order of remand when issued by a bankruptcy judge is to give parties an opportunity to obtain a stay pending appeal. A delay is not necessary if a district judge issues the order of remand because 28 U.S.C. § 1452(b) provides that the order is not reviewable by the court of appeals or the Supreme Court.

Time for Removing a Civil Action After a Bankruptcy Case is Closed

Judge Klein also points out that Rule 9027 does not provide a time limit for removing a bankruptcy-related action under 28 U.S.C. § 1452(a) where the civil action is commenced after the related bankruptcy case has been closed. For example, if a bankruptcy case has been closed and a civil action is commenced in state court regarding the application of the bankruptcy discharge, the action may be removed under § 1452(a). But there is no time limit for such removal. Judge Klein submitted a copy of his article, co-authored with Lauren A. Helbling, on reopening cases for the purpose of removing dischargeability proceedings from state court (see enclosed copy). Judge Klein does not offer any recommendations regarding a time limit for

removal when the bankruptcy case has been closed.

Rule 9027(a)(3) provides:

> (3) *Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code*. If a case under the Code is pending when a claim or cause of action is asserted in another court, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

An obvious solution is to amend the first phrase of Rule 9027(a)(3) as follows: "If a case under the Code is pending or is closed when a claim or cause of action is asserted in another court ...." But that amendment may cause administrative problems in the bankruptcy court because ordinarily the case would have to be reopened for further proceedings to occur. A court "may" reopen the case under section 350 of the Code "for cause." Clearly, removal of a claim or cause of action related to the bankruptcy case is sufficient cause to reopen the case. But reopening is not automatic and requires a court order. What would happen if an action pending in state court is removed to the bankruptcy court and the case has not yet been reopened?

In view of these administrative concerns, I recommend that the Advisory Committee have a preliminary discussion on this matter at the next meeting. I would be especially interested in hearing from Richard Heltzel and the judges on the Committee regarding potential administrative problems if an action is removed while the case is closed, or if the deadline for removing an action could expire before a case is reopened. Should a case be reopened automatically upon removal of a claim or cause of action under § 1452(a)?

United States Bankruptcy Court
EASTERN DISTRICT OF CALIFORNIA
8308 U.S. COURTHOUSE
650 CAPITOL MALL
SACRAMENTO, CALIFORNIA 95814

97-BK-C

CHRISTOPHER M. KLEIN
JUDGE

916-498-5543

May 13, 1997

Mr. Peter McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

Re: Proposed Amendment to Federal Rule of Bankruptcy Procedure 9027

Dear Mr. McCabe:

The remand procedure governed by Federal Rule of Bankruptcy Procedure 9027(d) provides no mechanism for transmitting an order of remand to the court whence the claim or cause of action was removed.

In contrast, the basic federal remand statute provides such instructions in the last two sentences of 28 U.S.C. § 1447(c):

> A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

While one might argue that this portion of § 1447(c) applies to bankruptcy remands under the "comfortable coexistence" principle of *Things Remembered, Inc. v. Petrarca*, 116 S.Ct. 494 (1995), such that the clerk of the bankruptcy court is already under a statutory duty to do the same thing the district court clerk would do in a remand by the district court, the applicability of § 1447(c) in that context is not free from doubt.

The fit between § 1447(c) and Rule 9027(d) is imperfect, at best, and does not plainly instruct bankruptcy clerks what to do and, more important, does not give nonbankruptcy courts unambiguous authority to proceed.

Section 1447(c) does not accommodate the fact that the bankruptcy court's order of remand is not final until either the time to appeal to the district court (or bankruptcy appellate panel) has expired or the appellate court has affirmed. Rather, § 1447(c) is drafted in the context of orders of remand issued by

district courts that are, per § 1447(d), not ordinarily subject to review by a court of appeals.[1]

Nor does § 1447(c), which refers only to remands to "State courts", accommodate the fact that § 1452(a) removals can be made from other federal courts, with concomitant remand to such other federal court.

The gap became apparent as I wrote my recent decision in *Billington v. Winograde (In re Hotel Mt. Lassen, Inc.)*, ___ B.R. ___ (Bankr. E.D. Cal. 1997). My solution in that case was to include the following language in the order of remand:

> The Clerk of the court shall, upon the expiration of the time in which a notice of appeal may be filed, mail a certified copy of this order of remand to the Clerk of the Lassen County Municipal Court. The State court may thereupon proceed with the remanded civil actions.

See Billington v. Winograde, slip op. at 17, n.11.

The critical concept is that the nonbankruptcy court and the parties to the remanded claim or cause of action need a bright-line authorization to resume proceedings.

There is a settled procedure for implementing remands that State courts understand well. They are accustomed to receiving certified copies of orders of remand from district courts pursuant to § 1447(c) and have the comfort of a ready

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[1]This aspect of the gap did not exist before the enactment of § 309(c) of the Judicial Improvements Act of 1990, which amended 28 U.S.C. § 1452(b) to permit an appeal under 28 U.S.C. § 158 from a bankruptcy court's order determining a motion to remand. That amendment prompted the 1991 amendment to Rule 9027 that made the motion to remand a contested matter instead of a matter that required a report and recommendation to the district court. *See* Advisory Committee Note to 1991 Amendment to Rule 9027. Under that former regime, the order of remand was an order of the district court that the district court clerk presumably treated like any other order of remand. *See Chambers v. Marathon Home Loans (In re Marathon Home Loans)*, 96 B.R. 296, 297 (E.D. Cal. 1989) (adopting report and recommendation)

reference to that statute to assure themselves that they have authority to proceed. The absence of a parallel procedure for bankruptcy remands invites confusion.

Accordingly, it is suggested that Federal Rule of Bankruptcy Procedure 9027(d) be revised to specify when the parties may resume proceedings in the nonbankruptcy court from which the claim or cause of action was removed.

Two alternatives suggest themselves. The first tracks the syntax and structure of the rest of Rule 9027. The second borrows operative language of § 1447(c) that is well-known to State courts but which suffers from the criticism that it contains an administrative instruction to the clerk that is not appropriate for rules of procedure.

Alternative eliminating administrative instruction to clerk:

> (d) Remand. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action. Upon receipt by the clerk of the court from which the claim or cause of action was removed of a certified copy of the order of remand, the parties may proceed in that court except to the extent that the bankruptcy court has ordered otherwise.
>
> *Comment*: This alternative utilizes the same syntax that appears in Rule 9027(c). The "except clause" is designed to accommodate the possibility that it may be desirable to specify some limitations on what may occur in or in consequence of the nonbankruptcy litigation, as often occurs in situations in which litigation is permitted to proceed against the debtor in a nonbankruptcy court on the condition that there be no effort to collect any judgment as a personal liability of the debtor.

Alternative modeled on § 1447(c):

> (d) Remand. A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action. A certified copy of the order of remand shall be mailed by the clerk, following the expiration of the time in which a notice of appeal may be filed for review under 28 U.S.C. § 158 or, if appealed, the expiration of a stay pending appeal, to the clerk of the court from which the claim or cause of action was removed. That court may thereupon proceed with such case.
>
> *Comment*: This alternative has the advantage of tracking well-known language in § 1447(c) and the disadvantage of containing an administrative instruction to the clerk of the bankruptcy court. One might, however, construe the apparent administrative instruction of a rule of procedure that establishes when the litigation may resume in the nonbankruptcy court.

In short, litigants and nonbankruptcy courts need objective, unambiguous criteria for knowing when they can resume proceedings in the original forum following a remand. Rule 9027 is the logical vehicle for such criteria.

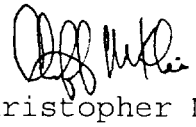
***

A more general review of Rule 9027 may also be warranted in light of various other issues that have arisen since the rule was last amended in 1991.

For example, Rule 9027(a) does not appear to prescribe a time for removing a civil action that is filed and served after a bankruptcy case is closed (and, hence, not "pending") and before it is reopened for the purposes of enabling litigation regarding the applicability of the discharge. Cf., Lauren A. Helbling & Christopher M. Klein, The Emerging Harmless Innocent Omission Defense to Nondischargeability Under Bankruptcy Code § 523(a)(3)(A): Making Sense of the Confusion Over Reopening

Cases and Amending Schedules to Add Omitted Debts, 69 American Bankr. L.J. 33, 59-63 (1995).

Very truly yours,



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The Emerging Harmless Innocent Omission Defense To Nondischargeability Under Bankruptcy Code § 523(a)(3)(A): Making Sense Of The Confusion Over Reopening Cases And Amending Schedules To Add Omitted Debts

by

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I. INTRODUCTION

The problem of how to apply the bankruptcy discharge to an omitted debt has led debtors to file motions to reopen bankruptcy cases for the purpose of adding debts to schedules on the assumption that the added debts would thereupon be discharged. When presented with motions to reopen, many courts have assumed that the debtor's inadvertence in omitting the debt is relevant to the question of whether the case should be reopened. Debtors and courts, however, have been laboring under false assumptions. A recent line of decisions, explicating what may be called the "ineffectual amendment to schedules approach," has demonstrated that amending schedules is irrelevant to whether the debt is discharged and that inadvertence is a red herring.

The realization that amending schedules has no impact on the discharge of the omitted debt has created a conceptual void that leaves the bench and bar unclear about how to proceed when a debt has been omitted and whether innocent omissions are relevant for other purposes. There is a missing link in existing analysis.

docket. It is appropriate to expect that the debtor would have the burden of proof as to each of these elements in the fashion of the typical affirmative defense.

In contrast, the case for the *nunc pro tunc* amendment has less support. First, Congress has provided § 523(a)(3)(A) as a specific vehicle to determine the parties' rights with respect to omitted debts. Second, the *nunc pro tunc* amendment clashes with the reasoning of *Anderson-Mendiola* and invites divergent jurisprudence separated only by the happenstance of whether a bar date for filing claims was fixed. Third, it is a fiction that, although essential to the court of appeals that decided *Robinson* in the face of, if not in outright defiance of, otherwise controlling Supreme Court precedent, became unnecessary when Congress overruled *Birkett*. Finally, the fiction does violence to the statutory structure of a discharge that is good against the world and not merely against those creditors that were actually listed on the schedules.

It is far preferable to confront the harmless innocent omission head-on in the form of an affirmative defense in a declaratory judgment action than to send the parties on a circuitous journey to an artificial and confusing end.

VII. REOPENING REVISITED

Having in mind the preceding discussion, what should the parties and the court do when an omitted debt comes to light and becomes a problem? The alternatives will be described, in turn, from the perspectives of debtor, creditor, and court.

A. Debtor's Alternatives

The debtor has several choices depending upon the nature of the situation. None of the first three alternatives require that the bankruptcy case be reopened.

First, the debtor may elect to do nothing and rely on the likelihood that the creditor will agree that the debt has been discharged and that litigation would be futile. This choice has its greatest practical appeal when the facts are clear, such as in the case of the otherwise dischargeable debt in a no-asset, no-bar-date case. This "do nothing" strategy is also available when the creditor brings an action on the omitted debt in a nonbankruptcy court. The discharge "voids any judgment *at any time obtained*," to the extent it determines the personal liability of the debtor with respect to a discharged debt "whether or not discharge of such debt is waived."[131] Thus, the debtor can choose to do nothing and see what happens in the post-bankruptcy action in confidence that a collateral attack will still be available and that no waiver of discharge can be implied.

Second, in response to a creditor's action on the omitted debt, the debtor could choose to interpose the affirmative defense of discharge in bankruptcy. As a practical matter, it is the equivalent of a counterclaim for a declaratory judgment that the debt

[131] Section 524(a)(1) provides that a discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged . . . whether or not discharge of such debt is waived." 11 U.S.C. § 524(a)(1) (1994)

has been discharged because the issues of law are the same. State courts are competent to entertain such a defense or counterclaim and would be applying the same law as the bankruptcy court.

Third, the debtor could file a declaratory judgment action in state court seeking a determination under § 523(a)(3)(A) that the debt has been discharged. State courts have concurrent jurisdiction over such an action,[132] which may be brought "at any time."[133]

If the debtor regards the bankruptcy court as a friendlier forum and is able to persuade the court to reopen the bankruptcy case, the debtor has two basic alternatives. The debtor could file a declaratory judgment action under § 523(a)(3)(A) seeking a determination that the debt has been discharged. This is the primary avenue for relief and could be utilized to make a collateral attack on a nonbankruptcy court's judgment as void pursuant to § 524(a)(1). Moreover, once the case is reopened, the debtor could remove any nonbankruptcy action to the bankruptcy court pursuant to § 1452 of the Judicial Code.

Alternatively, if the omitted debt has unambiguously been discharged, the debtor could attempt to initiate contempt proceedings. One should, however, be cautious and be prepared to demonstrate that a declaratory judgment action is not an appropriate solution. Courts may be reluctant to turn the "legal thumbscrew" of contempt at the request of a debtor who created the problem in the first instance by omitting the debt.

B. Creditor's Alternatives

The creditor's choices parallel the debtor's with the exception that a creditor makes a significant mistake by ignoring the bankruptcy discharge issue and leaving it to the debtor to raise the matter.

The first thing a creditor should do upon learning of a closed bankruptcy case is to inquire into the procedural history of the case. If it was a no-asset, no-bar-date case and if the omitted debt would have been otherwise dischargeable, it should be apparent that collection efforts against the debtor will be futile and contrary to the discharge injunction. If it is not clear that the omitted debt was discharged, the creditor can pursue its rights under nonbankruptcy law.

In any action on the debt in a nonbankruptcy forum, it is logical to expect the debtor to assert a defense of discharge in bankruptcy, to request a declaratory judgment under § 523(a)(3)(A), to attempt to move the dispute into the bankruptcy court, or seek to prosecute a contempt proceeding. But if the debtor does not take such steps, the creditor cannot breathe easy. The debtor's silence can be a trap.

It is not prudent for a creditor to ignore a suggestion that the debt was discharged in bankruptcy. One who succumbs to the temptation to leave it to the debtor to raise discharge in bankruptcy defensively ignores the provisions in § 524(a)(1) that, first,

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[132] 28 U.S.C. § 1334(b) (1994); *see supra* note 48

[133] Fed. R. Bankr. P. 4007(b); *see supra* note 46

void a judgment "at any time obtained" and that, second, outlaw waivers, including implied waivers, of discharge. Since there cannot be an implied waiver, a judgment on a discharged debt is subject to collateral attack at any time and could leave the creditor in the unhappy position of having thrown good money after bad.

The better strategy for the creditor who perceives a potential issue regarding discharge is to confront it head-on and obtain a determination that is *res judicata* on the question. If the debtor does not raise the matter by way of formal defense or declaratory judgment action, then the creditor should. This can be accomplished by adding a § 523(a)(3) count to a state court action on the debt[134] or, even, by having the case reopened and bringing a declaratory judgment action in bankruptcy court.[135]

The creditor should recognize that a debtor's motion to reopen the bankruptcy case is fundamentally a procedural matter that involves a choice of forum and that any amendment to the bankruptcy schedules will be irrelevant to the question whether the debt is actually discharged. The creditor who prefers to stay out of the bankruptcy forum should attempt to persuade the bankruptcy court either to abstain in favor of state court, or, if applicable, to remand a removed action to state court, as permitted by §§ 1334(c)(1) and 1452(b) of the Judicial Code.[136]

If the debtor tries to move the dispute over an omitted debt into the bankruptcy forum, the creditor can argue that there are two related disputes—the substantive action under state law and the discharge question—that are better resolved in a single forum. The creditor can suggest that the difficulties regarding the bankruptcy court's jurisdiction over the action on the debt, which probably is not a "core" proceeding, make the state court the more efficient forum. This type of argument gains force in complex multi-party disputes in which the limited jurisdiction of the bankruptcy court offers little prospect for a comprehensive final solution.

In sum, the primary mistake that the creditor can make is to ignore suggestions that the omitted debt was discharged in bankruptcy.

C. Court's Alternatives

The bankruptcy court has fewer options than the debtor or the creditors. Simply, it has to decide whether to reopen the case or not. That decision calls for an exercise of discretion based primarily on its view of whether it is the better forum for resolving the controversy over the omitted debt. If the motion is granted, no particular explanation is needed.[137]

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[134] This includes both § 523(a)(3)(A) and (B) If the omitted debt is nondischargeable for any reason other than § 523(a)(3)(A) or (15), then the creditor is also able to pursue a declaratory judgment action to that effect as well. Thus, actions under § 523(a)(2), (4), or (6) can be prosecuted in a nonbankruptcy court under § 523(a)(3)(B), as well as actions under § 523(a)(1), (5), (7)-(14), and (16) For example, a creditor whose omitted debt was incurred by fraud that would be nondischargeable under § 523(a)(2) could add a § 523(a)(3)(B) count to its state law action on the debt.

[135] The latter course may make sense in districts where bankruptcy courts liberally issue orders to show cause why the debtor should not be held in contempt

[136] See *infra* notes 140-41 and accompanying text for a discussion of abstention and remand.

[137] If the case is reopened, the likely basis will be "cause" under § 350(b) rather than "to accord relief to the debtor" because the outcome of the dispute is ordinarily in doubt.

Upon reopening, the court should require a formal proceeding within a fixed time to test the dischargeability of the omitted debt.[138] In a declaratory judgment action under § 523(a)(3)(A), the court may need to confront the question of whether there is a cognizable harmless innocent omission defense and whether the facts warrant its application.

Contempt proceedings based on efforts to collect omitted debts should be reserved for egregious circumstances. The court should bear in mind the Supreme Court's admonition that "the exercise of contempt power is 'a delicate one and care is needed to avoid arbitrary or oppressive conclusions' "[139] and that it should exercise the least possible power adequate to the situation. Ordinarily, the availability of a declaratory judgment under § 523(a)(3) will suffice.

Denial of a motion to reopen warrants an explanation from the court. The parties deserve guidance. Appellate courts need to be able to determine whether the trial court's discretion is being abused.

If the refusal to reopen is based on the *Anderson-Mendiola* ineffectual amendment rationale, the court should indicate whether the denial is without prejudice to another motion seeking to have the case reopened for the purpose of prosecuting a formal action to determine whether the omitted debt was discharged or to enforce the discharge. Putting the debtor to the time and expense of a renewed motion that would be granted, however, is not a very satisfying result. The better course of action in such instances would be for the court to grant the motion to reopen; require that a formal proceeding, other than amending the schedules, be initiated within a fixed time after the case is reopened; and order that the case be closed without further order if such a proceeding is not pending as of a specific date.

If the court is declining to reopen the case because it prefers that the question of the discharge of the omitted debt be litigated in a nonbankruptcy court of competent jurisdiction, then it should so indicate. In order to minimize appeals and delay for the parties, it should also either formally abstain or remand a removed action pursuant to §§ 1334(c)(1) or 1452(b) of the Judicial Code.[140] A decision to abstain or remand

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[138]It may be appropriate, as an administrative matter, to require that schedules be amended. *Cf. In re* McKinnon, 165 B.R. 55 (Bankr. D. Me. 1994). It should, however, be made clear that any such amendment would have no impact upon whether the omitted debt is discharged.

[139]Order of April 24, 1973, Adopting and Transmitting Bankruptcy Rules to Congress, 411 U.S. 991 (1973) (Douglas, J., dissenting) (quoting Cooke v. United States, 267 U.S. 517, 539 (1925)).

[140]Statutory abstention in favor of a state court is governed by § 1334(c)(1) of the Judicial Code, which provides:

> Nothing in this section prevents a district [or bankruptcy] court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C § 1334(c)(1) (1994).

Remand of an action removed from state court is governed by § 1452(b) of the Judicial Code, which states in pertinent part that the "court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground." *Id* § 1452(b).

can be reviewed only by the district court or bankruptcy appellate panel and not by the court of appeals or Supreme Court.[141]

VIII. CONCLUSION

Decisions holding that bankruptcy cases may be reopened for the purpose of amending schedules to add innocently omitted debts make two key mistakes. First, they erroneously assume that amending schedules will enable the debt to be discharged. The law is that adding a debt to the schedules is irrelevant to discharging the debt and that the determination whether an omitted debt has or has not been discharged ordinarily requires a declaratory judgment under § 523(a)(3). Second, they fail to recognize that the circumstances of omitting the debt are not relevant to reopening the case, but that they are relevant to the innocent omission defense to nondischargeability under § 523(a)(3)(A). Thus, evidence of why the debt was omitted belongs in a declaratory judgment action under § 523(a)(3)(A) in a civil action in state court, or in an adversary proceeding in bankruptcy court. Denial of a motion to reopen for the purpose of establishing the discharge status of an omitted debt amounts to a determination by the bankruptcy court to abstain and should be analyzed accordingly.

It is time to shift the focus from the red herring of amended schedules in reopened cases to the task of defining the parameters of the emerging equitable innocent omission defense to nondischargeability under § 523(a)(3)(A) that applies in cases of omitted debts where a bar date for filing claims has passed. Few decisions focus on appropriate standards to apply. A host of questions need answers. What is harmless? What is innocent? What if the debtor pays the omitted creditor the same dividend as was received by creditors who were not omitted? What if the omitted creditor learned of the bankruptcy in time to file a tardy claim that actually was paid the same dividend as timely claims as permitted by § 726(a)(2)(C)? There is much work to do.

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[141] "The restrictions on appellate review of bankruptcy abstentions state, in pertinent part, that:

> Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals . . . or by the Supreme Court of the United States . . . . This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

28 U.S.C. § 1334(d) (1994)

Similarly, the restrictions on appellate review of remands by bankruptcy courts provide that: "An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals or by the Supreme Court of the United States . . . " *Id* § 1452(d).

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS

RE: PROPOSED AMENDMENTS TO RULES 4004(c), 2015(a)(5) and 2010

DATE: AUGUST 23, 1999

The Executive Office of the United States Trustee (EOUST) has submitted three proposed amendments to the rules. A copy of the submission from the General Counsel of the EOUST is attached to this memorandum.

RULE 4004

The first proposed amendment is to Bankruptcy Rule 4004. That rule governs the entry of the discharge order. In particular, the rule postpones the entry of a discharge whenever an objection to discharge is pending or when a motion to dismiss the case is made under Rule 1007(e). That rule governs the practice when a motion is made under § 707(b) of the Bankruptcy Code. The section provides for the dismissal of cases filed by consumer debtors if it would be a substantial abuse to permit the case to proceed to discharge. Conspicuously absent from Rule 4004, however, is any postponement of the entry of the discharge order in the face of a motion to dismiss the case filed under § 707(a) of the Bankruptcy Code. Parties in interest may move to dismiss a case under § 707(a) "for cause." Typically, the courts have dismissed cases under this section when the debtor is targeting a particular creditor (often a former spouse) or when the debtor has substantial disposable income that would be available to pay creditors, or some combination of the two. See, e.g., In re Zick, 931 F.2d 1124 (6th Cir. 1991) (debtor sought discharge of a single creditor's claim and had substantial postpetition income available to pay the creditor's claim).

At least two courts have held that the filing of a motion to dismiss a case under § 707(a) does not prevent the entry of the debtor's discharge. In re Tanenbaum, 210 B.R. 182 (Bankr. D. Colo. 1997); In re Adams, 203 B.R. 240 (Bankr. E.D. Va. 1996). The courts in those cases concluded that postponement of the entry of the discharge was not available to the creditor given the language of Bankruptcy Rule 4004(c). Moreover, as the attached submission from the EOUST notes, this strict enforcement of deadlines is consistent with the Supreme Court's decision in Taylor v. Freeland & Kronz, 112 S. Ct. 1644 (1992).

The EOUST has proposed that Rule 4000(c)(1)(D) be amended to result in the postponement of the entry of discharge whenever a motion to dismiss a case is made under § 707 rather than made only under Rule 1017(e). This is also arguably consistent with a recent change made to Bankruptcy Rule 4003(b). That change was intended to overrule cases such as In re Laurain, 113 F.3d 595 (6th Cir. 1997), which held that a request for an extension of time within which to object to an exemption must be granted within the objection period or it becomes moot. Rule 4003(b) was amended to require only that the objecting party move for the extension of time in a timely manner so that they would not be penalized by the tardy action of a court in responding to the motion.

The current configuration of the Bankruptcy Rules also could lead creditors who are seeking dismissal of Chapter 7 cases to file objections to discharge simply for the purpose of postponing the entry of the order of discharge. That is the only avenue available to the creditor to prevent the entry of the discharge under Rule 4004. The debtor may request that the discharge not be entered, but it is unlikely in these cases that a debtor would so agree.

Notwithstanding the foregoing discussion, there may be good reason to continue the rule in its current form. Under the existing rules, creditors are denied the leverage that they might gain over

debtors by filing motions to dismiss. Creditors do not have standing to bring motions under § 707(b) so they cannot postpone the entry of the discharge by proceeding under Bankruptcy Rule 1017(e). Granting them this ability for all motions filed under § 707(a) could shift the balance of power between debtors and creditors to increase the potential for creditors to exert excessive authority over debtors. The delayed entry of the discharge could be used to extract "settlements" that are effectively reaffirmation agreements. Consequently, there may be good reason for limiting creditors' ability to postpone the entry of a discharge in a Chapter 7 case.

If the committee believes it is appropriate to amend Rule 4004(c)(1)(d), consistent with the request of the Executive Office of the United States Trustee, then the rule could be amended in the following manner:

Rule 4004. Grant or Denial of Discharge

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c) GRANT OF DISCHARGE

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant discharge unless:

(~~a~~A) the debtor is not an individual,

(~~b~~B) a complaint objecting to the discharge has been filed,

(~~c~~C) the debtor has filed a waiver under § 727(a)(10)

(~~d~~D) a motion to dismiss the case ~~pursuant to Rule 1017(e)~~ under § 707 is pending;

(eE) a motion to extend the time for filing a complaint objecting to discharge is pending, or

(fF) the debtor has not paid in full the filing fee prescribed by 28 USC § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 USC § 1930(b) that is payable to the clerk upon the commencement of a case under a Code.

COMMITTEE NOTE

Subdivision (c)(1)(d) is amended to provide that the filing of a motion to dismiss under § 707 of the Bankruptcy Code postpones the entry of the discharge. Under the prior version of the rule, only motions to dismiss brought under § 707(b) caused the postponement of the discharge. This amendment would change the result in cases such as In re Tanenbaum, 210 B.R. 182 (Bankr. D. Colo. 1997).

Other amendments to the rule are stylistic.

RULE 2015(a)(5)

The EOUST also proposed an amendment to Rule 2015(a)(5) regarding the filing of postconfirmation quarterly reports in Chapter 11 cases. Rule 2015(a) currently provides that the debtor must file quarterly reports "until a plan is confirmed or the case is converted or dismissed." Prior to 1996, Chapter 11 debtors had no obligation to pay a quarterly United States trustee fee under 28 USC § 1930(a)(6) after confirmation of the plan. Congress amended that section, however, in 1996 to provide that quarterly fees are payable "until the case is converted or dismissed, whichever occurs first." The courts have rejected attempts by debtors to avoid making these payments after confirmation of a plan but prior to the closing of a case. See, e.g., United States Trustee v. CF & I

Fabricators of Utah, Inc. (In re CF & I Fabricators of Utah, Inc.), 150 F.3d 1233 (10th Cir. 1998); Vergos v. Gregg's Entrs., 159 F.3d (6th Cir. 1998).

Given the amendment to 28 USC § 1930(a)(6) and the consistent interpretation of that provision in the courts, it seems appropriate to amend Rule 2015(a)(5) to require that the reports on which the trustee's fee are based be filed quarterly while the case is pending. Rule 2015 would be amended as follows:

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall

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(5) in a Chapter 11 reorganization case, on or before the last day of the month of each calendar quarter until ~~a plan is confirmed or~~ the case is converted or dismissed, file and transmit to the United State Trustee a statement of disbursements made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

COMMITTEE NOTE

Subdivision (a)(5) is amended to conform to the amendment of 28 U.S.C. § 1930(a)(6) enacted by Congress in 1996. Pub. L. No. 104-91, §101(a) and 104-99, §211, 110 Stat. 37 (1996). The statutory amendment requires Chapter 11 debtors to pay a quarterly fee to the United States Trustee "until the case is converted or dismissed, whichever occurs first." This rule requires the debtor to file the appropriate reports from which the amount of the quarterly fee is calculated.

It may be appropriate to postpone consideration of this issue at this time. Section 608 of H.R. 833 which passed the House on May 5, 1999, would amend 28 U.S.C. § 1930(a)(6) to provide

that quarterly United States trustee fees are no longer payable after confirmation of a plan or conversion of a case. A similar provision was originally contained in § 416 of S. 625 which is pending in the Senate at the date of this memorandum. That section has been stricken from the current version of the Bill. Given the inclusion of this amendment in the House Bill, however, amending Rule 2015(a)(5) in the manner suggested may be premature and may become unnecessary. Therefore, I would recommend that the Committee defer the matter to the next meeting at which time the legislative landscape may be more settled.

RULE 2010(b)

The final request made by the EOUST concerns Rule 2010(b). The Rule provides that proceedings on a trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition. That rule follows from Rule 2010(a) that authorizes the United States trustee to permit blanket bonds. No problems appear to exist with the current formulation of the rule; however, the proposal asserts that the silence in the Bankruptcy Rules regarding the enforcement of other bonds could lead to procedural and substantive problems with the enforcement of those bonds. Thus, the argument proceeds, the procedure for enforcing bonds other than a trustee's bond should be articulated in the rules.

Among the bonds that might be governed by the new rule are those issued by depository banks in favor of the United States trustee, auctioneer's bonds, and bonds for examiners who are given expansive powers. Under Rule 2010(b) it is clear that any party in interest can initiate a proceeding on a trustee's bond by acting in the name of the United States. The United States trustee asserts that the absence of a similar provision on other bonds should be remedied. The need for the addition to the rules is based on a single unreported decision and an assertion that the absence of an

appropriate rule creates other procedural difficulties such as determining whether the United States or the United States trustee is a necessary party to an action on a bond.

In the unreported case, Williams v. Wells Fargo Bank (In re Cardinal Well Service), Civ. Action No. H-95-5554 (S.D. Tex. Nov. 25, 1996), the case trustee sued a depository bank under the agreement the bank had reached with the United States trustee pursuant to § 345 of the Bankruptcy Code. He sought to join the United States trustee as an involuntary plaintiff, but the District Court denied the motion. The case was settled. Moreover, the submission by the EOUST itself notes that an intended third party beneficiary (such as the case trustee) can bring the action and that joinder of the other contracting party (the United States trustee) is unnecessary. *See attached letter to Mr. McCabe at p.4 and n.4.* Thus, the problem of case trustees being unable to bring these actions may not truly exist. Furthermore, the presence of a single unreported decision in the last eight years after the abrogation of Rule 5008 and under the current version of Rule 2010 suggests either that no cases have arisen or that they were resolved to the satisfaction of the parties involved.

The proposal also seeks a rule to govern the enforcement of other types of bonds, but again it does not indicate any present controversies over those bonds. Additionally, the proposal identifies several kinds of bonds but notes as well that there may be other bonds to which the rules should apply. The possibility of other types of bonds that are not identified specifically should also sound a note of caution about amending the rules any further. The doctrine of unintended consequences is especially significant when the parameters of a problem one is trying to solve are not clearly identified. Consequently, I would recommend that the Committee table consideration of the proposal. If new problems arise that lead to inconsistent decisions or opinions that improperly burden the process, then the Committee could address the matter at that time and with additional

evidence of the scope and impact of the problem. Of course, if the Committee chooses, I would be happy to prepare a draft of a rule governing actions to recover on bonds. Because Rule 2010 governs only the qualification of case trustees and their bonds, I think that a rule on the enforcement of other bonds should be separate from 2010.

U.S. Department of Justice 99-BK-H

Executive Office for United States Trustees

901 E Street, N.W.
Washington, D.C. 20530

July 20, 1999

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

Re: Recommendations for Amendments to Federal Rules of Bankruptcy Procedure 2010, 2015, and 4004

Dear Mr. McCabe:

On behalf of the United States Trustee Program, I submit the following suggestions for amendments to the Federal Rules of Bankruptcy Procedure (Rules) 2010, 2015, and 4004 and respectfully request that they be considered by the Bankruptcy Rules Committee at its September 27-28, 1999 meeting.

I. Suggested Amendment to Rule 4004 to Provide for a Delay in Entry of Discharge When a Motion to Dismiss Under 11 U.S.C. § 707(a) is Filed

There currently is no provision in the Bankruptcy Code or Rules that permits a court to defer entry of a chapter 7 discharge upon the filing of a motion to dismiss a case "for cause" under 11 U.S.C. 707(a). We urge the Committee to resolve this apparent oversight. Rule 4004(c) provides that the court shall grant a discharge "forthwith" unless, among other things, a complaint objecting to discharge is filed, a motion to extend the time for filing a complaint is filed, or a motion to dismiss the case pursuant to Rule 1017(e) is pending. Rule 1017(e) deals only with section 707(b) motions.

The failure of Rule 4004 to address a pending section 707(a) motion has adversely impacted our ability to seek dismissal of cases "for cause." Unless the court can rule on a section 707(a) motion before the expiration of the time period for filing either a complaint objecting to discharge or a section 707(b) motion, the Rule indicates that a discharge must be entered "forthwith." Several courts have held that the discharge must be entered even though it moots a pending section 707(a) motion. See In re Tanenbaum, 210 B.R. 182 (Bankr. D. Colo. 1997)(finding clerk's practice of

delaying discharge when United States Trustee's section 707(a) motion to dismiss was pending to be inappropriate); In re Adams, 203 B.R. 240 (Bankr. E.D. Va. 1996)(finding discharge was properly entered with creditor's section 707(a) motion to dismiss pending).

In Tanenbaum, the United States Trustee filed a motion to dismiss the case under section 707(a). The bankruptcy clerk delayed entry of the discharge, as was the clerk's regular practice whenever a section 707(a) or 707(b) motion was pending prior to the expiration of the time to object to discharge. Although the court agreed that the debtors acted in bad faith, the court found that the clerk's practice was impermissible as to a section 707(a) motion because there was nothing in the Code or Rules to prevent the discharge from being entered. Tanenbaum, 210 B.R. at 188 (quoting Adams, 203 B.R. at 241). Accordingly, the United States Trustee's motion was dismissed as moot. The prospects of obtaining a different result on appeal appear unlikely. Collier notes, for example, the following:

> The language of Rule 4004(c) does not permit the court to delay granting the discharge for any reason not set forth in the rule. Unless a complaint objecting to discharge or a motion to dismiss under Rule 1017(e) has been timely filed, the filing fees have not been paid in full, or the debtor requests a delay, the court must enter the chapter 7 discharge order as soon as possible. Therefore, the rule could appear to preclude the delay of a discharge for any other purposes, to as permitting a creditor time to obtain a lien on joint property.

9 COLLIER ON BANKRUPTCY ¶ 4004.04[1], at 4004-14 (15th ed. rev. 1999). This is consistent with the strict enforcement of Rule deadlines generally. See Taylor v. Freeland & Kronz, 112 S.Ct. 1644, 1648 (1992) (affirming denial of an objection to exemption that was not filed within the 30 days required by Rule 4003(b)).

Thus, until Rule 4004 is amended, the filing of a section 707(a) motion is a practical impossibility in those districts that refuse to depart from a strict reading of the text. To accomplish this change, we recommend that Rule 4004(c)(1)(d) be amended by deleting the reference to "Rule 1017(e)"and inserting in its place "§ 707". Rule 4004(c)(1)(d) would then read in pertinent part as follows:

> (1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless:
>
> (d) a motion to dismiss the case pursuant to ~~Rule 1017(e)~~ **§ 707** is pending;

II. Suggested Amendment to Rule 2015(a)(5) to Clarify the Requirement to File Post-Confirmation Quarterly Reports in all Pending Chapter 11 Cases.

Effective as of January 27, 1996, Congress amended 28 U.S.C. 1930(a)(6), pursuant to Pub. L. No. 104-91, § 101(a) and 104-99, § 211, 110 Stat. 37 (1996) to extend chapter 11 debtors' obligation to pay quarterly fees into the post-confirmation period of the case.[1] The change sparked a flurry of litigation regarding the extent of the post-confirmation fee, but virtually all of the cases have now been resolved on appeal in favor of the United States Trustees' position.[2]

In light of this change in the law and the body of case law that has been developed, we ask that Rule 2015(a)(5) be amended to conform with 28 U.S.C. § 1930(a)(6) and to reflect the fact that quarterly fees must now be paid as long as the case is pending. We recommend amending subsection (a)(5) by striking the phrase "until a plan is confirmed or the case is converted or dismissed" and inserting in its place "in which the case is pending." The paragraph would then read as follows:

> (5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter ~~until a plan is confirmed or the case is converted or dismissed~~ **in which the case is pending**, file and transmit to the United States trustee a statement of disbursements

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[1] Congress later enacted clarifying legislation in the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, § 109(d), 110 Stat. 3009, 3009-19 (1996).

[2] *See, e.g.*, In re Gryphon at the Stone Mansion, Inc., 204 B.R. 460 (Bankr. W.D. Pa. 1997) (en banc), *rev'd sub nom* United States Trustee v. Gryphon at the Stone Mansion, Inc., 216 B.R. 764 (W.D. Pa.), *aff'd*, 166 F.3d 552 (3d Cir. 1999); In re CF&I Fabricators of Utah, Inc., 199 B.R. 986 (Bankr. D. Utah 1996), *rev'd*, 214 B.R. 16 (D. Utah 1997), *aff'd*, 150 F.3d 1233 (10th Cir. 1998); Vergos v. Gregg's Enters., 159 F.3d 989 (6th Cir. 1998); In re Precision Autocraft, Inc., 197 B.R. 901 (Bankr. W.D. Wash. 1996), *rev'd*, United States Trustee vs. Precision Autocraft, Inc., 207 B.R. 692 (W.D. Wash. 1997); United States Trustee v. Uncle Bud's, Inc., 1998 WL 652542 (M.D. Tenn.,1998); United States Trustee v. Harness, 218 B.R. 163 (D. Kan. 1998); In re Maruko, Inc., 206 B.R. 225 (Bankr. S.D. Cal. 1997) *aff'd in part, rev'd in part on other grounds*, 219 B.R. 567 (S.D. Cal. 1998);United States Trustee v. Harness, 218 B.R. 163 (D. Kan. 1998); U. S. Trustee v. Boulders on the River, Inc., 218 B.R. 528 (D. Or. 1997); Robiner v. Beechknoll Nursing Homes, Inc., 216 B.R. 925 (S.D. Ohio 1997); *see also* In re A.H. Robins Co., 219 B.R. 145 (Bankr. E.D. Va. 1998); In re Campesinos Unidos, Inc., 219 B.R. 886 (Bankr. S.D. Cal. 1998); In re Central Copters, Inc., 226 B.R. 447 (Bankr. D. Mont. 1998); In re Postconfirmation Fees, 224 B.R. 793 (Bankr. E.D. Wash. 1998); In re Pudgie's Dev. of New York, 223 B.R. 421 (Bankr. S.D. N.Y. 1998). *But see* Tiffany v. Celebrity Duplicating Services, Inc., 216 B.R. 942 (C.D. Cal. 1997), *appeal pending*, (9th Cir.) (since there is no estate post-confirmation, there are no disbursements on which to base the fee; therefore, only minimal fee is due).

> made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid for such calendar quarter.

III. Suggested Amendment to Rule 2010(b) to Include Procedures for Bringing Suits on Bonds in Favor of the United States

The procedures for bringing suit on a trustee's bond provided under 11 U.S.C. § 322 are set forth in Rule 2010(b) as follows:

> *Proceeding on Bond.* A proceeding on the trustee's bond may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

The rule makes clear that any party in interest can bring a proceeding on the bond in the name of the United States. Unfortunately, there is no similar provision that addresses suits on a depository bond described in 11 U.S.C. § 345 or any other bonds that may be posted in the name of the United States in connection with a bankruptcy case.[3] The lack of an express provision in the rules or statute raises questions about the proper proceeding for bringing suit on such bonds, including who can bring the action. Although suits on these types of bonds are rare, we believe the rules should be amended to ensure that injured parties can bring suit without unnecessary difficulty.

In the absence of a rule or statute, the law generally indicates that the intended beneficiary of a contract may sue for breach of that contract. See Restatement (Second) of Contracts, §§ 302-315 (1982); Restatement (Third) of Suretyship & Guaranty § 69 (1996). Rule 7017 also provides that an action must be brought by the person who, under substantive law, is entitled to enforce the right at issue. 4 J. Moore, Moore's Federal Practice §§ 17.01, 17.10 (3rd ed. 1999). Even if we can assume that the case trustee is an "intended beneficiary" who could prosecute an action on behalf of the estate to recover on a bond, like a § 345 depository bond or an auctioneer's bond, the question still remains whether the United States is a necessary party to the action.[4]

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[3] Another bond in favor of the United States that is required in many districts is an auctioneer's bond. Also needed on occasion is a bond for an examiner who is given expanded powers.

[4] One commentator has stated that "in cases in which the beneficiary is a party, the courts uniformly reject the argument that all of the original parties to the contract must be joined." 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1613 at 186 (1986). See also Trans-Bay Engineers & Builders Inc. v. Hills, 551 F.2d 370, 376 (D.C. Cir. 1976)(owner of project not necessary party in suit by contractor against mortgagee holding retainage). But see Swerhum v. General Motors Corp., 141 F.R.D. 342, 347 (M.D. Fla. 1992)(other shareholders and franchisee corporation necessary parties in action by shareholder against franchisor).

In the unreported case of Williams v. Wells Fargo Bank (In re Cardinal Well Service), Civ. Action No. H-95-5554 (S.D. Tex. Nov. 25, 1996), the chapter 7 trustee brought suit against a depository bank to recover under the depository agreement that the bank had entered into with the United States Trustee pursuant to § 345. The trustee sought to add the United States Trustee as an involuntary plaintiff under Fed. R. Civ. P. 19 because it was the contracting party. The court denied the motion, noting that no law or express agreement obligates the United States Trustee to be a named plaintiff.[5] The court also found that it could not order the United States Trustee to enforce its rights under the depository agreement because his enforcement decisions are discretionary and protected by sovereign immunity. Although the suit was settled before the court could resolve the issue of whether the trustee was a proper party to bring the action, the case brought to light the uncertainty surrounding these kinds of suits. In the absence of a rule or statute, it is entirely possible that a court could hold that ***only*** the United States Trustee (or United States) can bring suit on the depository bond.

The Committee may recall that Rule 5008(d) formerly addressed proceedings on bonds or on agreements for the deposit of securities pursuant to 11 U.S.C. § 345. It was abrogated by the Supreme Court in 1991 in view of the amendments to section 345(b) which gave the United States Trustee bond-approving authority. 1991 Advisory Committee Note to Former Rule 5008. Similar to Rule 2010(b), former Rule 5008(d) stated:

> Proceedings on a bond given pursuant to § 345(b) of the Code or on an agreement for deposit of securities required by subdivision (c) of this rule shall be in the name of the United States for the use of the estate or any entity injured by a breach of the condition.

The Rule made clear that suit could be brought on the bond in the name of the United States "for the use of the estate or any entity injured by a breach of the condition."[6] We urge the Committee to incorporate a similar provision back into Rule 2010 to minimize litigation issues and to clarify that intended beneficiaries can bring appropriate actions on the bond in the name of the United States.

A proposed amendment to Rule 2010(b) is set forth below, although the Committee may also want to consider whether it would be more appropriate to have a separate rule to address this topic.[7]

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[5] Involuntary joinder of a plaintiff is used almost exclusively in patent and copyright infringement cases. Caprio v. Wilson, 513 F.2d 837, 839 (9th Cir. 1975); See, e.g., Sheldon v. West Bend Corp., 718 F.2d 603, 606 (3rd Cir.1983).

[6] This comports with the legislative history to section 345 which states that a bond or deposit of securities is required "to protect the creditors." H.R. Rep. No. 595, 95th Cong., 1st Sess. 333 (1977).

[7] Care should be taken, however to distinguish the various types of bonds. For example, Rule 9025 entitled "Security: Proceedings Against Sureties" covers all bonds including those required

The language of this proposal would also permit suits on other bonds in favor of the United States to address the growing number of districts that require bonded auctioneers.

> (b) Proceeding on Bond. A proceeding on (i) the a trustee's bond under section 322 of the Code, (ii) a depository bond under section 345 of the Code, or (iii) a bond provided in connection with the appointment or employment of a person to provide services in a case under the Code, may be brought by any party in interest in the name of the United States for the use of the entity injured by the breach of the condition.

Please do not hesitate to contact me if I can provide the Committee with further information on these proposals. Thank you for your cooperation and assistance.

Sincerely,

Martha L. Davis
General Counsel

cc: Professor Alan N. Resnick, Reporter
Patricia Sugrue Channon

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by §§ 322 and 345. Our suggestion would not apply to all bonds but only to those that are written in favor of the United States where it is unclear who can bring suit on the bond.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: APPLICATION OF BANKRUPTCY RULES 9019 AND 7041 TO MATTERS PENDING IN THE COURT OF APPEALS

DATE: AUGUST 19, 1999

Bankruptcy Rule 9019(a) provides the procedure for court approval of settlements. As settlements of disputes may affect the estate and parties in interest who are not parties to the particular dispute being settled, the rule requires notice to all creditors, the United States trustee, and others. For example, if a mortgagee and the trustee are disputing the allowed amount of a secured claim, and they reach a settlement, the court would have to approve the settlement on notice to all creditors. Rule 9019(a) provides:

Rule 9019. Compromise and Arbitration

> (a) *Compromise.* On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.

Bankruptcy Rule 2002(a)(3) provides for 20-day notice to all creditors of "the hearing on approval of a compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d), unless the court for cause shown directs that notice not be sent." These notices are also sent to official committees and the United States trustee. See Rule 2002(i) and (k).

In addition to the requirement of notice and court approval of settlements, the Bankruptcy Rules also require court approval, on notice to the trustee, the United States trustee, and any other person the court may direct, of the dismissal of a complaint objecting to the debtor's

discharge. The reason for this requirement is that dismissal of a complaint objecting to the debtor's discharge raises concerns because the plaintiff may have been induced to dismiss by an advantage given or promised by the debtor or someone else, which could be inconsistent with policies underlying the Bankruptcy Code (such as equality of treatment of creditors and fresh start for the debtor).

Hon. L. Edward Friend II (Bankr. N.D. W.Va.), in his letter of July 12, 1999, informed the Advisory Committee that the bankruptcy judges of the Fourth Circuit recently identified a potential problem with respect to Rule 33 of the Fourth Circuit's Local Rules. Judge Friend enclosed with his letter another letter that he wrote to Sam Phillips, the Fourth Circuit's Executive Director, explaining the problem. Both letters are enclosed.

Local Rule 33 ("Circuit Mediation Conferences") provides for mediation conferences with a mediator if the circuit mediator determines that such a conference may assist the parties or the court. The rule provides, in part that "[t]he mediator, through the Clerk of the Court, may enter orders which control the course of the proceedings and, upon agreement of the parties, dispose of the case." In addition, the rule provides that "[i]nformation disclosed in the mediation process shall be kept confidential and shall not be disclosed by a circuit mediator, counsel, or parties to the judges deciding the appeal or to any other person outside the mediation program participants." A copy of Local Rule 33 is enclosed.

Judge Friend states that Local Rule 33 "no doubt works well in the typical two party dispute, but it permits parties in a bankruptcy case to accomplish a settlement that could be detrimental to the bankruptcy estate without notice to creditors or scrutiny by the court." He then points out that Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to all cases under

title 11 of the United States Code, but it is not clear whether the Bankruptcy Rules, especially Rules 9019 and 7041, apply to cases on appeal in the court of appeals. "I am not sure how to address the problem, but a reference to Bankruptcy Rules 9019 and 7041 in Local Rule 33 or in a new Local Rule 6 might be an easy solution."

Judge Friend also suggests that same problem (lack of notice and court approval when bankruptcy related matters are settled) may exist with respect to Rule 33 of the Federal Rules of Appellate Procedure (dealing with appeal conferences), which expressly permits the court, as a result of the conference, to enter an order implementing a settlement agreement. He suggests that it may be appropriate to amend F.R.A.P. 33 and/or F.R.A.P. 6 (governing appeals in bankruptcy cases) to include a reference to Bankruptcy Rules 9019 and 7041. Copies of F.R.A.P. 6 and 33 are enclosed for your information.

I agree with Judge Friend that this is a real problem that should be addressed and that it should be resolved by amending the Appellate Rules (probably Rule 6). F.R.A.P. 6, among other things, lists the Appellate Rules that are not applicable in bankruptcy appeals, and lists additional appellate rules applicable in bankruptcy cases. A reference to Bankruptcy Rules 9019 and 7041 in Appellate Rule 6 may be the best way to solve this problem.

Of course, any amendments to F.R.A.P. 6 would have to be approved by the Advisory Committee on Appellate Rules. In the past, the Appellate Rules Committee has coordinated with the Bankruptcy Rules Committee, and the two reporters have worked together, regarding amendments to F.R.A.P. 6.

I suggest that the Advisory Committee on Bankruptcy Rules have a preliminary discussion of these problems, and how to solve them, at the September 1999 meeting.

Procedural issues, such as whether the approval of a settlement should be on remand to the bankruptcy court with notice to creditors, should be considered. Depending on those discussions, appropriate recommendations could be made to the Advisory Committee on Appellate Rules.

United States Bankruptcy Court

NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 70
WHEELING, WEST VIRGINIA 26003

L. EDWARD FRIEND II
BANKRUPTCY JUDGE

TELEPHONE 304-233-1655

COPY

July 12, 1999

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

Dear Mr. McCabe:

The bankruptcy judges of the Fourth Circuit recently identified a potential problem with Rule 33 of the Fourth Circuit's Local Rules and I am attaching a copy of my letter to Sam Phillips, our Circuit Executive. The same problem, i.e., lack of notice and court approval in bankruptcy related matters, may exist with respect to Rule 33 of the Federal Rules of Appellate Procedure.

Rule 33 provides in part that "[t]he court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement." It may be appropriate to amend Rule 33 and/or Rule 6 of the Federal Rules of Appellate Procedure to include a reference to Rules 9019 and 7041 of the Federal Rules of Bankruptcy Procedure.

If you have any questions, please give me a call.

Yours very truly,

L. Edward Friend II

L. Edward Friend II
Bankruptcy Judge

LEFII/sah
Enclosure

cc: Alan Resnick
Patricia S. Channon ✓

United States Bankruptcy Court

NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 70
WHEELING, WEST VIRGINIA 26003

L. EDWARD FRIEND II
BANKRUPTCY JUDGE

TELEPHONE 304-233-1655

COPY

July 12, 1999

Mr. Samuel W. Phillips
Circuit Executive
Fourth Circuit Court of Appeals
617 United States Courthouse Annex
1100 East Main Street
Richmond, Virginia 23219-3517

Dear Sam:

I am writing at the request of the bankruptcy judges of the Fourth Circuit to call to your attention a provision in Local Rule 33 that could be abused by litigants in bankruptcy cases.

Local Rule 33 provides in part that "[t]he mediator, through the Clerk of the Court, may enter orders which control the course of proceedings and, upon agreement of the parties, dispose of the case." This rule no doubt works well in the typical two party dispute, but it permits parties in a bankruptcy case to accomplish a settlement that could be detrimental to the bankruptcy estate without notice to creditors or scrutiny by the court.

Rule 9019(a) of the Federal Rules of Bankruptcy Procedure requires that settlements involving a bankruptcy estate be noticed to creditors and be approved by the court. Additionally, Rule 7041 of the Federal Rules of Bankruptcy Procedure provides that a complaint objecting to a debtor's discharge may not be dismissed at the request of the plaintiff without notice to the trustee and approval of the court. Although Rule 1001 of the Federal Rules of Bankruptcy Procedure makes the Bankruptcy Rules applicable to bankruptcy cases, it is not clear whether these rules apply to a proceeding pending in the court of appeals.

There are many settlements that benefit the immediate parties but are harmful to the bankruptcy estate and to the debtor's creditors. For example, a Chapter 11 debtor in possession might want to compromise an adversary proceeding to recover a preferential payment from an insider. Also, a creditor would gladly relinquish an objection to the debtor's entire discharge if the debtor agreed that the creditor's individual debt would be nondischargeable.

I am not sure how to address the problem, but a reference to Bankruptcy Rules 9019 and 7041 in Local Rule 33 or in a new Local Rule 6 might be an easy solution.

Please let me know if you have any questions.

Yours very truly,

L. Edward Friend II

L. Edward Friend II
Bankruptcy Judge

LEFII/sah
cc: Peter McCabe

(A) pay the district clerk all required fees; and
(B) file a cost bond if required under Rule 7.

(2) A notice of appeal need not be filed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules.

(3) The district clerk must notify the circuit clerk once the petitioner has paid the fees. Upon receiving this notice, the circuit clerk must enter the appeal on the docket. The record must be forwarded and filed in accordance with Rules 11 and 12(c).

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

[Rule 5.1. Appeal by Leave under 28 U.S.C. § 636(c)(5)] (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

Rule 6. Appeal in a Bankruptcy Case from a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) **Applicability of Other Rules.** These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). But there are 3 exceptions:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, 12(b), 13–20, 22–23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; and

(C) when the appeal is from a bankruptcy appellate panel, the term "district court," as used in any applicable rule, means "appellate panel."

(2) **Additional Rules.** In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) **Motion for rehearing.**

(i) If a timely motion for rehearing under Bankruptcy Rule 8015 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree—but before disposition of the motion for rehearing—becomes effective when the order disposing of the motion for rehearing is entered.

(ii) Appellate review of the order disposing of the motion requires the party, in compliance with Rules 3(c) and 6(b)(1)(B), to amend a previously filed notice of appeal. A party intending to challenge an altered or

amended judgment, order, or decree must file a notice of appeal or amended notice of appeal within the time prescribed by Rule 4—excluding Rules 4(a)(4) and 4(b)—measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) **The record on appeal.**

(i) Within 10 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule 8006—and serve on the appellee—a statement of the issues to be presented on appeal and a designation of the record to be certified and sent to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 10 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) **Forwarding the record.**

(i) When the record is complete, the district clerk or bankruptcy appellate panel clerk must number the documents constituting the record and send them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified. Unless directed to do so by a party or the circuit clerk, the clerk will not send to the court of appeals documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals. If the exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble and forward the record. The court of appeals may provide by rule or order that a certified copy of the docket entries be sent in place of the redesignated record, but any party may request at any time during the pendency of the appeal that the redesignated record be sent.

(D) **Filing the record.** Upon receiving the record—or a certified copy of the docket entries sent in place of the redesignated record—the circuit clerk must file it and immediately notify all parties of the filing date.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 24, 1998, eff. Dec. 1, 1998.)

(2) **Other Papers.** Any other paper, including a petition for rehearing and a petition for rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and

(B) Rule 32(a)(7) does not apply.

(d) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

Rule 33. Appeal Conferences

The court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

Rule 34. Oral Argument

(a) In General.

(1) **Party's Statement.** Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) **Standards.** Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

(b) Notice of Argument; Postponement. The clerk must advise all arties whether oral argument will be scheduled, and, if so, the ate, time, and place for it, and the time allowed for each side. A ıotion to postpone the argument or to allow longer argument ıust be filed reasonably in advance of the hearing date.

(c) Order and Contents of Argument. The appellant opens and ›ncludes the argument. Counsel must not read at length from ·iefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. If there is a cross-ap-ıal, Rule 28(h) determines which party is the appellant and which

LOCAL RULE 33. CIRCUIT MEDIATION CONFERENCES

All civil and agency cases in which all parties are represented by counsel on appeal will be reviewed by a circuit mediator after the filing of the docketing statements required by Local Rule 3(b). The circuit mediator will determine whether a mediation conference may assist either the Court or the parties. Counsel for a party may also request a conference if counsel believes it will be of assistance to the Court or the parties. Counsel's participation is required at any scheduled conference. Mediation conferences will generally be conducted by telephone but may be conducted in person in the discretion of a circuit mediator. Mediation conferences may be adjourned from time to time by a circuit mediator. Purposes of the mediation conference include:

(a) Jurisdictional review;

(b) Simplification, clarification, and reduction of issues;

(c) Discussion of settlement; and

(d) Consideration of any other matter relating to the efficient management and disposition of the appeal.

Although the time allowed for filing of briefs is not automatically tolled by proceedings under this local rule, if the parties wish to pursue, or are engaged in, settlement discussions, counsel for any party may move to extend the briefing schedule. The mediator, through the Clerk of the Court, may enter orders which control the course of proceedings and, upon agreement of the parties, dispose of the case.

Statements and comments made during all mediation conferences, and papers or electronic information generated during the process, are not included in Court files except to the extent disclosed by orders entered under this local rule. Information disclosed in the mediation process shall be kept confidential and shall not be disclosed by a circuit mediator, counsel, or parties to the judges deciding the appeal or to any other person outside the mediation program participants.

Adopted effective June 8, 1994; amended effective December 1, 1995; March 4, 1998.

FRAP 34. ORAL ARGUMENT

(a) In General.

(1) *Party's Statement.* Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) *Standards.* Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees

11

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: MISCELLANEOUS COMMENTS ON FORMS

DATE: AUGUST 17 1999

The Advisory Committee has received four letters commenting on forms. I suggest that these letters be referred to the Subcommittee on Forms for their consideration.

(1) Official Form 20 B (Notice of Objection to Claim).

Hon. Susan Pierson Sonderby, in her letter of January 8, 1999, has commented that Official Form 20B suggests that a party whose claim is being objected to must file a written response *and* appear in court as well. "I have never made such a requirement of creditors. A response *or* an appearance is sufficient for the first date that objections are noticed." A copy of Judge Sonderby's letter is enclosed.

(2) Director's Form B240 (Reaffirmation Agreement)

Judge Paul Mannes, in his letter of July 12, 1999, has forwarded to the Advisory Committee suggestions to improve the grammar and style of the new Reaffirmation Agreement form. A copy of his letter and an attachment are enclosed. This form was adopted as a "Director's Form" earlier this year, but is intended to be published for comment and adopted as an Official Form at some time in the near future (after Congress acts on the pending bankruptcy legislation).

(3) Official Form 9 (Notice of Commencement of Case, etc.).

A. Thomas DeWoskin, Esq., who is a chapter 7 trustee, has suggested in his letter of May 17, 1999, that Official Form 9 be revised to clarify that the trustee does not represent the debtor.

He has been inundated with telephone calls from creditors who do not know why they have received the notice. "Obviously, they should call the attorney for the debtor; however, I think the layout of the form being used makes my name the most prominent on the page." He suggests that the font size and placement of the information be improved. He encloses a copy of a notice generated by the Noticing Center that puts the chapter 7 trustee's name in bold and prominent in a manner that is not consistent with the official form.

(4) Official Form 10 (Proof of Claim)

Joel L. Tabas, a bankruptcy trustee, in his letter of May 27, 1999, has commented that the proof of claim form is confusing for nonpriority unsecured creditors. Many unsecured creditors are mistakenly checking the box under "Unsecured Priority Claim." He enclosed with his letter five proofs of claim that have been incorrectly filled out by unsecured creditors. This problem causes unnecessary work for trustees who must file objections to proofs of claim that erroneously state that they are priority claims.

1/13/99
99-BK-B

UNITED STATES BANKRUPTCY COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
SUSAN PIERSON SONDERBY
CHIEF JUDGE

(312) 435-5646

January 8, 1999

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

Dear Mr. McCabe:

It has come to my attention that there is a problem with the new Official Form No. 20B "Notice of Objection to Claim". The Form suggests that a party whose claim is being objected to must file a written response *and* appear in court as well. I have never made such a requirement of creditors. A response *or* an appearance is sufficient for the first date that objections are noticed.

An attorney who represented a large debtor in a chapter 11 case before me used the new form. The effect was that his office and my chambers were flooded with telephone calls from confused creditors for days before the court date and an unrepresented creditor flew to Chicago from Texas for no good reason.

Perhaps the Committee would reconsider rewording the requirements in the disjunctive.

Very truly yours,

cc: Hon. Adrian G. Duplantier, Chair, Advisory Comm. on Bankruptcy Rules
Prof. Alan N. Resnick, Reporter, Advisory Comm. on Bankruptcy Rules
Ms. Patricia S. Channon, Bankruptcy Judges Division

OFFICIAL FORM NO. 20B

Form 20B. Notice of Objection to Claim

Form B20B (Official Form 20B)
(9/97)

Form 20B. Notice of Objection to Claim

[Caption as in Form 16A.]

NOTICE OF OBJECTION TO CLAIM

_____ has filed an objection to your claim in this bankruptcy case.

Your claim may be reduced, modified, or eliminated. **You should read these papers carefully and discuss them with your attorney, if you have one.**

If you do not want the court to eliminate or change your claim, then on or before (date), you or your lawyer must:

{If required by local rule or court order.}

[File with the court a written response to the objection, explaining your position, at:

{address of the bankruptcy clerk's office}

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

You must also mail a copy to:

{objector's attorney's name and address}

{names and addresses of others to be served}]

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

If you or your attorney do not take these steps, the court may decide that you do not oppose the objection to your claim.

Date: _____

Signature: _____
Name:
Address:

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MARYLAND

7/15/99
99-BK-G

PAUL MANNES
JUDGE

U. S. Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770
(301) 344-8040

July 12, 1999

John K. Rabiej, Chief
Rules Committee Support Office
Administrative Office of
the United States Courts
Washington DC 20544

RE: Director's Form B240
Reaffirmation Agreement

Dear John:

One of my colleagues did some work on the first page of the above-referenced form to clarify and straighten out the grammar.

With best regards.

Sincerely,

Paul

PAUL MANNES

cc: Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton Ohio 45469-1320

Enclosure

Form B240
3/99

REAFFIRMATION AGREEMENT

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

Debtor's Name	Bankruptcy Case No.
	Chapter
Creditor's Name and Address	

Instructions: 1) Attach a copy of all court judgments, security agreements, and evidence of their perfection.
2) File all the documents by mailing them or delivering them to the Clerk of the Bankruptcy Court.

NOTICE TO DEBTOR:

This agreement gives up the protection of your bankruptcy discharge for this debt.

As a result of this agreement, the creditor may be able to take your property or wages if you do not pay the agreed amounts. The creditor and may also act to collect the debt in other ways.

You may rescind (cancel) this agreement at any time before the bankruptcy court enters a discharge order or within 60 days after this agreement is filed with the court, whichever is later, by notifying the creditor that the agreement is canceled. It is recommended that you give this notice in writing and retain a copy with your records.

You are not required to enter into this agreement by any law. It is not required by the Bankruptcy Code, by any other law, or by any contract (except another reaffirmation agreement made in accordance with Bankruptcy Code § 524(c)). ?

You are allowed to pay this debt voluntarily without signing this agreement. However, if you do not sign this agreement and are later unwilling or unable to pay the full amount, the creditor will not be able to collect it from you. The creditor also will not be allowed to take your property to pay the debt, unless the creditor has a lien on that property.

If the creditor has a lien on your personal property, you may have a right to redeem the property and eliminate the lien by making a single payment to the creditor equal to the current value of the property, as agreed by the parties or determined by the court.

GREENSFELDER, HEMKER & GALE, P.C.

ATTORNEYS AT LAW

2000 EQUITABLE BUILDING
10 SOUTH BROADWAY
ST. LOUIS, MISSOURI 63102-1774

TELEPHONE (314) 241-9090
TELEFAX (314) 241-8624

AFFILIATE OFFICE
GREENSFELDER, HEMKER & GALE
BELLEVILLE, ILLINOIS

99-BK-F

May 17, 1999

Mr. Peter G. McGabe
Committee on Bankruptcy Rules
Administrative Office of the U. S. Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Notice of Chapter 7 Filing

Dear Mr. McGabe:

I am writing to you about the format of an official form which is becoming a serious problem for me. I am referring to Form 9, the notice that a bankruptcy case has been filed.

I am a Chapter 7 panel trustee and I am being inundated with calls from creditors who do not know why they received the notice. Obviously, they should call the attorney for the debtor; however, I think the layout of the form being used makes my name the most prominent on the page. I enclose a copy of the official Form 9, as well as a copy of the actual notice being sent by the Federal Noticing Center.

The official form clearly indicates the debtor's name, the case number, the attorney's name, and so forth. However, because of the font size and placement of the information of the notice which actually is being used by the Noticing Center, that information is not nearly as obvious.

I am writing to inquire what can be done to amend the notice form actually being used so that it more accurately follows the official form. Also, I think a sentence to the following effect should be added in the area identifying the bankruptcy trustee: "The bankruptcy trustee is appointed by a federal agency and does not represent the debtor."

There are other problems with the form as it currently is being used. For example, the most obvious bit of information on the notice is the addressee; however, that information quite properly does not even appear on the official form. It takes up a lot of room and is superfluous. There are other problems which I would be glad to discuss with someone from your office.

I would appreciate anything that can be done to improve this form. I think the improvements will benefit the recipients by making the important information more obvious, and

will benefit me by reducing the number of fruitless telephone calls which creditors make to my office.

Thank you very much.

Very truly yours,

GREENSFELDER, HEMKER & GALE, P.C.

By
A. Thomas DeWoskin

ATD/mb
Enclosures

320376.01

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
One Metropolitan Square
211 N. Broadway, 7th Floor
St. Louis, MO 63102-2734

NOTICE OF COMMENCEMENT OF CASE UNDER CHAPTER 7
OF THE BANKRUPTCY CODE,
MEETING OF CREDITORS, AND FIXING OF DATES
(Individual or Joint Debtor No Asset Case)

Case Number: 99-43611-399
Date Filed: 4/2/99

IN RE(NAME/ADDRESS OF DEBTOR)
Noris Williams, 488-76-6025

A. Thomas DeWoskin
Attorney at Law
10 S. Broadway, Ste 2000
St. Louis, MO 63102

2812 Liberty Landing Court
Florissant, MO 63033

NAME/ADDRESS OF ATTORNEY FOR DEBTOR
Kimber H. Baro
Law Office of Bruce Eastman
1120 Graham Rd., Ste. B
Florissant, MO 63031
Telephone Number: 921-2100

NAME/ADDRESS OF TRUSTEE
A. Thomas DeWoskin
Attorney at Law
10 S. Broadway, Ste 2000
St. Louis, MO 63102
Telephone Number: (314) 241-9090

DATE/TIME/LOCATION OF MEETING OF CREDITORS
May 11, 1999 at 10:30 am
Room 408
815 Olive
Old Post Office Bldg
St. Louis, Mo 63101

Discharge of Debts: Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Types of Debts: 07/12/99

AT THIS TIME THERE APPEAR TO BE NO ASSETS AVAILABLE FROM WHICH PAYMENT MAY BE MADE TO UNSECURED CREDITORS. DO NOT FILE A PROOF OF CLAIM UNTIL YOU RECEIVE NOTICE TO DO SO.

COMMENCEMENT OF CASE. A petition for liquidation under chapter 7 of the Bankruptcy Code has been filed in this court by or against the person or persons named above as the debtor, and an order for relief has been entered. You will not receive notice of all documents filed in this case. All documents filed with the court, including lists of the debtor's property, debts, and property claimed as exempt are available for inspection at the office of the clerk of the bankruptcy court.

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review Sec. 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

MEETING OF CREDITORS. The debtor (both husband and wife in a joint case) is required to appear at the meeting of creditors on the date and at the place set forth above for the purpose of being examined under oath. Attendance by creditors at the meeting is welcomed, but not required. At the meeting, the creditors may elect a trustee other than the one named above, elect a committee of creditors, examine the debtor, and transact such other business as may properly come before the meeting. The meeting may be continued or adjourned from time to time by notice at the meeting, without further written notice to creditors.

LIQUIDATION OF THE DEBTOR'S PROPERTY. The trustee will collect the debtor's property and turn any that is not exempt into money. At this time, however, it appears from the schedules of the debtor that there are no assets from which any distribution can be paid to creditors. If at a later date it appears that there are assets from which a distribution may be paid, the creditors will be notified and given an opportunity to file claims.

EXEMPT PROPERTY. Under state and federal law, the debtor is permitted to keep certain money or property as exempt. If a creditor believes that an exemption of money or property is not authorized by law, the creditor may file an objection. An objection must be filed not later than 30 days after the conclusion of the meeting of creditors.

DISCHARGE OF DEBTS. The debtor is seeking a discharge of debts. A discharge means that certain debts are made unenforceable against the debtor personally. Creditors whose claims against the debtor are discharged may never take action against the debtor to collect the discharged debts. If a creditor believes that the debtor should not receive any discharge of debts under Sec. 727 of the Bankruptcy Code or that a debt owed to the creditor is not dischargeable under Sec. 523(a)(2), (4), (6), or (15) of the Bankruptcy Code, timely action must be taken in the bankruptcy court by the deadline set forth above labeled "Discharge of Debts." Creditors considering taking such action may wish to seek legal advice.

DO NOT FILE A PROOF OF CLAIM UNLESS YOU RECEIVE NOTICE TO DO SO.
PURSUANT TO 11 U.S.C. SEC. 554, THE TRUSTEE MAY, AT THE MEETING OF CREDITORS, ANNOUNCE THE ABANDONMENT OF SPECIFIC PROPERTY OF THE ESTATE THAT IS BURDENSOME OR OF INCONSEQUENTIAL VALUE. ANY OBJECTION TO THIS ABANDONMENT MUST BE FILED IN WRITING WITH THE CLERK AND THE TRUSTEE WITHIN 15 DAYS AFTER THE MEETING.

For the Court: Dana C. McWay, Clerk of the Bankruptcy Court — 04/06/99, Date

FORM B9A

0002

208120903 10995

FORM B9A (Chapter 7 Individual or Joint Debtor No Asset Case (9/97))

UNITED STATES BANKRUPTCY COURT _____ District of _____

Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines

[A chapter 7 bankruptcy case concerning the debtor(s) listed below was filed on _____ (date)]
or [A bankruptcy case concerning the debtor(s) listed below was originally filed under chapter __ on _____ (date) and was converted to a case under chapter 7 on _____]

You may be a creditor of the debtor. This notice lists important deadlines. You may want to consult an attorney to protect your rights. All documents filed in the case may be inspected at the bankruptcy clerk's office at the address listed below. NOTE: The staff of the bankruptcy clerk's office cannot give legal advice.

See Reverse Side For Important Explanations

Debtor(s) (name(s) and address)	Case Number:
	Social Security/Taxpayer ID Nos.
Attorney for Debtor(s) (name and address)	Bankruptcy Trustee (name and address)
Telephone number	Telephone number

Meeting of Creditors:

Date / / Time ( ) A.M. ( ) P.M. Location

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:

Thirty (30) days after the *conclusion* of the meeting of creditors

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So

Address of the Bankruptcy Clerk's Office:	**For the Court:**
	Clerk of the Bankruptcy Court
Telephone number	
Hours Open	Date

EXPLANATIONS

FORM B9A (9/97)

Filing of Chapter 7 Bankruptcy Case	A bankruptcy case under chapter 7 of the Bankruptcy Code (title 11, United States Code) has been filed in this court by or against the debtor(s) listed on the front side, and an order for relief has been entered.
Creditors May Not Take Certain Actions	Prohibited collection actions are listed in Bankruptcy Code § 362. Common examples of prohibited actions include contacting the debtor by telephone, mail or otherwise to demand repayment; taking actions to collect money or obtain property from the debtor; repossessing the debtor's property; starting or continuing lawsuits or foreclosures; and garnishing or deducting from the debtor's wages.
Meeting of Creditors	A meeting of creditors is scheduled for the date, time and location listed on the front side. *The debtor (both spouses in a joint case) must be present at the meeting to be questioned under oath by the trustee and by creditors.* Creditors are welcome to attend, but are not required to do so. The meeting may be continued and concluded at a later date without further notice.
Do Not File a Proof of Claim at This Time	There does not appear to be any property available to the trustee to pay creditors. *You therefore should not file a proof of claim at this time.* If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim.
Discharge of Debts	The debtor is seeking a discharge of most debts, which may include your debt. A discharge means that you may never try to collect the debt from the debtor. If you believe that the debtor is not entitled to receive a discharge under Bankruptcy Code § 727(a) *or* that a debt owed to you is not dischargeable under Bankruptcy Code § 523(a)(2), (4), (6), or (15), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and the required filing fee by that Deadline.
Exempt Property	The debtor is permitted by law to keep certain property as exempt. Exempt property will not be sold and distributed to creditors. The debtor must file a list of all property claimed as exempt. You may inspect that list at the bankruptcy clerk's office. If you believe that an exemption claimed by the debtor is not authorized by law, you may file an objection to that exemption. The bankruptcy clerk's office must receive the objection by the "Deadline to Object to Exemptions" listed on the front side.
Bankruptcy Clerk's Office	Any paper that you file in this bankruptcy case should be filed at the bankruptcy clerk's office at the address listed on the front side. You may inspect all papers filed, including the list of the debtor's property and debts and the list of the property claimed as exempt, at the bankruptcy clerk's office.
Legal Advice	The staff of the bankruptcy clerk's office cannot give legal advice. You may want to consult an attorney to protect your rights.

—Refer To Other Side For Important Deadlines and Notices—

JOEL L. TABAS

BANKRUPTCY TRUSTEE
SOUTHERN DISTRICT OF FLORIDA
25 SOUTHEAST 2ND AVENUE, SUITE 919
MIAMI, FLORIDA 33131-1538

TELEPHONE: (305)375-8171 ■ TELEFAX: (305) 381-7708

May 27, 1999

Patricia Channon
Administrative Office of the U.S. Courts
Bankruptcy Judges Division
Washington, DC 20544

Re: Proof of Claim Form

Dear Ms. Channon:

I would like to bring to your attention problems our office has encountered with the revised Proof of Claim Form B10 (the "form").

This form is very confusing for the unsecured non-priority claimant because there is no area for the claimant to indicate that his claim is unsecured. Many claimants do not realize that the proper procedure is to just indicate the amount and other information in sections 1 through 4 of the form and leave section 5 and 6 blank. As a result many claimants are mistakenly checking the box under "Unsecured Priority Claim". In one of our recent cases sixteen claims were filed and five claimants with non-priority unsecured claims filed their claims incorrectly. For your reference, I am enclosing copies of these claims.

I urge you to modify the Proof of Claim Form. The form in its present state is extremely misleading and will result in additional work for the trustee because he must file objections to non-priority unsecured claims that were filed in error as priority claims. Also, the distribution of funds and closing of cases will be delayed until these claims issues are resolved. Worst of all, valid claims which had objections and fail to timely respond to Trustees' objections will be disallowed.

If you would like to contact me to discuss this matter, I may be reached at (305) 375-8171.

Very truly yours,

Joel L. Tabas, Trustee

Enclosures
cc: Karen Eddy, Clerk of the Court
Robert A. Angueira, Assistant U.S. Trustee

FORM B10 (Official Form 10)(4/98) as revised as local form 61(12/98), USBC, SDFL.

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

PROOF OF CLAIM

Name of Debtor	Case Number
Jason Howe Tricia Howe	98-18222 - BKC - RAM

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

IMPORTANT: BAR CODED CLAIM FORM CAN ONLY BE USED BY THE ABOVE-NAMED CREDITOR IN THE ABOVE-NAMED CASE.

98-18222

3233198

THIS SPACE IS FOR COURT USE ONLY

Name of Creditor (The person or other entity to whom the debtor owes money or property):
Aldershot Of New Mexico
Name and Address where notices should be sent:

Aldershot Of New Mexico
Star Rte Box 4
Mesilla NM 88047

Telephone Number:

- ☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.
- ☐ Check box if you have never received any notices from the bankruptcy court in this case.
- ☐ Check box if the address differs from the address on the envelope sent to you by the court.

Account or other number by which creditor identifies debtor:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated _____

1. Basis for Claim
- ☒ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other _____
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)
  Your SS #: ____ ____ ____
  Unpaid compensation for services performed from _____ (date) to _____ (date)

2. Date debt was incurred:
03/98 - 04/98

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 6,522.19
If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.
☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.
☐ Check this box if your claim is secured by collateral (including a right of setoff).
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other _____

Value of Collateral: $ _____

Amount of arrearage and other charges at time case filed included in secured claim, if any: $ _____

6. Unsecured Priority Claim.
☒ Check this box if you have an unsecured priority claim
Amount entitled to priority $ 6,522.19
Specify the priority of the claim:
- ☐ Wages, salaries, or commissions (up to $4,300),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $ 1,950* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7)
- ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☒ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

**For cases commenced on or after 4/1/98. Amounts are subject to adjustment every 3 years thereafter.*

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach legible copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. Supporting documents should not exceed 5 pages **(See reverse for instructions)**

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim. Research and/or copy charges will apply for future copy requests of claims.

THIS SPACE IS FOR COURT USE ONLY

RECEIVED VIA MAIL
FILED
FEB - 2 99
COURT MIAMI, FLORIDA

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
01/27/99	Mark E. Northcutt, Mark E. Northcutt, Accounting Manager

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

(2)

FORM B10 (Official Form 10)(4/98) as revised as local form 61(12/98), USBC, SDFL

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

PROOF OF CLAIM

Name of Debtor	Case Number
Jason Howe Tricia Howe (Married)	98-18222 - BKC - RAM

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

IMPORTANT: BAR CODED CLAIM FORM CAN ONLY BE USED BY THE ABOVE-NAMED CREDITOR IN THE ABOVE-NAMED CASE.

98-18222 FEB 6 1999

3233221

Name of Creditor (The person or other entity to whom the debtor owes money or property): Floridan USA Name and Address where notices should be sent: Floridan USA 1523 Edgar Place Sarasota FL 3420 Telephone Number: 941-377-8666	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.	THIS SPACE IS FOR COURT USE ONLY
Account or other number by which creditor identifies debtor: 0004095	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated _____	

1. Basis for Claim
- ☒ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other _____
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)
  Your SS #: ___ ___ ___
  Unpaid compensation for services performed from _____ (date) to _____ (date)

2. Date debt was incurred: 10/23/97

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 1608.95
If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.
☒ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.
☐ Check this box if your claim is secured by collateral (including a right of setoff).
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other _____
Value of Collateral: $ _____
Amount of arrearage and other charges at time case filed included in secured claim, if any: $ _____

6. Unsecured Priority Claim.
☒ Check this box if you have an unsecured priority claim
Amount entitled to priority $ 1608.95
Specify the priority of the claim:
- ☐ Wages, salaries, or commissions (up to $4,300),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
- ☐ Up to $ 1,950* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
- ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

**For cases commenced on or after 4/1/98. Amounts are subject to adjustment every 3 years thereafter.*

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach legible copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. Supporting documents should not exceed 5 pages **(See reverse for instructions)**

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim. Research and/or copy charges will apply for future copy requests of claims.

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):
1/28/99	Nanci DuBarton Controller

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

FORM B10 (Official Form 10)(4/98) as revised as local form 61(12/98), USBC, SDFL

UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF FLORIDA

PROOF OF CLAIM

Name of Debtor	Case Number
Jason Howe Tricia Howe	98-18222 - BKC - RAM

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

IMPORTANT: BAR CODED CLAIM FORM CAN ONLY BE USED BY THE ABOVE-NAMED CREDITOR IN THE ABOVE-NAMED CASE.

98-18222

US BANKRUPTCY COURT SO. DISTRICT OF FLORIDA
FILED
FEB 16 1999
RECEIVED

Name of Creditor (The person or other entity to whom the debtor owes money or property): Vance Publishing Name and Address where notices should be sent: Vance Publishing Super Floral PO Box 97159 Chicago IL 60678 Telephone Number:	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.
Account or other number by which creditor identifies debtor:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:

THIS SPACE IS FOR COURT USE ONLY

1. **Basis for Claim**
   - ☐ Goods sold
   - ☑ Services performed
   - ☐ Money loaned
   - ☐ Personal injury/wrongful death
   - ☐ Taxes
   - ☐ Other _____

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Your SS #: _____ _____ _____
Unpaid compensation for services performed from _____ (date) to _____ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 513.23
If all or part of your claim is secured or entitled to priority, also complete Item 5 or 6 below.
☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. Secured Claim.
☐ Check this box if your claim is secured by collateral (including a right of setoff).
Brief Description of Collateral:
☐ Real Estate ☐ Motor Vehicle
☐ Other _____
Value of Collateral: $ _____
Amount of arrearage and other charges at time case filed included in secured claim, if any: $ _____

6. Unsecured Priority Claim.
☒ Check this box if you have an unsecured priority claim
Amount entitled to priority $ 513.23
Specify the priority of the claim:
☐ Wages, salaries, or commissions (up to $4,300),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).
☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4).
☐ Up to $ 1,950* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. § 507(a)(7).
☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).
☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

**For cases commenced on or after 4/1/98. Amounts are subject to adjustment every 3 years thereafter.*

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

8. Supporting Documents: *Attach legible copies of supporting documents*, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary. Supporting documents should not exceed 5 pages **(See reverse for instructions)**

9. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim. Research and/or copy charges will apply for future copy requests of claims.

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

THIS SPACE IS FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

8

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Bankruptcy Judges Division

MEMORANDUM

DATE: August 24, 1999

FROM: Forms Subcommittee

RE: Official Form 7, Statement of Financial Affairs

TO: Advisory Committee on Bankruptcy Rules

At the March 1999 meeting, the Committee directed the Forms Subcommittee to consider the suggestion made at that meeting to divide Official Form 7, the Statement of Financial Affairs, into two forms -- one for non-business debtors, and a longer one for business debtors. In August 1999, by mail ballot, the subcommittee voted not to attempt to divide the form into separate statements for non-business and business debtors. Accordingly, the subcommittee recommends against this suggested change.

In addition, at the March 1999 meeting, the Committee approved revisions to the instructions on page 1 of Official Form 7, for the purpose of eliminating an ambiguity with respect to whether a non-business debtor should check the "None" boxes beside questions 16-21 (questions 18-25 as published for comment) or simply leave those questions unanswered. The attached copy of proposed Official Form 7 shows the changes approved by the Committee for publication in March 1998 and the further change approved in March 1999. The revision approved in March 1999 directs a debtor to answer only "an applicable question" and to do so either by providing the requested information or checking the "None" box.

On page 7 of the form, there are additional instructions at the beginning of the so-called "business" questions. The subcommittee proposes adding a new sentence to these instructions which would advise a debtor who is not and has not been in business within the six years prior to the filing of the bankruptcy case to proceed directly to the signature page of the form.

The subcommittee believes the form need not be republished for comment on account of the change approved in March 1999 and the subcommittee's further recommendations, if the Committee approves them.

Attachment

Form 7
(Draft)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re: _____, (Name) Debtor

Case No. _____ (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - ~~15~~ 17 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions ~~16 - 21~~ 18 - 25. **If the answer to ~~any~~ an applicable question is "None," ~~or the question is not applicable,~~ mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the ~~two~~ six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or ~~person in control~~ owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any ~~person in control~~ owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

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1. Income from employment or operation of business

None ☐ State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐ State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

None ☐ a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐ b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

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4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐ b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

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5. Repossessions, foreclosures and returns

None ☐ List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

---

6. Assignments and receiverships

None ☐ a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐ b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐ List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

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8. Losses

None ☐ List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

---

9. Payments related to debt counseling or bankruptcy

None ☐ List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

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10. Other transfers

None ☐ List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐ List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE AND NUMBER OF ACCOUNT AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

---

12. Safe deposit boxes

None ☐ List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

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13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

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14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

[The following question is new]

16. Spouses and Former Spouses

None ☐ If the debtor resides or resided in a community property state, commonwealth, or territory (including Alaska, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, or Wisconsin) within the six-year period immediately preceding the commencement of the case, identify the name of the debtor's spouse and of any former spouse who resides or resided with the debtor in the community property state.

NAME

~~16~~ 17. Nature, location and name of business

None ☐ a. If the debtor is an individual, list the names, addresses ,taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was an officer, director, partner,or managing executive of a corporation, partnership, sole proprietorship, or was a self-employed professional within the ~~two~~ **six years** immediately preceding the commencement of this case, or in which the debtor owned 5 percent or more of the voting or equity securities within the ~~two~~ six years immediately preceding the commencement of this case.

If the debtor is a partnership, list the names, addresses, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities, within the ~~two~~ **six years** immediately preceding the commencement of this case.

If the debtor is a corporation, list the names, addresses, taxpayer identification numbers, nature of the businesses, and ~~addresses~~ beginning and ending dates of all businesses in which the debtor was a partner or owned 5 percent or more of the voting or equity securities within the ~~two~~ **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES ~~OF OPERATION~~

None ☐ b. Identify any business listed in response to subdivision a., ~~b., or c.,~~ above, that is "single asset real estate" as defined in 11 U.S.C. § 101.

NAME	ADDRESS

The following questions are to be completed by every debtor that is a corporation or partnership and by any individual debtor who is or has been, within the ~~two~~ six years immediately preceding the commencement of this case, any of the following: an officer, director, managing executive, or owner of more than 5 percent of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or otherwise self-employed.

(An individual or joint debtor should complete this portion of the statement ***only*** *if the debtor is or has been in business, as defined above, within the ~~two~~ six years immediately preceding the commencement of this case . A debtor who has not been in business within those six years should go directly to the signature page.)*

~~17~~ **18** . Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the ~~six~~ **two years** immediately preceding the filing of this bankruptcy case kept or supervised the keeping of books of account and records of the debtor.

NAME AND ADDRESS	DATES SERVICES RENDERED

None ☐ b. List all firms or individuals who within the **two years** immediately preceding the filing of this bankruptcy case have audited the books of account and records, or prepared a financial statement of the debtor.

NAME	ADDRESS	DATES SERVICES RENDERED

None ☐ c. List all firms or individuals who at the time of the commencement of this case were in possession of the books of account and records of the debtor. If any of the books of account and records are not available, explain.

NAME	ADDRESS

None ☐ d. List all financial institutions, creditors and other parties, including mercantile and trade agencies, to whom a financial statement was issued within the **two years** immediately preceding the commencement of this case by the debtor.

NAME AND ADDRESS	DATE ISSUED

~~18~~**19** . **Inventories**

None ☐ a. List the dates of the last two inventories taken of your property, the name of the person who supervised the taking of each inventory, and the dollar amount and basis of each inventory.

DATE OF INVENTORY	INVENTORY SUPERVISOR	DOLLAR AMOUNT OF INVENTORY (Specify cost, market or other basis)

None ☐ b. List the name and address of the person having possession of the records of each of the two inventories reported in a., above.

DATE OF INVENTORY	NAME AND ADDRESSES OF CUSTODIAN OF INVENTORY RECORDS

~~19~~20. Current Partners, Officers, Directors and Shareholders

None ☐ a. If the debtor is a partnership, list the nature and percentage of partnership interest of each member of the partnership.

NAME AND ADDRESS	NATURE OF INTEREST	PERCENTAGE OF INTEREST

None ☐ b. If the debtor is a corporation, list all officers and directors of the corporation, and each stockholder who directly or indirectly owns, controls, or holds 5 percent or more of the voting or equity securities of the corporation.

NAME AND ADDRESS	TITLE	NATURE AND PERCENTAGE OF STOCK OWNERSHIP

~~20~~21. Former partners, officers, directors and shareholders

None ☐ a. If the debtor is a partnership, list each member who withdrew from the partnership within **one year** immediately preceding the commencement of this case.

NAME	ADDRESS	DATE OF WITHDRAWAL

None ☐ b. If the debtor is a corporation, list all officers, or directors whose relationship with the corporation terminated within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS	TITLE	DATE OF TERMINATION

~~21~~22. Withdrawals from a partnership or distributions by a corporation

None ☐ If the debtor is a partnership or corporation, list all withdrawals or distributions credited or given to an insider, including compensation in any form, bonuses, loans, stock redemptions, options exercised and any other perquisite during **one year** immediately preceding the commencement of this case.

NAME & ADDRESS OF RECIPIENT, RELATIONSHIP TO DEBTOR	DATE AND PURPOSE OF WITHDRAWAL	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

[The following three questions are new]

23. Tax Consolidation Group.

None ☐ If the debtor is a corporation, list the name and federal taxpayer identification number of the parent corporation of any consolidated group for tax purposes of which the debtor has been a member at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PARENT CORPORATION	TAXPAYER IDENTIFICATION NUMBER

---

24. Pension Funds.

None ☐ If the debtor is not an individual, list the name and federal taxpayer identification number of any pension fund to which the debtor, as an employer, has been responsible for contributing at any time within the six-year period immediately preceding the commencement of the case.

NAME OF PENSION FUND	TAXPAYER IDENTIFICATION NUMBER

---

25. Environmental Information.

For the purpose of this question, the following definitions apply:

"Environmental Law" means any federal, state, or local statute or regulation regulating pollution, contamination, releases of hazardous or toxic substances, wastes or material into the air, land, soil, surface water, groundwater, or other medium, including, but not limited to statutes or regulations regulating the cleanup of these substances, wastes, or material.

"Site" means any location, facility, or property as defined under any Environmental Law, whether or not presently or formerly owned or operated by the debtor, including, but not limited to, disposal sites.

"Hazardous Material" means anything defined as a hazardous waste, hazardous substance, toxic substance, hazardous material, pollutant, or contaminant or similar term under an Environmental Law

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None ☐ a. List the name and address of every site for which the debtor has received notice in writing by a governmental unit that it may be liable or potentially liable under or in violation of an Environmental Law. Indicate the governmental unit, the date of the notice, and, if known, the Environmental Law:

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ b. List the name and address of every site for which the debtor provided notice to a governmental unit of a release of Hazardous Material. Indicate the governmental unit to which the notice was sent and the date of the notice.

SITE NAME AND ADDRESS	NAME AND ADDRESS OF GOVERNMENTAL UNIT	DATE OF NOTICE	ENVIRONMENTAL LAW

None ☐ c. List all judicial or administrative proceedings, including settlements or orders, under any Environmental Law with respect to which the debtor is or was a party. Indicate the name and address of the governmental unit that is or was a party to the proceeding, and the docket number.

NAME AND ADDRESS OF GOVERNMENTAL UNIT	DOCKET NUMBER	STATUS OR DISPOSITION

* * * * * *

[If completed by an individual or individual and spouse]

I declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct.

Date _____ Signature _____
of Debtor

Date _____ Signature _____
of Joint Debtor
(if any)

[If completed on behalf of a partnership or corporation]

I, declare under penalty of perjury that I have read the answers contained in the foregoing statement of financial affairs and any attachments thereto and that they are true and correct to the best of my knowledge, information and belief.

Date _____ Signature _____

_____
Print Name and Title

[An individual signing on behalf of a partnership or corporation must indicate position or relationship to debtor.]

____ continuation sheets attached

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. § 152 and 3571

CERTIFICATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (See 11 U.S.C. § 110)

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____ _____
Printed or Typed Name of Bankruptcy Petition Preparer Social Security No.

_____

_____
Address

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

X _____ _____
Signature of Bankruptcy Petition Preparer Date

A bankruptcy petition preparer's failure to comply with the provisions of title II and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 156.

12

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2002(f)(7)
NOTICE OF AN ORDER CONFIRMING A CHAPTER 13 PLAN

DATE: AUGUST 15, 1999

Bankruptcy Rule 2002(f) provides that the clerk, or some other person as the court may direct, shall give the debtor and all creditors notice by mail of certain specified events in a bankruptcy case. Under Rule 2002(f)(7), notice of entry of an order confirming a chapter 9, 11, or 12 plan must be mailed to all creditors. The rule does not require notice to creditors when a chapter 13 plan is confirmed.

The reason for omitting from the list of notices that must be mailed to all creditors a notice of confirmation of a chapter 13 plan is to save mailing expenses. Under Rule 2002(b), all creditors in a chapter 13 case are notified of the time for objecting to confirmation of a plan, and of the time of the hearing on confirmation. Under § 1326 of the Code, the debtor must begin paying the trustee the payments proposed by a plan within 30 days after the plan is filed. If the plan is confirmed, *as soon as practicable*, the trustee is required to distribute any such payment to creditors in accordance with the plan. Therefore, in the usual case, creditors learn that a plan has been confirmed when the hearing date passes and they begin receiving payments in accordance with the plan. Of course, a creditor who wants to know whether the plan has been confirmed without waiting to receive payments could inquire at the clerk's office or check the docket.

When Rule 2002(f) was promulgated, the monetary limits for eligibility for chapter 13 were significantly lower than they are today. Before 1994, a debtor was not eligible for relief

under chapter 13 if his or her noncontingent, liquidated unsecured debts exceeded $100,000, or if noncontingent, liquidated secured debts exceeded $350,000. Today, the limits are $269,250 for unsecured debts and $807,750 for secured debts.

Judge Paul Mannes, in his letter of April 28, 1999, has recommended that Rule 2002(f)(7) be amended to provide for notice of an order confirming a chapter 13 plan. "While this matter may have been under discussion in the past, I suggest now, where a Chapter 13 debtor may potentially have over $1 million in debt, that the Chapter 13 process has come to the point where creditors should receive and would be interested in notice of confirmation of a Chapter 13 plan."

I suggest that this recommendation be considered at the September meeting of the Advisory Committee.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MARYLAND

PAUL MANNES
JUDGE

April 28, 1999

U. S. Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770
(301) 344-8040

99-BK-E

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

RE: FRBP 2002(f)(7)

Dear Mr. McCabe:

This is to request a revision to Federal Rule of Bankruptcy Procedure 2002(f)(7) so as to provide for notice of an Order Confirming Chapter 13 Plan.

While this matter may have been under discussion in the past, I suggest now, where a Chapter 13 debtor may potentially have over $1 million in debt, that the Chapter 13 process has come to the point where creditors should receive and would be interested in notice of confirmation of a Chapter 13 Plan.

Sincerely yours,

Paul Mannes

PAUL MANNES

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: SERVICE ON CORPORATIONS, PARTNERSHIPS, AND UNINCORPORATED ASSOCIATIONS

DATE: AUGUST 17, 1999

Bankruptcy Rule 7004(b)(3) provides that, in an adversary proceeding, service by mail on a corporation, partnership, or unincorporated association must be made by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process. Rule 9014 makes Rule 7004 applicable in contested matters.

Hon. David H. Adams (Bankr. E.D. Va.), in his letter of October 8, 1998, has commented that the particularized service requirements set forth in Rule 7004(b)(3) are not applicable to service of motions, such as motions filed pursuant to §522(f)(2) to avoid liens that impair exemptions and nonpossessory, nonpurchase money security interests on household goods, or to objections to claims. In addition, "Bankruptcy Rule 4001(d)(1) contains no such limiting requirement for the service of motions for relief from the automatic stay, motions to prohibit or condition the use, sale or lease of property of the estate, motions requesting approval of adequate protection agreements or to use cash collateral."

Judge Adams correctly points out that Rule 9013 (motions) is silent as to the recipient of service, and that Rule 9014 does prescribe that service in contested matters must comply with Rule 7004. He also believes that Rule 2002(g) is inadequate in that it does not provide adequate due process because it requires the mailing of notices to entities at their addresses listed by the debtor in the schedules, unless the entity otherwise directs in a filed request. Judge Adams

suggests that it would be appropriate to state in one location in the Rules that service on a corporation, partnership, or unincorporated association must comply with Rule 7004(b)(3).

I recommend that the Advisory Committee take no action with respect to the recommendation made by Judge Adams. I respectfully disagree with Judge Adams' premise that Rule 7004(b)(3) is not applicable to the types of motions that he lists in his letter. All the motions listed in his letter -- i.e., motions for relief from the stay, to sell or use property of the estate, to object to a claim, to avoid a lien impairing an exemption, etc. -- are contested matters and Rule 9014 clearly provides that Rule 7004 applies to contested matters.

With respect to Rule 2002(g), Judge Adams is correct when he states that the debtor's schedules and list of creditors provide addresses used for Rule 2002 notice purposes. But it would be unduly burdensome for a debtor to list the name of an officer of each business creditor scheduled.

JUDGE'S CHAMBERS
United States Bankruptcy Court
EASTERN DISTRICT OF VIRGINIA
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, Virginia 23510

98-BK-D

DAVID H. ADAMS
JUDGE

(757) 222-7470
FAX(757) 222-7456

October 8, 1998

Mr. Peter G. McCabe
Secretary of the Committee
On Rules of Practice and Procedure
Administrative Office of the U. S. Courts
Washington, D.C. 20544

Re: Advisory Committee on Federal Bankruptcy Rules

Dear Mr. McCabe:

I am writing about a due process concern I have due to the present state of the Federal Rules of Bankruptcy Procedure. The concern simply relates to the service of various motions and pleadings on corporations, partnerships and unincorporated associations.

As you know, pursuant to B. R. 7004, service is permitted by First Class Mail anywhere within the United States. Under B. R. 7004(b)(3) such service must be made "[u]pon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant." Many courts have ruled, as have I, that this Rule requires the naming of a specific individual, rather than merely sending the adversary complaint and summons to "Vice President, ABC Corporation", such as "Mr. John Doe, Vice President, ABC Corporation."

The problem I am encountering is that there is no such particularized service requirement relating to the service of motions, such as motions filed pursuant to §522(f)(2) relating to liens that impair exemptions and nonpossessory, nonpurchase

money liens on household goods, or objections to claims. Bankruptcy Rule 4001(d)(1) contains no such limiting requirement for the service of motions for relief from the automatic stay, motions to prohibit or condition the use, sale or lease of property of the estate, or motions requesting approval of adequate protection agreements or to use cash collateral. Bankruptcy Rule 9013 is silent as to the recipient of service; however, Bankruptcy Rule 9014 does prescribe that service of contested matters must comply with Rule 7004. I also think that Bankruptcy Rule 2002(g) is inadequate to provide for required due process because it relates to service on entities as delineated by the debtor on the schedules, if the entity does not otherwise direct.

I often enter default orders stripping liens of corporate creditors wondering if anyone at that business has any idea what is happening to their security interest in a case in Norfolk, Virginia, maybe hundreds or thousands of miles from their corporate offices. I do not think it would be too onerous to require movants to properly serve a corporation, for instance, by a named officer or by the registered agent or by the Secretary of the Commonwealth of Virginia. I believe that due process requires such service to give the corporation or partnership actual notice.

It seems to me to be appropriate to state in one location in the Bankruptcy Rules that service on any of these entities must be accomplished as it is set out in Rule 7004(b)(3). I have reviewed the proposed changes to Bankruptcy Rule 9014, but I am not sure that the change relating to service goes far enough to give the referenced entities due process notice of all proceedings that occur under the present Code.

I would appreciate your taking up this shortcoming of the Rules with your Committee, if you deem it appropriate to do so.

Sincerely yours,

David H. Adams
Judge

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS

RE: ELECTION OF CHAPTER 7 TRUSTEES

DATE: AUGUST 23, 1999

In the vast majority of chapter 7 cases, the interim trustee initially selected by the United States trustee becomes the trustee in the case. Under § 702, the creditors may elect a trustee to serve in the case thereby displacing the interim trustee. Bankruptcy Rule 2003(b)(3) provides that creditors are entitled to vote in the trustee election if they have filed either a proof of claim or other writing setting out their right to vote provided that no objection to the claim is pending. The Rule further provides that if there is an objection either to the amount or the allowability of a claim, then the United States trustee must tabulate the votes under each alternative presented by the dispute and report the result of the election to the court. Rule 2003(d) further provides that if there is a disputed election, the officer presiding over the meeting of creditors at which the election took place "shall promptly inform the court in writing that a dispute exists." The Rule concludes by stating that the interim trustee continues to serve in the case pending resolution of the dispute, and serves permanently "[i]f no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting..."

While the election of trustees in chapter 7 cases occurs infrequently, the situations in which they arise are often highly charged. Creditors with strongly held positions may be intent on bringing significant pressure to bear on the debtor, or they may be interested in protecting themselves from potential attack by a trustee acting on behalf of the bankruptcy estate. Other

creditors and the debtor may hold contrary views, and forming the foundation for a disputed election.

While there are relatively few cases construing Bankruptcy Rule 2003 and § 702, many of the cases that have addressed the issues have held either that the Rule is inconsistent with the Code and therefore unenforceable, or that the Committee should consider some improvements for the Rule. The Ninth Circuit BAP recently held that the Rule is invalid because it "unreasonably interferes with the substantive rights of creditors who have elected a trustee." In re American Eagle Mfg., Inc., 231 B.R. 230, 332 (9th Cir. BAP 1999). In *American Eagle*, there was an attempted election of a trustee after conversion of a case from chapter 11 to chapter 7. Several creditors sought to elect a trustee, and the United States trustee's representative attempted to conduct the election. Several creditors' claims were challenged, and the votes were compiled with an eye towards clearing up the disputes by putting the issues before the bankruptcy court. The U.S. trustee's representative submitted a report of the election to the court seven days after the meeting of creditors, and several creditors filed a motion to certify the elected trustee as the permanent trustee eight days after the report was submitted. This motion was made 15 days after the meeting of creditors. The principals of the debtor challenged the certification of the trustee an the ground that the motion to certify the election was not timely under Bankruptcy Rule 2003(d). Under that Rule, the motion must be made within 10 days after the date of the creditors' meeting. The Bankruptcy Appellate Panel concluded that the 10 day motion requirement of the Rule "is an invalid attempt to invalidate an election under § 702 [, and t]here is nothing in § 702 which allows for such an invalidation of the election." Id.

There was a dissent in the case, but even in the dissent, there was a recognition of problems with the Rule. In particular, the dissenting judge noted that the term "disputed election" creates confusion in that it suggests multiple candidates as the source of the dispute. Moreover, he noted that the Rule would be improved by having the filing of the U.S. trustee's report trigger the 10 day period for filing a motion for resolution of the dispute. Id. at 335.

The Rule also came under attack in In re Michelex Ltd., 195 B.R. 993 (Bankr. W.D. Mich. 1996). In that case, the court upheld Rule 2003(b)(3) as creating "a procedural method by which a trustee election shall take place." Id.at 1005. Although a creditor could argue that it holds an allowable claim that is entitled to distribution under § 726 even without having yet filed a proof of claim, the court held that the Rules requirement that a proof of claim or other writing be filed as a prerequisite to voting for the trustee did not impermissibly modify the Bankruptcy Code.

Although there are not a great many cases that find the rules provisions governing chapter 7 trustee elections invalid, Rule 2003 could be improved with minor adjustments. One possible way to accomplish the change follows.

RULE 2003. MEETING OF CREDITORS OR EQUITY SECURITY HOLDERS

* * * *

(b) ORDER OF MEETING.

* * * *

(3) *Right to Vote.* In a chapter 7 liquidation case, a creditor is entitled to vote at a meeting only 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 under ~~pursuant to~~ § 702(a) of the Code unless objection is made to the claim or the proof of claim is insufficient on its face. A creditor of a partnership may file a proof of claim or writing evidencing a right to vote for the trustee for the estate of a general partner notwithstanding that a trustee for the estate has previously qualified. In the event of an objection to the amount or the allowability of a claim for the purpose of voting, unless the court orders otherwise, 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.

* * * *

(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 within 5 days inform the court in writing that a dispute exists. The presiding officer shall serve a copy of the report on all [voting] creditors. 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 filing of the presiding officer's report ~~date of the creditors' meeting~~, the interim trustee shall serve as trustee in the case.

COMMITTEE NOTE

Subdivision (b)(3) is amended to clarify that a creditor must file a proof of claim or other writing to be eligible to vote in an election of a trustee. Subdivision (d) is amended to establish a time within which the officer presiding over a disputed election must submit a report to the court. The amendment also directs the presiding officer to serve a copy of that report on all of the creditors [who voted in the election]. It further provides that the time within which creditors

must act to obtain court review of the disputed election begins to run with the submission of the report to the court. In the absence of motion to resolve the dispute, the interim trustee will serve as the trustee in the case.

The mechanics of the rule, such as the amount of time to file the report or to move the court for resolution of the dispute, are open for debate. The courts have noted that time is usually of the essence when these elections take place. Therefore, the time frames for filing the report and moving for resolution should be relatively brief. Since the presiding officer must be tabulating the votes as the meeting progresses, five days should be sufficient to prepare a report to the court setting out the alternative voting results. Creditors (whether all of them or just those voting) may need slightly more time to respond given that they will not likely receive the report until several days after it is filed with the court. Nevertheless, delay in the resolution of this issue can be extremely significant, so the relatively short time frames seem appropriate.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: SERVICE OF PROCESS BY UNITED STATES MARSHALS

DATE: AUGUST 18, 1999

Scott William Dales, Esq., in his letter of April 23, 1999, has recommended that the Bankruptcy Rules be amended to incorporate Rule 4.1(a) of the Federal Rules of Civil Procedure or to include a similar rule. A copy of his letter is enclosed.

Civil Rule 4.1(a) provides as follows:

Rule 4.1 Service of Other Process

> (a) GENERALLY. Process other than a summons as provided in Rule 4 or a subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.

Mr. Dales states that the purpose of his proposal is to provide express authority in the rules permitting bankruptcy judges to direct the United States marshal, or some other person specially appointed, to serve writs of execution and process other than a summons or subpoena. He acknowledges the existence of Rule 7069 on the execution of judgments and 28 U.S.C. §566 on the United States Marshals Service, but claims that "courts and practitioners are confused about the nuts and bolts procedures for enforcing judgments of the Bankruptcy Courts. There is also a judicial reluctance to direct executive officers (either federal or state officials) to execute process." In addition, bankruptcy judges "may be especially reluctant to impose upon the local Marshal, given their status as Article I judges." Mr. Dales believes that incorporating Rule 4.1(a) into the Bankruptcy Rules would give bankruptcy judges "the flexibility to appoint the Marshal

to serve process in districts where this is feasible, or other qualified persons where local conditions warrant. In this way, the amendment would promote comity with various federal and state officials, while accommodating the successful litigant's right to prompt enforcement of Bankruptcy Court judgments."

Mr. Dales also suggests that the incorporation of Rule 4.1(a) should be in Part IX (General Provisions) of the Bankruptcy Rules, rather than in Part VII (Adversary Proceedings) because it may be useful in matters other than adversary proceedings. However, Mr. Dales acknowledges that, as Part VII rules may be made applicable in contested matters through Rule 9014, placing the incorporation of Rule 4.1(a) in Part VII would be sufficient.

Background on Rule 4.1(a) and the Bankruptcy Rules

Rule 4.1(a) was promulgated in 1993 when Civil Rule 4 was entirely rewritten. Before the 1993 amendments, the language of the present Civil Rule 4.1(a) was in Civil Rule 4(c)(1). As stated in the committee note to the 1993 Civil Rules amendments, the purpose of creating the new Rule 4.1 was to "separate those few provisions in former Rule 4 bearing on matters other than service of a summons to allow greater textual clarity in Rule 4." Before 1993, the provisions in former Rule 4 that were subsequently moved to the new Rule 4.1, including former Rule 4(c)(1), were not applicable in adversary proceedings or contested matters.

In 1994, the Advisory Committee on Bankruptcy Rules proposed amendments to Bankruptcy Rule 7004 (which, in part, makes certain subdivisions of Civil Rule 4 applicable in adversary proceedings) so that it would conform to the 1993 amendments to Civil Rule 4. In the Advisory Committee's deliberations, it considered whether the new Rule 4.1(a) (former Rule 4(c)(1)) should be included in the list of Civil Rules that are applicable in adversary proceedings.

The Advisory Committee decided, after discussion, that Rule 4.1(a) should not be applicable in adversary proceedings. This decision was consistent with the decision of the Advisory Committee in the early 1980s (when the present Bankruptcy Rules were first drafted), that former Rule 4(c)(1) should not be applicable in adversary proceedings or contested matters.

The minutes of the 1994 Advisory Committee meeting include the following statement:

> "The amendments to Rule 4 included creating a new Rule 4.1 to cover 'other' process, not a summons or subpoena. These provisions were formerly in a subdivision of Rule 4 that was not incorporated by Rule 7004. The Reporter said that he consulted with Professor Lawrence P. King, a former member and former Reporter to the committee, about the history of not incorporating the subdivision. Professor King had said the subdivision was left out intentionally so that it would not apply to the service of motions. Rule 4.1 also contains territorial limits on service that are inconsistent with the nationwide service provisions of Rule 7004. **There was no opposition to the Reporter's recommendation that Rule 4.1 not be incorporated into the bankruptcy rules.**"

Although Mr. Dales' recommendation is worthy of consideration, I question whether it is necessary or desirable to incorporate Civil Rule 4.1(a) into the Bankruptcy Rules. For the reasons reflected in the minutes to the 1994 meeting, Rule 4.1(a) is too broad in that it could be construed to require the United States marshal to serve a motion in a contested matter (which could be considered "process" other than a summons or subpoena because it commences litigation). It also is too limiting because of territorial limits and because the language of Rule 4.1(a) is mandatory (such process "shall" be served by the United States marshal, etc.), rather than discretionary.

I also question whether it would be necessary to expressly provide that the bankruptcy court may order the United States marshal to serve process other than a summons or subpoena. In this regard, 26 U.S.C. § 566(a) and (c) (part of the statute on the United States Marshals Service) provides as follows:

(a) It is the primary role and mission of the United States Marshals Service to provide for the security and to obey, execute, and enforce all orders of the United States District Courts, the United States Courts of Appeals and the Court of International Trade.

****

(c) Except as otherwise provided by law or Rule of Procedure, the United States Marshals Service shall execute all lawful writs, process, and orders issued under the authority of the United States, and shall command all necessary assistance to execute its duties.

Under 28 U.S.C. § 151(a), "the bankruptcy judges in regular active service shall constitute a unit of the district court" and each bankruptcy judge is "a judicial officer of the district court." It appears, therefore, that the United States marshals may be called upon to enforce orders of a bankruptcy judge.

In addition, with respect to the execution of judgments, Bankruptcy Rule 7069 makes Civil Rule 69 applicable in adversary proceedings, and Bankruptcy Rule 9014 makes it applicable in contested matters. Civil Rule 7069(a) provides as follows:

Rule 69. Execution

(a) *In General.* Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, existing at the time the remedy is sought, except that any statute of the United States governs to the extent that it is applicable. In aid of the judgment or execution, the judgment creditor or a successor in interest when that interest appears of record, may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules or in the manner provided by the practice of the state in which the district court is held.

I also have found several court decisions that demonstrate that the United States Marshal Service is being called upon to assist bankruptcy judges in serving or enforcing their orders. See, e.g., In re Burkman Supply, Inc., 217 B.R. 223 (W.D. Mich. 1998) (district court upheld

bankruptcy court's contempt order which included ordering the person's apprehension by the U.S. Marshal Service); French Bourekas, Inc., v. Turner, 199 B.R. 807 (Bankr. E.D.N.Y. 1996) (referring to a bankruptcy court order directing the U.S. marshal to evict a tenant); In re Krisle, 54 B.R. 330 (Bankr. D.S.D. 1985) (referring to a district court decision upholding the bankruptcy judge's jurisdiction to issue an order of civil contempt committing a debtor to the custody of the United States marshal until he made available to the clerk of the court cash removed from a certain bank account).

I suggest that the Advisory Committee discuss Mr. Dales' recommendation at the September 1999 meeting, but I do not recommend any amendments to the Bankruptcy Rules with respect to the incorporation of Civil Rule 4.1(a).

SCOTT WILLIAM DALES

817 CADILLAC DRIVE SE
GRAND RAPIDS, MICHIGAN 49506-3307
(616) 475-4300

99-BK-D

April 23, 1999

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

Re: Proposed Amendment to Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

I understand that the Committee on Rules of Practice and Procedure is in the process of revising the Federal Rules of Bankruptcy Procedure. I am writing to propose that the Committee consider amending the Rules to incorporate Rule 4.1(a)[1] of the Federal Rules of Civil Procedure, or adopt a similar rule in Bankruptcy. As presently drafted, the Federal Rules of Bankruptcy Procedure do not incorporate this rule. See Fed. R. Bankr. P. 7004(a).

The purpose of my proposal is to provide express authority in the Rules for permitting United States Bankruptcy Judges to direct the United States Marshal or some other person "specially appointed" to serve writs of execution and other process, other than summonses and complaints. In my view, notwithstanding Fed. R. Bankr. P. 7069 and 28 U.S.C. § 566, courts and practitioners are confused about the nuts and bolts procedures for enforcing judgments of the Bankruptcy Courts. There is also a judicial reluctance to direct executive officers (either federal or state officials) to execute process. See, e.g., Potomac Leasing Co. v. Uriarte, 126 F.R.D. 526 (S.D. Tex. 1988) (refusing to compel sheriff to execute federal writ). Courts exercising civil jurisdiction are well aware of the many demands that the criminal process places upon the U.S. Marshals Service - demands that may prompt a busy

[1]The subject matter of Fed. R. Civ. P. 4.1(b) is already addressed elsewhere in the Bankruptcy Rules. See Fed. R. Bankr. P. 7004(d) & 9020.

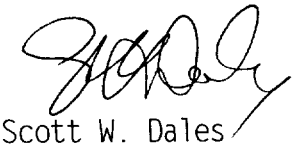
Marshal to refuse to execute process. See, e.g., Apostolic Pentecostal Church v. Colbert, 173 F.R.D. 199 (E.D. Mich. 1997). Bankruptcy judges may be especially reluctant to impose upon the local Marshal, given their status as Article I judges.

If Fed. R. Civ. P. 4.1(a) were incorporated into the Bankruptcy Rules, the court would have the flexibility to appoint the Marshal to serve process in districts where this is feasible, or other qualified persons where local conditions warrant. These other qualified persons need not be state officials. In this way, the amendment would promote comity with various federal and state officials, while accommodating the successful litigant's right to prompt enforcement of Bankruptcy Court judgments.

Although incorporating Rule 4.1(a) into Part VII of the Bankruptcy Rules would resolve much of the confusion that arises post-judgment in adversary proceedings, I believe that the amendment should be located in Part IX, because "judgments," as defined in Fed. R. Bankr. P. 9001(7), may arise in contested matters, as well as adversary proceedings or, assuming the present amendments are approved, administrative proceedings. For example, if the court imposes sanctions under Fed. R. Bankr. P. 9011 in a contested matter, the prevailing party may find it necessary to enforce the order against a recalcitrant party or attorney, by levy or through some other post-judgment procedure. In addition, an order holding a party in civil contempt under Fed. R. Bankr. P. 9020 may also impose compensatory obligations to be enforced as a judgment. The point is, the prevailing party's need for executive assistance is not limited to adversary proceedings. Given that the court may make one or more Rules of Part VII applicable in contested matters or in the proposed administrative proceedings, locating the language of Fed. R. Civ. P. 4.1(a) within Part IX is not absolutely necessary, but it would be expedient. See Fed. R. Bankr. P. 9014; Proposed Fed. R. Bankr. P. 9014(1) (Draft of Aug. 1998).

I appreciate your consideration of this letter, and would be pleased to learn your thoughts on the matter.

Very truly yours,



Scott W. Dales

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TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: ATTORNEY FEES IN CHAPTER 13 CASES

DATE: AUGUST 9, 1999

Wayne R. Bodow, Esq., in his letter to Peter McCabe, has recommended that the Bankruptcy Rules be amended so that attorneys for chapter 13 debtors would receive higher fees, thereby increasing the incentive for attorneys to channel consumer debtors into chapter 13 instead of chapter 7. A copy of Mr. Bodow's letter is enclosed. Mr. Bodow also submitted his article entitled "An Incentive Based Bankruptcy System Will Create Balance for Debtors and Creditors," and another article written by Morgan D. King, Esq., entitled "Inadequate Compensation of Debtors' Attorneys is Impairing the Chapter 13 System." Both articles are enclosed with this memorandum.

Mr. Bodow's position is that increasing the use of chapter 13, rather than chapter 7, is preferred, but will not occur unless the attorney fee structure is changed so that fees in chapter 13 cases are higher. He sets forth in his article several recommendations for changing the fee structure. For example, he suggests that the chapter 13 trustee should pay an "incentive fee" equal to 3% of all funds disbursed to "recognize the debtor's attorney continuing administrative role in the Chapter 13 process." Mr. Bodow then suggests that "[a]n appropriate procedure to award this 'incentive fee' to the Debtor's Attorney should be ultimately designed by the Advisory Committee on Bankruptcy Rules. The attorney should clearly meet or exceed a standard that demonstrates that they vigorously defend their clients rights, have a balanced bankruptcy practice [i.e., filing a statistically recognized balance between chapter 7 and chapter

13 cases], stay current with the law, and show some competency in other areas of law which more often than not are intertwined with the debtor's bankruptcy."

Mr. Bodow also recommends that "an administrative priority payment should be allowed for all work completed post confirmation through either motion or adversary practice undertaken by the debtor's attorney." He suggests that the attorney be paid $50 for each of his or her first three court appearances plus a minimum of $200 through the plan upon the successful resolution on behalf of the debtor of motions to dismiss or lift the automatic stay.

Another recommendation is that "[t]here should be a separate variable fee reviewed and approved only by the Chapter 13 Trustee of an amount not greater than $5,000.00 for business filings. For business and commercial Chapter 13 filings where fees sought are over $5,000.00 there should be a required fee application subject to review under the standards set by the United States Trustees Office. Only half of the approved fee should be allowed as an administrative priority expense with the balance being paid pro rata with secured creditors in the plan. The same additional incentive fee should be paid to the debtor's attorney in business cases, 3% of all funds disbursed by the Trustee."

These are only a few of the specific recommendations made by Mr. Bodow regarding the attorney fee structure. His article includes several others.

I suggest that the Advisory Committee take no action on Mr. Bodow's recommendations at this time. His recommendations are substantive and, in my view, would require amendments to the Bankruptcy Code. If the Code is amended to change the fee structure for debtors' attorneys in chapter 13 cases, then the Advisory Committee should propose appropriate procedures to implement such changes.

WAYNE R. BODOW
ATTORNEY & COUNSELOR AT LAW

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WAYNE R. BODOW*

PARALEGAL:
MARJORIE A. FLAHERTY

*BOARD CERTIFIED CONSUMER BANKRUPTCY LAW
CERTIFIED BY THE AMERICAN BANKRUPTCY BOARD OF CERTIFICATION

March 12, 1999

Peter G. McCabe
Assistant Director, Office of Judges Program
Administrative Offices of United States Courts
Suite 4-170
Columbus Circle, NE
Washington, DC 20544

Re: Proposed Rules Change

Dear Mr. McCabe:

I previously forwarded the enclosed articles to Judge Kressler for his review and comment. In his response, he provided me with your name and address and he indicated that the rules committee will give serious consideration to proposed changes in the Bankruptcy Rules once submitted. By this letter I am formally submitting a proposal to the Rules Committee through your office regarding rules changes relative to attorney fees.

I have also submitted my article to the NACTT Quarterly for publication along with the companion article written by Morgan D. King, Esq. that was published in the NACTT Quarterly in July of 1996.

My proposal is simple. The code as it stands is sufficient. The motivation for attorneys to file more Chapter 13's and scuttle massive revisions to the Bankruptcy Code lies with increased attorney fees. I believe I have outlined a comprehensive, balanced and fair system that will elevate the practice of law throughout the national bankruptcy bar and increase the total number of Chapter 13 filings countrywide.

I would ask that you review this proposal and submit it to the rules committee for consideration. I have also asked the local rules committee of the NDNY to consider these changes.

I look forward to your comments. If there is anything else I should do to assist the rules committee or otherwise formally present this proposal to them, please advise, otherwise, I look forward to your prompt consideration of the proposal.

Very truly yours,

By: Wayne R. Bodow

cc. Judge Kressler

AN INCENTIVE BASED BANKRUPTCY SYSTEM WILL CREATE BALANCE FOR DEBTORS AND CREDITORS

By: Wayne R. Bodow Esq.

The impetus to overhaul the bankruptcy code, I believe, originates from the success of Chapter 13. Today, Chapter Thirteen Trustees distribute more than one billion dollars annually to unsecured creditors, funds those creditors likely would never have collected.[1] Bankruptcy rules should support additional incentive fees to debtor's attorneys. Unfortunately, inadequate compensation of debtors' attorneys is impairing the Chapter 13 system. [2] (I suggest that Morgan King's article be reprinted.) Other minor incentive oriented changes to the Bankruptcy Code need to be created through congressional action to encourage debtors to file Chapter 13[3]. As a debtor's attorney, I believe that the banking community is correct in their assumption that more Chapter 13 cases should be filed. In my practice, in contrast to the local norm where 80% of the consumer filings are Chapter 7, I have filed approximately an equal number of Chapter 13 and Chapter 7 cases for over a decade. Yet in some communities the norm for consumer filings are lopsided in favor of Chapter 13! No significant changes in the national mix of consumer filings resulted from the 1994 amendments requiring language that the debtors be informed of alternatives to chapter 7. Indeed the frustrated creditors cry that it is improper for a debtor to have a free choice of filing either a Chapter 7 or Chapter 13. Yet, I believe that today the debtor's attorney strongly influences this decision.

Chapter 13 works today because the prospective debtor's decision to choose chapter 13 is incentive based but the incentives need to be further expanded. The incentives today fit into three easily divided categories: the right to cure; the right to "cramdown" and the need to protect assets otherwise known as the best interest of creditor's test. [4] Debtors are

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[1] See NACTT Quarterly, Vol. 10, No. 1, October 1997 Chapter 13 Disbursements.

[2] See NACTT Quarterly, Vol. 8, No.4, July, 1996 Inadequate Compensation of Debtors' Attorneys is Impairing the Chapter 13 System By Morgan D. King, Esq.

[3] This is perhaps the subject of an additional article that would seek to explain case law that if overturned by Congressional action, would create policies which in turn would create further incentives for filing Chapter 13's. Examples: Treating real property tax liens as unsecured debts when property is abandoned; full lien release when secured portion of claim is paid; easing the requirements of creditor notice to "verifiable good faith efforts"; Inheritances should escape the grasp of the Trustee; the "Rash" outcome should be changed as there is still no way to determine real market value absent the sale; why super discharge should be retained; allowing discriminatory treatment of a claim for restitution; treatment of student loans as long term debt; and, allow the discriminatory treatment of co-debtor debt.

[4] Unfortunately the provisions of HR 3150-Committee Report would significantly change the best interest of creditor's test and eliminate "cramdown". To comment from the debtor's perspective on the details of HR3150 would require an extensive exposé of 15 or more pages. Instead I refer the reader to two separate articles: COMMENTS OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES TO PROVISIONS OF HR3150-COMMITTEE REPORT By Henry E. Hildebrand, III NACTT Legislative Affairs Committee Chairman published January issue of NACTT Quarterly and STATEMENT OF THE NATIONAL BANKRUPTCY CONFERENCE presented by Professor Alan N. Resnick of the Hofstra University School Of Law to the United States House of Representatives Committee on the Judiciary found at http://www.house.gov/judiciary/5382.htm .. Also see the National Consumer Law web site at http://www.consumerlaw.org/announcements/s1301crit.html Critique of S.1301 "Consumer Bankruptcy Reform Act of 1998", A Bill That Would Devastate America's Consumer Bankruptcy System.

highly motivated when they file to save their homes from foreclosure. Debtors are encouraged to file when they can correct an abuse. They file to right mistreatment i.e. to pay only the value of the security at the time of filing. They occasionally file to avoid negative outcome of losing an asset that would be liquidated in a Chapter 7. They rarely choose to file under a threat of a 707b test. The reason 707b does not work is not because of the ambiguousness of the word "substantial." There is simply a natural resistance to the words "you have no other alternative". Yet the most persuasive reasons people choose to file Chapter 13 have been overlooked! Surprisingly, these are pride, dignity, and self-esteem. Debtors are embarrassed and emotionally traumatized because their crisis is not simply a financial matter. Financial problems lead to discord in their marriages and all their relationships have often reached the maximum of tolerable tension.

When I, in a Counselor role, touch this emotional button and then offer a solution through the magic of Chapter 13 they sigh, a sense of relief then with gratitude I often hear "thank you, my dignity has been restored." Debtors choose Chapter 13 because the Chapter 13 solution can create a forum for a myriad of problems that can be resolved without fronting large legal fees. The debtor's attorney can readily address a panacea of solutions and seek payment upon their resolution through the Chapter 13 Plan. Outside of a Chapter 13 context most consumer rights issues are too petty to be profitably addressed by an attorney. Consumer rights are universally enhanced by allowing access to the legal system for minor grievances or gross grievances that would be barred due to the high cost of legal representation.

A significant increase in Chapter 13 filings will never occur without the encouraged support of the consumer bankruptcy attorneys. Chapter 13 could further enhance consumer rights by enabling debtor attorneys' a fair incentive based compensation when violations of their clients' rights have been successfully remedied. Under today's Code when a side by side comparison is made between Chapter 7 and 13 the results will clearly demonstrate that Chapter 13 achieves better results in more than half of the potential fact patterns. Unfortunately, in my community, the attorneys who predominately file more Chapter 7 cases than Chapter 13 earn more money than I do! Chapter 7 is easy work for most attorneys. Most importantly in a chapter 7 practice the debtor's file is closed within a reasonable time. By contrast a Chapter 13 file remains active for the term of the plan. Numerous problems must be addressed for each client over a three to five year period. In my filing district I own one of the few practices dedicated to Chapter 13. I typically file or defend more than 40 motions per month. In addition to myself, two well-paid paralegal employees and an attorney work full time at this effort! At best the fees generated in my motion practice covers the cost of maintaining it. My profit is realized from new petition fees, and the small amount of negligence cases generated from this broad-based client contact. Because, I defend motions to dismiss and lift stays my plans have the highest completion rate in my district. My staff and I work long, often unpredictable hours resolving new crises without appropriate economic incentive. We provide this service often for the receipt of a label "good Samaritan." Yet it is a well known that economic motivation is the most dynamic factor for change.

The Chapter 13 Trustee should recognize the debtor's attorney's role in assisting the Trustee in his duty to ...advise and assist in performance under the plan.[8]
The Trustee should pay an additional incentive fee to the debtor's attorney of 3% of all funds disbursed. A score of years have past since Congress initiated the Chapter 13 fee structure. The growth of Chapter 13 has forced the Trustees to rely on debtor's attorney to create more efficiency for the system. This "incentive fee" would recognize the debtor's attorney continuing administrative role in the Chapter 13 process.

An appropriate procedure to award this "incentive fee" to the Debtor's Attorney should be ultimately designed by the Advisory Committee on Bankruptcy Rules. The attorney should clearly meet or exceed a standard that demonstrates that they vigorously defend their clients rights, that have a balanced [9] bankruptcy practice, stay current with the law, and show some competency in other areas of law which more often than not are intertwined with the debtors bankruptcy. The process should include the recommendation of the Chapter 13 Trustee, plus a standard of review by the United State Trustee's Office with final approval from the Bankruptcy Judge.

Additionally, an administrative priority payment should be allowed for all work completed post confirmation through either motion or adversary practice undertaken by the debtor's attorney. My experience indicates that at least two court appearances are necessary to resolve lift stay and motions to dismiss. Consequently I suggest that the debtor's attorney be paid $50.00 for each of his first three court appearances plus a minimum of $200.00 through the plan upon the successful resolution on behalf of the debtor of motions to dismiss or lift stay. Additionally the Court should have discretion to award greater fees when the work product is justified. Local rules should establish other fees to be awarded the debtor's attorney for work related to sanctions and modifications of plans or matters outside of the bankruptcy forum.

There should be a separate variable fee reviewed and approved only by the Chapter 13 Trustee of an amount not greater than $5000.00 for business filings. For business and commercial Chapter 13 filings where fees sought are over $5000.00 there should be a required fee application subject to review under the standards set by the United States Trustees Office. Only half of the approved fee should be allowed as an administration priority expense with the balance being paid pro rata with secured creditors in the plan. The same additional incentive fee should be paid to the debtor's attorney in business cases, 3% of all funds disbursed by the Trustee. The same uniform rules should be applied to post confirmation practice in business cases.

It is very clear that the changes envisioned in the bankruptcy Code will require any attorney who continues to practices in bankruptcy law will incur greater costs, which will

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[8] 11 USCS § 1302 (b) (4). Also S. Rept. No. 95-989 to accompany S.2266, 95th Cong., 2d Sess. (1978) p.139.) " ...The chapter 13 trustee must also assist the debtor in performance under the plan by attempting to tailor the requirements of the plan to the changing needs and circumstances of the debtor..."

[9] By "balanced" I refer to filing a statistically recognized balance between chapter 7 and chapter 13 cases under the Bankruptcy Code the does not have a means testing requirement.

INADEQUATE COMPENSATION OF DEBTORS' ATTORNEYS IS IMPAIRING THE CHAPTER 13 SYSTEM

By Morgan D. King, Esq.[1]

THERE is a certain natural tension between debtors' attorneys and Chapter 13 trustees, and it sometimes seems the attorney is viewed with suspicion, perhaps even as an obstacle to the smooth running of the machine instead of as a vital leg in the debt adjustment system. There should be no doubt, however, that debtors' lawyers in Chapter 13 play a crucial part in the system, and that without quality representation by lawyers the system would, quite simply, fail.

When the system operates as intended the result provides debt recovery for creditors on the one hand, and debt relief to consumers on the other. This happens when each entity in the system (judge, trustee and private attorney) understands and appreciates the objectives and roles, as well as the duties and burdens of the others, resulting in a *unity of professional goals.*

A dialogue in which information, problems and solutions may be shared among the professionals in the system facilitates this unity of goals. In this spirit the remarks that follow are intended to apprise Chapter 13 trustees of some of the concerns of private attorneys who practice in the Chapter 13 system.

There is evidence that recent budget cutbacks for funding the Chapter 13 offices are beginning to impair the trustees' ability to provide the level of services necessary to make their leg of the system function as well as it should. Accordingly, Chapter 13 trustees may be so preoccupied with their own problems that they are not noticing problems developing in another leg . . . the debtors' bar. However, these problems bear directly on the success or failure of the trustees' endeavors.

DEBTORS' LAWYERS OPERATE ON A SHOESTRING

Public policy is that debtors' lawyers are entitled to earn the same level of compensation as lawyers practicing in other, comparable areas of consumer law.[2]

However, despite this explicit public policy, the evidence is clear that this is not happening, and in fact too many consumer debtor attorneys are not being adequately compensated for their services. This evidence comes from anecdotal information, studies, surveys and reported cases.[3]

CONSEQUENCES TO THE SYSTEM

Consumer debtor attorneys are not being adequately compensated. The consequences of this go far beyond the mere pecuniary interest of lawyers in private practice, and in fact impact on the rights of debtors to quality legal representation, impair the recovery of debt by creditors, and interfere with the smooth administration of the Chapter 13 system. Accordingly, the financial health of consumer bankruptcy lawyers should be deemed an important concern not only of the private bar but of the trustees and courts charged with oversight of the system.

Some of the negative consequences of inadequate compensation of debtors' attorneys are discussed below.

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[1]The author, a member of the California Bar, received his J.D. from the University of California School of Law, Davis, 1971, and undergraduate degree from University of California, Berkeley, 1968. He is a practicing bankruptcy attorney in Dublin, California, and presently serves as chairman of the *Committee on Compensation of Bankruptcy Attorneys* for the National Association of Consumer Bankruptcy Attorneys (NACBA), and is a member of the American Bankruptcy Institute *Committee on Professional Compensation.* He is the author of numerous articles and books on legal topics, with particular emphasis on tax remedies in bankruptcy. In addition to membership in NACBA, ABI and various bar bankruptcy sections, he is an associate member of the National Association of Chapter 13 Trustees. He self publishes his book, *Attorney Fees in Consumer Bankruptcy Cases*, chapter 1 of which will appear as an article in the 1996 *Norton Annual Survey of Bankruptcy Law.*

[2]Comment, *Attorneys Fees in Bankruptcy*, 19 Conz. L. Rev. 333, 334 (1983/84).

[3]American Bankruptcy Institute *National Report on Professional Compensation in Bankruptcy*, 1991; The Altman Weil Pensa *Survey of Law Firm Economics* (Altman Weil Pensa Publications, Inc. (1993) (revealing that average compensation of bankruptcy attorneys across the nation is third from the bottom out of 14 specialties studied); Consumer Bankruptcy News, Vol. 3, September 1994; The NACBA 1996 *Survey of Consumer Bankruptcy Attorneys;* Morgan D. King, *Compensation of Debtors' Attorneys in Consumer Bankruptcy - The Failure of Public Policy* (Norton Annual Survey of Bankruptcy Law, 1996); *In re* Commercial Consortuum of California, 135 B.R. 120 (Bankr. C.D. Cal. 1991).

suffers. A large number of lawyers responding to the NACBA 1996 survey indicated that problems with compensation impair their ability to deliver quality legal services, and the 1995 Behles-Giddens survey revealed that 54% of attorneys believe that fee caps result in a decrease in the quality of legal services provided for the debtor. And, a startling fact is that the malpractice rate among bankruptcy lawyers is the third highest of all fields of consumer law,[10] indicating a problem with the quality of legal services being provided in the field of consumer bankruptcy law.

"A Day on Capitol Hill" meeting in Washington, D.C. with members of Congress and staff on issues on behalf of NACTT. Left: Jason Mahler with Rep. Zoe Lofgren (D-16-CA); Kathleen McDonald; George Stevenson and Jerry O'Donnell.

INABILITY TO PROVIDE POST-PETITION COUNSELING OR SERVICES

Across the nation only 32.89% of filed Chapter 13 cases are successfully completed.[11] Why so many fail to complete their plans is a subject of concern that has caught the attention of the National Bankruptcy Review Commission. To date, there appears to have been few, if any, empirical studies attempting to identify the causes of the high failure rate.

Intuitively, however, we may presume that one reason is the debtor's need for postpetition financial and budget counseling.

Debtors' attorneys could do more to meet this need. However, without adequate financial resources, they are unable to do so. In the present financial shoe-string environment, the typical debtor's lawyer reaches his limit of ability to provide services the moment the plan is confirmed.

ENCOURAGING "FORM-FILERS" OPERATING ON HIGH VOLUME

Because the profit margin is so thin on each case (and this presumes there is any profit at all in handling Chapter 13 cases . . . a dubious presumption) the economic pressure on Chapter 13 practitioners is to do a high-volume business which minimizes the level of professional resources that may be devoted to each case. In other words, in order to make a profit any individual representing debtors in Chapter 13 is virtually forced to take as many cases as possible and keep the level of professional services invested in each case to an absolute minimum. The result is that each individual case is given a superficial level of lawyering, at best.

This is contrary to the tradition of quality in delivery of legal services that is expected in this country. The message that one receives in one's legal education is to give each case one's best; the message given by the Chapter 13 system is just the opposite . . . *to give each case one's least.*

This pressure toward high-volume, cheap lawyering has two unfortunate consequences.

First, it discourages quality lawyers from representing debtors in Chapter 13, and impairs the ability of those quality lawyers who do stay in the system to provide quality services in each case.

Second, it encourages an unprofessional culture which fosters high-volume "form-filer" entities to spring up and exploit the market. Thus, in some areas there are lawyers who file massive quantities of cases without adequate attention to each case. And worse, in many areas so-called independent paralegals and other legal service schemes spring up which generate massive volumes of cases using aggressive advertising methods. These entities typically provide virtually no legal services at

[10] American Bar Association study, 1985, as reported in *Legal Malpractice Report*, Vol. 3, No. 2 (1992), published by Long & Levit, San Francisco, CA.

[11] NACTT, *Statistical Data Survey*, 1994.

all, and in too many cases damage the debtor's right to a fair chance at debt adjustment through Chapter 13, while disrupting the orderly processing of cases through the trustee's offices and the courts. The empirical evidence is clear that in all too many cases such entities routinely fail to provide competent services to the debtor.[12]

WHAT TRUSTEES CAN DO

If we accept the premise that adequate compensation for doing Chapter 13 work improves the quality of lawyering on behalf of the debtor, then it would seem that more Chapter 13 cases will succeed, and more money will be recovered by creditors. And, of course, more debtors will receive the quality of representation to which they are entitled under the law.

Accordingly, it seems fitting that Chapter 13 trustees should be sympathetic to the needs of the debtors' bar for timely and adequate compensation. Although there are limitations to what Chapter 13 trustees can do to help improve the situation, some suggestions are made here.

1. *Treat fees as priority administrative expenses - pay off first.*

One of the causes of inadequate compensation is the delay in payment of fees built into the typical Chapter 13 plan. The delay costs the lawyer in terms of risk of loss, and in loss of value of money over time. The risk of loss arises to some extent from dismissal or conversion of cases in which substantial portions of the attorney's fees remain to be paid. Collection of such fees following a dismissal or conversion is typically not feasible.

As a consequence, many lawyers report that they collect much less of their billable time in Chapter 13 than in any other kind of work,[13] and Judge Keith Lundin[14] in 1992 testified before the Senate Judiciary Committee's Courts and Administrative Practices subcommittee that attorneys in his district typically collect only 62% of awarded fees.

Jennie Behles, in her report to the ABI Symposium in Montana reported:

> [A] factor that has not been considered in setting these fees is collectability. Collectability is a real problem in consumer cases. If you think that $1,500 is a reasonable fee, that's fine. But what this survey shows is that out of that $1,500 somebody's probably collecting $1,000. That has an effect on keeping good attorneys in the system.[15]

Trustees can help ameliorate this problem by, among other things, developing payment formulas that expedite and shorten the time required to pay off the balance of the attorney's fees in the plan.

Another helpful policy is to send refund checks for dismissed cases to the attorney, and encourage the attorney to seek priority administrative expense status for his fees. This was suggested by Hon. Keith Lundin in his treatise on handling Chapter 13 cases. If the fee is declared an administrative expense pursuant to 11 U.S.C. §503(a), then if the case is dismissed the trustee must deduct these fees from any refund check due to the debtor and send the fees directly to counsel pursuant to §1326.

2. *Oppose fee guidelines and fee caps that limit recovery of fees.*

Jennie Behles reported to the ABI at the 1995 Symposium that her firm's survey indicated " . . . we found out from the survey that effective lawyering increases distribution to creditors. So, we need to make sure that any guidelines that we use in these cases don't get good lawyers out of the system." And, a substantial number of responses from the 1996 NACBA survey revealed that many consumer lawyers are convinced that unfair fee guidelines have discouraged them from handling Chapter 13 cases, and the 1991 ABI National Report On Professional Compensation discovered evidence that inadequate compensation was causing lawyers to decline bankruptcy work or leave the system entirely.

Other evidence generated by these and other reports and studies indicates that such guidelines are actually unnecessary, and that across the board ordinary market mechanisms, such as competition, market rates, advertising and state bar ethical guidelines, are just as effective at keeping fees within reasonable boundaries. Furthermore, such guidelines may indirectly violate the Lodestar formula, which is the formula adopted by majority rule in the bankruptcy courts for awarding compensation based on reasonable hourly rates and the actual amount of time reasonably necessary to handle the case.

Accordingly, trustees can help improve compensation of debtors'

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[12]Hon. A. Jay Cristol, *The Nonlawyer Provider of Bankruptcy Services: Angel or Vulture?* 2 Am.Bankr.Inst.L.Rev. 353 (in which Professor Cristol concludes that as a rule such providers are more akin to vultures than angels).

[13]NACBA Survey, 1996.

[14]Judge, U.S. Bankruptcy Court, Nashville, Tenn.

[15]Transcript, *ABI Symposium, supra*, at 24.

6. *Be more sensitive to the costs of comparable services standard.*

Congressional intent is clear that bankruptcy attorneys should be paid on a level commensurate with their nonbankruptcy colleagues performing comparable legal services.[19] This standard has been incorporated into the standards of review provided for in 11 U.S.C. §330(a) (3)(E).

Yet how many trustees are familiar with market rates and billing practices outside the field of bankruptcy? If the level of knowledge among trustees is comparable to that of bankruptcy judges, it is pretty dismal; the 1991 ABI Report on Compensation found that a large number of judges have no knowledge whatever of nonbankruptcy compensation, and the majority have only a smattering of familiarity.

Trustees should encourage local lawyers to provide evidence of nonbankruptcy billing rates and billing practices in order to facilitate fair and realistic appraisals of their compensation and billing needs.

CONCLUSION

A fundamental problem with Chapter 13 from the lawyer's point of view is the split personality of the system . . . because of its relatively recent statutory origins it is in some respects akin to a governmental or bureaucratic public service, and yet at the same time is set up to function like a traditional legal remedy with judges, an adversary system, and official published legal opinions.

Thus, on the one hand the system would like to shuffle the public through a quick clerical process designed to conform all cases to a pre-determined profile, minimizing the distinctive features of each debtor's situation; on the other hand, it invites lawyers to step in and represent a debtor in the traditional manner of lawyering . . . that is, to assure that the debtor is not run over by the system . . . in fact to assure that the distinctive features of his or her client's situation are emphasized, not minimized, and that decisions are not made in a cookie-cutter fashion, but just the opposite . . . are made in an adversary manner designed to advance the interests of the individual client. The system is motivated to force the debtor to bend to the needs of the system; but on the contrary, the lawyer's duty is to force the system to bend to the client's needs.

This split personality may be seen by looking at whose compensation is actually at risk in the Chapter 13 process. When a case requires attention, the courts and the trustees and their respective employees get paid the same, regardless of whether that attention is actually given. When a Chapter 13 case fails, the judge and the trustees and their respective employees still get paid and still collect their benefits . . . *it is only the debtor's lawyer who loses a portion of his compensation.* And this risk of loss by the debtor's lawyer is accepted by the system as altogether fitting and appropriate (not, however, by the debtor's lawyer).

This split personality creates an environment in which the lawyer is felt to be almost more of an impediment than a necessary and esteemed part of the system. And this, in turn, creates a culture in which the lawyer's expectations of being paid adequately for his services are deemed unseemly, unnecessary, even unethical. A lawyer who actually presumes to be properly compensated all too often is forced to "rock the boat," and before long is viewed in a manner akin to the leper at the courthouse.

Lawyers representing debtors in Chapter 13 do not like the feeling of being treated like lepers when it comes to being compensated. But far more serious than the lawyer's mere feelings is the effect of inadequate compensation on the system itself. The system will never achieve its full potential, as originally envisioned, until the debtors' bar is able to perform its proper function in a tradition of excellence in the delivery of legal services. And this can only happen with appropriate reform in the philosophy, culture and procedure of compensation of debtors' lawyers.

[19] Notes of the Committee on the Judiciary, House Report No. 95-595; In re Manoa Fin. Co., 853 F.2d 687 (9th Cir. 1988); Charles Jordan Tabb, *The History of The Bankruptcy Laws in the United States*, 3 Am.Bankr.Inst. L. Rev. 5, 25 (Spring, 1995).

(Official Form 1) (9/97)

FORM B1

United States Bankruptcy Court
_____District of_____

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):

Location of Principal Assets of Business Debtor (if different from street address above):

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other _____

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 13
☐ Chapter 9 ☐ Chapter 12
☐ Sec. 304 - Case ancillary to foreign proceeding

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.
☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

Prior Bankruptcy Case Filed Within Last 6 Years (If more than one, attach additional sheet)

Location Where Filed:	Case Number:	Date Filed:

Pending Bankruptcy Case Filed by any Spouse, Partner or Affiliate of this Debtor (If more than one, attach additional sheet)

Name of Debtor:	Case Number:	Date Filed:
District:	Relationship:	Judge:

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of Attorney

X _____
Signature of Attorney for Debtor(s)

_____
Printed Name of Attorney for Debtor(s)

_____
Firm Name

_____
Address

_____

_____
Telephone Number

_____
Date

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Authorized Individual

_____
Printed Name of Authorized Individual

_____
Title of Authorized Individual

_____
Date

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter.

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.
☐ No

Signature of Non-Attorney Petition Preparer

I certify that I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110, that I prepared this document for compensation, and that I have provided the debtor with a copy of this document.

_____
Printed Name of Bankruptcy Petition Preparer

_____
Social Security Number

_____
Address

_____

Names and Social Security numbers of all other individuals who prepared or assisted in preparing this document:

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

X _____
Signature of Bankruptcy Petition Preparer

_____
Date

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. §110; 18 U.S.C. §156.

Form B1, Exhibit C
(Draft)

Exhibit "C"

[If, to the best of the debtor's knowledge, the debtor owns or has possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety, attach this Exhibit "C" to the petition.]

[Caption as in Form 16B]

Exhibit "C" to Voluntary Petition

1. Identify and briefly describe all real or personal property owned by or in possession of the debtor that, to the best of the debtor's knowledge, poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

2. With respect to each parcel of real property or item of personal property identified in question 1, describe the nature and location of the dangerous condition, whether environmental or otherwise, that poses or is alleged to pose a threat of imminent and identifiable harm to the public health or safety (attach additional sheets if necessary):

.....
.....
.....
.....

Item 18 will be an oral report.

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 1999

1017
1019
2002
2003
3020
3021
4001
4004
4007
6004
6006
7001
7004
7062
9006
9014

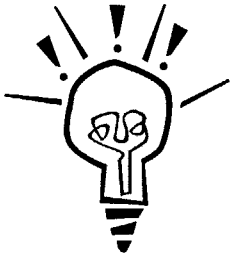
December 1, 2000

1017
2002(a)
4003
4004
5003

December 1, 2001

1007
2002(c)
2002(g)
3016
3017
3020
9020

THE GESTATION OF AN AMENDMENT



YEAR 1 → **YEAR 2** → **YEAR 3**

Rules 1006, 2002(a), 2002(f)(7), 2002(h), 2003(b), 2003(d), 2004, 2010, 2014, 2015(a)(5), 4004(c), 7004(b)(3), 7041, 9013, 9014, 9019, and 9027

Proposed new Rules 1004.1, and 1004.2
Official Forms 7, 9, 10, and 20B
Director's Form B240

Official Form 1

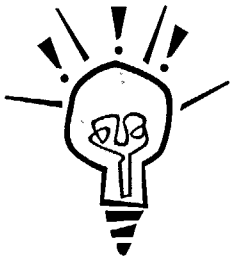
Rules 1007, 2002(c), 2002(g), 3016, 3017, 3020, and 9020

Rules 1017, 2002(a), 4003, 4004, and 5003

Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC
8/99

THE GESTATION OF AN AMENDMENT



YEAR 1

1.Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.

2. This period is of indeterminate length.

3. Proposals come from Committee members, the Reporter, judges, clerks, or the public, or result from statutory changes, case law developments, or experience.

Advisory Committee approves draft of proposed amendments. (January-May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited.

(August)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). Public comment period closes.

(January - March)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate).

(March -April)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress.

(March or April)

(must be by May 1)

Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

Proposed amendments may be at different stages of the process at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

3/99

Items 20 & 21 will be oral discussions.

9027(a)(3)

Committee Note

Subdivision (a)(3) is amended to make it applicable where a claim or cause of action is removed under 28 U.S.C. §1452(a) after the commencement of the bankruptcy case, whether the bankruptcy case is pending, suspended, or closed.

U.S. Department of Justice

Office of the United States Trustees

Washington, D.C. 20530

September 22, 1999

TO: MEMBERS OF THE BANKRUPTCY RULES ADVISORY COMMITTEE

FROM: The Executive Office for United States Trustees

SUBJECT: WORKING GROUP – FORM MONTHLY OPERATING REPORTS

Attached is the proposed Small Business Debtor Initial Report (FORM IR) and Small Business Debtor Monthly Operating Report (FORM MOR) prepared by the United States Trustee Program at the suggestion of the Reporter for the Rules Committee. This cover memorandum summarizes the objective of the project, explains the format used in the proposed forms and the underlying assumptions, and highlights issues which may require further discussion. The forms are in draft form and intended to initiate discussion leading to final issuance.

There are currently no official or standardized operating reports which are required to be filed by chapter 11 debtors pursuant to the provisions of the Code, 11 U.S.C. Section 101 et seq or the Bankruptcy Rules. The United States Trustee Program (hereinafter UST), however, routinely requires chapter 11 debtors to submit some form of operating report, pursuant to Section 704(8) of the Code,[1] that can be used to monitor debtor activities. Field offices throughout the UST Program have developed various reports designed to capture the information needed to assess the feasibility of a debtor's plan of reorganization and oversee the chapter 11 process. We reviewed and adapted many of these forms in preparing the proposed Small Business Debtor FORM IR and FORM MOR. It would be helpful whether or not the proposed bankruptcy reforms are enacted to have national uniformity for both the initial reports and the monthly operating reports for chapter 11 debtors.

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[1] 11 U.S.C. §704(8) is applicable in Chapter 11 pursuant to 11 U.S.C. §§1106(a)(1) and 1107(a).

I. OBJECTIVE

A. Small Business Definitions

Under H.R. 833, a "small business debtor" is defined as "a person (including affiliates of such person that are also debtors under this title) that has aggregate non-contingent, liquidated secured and unsecured debts as of the date of the petition or the order for relief in an amount not more than $4,000,000 (excluding debts owed to one or more affiliates or insiders), except that if a group of affiliated debtors has aggregate non-contingent, liquidated secured and unsecured debts greater than $4,000,000 (excluding debt owed to one or more affiliates or insiders), then no member of such group is a small business debtor." S. 625 contains similar provisions. A small business debtor is defined as "a person (including any affiliate of such person that is also a debtor under this title) that has aggregate non-contingent, liquidated secured and unsecured debts as of the date of the petition or the order of relief in an amount not more than $4,000,000 (excluding debts owed to one or more affiliates or insiders) for a case in which the United States trustee has appointed under section 1102(a)(1) a committee of unsecured creditors that the court has determined is sufficiently active and representative to provide effective oversight of the debtor; and...does not include any member of a group of affiliated debtors that has aggregate non-contingent liquidated secured and unsecured debts in an amount greater than $4,000,000 (excluding debt owed to one or more affiliates or insiders)". These definitions effectively double the current debt limit for small business debtor treatment and exclude insider debt from the calculation of the limit. These changes were intended to expand small business treatment to encompass the majority of chapter 11 cases. The provisions reflect an on-going effort to streamline the chapter 11 process for smaller debtors and reduce the amount of time spent in bankruptcy. It is anticipated that feasibility will be assessed early in small business cases and debtors who are able to reorganize will file a plan within no more than 150 days and move quickly to plan confirmation.

B. Proposed Uniform National Reporting Requirements

In order to meet these objectives, the proposed legislation creates uniform national reporting requirements for small business debtors operating in chapter 11. It attempts to provide standardized information to the public by requiring periodic reports to be filed with the Bankruptcy Court. The proposed legislation expressly states that the reports shall be designed to achieve a practical balance between (1) the reasonable needs of the bankruptcy court, the United States trustee, creditors, and other parties in interest for reasonably complete information; (2) the small business debtor's interest that required reports be easy and inexpensive to complete; and (3) the interest of all parties that the required reports help the small business debtor to understand its financial condition and plan its future. These stated objectives of reasonable information, simplicity, practicality and usefulness were the primary considerations used by this Working Group in preparing the Proposed FORM IR and the FORM MOR.

The proposed small business debtor reporting requirements apply throughout the chapter 11 process. Some of the requirements are linked to the initial filing of the petition by the debtor while others focus on the results of operations during the chapter 11 period. In order to draft the proposed monthly operating report, we found it necessary to distinguish between the initial reporting requirements and the on-going operating requirements.

The initial reporting requirements consist of the duty to append to the voluntary petition (or file within three days after the order for relief in involuntary cases) the debtor's most recent balance sheet, statement of operations, cash flow statement, and Federal income tax return, or a statement made under penalty of perjury that no balance sheet, statement of operations, or cash flow statement has been prepared and no Federal tax return has been filed. The debtor also has a duty to establish one or more separate deposit accounts no later than 10 business days after the date of the order for relief to be used for tax deposits.

The operating requirements are two-fold in that they require disclosure of certain financial information and also require proof of compliance with certain duties set forth in the Bankruptcy Code and Rules. The financial information required consists of periodic financial and other reports, including profitability during current and recent fiscal periods; reasonable approximations of projected cash receipts over a reasonable period; and comparisons of actual cash receipts and disbursements with projections in prior reports.

The compliance information is linked to the debtor's duties under the Bankruptcy Code and Rules. Small business debtors are required to maintain the insurance coverage customary and appropriate to the industry; timely file tax returns; timely pay all administrative expense tax claims; and deposit all taxes collected or withheld into the tax deposit accounts not later than one business day after receipt. The proposed uniform reporting legislation requires the debtor to demonstrate compliance with these and other duties by requiring periodic reports which include a showing of compliance in all material respects with post-petition requirements imposed by the Code and Rules; timely filing tax returns and paying taxes and other administrative claims when due, and if not, what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and such other matters as are in the best interest of the debtor and creditors and in the public interest in fair and efficient procedures under chapter 11 of this Title.

II FORM OF REPORTS

The proposed forms are designed to reflect the differences in report timing and information type outlined above. To facilitate initial reporting by debtors, we utilized a separate Initial Report (FORM IR) which supplements the Monthly Operating Report (FORM MOR). For both reports, the instructions are contained on the proposed forms themselves. There are no

additional or separate instruction sheets. Although we would encourage the UST Program Field Offices to review the forms with small business debtors, it is our position that the forms can be completed without any special training or instruction.

The forms are intended for use by any legal form of small business debtor: corporation, partnership, proprietorship, or limited liability company. Similarly, they are designed to be suitable for any type of business. (However, see Section C below for special issues concerning single asset real estate cases and individual debtors.)

A. Small Business Debtor Initial Report (FORM IR)

FORM IR is designed to capture the initial compliance information for insurance coverage and debtor in possession bank accounts, as well as providing some basic financial information in the form of cash flow projections. The FORM IR is to be filed within 15 days after the order for relief. This deadline is not expressly set forth in the proposed legislation, but was selected by us as a date which would provide reasonable information in a timely manner while still allowing adequate time for the debtor to gather supporting documents, prepare its schedules and statement of financial affairs, and open the necessary bank accounts. FORM IR consists of a cover sheet, a 12-month cash flow projection, and several attachments from the debtor's own records.

1. Cover Sheet: The cover sheet is to be signed under penalty of perjury by the debtor and any joint debtor. In the case of a corporation, partnership or limited liability company, the cover sheet must be signed by the "authorized individual" as that term is defined on the FORM IR.

2. Cash Flow Projections (FORM IR-1): The Cash Flow Projections are for a 12 month period and are in a typical accounting format. The categories of revenues and expenses used match the categories used in the FORM MOR to facilitate comparisons of projected to actual data.

The time frame for the filing of cash flow projections is not expressly set forth in the proposed legislation. It calls for periodic financial and other reports, including profitability during current and recent fiscal periods; reasonable approximations of projected cash receipts over a reasonable period; and comparisons of actual cash receipts and disbursements with projections in prior reports. It is our view that cash flow projections will be most useful to all parties when provided early in the case. That will help the debtor focus on its objectives and duties in chapter 11 and enable all parties to assess feasibility in a timely fashion. Thus, the projections have been incorporated into the initial report FORM IR.

Similarly, the legislation calls for projections over a reasonable period without specifying what period is to be used. It is our view that 12 months allows for consideration of seasonality in the debtor's business and is a sufficient period to allow for trend analysis. In addition, accounting practices typically call for one-year budgets and projections. Extending the period beyond 12 months would tend to give the impression that the small business case should be pending for an extended period and would result in stale data unless updated projections were submitted. Similarly, shortening the period might result is the omission of seasonal fluctuations and provide a limited view of long-term feasibility. Thus, we selected a one-time, 12 month cash flow projection. The debtor may revise or update the projections as necessary.

The proposed legislation also calls for comparisons of actual data to the projections. We incorporated this requirement into the FORM MOR. The debtor will use the data from the initial FORM IR projections and will report the monthly comparison on the FORM MOR.

3. Other Attachments: The other attachments to the FORM IR can generally be taken from the debtor's ordinary business records and should be readily available or obtainable without any special preparation. These attachments consist of certificates of insurance naming the UST as a party to be notified in the event of policy cancellation and proof of separate debtor in possession bank accounts. The instructions to the form specifically call for bank accounts and checks to be captioned "debtor in possession." This requirement is not expressly set forth in the proposed legislation, but we fill that it is implicit in the duty to establish 1 or more separate deposit accounts no later than 10 business days after the date of the order for relief to be used for tax deposits. If any of the documents requested cannot be provided with the FORM IR, the debtor is directed by the cover sheet to attach an explanatory statement of the circumstances preventing compliance.

B. Small Business Debtor Monthly Operating Report (FORM MOR):

FORM MOR is designed to capture the results of operations during the chapter 11 period on a monthly basis. The instructions to the form specifically call for copies to be submitted to any official committee appointed in the case. This requirement is not expressly set forth in the proposed legislation. It is our view that cooperation with official committees is an implicit duty in any chapter 11 case. The FORM MOR should be filed within 20 days after the end of the month. This deadline is not expressly set forth in the proposed legislation, but is a date commonly in use. It would provide timely, current information while still allowing adequate time for the debtor to review bank statements, update internal accounting records, and prepare the FORM MOR. FORM MOR consists of 9 pages that include the following: the cover sheet, schedule of cash receipts and disbursements, bank reconciliation form, statement of operations, statement of operations - continuation sheet, balance sheet, balance sheet - continuation sheet, status of post-petition taxes and summary of unpaid debts, accounts receivable reconciliation and debtor questionnaire.

1. Cover Sheet: The cover sheet is to be signed under penalty of perjury by the debtor and any joint debtor. In the case of a corporation, partnership or limited liability company, the cover sheet must be signed by the "authorized individual" as that term is defined on the FORM MOR.

2. Schedule of Cash Receipts and Disbursements (FORM MOR-1): The Schedule of Cash Receipts and Disbursements is used to report the debtor's cash flow information. In addition to completing this schedule, the debtor is required to attach copies of all bank statements and its cash disbursements journal. These attachments are business records which should be readily available in the debtor's internal files and would not require any additional preparation. These supporting documents are necessary to enable parties reviewing the FORM MOR to verify the information reported, analyze the sources and uses of the debtor's cash flow, and identify expense items which might need further explanation or review by the debtor.

The main body of the cash receipts and disbursements schedule is organized into three sections: (1) receipts and disbursements for each bank account; (2) current month totals for all bank accounts compared to projected totals for the month; and (3) cumulative filing to date totals compared to projected totals for filing to date. The legislation expressly calls for comparisons of actual cash receipts and disbursements with the projections made in prior reports and this requirement is incorporated into the cash receipts and disbursements schedule. The projected information is taken from the 12 month projections previously submitted with the FORM IR to eliminate the need for the debtor to continually prepare new projections. This approach balances the need for ease of preparation by the debtor with the need for reasonably current information. Thus, the debtor may revise its original projections to reflect unexpected changes in circumstance, but it is not required to update the original data on a monthly basis.

The schedule also provides cumulative information from the date of the filing to assist the debtor and other parties is identifying trends and problem areas in the debtor's cash flow. In addition, it contains a section at the bottom of the page which captures the disbursement information needed for the assessment of UST quarterly fees.

3. Bank Reconciliation Page (FORM MOR-1 CON'T): The debtor is allowed to substitute its own internal bank reconciliations prepared in the ordinary course of business. The form is included primarily as an aid to those debtors which have not routinely prepared bank reconciliations prior to filing for bankruptcy protection. A separate bank reconciliation is to submitted for each bank account.

4. Statement of Operations and Continuation Sheet (FORM MOR-2): The Statement of Operations is the debtor's income statement. It is to be prepared on an accrual basis only and the instructions include a brief definition of the accrual basis of accounting. We recognize that some debtors may not have kept their accounting records on an accrual basis pre-petition. Such

accrual basis accounting is necessary to accurately report the results of operations. The majority of debtors are required to file their Federal tax returns on an accrual basis, thus demonstrating that they have the ability to use accrual accounting when necessary.

The Statement of Operations uses a typical accounting format with Federal tax return revenue and expense categories. The primary exception is in the separation of reorganization items directly attributable to the bankruptcy proceeding, such as professional fees, UST quarterly fees, and the interest earned on cash accumulated during the chapter 11 period.

The proposed legislation calls for periodic financial and other reports, including profitability during current and recent fiscal periods. To satisfy this requirement, the Statement of Operations includes a column for the current month data and a separate column for the cumulative filing to date information. A separate continuation sheet (FORM MOR-2 CON'T) is provided for detailing items such as "Other Income" and "Other Expense."

5. Balance Sheet and Continuation Sheet (FORM MOR-3): The Balance Sheet is a standard accounting document. Although the proposed legislation does not expressly call for a balance sheet, it is a critical financial statement inherently part of the periodic financial reports.

The balance sheet is to be prepared on an accrual basis, for the same reasons stated above in the discussion of the Statement of Operations. For the most part, the Balance Sheet uses a traditional accounting format. It has been modified to reflect significant issues relating to bankruptcy. For example, instead of using short-term and long-term classifications, liabilities are segregated into pre-petition and post-petition categories, an important bankruptcy distinction. Pre-petition liabilities are usually subject to compromise while post-petition liabilities are not. Similarly, the asset section of the balance sheet separates unrestricted cash from cash that restricted for a particular purpose, such as cash collateral proceeds, factoring reserves, or other escrow funds. A continuation sheet (FORM MOR-3 CON'T) is also provided for detailing items such as "Other Assets" and "Other Liabilities."

To comply with the legislative requirement of data from both current and recent periods, the Balance Sheet includes separate columns for the current month's values and the values on the date of filing. Also, to facilitate ease of preparation, the categories of post-petition liabilities on the Balance Sheet match the categories used in the Status of Post-petition Taxes and Summary of Unpaid Post-petition Debt (FORM MOR-4).

6. Status of Post-petition Taxes and Summary of Post-petition Debts (FORM MOR-4): The proposed legislation contains detailed requirements for reporting as well as paying post-petition taxes. The debtor is required to timely pay all administrative claims and taxes when due and deposit all taxes collected or withheld into the tax deposit accounts not later than 1 business day after receipt. If the debtor fails to do so, it must provide a detailed statement of what the

failures are and how, at what cost, and when the debtor intends to remedy such failures. The Status of Post-petition Taxes and Summary of Post-petition Debt is designed to implement these provisions. In addition to completing this form, the debtor is required to attach copies of all tax returns filed and the deposit slips or payment receipts for taxes deposited or paid.

The Summary of Unpaid Debts provides an aging for accrued expenses and requires an explanation of how the debtor will pay any past due post-petition debts. In addition to completing the form, the debtor must attach an aged listing of accounts payable. This aging schedule is a typical accounting record which should be easily produced by the debtor from its ordinary business records.

7. Accounts Receivable Reconciliation & Aging (FORM MOR-5): Although the proposed legislation does not expressly require an aging of accounts receivable, it is our position that this information is necessary for the assessment of the debtor's cash flow and for the evaluation of long-term feasibility. The accounts receivable information should be readily available to the debtor in its ordinary business records. To achieve simplicity, the form requires the debtor to report only the total receivable information without itemizing the individual accounts.

8. Debtor Questionnaire (FORM MOR-5): The Debtor Questionnaire consists of four questions dealing with compliance issues. The questions must be answered by checking yes/no boxes and providing an explanation for answers suggesting non-compliance. The questions focus on unauthorized transfers, the use of unauthorized bank accounts, timely filing of post-petition tax returns, and maintenance of necessary insurance coverage. To avoid duplication, the questionnaire is limited to information which is not addressed in any other portion of the FORM MOR.

C. *Special Issues Concerning Single Asset Real Estate Cases and Individual Debtors Not Operating A Business*

To the extent that they fall under the definition of "small business debtor," single asset real estate cases and individual debtors who are not operating businesses pose special reporting issues. The nature of the financial activity in a single asset real estate case differs from that of a debtor operating a retail, service, or manufacturing business, and an individual who is not operating a business may have little financial activity other than the receipt of wages and the payment of living expenses. These issues may necessitate modified reporting forms.

We have included in a separate packet the following alternative forms:

Single Asset Real Estate Cases - FORM IR-1 (RE), Cash Flow Projections for Single Asset Real Estate Case; FORM MOR-2 (RE), Statement of Operations for Single Asset Real Estate Case; and FORM MOR-2 (RE) CON'T, Rent Roll for Single Asset Real Estate Case. These forms would be substituted for IR-1 and MOR-2, described previously in Sections II.A. and B, above. All of the other small business reporting forms described in Sections II.A. and B can be used in the single asset real estate case without special modification.

Individual Debtors Not Operating A Business - FORM MOR-1 (INDV), Individual Debtor Cash Receipts and Disbursements and continuation sheet, would be included in the monthly operating report for an individual debtor who is a wage earner. The other small business forms described in Section II.B would be used to the extent applicable to the debtor's circumstances.

Cover Sheets - The Initial Report (FORM IR) and Monthly Operating Report (FORM MOR) cover sheets would require minor modifications to reflect the alternative forms for single asset real estate cases and individual debtors who are wage earners.

III. CONCLUSION

The drafts of the proposed FORM IR and FORM MOR are designed to achieve a practical balance between need for timely and complete information and the small business debtor's interest in simplicity. The information contained therein is intended to benefit all parties by assisting the small business debtor in understanding its financial condition and planning its future. We believe that the proposed forms meet these objectives and can be used to implement the reporting requirements contained in H.R. 833, the Bankruptcy Reform Act of 1999 and S. 625.

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____ **Case No.** _____
Debtor

SMALL BUSINESS INITIAL REPORT

File report and attachments with Court and transmit copy to United States Trustee within 15 days after order for relief

Certificates of insurance shall name United States Trustee as a party to be notified in the event of policy cancellation.
Bank accounts and checks shall bear the name of the debtor, the case number, and the designation "Debtor in Possession."
Examples of acceptable evidence of Debtor in Possession Bank accounts include voided checks, copy of bank deposit agreement/certificate of authority, signature card, and/or corporate checking resolution.

REQUIRED DOCUMENTS	Document Attached	Explanation if no Document Attached
12-Month Cash Flow Projection (Form IR-1)		
Certificates of Insurance:		
Workers Compensation		
Property		
General Liability		
Vehicle		
Other:_____		
Evidence of Debtor in Possession Bank Accounts		
Tax Escrow Account		
General Operating Account		
Other:_____		
Other:_____		

I declare under penalty of perjury (28 U.S.C. Section 1746) that this report and the documents attached are true and correct to the best of my knowledge and belief.

_____ _____
Signature of Debtor Date

_____ _____
Signature of Joint Debtor Date

_____ _____
Signature of Authorized Individual* Date

_____ _____
Printed Name of Authorized Individual Title of Authorized Individual

*Authorized individual shall be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

In re _____ Case No. _____
Debtor

CASH FLOW PROJECTIONS FOR THE 12 MONTH PERIOD: _____ through _____

This schedule shall be filed with the Court and a copy transmitted to the United States Trustee within 15 days after the order for relief. Amended cash flow projections should be submitted as necessary.

	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Month ____	Total
Cash Beginning of Month													
RECEIPTS													
CASH SALES													
ACCOUNTS RECEIVABLE													
LOANS AND ADVANCES													
SALE OF ASSETS													
OTHER *(ATTACH LIST)*													
TOTAL RECEIPTS													
DISBURSEMENTS													
NET PAYROLL													
PAYROLL TAXES													
SALES, USE, AND OTHER TAXES													
INVENTORY PURCHASES													
SECURED/ RENTAL/ LEASES													
INSURANCE													
ADMINISTRATIVE & SELLING													
OTHER *(ATTACH LIST)*													
PROFESSIONAL FEES													
U.S. TRUSTEE FEES													
COURT COSTS													
TOTAL DISBURSEMENTS													
NET CASH FLOW (RECEIPTS LESS DISBURSEMENTS)													
Cash End of Month													

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____ **Case No.** _____
Reporting Period: _____

SMALL BUSINESS MONTHLY OPERATING REPORT

File with Court and submit copy to United States Trustee within 20 days after end of month

Submit copy of report to the official committee(s) appointed in the case.

REQUIRED DOCUMENTS	Form No.	Document Attached	Explanation if no Document Attached
Schedule of Cash Receipts and Disbursements	MOR-1		
Bank Reconciliation (or copies of debtor's bank reconciliations	MOR-1 (CON'T)		
Copies of bank statements			
Cash disbursements journals			
Statement of Operations	MOR-2		
Balance Sheet	MOR-3		
Status of Postpetition Taxes	MOR-4		
Copies of IRS Form 6123 or payment receipt			
Copies of tax returns filed during reporting period			
Summary of Unpaid Postpetition Debts	MOR-4		
Listing of aged accounts payable			
Accounts Receivable Reconciliation and Aging	MOR-5		
Debtor Questionnaire	MOR-5		

I declare under penalty of perjury (28 U.S.C. Section 1746) that this report and the attached documents are true and correct to the best of my knowledge and belief.

_____ _____
Signature of Debtor Date

_____ _____
Signature of Joint Debtor Date

_____ _____
Signature of Authorized Individual* Date

_____ _____
Printed Name of Authorized Individual Title of Authorized Individual

*Authorized individual shall be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

In re _____ Case No. _____
Debtor

Reporting Period: _____

SCHEDULE OF CASH RECEIPTS AND DISBURSEMENTS

Amounts reported should be in accordance with the debtor's books, not the bank statement. The beginning cash should be the ending cash from the prior month or, if this is the first report, the amount should be the balance on the date the petition was filed. The amounts reported in the "CURRENT MONTH - ACTUAL" column must equal the sum of the four bank account columns. The amounts reported in the "PROJECTED" columns should be taken from the SMALL BUSINESS INITIAL REPORT (FORM IR-1). Attach copies of the bank statements and the cash disbursements journal. The total disbursements listed in the disbursements journal must equal the total disbursements reported on this page. A bank reconciliation must be attached for each account. [See MOR-1 (CON'T)]

	BANK ACCOUNTS				CURRENT MONTH		CUMULATIVE FILING TO DATE	
	OPER.	PAYROLL	TAX	OTHER	ACTUAL	PROJECTED	ACTUAL	PROJECTED
CASH BEGINNING OF MONTH								
RECEIPTS								
CASH SALES								
ACCOUNTS RECEIVABLE								
LOANS AND ADVANCES								
SALE OF ASSETS								
OTHER *(ATTACH LIST)*								
TRANSFERS *(FROM DIP ACCTS)*								
TOTAL RECEIPTS								
DISBURSEMENTS								
NET PAYROLL								
PAYROLL TAXES								
SALES, USE, & OTHER TAXES								
INVENTORY PURCHASES								
SECURED/ RENTAL/ LEASES								
INSURANCE								
ADMINISTRATIVE								
SELLING								
OTHER *(ATTACH LIST)*								
OWNER DRAW *								
TRANSFERS *(TO DIP ACCTS)*								
PROFESSIONAL FEES								
U.S. TRUSTEE QUARTERLY FEES								
COURT COSTS								
TOTAL DISBURSEMENTS								
NET CASH FLOW (RECEIPTS LESS DISBURSEMENTS)								
CASH - END OF MONTH								

* COMPENSATION TO SOLE PROPRIETORS FOR SERVICES RENDERED TO BANKRUPTCY ESTATE

THE FOLLOWING SECTION SHALL BE COMPLETED

DISBURSEMENTS FOR CALCULATING U.S. TRUSTEE QUARTERLY FEES: (FROM CURRENT MONTH ACTUAL COLUMN)	
TOTAL DISBURSEMENTS	$
LESS: TRANSFERS TO DEBTOR IN POSSESSION ACCOUNTS	$
PLUS: ESTATE DISBURSEMENTS MADE BY OUTSIDE SOURCES (e.g. from escrow accounts)	$
TOTAL DISBURSEMENTS FOR CALCULATING U.S. TRUSTEE QUARTERLY FEES	$

In re_____ Case No. _____

Reporting Period:_____

BANK RECONCILIATIONS

Continuation Sheet for MOR-1

A bank reconciliation must be included for each bank account. The debtor's bank reconciliation may be substituted for this page.

	Operating #	Payroll #	Tax #	Other #
BALANCE PER BOOKS				
BANK BALANCE				
(+) DEPOSITS IN TRANSIT *(ATTACH LIST)*				
(-) OUTSTANDING CHECKS *(ATTACH LIST)*				
OTHER *(ATTACH EXPLANATION)*				
ADJUSTED BANK BALANCE *				
* Adjusted bank balance must equal balance per books				

DEPOSITS IN TRANSIT	Date	Amount	Date	Amount	Date	Amount	Date	Amount

CHECKS OUTSTANDING	Ck. #	Amount	Ch. #	Amount	Ck. #	Amount	Ck. #	Amount

OTHER _____

_____

_____

_____

_____

In re_____ Case No._____
Debtor Reporting Period.:_____

STATEMENT OF OPERATIONS
(Income Statement)

The Statement of Operations is to be prepared on an accrual basis. The accrual basis of accounting recognizes revenue when it is realized and expenses when they are incurred, regardless of when cash is actually received or paid.

REVENUES	Month	Cumulative: Filing to Date
Gross Revenues	$	$
Less: Returns and Allowances		
Net Revenue	$	$
COST OF GOODS SOLD		
Beginning Inventory		
Add: Purchases		
Add: Cost of Labor		
Add: Other Costs *(attach schedule)*		
Less: Ending Inventory		
Cost of Goods Sold		
Gross Profit		
OPERATING EXPENSES		
Advertising		
Auto and Truck Expense		
Bad Debts		
Contributions		
Employee Benefits Programs		
Insider Compensation*		
Insurance		
Management Fees/Bonuses		
Office Expense		
Pension & Profit-Sharing Plans		
Repairs and Maintenance		
Rent and Lease Expense		
Salaries/Commissions/Fees		
Supplies		
Taxes - Payroll		
Taxes - Real Estate		
Taxes - Other		
Travel and Entertainment		
Utilities		
Other *(attach schedule)*		
Total Operating Expenses Before Depreciation		
Depreciation/Depletion/Amortization		
Net Profit (Loss) Before Other Income & Expenses		
OTHER INCOME AND EXPENSES		
Other Income *(attach schedule)*		
Interest Expense		
Other Expense *(attach schedule)*		
Net Profit (Loss) Before Reorganization Items		
REORGANIZATION ITEMS		
Professional Fees		
U. S. Trustee Quarterly Fees		
Interest Earned on Accumulated Cash from Chapter 11 *(see continuation sheet)*		
Gain (Loss) from Sale of Assets**		
Other Reorganization Expenses *(attach schedule)*		
Total Reorganization Expenses		
Income Taxes		
Net Profit (Loss)	$	$

* "Insider" is defined in 11 U.S.C. Section 101(31).

** Per SOP 90-7, GAAS2

In re_____ Case No._____
Debtor Reporting Period:_____

STATEMENT OF OPERATIONS - continuation sheet

BREAKDOWN OF "OTHER" CATEGORY	Month	Cumulative Filing to Date
Other Costs		
Other Operational Expenses		
Other Income		
Other Expenses		
Other Reorganization Expenses		

Reorganization Items - Interest Earned on Accumulated Cash from Chapter 11:
Interest earned on cash accumulated during the chapter 11 case, which would not have been earned but for the bankruptcy proceeding, should be reported as a reorganization item.

In re _____ Case No. _____
Debtor Reporting Period: _____

BALANCE SHEET

The Balance Sheet is to be completed on an accrual basis only. Pre-petition liabilities must be classified separately from postpetition obligations.

ASSETS	BOOK VALUE AT END OF CURRENT REPORTING MONTH	BOOK VALUE ON PETITION DATE
CURRENT ASSETS		
Unrestricted Cash and Equivalents		
Restricted Cash and Cash Equivalents *(see continuation sheet)*		
Accounts Receivable (Net)		
Notes Receivable		
Inventories		
Prepaid Expenses		
Professional Retainers		
Other Current Assets *(attach schedule)*		
TOTAL CURRENT ASSETS	$	$
PROPERTY AND EQUIPMENT		
Real Property and Improvements		
Machinery and Equipment		
Furniture, Fixtures and Office Equipment		
Leasehold Improvements		
Vehicles		
Less Accumulated Depreciation		
TOTAL PROPERTY & EQUIPMENT	$	$
OTHER ASSETS		
Loans to Insiders*		
Other Assets *(attach schedule)*		
TOTAL OTHER ASSETS	$	$
TOTAL ASSETS	$	$

LIABILITIES AND OWNER EQUITY	BOOK VALUE AT END OF CURRENT REPORTING MONTH	BOOK VALUE ON PETITION DATE
LIABILITIES REQUIRED TO BE PAID IN FULL (Postpetition)		
Accounts Payable		
Taxes Payable *(refer to FORM MOR-4)*		
Wages Payable		
Notes Payable		
Rent / Leases - Building/Equipment		
Secured Debt / Adequate Protection Payments		
Professional Fees		
Amounts Due to Insiders*		
Other Postpetition Liabilities *(attach schedule)*		
TOTAL POSTPETITION LIABILITIES	$	$
LIABILITIES SUBJECT TO COMPROMISE (Pre-Petition)		
Secured Debt		
Priority Debt		
Unsecured Debt		
TOTAL PRE-PETITION LIABILITIES	$	$
TOTAL LIABILITIES	$	$
OWNER EQUITY		
Capital Stock		
Additional Paid-In Capital		
Partners' Capital Account		
Owner's Equity Account		
Retained Earnings - Pre-Petition		
Retained Earnings - Postpetition		
Adjustments to Owner Equity *(attach schedule)*		
Postpetition Contributions (Distributions) (Draws) *(attach schedule)*		
NET OWNER EQUITY	$	$
TOTAL LIABILITIES AND OWNERS' EQUITY	$	$

*"Insider" is defined in 11 U.S.C. Section 101(31).

In re _____
Debtor

Case No. _____
Reporting Period: _____

BALANCE SHEET - continuation sheet

ASSETS	BOOK VALUE AT END OF CURRENT REPORTING MONTH	BOOK VALUE ON PETITION DATE
Other Current Assets		
Other Assets		
LIABILITIES AND OWNER EQUITY	**BOOK VALUE AT END OF CURRENT REPORTING MONTH**	**BOOK VALUE ON PETITION DATE**
Other Postpetition Liabilities		
Adjustments to Owner Equity		
Postpetition Contributions (Distributions) (Draws)		

Restricted Cash: cash that is restricted for a specific use and not available to fund operations. Typically, restricted cash is segregated into a separate account, such as an escrow account.

In re_____ Case No. _____

Debtor Reporting Period:_____

STATUS OF POSTPETITION TAXES

The beginning tax liability should be the ending liability from the prior month or, if this is the first report, the amount should be zero.
Attach photocopies of IRS Form 6123 or payment receipt to verify payment or deposit of federal payroll taxes.
Attach photocopies of any tax returns filed during the reporting period.

	Beginning Tax Liability	Amount Withheld or Accrued	Amount Paid	Date Paid	Check No. or EFT	Ending Tax Liability
Federal						
Withholding						
FICA-Employee						
FICA-Employer						
Unemployment						
Income						
Other:_____						
Total Federal Taxes						
State and Local						
Withholding						
Sales						
Excise						
Unemployment						
Real Property						
Personal Property						
Other:_____						
Total State and Local						
Total Taxes						

SUMMARY OF UNPAID POSTPETITION DEBTS

Attach aged listing of accounts payable.

		Number of Days Past Due				
	Current	0-30	31-60	61-90	Over 90	Total
Accounts Payable						
Wages Payable						
Taxes Payable						
Rent/Leases-Building						
Rent/Leases-Equipment						
Secured Debt/Adequate Protection Payments						
Professional Fees						
Amounts Due to Insiders*						
Other:_____						
Other:_____						
Total Postpetition Debts						

Explain how and when the Debtor intends to pay any past-due postpetition debts.

_____

_____

_____

_____

_____

_____

*"Insider" is defined in 11 U.S.C. Section 101(31).

In re_____ Case No. _____
Debtor
Reporting Period:_____

ACCOUNTS RECEIVABLE RECONCILIATION AND AGING

Accounts Receivable Reconciliation	Amount
Total Accounts Receivable at the beginning of the reporting period	
+ Amounts billed during the period	
- Amounts collected during the period	
Total Accounts Receivable at the end of the reporting period	

Accounts Receivable Aging	Amount
0 - 30 days old	
31 - 60 days old	
61 - 90 days old	
91+ days old	
Total Accounts Receivable	
Amount considered uncollectible (Bad Debt)	
Accounts Receivable (Net)	

DEBTOR QUESTIONNAIRE

Must be completed each month	Yes	No
1. Have any assets been sold or transferred outside the normal course of business this reporting period? If yes, provide an explanation below.		
2. Have any funds been disbursed from any account other than a debtor in possession account this reporting period? If yes, provide an explanation below.		
3. Have all postpetition tax returns been timely filed? If no, provide an explanation below.		
4. Are workers compensation, general liability and other necessary insurance coverages in effect? If no, provide an explanation below.		

ALTERNATIVE SMALL BUSINESS
FORM MONTHLY OPERATING REPORT PACKET
(Single Asset Real Estate Cases)
(Individual Debtors Not Operating A Business)

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____ Case No. _____
Debtor

SMALL BUSINESS INITIAL REPORT

File report and attachments with Court and transmit copy to United States Trustee within 15 days after order for relief

Substitute FORM IR-1 (RE) for IR-1 if case is a Single Asset Real Estate Case.
Certificates of insurance shall name the United States Trustee as a party to be notified in the event of policy cancellation. Bank accounts and checks shall bear the name of the debtor, the case number, and the designation "Debtor in Possession." Examples of acceptable evidence of Debtor in Possession Bank accounts include voided checks, copy of bank deposit agreement/certificate of authority, signature card, and/or corporate checking resolution.

REQUIRED DOCUMENTS	Document Attached	Explanation Attached
12-Month Cash Flow Projection (Form IR-1)		
Certificates of Insurance:		
Workers Compensation		
Property		
General Liability		
Vehicle		
Other:_____		
Evidence of Debtor in Possession Bank Accounts		
Tax Escrow Account		
General Operating Account		
Other:_____		
Other:_____		

I declare under penalty of perjury (28 U.S.C. Section 1746) that this report and the attached documents are true and correct to the best of my knowledge and belief.

_____ _____
Signature of Debtor Date

_____ _____
Signature of Joint Debtor Date

_____ _____
Signature of Authorized Individual* Date

_____ _____
Printed Name of Authorized Individual Title of Authorized Individual

*Authorized individual shall be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

In re_____
Debtor

Case No._____
Reporting Period.:_____

CASH FLOW PROJECTIONS FOR THE 12 MONTH PERIOD: _____ through _____

(Single Asset Real Estate Case)

This schedule shall be filed with the Court and a copy transmitted to the United States Trustee within 15 days after the order for relief. Amended or updated projections should be filed as necessary.

	Month	Month	Month	Month	Month	Month	Month	Month	Month	Month	Month	Month	Total
INCOME													
Rental Income													
Additional Rental Income													
CAM Income													
Other Income													
Total Income													
EXPENSES													
Advertising													
Auto Expense													
Cleaning & Maintenance													
Commissions													
Insurance													
Management Fees													
Other Interest													
Repairs													
Supplies													
Taxes - Real Estate													
Travel and Entertainment													
Utilities													
Other: *(List Below)*													
Total Expenses													
Debt Service													
Professional Fees													
U. S. Trustee Fees													
Court Costs													
Net Income													
Tenant Improvements													
Vacancy Allowance													
NET CASH FLOW													

UNITED STATES BANKRUPTCY COURT
_____ DISTRICT OF _____

In re _____ Case No. _____
Reporting Period:_____

SMALL BUSINESS MONTHLY OPERATING REPORT

File with Court and transmit a copy to United States Trustee within 20 days after end of each month

Include FORM MOR-1 (INDV) if debtor is a wage earner.
Substitute FORM MOR-2 (RE) for MOR-2 if case is a Single Asset Real Estate case.
Submit copy of report to any official committee appointed in the case.

REQUIRED DOCUMENTS	Form No.	Document Attached	Explanation Attached
Schedule of Cash Receipts and Disbursements	MOR-1		
Bank Reconciliation (or copies of debtor's bank reconciliations)	MOR-1 (CON'T)		
Copies of bank statements			
Cash disbursements journals			
Statement of Operations	MOR-2		
Balance Sheet	MOR-3		
Status of Postpetition Taxes	MOR-4		
Copies of IRS Form 6123 or payment receipt			
Copies of tax returns filed during reporting period			
Summary of Unpaid Postpetition Debts	MOR-4		
Listing of aged accounts payable			
Accounts Receivable Reconciliation and Aging	MOR-5		
Debtor Questionnaire	MOR-5		

I declare under penalty of perjury (28 U.S.C. Section 1746) that the documents attached to this report are true and correct to the best of my knowledge and belief.

_____ _____
Signature of Debtor Date

_____ _____
Signature of Joint Debtor Date

_____ _____
Signature of Authorized Individual* Date

_____ _____
Printed Name of Authorized Individual Title of Authorized Individual

*Authorized individual shall be an officer, director or shareholder if debtor is a corporation; a partner if debtor is a partnership; a manager or member if debtor is a limited liability company.

In re: _____ Case No. _____
Debtor

Reporting Period _____

INDIVIDUAL DEBTOR CASH RECEIPTS AND CASH DISBURSEMENTS

(This Form must be submitted for each Bank Account maintained by the Debtor)

Amounts reported should be taken from the debtor's books, not the bank statement. The beginning cash should be the ending cash from the prior month or, if this is the first report, the amount should be the balance on the date the petition was filed. Attach the bank statements and a detailed list of all disbursements made during the report period that includes the date, the check number, the payee, the transaction description, and the amount. A bank reconciliation must be attached for each account. [See MOR-1 (INDV) (CON'T)]

	Current Month Actual	Cumulative Filing to Date Actual
Cash - Beginning of Month		
RECEIPTS		
Wages (Net)		
Interest and Dividend Income		
Alimony and Child Support		
Social Security and Pension Income		
Sale of Assets		
Other Income *(attach schedule)*		
Total Receipts		
DISBURSEMENTS		
ORDINARY ITEMS:		
Mortgage Payment(s)		
Rental Payment(s)		
Other Secured Note Payments		
Utilities		
Insurance		
Auto Expense		
Lease Payments		
IRA Contributions		
Repairs and Maintenance		
Medical Expenses		
Household Expenses		
Charitable Contributions		
Alimony and Child Support Payments		
Taxes - Real Estate		
Taxes - Personal Property		
Taxes - Other *(attach schedule)*		
Travel and Entertainment		
Gifts		
Other *(attach schedule)*		
Total Ordinary Disbursements		
REORGANIZATION ITEMS:		
Professional Fees		
U. S. Trustee Fees		
Other Reorganization Expenses *(attach schedule)*		
Total Reorganization Items		
Total Disbursements *(Ordinary + Reorganization)*		
Net Cash Flow *(Total Receipts - Total Disbursements)*		
Cash - End of Month *(Must equal reconciled bank statement)*		

In re_____ Case No._____

Debtor Reporting Period:_____

INDIVIDUAL DEBTOR CASH RECEIPTS AND CASH DISBURSEMENTS - continuation sheet

DETAIL OF "OTHER" CATEGORY	Current Month Actual	Cumulative Filing to Date Actual
Other Income		
Other Taxes		
Other Ordinary Disbursements		
Other Reorganization Expenses		

In re_____ Case No._____
Debtor Reporting Period.:_____

STATEMENT OF OPERATIONS - Single Asset Real Estate Case

(Income Statement)

The Statement of Operations is to be prepared on an accrual basis. The accrual basis of accounting recognizes revenue when it is realized and expenses when they are incurred, regardless of when cash is actually received or paid.

INCOME	Month	Cumulative Filing to Date
Rental Income		
Additional Rental Income		
Common Area Maintenance Reimbursement		
Total Income *(attach Rent Roll)*		
EXPENSES		
Advertising		
Auto Expense		
Cleaning and Maintenance		
Commissions		
Insider Compensation*		
Insurance		
Management Fees		
Other Interest		
Repairs		
Supplies		
Taxes - Real Estate		
Travel and Entertainment		
Utilities		
Other: *(List Below)*		
Total Operating Expenses Before Depreciation		
Depreciation/Depletion/Amortization		
Net Income (Loss) Before Other Income & Expenses		
OTHER INCOME AND EXPENSES		
Other Income: *(List Below)*		
Interest Expense		
Other Expense: *(List Below)*		
Net Income (Loss) Before Reorganization Items		
REORGANIZATION ITEMS		
Professional Fees		
U. S. Trustee Quarterly Fees		
Interest Earned on Accumulated Cash from Chapter 11**		
Gain (Loss) from Sale of Property		
Other Reorganization Expense: *(List Below)*		
Total Reorganization Expenses		
Income Taxes		
Net Income (Loss)		

*"Insider" is defined in 11 U.S.C. Section 101(31).

**Interest Earned on Accumulated Cash from Chapter 11: Interest earned on cash accumulated during the chapter 11 case, which would not have been earned but for the bankruptcy proceeding, should be reported as a reorganization item.

In re_____
Debtor

Case No._____
Reporting Period.:_____

STATEMENT OF OPERATIONS - Single Asset Real Estate Case
continuation sheet

RENT ROLL
Property:_____
Total Square Feet:_____

Tenant	Unit No.	Office Area	Warehouse Area	Total Sq. Ft.	% of Bldg.	Lease Type	Lease Term	Lease Start	Lease End	Monthly Rent	Annual Rent	Common Area Maintenance
									TOTALS			

FORM MOR-2 (RE)
(CON'T)
(9/99)

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 22, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBJECT: *Financial Disclosure*

At the request of the Judicial Conference's Committee on Codes of Conduct in late 1998, the Standing Committee asked each of the advisory rules committees to examine the need for uniform rules requiring disclosure of financial interests patterned on Appellate Rule 26.1. It was decided that additional information on the experiences of courts was needed, and the Federal Judicial Center undertook a survey of the courts' practices. The Center plans to submit a final report on its study in January 2000. An interim report is attached.

If a consensus to adopt a uniform rule requiring financial disclosure develops, we plan to publish proposed amendments in August 2000. Under this timeframe, the advisory rules committees would need to approve the proposal at their respective spring 2000 meetings. During the January 2000 Standing Committee meeting, the advisory committees' reporters will undertake a coordinated effort to put forward a proposed uniform rule acceptable to all advisory rules committees. The preliminary views of the advisory committees at their respective fall 1999 meetings would help guide the reporters in their discussion at the Standing Committee meeting. As a starting point, it would be useful to know whether any advisory committee objects to or has reservations to adopting a rule identical or very similar to Appellate Rule 26.1.

The following materials are attached: (1) background information on the Appellate Rules Committee's drafting of Appellate Rule 26.1, (2) the actions of the Committee on Codes of Conduct addressing recusal problems and recommending solutions, (3) a series of newspaper articles criticizing the federal bench for recusal lapses, and (4) an interim FJC report.

John K. Rabiej

Attachments

I very much appreciate the opportunity to comment on the draft letter. I will keep you and your committee's staff advised of the rules committees' progress as we proceed in the rulemaking process.

Sincerely,

Anthony J. Scirica

cc: Chairs and Reporters,
Advisory Rules Committees
Marilyn J. Holmes

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

TELEPHONE
(718) 260-2410

MARILYN J. HOLMES
COUNSEL
(202) 502-1100

September 9, 1999

Honorable Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Disclosure of Corporate Parents

Dear Judge Scirica:

Last year, my predecessor as chairman of the Codes of Conduct Committee, Judge A. Raymond Randolph, wrote to your predecessor, Judge Alicemarie Stotler, soliciting the assistance of your Committee in an initiative to help judges meet their recusal obligations. Judge Randolph asked your Committee to consider promulgating a national rule applicable in district and bankruptcy courts corresponding to Rule 26.1 of the Federal Rules of Appellate Procedure, which requires disclosure of corporate parents. I understand that the Committee on Rules of Practice and Procedure and the Advisory Committees on Bankruptcy Rules, Civil Rules, and Criminal Rules considered this request at recent meetings and have begun exploring the issue.

My colleagues and I on the Codes of Conduct Committee very much appreciate the attention you have given to this request. We recognize that the process of adopting new federal rules involves weighty considerations and requires extended analysis and consultation. I am writing to reiterate my Committee's continued interest in and support for your efforts. In addition, I want to take this opportunity to advise you of a complementary step the

Codes Committee is considering that relates closely to the Rules Committee's ongoing efforts.

During the last year, the Codes of Conduct Committee has been exploring various ways to assist judges in meeting their recusal obligations. We are offering enhanced education and training at the Federal Judicial Center's national judges' workshops, and we are working to develop automated conflicts screening software and conflicts checklists, which should help judges identify potential conflicts of interest. These efforts are particularly important in light of recent and continuing press coverage criticizing judges who failed to recuse themselves when they or their spouses owned stock in a party. In most of those situations, it appears that the judge's failure to recuse was inadvertent and was occasioned by a breakdown of the system for identifying conflicts of interest in the judge's chambers or the clerk's office.

Identification of all potential conflicts of interest is a difficult endeavor under the best of circumstances, but it presents special challenges in situations involving corporate parents. As you know, Canon 3C(1)(c) of the Code of Conduct for United States Judges and Advisory Opinion No. 57 advise that judges should recuse when they own stock in a parent company whose subsidiary appears as a party before the judge. Disclosure of corporate parents by the parties presents a simple way for judges to determine whether a subsidiary of a company in which they own stock is a party to a case, necessitating recusal. The alternative — attempting to identify and keep track of all subsidiaries of the companies in which a judge owns stock — can be a difficult, time-consuming exercise, complicated further by the daily vicissitudes of the modern corporate world.

For these reasons, the Codes of Conduct Committee strongly supports a federal rule requiring parties to disclose their corporate parents (and to update this disclosure as necessary). This approach holds substantial promise as a means of identifying proceedings in which judges may be disqualified. Indeed, we believe this approach is sufficiently beneficial that individual judges ought to consider adopting similar local procedures as an interim measure. We believe it may be useful, on an interim basis, for judges to consider requesting information from parties about their corporate parents, pending adoption of a national rule. This could be accomplished by adoption of local rules or standing orders. My Committee is interested in providing guidance along these lines to circuit councils and chief judges. I am hopeful that our two Committees can coordinate this effort, and I want to ensure that you have no concerns or objections before we proceed.

I have drafted the attached sample letter setting out the Codes of Conduct Committee's views on this subject. We are considering communicating these views to circuit councils and to district and bankruptcy chief judges. I would appreciate your comments on this initiative. Please feel free to call me at (718) 260-2410 if you believe it would be useful for us to discuss these issues. Thank you for your counsel and for your ongoing efforts to devise a national disclosure rule.

Sincerely,

Carol Bagley Amon
Chairman

Attachment

cc: Honorable W. Eugene Davis
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
John K. Rabiej

(Attached sample letter has not been finalized and is omitted.)

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

September 15, 1999

Honorable Carol Bagley Amon
Chair, Committee on Codes of Conduct
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Amon:

Thank you for your September 9th letter describing your committee's work on financial disclosure issues. Let me briefly describe what the rules committees are doing now and what they plan to do at upcoming meetings. Our advisory rules committees will consider the preliminary results of the Federal Judicial Center's survey of courts' practices at their respective fall meetings. I understand that the Center found a growing number of local rules and standing orders requiring parties to disclose particular financial information. It seems that these new practices, however, have generated unforeseen problems, and we are keenly interested in reviewing the courts' experiences.

Much of our schedules is dictated by statutory deadlines. We expect that the advisory rules committees will finish their work at their respective spring 2000 meetings and will submit proposed uniform financial disclosure rules for consideration by the Standing Rules Committee at its June 2000 meeting. Under this timetable proposed rule amendments would be published for public comment in August 2000. As noted in your letter, the rulemaking process is time consuming. Assuming that the public comments do not uncover any major problems with the proposed rule amendments, the proposals would be reviewed again by the rules committees, and transmitted for approval to the Judicial Conference and the Supreme Court in late 2001. The rules would take effect in December 2002, unless Congress intervenes.

The time required in prescribing a national financial disclosure rule certainly suggests that interim measures should be implemented now to address the problems. Recent adverse news coverage underscores the need for swift action, and your initiative will provide immediate assistance to judges. Although the rules committees generally disfavor local rules or standing orders, I agree with you that in this case interim local rules or standing orders may be prudent. Accordingly, I endorse the recommendations made in your suggested letter.

I very much appreciate the opportunity to comment on the draft letter. I will keep you and your committee's staff advised of the rules committees' progress as we proceed in the rulemaking process.

Sincerely,

Anthony J. Scirica

cc: Chairs and Reporters,
Advisory Rules Committees
Marilyn J. Holmes

Federal Judicial Center
Research Division

tel. 202-502-4068
fax 202-502-4199

memorandum

DATE: September 22, 1999

TO: Honorable Adrian G. Duplantier

FROM: Carol Krafka

SUBJECT: Rules Governing Party Disclosure of Financial Interests Information

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I understand from Judge Scirica of the Standing Committee that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules currently used to collect financial information from parties, and to make preliminary materials available for the advisory committees' Fall 1999 meetings. To that end, I have attached summary tables of the local rules and general orders that are in use in federal bankruptcy and district courts. I include information from the district courts because only four bankruptcy courts have rules on point, and three of the four follow the disclosure rule in effect in the district court. A brief description of the project, the tables, and findings precedes the tables.

The tables provide information on all of the bankruptcy and district courts that we have so far identified as having local rules. I do not expect to learn of additional courts with rules, but the possibility exists that the final report to the Standing Committee will contain information from more courts. The final report will be submitted in January 2000.

Please call on me if you have questions about the materials or if I can be of assistance. My phone number is 202-502-4068.

Attachment

cc: Honorable Frank W. Bullock, Jr.
Project Liaison from the Standing Committee

An Analysis of Local Rules and General Orders in the United States District and Bankruptcy Courts

Introduction

Judge Scirica of the Standing Committee on Rules of Practice and Procedure advised the Federal Judicial Center (FJC) that the Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules will soon evaluate whether a national rule on party disclosure of corporate affiliations and other interested parties is necessary, and if so, how the rule should be structured. Federal Rule of Appellate Procedure 26.1 already provides for party disclosure of corporate affiliations to assist appellate judges in identifying financial conflicts of interest for recusal purposes. No corresponding provisions exist in the federal rules governing civil, criminal, and bankruptcy proceedings at the trial level.

In anticipation of the Advisory Committees' work, Judge Scirica asked the FJC to report on local rules and other procedures the district and bankruptcy courts use to collect financial information from parties. He asked, additionally, that we provide interim materials to the Advisory Committees for their Fall 1999 meetings.

To that end, we have prepared summary tables of the local rules and general orders that are in use in federal bankruptcy and district courts for you to consider. We include information about disclosure rules in the district courts because only four bankruptcy courts have rules on point, and three of the four follow the disclosure rule in effect in the district court. We have also included tables with information about circuit local rules governing bankruptcy appellate panels.

We searched published and electronic database collections, and surveyed clerks of courts in the courts of appeals, district courts, and bankruptcy courts to compile the local rules. Our survey additionally sought information about court-wide standing orders or standing orders in use by individual judges. The enclosed tables permit comparative analyses of the range of disclosure requirements in existence.

This report has 4 parts. The first reproduces FRAP Rule 26.1 for reference. The second summarizes major findings. The third contains summary tables in alphabetical order by district for each district and bankruptcy court with a rule akin to FRAP Rule 26.1. The fourth contains summary tables of the relevant BAP rules. The tables are preceded by a set of notes regarding their content and organization.

Part I. FRAP Rule 26.1

FRAP Rule 26.1 requires non-governmental corporate parties to identify their parents and affiliates. The rule reads as follows:

> Rule 26.1 Corporate Disclosure Statement
>
> (a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement identifying all its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.
>
> (b) Time for Filing. A party must file the statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents.
>
> (c) Number of Copies. If the statement is filed before the principal brief, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case.

The purpose of the rule is to assist judges in determining whether they have financial interests in a case that should result in a decision to recuse from the case. The most recent amendments to the rule (1998 amendments) deleted a requirement that corporate parties identify subsidiaries and affiliates that have issued shares to the public. The amendment, however, added a requirement that corporate parties list all stockholders that are publicly held companies owning 10% or more of the stock of the party.

FRAP Rule 26.1 represents minimum disclosure requirements in the federal courts of appeals. Eleven of the thirteen courts of appeals have broader requirements by local rule. Most of the courts have either extended the group to which the rule applies or they require more disclosure information, or both.

Part II. Findings: Bankruptcy and District Courts

As noted, no *national* rule requires parties to disclose financial interests information in federal bankruptcy or district courts.[1] We located relevant *local* rules in

[1] The Bankruptcy Code does, of course, provide a measure of disclosure, though the focus is on appointments rather than on the judge. Code provisions directed at disclosing conflicts of interest include: 1) Fed.R.Bank.P. 2014, restricting appointment of attorneys and other professionals by trustees, 2) Fed.R.Bank.P. 5002(a), prohibiting appointment of relatives, and 3) Fed.R.Bank.P. 5004, disqualifying bankruptcy judges in accordance with 28 USC §455.

just four bankruptcy courts. We found no bankruptcy courts or bankruptcy judges collecting relevant information through the use of standing orders.

The four bankruptcy courts governed by local rules are the U.S. Bankruptcy Courts for the:

District of Columbia,
Southern District of Georgia,
Central District of Illinois, and the
District of Maine.

With the exception of the bankruptcy court in the District of Maine, the bankruptcy courts follow the disclosure rule in effect in the district court.[2]

In addition to the four noted bankruptcy courts, we found nineteen district courts with local rules requiring disclosure. In an additional district court, two judges collect the information by other means (Florida Middle). Two more courts, operating under a uniform local rules provision, have a proposed rule awaiting court action (Northern and Southern Mississippi, operating under uniform rules); another court reported that it had recently enacted and subsequently repealed a disclosure rule (Kansas).

The district courts with local rules are U.S. District Courts for the:

Central District of California;
District of Columbia;
Northern District of Georgia;
Southern District of Georgia;
Northern District of Illinois;
Southern District of Illinois;
Central District of Illinois;
District of Maine;
District of Maryland;
Eastern District of Missouri;
District of Nevada;
District of New Hampshire;
Southern and Eastern Districts of New York (uniform local rules);
Western District of Pennsylvania;
District of South Carolina;
District of Vermont;
Eastern District of Wisconsin;
Western District of Wisconsin;

Middle District of Florida (judges use other procedures);
Northern and Southern Districts of Mississippi (uniform local rules) (proposed);
and District of Kansas (enacted and repealed).

[2] Local Rule 5004-1 of the U.S. Bankruptcy Court for the District of Columbia states that the applicable rule from the district court applies to adversary proceedings and contested matters in the bankruptcy court. The Uniformity of Practice Statement in the local rules of the U.S. Bankruptcy Court for the Southern District of Georgia directs that the relevant rule of the district court applies by incorporation to bankruptcy cases and proceedings. General Rule 1.1 of the District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district, including the U.S. Bankruptcy Court for the Central District of Illinois.

Rules associated with the district and bankruptcy courts are summarized in the tables included herein. The local rules in the courts differ from each other and from the national rule on a number of dimensions, the most significant being: (1) who must file the information, (2) the scope of applicability to various types of cases, and (3) what type of information is required.

Who Must File. Among the district court local rules, there is considerable variation in the requirements for who must disclose information. At one end of the range is the narrow requirement borrowed from FRAP 26.1 which obliges "non-governmental corporate parties" to file disclosure statements (see, e.g., ME, MO, VT). The requirement expands slightly to encompass a broader group of "corporate parties and corporate intervenors" in another court (DC).

The type of party required to file disclosure statements is more widely drawn in other courts. Several apply the requirement to other parties with an obvious business connection (see, e.g., PA-W ["a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding"], SC ["any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity"]).

The broadest rules require disclosure in civil cases from "all parties" (see, e.g., CA-C, KS, N/S MS), "all non-governmental parties and amicus curiae" (IL-C), "all non-governmental parties and amicus curiae, unless the party is a pro se litigant", "all private non-governmental parties" (see, e.g., GA-N, IL-S, S/E NY), and so on.

In a few instances, courts have specified particular exemptions or inclusions in the party types expected to disclose information. Pro se litigants, individuals filing habeas corpus petitions, and parties in bankruptcy are three exemptions seen in a few of the collected local rules. Amicus curiae parties and intervenors are two party types specifically noted as inclusions in a few of the courts' requirements to file.

Types of Cases. Some district courts limit the disclosure to civil litigants only. Some require disclosure in criminal cases, from either corporate defendants or the government. Bankruptcy proceedings are explicitly covered by the disclosure requirement in some of the district courts; applicability to bankruptcy proceedings in other district courts is ambiguous. Bankruptcy cases filed in bankruptcy courts are subject to this type of disclosure requirement only in the four bankruptcy courts identified above. The local rules in a few of the district courts note applicability to special case categories involving agency review and maritime proceedings.

Types of Information. The scope of information that parties are required to disclose is quite variable among the district courts. Essentially, however, each court requires parties to identify one or both of the following: (1) entities having specific financial connections with the party and (2) entities with a financial interest in the outcome of the litigation (and, additionally, the nature of the interest).

Information on financial connections typically involves a listing of parent corporations, subsidiaries not wholly-owned, and corporate stockholders that are publicly held (see, e.g., MO-E, ME, NH, VT). A second level of reporting exists in courts that require parties to identify affiliates (see, e.g., IL-N, PA-W). These affiliates may specifically include trade associations, partnerships, conglomerates, or other business entities related to the party.

Information on financial interests involves listing entities with "a substantial financial interest", or simply "an interest" in the outcome of the litigation. These clauses provide for the identification of insurers (see, e.g., CA-C) but are broadly defined in many courts to additionally include subgroups of such entities as associations of persons, firms, partnerships and corporations, unincorporated associations, and officers, directors, or trustees of parties. One of the broadest local rules simply requires parties to identify all public corporations with a financial interest in the outcome of the case (IL-S).

In addition to requiring information on financial connections and interests, local rules in several of the district courts require parties to identify past and present attorneys and law firms representing a party to a proceeding.

Part III. Summary Tables for Bankruptcy and District Courts

We have organized the bankruptcy and district court local rules into tables in alphabetical order by state. The tables summarize:

(1) the types of parties required to file (Who Must File);
(2) the type of information required (Required Information);
(3) the time for filing the information (Time of Initial Filing);
(4) the existence of a requirement that parties with nothing to disclose submit a negative report (Negative Report);
(5) the form of the disclosure (Disclosure Form);
(6) the number of copies required to be filed (Number of Copies);
(7) the applicability of the rule to various case types and proceedings (Scope of Applicability);
(8) the existence of a stated duty for parties to update disclosed information (Obligation to Update); and
(9) additional relevant information (Note).

Notes on table entries:

(a) Where a table entry is blank, the local rule is silent.

(b) Where a local rule refers to "counsel for the parties" or uses a similar phrase to identify who must file disclosure, we have substituted "parties" for the sake of brevity (see Who Must File).

(c) We use the phrase "identification of [e.g., parent companies, subsidiaries, and affiliates]" to summarize the type of information required of parties (see Required Information). Local rules may use more precise phrasing; counsel may be required, for example, to "certify" a list of the names of interested parties.

(d) Some courts require identification of law firms, partners, etc. that currently or previously represented the party in the issue before the court. These requirements are noted in the tables even though they are not directly related to the report (see Required Information).

U.S. District Court for the Central District of California

Local Civil Rule 4.6	Certification as to Interested Parties
Rule 2.2. of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings
Rule 6.1 of Ch.VI	Local Rules Governing Bankruptcy Appeals, Cases and Proceedings

Local Civil Rule 4.6

Who Must File	all parties
Required Information	identification of all persons, association of persons, firms, partnerships and corporations (including parent corporations) which have a direct, pecuniary interest in the outcome of the case, including any insurance carrier which may be liable in whole or in part (directly or indirectly) for a judgment that may be entered in the action or for the cost of defense
Time of Initial Filing	party's first appearance
Negative Report	
Disclosure Form	Notice of Interested Parties; (form prescribed in the local rule)
Number of Copies	original and 2 copies
Scope of Applicability	all civil actions and proceedings in the district court [by Local Rule 1.1] or matters of a civil nature [by Local Rule 1.3(c)]
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 2.2 of Chapter VI (applicable to bankruptcy appeals to the district court)

Who Must File	parties appealing to the district court from the bankruptcy court
Required Information	identification of interested parties (to be provided to the bankruptcy court clerk)
Time of Initial Filing	at the time the notice of appeal is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy appeals to the district court
Obligation to Update	
Note	

U.S. District Court for the Central District of California (continued)

Rule 6.1 of Chapter VI (applicable to pending bankruptcy cases and proceedings where a motion has been made to withdraw reference from the bankruptcy court to the district court)

Who Must File	parties moving to withdraw reference of matters pending in the bankruptcy court and parties opposing such a motion
Required Information	identification of interested parties (to be provided to the district court clerk and to the presiding bankruptcy judge)
Time of Initial Filing	with the motion to withdraw or with reply papers in opposition
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	pending bankruptcy cases and proceedings
Obligation to Update	
Note	

U.S. District Court for the District of Columbia

Local Civil Rule 26.1 Disclosure of Corporate Affiliations and Financial Interests

Who Must File	corporate parties and corporate intervenors
Required Information	identification of any parent, subsidiary or affiliate of the party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	at the time the party's first pleading is filed
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	civil, agency, and criminal cases [General Rule 109]; all other proceedings in the district court [General Rule 101(a)] (including, by inference, bankruptcy cases and other proceedings in the district court)
Obligation to Update	stated
Note	

U.S. Bankruptcy Court for the District of Columbia

Local Bankruptcy Rule 5004-1	Disclosure of Corporate Affiliations and Financial Matters

The rule reads:
Local District Rule 109 applies to adversary proceedings and contested matters in the Bankruptcy Court, with the required certificate to be filed in contested matters with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter.

Who Must File	corporate parties and corporate intervenors to adversary proceedings and contested matters in the bankruptcy court
Required Information	in conformance with General Rule 109 of the Local District Court, a party or intervenor must identify any parent, subsidiary, or affiliate of that party or intervenor which has any outstanding securities in the hands of the public
Time of Initial Filing	with a party's paper commencing the contested matter or a party's paper opposing the relief sought in the contested matter
Negative Report	
Disclosure Form	form prescribed is the same as for the district court
Number of Copies	
Scope of Applicability	bankruptcy cases
Obligation to Update	stated in the district court local rule, so applicable in bankruptcy matters as well
Note	Local Bankruptcy Rule 5004-1 applies the district court local rule on disclosure of corporate affiliations to apply to require application to bankruptcy proceedings and contested matters

U.S. District Court for the Middle District of Florida

Disclosure of financial interest information is required by Standing Order from one Middle District of Florida judge.

Who Must File	civil: all non-government corporate parties criminal: the government
Required Information	civil: identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public criminal: identification of victims of the conduct alleged in the Indictment who are entitled to restitution; and for any non-government corporate victims, identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	within 11 days of the date of the Standing Order
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Middle District of Florida (continued)

A second Middle District of Florida judge obtains disclosure of financial interest information through use of several case management tools. These include a Case Management Report (civil cases), Order Requiring [the] Government to File a Certificate of Interested Parties (criminal cases) and [Order titled] Notice to Counsel or Any Pro Se Party to Review and to Certify Compliance (bankruptcy cases).

Who Must File	civil: parties criminal: the government bankruptcy: parties, including pro se parties
Required Information	civil: identification of all attorneys, persons, associations of persons, firms, partnerships and corporations, including subsidiaries, conglomerates, affiliates, parent corporations, and other identifiable legal entities related to a party, or as to which such party has a controlling interest, that have an interest in the outcome of the case; criminal: identification of all persons, associations of persons, firms, partnerships, corporations, including subsidiaries, conglomerates, affiliates, and parent corporations and other identifiable legal entities related to each Defendant, or over which Defendant exercises a controlling interest and who or which may have a financial or monetary interest in the outcome of the case or whose stock or equity value may be substantially affected by the outcome of the case proceedings; identification of known victims, including those to whom restitution may be owed bankruptcy: identification of any person, associations of persons, attorneys, firms, partnerships, corporations, or entities whose stock or equity value may be substantially affected by the outcome of the proceedings, including subsidiaries, conglomerates, affiliates, parent corporations and other identifiable legal entities related to a party
Time of Initial Filing	criminal and bankruptcy: within 30 days of the date of the order
Negative Report	
Disclosure Form	
Number of Copies	

U.S. District Court for the Middle District of Florida (continued)

Scope of Applicability	civil, criminal, and bankruptcy cases
Obligation to Update	stated
Note	

U.S. District Court for the Northern District of Georgia

Civil Local Rule 3.3 Certificate of Interested Persons

Who Must File	all private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case (the listing shall specifically include all subsidiaries, conglomerates, affiliates, and parent corporations, and any other identifiable legal entity related to a party); identification of each person serving as a lawyer in the proceedings
Time of Initial Filing	within 15 days after the first pleading is filed by any defendant or defendants
Negative Report	
Disclosure Form	Certificate of Interested Persons; form of the certificate prescribed in the local rule
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	stated
Note	counsel for all cases submit joint-certification; if the government is a party, however, certification is submitted only by the private party or parties; in cases of default, the moving party shall submit the required information before seeking any court action on the case

U.S. District Court for the Southern District of Georgia

Civil Local Rule 3.2 Disqualification of Judges
Local Rules for the Administration of Criminal Cases

Who Must File	all private (non-government) parties, both plaintiffs and defendants
Required Information	identification of all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interested in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	with the first filing (and any subsequent filing) of a complaint and answer
Negative Report	
Disclosure Form	Certificate of Interested Parties Form, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	civil cases (L.R. 3.2); criminal cases ["These Local Rules...are to be construed consistently with the generally applicable {Civil} Local Rules, supra."]; bankruptcy proceedings in the district court are presumed covered
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Southern District of Georgia

Local Rules for Bankruptcy Cases: Uniformity of Practice

The Uniformity of Practice Statement directs that Civil Local Rule 3.2 of the U.S. District Court for the Southern District of Georgia applies by incorporation to bankruptcy cases and proceedings.

Who Must File	all private (non-government) parties
Required Information	in conformance with Local Rule 3.2 of the district court, parties identify all parties; officers, directors, or trustees of parties; and all other persons, associations of persons, firms, partnerships, corporations, or organizations which have a financial interest in, or another interest which could be substantially affected by, the outcome of the particular case
Time of Initial Filing	
Negative Report	
Disclosure Form	Certificate of Interested Parties, located in the Appendix of Forms to the Local Rules
Number of Copies	
Scope of Applicability	bankruptcy cases in bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the Northern District of Illinois

General Rule 2.23 Notification as to Affiliates

The court is currently revising its local rules. General Rule 2.23 will be renumbered as General Rule 3.2 but the provisions will remain intact. A form titled "Disclosure of Affiliates Pursuant to Local Rule 3.2" will be provided counsel for reporting. The form includes space for counsel to furnish stock ticker symbols.

Who Must File	any party which is an affiliate of a public company
Required Information	identification of any public company of which the party is an affiliate, where: 1) The term "public company" means a corporation any of whose securities are listed on a stock exchange or are the subject of quotations collected and reported by the National Association of Securities Dealers Automated Quotations Systems (NASDAQ). 2) The term "affiliate of a public company" means another corporation that controls, is controlled by or is under common control with the public company. The term includes but is not limited to a corporation 10% percent or more of whose voting stock is owned by the public company. 3) The term "control" of a corporation means possession, direct or indirect, of the power to direct or cause the direction of the management and policies of that corporation through the ownership of voting securities or otherwise.
Time of Initial Filing	a plaintiff files notification with the complaint; a defendant files notification with the answer or with a motion in lieu of answer; if a party becomes a party after the filing of the complaint, the notification is filed with the first pleading filed on behalf of the party
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases are presumed from the wording of the local rule, applicability to bankruptcy cases and other matters is not known

U.S. District Court for the Northern District of Illinois (continued)

Obligation to Update Note

U.S. District Court for the Southern District of Illinois

Rule 11.1.b — Disclosure of Interested Parties/Affiliates

Who Must File	private (non-governmental) parties
Required Information	identification of any publicly owned corporation, not a party to the case, that has a financial interest in the outcome of the case
Time of Initial Filing	at the time of the initial pleading
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil
Obligation to Update	
Note	

U.S. District Court for the Central District of Illinois

General Rule 11.3 Certificate of Interest

Who Must File	non-governmental parties and amicus curiae, unless the party is a pro se litigant
Required Information	identification, if party or amicus is a corporation, of its parent corporation, if any, and a list of corporate stockholders which are publicly held companies owning 10 percent or more of the stock of the party or amicus if it is a publicly held company; the name of all law firms whose partners or associates appear for a party or are expected to appear for the party in the case
Time of Initial Filing	with the complaint or upon the first appearance of counsel in the case
Negative Report	
Disclosure Form	Certificate of Interest; form of the certificate is prescribed in the local rule
Number of Copies	
Scope of Applicability	applicable in all proceedings in all of the courts in the district (CD-IL 1.1)
Obligation to Update	
Note	

U.S. Bankruptcy Court for the Central District of Illinois

General Rule 1.1 of the U.S. District Court for the Central District of Illinois directs that the general and civil rules of the court apply in all of the courts in the district.

U.S. District Court for the District of Kansas

Local Rule 3.2	Required Certification of Interested Parties
Adopted	January, 1999
Repealed	**April, 1999**

Local Rule 3.2 was adapted from Tenth Circuit Rule 46.1.3 entitled "Certification of Interested Parties and Rule 42.1 "Dismissal for Failure to Prosecute". The court adopted its local rule effective January 1, 1999 and repealed it in April 1999. Repeal was based on a finding that problems with the rule's enforcement outweighed any advantage the new procedure potentially offered over existing automated procedures for identifying conflicts of interest. Failure to comply with the provisions of the rule resulted in either dismissal or a default judgment (see Note 1, below). Enforcing compliance with the rule proved excessively burdensome for both Clerk's Office and chambers staff (see Note 2, below).

The structure of the original rule is summarized in the table that follows.

Who Must File	all parties
Required Information	identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities who are financially interested in the outcome of the litigation (if a large group of persons or firms can be specified by a generic description, no individual listing is required); identification of all parties not named in the caption of the initial pleading or paper; for corporate parties and interested entities, identification of all parent and subsidiary corporations; identification of attorneys not entering an appearance in the court who have appeared for any party in any administrative proceedings sought to be reviewed, or in any related proceedings that preceded the action being pursued in the court
Time of Initial Filing	with the initial pleading or other paper filed for a party
Negative Report	
Disclosure Form	form provided by the clerk and outlined in the local rule
Number of Copies	

U.S. District Court for the District of Kansas (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note 1	The repealed rule established the following consequences for failure to comply: "If a party fails to comply with the provisions of this rule, the clerk shall notify the party that unless the failure of compliance is remedied within 10 days from the date of the notice the following action will be taken: (a) If the party is a plaintiff, that the action will be dismissed as to that party plaintiff for lack of prosecution; (b) if the party is other than a plaintiff, that default will be entered against that party for lack of prosecution."
Note 2	Excerpt from a July 2, 1999 letter from Clerk of the Court Ralph L. DeLoach to Abel Mattos of the Administrative Office of the United States Courts, describing enforcement difficulties with the repealed rule: "[The ruled] required all parties to attach a certificate of Interested Parties to every initial pleading filed in every civil case. An issue quickly developed regarding what constituted an 'initial pleading.' An example would be whether a Motion for Extension of Time (to answer a Complaint) filed by a defendant would be considered an initial pleading. The docket clerks were overwhelmed with this issue as pleadings come with many different titles. If a party failed to attach the required Certificate, a notice was sent from the Clerk's Office to the assigned judge indicating non-compliance with the rule. The judge would then determine whether further action was necessary. When a Certificate was filed in compliance with the Rule it was then sent to the assigned judge for a determination of a possible conflict of interest. Needless to say, the amount of paperwork generated by this Rule was voluminous. It greatly impacted the workload of both Clerk's Office staff and chambers staff. A great deal of time was spent following up on non-compliance with the Rule. Special codes were created to enable reports to be generated from ICMS tracking delinquent Certificates filing status. The court determined that a lot of work was being done to find the one 'needle in a haystack.'"

U.S. District Court for the District of Maine

Civil Rule 83.7 Corporate Disclosure Statement

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public
Time of Initial Filing	with the party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. Bankruptcy Court for the District of Maine

Bankruptcy Rule 1002-1(b)(3)	Disclosure Statement
Who Must File	non-governmental, non-individual debtors
Required Information	identification of all "affiliates" and "insiders", as defined in 11 U.S.C. §101(2),(31).4 Under 11 U.S.C. §101(2) "affiliate" means -- (A) entity that directly or indirectly owns, controls, or holds with power to vote, 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (B) corporation 20 percent or more of whose outstanding voting securities are directly or indirectly owned, controlled, or held with power to vote, by the debtor, or by an entity that directly or indirectly owns, controls, or holds with power to vote 20 percent or more of the outstanding voting securities of the debtor, other than an entity that holds such securities (i) in a fiduciary or agency capacity without sole discretionary power to vote such securities; or (ii) solely to secure a debt, if such entity has not in fact exercised such power to vote; (C) person whose business is operated under a lease or operating agreement by a debtor , or person substantially all of whose property is operated under an operating agreement with the debtor; or (D) entity that operates the business or substantially all of the property of the debtor under a lease or operating agreement. Under 11 U.S.C. §101(31) an "insider" includes— (A) if the debtor is an individual: (i) relative of the debtor or of a general partner of the debtor; (ii) partnership in which the debtor is a general partner; (iii) general partner of the debtor; or (iv) corporation of which the debtor is a director, officer, or person in control;

U.S. Bankruptcy Court for the District of Maine (continued)

	(B) if the debtor is a corporation: (i) director of the debtor; (ii) officer of the debtor); (iii) person in control of the debtor; (iv) partnership in which the debtor is a general partner; (v) general partner of the debtor; or (vi) relative of a general partner, director, officer, or person in control of the debtor; (C) if the debtor is a partnership: (i) general partner of the debtor; (ii) relative of a general partner in, general partner of, or person in control of the debtor; (iii) partnership in which the debtor is a general partner; (iv) general partner of the debtor; or (v) person in control of the debtor; (D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor; (E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and (F) managing agent of the debtor.
Time of Filing	with the petition or within 15 days thereafter
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	bankruptcy cases and proceedings under Title 11 pending in the district court and in the bankruptcy court
Obligation to Update	
Note	

U.S. District Court for the District of Maryland

Civil Rule 103.3 Disclosure of Affiliations and Financial Interest

Who Must File	parties
Required Information	the identity of any parent or other affiliate, if the party is a corporation, and a description of the relationship between the party and such affiliates; the identity of any corporation, unincorporated association, partnership or other business entity, not a party to the case, which may have any financial interest whatsoever in the outcome of litigation, and the nature of the financial interest; the term "financial interest in the outcome of the litigation" includes a potential obligation of an insurance company or other person to represent or to indemnify any party to the case; information to be provided to the district court clerk
Time of Initial Filing	when filing an initial pleading or promptly after learning of the information to be disclosed
Negative Report	
Disclosure Form	
Number of Copies	2
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules)

(Proposed)

Local Rule 3.1(D) — Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

Who Must File	all parties (including amici) to a civil action, a maritime proceeding, or a bankruptcy proceeding filed in the district court, and all corporate defendants in a criminal prosecution; the rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis
Required Information	a non-governmental corporate party must identify parent corporations, publicly held companies owning 10% or more of the party's stock, similarly situated master limited partnerships, real estate investment trusts, joint ventures, syndicates, or other legal entities whose shares are publicly held or traded; the disclosure form, but not the proposed rule, asks that grandparent and great-grandparent corporations be identified; the disclosure form, but not the proposed rule, asks that publicly held corporations or other publicly held entities that have a direct financial interest in the outcome of the litigation be identified, along with the nature of the interest
Time of Initial Filing	the clerk will deliver the disclosure form to parties with the notice of a case's having been assigned to a district judge; return filing is required within 10 days of receipt
Negative Report	required
Disclosure Form	Disclosure of Corporate Affiliations and Other Entities With a Direct Financial Interest in Litigation; the form is provided by the clerk
Number of Copies	
Scope of Applicability	civil actions, maritime proceedings, bankruptcy proceedings, and criminal cases

U.S. District Court for the Northern and Southern Districts of Mississippi (operating under uniform local rules) (continued)

Obligation to Update	stated
Note	proposed local rule

U.S. District Court for the Eastern District of Missouri

Local Rule 2.09 Disclosure of Corporation Interests

Who Must File	non-governmental corporate parties
Required Information	identification of all parent companies of the corporation, subsidiaries not wholly owned, and any publicly held company that owns 10% or more of the corporation's stock
Time of Initial Filing	first pleading or entry of appearance
Negative Report	required
Disclosure Form	
Number of Copies	
Scope of Applicability	civil and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the District of Nevada

Local Rule 10-6 Certificate as to Interested Parties

Who Must File	all private (non-governmental) parties in cases other than habeas corpus cases
Required Information	identification of all persons, associations of persons, firms, partnerships or corporations known to have an interest in the outcome of the case
Time of Initial Filing	at the time counsel enters the case
Negative Report	required
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	all cases except habeas corpus cases
Obligation to Update	
Note	The court finds the current form of the rule insufficient, and has asked the Standing Committee on the Local Rules to consider a proposal modifying the rule to additionally provide that "concurrent with the filing of a complaint or a responsive pleading the party shall be required to file a list of the names of any publicly traded subsidiary and/or parent companies and/or corporation of the party" [August 6, 1999 letter from District Court Executive/Clerk of the Court Lance S. Wilson]

U.S. District Court for the District of New Hampshire

Local Civil Rule 83.6(a)(4) — Appearances

Who Must File	non-governmental corporate parties and non-governmental corporate defendants
Required Information	identification of all parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public
Time of Filing	at the time an appearance is filed
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases, bankruptcy cases, agency review proceedings, and criminal cases
Obligation to Update	stated
Note	

U.S. District Court for the Southern and Eastern Districts of New York (operating under uniform local rules)

Civil Rule 1.9 Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of any corporate or other parents, subsidiaries, or affiliates of the party, securities or other interests which are publicly held
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of the party
Negative Report	
Disclosure Form	the reverse side of the civil cover sheet used in the Eastern District of New York has a section directing corporate parties to identify corporate parents, subsidiaries and affiliates
Number of Copies	
Scope of Applicability	civil actions
Obligation to Update	
Note	

U.S. District Court for the Western District of Pennsylvania

Local Rule 3.2 — Disclosure Statement

Who Must File	a corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus in any proceeding
Required Information	identification of all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public, where: (1) "affiliate" means a person that directly or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity, (2) "parent" means an affiliate controlling such entity directly, or indirectly through intermediaries, and (3) "subsidiary" means an affiliate controlled by such entity directly or indirectly through one or more intermediaries; identification of the represented entity's general nature and purpose; if the entity is unincorporated, identification of any members of the entity that have issued shares or debt securities to the public; no listing is required, however, of the names of members of a trade association or professional association, where "trade association" is defined as a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership
Time of Initial Filing	filing of the initial pleading or other court paper on behalf of that party or as otherwise ordered by the court; where it is impossible or impracticable to file with the initial pleading or other court paper, the required Disclosure Statement must be filed within seven days of the date of the original filing
Negative Report	Disclosure Statement, but not the local rule, indicates that a negative report should be filed
Disclosure Form	form titled Disclosure Statement, located in Appendix A of the local rules
Number of Copies	

U.S. District Court for the Western District of Pennsylvania (continued)

Scope of Applicability	all proceedings
Obligation to Update	stated
Note	

U.S. District Court for the District of South Carolina

Local Rule	General Provisions Governing Discovery; Duty of Disclosure
Who Must File	any party (plaintiff or defendant) that is either a publicly owned entity, or is a partner, parent, subsidiary or affiliate of a publicly owned entity [except for parties in bankruptcy proceedings and other specifically exempted case types listed in Local Rule 26.01]
Required Information	identification of the publicly owned entity and its relationship to the disclosing party; identification of any publicly owned entity not a party to the case that has a significant financial interest in the outcome of litigation and the nature of the interest
Time of Initial Filing	a plaintiff files disclosure with the initial pleading; a defendant files within 30 days of the later of (1) defendant's responsive pleading or (2) the date on which the person asserting a claim against the defendant serves answers to interrogatories and produces documents pursuant to the local rule
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

U.S. District Court for the District of Vermont

General Order No. 45 In Re: Disclosure of Corporate Interests

Who Must File	all non-governmental corporate parties
Required Information	identification of parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates that have issued shares of ownership to the public
Time of Initial Filing	with a party's first appearance
Negative Report	
Disclosure Form	
Number of Copies	
Scope of Applicability	all proceedings
Obligation to Update	
Note	

U.S. District Court for the Eastern District of Wisconsin

Local Rule 5.05 — Certificate of Interest

Who Must File	all non-governmental parties and amicus curiae
Required Information	if the party or amicus is a corporation: identification of a parent corporation, if any; identification of corporate stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus; the full name of every party or amicus represented in the case and the name of all law firms whose partners or associates appear for a party or are expected to appear for the party
Time of Initial Filing	with the appearance of the party or upon the first filing of a paper on behalf of the party, whichever occurs first
Negative Report	
Disclosure Form	form prescribed in the local rule
Number of Copies	
Scope of Applicability	
Obligation to Update	
Note	

U.S. District Court for the Western District of Wisconsin

The court has no local rule, court-wide standing order, or individual standing orders on the subject of party disclosure of financial interest information. Private parties that are businesses, companies, or corporations are expected, however, to provide such information at the outset of a case on a form provided by the clerk.

Who Must File	private (non-governmental) parties that are businesses, companies, or corporations
Required Information	identification of the parent corporation or affiliate and the relationship between such and the party, if the party is a subsidiary or affiliate of a publicly owned corporation; identification of any publicly owned corporation not a party to the case that has a financial interest in the outcome of litigation and the nature of the financial interest
Time of Initial Filing	at the time of initial pleading
Negative Report	
Disclosure Form	form titled Disclosure of Corporate Affiliations and Financial Interest is provided by the clerk
Number of Copies	
Scope of Applicability	civil cases
Obligation to Update	
Note	

Part IV. Summary Tables for Bankruptcy Appellate Panels

Four of the appellate courts with Bankruptcy Appellate Panels (BAP) have a relevant local rule. The rules apply to bankruptcy cases appealed from final judgements in bankruptcy courts to BAP. We have organized these rules into tables with a structure identical to the tables summarizing bankruptcy and district court rules. The courts included here are the U.S. Courts of Appeals in the:

Second Circuit;
Eighth Circuit;
Ninth Circuit; and
Tenth Circuit.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Second Circuit

BAP Local Rule 8009.1(c)	Disclosure of Interested Parties

Who Must File	private (non-governmental) parties
Required Information	identification of persons, associations of persons, firms, partnerships and corporations which may have an interest in the outcome of the case; identification of the connection and interest in the appeal
Time of Filing	with the initial brief
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Eighth Circuit

BAP Local Rule 8009.A(1) — Certification of Interested Parties

Who Must File	appellant (and appellee if the appellee exercises the option to prepare and file a separate appendix with its brief, Internal Operating Procedures Manual at IOP III.B.2)
Required Information	identification of parties that have an interest in the outcome of the appeal; identification of the connection and interest in the appeal
Time of Filing	at the same time as a party's brief (Internal Operating Procedures Manual at IOP III.B.2)
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided in an appendix to the appellant's brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Ninth Circuit

BAP Local Rule 5(c) Certification as to Interested Parties

Who Must File	parties
Required Information	identification of all persons, associations of persons, firms, partnerships and corporations which have an interest in the outcome of the case
Time of Filing	
Negative Report	
Disclosure Form	the general form of the disclosure certificate is prescribed in the BAP rule
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	
Note	The information is provided on the inside cover of the initial brief.

Bankruptcy Appellate Panels in the U.S. Court of Appeals for the Tenth Circuit

BAP Local Rule 8001-2(b) — Certificate of Interested Parties

Who Must File	parties, including pro se parties (BAP Rule 8001-2(a))
Required Information	identification of all parties to the litigation not revealed by the caption of the notice of appeal; identification of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, or other legal entities that are financially interested in the outcome of the litigation; for corporations, identification of all parent corporations and identification of any publicly held company that owns 10% or more of the corporation's stock; an individual listing is not necessary if a large group of persons or firms can be specified by a generic description; identification of attorneys not entering an appearance in the court who have appeared for any party in the bankruptcy court case or proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court
Time of Filing	with each entry of appearance; first entry of appearance should be filed within 10 days after service of notice that the appeal has been docketed with the court (BAP Rule 8001-2(a))
Negative Report	required
Disclosure Form	Form 3. Entry of Appearance, Certificate of Interested Parties, and Oral Argument Statement, located in BAP L.R. Appendix A.
Number of Copies	
Scope of Applicability	bankruptcy appeals before a bankruptcy appellate panel
Obligation to Update	stated
Note	

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules &
Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: March 27, 1996

SUBJECT: Gap Report concerning the proposed amendments to the Federal Rules of Appellate Procedure published September 1995

In September 1995 the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on March 1, 1996. At the Advisory Committee's meeting on April 15 and 16 the Committee must consider all the comments and decide whether to amend the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

Each rule, as published, is set forth below and is followed by a summary of the comments submitted concerning that specific rule. Following the summary is a segment labeled "Issues and Changes." In that segment, I discuss the issues raised by the commentators and outline the changes that are made in the new draft prepared for your consideration. The new draft concludes the treatment of each rule.

General comments, applicable to all of the rules are summarized first.

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 26.1

The rule is divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and <u>at least</u>

three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal,

it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker, a member of the Standing Committee, wrote to Judge Logan and me after last summer's Standing Committee meeting. He is concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an

interest that would create a conflict for a judge. A copy of Judge Parker's letter follows this page.

One part of Judge Parker's example is probably not much different than the relationship between a party and its subsidiary or affiliates, a relationship that the Committee believes does not require disclosure. When a corporate party is a limited partner and there is the potential that the judge may also be a limited partner in the same partnership, a judgment for or against the corporate party should have no effect upon the judge. The point remains, however, that Rule 26.1 is narrow. The Advisory Committee has long been aware that Rule 26.1 is not as broad as may be desirable. However, the Committee consulted with the circuits during the development of Rule 26.1 and there was no consensus for a broader rule. The Committee has agreed with Mr. Lacovara's comment that the difficulty of defining a broader category of investments and in tracking the identity of investors makes the focus on stock reasonable.

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

JAMES A. PARKER
Judge

July 31, 1995

Honorable James K. Logan
United States Circuit Judge
P.O. Box 790
Olathe, Kansas 66061

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Re: Proposed Appellate Rule 26.1 - Corporate Disclosure Statement

Dear Judge Logan and Professor Mooney:

I begin with an apology for not earlier having commented on proposed Rule 26.1. Obviously your Advisory Committee has devoted considerable time and thought to this rule. Unfortunately, I did not focus attention on the substance of Rule 26.1 until the Standing Committee meeting on July 6.

My concern is that proposed Rule 26.1 is worded too narrowly to accomplish its objective of requiring parties to provide information that will help judges identify potential conflicts of interest. The proposed rule covers only corporations. A corporation, of course, is only one form of organizations that have numerous, diverse owners. Another is a limited partnership. Limited partnerships that have been widely sold often have been parties in many lawsuits. As presently worded, proposed Rule 26.1(a) would not require a corporation that is either a general or a limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner.

I recommend broadening the language of proposed Rule 26.1(a) to require identification of all types of organizations, not just corporations, in which a party may have an interest that would create a conflict for a judge. Having said that, I apologize, again, for not proposing alternative language. I would suggest, however, deleting "corporate" from the title of Rule 26.1.

Sincerely,

James A. Parker

cc: Honorable Alicemarie H. Stotler
Standing Committee Chairperson

ISSUES AND CHANGES - RULE 26.1

Eleven letters commenting on the proposed amendments were received; the letter from the A.B.A. Section of Intellectual Property, however, included separate suggestions from two committees so there is a total of 12 commentators. Of the 12, four support the amendments, none generally oppose the amendments, but 8 suggest revisions.

1. Support

The opinion of the Judicial Conference Committee on Codes of Conduct was specifically solicited. The Committee supports the amendments. The Committee believes that disclosure only of parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that a judge is made aware of a party's corporate affiliations and that a judge is able to make an informed decision about recusal.

2. Suggested Revisions

All of the commentators who suggest revisions focus on the extent of the disclosure that should be required. Unfortunately, they are not in agreement about what should be done.

a. Two commentators urge the Committee to continue to require disclosure of subsidiaries and affiliates, although they apparently would also retain the new 10% rule. These commentators stress that although it would be rare that recusal would be required because a judge owns stock in a litigant's subsidiary or affiliate, "rarely" does not mean "never."

b. Three other commentators specifically approve the deletions but would make changes in that portion of the amendments that require disclosure of all publicly traded companies that own 10% or more of the party's stock:

   i. one commentator recommends dropping the requirement because the judge's interest may be extremely minimal — some stock in a company that owns 10% of the party's stock (would this preclude the use of mutual funds?) — and it would be a burden for the party to comply with the requirement;

   ii. another commentator would require disclosure of all stockholders that are publicly owned; he thinks it would be easier to list them all;

   iii. a third commentator would amend the language to make it clear that the rule does not call for identifying public companies that collectively might own a total of 10% of the party's stock; he would amendment the language as follows:

"listing any stockholders that is a ~~are~~ publicly held company ~~ies~~ and that owns ~~ing~~ 10% or more of the party's stock."

c. Another commentator suggests that it is not always clear whether a company is publicly held and suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

d. Another commentator believes that the rule should be expanded to include publicly held joint venture partners and grandparent or great grandparent companies.

3. The New Draft

The Advisory Committee specifically requested that the Committee on Codes of Conduct review the proposed amendments. Given the approval of the Committee on Codes of Conduct, the new draft does not reinstate the requirement that a party disclose "subsidiaries" and "affiliates." Both of the commentators who urged retention of the rule admitted that it would be rare that a judge should recuse himself or herself because of the judge's ownership of stock in a subsidiary or affiliate.

The new draft does continue to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. Although one commentator believes that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal, the disqualification statute is quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4), (d)(4). Note, the statute does not require that the judge be substantially affected by the outcome, but that the judge's interest (however small) could be substantially affected. Although it could be argued that the judge does not have a financial interest in the party, but only in the stockholder, the commentator's focus upon the "minimal" nature of the judge's interest is inappropriate. As to the mutual fund question, the statute specifically says:

> Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. 28 U.S.C. § 455(d)(4)(i).[2]

The draft, however, does not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continues

[2] That the statute creates a specific exception for mutual fund ownership may suggest that the statute is otherwise concerned about the sort of indirect ownership at issue in the proposed amendment.

only to require disclosure of those corporations that own 10% of the party's stock. The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. If a judge owns stock in a corporation which in turn owns a very small percentage of the party's stock, the argument that the judge does not have a financial interest in the party is quite strong.

Changes are made in the draft at lines 11 and 12. (Changes are shaded.) Mr. Lacovara's suggestion is adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of the party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. See the underlined changes in the Committee Note.

At line 27 the words "the filing of" are deleted as suggested in the "style" version being prepared for publication.

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5. Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

Item 93-10, Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

Item 94-1, Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates, and
93-10, application of Rule 26.1 to trade associations

I. Item 93-5, Use of the Term Affiliates

At the Committee's April 1993 meeting it reviewed Fed. R. App. P. 26.1 and an amendment to it which had been published earlier in the year; the amendment dealt with the number of copies problem. During the discussion, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates."

The first sentence of Fed. R. App. P. 26.1 provides:

> Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

The Committee briefly discussed the meaning of the term "affiliates." Judge Boggs stated that he thought the term encompassed "brother" and "sister" corporations; *i.e.*, those owned in whole or in part by the same parent. Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree.

Nine circuits have local rules supplementing Fed. R. App. P. 26.1. (The local rules are appended to this memorandum.) Of those nine, six use the term affiliate in their rules. Two of the six define "affiliate" for purposes of the rule.

The D.C. rule states: "For the purposes of this rule, 'affiliate' shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity . . .."[1] The Sixth Circuit's

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[1] D.C. Cir. R. 26.1(a). This definition appears to be drawn from the definition of an "affiliate" in the regulations promulgated under the Securities Exchange Act of 1934. The regulations define an "affiliate as:

> [A] person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

definition is similar; it states: "A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."[2]

Because Fed. R. App. P. 26.1 explicitly requires disclosure of parent and subsidiary corporations, it is the "under common control" provisions of the definitions that is helpful, and it appears to require disclosure of "brother" and "sister" corporations. Disclosure of their existence is required under the rule, however, only if they have issued shares to the public. The disclosure, therefore, of the existence of "full brother" or "sister" corporations, those wholly owned by an entity's parent, would not be required. Disclosure of the existence of affiliates that have issued shares to the public would seem appropriate.

The Seventh Circuit's rule does not require the disclosure of subsidiaries or of "brother" or "sister" corporations. It requires the disclosure only of parent corporations and of publicly held companies owning 10% or more of the stock of the party. The underlying assumption apparently is that a decision adverse to the party would harm significantly only those corporations owning at least 10% of the stock of the party and that an adverse decision would not have sufficient impact upon a subsidiary or sister corporation to require recusal of a judge who owned stock in the subsidiary or sister.

If the Committee wishes to retain the term affiliate, but clarify its meaning, Rule 26.1 could be amended to include a definition like that in the D.C. or Sixth Circuit rules.

Rule 26.1. Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates

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17 C.F.R. § 240.12b-2 (1994).

The same regulation defines "control" as:

> the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
> 17 C.F.R. § 240.12b-2 (1994).

[2] 6th Cir. R. 25.

that have issued shares to the public. For purposes of this rule, an affiliate is a corporation that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the corporate party. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

II. Item 93-10, Applicability of 26.1 to Trade Associations

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The question of whether the rule does, or should, require a trade association to disclose all of its members was deferred for later discussion.

As the local rules attached to this memorandum disclose, most of the circuits rules are silent about the applicability of Rule 26.1 to trade associations. Two circuits, however, directly address the question and take opposite positions.

The D.C. circuit rule by its terms applies not only to corporations but also to an "association, joint venture, partnership, syndicate, or other similar entity." D.C. Cir. R. 26.1(a). As to unincorporated associations, the disclosure statement generally must include the "names of any members of the entity that have issued shares or debt securities to the public." The rule further provides, however, that a trade association need not list the names of its members. D.C. Cir. R. 26.1(b). For purposes of the rule, a trade association is defined as "a continuing association of numerous organizations or individuals, operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." Id.

In contrast, the fourth circuit rule states: "A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public." Note that in addition to disclosing each member of the association, the fourth circuit requires disclosure of each member's affiliates.

The Advisory Committee worked for several years to develop Rule 26.1. One of the drafts prepared for the Committee's consideration required disclosure of a trade association's publicly owned members, whenever a trade association is a party or an intervenor. That approach was thought to be a middle of the road approach requiring disclosure of members (which while possibly lengthy, should not be burdensome to produce) but not of their affiliates. The Committee ultimately approved a less detailed rule that had been modeled after Supreme Court Rule 28.1. Because there had been a lack of consensus among the circuits on the approach that should be taken (an earlier draft had been circulated to the circuits for comment), the Committee approved a rule that established minimum requirements that all circuits should meet. As the Committee Note to the rule indicates, a court of appeals is free to require additional information by local rule.

The language of Fed. R. App. P. 26.1 does not address the trade association question. The rule requires a "corporate" party to disclose "parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates." Even if a trade association is incorporated, its members are not subsidiaries or affiliates in the ordinary sense of those words.

Although the Committee in 1988 rejected a provision addressing the trade association issue, is it time to reverse that decision? If so, should the Committee reconsider a more global reversal of the rule's bare bones approach? Section 455 requires a judge to disqualify himself or herself from hearing a case whenever the judge's impartiality might reasonably be questioned. The statute addresses a much broader range of interests than simply stock ownership. One of the early drafts considered by the Committee would have required all parties (not just corporate parties) to list "all attorneys involved in the case, and all persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party."

The Local Rules Project had suggested that Rule 26.1 should be broadened in an effort to eliminate the diverse circuit rules. The Advisory Committee voted to take no further action on that suggestion in light of the difficulty the Committee previously had encountered when trying to develop a rule that would be acceptable to most of the circuits.

D.C. Cir. R. 26.1. Disclosure Statement

(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or *amicus* in any proceeding shall file a disclosure statement, at the time specified in FRAP 26.1, or as otherwise ordered by the court, identifying all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. For the purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

(b) The statement shall identify the represented entity's general nature and purpose, insofar as relevant to the litigation, and if the entity is unincorporated, the statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

* * * * *

Third Cir. R. 26.1.1. Disclosure of Corporate Affiliations and Financial Interest.

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, shall file a corporate affiliate/financial interest disclosure statement on a form provided by the Clerk that identifies every publicly owned corporation not named in the appeal with which it is affiliated. The form shall be completed whether or not the corporation has anything to report.

(b) Every party to an appeal shall identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form shall be completed only if a party has something to report under this section.

* * * * *

II-B II-C I-H I-I II-A

Fourth Cir. R. 26.1 Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of Federal Rule of Appellate Procedure 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by Federal Rule of Appellate Procedure 26.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public.

* * * * *

Fifth Cir. R. 28.2.1. ***Certificate of Interested Persons***

A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation which is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it

controls, is controlled by, or is under common control with a publicly owned corporation.

* * * * *

Seventh Cir. R. 26.1. Certificate of Interest

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or *amicus curiae*, or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information:

* * * * *

(2) If such a party or *amicus* is a corporation:

(i) its parent corporation, if any; and

(ii) a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or *amicus*.

* * * * *

Eighth Cir. R. 26.1A. Certificate of Interested Persons.

Within ten days after receipt of notice that the appeal has been docketed in this court, each nongovernmental party shall certify a complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case. This certificate enables judges of the court to evaluate possible bases for disqualification or recusal. . . .

Eleventh Cir. R. 26.1-1. Certificate of Interested Persons and Corporate Disclosure Statement; Contents.

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in

the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 57

Disqualification in a Case When Controlled Subsidiary of a Corporation in Which Judge Owns Stock Is a Party.

Two judges have requested an opinion from the Committee as to whether a judge is disqualified when a controlled subsidiary of a corporation in which the judge owns stock is a party.

A complete answer to these inquiries would involve an interpretation of both Canon 3C of the Code of Conduct for United States Judges and 28 U.S.C. § 455. The provisions of the canon and statute are similar, but our opinion is limited to an interpretation of the canon.

Canon 3C(1) provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that . . . [he or she] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small," with enumerated exceptions, including ownership in a mutual or common investment fund, the proprietary interest of a policy holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest.

The Reporter's Notes to Code of Judicial Conduct, in explaining the meaning of financial interest, reads in part:

> The "financial interest" of a judge that will disqualify him is his direct legal or equitable ownership interest, no matter how small, in a party or in the subject matter in a proceeding before him.
>
> * * *
>
> When a judge deposits money in a mutual savings association or takes out a policy of insurance in a mutual insurance company, he has a technical legal interest in the association or

> company. The Committee was of the opinion that these technical interests, and other similar ones, should not be a basis for disqualifying a judge even though the association or company is a party to a proceeding before him, unless the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable.

Thode, Reporter's Notes to Code of Judicial Conduct 69-71 (ABA 1973).

We are concerned accordingly with the question of whether an owner of stock in the parent corporation has a direct legal or equitable interest in the controlled subsidiary or merely a "technical legal interest" within the recognized exceptions.

It is the opinion of the Committee that the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary, and where a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should disqualify in the proceeding.

August 9, 1978
Revised July 10, 1998

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Judges Ruled on Firms in Their Portfolios

Appeals Jurists Attribute Participation to Innocent Mistakes

By Joe Stephens
Washington Post Staff Writer
Monday, September 13, 1999; Page A01

A number of federal appellate judges have ruled on cases involving companies in which they own stock, despite a federal law designed to prevent judges from taking part in any case in which they have a financial interest.

An examination of financial disclosure reports and federal court records shows that in 1997 eight appeals court judges took part in at least 18 cases in which they, their spouses or trusts they helped manage held stock in one of the parties. The stock ownership ranged from a few thousand dollars to as much as $250,000.

In interviews, the judges acknowledged that they should not have participated in the cases but stressed that their stock interests did not affect their rulings. The judges, who include some of the nation's best-known jurists, attributed their participation in the cases to innocent mistakes or memory lapses about their financial portfolios.

"It's embarrassing; I should have been more alert," said Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals in California. "I certainly am going to try to be more careful."

Some of those involved in the cases also were upset to learn about the stock. Judge Alice Batchelder of the 6th Circuit in Ohio improperly sat on a case involving Wal-Mart Stores Inc. even though her husband held up to $50,000 worth of stock in the company. Batchelder and two other judges ruled the discount-store chain could not be held responsible for selling Wayne Brashear's 19-year-old son a .357 Magnum revolver, which he later used to commit suicide.

"It leaves a pretty bitter taste," Brashear said of the judge's actions.

Batchelder explained that, until contacted by a reporter, she did not realize her husband's retirement account owned stock in Wal-Mart and other companies. She said she should have withdrawn from Brashear's appeal and four other cases.

"I'm extremely chagrined to discover it," she said. "The error is mine."

The conflicts were uncovered by Community Rights Counsel, a public-interest law firm that concentrates on land-use issues. The group reviewed 1997 personal financial disclosure reports, the most recent available at the time, filed by the approximately 150 active federal appeals court judges, and checked the holdings against computerized records of cases in which the judges participated. It provided the material to The Washington Post.

"Our findings represent the tip of the iceberg, and there are likely hundreds of similar cases to be found throughout the federal judiciary," said the group's executive director, Doug Kendall.

But David Sellers, a spokesman for the Administrative Office of the U.S. Courts, said the conflicts involved a surprisingly small percentage of the roughly 52,000 cases that passed through the nation's appeals courts in 1997. He also questioned why seven of the eight judges cited by the group were named by Republican presidents.

Kendall said he scrutinized all judges equally. He said his study understated the probable number of conflicts because it did not include cases handled by judges who have taken retired status and did not include an exhaustive search of corporate subsidiaries.

In interviews, the judges said their rulings in the cases were unlikely to affect their stock values. In some cases, in fact, the judges ruled against the companies' interests. Even so, they acknowledged that they should have withdrawn from the lawsuits to prevent a conflict.

"I accept the responsibility. I shouldn't have sat on those cases," said Judge Morris Arnold of the 8th U.S. Circuit in Arkansas. "I regret the mistake happened and I'm going to work to see it doesn't happen again."

Arnold took part in one lawsuit involving General Electric and another involving a General Electric subsidiary while his wife owned company stock worth up to $50,000. He said he overlooked one conflict because the case had dozens of litigants. In the other, he said, he did not recognize that General Electric Capital Corp. was a subsidiary of General Electric.

Some judges said their spouses or investment managers bought the stocks without immediately notifying them. Others said the companies' names became lost in a long list of litigants or that they were confused by the names of subsidiaries and affiliated corporations.

Federal appeals court rules require corporations to provide a list of all parent companies and related entities in order to prohibit precisely such conflicts.

Federal law requires that judges remove themselves from any case in which they know they or their spouses have a financial interest, no matter how small. Even a $1 investment violates the statute. Federal law also directs judges to keep abreast of what they own so that they may immediately resolve any conflicts that arise.

Evidence of the conflicts was not news to one judge, Laurence Silberman of the U.S. Circuit Court of Appeals for the District of Columbia.

Silberman said he identified a series of conflicts in early 1998 and sent letters reporting the problem to the lawyers in three cases. At the same time, Silberman withdrew from hearing an appeal in one of the most closely watched cases in recent years -- the U.S. Justice Department's antitrust lawsuit against Microsoft Corp.

Silberman said he had no ownership in Microsoft or the companies involved in the other cases. But after his brother-in-law died suddenly in 1997, Silberman explained, he became a trustee of the Gaull Marital Trust, which owned a variety of stocks, including up to $100,000 in Microsoft.

In his letters, Silberman noted that his "participation was in violation" of federal ethics laws.

In 1997, Silberman received $15,000 for teaching at Georgetown University Law Center and was one of three judges who ruled in Georgetown's favor in a case accusing the university hospital of medical malpractice. Silberman said it was "absurd" to think he should remove himself in that situation, noting the hospital and law school are separate entities. Legal ethics experts said he was not required to disqualify himself.

In cases handled by the other judges, lawyers and litigants were not warned about the conflicts. For example, attorney Paul Bennett of San Francisco said he was surprised to learn that Judge Kozinski owned General Motors stock.

Bennett represented eight railroad workers who claimed their hearing was damaged by noise from locomotive engines manufactured by General Motors. Kozinski led a three-judge panel that rejected his argument, which Bennett said could have led to a national class-action suit against General Motors if it had been successful.

"It's disturbing that people say they don't know what they own," Bennett said. "If I had a different panel of judges, who knows if I would have won?"

Kozinski explained that midway through the case his wife bought 95

shares of stock, worth less than $15,000. The judge learned of the purchase later, he said, and never connected it to the lawsuit.

"We will try harder from now on," Kozinski said. "We do take this very seriously."

Some members of Congress argue that, to help the public quickly identify such conflicts, lists of stocks held by federal judges should be easily available to the public. In March the Judicial Conference rejected a plan to have judges post "recusal lists" at local courthouses, citing security and privacy concerns. Judges also said that such lists already are available to anyone willing to fill out a request and wait several weeks.

Kendall and other critics point out, however, that each request results in a warning to the judge about who is examining his finances. They said few lawyers and litigants would risk angering the judge who will decide the outcome of their case.

The Environmental Working Group, an environmental watchdog organization, wrote to Chief Justice William H. Rehnquist last week urging him to improve the disclosure process, including posting the forms on the Internet. "Litigants and citizens' faith in the judicial process is severely eroded by these conflicts," said the letter by vice president Mike Casey.

Judge Arnold called it a good idea to make judges' financial disclosures more readily available to the public.

"I understand why some people would be reluctant" to check the reports if they know their inquiries will be reported to the judge, Arnold said. "If it's a matter of public record, it's a matter of public record, and people ought to be able to look at it."

Taking Stock on the Bench

Federal appeals court judges with conflicts of interest:

Morris Arnold of the 8th Circuit in Arkansas

* Took part in one lawsuit involving General Electric, and another involving a General Electric subsidiary, while his wife owned company stock worth up to $50,000.

Alice Batchelder of the 6th Circuit in Ohio

* Took part in five lawsuits involving Wal-Mart Stores Inc. and Bristol-Myers Squibb Co. while her husband's retirement account held up to $50,000 stock in those companies.

Edward Becker of the 3rd Circuit in Pennsylvania

* Said his clerk overlooked his stock ownership in one case involving Hercules Inc. In a second, said he mistakenly believed he had already sold the stock, worth up to $15,000.

Alex Kozinski of the 9th Circuit in California

* Ruled for General Motors in a case brought by railroad workers who claimed hearing damage from GM engines. Said his wife bought GM shares midway through the case and that he only learned of the purchase later.

Sandra Lynch of the 1st Circuit in Massachusetts

* Married a man who owned up to $100,000 in Monsanto Co. stock a few weeks before joining a ruling in a case involving Monsanto. Said she did not learn of her husband's stock until later, and did not realize the problem with the case until called by a reporter.

Daniel Manion of the 7th Circuit in Indiana

* Participated in a lawsuit involving Lucent Technologies while holding company stock worth up to $15,000. Manion pointed out that early in the appeal the litigant's name was listed as AT&T. Later, it was changed to Lucent.

Bruce Selya of the 1st Circuit in Rhode Island

* Participated in three cases while owning stock worth up to $15,000 in a litigant's or a litigant's parent company. Said the problems arose because his investment manager bought stocks for his portfolio and only later supplied him with the names of the companies.

Laurence Silberman of the D.C. Circuit

* Participated in three cases involving companies in which a trust he administered held stock. Wrote letters to the parties saying his involvement violated federal ethics rules.

"On Their Honor: Judges and their Assets."

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Administrative Office of the United States Courts

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On their honor Judges and their assets

Stocks and ethics collide in courtroom

By JOE STEPHENS - Staff Writer
Date: 04/04/98 23:00

Federal judges here and elsewhere repeatedly have presided over lawsuits against companies in which they own stock.

That's not supposed to happen. U.S. law requires judges to withdraw from any lawsuit in which they know they have a financial interest, however small. So does the judicial Code of Conduct.

Yet a study by *The Kansas City Star* discovered federal judges from the Kansas City area issued more than 200 court orders while holding an interest in a litigant. They set hearings, granted motions, threw out legal claims and even conducted a jury trial.

For comparison, *The Star* examined courthouses in Oregon and Pennsylvania -- and found identical problems.

In all, *The Star's* investigation identified 57 legal actions in which a district judge entered one or more such orders. In the Kansas City area alone, nine district judges, or two-thirds of those in the local courthouses, entered orders in 33 problem cases.

At the same time, the judges owned anywhere from a few thousand dollars to as much as $250,000 in stock in companies involved in a suit, or in the companies' parent corporations.

"I'm shocked," said Jeffrey Shaman, a

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

G. Thomas Van Bebber District of Kansas	John W. Lungstrum District of Kansas
Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

judicial ethicist and a law professor at DePaul University in Chicago. "It's such a clear violation."

The newspaper's study found no evidence any judge benefited personally or let his stock holdings influence his rulings.

But many litigants and lawyers said the findings raised questions about how judges, who are appointed for life to ensure others follow the letter of the law, police themselves.

David Barrett, an attorney in one of the lawsuits, called the findings "a little scary."

"People assume," he said, "that judges are all honest and fair -- and avoid conflicts."

Most judges said in explaining the lapses that they made innocent mistakes or forgot what they owned. Some said their staffs were supposed to spot the conflicts. Others blamed the crush of paperwork.

Many orders were routine and had little effect on the lawsuits, which often were settled out of court. Some orders simply appointed legal couriers or set filing schedules. And in at least seven of the 57 cases, judges recognized their stock conflict and stepped out of the lawsuits before *The Star* began its study.

Yet experts said that, in each instance, judges should have monitored their investments and withdrawn before entering a single order.

"This kind of sloppiness is more than unseemly; it is destructive of the public's confidence in an impartial judiciary," said James C. Turner, a Washington lawyer and consumer advocate.

Many judges acknowledged they may have broken ethics laws, at least technically.

"I take it very seriously," Judge John W. Lungstrum of Kansas City, Kan., said of the lapses. He inadvertently presided over two recent lawsuits while his family owned up to $65,000 in stock in the defendants.

"I want to make sure," he added, "that it doesn't happen again."

For some litigants, the judges' stock ownership already has sullied the image of the court system.

Two years ago a Kansas City man sued cigarette manufacturers, accusing them of deliberately addicting smokers to nicotine. Seven weeks later, a judge threw out the lawsuit as frivolous.

Until told by *The Star*, the plaintiff had no idea the judge owned stock in one of the companies.

In another lawsuit, Dana DeSuza of Independence charged that the Sprint Corp. violated discrimination laws when it fired her. A judge threw out part of her $1.9 million claim, and presided over a trial in which a jury rejected the remainder of her case.

Two years passed before DeSuza learned the judge owned stock in Sprint. Her reaction: "I'm disgusted."

The Star's findings already are leading to change here and around the country.

For example, at least one judge sold his stock within days of being interviewed. "I don't want any question," said Judge Dean Whipple, "about whether I had any ulterior motive on those cases."

Two weeks after court officials sent her notice that the newspaper was reviewing her investments, Judge Kathryn H. Vratil mailed letters to litigants in at least six lawsuits. She told them they might have grounds to vacate her judgments and

reopen their cases. Vratil called the timing a coincidence.

In Pittsburgh, a judge withdrew from a $9 million lawsuit shortly after *The Star* notified him that his wife owned stock in three separate defendants, eight years into the legal action.

A factory worker in northern Pennsylvania, alerted to his judge's stock by *The Star's* study, two weeks ago filed a motion accusing the judge of violating ethics laws. He requested a new trial in the age-discrimination case, which had been closed for two years.

Other litigants said they also were looking into resurrecting their long-closed cases.

Authorities in Washington are taking notice, too.

Three days after being contacted by *The Star*, the Administrative Office of the U.S. Courts faxed a memo marked "URGENT" to more than 100 chief judges across the nation. It suggested they review and update their methods for identifying conflicts of interest. That is something several judges said they were doing already.

"What we're really talking about is the integrity of the judicial system," explained Leslie W. Abramson, a law professor at the University of Louisville and an expert on judicial ethics.

"In the worst-case scenario, judgments could be affected."

The honor system

Congress was worried about such conflicts 24 years ago. That's when legislators beefed up ethics laws to bolster confidence in the courts.

They considered financial conflicts so serious, in fact, that they made them illegal even when

the judge's investment is tiny and when lawyers waive any objections.

The idea was to prevent quibbling over the extent of the judge's legal role or the size of his financial stake. As a practical matter, experts said, it would be impossible to determine the purity of a judge's thoughts when he renders a particular decision.

To help ensure compliance, judges must list their investments annually on reports filed in Washington.

But strict rules make the reports difficult to get and alert the judges they are under scrutiny. That ensures few people review them.

Short of Congress impeaching a judge, no one outside the judiciary is authorized to enforce the ethics statutes. Judges are on the honor system, trusted to police their own conflicts. The law sets no penalty for crossing the line.

Until now, experts said, no one has taken an in-depth look at how scrupulous trial-level judges have been about avoiding such problems.

For its study, the newspaper analyzed financial disclosure reports filed since 1991 by district judges based in parts of four of the 13 federal appellate circuits.

The courthouses were chosen because of their size and because each represents a different judicial district: Kansas City (Western Missouri District); Kansas City, Kan. (Kansas); Pittsburgh (Western Pennsylvania) and Portland (Oregon).

The Star then compared the judges' stock holdings with thousands of civil lawsuits.

Although the study found problems at each courthouse, on average judges in the Kansas City area issued more court orders in more questionable cases.

Among the lawsuits identified locally, 19

involved judges who owned stock in a litigant; one suit involved a judge whose wife owned the problem stock. In 11 other lawsuits, judges owned stock in the parent corporation of one or more litigants.

The final two cases involved a different sort of problem. A judge who sat on the Board of Governors at Truman Medical Center presided over two lawsuits against the center -- and threw both out of court.

Under ethics statutes and judicial canons, experts said, judges should have no role in any of those cases.

"Some people might say it's surprising," Abramson said of *The Star's* findings. "Other people might say it's disappointing."

`Slap in the face'

Some litigants grew furious when told of the judges' investments.

"It makes me feel like I've been violated," litigant Ed Wallace said moments after hearing that the judge in his lawsuit against the Chrysler Corp. bought Chrysler stock in the midst of the case.

"I really feel that I got the raw end of the deal."

Nancy Powell is stinging, too. The judge who handled Powell's lawsuit against her former employer revealed her stock ownership just 11 days before trial, bringing the case to a halt.

"The sheer emotion of the whole thing was horrendous," Powell said.

Darrell Taylor suffered severe injuries in a traffic accident, then pursued a $1 million lawsuit against an insurance company. He had no idea his judge owned stock in the company's holding corporation.

"There should be a law against that," he said.

Even in cases where a judge's involvement was brief and cursory, some litigants grew indignant.

For example, the first judge assigned to handle Linda Zimmerman's lawsuit against General Motors issued one order, scheduling a conference. Because of a conflict unrelated to stock ownership, the judge withdrew nine days later.

Even so, Zimmerman erupted when a reporter told her the judge owned up to $30,000 in General Motors stock.

"I did not know about any of this," Zimmerman said. "That's a conflict."

Rightly or wrongly, the findings also fed a pervasive skepticism about the fairness of American courts.

"I am not a fan of the justice system," explained one litigant, Harvey Bruce. "You cannot get a fair shake in this country."

Among the lawyers involved, Randy James' reaction mirrored that of many.

James of Overland Park praised the integrity of federal judges. He is confident stock investments did not sway the judge's rulings in his case.

Yet James responded to *The Star's* overall findings with exclamations of "Wow!" and "My goodness!" And he found the picture they painted disturbing.

"It's so obvious it slaps you in the face," James said. "If you've got a conflict, you've got to get out."

Unlike James, many lawyers refused to discuss the conflicts unless promised anonymity.

"You've got to understand my position," one attorney said, repeatedly asking that his name not appear in the newspaper. "This judge

determines my ability to make a living."

Several lawyers said they never considered looking for financial conflicts. They assumed judges were conscientious and would reveal any stock interests.

Some also pointed out that if an attorney had a financial conflict, he would face serious trouble for himself and his case.

"It's more than a little ironic," one lawyer said, "that a judge got caught in this situation."

Hollow warnings

Each spring, judges take part in a ritual designed to remind them of conflicts and their duty to avoid them.

Every judge lists his assets on a detailed form, then signs an attached certification declaring that he did not break any ethics laws.

The certification requires each judge to attest that:

"To the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I ... had a financial interest. ..."

The judge's signature is followed by a pre-printed warning:

"Any individual who knowingly and wilfully falsifies ... this report may be subject to civil and criminal sanctions."

But the warning is hollow. Court officials in Washington could not identify a single instance in which a judge was disciplined. And the certification clearly did not stop judges from handling cases in which they owned stock.

For example, Whipple presided over two 1996 lawsuits against the Philip Morris Cos. Whipple threw out both.

Then, Whipple filed a financial report last spring that disclosed he owned up to $15,000 worth of stock in Philip Morris. (The form only shows ranges of stock value, not precise amounts.)

Whipple said in an interview he believed that, in some cases, he could legally own stock in litigants, although he concedes his opinion is in the minority.

Whipple was far from alone in signing the statement. *The Star* reviewed more than 200 of the certifications filed over six years by judges in four states. None of the judges disclosed a single conflict.

That's the case even for judges who presided over part of a lawsuit, discovered and acknowledged their stock ownership, then belatedly withdrew. Each later signed the statement without elaboration.

For example, Judge Elmo B. Hunter presided over a lawsuit filed in 1990 by the General Motors Acceptance Corp. Ten months and seven court orders into the suit, he notified lawyers that he owned General Motors stock; his disclosure reports show it was worth $100,000 to $250,000.

Hunter announced he would preside over the case unless the lawyers objected. They did not, and Hunter continued on the case until the parties reached a negotiated settlement six months later.

Federal law requires a judge with an interest in a litigant to withdraw even if the lawyers beg him to stay. That applies even when the judge's interest is in the litigant's parent company, experts said. Yet Hunter signed the certification.

Hunter, who has been ill, could not be reached for comment.

The lapses are especially striking in instances where a judge issued orders in a lawsuit just

before signing the certification.

Two years ago, for example, Judge Fernando J. Gaitan Jr. issued an order in a lawsuit against AT&T Communications, a common name for AT&T Corp. The very next day, Gaitan signed the certification and sent a list of his investments to Washington.

The list included up to $15,000 in AT&T stock.

Gaitan declined repeated requests for an interview. In a letter, he called his AT&T holdings insubstantial and his role in the case minimal.

About the same time, Judge Lungstrum signed a 108-page consent decree in a lawsuit against a string of corporations, including Western Resources Inc. and General Motors.

The same day, Lungstrum signed the certification and mailed a list of his family's 1995 holdings to Washington. They included Western Resources stock and a special class of General Motors securities, worth up to $100,000.

Lungstrum acknowledged he probably did not compare his assets with his caseload before signing the form. Instead, he assumed he already would have discovered and resolved any conflicts.

"I just did not think about that," he said. "But I signed it with an absolute certainty that I did not have a conflict.

"I probably had a little bit of hubris there that I was not going to miss it."

In one case, the disclosure ritual failed to prevent stock problems from cropping up twice in a single lawsuit.

Jerald Heintzelman filed suit in 1995 after losing his job at AT&T Microelectronics, a division of AT&T with offices in Lee's Summit.

http://www.kcstar.com/item/pages/judges.pat,local/30da0058.404,.html

The case was assigned to Judge Howard F. Sachs, who owned AT&T stock worth $15,000 to $50,000. Sachs issued two orders.

Seven months into the suit, Sachs disclosed his stock and withdrew. Three days later, a magistrate withdrew before taking any action because he also was an AT&T stockholder.

The case then passed to Gaitan, who issued five orders. Ultimately, Gaitan agreed to requests by both sides and dismissed the lawsuit.

Five weeks later, Gaitan signed a form disclosing his assets.

The only stock listed: AT&T.

On their honor Judges and their assets

Judicial ethics law contains few loopholes

By JOE STEPHENS - Staff Writer
Date: 04/04/98 22:30

Congress had a simple idea in mind two decades ago when it enacted strict new ethics laws:

No one should be a judge in his own dispute.

So Congress set an exacting standard. A judge, it said, must pull out of a lawsuit when he knows he has a financial interest "in the subject matter in controversy or in a party to the proceeding."

In 1988, the U.S. Supreme Court weighed in. It ruled that a judge must step aside even when no reasonable person would conclude that the investment could affect his judgment.

Federal law, the court said, "requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety."

Appeals courts and ethics committees have ruled the same way in case after case, noting that judges must withdraw even when no one objects and when doing so "would involve great inconvenience."

The only other option: Sell the stock.

In one often-cited case, a judge was presiding over a complex class-action lawsuit involving thousands of companies

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Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

when he discovered that his wife had an interest in the dispute worth less than $30. A federal appeals court ruled that the judge had to withdraw.

"Thus," the court wrote, "after five years of litigation, a multimillion-dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over ... $29.70."

And just in case a judge claims ignorance of what he owns, the law flatly states: "A judge should inform himself about his personal and fiduciary interests." Failure to do so, the Supreme Court has held, may constitute a separate violation of ethics laws.

Peter W. Rodino Jr. was chairman of the House Judiciary Committee in 1974 and helped craft the ethics statutes. He describes them as common sense.

"Public service is a public trust," Rodino explained in an interview last month. "We've got to have *full* trust."

That is why Rodino and his colleagues provided judges with a clear formula for determining when they must disqualify themselves. The legislators did not want anyone questioning when the rule applied.

"So there is no argument upon which reasonable people could differ, Congress chose to draw a bright line," explained Stephen Gillers, a judicial ethicist at New York University who has worked as a White House consultant.

"What the Congress did was simply not leave room for discretion. Congress decided it's better to err on the side of recusal when a judge has a financial interest in a party, rather than split hairs about whether the judge's financial interest is likely to be decreased or increased, depending on the result of the case."

And if the rule seems severe, that's as it should be, said Steven Lubet, a judicial ethicist at Northwestern University in Chicago.

"It's supposed to be picky," he said, "because judging is important."

The rules also recognize the uncommon influence commanded by members of the bench.

Judicial authority is not hamstrung by politics or limited by the need to reach consensus. The clout wielded by Kansas City Mayor Emanuel Cleaver pales beside that of U.S. District Judge Russell G. Clark, who took control of Kansas City public schools and ordered a property tax increase. Or that of Judge Dean Whipple, who seized the Kansas City Housing Authority.

Unlike senators and presidents, federal judges are guaranteed their jobs for life. Even if they retire or are convicted of a felony, federal law gives them the right to receive their full salary until death.

"A federal district court judge in many ways is the most powerful individual in our governmental system, excepting the president," said James C. Turner, a Washington lawyer and legal reformer.

In return for that power, ethics canons demand that the nation's 585 district judges be not only incorruptible but also above even the appearance of impropriety. Actions and conflicts common among elected officials are expressly illegal for federal judges.

Congress enacted those prohibitions in a flood of post-Watergate reforms. And in particular, Rodino recalled, they were prompted by Clement Haynsworth.

Richard Nixon nominated the appellate judge to the U.S. Supreme Court in 1969.

http://www.kcstar.com/item/pages/judges.pat,local/30da0056.404,.html

Soon, scandal erupted over Haynsworth's business dealings.

Two civil cases in which Haynsworth took part, it turned out, involved subsidiaries of companies in which he owned a few thousands dollars in stock. One of the cases was a personal injury lawsuit that resulted in an award of just $50.

Although no one charged Haynsworth with making money off his rulings, U.S. senators cited the conflicts as the reason for his rejection. Some critics even called for him to resign from the federal appeals court.

Tom Eagleton, then a senator from Missouri, lambasted Haynsworth in a nationally televised debate.

"It's fundamental that a judge is prohibited from sitting on a case when he has stock ownership in one of the parties," Eagleton said. "That in itself disqualifies him from being considered for the court."

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On their honor Judges and their assets

Most area federal judges have owned stock in litigants

NAME: Kathryn H. Vratil
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1992 by President Bush
PROBLEM CASES: 14

Vratil

Vratil owned stock in more companies than did any other local federal judge. She also issued orders in more lawsuits involving those companies.

And she offered by far the most extensive explanation of any judge.

The cases involved General Electric, Travelers Group Inc., Sprint Corp., General Motors, Transamerica Corp. and their subsidiaries. Vratil owned no more than $30,000 in stock in any of the corporations.

Vratil acknowledged that her stock ownership may have created the appearance of impropriety. "It's a bad situation," she said.

In fact, last year Vratil wrote to litigants in six of the lawsuits and offered to consider vacating her judgment and reopening their cases. (None has accepted.) She told them her stock holdings resulted in an "actual or apparent" conflict of interest.

In interviews and a detailed letter

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Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

complete with footnotes, she offered a series of explanations:

- She gave an investment manager discretion to buy and sell some stocks in her portfolio. She said she mistakenly thought her staff was tracking the purchases and comparing them with her caseload.

- Although she signed annual disclosure reports that listed her stocks, Vratil said she lacked "conscious knowledge" that she had a financial interest in any of the companies while signing court orders.

That, she said, meant the stock ownership did not bias her rulings and did not create what she considered a true conflict of interest.

- Vratil said she told her staff to scour her mail and remove information about her investments, such as brokerage statements, annual reports and letters to shareholders. The judge said she did not want to know details of her portfolio.

However, federal law states: "A judge should inform himself about his ... financial interests." Ethicists said Congress enacted that rule to prevent judges from claiming ignorance of their investments.

- Finally, the judge said, the investment manager who bought stocks for her also bought stocks on behalf of other investors in a "managed money" program. That, she said, means her portfolio shared some, but not all, the attributes of a mutual fund.

Investments made through a mutual fund are exempt from ethics laws. Judges are not required to disclose the underlying stocks.

But Vratil's disclosure reports list her stocks as individual assets. The reports do not identify the securities as part of a

fund and do not indicate they were under independent management.

And Vratil acknowledged that, unlike mutual fund investors, she took direct ownership of the stock and was notified about all trades.

"I considered the ownership to be sort of technical in nature," Vratil said. "I don't know if I made the right call."

Vratil said she discovered her stock ownership last spring while in the midst of two of the lawsuits. She disclosed the investments, withdrew from the cases, then told her staff to search for similar problems in older, closed lawsuits.

Vratil eventually notified litigants in at least six of those legal actions about her stock. She mailed letters to them about two weeks after *The Star* began reviewing her finances. The timing, she said, had nothing to do with the newspaper's inv estigation.

In some other lawsuits, Vratil said, she was unaware she had owned stock in a litigant or in a litigant's parent company until questioned by *The Star.*

Vratil says she has moved her savings into mutual funds to avoid similar problems in the future.

"I'm sorry this happened," she said. "And this is not going to happen again."

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NAME: Elmo B. Hunter
COURTHOUSE: Kansas City
APPOINTED: In 1965 by President Johnson
PROBLEM CASES: 5


Hunter

Hunter's financial disclosure reports show he owned General Motors stock worth as much as $250,000 while presiding over all or part of four legal actions involving the car company or one of its wholly owned subsidiaries.

Midway through one lawsuit against a General Motors subsidiary, Hunter notified lawyers for both sides that he owned General Motors stock. The lawyers waived any objection, and Hunter remained on the case until its conclusion seven months later.

Federal law requires judges to withdraw when they know they have an interest in a litigant, even when no one objects.

In a fifth case, Hunter's wife owned stock in General Electric while he appointed a legal courier in a lawsuit involving the company.

Hunter, who has been ill, could not be reached for comment. Lawyers in the cases, like those in the other lawsuits identified by *The Kansas City Star's* study, said they saw no evidence of bias in the judge's rulings.

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NAME: Fernando J. Gaitan Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 3

Gaitan owned stock in AT&T while presiding over all or part of three cases involving the company or one of its wholly owned subsidiaries. Gaitan declined repeated requests for an interview.

Gaitan

In a brief letter, however, he described his handling of the lawsuits as minimal and called his investment in the company insubstantial. Federal records show his stock was worth $15,000 or less.

Gaitan said he acquired the stock during the six years he worked for a subsidiary of AT&T.

"Obviously, I would not intentionally violate a code of conduct," Gaitan wrote. "I have scrupulously avoided conflicts during my nearly 18 years as a judicial officer.

"Two of the three cases were dismissed by agreement of the parties at a very early stage. The third was dismissed for plaintiff's failure to comply with procedures necessary to prosecute the case, again at an early stage of the case."

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NAME: Howard F. Sachs
COURTHOUSE: Kansas City
APPOINTED: In 1979 by President Carter
PROBLEM CASES: 3

Sachs owned up to $50,000 worth of stock in AT&T while entering orders in three cases against AT&T or one of its wholly owned subsidiaries.

Sachs

In one lawsuit, Sachs issued two orders, then disclosed his stock ownership and withdrew.

In another, Sachs said a clerk stamped his signature on an order appointing a legal courier; Sachs later disclosed his stock and passed the case to another judge. That order, like many identified by the study, was routine and had little effect on the c ase.

None of the litigants in Sachs' cases contested any of the orders, and Sachs estimated he spent no more than a minute working on each lawsuit.

He acknowledged that "conceivably, somebody could say it's an illegal situation." But he called any violation a technicality and said he would be inclined to do the same thing in the future.

"Maybe," he joked, "I will be impeached."

.....

NAME: Dean Whipple
COURTHOUSE: Kansas City
APPOINTED: In 1987 by President Reagan
PROBLEM CASES: 2


Whipple

Whipple presided over two lawsuits against the Philip Morris Cos. and other cigarette manufacturers. The suits, each filed by a state inmate, accused the tobacco companies of manipulating nicotine levels to addict smokers.

Whipple declared both cases "frivolous" and threw them out of court. He said he believed he could lawfully handle the lawsuits, despite owning up to $15,000 worth of stock in Philip Morris.

"I take the position that whatever I rule will not affect the bottom line of Philip Morris," he said.

After researching the issue, however, Whipple agreed his position was not supported by most legal ethicists or by case law.

"I'm in the minority in my opinion," he acknowledged. "Although I think that I have a valid argument, I'm not going to fight it. And so, from now on, if I have a case where I own any stock, I'll just disqualify (withdraw)."

Shortly after being questioned by a reporter, Whipple sold all his shares in Philip Morris.

"I don't want any question," he said, "about whether I had any ulterior motive on those cases."

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NAME: John W. Lungstrum
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 2

Lungstrum

Lungstrum presided over two lawsuits against companies in which he and his family owned stock. In each instance, he acknowledged, his actions appeared contrary to ethics laws.

Lungstrum entered several orders in a $2 million lawsuit against the Chrysler Corp. that the litigants ultimately settled out of court. He said the case slipped by because he bought stock in the car company -- up to $15,000, according to his disclosure form -- after the case was assigned to his courtroom.

"I forgot I had the case at the time the stock was bought," he said. "By the time the case came back to my attention, I had forgotten I had the stock."

Lungstrum also filed one order and approved a consent decree in a lawsuit over the multimillion-dollar cost of cleaning up a Superfund hazardous waste site in Johnson County. Lungstrum and his family owned up to $50,000 in stock in one of the many comp anies named in the lawsuit.

"I may not have even checked who the parties were," he said. "I probably just got lazy."

Lungstrum said he made no contested rulings in that case. Still, he says he plans to tighten his procedures for identifying financial conflicts.

"We should be concerned about these things," he said. "I'm glad to have my attention called to it, and to redouble my efforts to make sure things don't fall through the cracks."

NAME: D. Brook Bartlett
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2

Bartlett

Bartlett, chief judge for the Western District of Missouri, presided over two lawsuits against McDonald's restaurants while he owned up to $50,000 in stock in McDonald's Corp.

In one case, Bartlett issued two orders, then disclosed his stock ownership and withdrew. In the other, he issued one order, then granted the plaintiff's request that he dismiss the lawsuit.

"I should not have done that," Bartlett said. "It probably was a technical violation (of ethics laws).

"It's below the standards I set for myself. It just means I have to be more careful."

Upon checking, Bartlett said he was relieved to discover that "all orders entered were either routine or not opposed by plaintiff."

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NAME: Ortrie D. Smith
COURTHOUSE: Kansas City
APPOINTED: In 1995 by President Clinton
PROBLEM CASES: 1

Smith issued a single order setting deadlines in an employment discrimination lawsuit against Wal-Mart Stores Inc. Two months later, Smith withdrew because he owned up to $15,000 worth of stock in the company.


Smith

"It probably was a technical violation (of the law)," Smith said. "I regret that it happened, but it did."

Smith said he did not read the routine order, which was issued by a clerk using a signature stamp. The order did not affect the outcome of the lawsuit, he said.

"There should have been a procedure in place to avoid it ever coming to me to begin with," he said of the case. "That is now in place."

• **Joseph E. Stevens Jr.:**
Position held at hospital poses different problem

.....

No problems

District judges from the Kansas City area who did not issue any court orders in cases involving companies in which they owned stock:

WESTERN DISTRICT OF MISSOURI

Gary A. Fenner
Nanette K. Laughrey
Scott O. Wright

DISTRICT OF KANSAS

Earl E. O'Connor
G. Thomas Van Bebber

Position held at hospital poses different problem

NAME: Joseph E. Stevens Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2


Stevens

For many years, Judge Stevens was a powerful figure at Truman Medical Center, where he sat on the board of governors.

But during that time he also had a hand in the hospital's affairs while sitting on the bench.

That's where, in May 1995, Stevens threw out a legal claim against Truman. Eleven months later, he threw out another.

He ultimately dismissed both lawsuits "with prejudice," meaning the plaintiffs can never refile them.

Yet federal law is clear: Judges must withdraw from any lawsuit in which they know they are a "director, adviser or other active participant in the affairs of a party."

Stevens did not dispute that he should not have handled cases against Truman. In fact, he said he was surprised to learn that he had presided over the lawsuits. Each was filed by an inmate at the Jackson County Jail, alleging he received substandard medical care.

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Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

"If I had known Truman was on the pleading," Stevens said, "I would not have signed the orders."

Each order emanating from Stevens' chambers bears his signature. But in many routine lawsuits, he said, law clerks draft orders for him to review and sign.

If they failed to point out Truman was a defendant, he argued, the conflict was due to "administrative error" by the clerks -- not to his own lapse.

Both of the court orders that dismissed the claims against Truman referred to the medical center four times by name. One of those orders mentions Truman in both its first and last sentence. Directly below the last sentence, the judge signed his name.

Yet Stevens said that does not mean he realized Truman was a defendant. "I just barely see them," he explained of the orders, which did not list Truman in the headings.

Stevens said *The Star's* discovery might lead him to resign from Truman -- and nine days later he did.

At Truman, Stevens said, he and his fellow governors acted as advisers to the hospital's board of directors.

Governors attend but have no vote at the hospital's monthly business meetings. That power is reserved for directors, a position Stevens held for nine years before becoming a governor.

But governors also serve on policy committees with the directors. Governors may vote at committee meetings, officials said, and their duties can include guiding litigation.

The hospital listed Stevens in its corporate filings as part of the medical center's controlling board. And it listed

Stevens on its federal tax return as among its "directors, trustees and key employees."

Still, Stevens said, determining whether his actions broke ethics laws remains "a hard question."

"There isn't any black and white," he said.

But the judge agreed that his actions may have created the appearance of impropriety.

"I now think it would have been better," he said, "to have recused."