ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Key Largo, Florida
March 9-10, 2000

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 9 - 10, 2000
Key Largo, Florida

Agenda

Introductory Items

1. Approval of minutes of September 1999 meeting.

2. Report on the January 2000 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). (This will be an oral report by the Chairman and the Reporter.)

3. Report on the February 4, 2000, attorney conduct session. (This will be an oral report by Gerald K. Smith, Esq..)

4. Report on the January 2000 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report by Judge James D. Walker, Jr.)

Action Items

5. Consideration of comments received to the preliminary draft of proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 published August 1999, and review of comments received to the preliminary draft of proposed amendments to Civil Rules 5, 6, and 77 concerning electronic service.

6. Proposed amendments to Rule 2014 on employment of professionals, recommendations of Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements.

7. Consideration of whether to propose amending Rule 1006 to delete as substantive the prohibition on a debtor's payments to professionals while paying filing fees in installments.

8. Proposed amendments concerning capacity of infants, incompetent persons, corporations, and other entities to commence a bankruptcy case.

9. Proposed amendments to Rule 9027 on removal and remand.

10. Proposed amendments to Rule 2015(a)(5).

11. Proposed amendment to Rule 2002(f)(7) regarding notice of an order confirming a chapter 13 plan.

12. Proposed amendment to Rule 8014 concerning taxation of costs in an appeal.

13. Consideration of language concerning attorney admitted "pro haec vice" added to Committee Note to previously approved amendment to Rule 2004.

14. Consideration of privacy issues and possible amendments to the rules and official forms to reduce Internet exposure of personal information.

15. Consideration of feasibility of converting the time periods specified in the rules to seven days, 14 days, and 21 days.

Subcommittee Reports

16. Report of the Forms Subcommittee.

17. Report of the Technology Subcommittee. (This will be an oral report.)

Information Items

18. Special Report: Status of "bankruptcy reform" bills. (This will be an oral report by Peter G. McCabe.)

19. Texts of proposed amendments to rules and official forms previously approved by the Advisory Committee: Rules 4004 (9/99) and 9014 (9/99); Official Form 1, Voluntary Petition, and Exhibit "C" (to be republished for comment) (3/99); Official Form 7, Statement of Financial Affairs (9/99).

20. Progress chart of proposed amendments.

21. Next meeting reminder: September 21 - 22, 2000, at Arden House Conference Center, Harriman, New York

Administrative Matters

22. Discussion of dates and place for March 2001 meeting.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

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Judge Robert W. Gettleman
Judge Donald E. Cordova
Judge Robert J. Kressel
Leonard M. Rosen, Esquire
Howard L. Adelman, Esquire

Subcommittee on Contempt
Judge Robert J. Kressel, Chair
J. Christopher Kohn, Esquire

Subcommittee on Forms
Judge Robert J. Kressel, Chair
Judge James D. Walker, Jr.
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire

Subcommittee on Government Noticing
[Vacant], Chair
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Richard G. Heltzel, Bankruptcy Clerk

Subcommittee on Injunctions in Plans
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Judge Norman C. Roettger, Jr.
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
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Subcommittee on Litigation
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Judge Robert J. Kressel
Judge A. Thomas Small
R. Neal Batson, Esquire
Gerald K. Smith, Esquire

Subcommittee on Style
Professor Alan N. Resnick, Chair
Judge Donald E. Cordova
Professor Kenneth N. Klee
Peter G. McCabe, ex officio

Subcommittee on Technology
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Judge Bernice B. Donald
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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 27 -28, 1999
Jackson Lake Lodge, Moran Junction WY

Draft Minutes

The following members attended the meeting:
District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
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
Professor Mary Jo Wiggins
Gerald K. Smith, Esquire
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Eduardo C. Robreno, Leonard M. Rosen, Esquire, and R. Neal Batson, Esquire, 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"), Bankruptcy Judge Frank W. Koger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy 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 James D. Walker, Jr., and Howard L. Adelman, Esquire, appointed to the Committee for terms beginning October 1, 1999, also attended 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. Ketchum, 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, David M. Poitras, Esquire, a member of the American Bar Association's General Practice, Solo and Small Firm Section, 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 March 1999 meeting.

The Chairman welcomed Judge Walker and Mr. Adelman, newly appointed members, the guests present, and noted with thanks the service of the members whose terms were expiring: Judge Robreno, Judge Small, Mr.Smith, and Mr.Batson. He also informed the Committee that Professor Resnick, the Committee's Reporter, would be retiring as Reporter and joining the Committee as a member. He announced that Professor Morris, a consultant to the Committee for the past year, would be the new Reporter.

The Chairman and Professor Resnick reported on the actions taken at the June 1999 meeting of the Standing Committee. The proposed amendments submitted by the Committee were approved for transmittal to the Judicial Conference. The draft amendments which the Committee requested permission to publish for comment also were approved for that purpose. Amendments to Rule 5 of the Federal Rules of Civil Procedure (Civil Rules) to permit service of papers after the initial complaint by electronic means, which the Committee had discussed at the March 1999 meeting, also were approved for publication. If adopted, they would permit similar electronic service in adversary proceedings. There was a division of opinion among the advisory committees over whether to afford parties who receive service electronically the additional three days for response currently available when service is made by mail. Accordingly, the proposed amendments to Civil Rule 6(a) and Bankruptcy Rule 9006, as published, are not consistent.

The Standing Committee also approved and forwarded to the Judicial Conference proposed amendments to the Civil Rules on discovery. Under the proposed amendments, a mandatory disclosure requirement narrower than the scope of the present Rule 26(a) would become the national rule, although a court could order otherwise in a particular case. The current provision allowing a district to opt out of mandatory disclosure by local rule would be deleted. The Reporter noted that Rule 9014 makes Rule 26 applicable in contested matters unless the court orders otherwise and suggested that the Committee may want to address Rule 9014 in connection with this issue. The amendments to the Civil Rules were approved by the Judicial Conference in mid-September, with the exception of a proposed amendment to Rule 26(b)(2) which would have allowed "burdensome" discovery at the expense of the requesting party.

Judge Kressel said the Committee should consider promptly the matter of mandatory disclosure, both as an amendment to Rule 9014 and in adversary proceedings, because of the time issues that pervade bankruptcy cases. Professor Resnick noted that Bankruptcy Judge Louise DeCarl Adler had written a letter stating that mandatory disclosure should not apply in adversary proceedings involving less than a certain dollar amount.

The Chairman reported that the Standing Committee had approved a resolution of appreciation for Professor Resnick and his extraordinary contributions to the rules and the work of the rules committees over his 12 years as Reporter. Judge Duplantier presented Professor Resnick with an illuminated rendering of the resolution. Professor Resnick expressed thanks for the opportunity to work with four chairmen of the Committee and with the more than 40 Committee members during his service as Reporter. He said he also was grateful to the chairs and members of the Standing Committee, to its Reporter, Professor Coquillette, and to the reporters for the other advisory committees whom he had gotten to know. He also thanked the Administrative Office staff for their support and congratulated Professor Morris on having accepted a rewarding post.

The Chairman said the Standing Committee had asked the various advisory committees to study the issue of judicial conflicts of interest and divestiture/recusal requirements, a subject which had received extensive press coverage over the prior year. He said that public interest groups had paid to obtain the financial disclosure statements of many district judges. Rule 26.1 of the Federal Rules of Appellate Procedure (Appellate Rules) requires any nongovernmental corporate party to an appeal to list all its parent corporations and any publicly held company that owns ten percent or more of the party's stock. The Standing Committee had asked the advisory committees to consider specifically whether a similar rule should be in all the federal rules, he said. Professor Resnick said the reporters already are scheduled to meet at the January 2000 Standing Committee meeting to prepare a common draft.

Professor Klee said the difficulty in bankruptcy will be similar to that in a civil class action: too many parties all making disclosures that must be checked. Judge Duplantier said that is part of judging, and the judge must read them all. Professor Resnick said that the bankruptcy rule probably could limit the duty to disclose to parties involved in adversary proceedings and contested matters. The proof of claim form could be modified to require the disclosures, but this approach might not be effective, as judges normally do not see the proofs of claim. Judge Cordova said the filing of a proof of claim generally is too broad a test, that conflict-checking should await the filing of an objection to a claim. Professor Klee said Rule 3001 also should be amended to require a claims purchaser to disclose its corporate parents, because claims purchasing can be used strategically to disqualify a judge.

Judge Cristol said there should be carve-outs for holdings of entities like Blue Cross and public utilities, but Judge Duplantier said the rule could not change the statute, which disqualifies a judge from sitting in a case if the judge holds a single share of stock in a party. Judge Kressel said that Appellate Rule 26.1 would not pick up partnerships and other important connections. Judge Duplantier said he believed any new rule would be broader than the current one. Professor Klee said Rule 26.1 would not create a problem because it is very narrow; his concern, rather, would be with a broader sweep. Judge Gettleman said the simple solution for a judge is to sell

the stock in question when a conflict is discovered. He noted that the frequency of conflicts is increasing with corporate fluctuations and that partnerships which include corporate partners are particularly difficult to monitor for conflicts. He said he would like to see a conflict-checking software program combined with electronic filing.

Judge Tashima said that judges need software similar to that used by law firms to perform conflicts checks and an entity should become a party to which the disclosure requirement would apply only when the party makes an appearance or takes action in the bankruptcy case. Mr. McCabe described a judicial conflict-checking software program originally developed by the district court in Maine and now being distributed by the Administrative Office to any court that requests it. The program runs overnight to check against new filings, but depends ultimately on up-to-date information from judges about their holdings to be fully effective. A conflict-checking function will be included in the Case Management/Electronic Case Files systems now being developed for the federal courts.

Judge Duplantier said that disclosure is all that is being discussed, and it is very simple. What happens after the disclosures are filed is not a concern of the rules, he said. Mr. Smith and Professor Klee pointed out that in a chapter 11 case scheduled claims are allowed and that, if any rule were too broadly stated, the debtor might be required to make the disclosures but not have the information.

The Chairman said he would inform the Standing Committee that the Committee approves in principle the adoption of a general rule to require disclosure of corporate parents and partnership members. He said any bankruptcy problems seem to resemble the ones in civil class action cases and are not insurmountable. He said the Committee should plan on responding to a proposed common draft at its next meeting and could include any special bankruptcy considerations at that time.

Mr. Smith reported on the activities of the Ad Hoc Committee on Attorney Conduct of the Standing Committee. He said the group is still considering whether to propose any federal rule or rules governing attorney conduct, but appears to be moving toward a rule that would expressly make applicable the rules of the state in which the trial court is located, subject to some exceptions. He said the group appeared ready to allow the Committee some leeway in determining the exceptions that would apply in bankruptcy representation. He said it is important for the Committee to continue grappling with the core issues: defining what is an adverse interest in the bankruptcy context, and establishing when a chapter 11 debtor's counsel may become adverse. The Ad Hoc Committee had a meeting scheduled for the day after the Committee meeting, he said, and there would be further developments to report at the March 2000 meeting.

Judge Kressel reported on his attendance at the June 1999 meeting of the Bankruptcy Committee. He said the Bankruptcy Committee members were impressed that the Committee had been willing to change its mind about the effort to nationalize motion practice. The

Bankruptcy Committee discussed a proposal to amend the bankruptcy judge recall service regulations to permit recalled judges who serve on bankruptcy appellate panels (BAPs) to hear cases from the districts in which they formerly served, he said. The Bankruptcy Committee, however, determined that considering appeals from a district the recalled judge formerly served in would be inappropriate, even though the statute (28 U.S.C. § 155(b)) seems not to prohibit it. The Bankruptcy Committee also approved changing the bankruptcy appellate structure to add a method for direct appeal to the circuit, bypassing the district court or BAP, at the option of the circuit and on certification from the district court or BAP that the matter presents an important question of law. At its September 1999 session, the Judicial Conference also had approved the proposal to add the direct appeal option, he said.

The Reporter discussed the pending bankruptcy reform legislation, which could be enacted either before this session of Congress ends or early in the next session. Both the House and the Senate bills contain provisions requiring new official forms in small business chapter 11 cases, including monthly operating reports, disclosure statements, and plans, he said. Mr. Patchan had offered to assist in developing these, and three United States trustees had met with Professor Resnick in New York in anticipation of the enactment of legislation. The trustees had provided Professor Resnick with copies of existing disclosure statement forms used, or proposed to be used, in five United States trustee regions. Mr. Patchan's office also has copies of operating report forms currently in use, he said, and all of these can be used as the basis for any statutorily-mandated forms. Mr. Patchan said his office had prepared a draft set of proposed national forms derived from various local forms, that copies had been sent to the meeting, and that he would welcome any reactions and comments from Committee members.

Action Items

Rules 9013 and 9014. The Reporter introduced the proposed amendments to Rule 9013 and reviewed their history. The Committee's intent in publishing a draft amendment in 1998 had been to provide guidance to the courts and the bar on matters that usually are routine and uncontested but require a court order and to specify a procedure by which the court could consider and act on such matters ex parte. This proposal had been generally well received, but did not go forward because it was part of a larger package of amendments which the Committee had withdrawn for further study.

Professor Resnick said that Mr. Rosen, who could not attend the meeting, had made a style suggestion concerning line 3 of the draft that would change the first two words from "when an application is authorized" to "made in an application authorized." The Reporter's suggested changes to the existing Rule 9013(a), he said, are all stylistic except in line 6 where the Reporter had inserted "and a hearing" so that a motion generally would be considered "after notice and a hearing" as that phrase is defined in § 102 of the Bankruptcy Code. Proposed Rule 9013(b), he

said, contains a list of matters that could be decided with no prior notice to other parties, matters that would be relatively easy for a court to undo in the event a party were to file a motion to reconsider or vacate.

Concerning the proposed amendments to Rule 9014, the Reporter explained that the purpose of referring to Civil Rule 5 rather than Bankruptcy Rule 7005 is to make it clear that the methods of service authorized, including the proposed authorization of electronic service, apply only to the serving of papers filed after the initiating motion. Rule 9014(d) addresses the use of affidavits, and Rule 9014(e) requires the court to provide notice procedures concerning whether to bring witnesses to a hearing, he said.

A member asked whether the Committee should eliminate the word "application" from the rules, so that every request for court action would be a motion. Another member observed that once "and a hearing" is added to Rule 9013, there really is no difference between Rule 9013 and Rule 9014. The Reporter acknowledged that the terminology is inconsistent and agreed that the inconsistencies make distinguishing between the two rules more difficult. Judge Duplantier suggested changing the phrase to "an opportunity for a hearing" as in Rule 9014. The Reporter said "notice and a hearing" is defined in § 102 of the Code to mean an opportunity for a hearing. Judge Kressel said the phrase should be deleted from Rule 9014 . Professor Klee said the use of the word "service" also is used inconsistently in Rules 9013(a) and (b) and 9014. In addition, he said, the list of matters in Rule 9013(b) is non-exclusive, and judges might be encouraged to determine more and more matters ex parte. The Reporter said the Committee could simply leave Rule 9013 as it is, so that whether a matter could be determined ex parte would be in each court's discretion. He noted that Rule 9013 as published did not have a list of ex parte matters, that the list was an idea that had come up at the March 1999 meeting, and that perhaps the Committee was again falling into the trap of trying to micro-manage procedure. **A motion not to amend Rule 9013, but leave it as it presently is, passed by a vote of 9 to 3.**

Judge Tashima said that proposed Rule 9014(d) should state explicitly that direct testimony of a witness can be in an affidavit so long as the witness is available for cross examination, but if the Committee disagrees, that the Committee Note should mention that direct testimony by affidavit is permitted in some circuits, citing In re Adair, 965 F.2d 777 (9th Cir. 1992). Judge Duplantier said he opposed the suggestion, and that affidavits should not be admitted as testimony at trial. With respect to proposed Rule 9014(e), Professor Klee said the bracketed language on line 26 should be included so that any notice of an evidentiary hearing would go to the witnesses as well as the attorneys. Judge Cristol suggested simply stating that any notice of a hearing must inform the recipients whether the hearing will be an evidentiary one.

A motion to accept Rule 9014 as drafted, including subdivisions (d) and (e) but without the bracketed language in line 26, passed with no opposition.

Mr. Frank observed that there remains a gap in the rule concerning who must be served and asked whether that is intentional. The Reporter said the draft is deliberately silent in response to public comment criticizing the service list in the previously published draft. There was no consensus to delete the phrase "opportunity for hearing" from subdivision (a). A member suggested that a sentence be added at the end of subdivision (a) permitting the movant to request a response to a motion. Judge Duplantier suggested deleting "under this rule" from line 4 as a matter of style. Professor Klee questioned the phrase "the court directs" rather than "the court orders," and the Reporter said he had used "directs" so that a court could use a local rule to require a response to a motion, rather than having to order a response in every instance.

Rule 1006. The proposed amendments had been approved for publication previously and were published in 1998, although they were unrelated to the amendments to Rules 9013 and 9014. A member questioned the provision in the rule that forbids paying an attorney until the filing fee has been paid in full and said the provision appears to be substantive. The Reporter agreed that the provision is substantive, although it has been in the rule for a long time. He added that Henry Sommer, a former member of the Committee, often had said a debtor should not have to apply to the court, as the right to pay in installments is granted by statute in 28 U.S.C. § 1930. After discussion, **the Committee determined not to forward the proposed amendments to the Standing Committee and requested the Reporter to prepare a memorandum concerning the rule generally.** The memorandum would cover the following points: whether the provision forbidding payment to an attorney is substantive and, therefore, violative of the Rules Enabling Act, whether the present rule actually favors petition preparers and encourages debtors to use them, the regulation of petition preparers under § 110 of the Code, and ways to safeguard debtors against being punished for using a petition preparer. Mr. Patchan suggested amending the form to require disclosure of the amount paid to a petition preparer and added that the United States trustee program is preparing to issue guidelines on petition preparer fees.

Rule 2004. The amendment to Rule 2004(c), previously approved by the Committee and published for comment, makes it clear that an examination under the rule can be held outside the district where the case is pending. Mr. Kohn suggested that it would be useful to add to the Committee Note the language concerning the issuance of a subpoena by an attorney admitted pro hac vice from the Committee Note to the 1991 amendments to Civil Rule 45. **A motion to include the suggested language in the Committee Note to Rule 2004 carried unopposed.**

Rules 1004 and 1004.1. Professor Morris had prepared draft amendments and a memorandum on the capacity of infants, incompetent persons, and corporate and partnership entities to file bankruptcy for the March 1999 meeting. The Committee considered these briefly at that meeting and postponed further consideration. The Committee also had requested Professor Morris to consider the question of making Civil Rule 17 applicable throughout the Bankruptcy Rules, rather than only in adversary proceedings as it currently is under Rule 7017.

He said it is important in working with Civil Rule 17 to avoid drafting a substantive rule that could be construed as conferring a right or capacity to file a bankruptcy petition by an entity -- a corporation, for example.

Professor Resnick said that if the bankruptcy rules were to make Civil Rule 17(b) applicable beyond adversary proceedings, some states likely would pass laws making corporations bankruptcy-proof, and there is no evidence before the Committee that corporations are encountering challenges to their right to file bankruptcy petitions. Professor Klee said various problems, such as deadlocked boards of directors and bankruptcy-remote state laws, do not currently raise rules questions but would do so under the draft amendments concerning corporations. He also said it does not make sense for the rules to treat partnerships without also treating corporations, limited liability corporations, and limited liability partnerships. **The Committee determined not to go forward with a rule on filing by a corporation and asked the Reporter to study whether to delete existing Rule 1004(a), filing by a partnership, with a Committee Note stating that the question is left to substantive law** (which could be either the Bankruptcy Code or state law).

The Committee discussed redrafting proposed Rule 1004.1, concerning filing a petition for an infant or incompetent person, to track the language of Civil Rule 17(c) more closely, keeping the changes only to those necessary to replace the word "sue" in Rule 17(c) by "file a voluntary petition," and stating in the Committee Note that the bankruptcy rule merely tracks the existing civil rule. **A motion to alter the draft as discussed was not opposed.** On the second day of the meeting, the **Committee agreed to add the words "not otherwise represented" at the end of the draft rule.**

Rule 2014. Mr. Smith introduced the proposed amendments recommended by the Subcommittee on Attorney Conduct, including Rule 2014 Disclosure Requirements. He noted that the amendments specify that a professional seeking approval of employment must disclose any interest, representation, or relationship that bears on whether the applicant has an interest adverse to the estate or on whether the applicant is disinterested. The proposed amendments also substitute "interest or relationship relevant" to determining disinterestedness for the existing "connections." The proposed amendments, however, still fail to provided guidance concerning what is a disqualifying interest or relationship, he said. Mr. Smith said there is no definition of "adverse interest" in the Bankruptcy Code or the Bankruptcy Rules and the unmodified word "connections" is too broad. The bar needs guidance on what to disclose, he said. Mr. Smith said he would like the rule to provide this kind of guidance, but that it probably would take several more years to develop a workable rule.

Professor Resnick said the proposals to amend Rule 2014 began after In re Leslie Fay Companies, Inc., 175 B.R. 525 (Bankr. S.D.N.Y. 1994). Several courts have indicated that lawyers must disclose all connections without screening out those that the lawyers believe are irrelevant, he said. Thus, it is not the lawyer but the judge who determines what is disqualifying. The new draft would change "setting forth the person's connections" with no limitations to

"relevant to a determination that the person is disinterested," which would allow the lawyer to screen out connections that are obviously irrelevant. The judge could still disagree and rule that a particular connection is relevant, but the initial disclosure decisions would be made by the lawyer, he said.

Mr. Adelman commented that as the word "connection" is used in § 101(14) of the Bankruptcy Code, it is only connections with the debtor or an investment banker of the debtor that taint prospective counsel. In his view, he said, it also is important to know that counsel had been retained by a prior board of directors or had brought in the same accounting firm in prior cases, yet such disclosures are not required now. Mr. Smith said there might be ways to avoid an adverse interest problem if debtor's counsel and the debtor were to agree to engage special counsel to determine whether to sue the creditor that debtor's counsel's firm represents in unrelated matters. In response to questions concerning the reason for requiring in the rule a broader range of disclosures than seems to be required by the Bankruptcy Code, Mr. Smith agreed that an admirable principle can be impossible to carry out in practice. As examples, he said a debtor's law firm must conflict-check more than every creditor; it must also check every ongoing contractor of the debtor, relationships anyone in the firm may have with attorneys and accountants for every creditor, and relationships anyone in the firm may have with any landlord of any of a retail debtor's 400 stores. Mr. Patchan said that at the time the rule originally was drafted there were major ethical problems in bankruptcy practice. Also, at that time, he said the bankruptcy practice mostly was confined to small, boutique firms, rather than the large, full service firms that are active in bankruptcy now.

The Chairman noted that Mr. Smith's term on the Committee would be ending and thanked him for his thoughtful work as subcommittee chairman. The Chairman said the subcommittee should continue its work under a new chairman to be appointed.

Rule 2002(h). Professor Resnick said the proposed amendment had been suggested by Bankruptcy Judge Arthur J. Spector and he reviewed the Reporter's memorandum in which he pointed out that adopting the suggestion to automatically discontinue notices to creditors who miss the claims filing deadline could be ill-advised. The memorandum notes that creditors entitled to priority under § 507 can be paid regardless of whether they file their claims before the deadline, and in certain circumstances general unsecured creditors can be paid if they file a claim before distribution begins. The Reporter suggested that if the Committee wants to amend the rule to save noticing costs, a better approach would be to amend Rule 2002(h) to automatically cut off notices to creditors who miss the deadline, unless the court orders otherwise. **By consensus, the Committee decided to take no action.**

Judge Gettleman noted a second issue contained in Judge Spector's letter, that of restricting the time periods in the rules to 7, 14, and 21 days, so that the time for taking action always would expire on the same day of the week as the filing or ruling to which the party would be responding. The Reporter said the Committee had discussed the idea previously, so he had not written a memorandum on it for this meeting. Judge Gettleman said many courts' local rules

are using the uniform one-week, two-week, approach and that he would like to revisit the matter. **The Chairman asked the Reporter to prepare a report on what the time limits are now in the various rules, although the Committee has no immediate plans to amend Rule 9006.**

Rule 9027. Bankruptcy Judge Christopher M. Klein had suggested that the rule should provide for notifying the nonbankruptcy court from which an action was removed of the entry of a remand order. In addition, Judge Klein had pointed out that the rules do not establish any time limit for removal of an action that may be filed after a bankruptcy case is closed. The Reporter had drafted an amendment to Rule 9027 that would direct the clerk, after the ten-day period to appeal had expired, to mail a certified copy of the order of remand to the clerk of the court from which the claim or cause of action was removed. The proposed amendment also included a sentence stating that the action then could proceed in the court from which it was removed except as otherwise directed by the court issuing the order of remand. Judge Kressel said that if the debtor is a party to the removed action, the sentence authorizing the court from which the matter was removed to resume the proceeding would violate the automatic stay. The Reporter suggested deleting the final sentence to remove any idea that an order of remand acts to lift the automatic stay. Judge Kressel also said he did not think the ten-day stay was necessary. The Reporter said it serves to recognize the participation of the Article III district court in the process, and that 28 U.S.C. § 1452 provides that an order of remand by a bankruptcy judge is subject to district court review. A motion to delete the ten-day stay was not acted upon. After a discussion about whether to specify or leave ambiguous which clerk -- bankruptcy court clerk or district court clerk -- should notify the court from which the action was removed, a motion to leave the word "clerk" unmodified also was not acted upon. **A motion to adopt the Reporter's draft except the final sentence passed on a voice vote.**

On the matter of removal after a case is closed, the Reporter said there appeared to be various options for amending Rule 9027(a)(3) to insert phrases such as "or is closed," "is or was pending," or "is pending or has been dismissed or closed." Professor Klee said a case might also be suspended if the bankruptcy judge has abstained under § 305 of the Bankruptcy Code. The Reporter said there might be additional considerations, such as whether the case must be reopened to address the removed action. Mr. Heltzel said that although reopening is not necessary for jurisdiction, a court probably would want to reopen the case for practical reasons such as researching the file in connection with the issues in the removed matter. Judge Kressel suggested deleting from Rule 9027(a)(3) the entire first clause, so that the rule would begin with the words "a notice of removal." This would remove both the existing "is pending" and avoid substituting other words that might not include all the possibilities. The consensus, however, was to substitute for the existing initial clause the following: "If a claim or cause of action is asserted in another court after commencement of the case,". On the second day of the meeting the Reporter offered a proposed Committee Note which, after changes suggested by the Committee, would read:

> Subdivision (a)(3) is amended to delete the words "is pending" to make it applicable when 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, dismissed, or closed.

The proposed amendment and committee note will be brought back to the Committee for final approval at the March 2000 meeting.

Rule 4004. Professor Morris introduced the amendment proposed by the Executive Office for United States Trustees (EOUST) to provide for delaying the debtor's discharge whenever a motion to dismiss is made under § 707, rather than only when the motion is made under § 707(b), as in the current rule. Judge Small said he supported the change, because it is difficult, procedurally, to revoke a discharge, and the only detriment to the debtor would be a delayed discharge. Judge Kressel agreed. **The Committee approved the amendment without opposition.** The Reporter commented that line 3 of the Committee Note should read "present" rather than "prior."

Rule 2015(a)(5). The EOUST also had proposed amending Rule 2015(a)(5) to require the filing of quarterly reports by a chapter 11 trustee or debtor in possession as long as the case is pending. Professor Morris noted that the pending bankruptcy reform legislation contained a provision that would amend 28 U.S.C. § 1930(a)(6) to provide that quarterly fees to the United States Trustee System Fund are no longer payable after confirmation of a plan or conversion of a case. The amount of any quarterly fee is based on information in the quarterly report. If the amending legislation is enacted, it would be unnecessary to file the reports after confirmation of a plan. **The Committee deferred consideration of the proposed amendment until the March 2000 meeting and instructed Professor Morris to add to the draft to be discussed the closing of the case as one of the events that would end the obligation to file reports.**

Rule 2010(b). The EOUST had proposed amending the rule to cover bonds other than the trustee's bond. **The Committee declined to amend the rule to expand its scope.**

Rule 9019. The Reporter introduced the problem, raised initially by Bankruptcy Judge L. Edward Friend, that it is unclear whether the Bankruptcy Rules continue to apply when a bankruptcy matter has been appealed to the court of appeals. Rule 1001 states that the rules apply to all cases under title 11 of the United States Code, and it is well understood that they govern in both the bankruptcy court and the district court. Rule 9019 requires that any settlement be approved by the bankruptcy judge after notice to all creditors. A settlement between the debtor and one creditor, or between two creditors, may adversely affect other creditors of the bankruptcy estate who are entitled to equality of treatment. The purpose of the Rule 9019 is to permit any creditor that may be affected to object and be heard by the bankruptcy judge before the settlement takes effect. If a matter is appealed to a court of appeals and a settlement reached at that point, however, the applicability of Rule 9019 is less clear, and at least one circuit has a local rule that permits a mediator "upon agreement of the parties, [to] dispose of the case."

Accordingly, Judge Friend had suggested that the Appellate Rules should be amended to assure that the notice and approval procedures required under Rule 9019 are observed when a matter is settled at that point.

The Committee discussed what the procedure should be when a settlement is reached at the court of appeals level and how the two courts should coordinate. Judge Duplantier said the party benefitting is going to want to know that the settlement will be approved before the court of appeals dismisses the appeal or otherwise terminates its role. He said that minors and incompetent persons also require delay procedures, so that a state court can approve, when a settlement is involved, and the settlement is not binding on the minor or incompetent person if the approval is not obtained. Judge Walker said many lawyers seem unaware of Rule 9019's continued applicability in an appeal situation, even at the district court level. He recalled one matter in which it was the district judge who brought the attorneys' attention to the rule. **A motion to recommend to the Advisory Committee on Appellate Rules that Appellate Rule 6 be amended to add Rules 9019 and 7041 to the list of bankruptcy rules that apply in the court of appeals passed with one member objecting.**

Official Forms. The Reporter presented several letters commenting on various forms and suggesting amendments to them. Bankruptcy Judge Susan Pierson Sonderby wrote that Official Form 20B seems to require a party to whose claim an objection has been filed both to file a written response and appear in court. Judge Sonderby stated that either a response or an appearance should be sufficient. Members discussed whether the form actually requires both a written response and an appearance or, rather, is ambiguous. The Reporter said the flexibility Judge Sonderby supports should be written in to the form.

A. Thomas DeWoskin, Esquire, a chapter 7 trustee, had written to suggest that Form 9, the Notice of Commencement of Case, etc. (§ 341 Notice) be amended to clarify that the trustee does not represent the debtor. The Reporter noted that the sample notice attached to Mr. DeWoskin's letter is not consistent with the official form. Joel L. Tabas, also a bankruptcy trustee, had written a letter commenting that Form 10, the Proof of Claim, is confusing for unsecured nonpriority creditors, who often mistakenly check the box labeled "Unsecured Priority Claim." This mistake results in the filing by the trustee of many otherwise unnecessary objections to claims. The consensus was that, as the form was amended in 1997, it is too soon to amend it again. Bankruptcy Judge Paul Mannes had forwarded several suggestions to improve the grammar and style of the new Reaffirmation Agreement form, which was adopted in 1999 as a "Director's Form," but is intended to be published for comment and adopted as an Official Form after Congress acts on the pending bankruptcy legislation. **The Committee referred all of these suggestions to the Forms Subcommittee.**

Mr. Patchan said that the copies of the proposed forms package for reporting by small businesses the EOUST had drafted to implement the pending bankruptcy reform legislation had arrived and were available for review by the Committee members. He said his office is prepared to assist the Committee with any official forms that may be required once the legislation is

enacted. Professor Klee asked whether the draft forms had been reviewed by an accountant, and Mr. Patchan replied that his staff includes analysts who are certified public accountants. The Reporter mentioned that the Committee also could request that a consultant be engaged to provide any expert review of proposed official forms that might be needed, and Mr. Smith suggested that help also might be available from other private sources, such as from an ad hoc group that could be formed by the Insolvency Institute.

Official Form 7. Judge Kressel reported that the Forms Subcommittee had considered the suggestions referred to it at the March 1999 meeting: 1) to separate the business-related questions from those to be answered by all debtors, and 2) to make it clear that individual consumer debtors can skip the business-related questions entirely. He said the subcommittee had decided not to make two separate forms, despite the extra paper that is generated in cases filed by individual consumer debtors, at least as long as the courts still use paper. Mr. Heltzel reiterated his observations about the file space required for the blank pages of the form and the disk space occupied when the documents are scanned, but added that a solution to the storage problem may have to await the next major revision of the forms. Judge Kressel commented that most individual consumer debtors also file several blank schedules, as well. Judge Gettleman asked whether a court could be permitted to dispose of unneeded items after ascertaining that the filing was complete. Professor Resnick suggested that the business questions could become an exhibit to Form 7, similar to Exhibit "A" to Form 1, the Voluntary Petition, with directions to attach the exhibit if the debtor is in business. Professor Morris said that the environmental authorities might not be satisfied with the transfer to an exhibit of the environmental question now Question 25 in the business section. It would be too easy for a debtor to evade answering the question by saying, "I didn't notice the exhibit," he said. Professor Klee observed that the new sentence that had been inserted at the beginning of the business questions starts with the phrase "An individual or joint debtor" rather than "A debtor" as in the current form; he questioned whether an individual debtor should be exempted from answering the environmental question. Professor Resnick suggested that the Committee could move Question 25 forward to the part of the form to be answered by all debtors. Mr. Kohn said he is concerned that Form 7 not be further delayed and noted that the substance of the changes, the new questions, already had been published for comment. **The consensus was to approve the new instructional sentence, move Question 25 to make it answerable by all debtors, and issue the form without republication.**

Rule 2002(f)(7). This rule requires that notice of the entry of an order confirming a plan in a chapter 9, 11, or 12 case be mailed to all creditors, but does not require that any notice be sent when a chapter 13 plan is confirmed. Bankruptcy Judge Paul Mannes had suggested that the Committee consider amending the rule to include sending notice when a chapter 13 plan is confirmed. Judge Mannes had noted the 1994 increase in the debt limit for eligibility for chapter 13 to more than $1 million and suggested that the higher limit should entitle creditors to notice. Mr. Frank said he did not think the increased debt limit justified requiring notice. He added that many unsecured creditors do not begin receiving payments immediately in chapter 13. He said it is uncertain whether notice would be helpful or would simply lead to unrealistic expectations of prompt payment. Professor Klee noted that, unlike chapter 11, most plans in chapter 13 cases are

confirmed. He suggested that any need for notice could be satisfied by including in the notice of the confirmation hearing a sentence that directs creditors to assume confirmation unless they receive notice otherwise.

Judge Walker said that formerly, when notice was given, it included other information that was useful to the parties. Judge Small said that chapter 13 plans change before confirmation and that bare notice may not be useful. Professor Wiggins said the Committee needs more empirical information before deciding what to do. Judge Cordova said that in Colorado the chapter 13 trustee sends every creditor a copy of the order confirming the plan, even though not required by the rules. The court has found that a copy of the order gives creditors the information they need and stops phone calls to the court and the trustee. The Reporter noted that the Committee had a chapter 13 subcommittee in the early 1990s which had found that every court handles chapter 13 cases differently. Professor Morris said that in the Southern District of Ohio, each division has separate local rules governing chapter 13 procedure.

There was no support for a bare notice of confirmation. The Committee preferred either a rule specifying that certain information must be provided upon confirmation or leaving the matter to the local legal culture. Mr. Patchan said the EOUST has general policies on the subject, but that chapter 13 administration is the most local of operations. He said the EOUST could encourage trustees to provide information upon confirmation but that a statement in the national rules would be helpful. Judge Walker suggested asking a sample of chapter 13 trustees what information they can conveniently generate from their existing software and include in a confirmation report to creditors. He said the bankruptcy system faces an integrity issue, because the world at large does not know what the courts and trustees are doing. This lack of information, he said, may be part of what is driving the bankruptcy reform legislation. Mr. Patchan said the EOUST can conduct a survey of current practices and report at the next meeting.

Rule 7004. Bankruptcy Judge David H. Adams had suggested 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). Judge Kressel said the rule appears to be ambiguous, because people address service to "ABC Corp., Attention: officer, managing or general agent." The Reporter pointed out that Rule 7004 tracks the language of Civil Rule 4, and that if the Committee were to change Rule 7004 -- perhaps to require that a name be used -- the Standing Committee would want the Committee to coordinate the proposed amendment with the Advisory Committee on Civil Rules. Judge Walker said he has seen a name challenged on the basis there was no proof that the person named had the capacity to receive service on behalf of the corporation. He said the rule is sufficient as it is, and Judge Gettleman agreed. Judge Donald said requiring parties to name an officer, director, or managing agent would create more problems than it would solve. **The Committee determined to take no action on the rule.**

Civil Rule 4.1. Scott William Dales, Esquire, had recommended that the Bankruptcy Rules be amended to incorporate Civil Rule 4.1(a) or to include a similar rule to provide

bankruptcy judges with express authority 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. Committee members, however, said bankruptcy judges use United States marshals to dispossess debtors from property of the estate, to apprehend debtors who fail to appear, and to aid the trustee in taking possession of bankruptcy estate property, and that there does not appear to be a problem. **The Committee determined to take no action.**

Attorney Fees in Chapter 13 Cases. Wayne R. Bodow, Esquire, had 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. The consensus was that the suggestion is substantive and not a matter that can be addressed in the Bankruptcy Rules. **A motion to take no action in the Bankruptcy Rules but to inform Mr. Bodow that he should direct his letter to Congress passed without opposition.**

Rule 2003. A proposal to amend the rule was withdrawn, because a similar amendment had been prescribed by the Supreme Court and was due to take effect December 1, 1999.

Subcommittees

Technology Subcommittee. Judge Duplantier reported that Judge Cristol and Mr. Heltzel had attended all the meetings of the Standing Committee's Technology Subcommittee and had represented the Committee very ably. Mr. McCabe said the major new technology-related issue arises from the posting of documents on the Internet by the courts that are the prototypes for the electronic filing system. Other courts, he said, are imaging paper documents and posting them on the Internet. Section 107 of the Bankruptcy Code also states that every document filed in a bankruptcy case is a public record, he said, and the clerks have traditionally thought that they have no right to restrict access to documents filed with the court. Many judges agree with this view, he said. Others, including some judges, are concerned that unrestricted Internet access to court files may be an unwarranted invasion of the privacy of the parties. This tension between the right of public access and the right of privacy can be resolved only by a combination of statutory and policy actions, he said. The consensus is that the Judicial Conference should provide national guidance in this area, and that it is not for individual courts to decide, he said.

Among the possibilities for regulation of electronic access, he said, are both rules amendments and the granting of statutory authority to the Judicial Conference. Judge Duplantier asked if courts can image documents without putting them on the Internet. Mr. Heltzel said a court can do that but that practitioners eagerly await the easy access from their offices to the court's files. In addition, Mr. Heltzel said, anyone can visit the courthouse, obtain documents, and put them on the Internet, so that it is impossible to keep the material from reaching the Internet. Judge Small said the three years that would be required to achieve a rules solution is too slow, that the problem needs an immediate solution. Professor Resnick noted that the

unrestricted access offered by the Internet negates many of the protections that other statutes such as the Fair Consumer Credit Reporting Act provide. Of course, he added, stringers go to the courthouse to obtain the information, which they then sell to their clients. Mr. Patchan said he was disturbed to learn recently that one of the trustee organizations has set up a corporation for the purpose of selling information collected by trustees in the course of their duties. Mr. McCabe said the Committee on Court Administration and Case Management has been given the lead on the privacy issue and had set up a subcommittee to develop policy recommendations for the Judicial Conference. He said that liaisons had been appointed from various other interested committees, and that Gene Lafitte, Esquire, chairman of the Standing Committee's Technology Subcommittee, had been appointed as liaison from the Standing Committee.

Respectfully Submitted,

Patricia S. Ketchum

Agenda Items 2 through 4 will be oral reports.

5

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: PUBLIC COMMENTS ON PROPOSED RULES

DATE: FEBRUARY 25, 2000

In August, the Standing Committee published for public comment Proposed Amendments to Bankruptcy Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020 and 9022. Written comments on those Proposed Rules were due on February 15, 2000. A public hearing on the Proposed Amendments was scheduled for January 18, 2000, in Washington, D.C. Only one person requested an opportunity to appear before the Committee and provide oral testimony. He later withdrew that request and rested on his written submission. A list of the persons submitting comments and the comment letters are attached.

There were thirteen comments submitted on the Proposed Rules. Several of the comments were offered on behalf of groups, including the Bankruptcy Judges of the Northern District of Illinois, and the Chief Bankruptcy Judges of the Ninth Circuit.

The Proposed Rules primarily address five areas: providing notice and the means to notice for infants and incompetent persons; updating mailing addresses for creditors and indenture trustees; improving notice to persons who are subject to injunctions contained in plans; authorization of service by electronic means in limited circumstances; and the substitution of the directive that contempt actions are governed by Rule 9014 in place of the much more comprehensive rule governing those matters. The comments touched on each of these areas, although the comments on matters relating to infants and incompetent persons were minimal.

Service by Electronic Means

The most favorable commentary was addressed to the amendments authorizing service by electronic means in appropriate circumstances. Every person who commented on Proposed Civil Rule 5(b)(2)(D) and Proposed Bankruptcy Rules 2002(c) and 9022 endorsed the use of service by electronic means, and Michael E. Kunz, Clerk of the United States District Court for the Eastern District of Pennsylvania (Comment 99-BK-013), submitted statistical information demonstrating the success of his district's fax noticing pilot program. In fact, Hon. Susan Pierson Sonderby, on behalf of the Bankruptcy Judges for the Northern District of Illinois (Comment 99-BK-007), urged that the Rule permit service by electronic means even without the consent of the party being served. No other comments adopted this view.

The only area for disagreement regarding service by electronic means was in whether the Rules should retain the "three added day" rule for electronic service. Judge Sonderby's group opposed the application of the three day rule when service is electronic because the recipient of the notice has consented to that form of notice, and there is no "mail delay" that supports the need for the three day rule. Martha Davis, Esq., General Counsel to the Executive Office of the United States Trustee (Comment 99-BK-012) argued for including the three day rule even when service is accomplished electronically because it would encourage parties to opt into that system. Further, there can still be delays with service by electronic means as well as complications resulting from the use of incompatible software or other corruption of data problems in the transmission itself. She also indicated concern with the proposed amendment to Rule 9022 that also permits service of judgments or orders by electronic means. Specifically, she noted that the Committee Note to the Proposed Rule clarifies that the party served must have consented to that form of service. I believe that the cross reference to F. R. Civ. Pro. is sufficient to bring that

requirement into Proposed Rule 9022 without another restatement of the requirement. In any event, persons holding these divergent views did converge in their view that whatever the rule, it should be the same under the Bankruptcy Rules as it is under the Civil Rules. (See comments of Hon. Louise DeCarl Adler on behalf of Chief Bankruptcy Judges of the Ninth Circuit (Comment 99-BK-009), Messrs. Brenner, Marion and Madva (Comment 99-BK-010), Mr. Newell (Comment 99-BK-011), and Ms. Davis (Comment 99-BK-012). Of course, that is the view the Committee has already adopted.

Judge Sonderby also questioned the meaning of the phrase in Civil Rule 5(b)(2)(D) that service may be accomplished by "any other means." She suggested that the Committee Note be expanded to describe any additional form of service it had in mind when adopting this language. Mr. Hurshal Tummelson (Comment 99-BK-001) and Mr. Jack Horsley (Comment 99-BK-002) also commented that they found the reference to other service means somewhat confusing or incomplete. These comments are really directed to the Civil Rules Committee, and we will have an opportunity to reconsider the issue as they proceed with Rule 5.

Updating Mailing Addresses

Mr. Mark Cronin submitted Comment 99-BK-003 which supported the proposed amendment to Rule 2002(g). Mr. Cronin indicated that the amendment would improve the Rule by permitting creditors to designate a mailing address, but he suggested that the Rule should go further to permit a creditor to designate a mailing address for all cases (not just on a case by case basis as in the Proposed Rule). He also suggested that the Committee consider a "deemed filed" rule for all cases such as exists in Chapter 11. The problem with that suggestion is that the "deemed filed" rule is not a rule, but is contained in § 1111(a) of the Bankruptcy Code. A rule to import that mechanism into other chapters would likely violate the Rules Enabling Act.

Karen Eddy, Clerk of the Bankruptcy Court for the Southern District of Florida (Comment 99-BK-008), indicated that clerks may face some difficulties in identifying the "last request" of a creditor designating a particular address. She posited a situation in which special counsel appears in a case after the initial designation of the creditor's address and offers another address that is not intended to supercede the initial address. She suggested also that the Committee should consider whether an official form or "Request for Service" could be adopted to reduce potential confusion for the clerks.

Notice of Injunctions in Plans

The Proposed Rules contain a series of amendments intended to provide enhanced notice to parties who may be subject to injunctions in confirmed plans. These Rules require that plans and disclosure statements include conspicuous language describing these injunctions. Proposed Rules 2002(c) and 3016(c) suggest "bold, italic or highlighted text" to convey these provisions. Richard Heltzel noted in the September meeting that the use of "highlighted" text may be counterproductive to the extent that clerks "scan" the documents and retrieve the materials electronically. No other comments were received regarding the technical aspects of these Proposed Rules. Instead, several comments addressed the propriety of the Proposed Rules and whether they violate the Rules Enabling Act.

Mr. Matthew Wilkins (Comment 99-BL-004) asserted that by including procedures in the Bankruptcy Rules to notify parties that they may be subject to an injunction not otherwise provided for in the Bankruptcy Code, the Rules are adopting a position contrary to the Code. This position was echoed by Judge Adler (Comment 99-BK-009). The concern is that inclusion of these provisions would legitimate the practice of providing injunctive relief in a manner not permitted by the Code. Both Judge Adler and Mr. Wilkins recognized that the purpose of the

Proposed Rule is laudable (i.e. making sure that those who need notice actually get notice), yet they concluded (Mr. Wilkins) or at least intimated (Judge Adler) that the substantive problems presented by the proposal render it defective.

Hon. S. Martin Teel, Jr. (Bankr. D.D.C.) wrote to urge adoption of the proposals regarding notice of injunctions in plans. He made two additional suggestions for amendments to the Proposed Rules. He suggested that the Rules provide that the title of the notice in the caption of the documents (the plan and disclosure statement) indicate that the plan seeks injunctive relief otherwise than is provided for in the Code. He also suggested that the rules should include an enforcement mechanism in the event that the plan proponent fails to include the conspicuous notice of the injunction as required. He would add a statement in the rule that the failure to comply with the notice provision renders the injunction ineffective. He asserts that even if the ineffectiveness of the injunction is the logical consequence of failing to include the proper notice, leaving the rule silent as to the consequences of a breach of the rule invites litigation and may even permit the enforcement of injunctions without the proper notice.

Contempt

Ms. Davis (Comment 99-BK-012) stated strong opposition to the Proposed Rule 9020. She is unpersuaded that the judicial developments governing the contempt powers of the bankruptcy courts justify the deletion of the more elaborate system of contempt actions in place under current Rule 9020. She also suggests that a simple cross reference to Rule 9014 will leave too much ambiguity in the application of contempt procedures, including *sua sponte* contempt actions. For these reasons, she advocates retention of existing Rule 9020.

1999 BANKRUPTCY COMMENT CHART

99-BK	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
001 (Also CV-002)	Hurshal C. Tummelson, Esq.	9/28	All	12/6	
002 (Also CV-004)	Jack E. Horsley, Esq.	11/1 11/8 11/16	2002, 3017, 9022. 2002, 9006. 3016.	12/6	
003 (Also 00-BK-A)	Raymond P. Bell, Jr., on behalf of Fleet Credit Card Services, L.P.	11/23 Request to testify. 1/18 additional comments .	2002	12/6 2/9	
004	Matthew E. Wilkens, Esq.	12/21	2002, 3016, 3017, 3020	1/3	
005	Mark D. Reed, Esq.	11/1	9006	12/29 Received & responded via Internet	
006	Judge Martin S. Teel, Jr.	1/13	2002	2/9	
007 (Also CV-010)	Judge Susan Pierson Sonderby on behalf of the bankruptcy judges of the Northern District of Illinois	1/24	2002, 9006	2/9	
008	Karen Eddy, Clerk of Court	2/11	1007, 2002		
009	Judge Louise De Carl Adler, on behalf of the Conference of Chief Bankruptcy Judges of the Ninth circuit	2/14	2002, 3016, 3017, 3020		

99-BK	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
010 (Also 99-CV-015)	Ralph W. Brenner, Esq.; David H. Marion, Esq.; and Stephen A. Madva, Esq.	2/15	Electronic Service		
011 (Also 99-CV-016)	Francis Patrick Newell, Esq.	2/15	Electronic Service		
012	Martha L. Davis, on behalf of United States Trustee Program, DOJ	2/18	9006, 9020, 9022		
013 (Also 99-CV-018)	Michael E. Kunz, Clerk of Court	2/17	9006		

99-BK-001

99-CV-002

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September 23, 1999

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

RE: Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure

Dear Mr. McCabe:

Thank you for your letter of August 25, 1999, and I have read through the Preliminary Draft of Proposed Amendments to the Federal Rules which I received with your letter of August 25. The proposed rules contained in Section I. appear to me to be reasonable.

As to those in Section II. entitled "Proposed Amendments to the Federal Rules of Civil Procedure", referring to Rule 5(b), Rule 65, Rule 77(d), and Rule 81 are of some concern to me unless the provision that the proposed service by electronic means or any other means be available "only if consent is obtained from the person served".

There are so many possible means of service electronically or otherwise which might be used that the end result could be very confusing. Even in those cases where "consent" is obtained, some specific clarification with reference to this form of service should be made very clear to the person who "consents".

Yours truly,

Hurshal C. Tummelson

HCT:jp

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October 28, 1999
(Dictated October 21, 1999)

99-BK-002

Peter G. McCabe, Esq., Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

99-CV-004

Dear Mr. McCabe:

On September 21st your communication of August 25th and the preliminary draft of Proposed Amendments to the Federal Rules of Practice and procedure were acknowledged. I have been engaged out of the office much of the time since then. I want now, if you please, to respond to your kind invitation for me to submit any comments. The work is so excellent that it is difficult to find something about which to make any observations of a nature which might be helpful or constructive.

Speaking first to the pamphlet, "Preliminary Draft, etc.", I liked especially the provision concerning an opportunity to provide the public at large to come to scheduled public hearings and testify (by which I assume it is meant make formal comments, not function as a witness) regarding the proposals.

Passing to (E) Rule 3017, would it be worthwhile to consider striking that portion following the second hyphen and substituting:

> "...are provided with not less than 30 days notice of the proposed injunction,...".

It came to my mind that the broad term, "adequate notice" might be more effective if it were clarified by something of a specific nature.

Passing to Section II, subparagraph (b), I have never handled any bankruptcy cases in my decades of practice. But I noted with interest that the Committee on Bankruptcy Rules reached a conclusion different from the one set forth in the first paragraph of sub-section (B). It seems to me the first sentence of that sub-section is supported and the Bankruptcy Rules Committee and its determination that the 3-day rule should be extended, etc., are not supported.

Considering the larger pamphlet, marked on the cover "Request For Comment", I studied the entire publication carefully. I am and long have been a non-resident member of the Association of the Bar of the City of New York. It is not, of course, correlated with the New York State Bar Association. But, a good many years ago I tried several law suits in the Supreme Court of New York. And I met Bernice Leber. We had several discussions on procedural matters largely identified with social occasions. But it is good to have her stated as a "Point of Contact" for the Committee.

As to the substance of the Preliminary Draft, I noted in your communication dated August, 1999, at the opening of the pamphlet, you used an expression equating, in substance, with what I have suggested above with regard to the term "adequate time" in the pamphlet; you stated (and it is in heavy type in your communication) "...at least 30 days before the hearing." It seems to me this buttresses by suggestion concerning specifying a given measure of time rather than using the term "adequate days" in my discussion above.

Again, notwithstanding my not having practiced bankruptcy law, I checked the observation on page 5 about Rule 9022(a). A classmate of mine was what was then called Referee in Bankruptcy in our state capital, Springfield, Illinois, and was so serving when the title was changed to "Bankruptcy Judge". Judge Coutrakon, with whom I have many close interchanges notwithstanding my not engaging in the practice of law before him or otherwise in connection with bankruptcy matters, visited with me at a professional meeting about 5 months ago on the use of electronic means. He said he was initially chilly in that respect but after profound consideration he favored what I now have read as Rule 9200(a) page 5 of your pamphlet.

I suggest consideration be given to expanding the provisions of Rule 2002, sub-paragraph (c) to include in "Content of Notice" the following, at least in substance:

> "(Lines 13 and 14, page 8)...[add] and the reason such entities would be subject to the injunction."

On page 21, sub-section (D) you may think it worth while to add something like this to line 34: "...providing an appropriate demand for jury is made on a timely basis in accordance with the procedural provisions governing the right to jury trial."

I read the section on "International Obligations". I have no special comments to make about them. It seems to me they were well composed and informative.

On Rule 77, beginning on page 51, I suggest consideration be given to adding, in place of "bymail" (line 4), which has been deleted, this:

> "...by notice <u>delivered by hand</u> or otherwise in the manner...". (Underlining added here.)

Careful consideration does not bring to my mind any further observations. If anything particular occurs to you or your Advisory Committee members or any other person on your staff, I will be glad to be advised and will undertake to be of any other possible further help.

With appreciation for the opportunity and invitation to submit comments, I remain

Respectfully yours,

Jack E. Horsley, J.D.

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September 21, 1999

Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference pf the United States
Washington D. C. 20544

-In re:- Prelinary Draft of Proposed Amendments, etc.

Dear Mr. McCabe:

Thank you for your communication and the Preliminary Draft captioned above. I have scanned the draft. I am leaving for a trial which will probably last until a week from nexty Monday. I will study the pamphlet in detail and write you further then.

I am honored to be included in being invited to comment in connection wiht this important project.

Respectfully,

Jack E. Horsley

JACK E. HORSLEY, J. D.

JEH:bgg

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October 18, 1999

John K. Rabiej, Esq.
Chief
Administrative Office of the U. S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N. E. Room 4-170

-In Re:- Rules Committee Support Office Materials

Dear Mr. Rabiej:

Last week I acknowledged the materials you kindly sent me. I said I would review them and perhaps some suggestions from me might be worth considering.

Last weeekend I went through everything. My suggestions are scanty because the work products described are all excellent. I have dictated a full response. It may be a few days before it is transcribed because of some secretarial shortage at this time. But my suggestions, for whatever they may be worth, will reach you in due course.

I am honored to have an opportunity to submit them whether they are or are not things meriting consideration in the final work product you and your staff will complete.

Respectfully yours,

Jack E Horsley

JACK E. HORSLEY, J. D.

JEH:bgg

11/8/99

99-BK-002

99-CV-004

Mr. Jack E. Horsley
913 N. 31st Street
Mattoon, IL 61938

November 2, 1999
(Dictated October 14, 1999)

The Hon. John K. Rabiej
Chief Administrative Office
Of The United States Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E. Room 4-170
Washington, D.C. 20544

My Dear Mr. Rabiej:

Your communication transmitting to me the preliminary draft of the proposed amendments of the federal rules of bankruptcy and civil procedure and the other material that came with your transmittal communication were acknowledged on October 22. I have now begun a review which I hope may be of some help in connection with the Request for Comment which appears on the cover page of the Preliminary Draft:

First, speaking to the summary of proposed amendments, beginning under Section B, page 3, I recommend consideration be given to changing "legal relationship" to: "...either parent, guardian, trustee or other legal relationship...". I make this suggestion because it appears to me construing the amendment if it refers only to "legal relationship" might result in a feeling that it is vague; I think it might be desirable to consider more specificity in defining the term.

Passing to paragraph [G], page 5, I feel again "electronic means", although it would be clear to most, might well be expanded to specify the types of electronic means. So would it not be supported to delete those words and substitute something like:

"...Internet, fax, computer transmittal or other electronic means...". It appears to me, after examining Civil Rule 5(b) this would be consistent and I think it might be something to look upon as a possible improvement in the terminology of [G], page 5.

On bankruptcy procedures, I have some doubt as to whether, alluding line 37, page 9, "proof of interest" is adequate. Would not it be possible to have an involved person contend that "interest", like the terms I discussed in other respects above, is vague? I suggest consideration be given to deleting that term and substituting something like this: "...of identification as trustee, guardian, attorney-in-fact or other interest..."

I read carefully everything through the discussion of electronic filing, page 39, and the observations made in the paragraph starting at the bottom of that page seemed to me to be consistent with what I have suggested concerning the term "electronic filing", above.

My attention next came to Rule 49 where, in the paragraph at the bottom of that page under the Committee Note, it is certainly well taken that the Copyright Rules of Practice are antiquated, at least in several respects. Rule 65 does respond to the apparent inconsistency described. I favor the observations in that portion of the Preliminary Draft.

I noted also with favor the deletions in Rule 9, Rule 10 (both on page 59) and various other rules. I have some misgiving about deleting Rule 13 (page 60), however. Unless I am overlooking something, I see nothing else which would address the matter of service in disputes involving the marshal or their being entitlement to the same fees as those allowed for similar services. Am I overlooking something here? If not, I recommend you consider reinstating, with a proper re-designation, Rule 13.

Director Mecham, whom I had the pleasure of meeting although with whom I am not intimately acquainted, did an excellent job in preparing the Summary pamphlet. His outline of the manner in which the Rules are amended and the summary of procedures are excellent.

Chief Justice Rehnquist's Communication, which constitutes a separate pamphlet, impressed me favorably. I did have some wonderment about the provision of Sub-section (c), beginning on page 2, regarding dismissals of voluntary chapters 7 or 13 cases for failure to file on a timely basis. I realize that the C.J. is the determinative official in this respect. I have some feeling of confusion, however, as to whether there should not be some more detailed explanation as to how time could be extended. Chief Justice Rehnquist states only that it can be on written motion or

by oral requests made during a hearing. I do not understand exactly what types of "hearing" is contemplated. With a single annual term beginning on the first Monday in October of each year it strikes me that consideration could properly be given to defining the type of "hearing" to which the Chief Justice referred.

I like the Forms which are comprised in the blue pamphlet styled "Federal Rules Of Civil Procedure". Their conciseness and simplicity are excellent. For example, Rule 29 on discovery procedure is extremely well stated in a dozen or so lines. It might have been expanded to constitute what Shakespear called "an unproportioned act". This was only one illustration of the favorable reactions I had to the pamphlet described; likewise, the Committee's December 1, 1988, pamphlet on Federal Rules of Criminal Procedure was well done. An extremely important thing is Rule 16 on discovery and/or disclosure of evidence. I do not know of any more reliable method of reducing trials than learning about the claims of the opposition. The Discovery and Inspection provisions in Rule 16 may well cause an attorney to realize that his case is stronger than he thought or weaker than he had hoped; either way, it may open the door towards compromise or pursuit of one's client's interests with vigor.

I am grateful for all of these materials and I hope my observations may be of help. If there is any other special area which should be addressed and where you think my comments might be helpful, I will be grateful if you or Mr. Shapiro or any other member of your staff would advise me.

After several decades of practice in the Federal Courts and also in the state judiciary of numerous jurisdictions, and after having made several arguments in the United States Supreme Court, I am eager to bring to my suggestions and reactions any ideas which may be of benefit to the Committee. Needless to say, my observations are purely suggestions; and I take no umbrage if they are not favorably considered.

Respectfully yours,

Jack E. Horsley

Jack E. Horsley, J.D.

JEH/pas

JACK E. HORSLEY
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November 11, 1999

99-BK-002

99-CV-004

Peter G. McCabe, Esq., Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, DC 20544

In re: Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure

Dear Mr. McCabe:

Your communication of August 25 was acknowledged. I have encountered some difficulty which kept me out of action including a brief period of hospitalization and a considerable measure of time house-bound. Please pardon my consequent tardiness in replying properly to your letter and the Preliminary Draft even thought it was acknowledged at the time it was received in the office.

I have now reviewed the materials. I have previously submitted some information concerning this same data. Addressing Chief John K. Rabiej's flyer form, it is helpful and informative. During my absence from the office I did dictate some materials at home and they were transcribed and signed with my name during my absence. Please pardon any repetition involved here. Speaking further to the flyer, authorizing service by electronic means is consistent with current developments in my best judgment. In this Firm we use electric facilities extensively. I recognize there may well be a good many protesters who would prefer to retain the less modern approach to this method of service. But, in my feeling, adopting service by electric means is consistent with the vast changes and advancements made in administrative matters and in the conduct of law business.

Looking back at (D) Rule 3016 the amendment to make certain that the entities who would be enjoined from any given course of action, rather than proscribed by the Bankruptcy Code, it is my judgment adequate notice of the proposed injunction in the plan and disclosure statements is present.

I reviewed carefully the entire pamphlet titled, on the cover page, "Request to Comment." In my earlier letter, which I dictated at home and which was signed and forwarded in my absence, I made many comments about this. I have re-checked the file copy of that letter. I have nothing more to add and I confirm the various comments, recommendations and observations I made in my earlier communication.

Thank you for giving me the opportunity to express my views and I am grateful for the recognition represented by the invitation to submit observations and reactions to the Preliminary Draft of Proposed Amendments, etc.

Respectfully yours,

Jack E. Horsley

JEH/krs

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November 18, 1999

99-BK- 003
Request To Testify

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

RE: **Federal Rules of Bankruptcy Procedure – Proposed Amendments**

Dear Mr. McCabe:

This law firm represents Fleet Credit Card Services, L.P. (**"Fleet"**) in connection with bankruptcy litigation throughout the United States. As the ninth largest credit card issuer in this Country, Fleet is engaged with numerous bankruptcy issues on a day-to-day basis, including the notice provisions which are touched upon in the proposed changes to the Federal Rules of Bankruptcy Procedure. Raymond P. Bell, Jr. is the Bankruptcy Manager for Fleet and would seek to testify on the proposed rule changes, as well as the lack of any "deemed filed" rule change.

Most of the proposed rule changes attempt to give adequate notice of any injunction included in a plan, disclosure statement, etc. These rule changes do not go far enough to protect creditors who have rights modified in Chapter 11, 12 and 13 plans. For example, some courts bind unsecured creditors to a Chapter 13 plan which does not pay that creditor 100% and, thus, prevent that creditor from seeking relief from the codebtor stay. See, e.g., In re Bonanno, 78 B.R. 52 (Bankr.E.D.Pa. 1987); In re Weaver, 9 B.R. 803 (Bankr.S.D.Ohio 1983). The term "injunction" in these proposed rule changes should also encompass modifications that may significantly affect a creditor's rights in a bankruptcy case.

The primary notice rule change proposed by the Judicial Conference's Advisory Committee is to change Rule 2002(g) to clarify when a creditor files a proof of claim, which includes a mailing address and a separate request designating a different mailing address. Under the proposed rule, the last document filed determines the proper address and a request designating a mailing address is effective only with respect

to a particular case. Although this rule change is preferable over the present rule, it would be vastly more efficient if a creditor could designate its proper address with the Bankruptcy Court for all notices in all cases pending in that particular court. In summary, the present rule change does not go far enough in order to allow a creditor to determine its proper address for notice purposes, as well as possible distribution in a bankruptcy case.

The Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) needs to strongly consider a "Deemed Filed" Rule, which would allow creditor claims to be allowed as scheduled on debtors' bankruptcy schedules. Bankruptcy Rule 3002(a) sets forth the general rule regarding the filing of proofs of claim in a bankruptcy case, which is that all unsecured creditors must file proofs of claim in order for their claims to be allowed. However, Bankruptcy Rule 3003 carves out an exception to rule 3002(a) in cases under Chapters 9 and 11 of the Bankruptcy Code. Under Bankruptcy Rule 3003(b)(1), creditors in Chapters 9 and 11 cases whose claims are listed in the Schedule of Liabilities filed by the debtor, and whose claims are not designated as disputed, contingent or unliquidated, do not need to file proofs of claim in order for their claims to be allowed. The scheduled amount of their claims shall be prima facie evidence of the validity and amount of such claims. This exception applies only in cases under Chapters 9 and 11 of the Bankruptcy Code. Creditors of debtors in cases under Chapters 7, 12 and 13 must file proofs of claim regardless of whether their claims are listed in the debtor's Schedule of Liabilities.

Extending the Deemed Filed rule of 11 U.S.C. §1111(a) to Chapter 7 and Chapter 13 cases would save creditors, trustees and, most importantly, the bankruptcy courts from dealing with vast amounts of paperwork. For the most part, consumer debtors accurately list their debts on the bankruptcy schedules, which are subscribed to under penalties of perjury. Creditors would need to file claims only in those instances where debtors' schedules markedly differ from those of the claimants. Overall, the adoption of the Deemed Filed Rule would ease the administrative burden of the bankruptcy courts and promote greater efficiency in the bankruptcy claims process.

As the Standing Committee may be aware, the Deemed Filed Rule was embodied in the proposed Bankruptcy Reform Act of 1998 (H.R. 3150), which amended §501 of Title 11 to include a subsection (e). Subsection (e) stated that "[i]n a case under Chapter 7 or 13, a proof of claim or interest is deemed filed under this section for any claim or interest that appears in the schedules filed under §521(a)(1) of this title, except a claim or interest that is scheduled as disputed, contingent, or liquidated." The National Bankruptcy Review Commission discussed the deemed filed rule, but never incorporated this rule in its final report.

I would appreciate it if you could schedule Mr. Bell to testify in Washington, DC on January 18, 2000 regarding the proposed bankruptcy rules. Mr. Bell has been in the consumer lending industry for 20 years and is well known in both bankruptcy and creditors' rights circles. Please notify me if Mr. Bell would be invited to speak on the prospective rule changes. Thank you for your consideration in this matter.

Very truly yours,

Mark A. Cronin

Mark A. Cronin

MAC:dvn-k

Fleet

Fleet Credit Card Services
Mail Stop: PA HR MO 1B
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Horsham, PA 19044

99-BK-003
Additional Comments
00-BK-A

January 18, 2000

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

Dear Mr. McCabe:

I am enclosing my statement proposing two rule changes.

Your office was kind enough to allow me to incorporate additional comments in my proposal since the public hearing scheduled for January 18, 2000 was postponed.

I am sending this letter and the attachments via facsimile and by express mail. I have made twenty duplicates of the recommendations and their attachments.

Please accept my appreciation for your consideration and I will be available to respond to any questions the Committee may have concerning my recommendations. I can be reached at 1-215-444-7493.

Sincerely,

Raymond P. Bell, Jr.
Bankruptcy Manager

RPB: jml
Enclosures

TO: The Advisory Committee on Federal Rules of Bankruptcy Procedure

FROM: Raymond P. Bell, Jr., Bankruptcy Manager
Fleet Credit Card Services, L.P.

DATE: January 18, 2000

I thank the Committee for this opportunity to submit my recommendations for proposed changes to the Federal Rules of Bankruptcy Procedure.

My current position is Bankruptcy Manager for Fleet Credit Card Services, L.P. Fleet is the ninth largest credit card issuer in the United States. Fleet receives 90,000 bankruptcy petitions per year. I have worked in the field of consumer credit and collections for 30 years. For the past 20 years, I have been in charge of bankruptcy operations for three national banks. I was also employed as a director of two national law firms, which represented creditors in consumer bankruptcies. I was a former instructor of the American Institute of Banking. I have been an invited speaker on creditor's rights at various seminars. I am a member of the Board of Directors for the Coalition for Consumer Bankruptcy Debtor Education.

A. *Proposed Change to Rule 2002(g).*

The proposed change to Rule 2002(g) attempts to give adequate notice to creditors. Under the current proposed change, the last

document filed by the debtor or by a creditor determines the proper address for the creditor in each specific case. This was suggested in H.R. 833 (§603(a)) where a creditor must be served at addresses filed with the Court. (See *ABI Journal*, July/August, 1999 "*Legislative Update*".)

My proposal is to allow creditors to designate their proper address in all bankruptcy courts where cases are pending. Each court would have this information electronically designated so that the creditors' addresses would electronically appear when the clerk enters schedules D, E, and F for creditors who have notified the Court of its address. As the same creditors appear in bankruptcy cases, this change would significantly decrease the time and cost to administer the notices to creditors. If a court receives an average of 5,000 bankruptcy petitions per month and, assuming an average of 15 creditors per case, an electronic designation of creditors' addresses, as opposed to the manual entry of each creditor's address in each case, would reduce the costs of entering the creditor's addresses in each case and the duplicate entry of addresses for the same creditors.

B. *Proposed Rule Change: Allowed Claims to be Deemed Filed in Chapter 7 and Chapter 13 Cases by Amending Rule 3002(a).*

Creditors' claims are deemed filed in Chapter 9 and Chapter 11 cases. This rule was adopted on October 1, 1979 and has worked well in over 325,000 petitions filed in Chapter 11 cases since that date.

Under the current law, creditors are required to file proofs of claim in Chapter 13 cases and in asset 7 cases by a certain date, or their

claims are not paid. The filing of proofs of claim in Chapter 13 cases produce a voluminous amount of paperwork for both the bankruptcy courts and for creditors.

We propose that Rule 3002(a) be amended to allow that all claims listed by debtors in Chapter 13 and asset 7 cases be deemed filed, as is the current law in Chapter 11 cases. To notify the creditors of the amounts scheduled by the debtors in each case, the scheduled debt amount and its claim classification could be included on the 341 notice. This information is already provided on the 341 notice by some bankruptcy courts. Creditors could still file a proof of claim if there is a variance between the scheduled amount and the account balance at filing.

The benefit to the courts of a deemed filed rule in Chapter 13 and asset 7 cases would be the significant decrease in the number of proofs of claim filed by creditors in Chapter 13 cases and asset 7 cases, thereby decreasing the paper flow and labor in the bankruptcy courts and in the offices of the Chapter 13 trustees. Looking at the year 1998 alone, approximately 389,000 Chapter 13 cases were filed with the courts in 1998. Assuming an average of 15 creditors per case and each creditor filing two claims in each case, 11,670,000 proofs of claim were filed with the bankruptcy courts in 1998. To illustrate the paper flow since 1982, there have been approximately 2,710,000 Chapter 13 filings. If each filing contained 15 unsecured creditors, a total of 80,505,000 claims

would have been submitted to the Clerk of the Court based upon each creditor filing two proofs of claim, so that they would receive an acknowledgement from the Court. Based upon two-thirds of Chapter 13 plans failing, the system still had to manage 60,370,000 pieces of paper. These figures do not include Chapter 7 cases, where unsecured creditors do the same ritual of filing proofs of claim. In addition, the costs to creditors to file proofs of claim is burdensome, due to the large number of bankruptcy filings and considering that two-thirds of all Chapter 13 cases are dismissed based upon the records of the Administrative Office.

The adoption of deemed filed in Chapter 13 and asset 7 cases was proposed previously by the Government Working Group at the National Bankruptcy Review Commission. (December 17-18, 1996 and January 23, 1997, National Bankruptcy Review Commission.) It was not adopted by the Commission due to the proposition that the debtors' schedules are not reliable. However, this conclusion was based upon data from the 1970's. (Testimony of Professor Laurence King on December 17-18, 1996).

Similarly, the original HR 2500 and 3150 provided that the proofs of claim be deemed filed in Chapter 13 and asset 7 cases. Opposition to this provision was submitted by the Honorable Eugene R. Wedoff. (An Analysis of the Consumer Bankruptcy Provisions of HR 3150, Proposed Bankruptcy Reform Legislation (Revised)). In support of his opposition to deemed filed in Chapter 13 cases, Judge Wedoff stated that as consumer

debtors have poor records on what they owe, requiring proof by the creditor assures that the debt is paid in the appropriate amount. Judge Wedoff was concerned that treating all scheduled debts as accurate may result in overpayment of claims or payment of inaccurate claims.

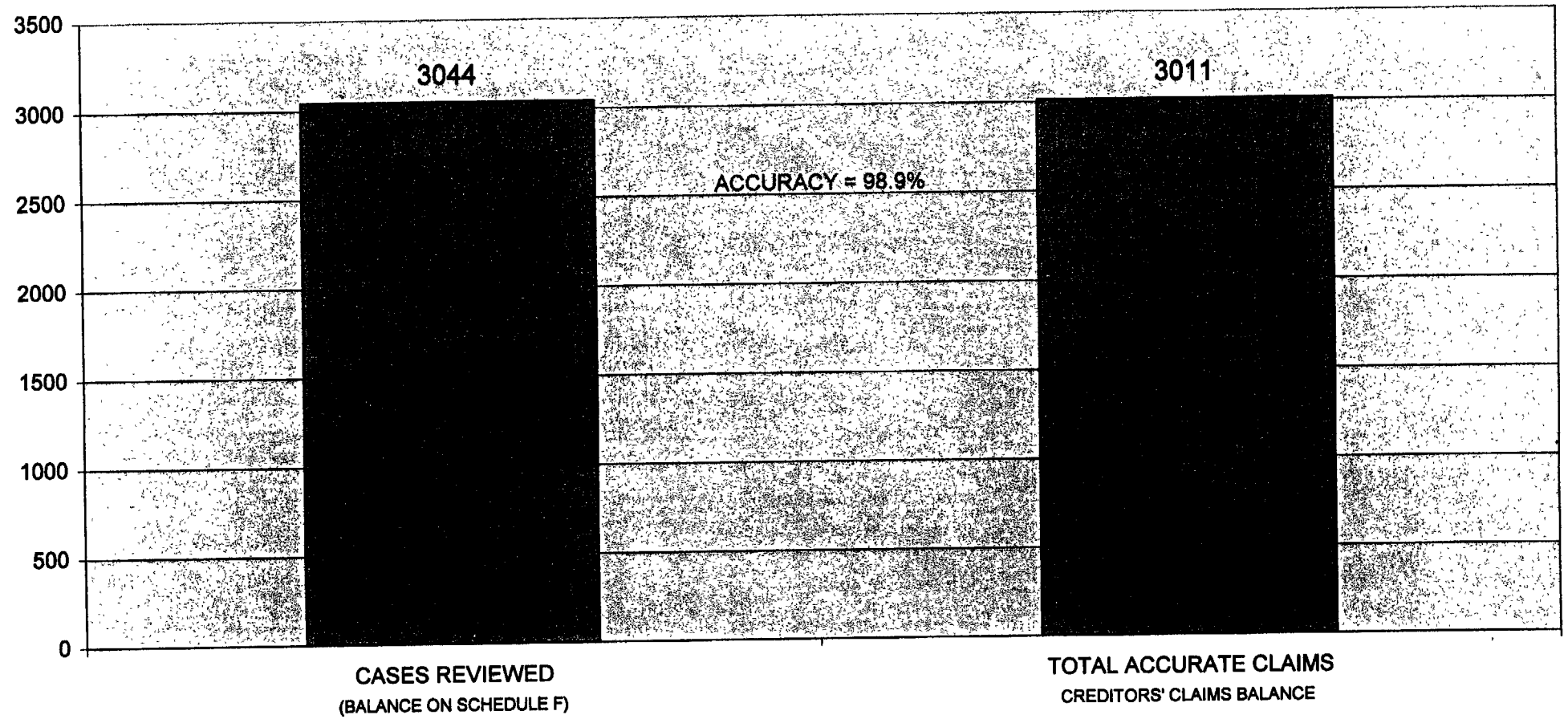
Fleet conducted a study comparing the claim amounts scheduled by debtors in Chapter 13 cases from three trustees where we had electronic access via the Internet, and in Chapter 7 cases where Fleet was listed as a creditor. In our study, the records of 3,044 Chapter 13 cases were reviewed and the records of 91 Chapter 7 cases were reviewed. In both studies, there was less than a 1.5% variance between the debtors' scheduled claim amounts and the creditors' proof of claim amounts. Attached are graphs of the two studies. There are over 3,000 pages of information in this study. I have retained the data from the study and will forward it to you, if requested.

Based upon the low variance between the debtors' listed claim amounts and the creditors' proof of claim amounts, namely 1.5% in our study, adoption of the deemed filed rule in Chapter 13 and Chapter 7 cases could decrease claim filings by 98-99%, which would significantly decrease the amount of paper filed with the courts and with Chapter 13 trustees, and would decrease the considerable cost to creditors to file proofs of claim in Chapter 13 and asset 7 cases. Creditors would be able to review the debtor's scheduled claim amounts and file a proof of claim if the scheduled amount was incorrect.

The bankruptcy process has changed since October, 1979. Filings have significantly increased and the expense of administering the process has increased for the courts, the debtors, the creditors and the American taxpayers. A deemed filed rule in Chapter 13 and asset 7 cases would alleviate the expense. In a discussion draft (March, 1997) by Leonidas R. Mecham, Director, Administrative Office of the United States Courts, Mr. Mecham proposed that federal courts can reduce their reliance on paper records. He also indicated that reduced physical handling, maintenance and copying of file documents would produce an impressive range of benefits to the courts and the people who use the courts. ("*Electronic Case Filed in the Federal Courts: A Preliminary Examination of Goals, Issues and the Road Ahead*" March, 1997.)

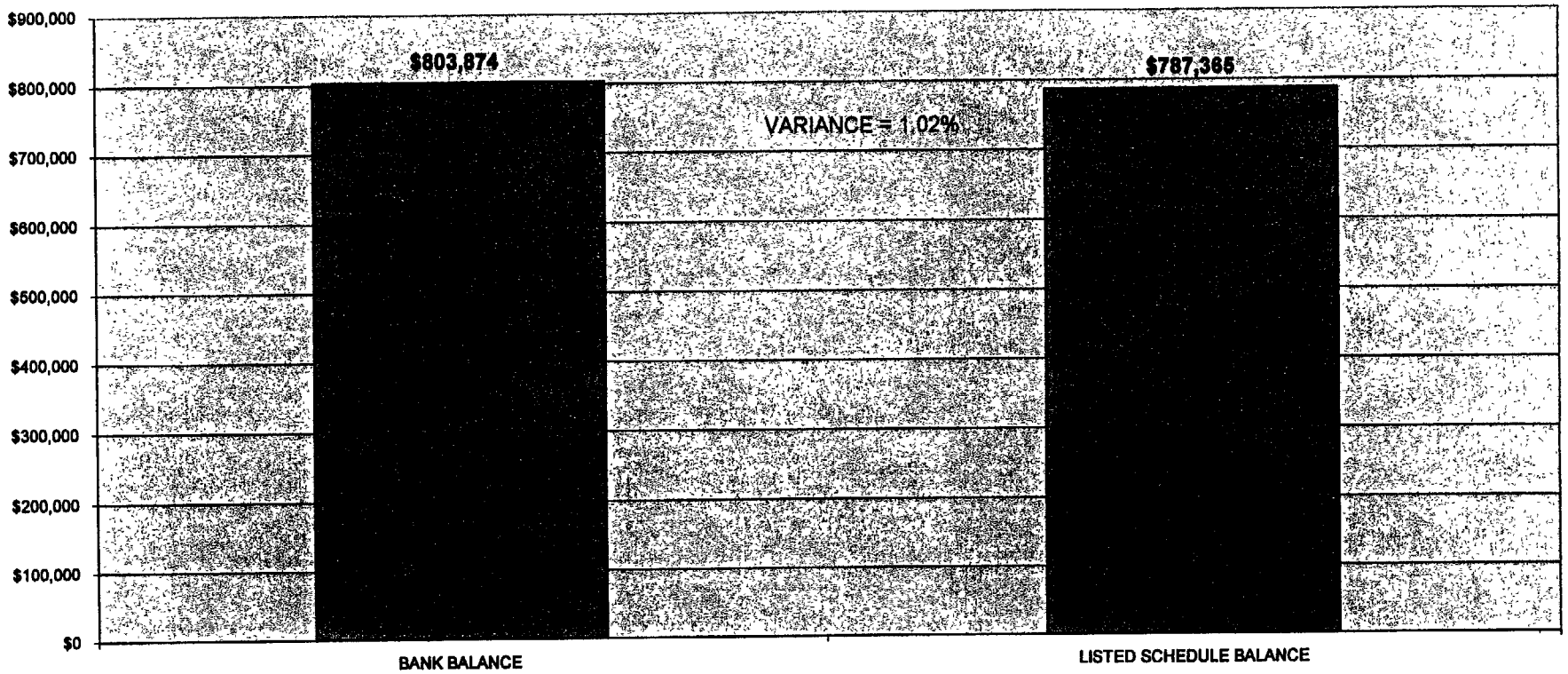
Again, thank you for considering my recommendations on these changes, which would significantly reduce the papers filed and labor in the bankruptcy courts, while at the same time decreasing the costs to creditors in protecting their rights to recovery in bankruptcy cases.

CHAPTER 13 BALANCE COMPARISON
(ALL UNSECURED CREDITORS' BALANCES vs. SCHEDULE F)



Note-Unsecured creditor balances represent bank credit cards, revolving store credit cards, installment loans, asset claim buyers, and oil company credit cards. All or part were listed from schedule F and the balance listed in the Chapter 13 Trustee claim register.

CHAPTER 7 BALANCE COMPARISON
(FLEET SYSTEM BALANCE vs. AMOUNT LISTED IN SCHEDULE F)



91 CHAPTER 7 CASES SELECTED - NINETY ONE BALANCES WERE TOTALED FROM FLEET'S COMPUTER SYSTEM AND THE AMOUNTS LISTED IN SCHEDULE F.

99-BK- 004

Butzel Long

A PROFESSIONAL CORPORATION

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Detroit Office
December 16, 1999

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

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

Thank you for the opportunity to comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure. Please accept my comments on the amendments proposed to Bankruptcy Rules 2002(c), 2002(g), 3016, 3017 and 3020 – each of which concerns notice to parties whose conduct would be enjoined as a result of the provisions of a plan of reorganization, rather than the Bankruptcy Code, and who might otherwise not receive notice of such injunction.

I have substantial reservations concerning the proposed amendments to these rules, not because the goal is not laudable, which it certainly is, but because they appear to codify or at least

sanction injunctions which are contrary to the plain language of the Bankruptcy Code and, as a consequence, are outside of the jurisdiction of the Bankruptcy courts.

Section 1141 of the Bankruptcy Code concerns the effect of confirmation of a plan of reorganization. Section 1141(a) in summary provides that the provisions of a confirmed plan of reorganization bind the debtor and any creditor of the debtor. That section has been interpreted to not impact, for example, non-debtor guarantors of the debtor. *See,* ***In Re: Sandy Ridge Development Corp.*** 881 F.2d 1346 (5th Cir. 1989) and ***Union Carbide Corp. v. Newboles***, 686 F.2d 593 (7th Cir. 1982)(confirmation of a Chapter 11 plan does not release non-debtor guarantors of the debtor). This view is not shared by all courts. *See,* ***Trulis v. Barton***, 107 F.3d 685 (9th Cir. 1995)(plan confirmation precluded suit against debtor's officers by creditors). Nonetheless, the majority of courts and commentators who have reviewed and addressed this issue have concluded that the Bankruptcy Code does not give Bankruptcy judges the ability to enjoin actions against non-debtor third parties over the objection of those who would bring such actions against the third parties.

Section 524 of the Bankruptcy Code, which deals with the effect of a bankruptcy discharge, is even more clear on this issue. Section 524(e) plainly provides that the discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt. For example, if a debt is guaranteed by two parties, one of whom files bankruptcy, the other guarantor remains liable for the debt. Most courts and commentators view this provision as precluding injunctions in favor of third parties – the non-debtor guarantor in my example. *See,* ***In Re: Lowenschuss***, 67 F.3d 1394 (9th Cir. 1995), *cert. den.* 517 U.S. 1243, 116 S. Ct. 2497, 135 L.Ed. 2d 189 (1986)(Section 524(e) does not permit a reorganization plan to release claims against a pension plan established by the debtor's professional corporation). To the contrary is ***In Re: Drexel Burnham Lambert Group, Inc.***, 138 B.R. 723 (Bnkrtcy. S.D.N.Y 1992)(Section 524(e) does not prevent the release of non-debtor parties who fund the plan of reorganization).

Although some bankruptcy courts have taken an expansive and liberal view of the Bankruptcy Code's prohibitions on injunctions in favor of third parties, the more sound view is that the Bankruptcy Code does not confer jurisdiction on the Bankruptcy courts to enjoin actions against parties who have not availed themselves of the Bankruptcy Code's protections. Fundamental due process concerns strongly support this view.

The amendments to Rules 2002(c), 2002(g), 3016, 3017 and 3020 are proposed, I assume, in an effort to protect parties who might not otherwise be creditors of a debtor from the harsh impact of an order confirming a plan of reorganization which purports to enjoin their actions against non-debtor third parties. Again, while this is a laudable objective, it would appear that the amendments only encourage the sort of injunctions which the Bankruptcy Code does not permit

in the first place. Therefore, I feel that these proposed amendments should not be adopted, or if adoption is seriously contemplated, that our organization's endorsement be carefully qualified to make clear that we do not acknowledge that the Bankruptcy Code permits such injunctions.

I appreciate this opportunity to have some input in this process and would be happy to discuss my views with any interested party.

Respectfully,

Butzel Long, P.C.

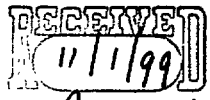
Matthew E. Wilkins

MEW:cmm

cc: William M. Saxton

99-BK-005

Author: Reedepp@aol.com at ~Internet
Date: 10/29/99 11:28 PM
Normal
TO: Rules_Comments@ao.uscourts.gov at ~Internet
Subject: Rule 9006 amendment
---------- Message Contents



Received + responded via Internet.

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Des Moines, IA 50310
(515) 271-7550
Fax (515) 255-4686

We wholeheartedly support and approve of the authorization of electronic service (i.e. facsimile). This means of communication has become an essential part of our extensive adversarial practice. We find that almost all business entities are willing to accept service by facsimile and we encourage all to do the same. In fact it can be said that this manner of service is more effective than ordinary mail which the rules presently allow for service of summons and notice.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

S. MARTIN TEEL, JR.
Judge

E. BARRETT PRETTYMAN COURTHOUSE
WASHINGTON, DC 20001
202-273-0708

99-BK-006

January 10, 2000

Peter G. McCabe
Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544

Re: Proposed Amendment of F.R. Bankr. P. 2002(c)

Dear Mr. McCabe:

I write to urge that the proposed amendment to F.R. Bankr. P. 2002(c) be adopted in a strengthened form to assure meaningful notice to a creditor against whom injunctive relief is sought.

The amendment effective December 1, 1999, of F.R. Bankr. P. 7001 permitting injunctions to be obtained via a plan created a substantial risk of a creditor not receiving fair and adequate notice when injunctive relief was to be obtained against the creditor under a plan.[1] Previously, the requirement of an adversary proceeding before injunctive relief could be obtained assured that there would be meaningful notice via a summons and complaint.

The proposed amendment to Rule 2002(c) goes part of the way towards addressing the matter of giving meaningful notice. But I

---

[1] The Rule 7001 amendment creates a trap for the unwary creditor who cares not to exert effort and expense closely monitoring a puny bankruptcy estate. The creditor may care very little about what happens to the debtor's puny estate and not bother to monitor what the plan provides regarding payment of the creditor's claim against the debtor (as opposed to claims against third parties for the same debt). And even if the creditor does monitor the treatment of the claim, the creditor may miss completely provisions of the plan which deal with injunctions against collections from third parties who are not in bankruptcy.

would strengthen the rule by adding at the end of proposed Rule 2002(c)(3) a paragraph (D), and a concluding sentence regarding the effect of failure to comply with the rule as follows:

> (D) the title of the notice in the caption shall also indicate that the plan seeks injunctive relief, briefly describing the nature of such injunctive relief.
>
> Failure to comply with these provisions shall result in the injunction under the plan not being effective.

My fears regarding the proposed amendment as currently written are two-fold.

First, too many notices are far too lengthy, and although the notice may include a paragraph in bold type regarding the injunctive relief sought, it may be buried in the notice and missed by many a creditor. (See n.1, supra.) Proposed paragraph (D) attempts to remedy that problem somewhat.

Second, and more importantly, the proposed rule contains no remedy for failure to comply with the rule. If the plan is confirmed containing an injunction but conspicuous notice was not given as required by the proposed amendment to Rule 2002(c), will the plan's injunction nevertheless be binding? My guess is that after protracted litigation the court would determine that the injunction would be effective (based on numerous decisions regarding the res judicata effect of a confirmed plan). This is undesirable for two reasons:

- First, if the proposed amendment is to serve its purpose, it should have some bite. The injunction should not be effective if the notice failed to comply with the rule. Otherwise the rule will be completely toothless, giving only lip service to the policies it purports to advance.

- Second, if the rule remains silent on the effect of non-compliance, it will only invite litigation. Even if that litigation ultimately invalidates the injunction, it would be preferable to spell out the consequence, thereby deterring non-compliance and minimizing the possibility that a serious issue would remain for litigation when there is noncompliance.

Sincerely yours,

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
SUSAN PIERSON SONDERBY
CHIEF JUDGE

(312) 435-5646

January 18, 2000

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

Dear Mr. McCabe:

For the most part, the judges of the Bankruptcy Court for the Northern District of Illinois support the proposed amendments to the Federal Rules of Bankruptcy Procedure. Our court is particularly pleased with the proposed amendments to Bankruptcy Rule 2002(c) which require notice and an opportunity to be heard for persons or entities who may be subject to an injunction under an order confirming a Chapter 11 or Chapter 13 plan.

Concerning proposed Rule 5(b)(2)(D), however, we believe service by electronic means (fax and e-mail) should be valid, irrespective of consent, where available to the recipient. The Committee Notes state, "Consent is required . . . because it is not yet possible to assume universal entry into the world of electronic communication." Because the server has the obligation to make effective service, which cannot be done by electronic means on a person who does not have the ability to receive it, unavailability of universal electronic communication poses no obstacle to authorizing service by electronic means. At the speed with which the expansion of electronic communication is moving, the Rule should at least be flexible enough to allow local courts to authorize service by electronic means without an amendment to the Rule being required.

In general, we see no need to provide for "consented means" in the Rules. Agreements between parties as to manner of service have always been and will continue to be made wholly apart from the Rules. We also question what is intended in Rule 5(b)(2)(D) by the sentence, "Service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery." What other consented means are contemplated? We assume that it

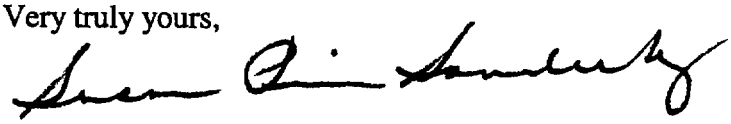
does not refer to Federal Express or local delivery services, because these are forms of hand delivery under Rule 5(b)(2)(A) to which the bar has been long accustomed. If the Committee had in mind a specific form of "other" service, it would be most helpful if the Notes made reference to it. If there is not a specific form of service in mind, we suggest eliminating this sentence and other references in (D) to "other [consented] means."

We agree with the Committee's proposal to make no change to Rule 6(e), and we oppose Proposed Rule 9006(f) of the bankruptcy rules and the Alternative Proposal for Rule 6(e) of the Federal Rules of Civil Procedure, to the extent they would extend the3-day rule to service by electronic means. We find in the Notes no explicit rationale for the proposed extension of the 3-day rule to service by electronic means. Perhaps it is designed to encourage litigants to consent to such service. Although it may be desirable to induce consent, the extension is inconsistent with the Notes to Rule 5(b), "By giving consent, a party also accepts the responsibility to monitor the appropriate facility for receiving service." The 3-day rule applies to mail service because service is complete upon deposit in the mail, but mail service takes approximately 3 days. The 3-day rule serves to compensate for the additional time needed for mail delivery so that 10 days is 10 days for everyone, not 7 for some and 10 for others. This rationale is defeated when the 3-day rule is applied to electronic service. Rather, under the proposed amendment (alternative proposal), a person served electronically is given a 3-day advantage over a person served by mail. We believe that consent to service by electronic means should, like hand delivery of a paper, entail the presumption of same day delivery.

Finally, we note an editing matter in Proposed Rule 77(d), first sentence. The draft deletes the words "by mail" from "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry [by mail] in the manner provided for in Rule 5(b). . . ." At the end of the sentence, however, it says the clerk "shall make a note in the docket of the mailing." We suggest the wording be changed to "of the service" in that the purpose of the change is to authorize the clerk to send notice of order or judgment by electronic means.

We thank you for the opportunity to comment and hope that these remarks will be helpful to the Committee on Rules.

Very truly yours,



UNITED STATES BANKRUPTCY COURT
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MIAMI, FLORIDA 33130-1669

99-BK-008

KAREN EDDY
CLERK OF COURT

(305) 536-5216
EXT. 3021

KATHERINE GOULD FELDMAN
CHIEF DEPUTY CLERK

February 6, 2000

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

Dear Sir:

In conjunction with the August 1999 Request for Comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, the following comments are respectfully submitted for your consideration.

1. Proposed Amendment to Bankruptcy Rule 1007(m):

It is suggested that the proposed rule state a format for providing the required information in order for those who must serve notice to be able to link the address of the creditor with the address of the representative. Perhaps the rule should require that the format of address submission for service matrix purposes be as follows:

name of infant or incompetent
c/o (representative's name)
address of representative

It would be beneficial also to amend the Official Form Schedules to provide space next to the creditor's name for the name/address of the guardian or the form schedules could have a column similar to the "codebtor" "husband, wife , joint" columns on the form next to the creditor listed to indicate "guardian or representative" and to state which entity they are related to.

2. Proposed Amendment to Bankruptcy Rule 2002(g)(1)(a):

Courts that utilize BANCAP do not currently terminate creditors or any previously supplied appearance or service request from the case's service matrix and continue to serve notices on all such appearances and service requests regardless of order of filing. Since a clerk's office receives "requests to mail notices" in many different

formats and of different durations, it would be difficult for a deputy clerk to make a judgement call regarding whether a particular "request" constitutes the "last request" that is intended to replace all other filed "requests". For example, an attorney may file a claim on behalf of a creditor and then special counsel may later appear on behalf of that creditor but only for a particular matter. Although the appearance by special counsel would be a "last request" filed on behalf of that creditor, it would not be the intent of special counsel, by filing the appearance, to supplant the attorney who is representing the creditor on the overall claim. Although the policy of continually adding but not deleting multiple appearances may result in multiple service on the same entity or parties representing a given entity, substituting a deputy clerk's (or other party providing service) judgement as to what constitutes "last request filed" may result in incomplete service.

A possible solution could be for the rule to provide that a proof of claim filed in an asset case will serve as a request for service, however it will not supercede an already filed request for service unless accompanied by a notice of amended request for service (perhaps a national form "Request for Service" could be developed which would clarify the status of service requests previously filed on behalf of a particular entity). If both a notice of appearance and a proof of claim are filed in a case and they contain different addresses, then both should receive notice unless clarification by the creditor is filed. This takes the burden off the clerk to try to determine the correct service address and ensures that, although some duplicate service will take place, that service will be achieved on all necessary parties.

Related question to proposed amendments to BR 2002:

Does current BR 2002(h), which provides for notices to be served only on creditors who have filed claims, need to be amended to clarify that the notice has to go to the last filed request (per proposed BR 2002(g)(1)(a) and, in conjunction with the amendment to 2002(g) (3), also to the representative of an incompetent or infant person if they are listed on the schedules or in a request filed with the court which differs from the address provided in any filed claim? If, under proposed rule 2002(g)(1)(a), a filed claim is superceded by a later filed "request", it would be difficult (in those courts that utilize BANCAP) to identify which creditors "have filed claims" under this rule if the claim data on a creditor's claim has been overwritten upon the filing of a "request".

If I can provide any further clarification on these comments, please contact me.

Thank you for providing me with the opportunity to comment on the proposed rules.

Sincerely,

Karen Eddy

Karen Eddy
Clerk of Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

Jacob Weinberger United States Courthouse
325 West "F" Street
San Diego, California 92101-6989

LOUISE DE CARL ADLER
CHIEF BANKRUPTCY JUDGE

Telephone (619) 557-5661
Facsimile (619) 557-5536

February 11, 2000

99-BK-009

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

Re: Proposed Amendments to the Federal
Rules of Bankruptcy and Civil Procedure

Dear Mr. Secretary:

At the request of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, I write to comment upon the proposed changes to the Federal Rules of Bankruptcy Procedure and Federal Rules of Civil Procedure. By way of background, the Conference of Chief Bankruptcy Judges consists of thirteen chief bankruptcy judges from the various judicial districts within the Ninth Circuit.

1. ***Proposed Amendments to FRBP 2002(c)(3), 3016, 3017 and 3020(c):*** As we understand these proposed rules changes, they are designed to alert persons potentially affected by Chapter 11 plan provisions containing injunctions not otherwise provided by the Bankruptcy Code. Our Conference of Chief Judges has grave concerns about these proposed amendments. First, we are concerned about the possibility of collateral litigation. "Conduct not otherwise enjoined under the Code" is a vague, undefined term. Once a plan has been confirmed, it would seem the terms of the plan are provided for by the Code. What about the broad powers given to the court to issue injunctions in connection with confirmation of a plan as provided in 11 U.S.C. Sec. 524(g)? Is any injunction proposed under that section covered by this phrase?

In addition, we believe these rules changes may, in fact, imply that debtors have the right to propose plans containing injunctions not otherwise provided for by the Code . From those of us on the frontline of novelty, this is more than an abstract concern.

Finally, we question whether providing potentially affected entities merely with notice solves the obvious jurisdictional question whether an entity who is not otherwise a party to a case may be bound by a Chapter 9 or Chapter 11 plan.

In summary, the consensus of our Conference is that these proposed amendments, while laudable in their intent, step over the line of mere procedural protection and have the very real possibility of fomenting disputes.

2. ***Proposed Amendment to FRBP 9020***: As the comment to this proposed rule change accurately observes, there has been a number of cases dealing with the contempt powers of bankruptcy court judges since the original adoption of FRBP 9020. One of those cases upon which Ninth Circuit bankruptcy judges rely is In Re Rainbow Magazine, Inc., 77 F3d 178 (9th Cir. 1996) . However, Rainbow Magazine relies on FRBP 9020 as it is presently worded along with the U. S. Supreme Court decision in Chambers v. PASCO, 501 U.S. 32 (1991) to conclude that bankruptcy judges indeed have inherent powers to sanction for contempt. *See* Rainbow Magazine at 284-5. We are concerned that this proposed rules change might undercut our ability to exercise the *sua sponte* contempt power now firmly established by case law which, in part, relies on the current rule. We strongly suggest that the language in the second paragraph of the Committee Note be added in summary form to the body of the amended rule. One possibility might be:

> "Nothing in this rule is meant to extend, limit, or otherwise affect the court's *sua sponte* contempt power."

This suggestion is one unanimously adopted by our Conference.

3. ***Proposed Amendments to FRBP 9006, FRCivP 5(b)(2)(D) and FRCivP 6(e):*** It appears the proposed amendments conflict. While they provide for electronic service, FRBP 9006 would give three extra days for response to electronically served documents, FRCivP 5(b)(2)(D) would not and FRCivP 6(e) would do the same as FRBP 9006. After considerable discussion, the Conference concluded there were good arguments to be made for either giving or not giving extra time to respond to electronic service of process. However, we unanimously concluded that whatever policy is ultimately adopted, it should be the same for both the bankruptcy rules and the civil rules.

I hope the comments of our Conference of Chief Bankruptcy Judges of the Ninth Circuit are helpful to your deliberations.

Sincerely,

LOUISE DE CARL ADLER
Chief Judge, United States Bankruptcy Court
Southern District of California

MONTGOMERY, MCCRACKEN, WALKER & RHOADS, LLP

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99-BK-010
99-CV-015

February 14, 2000

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
One Columbus Circle, NE
Room 4-170
Washington, DC 20544

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure

Subject: Service by Electronic Means

Dear Mr. McCabe:

We take pleasure in this opportunity as Fellows of the American College of Trial Lawyers to comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure.

In particular, as practitioners with ample experience in civil litigation, we are of the view that the Proposed Amendments to Federal Rules of Civil Procedure 5 and 77 are supported by both our personal experiences as litigators and sound judicial policy. These amendments will provide for prompt notification to members of the bar of opinions and orders in the cases in

which they are involved; this increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients.

We would like further to recommend that there be steps taken to ensure consistency between the Civil Rules and the Bankruptcy Rules, as this will enhance speedy and smooth processing of litigation by the Courts and the Bar.

Very truly yours,

Ralph W. Brenner

David H. Marion

Stephen A. Madva

RWB:DHM:SAM:ww

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99-BK-011

99-CV-016

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February 14, 2000

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure of the
Judicial Conference of the United States
One Columbus Circle, NE
Room 4-170
Washington, DC 20544

Re: Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure

Subject: Service by Electronic Means

Dear Mr. McCabe:

I take pleasure in this opportunity to comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure.

In particular, as a practitioner with ample experience in civil litigation, and having served as a Governor of the Philadelphia Bar Association and Chairman of its Federal Courts Committee, I am of the view that the Proposed Amendments to Federal Rules of Civil Procedure 5 and 77 are supported by both personal experience as a litigator and sound judicial policy. These amendments will provide for prompt notification to members of the bar of opinions and orders in the cases in which they are involved; this increase in efficiency will allow for our office to provide for more prompt and less costly service for our clients.

I would like further to recommend that there be steps taken to ensure consistency between the Civil Rules and the Bankruptcy Rules, as this will enhance speedy and smooth processing of litigation by the Courts and the Bar.

Very truly yours,

Francis Patrick Newell

FPN:ww

U.S. Department of Justice
Executive Office for United States Trustees

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Washington, D.C. 20530

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99-BK-012

February 11, 2000

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: U.S. Trustee Program Comments on Proposed Bankruptcy Rule Changes

Dear Mr. McCabe:

On behalf of the United States Trustee Program, Department of Justice, we respectfully offer these comments on the following proposed amendments to the Federal Rules of Bankruptcy Procedure ("FRBP"):

- Rule 9006(f), which would expand the three-day rule to service by electronic, or other agreed, methods;
- Rule 9020, which would delete the current procedural protections associated with contempt proceedings before bankruptcy judges; and
- Rule 9022(a), which would authorize service of a judgment or order by any method, including service by electronic means, as permitted under the proposed amendments to Rule 5(b) of the Federal Rules of Civil Procedure ("F.R.Civ.P." or "Civil Rule").

Rule 9006(f)

We support the proposed amendment of Bankruptcy Rule 9006(f) to expand the three-day grace period with respect to documents served by mail and by other means, including electronic filing ("e-filing"). The proposed amendment provides (new language underscored):

> (f) ***Additional Time after Service by Mail or Under Rule 5(b)(2)(C) or (D) F.R.Civ.P.*** When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ.P., three days shall be added to the prescribed period.

See Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Civil Procedure, at 18-19 (Aug. 1999). Proposed Civil Rule 5(b)(2), in turn, provides as follows in pertinent part:

> **(b)** ***Making Service.*** . . . (2) Service under Rule 5(a) is made by:
>
> (A) Delivering a copy to the person served . . . ;
> (B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing;
> (C) If the person served has no known address, leaving a copy with the clerk of the court; [and]
> (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 service. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

Request for Comment, at 44-46 (emphasis added).

We believe that extending the three-day "mailbox rule" to documents served by e-filing or other means consented to pursuant to Civil Rule 5(b)(2)(D) is fully warranted in bankruptcy proceedings at this time. While electronic service may occur with greater speed than mailing, "e-filing" and other forms of alternate service are still in their infancy and will likely experience technical glitches until the underlying applications mature and develop. For instance, simply because a document was electronically "served" upon an attorney via email or the like does not necessarily mean it was received the same day or fully intact. Attached files could become corrupted in transit and require re-transmission; accessing and printing documents may be complicated by use of differing word processing platforms (*e.g.*, Microsoft Word vs. Corel Word Perfect); and procedures need to be established to track receipt of electronically served documents in large multi-attorney offices, such as U.S. Trustee Offices. In order to encourage parties to consent to e-service, they should not be deprived of the same three-day grace period that has traditionally been afforded to documents served by mail.[1]

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[1] In response to the related request for comments on the preliminary decision not to extend the three-day period under Civil Rule 6(b) to documents electronically served in civil cases (*see Request for Comment* at 18, note), we offer the following. Failure to extend the same three-day period to e-filings and traditionally-served documents may chill parties' willingness to consent to alternate/electronic forms of service. The three-day rule has long been in place and has not

Rule 9020

We strongly oppose the proposed amendment to Bankruptcy Rule 9020, which would delete all the current procedural safeguards in the rule in favor of a new one-sentence provision that simply states: "Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest." *Request for Comment*, at 19. The rationale offered for the proposed amendment states in pertinent part:

> Since 1987, several courts of appeals have held that bankruptcy judges have the power to issue civil contempt orders. . . . To the extent that Rule 9020, as amended in 1987, delayed the effectiveness of civil contempt orders and required de novo review by the district court, the rule may have been unnecessarily restrictive in view of judicial decisions recognizing that bankruptcy judges have the power to hold parties in civil contempt.

Id. at 23. Quite apart from the significant constitutional issues raised by such a broadening of bankruptcy judges' contempt powers,[2] the proposed amendment raises at least three concerns.

First, by totally eliminating the current provision granting a ten-day period within which to object to a contempt order pursuant to Rule 9033(b), the new rule apparently relegates aggrieved parties to the appeal procedures contemplated by 28 U.S.C. § 158(a)-(c) — which allow appeals to district courts or Bankruptcy Appellate Panels ("BAP"), where authorized. However, the appellate route is inherently slower and costlier than Rule 9020(c)'s objection procedure. Moreover, if a contempt order were not deemed "final," it presumably could not be appealed until the end of the entire case (absent leave to file an interlocutory appeal), pending which time the damage to a party improperly subjected to contempt could cause undue harm.

Second, the new rule introduces a host of ambiguities into contempt proceedings. Rather than itemizing the procedures specifically applicable to contempt proceedings, the new rule would

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unduly delayed proceedings. Not applying the three-day rule to e-filings may have the unintended consequence of encouraging parties to seek time extensions they would not have otherwise needed.. In addition, uniformity between civil and bankruptcy procedure should be maintained in this regard to encourage experimentation with e-filing techniques in both bankruptcy and civil proceedings. We thus endorse the "Alternative Proposal" (*id.* at 48) to amend Civil Rule 6(e) in a manner comparable to the proposed amendment of Bankruptcy Rule 9006(f).

[2] Rather than reiterate those points, we defer to the memorandum on the subject to Professor Alan N. Resnick from J. Christopher Kohn, Director, Commercial Litigation Branch, Civil Division, Department of Justice, dated February 11, 1998.

simply cross-reference Rule 9014, which governs contested matters generally and provides in pertinent part as follows:

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

FRBP 9014. The cross-reference to Rule 9014 in the proposed amendment to Rule 9020 appears to make the full gamut of motions practice and testimonial proceedings applicable to future contempt proceedings. It will likely engender considerable litigation as parties attempt to discern precisely what procedural avenues are open to them to replace the time-tested procedures under current Rule 9020.

It is also disturbing that the new rule would apparently not cover *sua sponte* contempt issues at all, thereby introducing a major ambiguity as to what procedures apply when contempt proceedings are initiated directly by a bankruptcy judge without motion by the U.S. Trustee or any party-in-interest. Current Rule 9020(a) governs contempt proceedings initiated by a bankruptcy judge for "contempt committed in [his or her] presence," while current Rule 9020(b) governs "other contempt" committed outside the judge's presence. The new proposed rule is silent as to contempt proceedings initiated by a bankruptcy judge *sua sponte*, and instead applies the safeguards of Rule 9014 only to motions "made by the United States trustee or a party in interest." This leaves parties faced with *sua sponte* contempt proceedings in the untenable position of lacking any pre-established "ground rules" regarding such basic fairness concepts as guarantees of adequate notice, an opportunity to be heard, and meaningful review procedures.

Yet a third flaw in the proposed rule is its assumption that the current regime warrants wholesale repeal simply because "several courts of appeals have held that bankruptcy judges have the power to issue civil contempt orders." *Request for Comment*, at 23, *citing* Matter of Terrebonne Fuel and Lube, Inc., 108 F.3d 609 (5th Cir. 1997), and In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996). We are unaware of any case that invalidated the current rule, and even

the Committee Note accompanying the proposed rule acknowledges that several appellate courts have questioned bankruptcy judges' authority to issue criminal contempt orders.

Stated simply, the committee has proffered no case law to support the proposed repeal of current Rule 9020. If anything, that rule provides meaningful, expeditious, and time-tested safeguards against the possible misuse of bankruptcy judges' contempt power, and Rule 9020 should thus be left intact without amendment.

Rule 9022

Finally, the proposed amendment to Rule 9022(a) reads in pertinent part as follows (new language underscored, deleted language stricken):

> (a) ***Judgment or Order of Bankruptcy Judge.*** Immediately on the entry of a judgment or order the clerk shall serve a notice of entry ~~by mail~~ in the manner provided ~~by Rule 7005~~ in Rule 5(b) F. R. Civ. P. on the contesting parties and on other entities as the court directs. Unless the case is a chapter 9 municipality case, the clerk shall forthwith transmit to the United States trustee a copy of the judgment or order. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by Rule 8002.

Request for Comment, at 23-24.

The Committee Note indicates that this new language tracks a similar proposed change to Civil Rule 77(d), and is intended to extend to orders and judgments the more flexible means of electronic and other service allowed by Civil Rule 5(b) with respect to other papers.

The proposed amendment to Rule 9022 does not expressly mention that consent is required before a party may be subjected to electronic or alternate service of court orders and judgments. However, the Committee Note appears to make this clear. Based upon this understanding — *i.e.*, that a party's actual consent is an absolute prerequisite to service of orders and judgments by any means other than mail — we support the proposed amendment. As noted in our comments on the proposed revision of Rule 9006(f), we are concerned that current "e-filing" technologies are still too untested to make important substantive rights (such as strict appellate deadlines) run from the date of mere electronic notice of dispositive court orders and judgments, unless a party has expressly consented to that mode of service.

Thank you for your consideration of these comments and, should you have any questions, please do not hesitate to call me or Anthony J. Ciccone of my staff at (202) 307-0003.

Sincerely,

Martha L. Davis
General Counsel
Executive Office for U.S. Trustees

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
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(215) 597-7704

99-BK-013

February 15, 2000

99-CV-018

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

RE: Fax Noticing

Dear Mr. McCabe:

Enclosed please find a copy my *Recommendation for Amendment to Federal Rule of Civil Procedure 5(b), Federal Rule of Civil Procedure 77(d), Federal Rule of Criminal Procedure 49(c), and Federal Rule of Appellate Procedure 3(d),* which was submitted in September 1997 and an executive summary of the Eastern District of Pennsylvania Fax Noticing Program.

Since this district's last report "Recommendation for Amendment to Federal Rule of Civil Procedure 5(b), Federal Rule of Civil Procedure 77(d), Federal Rule of Criminal Procedure 49(c), and Federal Rule of Appellate Procedure 3(d)" in September of 1997, which featured the highlights and benefits of the Eastern District of Pennsylvania fax noticing pilot program, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recently drafted preliminary proposed amendments to the Federal Rules which would incorporate such recommendations to authorize service by electronic means.

The fax noticing program continues to produce favorable results, in terms of expedited noticing, improved efficiency in personnel time, and costs savings. The statistics generated from the since the implementation of the local pilot program in April 1996 are overwhelmingly supportive of such amendments:

- As of December, 1999, a total of 4,742 attorneys and litigants identified in the Eastern District of Pennsylvania ICMS data base have voluntarily opted to receive notice of judicial opinions and orders by facsimile in lieu of the conventional manner of notice by first class mail.

- During September 1999, 61 percent of civil and 85 percent of criminal docketed orders and judgments were forwarded to at least one attorney by fax; overall, 66% of all docketed orders and judgments forwarded during this period were forwarded to at least one attorney by fax.

- During this same month, the number of attorneys who received faxed civil orders and judgments outnumbered those that received mailed notices over 6 to 1 (1680:265). In other words, 86% of all attorneys who were of record to receive copies of orders filed in September received these documents electronically, rather than by mail.

- Also, during this period, 63% of all attorneys identified in the criminal data base were fax (as opposed to mail) recipients of docketed criminal orders (360:209).

- The cumulative total percentage for the number of attorneys who received notice by fax by voluntarily consenting to participate in the pilot program for September 1999 is 81% (2040:474).

- According to estimates from the Court Administration Division, Administrative Office of the U.S. Courts, the flat notice rate for fax transmissions is $.10½ per transmission, regardless of the number of pages in each transmission (up to the maximum limit of 30 pages, whereby the cost defaults to the first class mail rate). Since the debut of this pilot program, 116,124 docketed opinions and orders have been forwarded to at least one attorney by fax.

- Compared to the base first class mail rate of $.37 per mailing (this is the total of the average discounted postage rate of 25¢ to 26¢ + the actual cost of production of 11¢ to 12¢), serving notice by mail is over 3½ times more costly than fax noticing.

It is maintained that this program has been remarkably successful due in large part to the endorsement and favorable reception by district and magistrate judges and Clerk's Office staff, and ease of implementation and transition process. These factors contributed to the resounding success of this program.

It is with optimism that these proposed changes to the Federal Rules to authorize service by electronic means upon consent will be adopted. Should the amendments be approved, it is fully anticipated that the number of attorneys and litigants opting to take advantage of this alternative form of service will increase to even a higher level.

Please let me know is I can provide any additional information which may be of use to the committee in considering these amendments. I am available to appear personally to provide any additional information on this matter that the committee requires. Also, I would like to extend an invitation to any member or representative of the committee to visit our court to observe our programs.

Please note that we recommend that Section B.1. [G], set forth on page 5 of the Preliminary Draft of the Proposed Amendments, which proposes to amend Local Bankruptcy Rule 9006(e) "to expand the 3-day rule so that it will apply to any method of service, including service by electronic means, authorized under proposed amendments to Civil Rule 5(b), other than service by personal delivery" be deleted in its entirety. This provision would appear unnecessary when service is being made by electronic means. This recommendation is made in view of the fact that relevant provisions in the Rules of Civil Procedure are silent as to expanding the time for service.

In closing, it is most gratifying to note that the amendments as proposed will codify the fax noticing local pilot program which has been operational in the Eastern District since May of 1996. The program, which is designed to expedite case processing procedures by providing required notice of judicial opinions and orders which rule on motions or schedule judicial proceedings or trial dates, in a more timely manner via facsimile as consented to by the recipients, has been very successful in reducing the costs of litigation in the Eastern District.

Sincerely,

MICHAEL E. KUNZ,
Clerk of Court

MEK:crl

Fax Noticing Local Pilot Program
in the
United States District Court
for the Eastern District of Pennsylvania
Executive Summary

The Fax Noticing Local Pilot Program was instituted in the Eastern District of Pennsylvania in April 1996 as a means of processing judicial opinions, orders and judgments in a timely and cost-effective manner. It was designed with the intent to expedite case processing procedures by providing timely notice via facsimile, with the consent of recipients, and at a considerably less cost to the federal judiciary. In addition to providing quicker notification, use of electronic means allows the district court clerk's office to keep up with technology and the legal practices of the community. Because fax noticing renders notice to counsel and litigants faster than first class mail, it is possible to achieve the judiciary goal of same-day docketing. And by conserving and pooling of staff resources, fax noticing has proven to be a cost saving measure as well.

The Eastern District of Pennsylvania's fax noticing program procedures were developed in late 1995. In January 1996, an announcement explaining the scope, procedures and objectives of the local pilot program was sent to counsel in every pending civil and criminal case, counsel filing new cases, the United States Attorney's Office and CJA panel attorneys. [To date, 4,742 attorneys and litigants identified in the Eastern District of Pennsylvania Integrated Case Management System (ICMS) have voluntarily consented to participate in the pilot program by agreeing to receive notice of orders and judgments by facsimile transmission and waiving provisions of Fed.R.Civ.P. 77(d) or Fed.R.Crim.P. 49(c) which provides notice by the conventional manner of first class mail.] As signed consent forms were received (a total of 7,220 were sent initially), fax information as to each participant was entered into ICMS and a fax information directory, which lists current names and fax numbers. Training for courtroom deputy clerks and judicial secretaries followed shortly thereafter in February 1996, with implementation effectively immediately after training. A fax noticing station was established in the docketing section of clerk's office, and a docket clerk was assigned to process all orders filed.

Success of the local pilot program was immediately apparent as statistical data compiled was analyzed. Statistics from this district's pilot program are overwhelmingly supportive of proposed amendments now before the Judicial Conference Committee on Rules of Practice and Procedure, adoption of which would authorize service by electronic means upon consent.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: REVISION OF RULE 2014

DATE: FEBRUARY 16, 2000

Rule 2014 has caused considerable difficulties for professionals who are being employed to represent trustees, debtors in possession and creditors' committees. The rule requires the professionals to disclose all of the person's "connections" with creditors and other parties in interest as well as any connections to those entities' attorneys and accountants. See, e.g., In re The Bennett Funding Group, Inc., 226 B.R. 331 (Bankr. N.D.N.Y. 1998)(trustee retained as a consultant to national accounting firm must either resign as trustee or decline employment by accounting firm because accounting firm will not disclose its list of private clients, some of whom may be creditors of the bankruptcy estate). This is information significantly beyond what is required to determine whether a particular professional is "disinterested" as that term is defined in § 101(14) of the Code. That section requires that the professional not hold "any interest materially adverse to the estate or any class of creditors or equity security holders" because of any connections with the debtor or an investment banker of the debtor. Moreover, the statute provides that if the professional has a materially adverse interest for any other reason, then the professional is not disinterested.

Existing Rule 2014 extends the disclosure requirement of the professional's "connections" with the debtor and investment bankers, to include as well the professional's "connections" with creditors and their lawyers and accountants. Bankruptcy Code § 101(14)

does not call for this information. Furthermore, if followed to the letter, the rule is likely to generate so much disclosure that the courts and interested parties would be overwhelmed. In that event, the excessive disclosure actually defeats the informational function of the rule.

The following revised rule draws in large part from Rule 2014 contained in the Litigation Package. The revised sections are based on the need for the full disclosure of relationships and connections with the debtor, and any investment banker of the debtor, while providing some guidance with respect to disclosures concerning creditors and other parties in interest. The requirement of disclosing "connections" with creditors, other parties in interest and their attorneys and accountants is deleted and replaced by specific disclosure of relevant facts regarding creditors and other parties in interest, which may give rise to a materially adverse interest. The courts will then be able to consider comprehensive, but focused, disclosure, rather than scrutinizing a substantial amount of superfluous information.

There is also included an alternative subdivision (b)(6) regarding the sharing of fees. The first version of the subdivision is taken directly from the Litigation Package rendition of Proposed Rule 2014. The alternative is not intended to change the assumed meaning of the provision, but is offered as another way of expressing the idea that there is no requirement of disclosure if the sharing arrangement is within a partnership, corporation, or direct employment relationship.

The proposed rule follows.

Rule 2014

EMPLOYMENT OF PROFESSIONAL PERSONS

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

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

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

(3) state the professional services to be rendered;

(4) disclose any proposed arrangement for compensation; and

(5) state that, to the best of the trustee's or committee'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 request shall be accompanied by a verified statement of the person to be employed made according to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the

circumstances. The statement shall:

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

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

(3) disclose the person's direct or indirect relationship to, connection with or interest in the debtor or an investment banker for any outstanding security of the debtor which may give rise to an interest materially adverse to the estate or a class of creditors or equity security holders;

(4) disclose all relevant facts regarding any relationship with 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, which may give rise to an interest materially adverse to the estate, or a class of creditors or equity security holders;

(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.

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

(c) SERVICE. The request shall be transmitted to the United States trustee, unless the case is a chapter 9 case, and shall be served on:

(1) the trustee;

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

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

(d) 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.

(e) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 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, serve copies on the entities listed in Rule 2014(c) and, unless the case is a chapter 9 municipality case, transmit a copy to the United States trustee.

COMMITTEE NOTE

This rule has been rewritten to make it conform more closely to the applicable provisions of the Code. The rule no longer includes references to "connections" with creditors or parties in interest or their respective attorneys. Rather, the rule directs professionals who wish to be employed to disclose "connections" with the debtor or an investment banker of the debtor consistent with the definition of disinterestedness in § 101(14)(E) of the Code. The rule also requires the professional to undertake a reasonable inquiry under the circumstances to identify any facts relevant to a determination that the professional holds any interest materially adverse to the estate or a class of creditors or equity security holders.

The rule also sets out the service requirements for the request for the authorization of employment. There is no provision requiring a hearing on the request. In most cases, an order authorizing the employment will be entered without a hearing. The court may set a hearing on the request or may set aside any order issued under the rule upon motion of an interested party aggrieved

by the order.

The rule does not attempt to address the standards that courts should apply in ruling on the requests for employment of professionals. Instead, it is intended only to establish the parameters for disclosure by the professional to the court. The professional must exercise judgment in deciding whether a fact or relationship is relevant to the determination that he or she holds materially adverse interest.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: POSTPONEMENT OF PAYMENT OF ATTORNEY FEES WHEN FILING FEE IS PAID IN INSTALLMENTS

DATE: February 16, 2000

Under Rule 1006(b), debtors may apply for an order permitting the payment of the filing fee in installments. Rule 1006(b)(3) provides further, however, that neither the debtor nor the chapter 13 trustee may pay an attorney or other person who renders services to the debtor in connection with the case until the filing fee is paid in full. This rule is derived from former Rule 107 which contained a similar restriction on the payment of attorney fees prior to the payment of the filing fee. Rule 107 codified decisions that ordered the payment of filing fees prior to the payment of attorney fees. *See, e.g., In re Latham,* 271 F. 538 (N.D.N.Y. 1921); *In re Darr*, 232 F. 415 (N.D. Cal. 1916). The decision in *Darr* is particularly instructive. In that case, the court held that under the applicable priority statute, the debtor could not pay his attorney without having paid the clerk of the court. My research indicates that there was no specific priority for filing fees in voluntary cases. Section 64b(2) established priority only for "the filing fees paid by creditors in involuntary cases."

The current priority system is not so direct, but it has a very similar purpose. Congress made a policy decision by enacting the priority scheme set out in the Code. Bankruptcy Code § 507(a)(1) includes fees "assessed against the estate under chapter 123 of title 28" among the first priority expenses. These fees are equal in priority to administrative expenses allowed under

§ 503(b). Among the expenses included in § 503(b)(3)(A) are the expenses of a creditor initiating an involuntary case. If there are insufficient funds to pay all claims of a common priority, then those claims are paid pro rata. Permitting the payment of a debtor's attorney's fees arguably would be inconsistent with that priority decision. While it can be argued that permitting the payment of the filing fee in preference to the attorney fees similarly violates the priority system, the amount of the filing fee is static, while the amount of the debtor's attorney's fee may be quite different in each case. It is also subject to requests for additional compensation in appropriate circumstances. Given that the amount of the filing fee is both set and limited (especially when compared to attorney fees), I believe that the postponement of the attorney fee payment is consistent with the general purposes of § 507.

There is a presumption that the Supreme Court has not abridged or modified any substantive rights by adoption of the Bankruptcy Rules. *In re Decker,* 595 F.2d 185 (3d Cir. 1979). Therefore, the party asserting that a particular rule violates the Rules Enabling Act must carry an affirmative burden for the rule to be set aside. One can argue that Rule 1006(b) simply establishes a payment timetable and does not prohibit a debtor from paying an attorney.

There does not appear to be any case that has raised the issue of whether the postponement of fees by rule violates the Rules Enabling Act. Therefore, I think it is premature at best, and has the potential to create more controversy than seems to have existed thus far, to raise the issue at this time.

The only related matter that has generated any reported decisions concerns the applicability of Rule 1006(b)(3) to cases commenced in forma pauperis. The courts have split on the issue of whether an attorney fee can be paid in a case filed without the payment of a filing

fee. *Compare In re Takeshorse*, 177 B.R. 99 (Bankr. D. Mont. 1994) (debtor who can afford a prepetition retainer for her attorney is not eligible for in forma pauperis status), *with In re Stephenson,* 202 B.R. 52 (Bankr. E.D. Pa. 1997) (Rule 1006(b)(3) does not apply to cases commenced in forma pauperis). The House version of the pending bankruptcy legislation includes a provision that would make the current pilot program authorizing in forma pauperis filings both permanent and nationwide. There is no comparable provision in the Bill that passed the Senate. If that provision is enacted, it may be appropriate to reevaluate Rule 1006(b)(3) to address directly the postponement of the payment of a debtor's attorney fees. .

A separate issue involves the application of Rule 1006(b)(3) to petition preparers. Section 110 of the Code governs bankruptcy petition preparers. Subsection (h) requires petition preparers to file a declaration with the court disclosing any fees they have received from the debtor in the twelve months prior to the commencement of the case. This is comparable to the obligation Code § 329(a) imposes on a debtor's attorney to disclose all fees paid or promised to be paid by to the attorney in connection with the case. Rule 2016(b) supplements § 329 by setting out the time limit for the submission of the statement and providing direction as to the information included in the statement. That Rule applies only to attorneys. Consequently, petition preparers (who by definition are not attorneys) are not governed by that Rule.

The common purpose of §§ 110(h)(1) and 329(a) suggest that it is appropriate to amend Rule 2016 to include petition preparers. The Rule could be amended as follows:

Rule 2016

Compensation for Services Rendered and Reimbursement of Expenses.

* * * * * * *

(c) Every petition preparer for a debtor shall file a statement 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 § 110(h) of the Code including whether the petition preparer has shared or agreed to share the compensation with any other person or entity. The statement shall include the particulars of any such sharing or agreement to share by the petition preparer, but the details of any sharing of the compensation with an employee of a petition preparer 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.

COMMITTEE NOTE

Subdivision (c) is added to require that petition preparers file the statement required by Code § 110(h) within 15 days after the order for relief. Supplemental statements also are required within 15 days of any other payments or sharing agreements not previously disclosed. Adding the new subdivision to the rule makes it parallel to the statutory disclosure requirements. Subdivision (b) provides the necessary procedural guidance to effectuate Code § 329, and subdivision (c) does the same for § 110(h).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 1004(a) - VOLUNTARY PARTNERSHIP PETITIONS

DATE: FEBRUARY 23, 2000

Section 303(b)(3)(A) of the Bankruptcy Code provides that an involuntary bankruptcy case is commenced against a partnership by the filing of a petition "by fewer than all of the general partners in such partnership." Rule 1004 (b) implements this provision and sets out service and summons requirements in the event an involuntary petition is filed.

Unlike Rule 1004(b), however, Rule 1004(a) has no direct statutory counterpart. Bankruptcy Code § 301 does provide that a voluntary petition is one that is filed "by an entity that may be a debtor under such chapter." A partnership is a "person", Bankruptcy Code § 101(41), and persons are generally eligible for relief under the Code. See Bankruptcy Code § 109. The problem presented is whether Bankruptcy Code § 303(b)(3)(A) creates a substantive requirement that the effectiveness of a voluntary petition is dependent on all partners of a general partnership executing the petition. If that is so, then Rule 1004(a) arguably would violate the Rules Enabling Act.

The Supreme Court has held that state law governs the issue of whether a person is empowered to file a corporate bankruptcy petition. Price v. Gurney, 324 U.S. 100 (1945). The courts have continued to follow this rule under the Bankruptcy Code. See, e.g., Keenihan v. Heritage Press, Inc., 19 F.3d 1255 (8th Cir. 1994). While there are relatively few decisions, the

courts have followed this directive in partnership bankruptcy cases as well. In In re Channel 64 Joint Venture, 61 B.R. 255 (Bankr. S.D. Oh. 1986), an amended joint venture agreement provided that the entity created by two corporations was a partnership and that a majority vote of the management committee of the entity could authorize the filing of a bankruptcy petition. The management committee passed the appropriate resolution and filed a voluntary petition on behalf of the partnership. One of the two coowners of the joint venture objected to the filing, relying on § 303(b)(3)(A). The court rejected the argument and held that the petition was properly filed. It found no conflict between Rule 1004(a) and the Bankruptcy Code. Importantly, the court did not find or even suggest that the Rule would override state law. Rather, the court held that the case was properly commenced because of the joint venture agreement.

The Bankruptcy Rules cannot abridge, enlarge, or modify any substantive right 28 U.S.C. § 2075. The courts presume that the rules do not violate this limitation. In re Decker, 595 F.2d 185 (3d Cir. 1979). The argument that Rule 1004(a) violates the Rules Enabling Act is that ir authorizes the filing of a voluntary case by less than all of the general partners in contravention of Bankruptcy Code § 303(b)(3)(A). The more likely analysis, however, is that Rule 1004(a) simply recognizes that authorization for filing exists in different forms. It can be included in a partnership agreement as in *Channel 64 Joint Venture*, or it can be evidenced by a separate consent form signed by the partners. Under Bankruptcy Rule 1004(a), the authorized party can execute the bankruptcy petition without the necessity of every partner actually signing the petition. This can be particularly helpful in partnerships with a significant number of partners. That is true as well in cases in which the partners are in distant locations.

The relative dearth of cases on the subject and the presumption of validity of the Rules

suggests that it is not necessary to amend Rule 1004(a). If there is enough concern that the Rule might be construed as inconsistent with Bankruptcy Code § 303(b)(3)(A), then the Rule could be repealed. This could be accomplished by deleting Rule 1004(a) and the designation of subdivision (b), leaving current subdivision (b) as Rule 1004.

If the Committee believes that it is not necessary or appropriate to repeal Rule 1004(a), it may still be helpful to amend the Rule to state that it is not intended to create any particular authority for a partner to commence a voluntary case. A proposal to accomplish that purpose follows.

Rule 1004. Partnership Petition

(a) VOLUNTARY PETITION. A voluntary petition filed by a partnership shall be signed either by all of the general partners or by a general partner. If the petition is signed by fewer than all of the general partners, it shall be accompanied by evidence of the authority of the partner or partners to file the petition on behalf of the partnership. ~~may be filed on behalf of the partnership by one or more general partners if all general partners consent to the petition.~~

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a general partner filing a voluntary bankruptcy petition for a partnership must submit with it a copy of the appropriate authorization for the filing whenever the petition is signed by fewer than all of the general partners. The rule does not create authority on behalf of any partner to file a voluntary petition for a partnership. Those issues are determined by reference to applicable nonbankruptcy law. *See Price v. Gurney*, 324 U.S. 100 (1945) (corporate authority); *In re Channel 64 Joint Venture*, 61 B.R. 255 (Bankr. S.D. Oh. 1986).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: REPRESENTATIVES FOR INFANTS AND INCOMPETENT PERSONS

DATE: FEBRUARY 24, 2000

The Committee has considered whether to adopt a rule governing the filing of a petition on behalf of an infant or incompetent person. At the September meeting, the Committee concluded that the proposed rule should track Rule 17(c) of the Federal Rules of Civil Procedure as closely as is reasonable. The Committee also concluded that the Committee Note should simply state that the rule follows Rule 17(c). The following revision follows that directive.

Rule 1004.1. Petition for Infant or Incompetent Persons.

Whenever an infant or an 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. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by a next friend or a guardian ad litem. The court shall [may] appoint a guardian ad litem for an infant or incompetent person who is not otherwise represented or shall make such other order as it deems proper 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 incomptent persons.

The rule and note as redrafted from the prior version should resolve the problems addressed in greater detail in the memoranda to the Committee under Tab 6 of the September 1999 agenda book. The problems continue to arise. See, e.g., In re Moss, 239 B.R. 537 (Bankr. W.D. Mo. 1999)(bankruptcy court lamented the lack of direction in the Bankruptcy Rules on the issue and resolved the matter in a way consistent with the proposed rule).

The proposed rule will not, however, solve the problem presented in In re King, 234 B.R. 515 (Bankr. D.N.M. 1999). In *King*, a conservator filed a voluntary petition on behalf of his mother who had been missing for over two years. The court dismissed the case for two reasons. First, the court was concerned that permitting the case to go forward would establish a precedent that the unscrupulous might employ to abuse the bankruptcy process. Judge McFeeley noted that "there is no way to be sure what the debtor's assets and liabilities are if the debtor's whereabouts are unkown." Id. at 518. Second, the court noted that the circumstances of the case made it likely that the debtor was deceased. A decedent's estate is not a person under the Bankruptcy Code and therefore is not eligible for any form of bankruptcy relief. (Rule 1016 does provide, however, that a debtor's death does not abate a pending chapter 7 case, and cases under other chapters also may under proper circumstances.) Thus, permitting the case to go forward through a conservator would be inconsistent with the Bankruptcy Code.

The court's analysis in *King* is persuasive. Moreover, *King* is the only case that has addressed that issue. Consequently, I think it is both unnecessary and unwise to add anything to

the Bankruptcy Rules, whether in Rule 1004.1 or elsewhere, to permit the filing of a voluntary petition on behalf of a person who is missing.

PK

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October 26, 1999

Hon. Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Dear Judge Duplantier:

I have recently run across two decisions, In re Moss, 1999 WL 781672 (Bankr. W.D. Mo. Sept. 28, 1999), and In re King, 234 B.R. 515 (Bankr. D. N.M. 1999), which relate to our consideration of a new Rule 1004.1 governing procedures for filing bankruptcy petitions on behalf of incompetent persons. (Copies are enclosed.)

In Moss, the court grapples with a debtor's incompetency manifest after the filing of her petition. Whether the last sentence of our proposed rule would cover this situation is not entirely clear, especially since our rule is characterized as addressing the initial filing of petitions by infants and incompetent people. In King, a conservator appointed to administer the financial affairs of his missing mother seeks to file a bankruptcy petition on her behalf. While our proposed rule explicitly covers "conservators," missing persons seemingly would not be included in the definition of an "incompetent person."

The incidence of either set of circumstances presumably is extemely low; hence, invocation of the Committee's "we don't write a rule to address every aberrant case or situation" guideline might be appropriate. Nevertheless, since we are already on the subject, we may want to at least consider the circumstances described in Moss and King.

Best regards.

Very truly yours,

J. Christopher Kohn

Enclosures

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In re Marilyn M. MOSS, Debtor.

No. 98-43272.

United States Bankruptcy Court, W.D. Missouri.

Sept. 28, 1999.

MEMORANDUM OPINION AND ORDER

VENTERS, Bankruptcy J.

***1** This matter comes before the Court on the Motion for Appointment of Guardian ad Litem or Next Friend of Debtor filed by the Trustee, Steven C. Block, on August 17, 1999.

Marilyn M. Moss ("Debtor" or "Moss") filed for protection under Chapter 7 of the Bankruptcy Code on August 6, 1998. From its inception, this case has been marked by bizarre occurrences and complicated by the Debtor's unusual behavior. Shortly after her pro se bankruptcy petition was filed, declarations were filed (presumably by Moss) with the Court stating that she was extremely ill and could not attend her § 341 meeting in person. Approximately two months later, pleadings were filed (presumably by Moss) that represented that she had died on November 15, 1998. The filing of these pleadings, which have been found to be false, led to Moss' indictment by a grand jury on two counts of bankruptcy fraud. [FN1] She was arrested and taken into custody on March 2, 1999, and has been incarcerated since that time. On July 21, 1999, the District Court for the Western District of Missouri declared her unfit to assist in her criminal defense and ordered her to undergo treatment at a mental health facility. Moss is currently undergoing treatment at Federal Medical Center Carswell, located in Ft. Worth, Texas.

In addition to the District Court's determination that she is unable to assist in her defense in the criminal proceedings, Moss has demonstrated, through her various correspondences with the Court and her conduct at the August 17 and September 2 hearings, her inability to competently participate in her bankruptcy case. Therefore, in order to adequately protect the rights of the Debtor, facilitate the expeditious administration of the bankruptcy estate, and preserve the integrity of the bankruptcy court and bankruptcy process, the Court will grant the Trustee's Motion and appoint a guardian for the Debtor. The guardian will be appointed for the limited purpose of handling matters related to the bankruptcy case and the guardianship will terminate upon a showing that the Debtor is capable of competently participating in her bankruptcy case.

This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law as required by Federal Rule of Bankruptcy Procedure 7052. The factual background relevant to this Memorandum Opinion and Order will be developed in the Discussion section as necessary.

DISCUSSION

This case presents an issue of first impression to the Court. In fact, the issue of whether a guardian ad litem may be appointed by a bankruptcy court during the pendency of a case, for its general administration (as opposed to the appointment of a guardian for adversarial proceedings pursuant to Rule 7017, Fed.R.Bankr.P.), appears to be novel to the whole of bankruptcy law. The case law dealing with the issues of incompetency and the appointment of guardians ad litem in the bankruptcy context is notable for its absence. Quite simply, it is an issue that doesn't come up often. The Court has uncovered only one case in which a guardian ad litem was appointed by a bankruptcy court during the pendency of a case for its general administration--Gerst v. West Poplar Apartments (In re Gerst), 106 B.R. 429 (Bankr.E.D.Pa.1989). Unfortunately, the court in Gerst did not provide any significant explanation or rationale in support of its appointment of a guardian; it merely noted in the factual recitation of the case that the court had appointed a guardian and cited In re Zawisza, 73 B.R. 929 (Bankr .E.D.Pa.1987), a case in which it was held that a previously appointed guardian ad litem could file bankruptcy for an incompetent or minor. Gerst, 106 B.R. at 430. As we discuss below, the analysis in Zawisza and its progeny does provide some direction to the issue presently before the Court; however, our starting point must be consideration of Rule 1016 and the Debtor's competency to adequately and properly participate in these bankruptcy proceedings.

***2** Federal Rule of Bankruptcy Procedure 1016 provides, in pertinent part:

Death or incompetency of the debtor shall not

> abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.
> Fed.R.Bankr.P. 1016 (emphasis added).

In the context of this case, this rule raises two issues that the Court must address: 1) what is meant by "incompetency" as it applies to these bankruptcy proceedings; and 2) what is meant by "in the same manner, so far as possible," in Rule 1016. We deal with these issues in order.

1. INCOMPETENCY

Incompetency, in the sense of mental competency, is not mentioned or defined in the Bankruptcy Code. [FN2] The only relevant references to incompetency are in the Federal Rules of Bankruptcy Procedure--Rules 1016 and 7017. Rule 1016 deals with the administration of a bankruptcy case in the event of a debtor's death or incompetency, and Rule 7017 deals with the appointment of a guardian ad litem for adversary proceedings in the event the debtor is a minor or an incompetent. Neither rule, however, provides or indicates what definition of incompetency should be used. The case law surrounding the application of Rule 1016 (of which there is very little) is unavailing, but one court applying Rule 7017 has indicated that determinations of incompetency should be made by reference to state law. Moody v. Smith (In re Moody), 105 B.R. 368, 371 (Bankr.S.D.Tex.1989). Because there is no federal law dealing with the determination of mental incompetency in the sense of management of an individual's personal and business affairs (as under state guardianship statutes), and since this has traditionally been an area left to the various state laws, the Court believes that it would be appropriate to look to the laws of the State of Missouri, the state of the Debtor's present domicile, for guidance in this matter.

In Missouri, the definition of incompetency and the procedures for the appointment of a guardian ad litem are governed by Missouri Revised Statutes § 475.010, et seq. Generally speaking, the requirements and procedures for the appointment of a guardian ad litem are quite stringent, and understandably so; the appointment of a guardian may entail a serious deprivation of personal liberty and, to some extent, stigmatizes the allegedly incompetent person in the eyes of the community. Fortunately, Missouri law provides an option that is a significantly less drastic infringement of personal liberty, and happens to be all that is necessary under the present circumstances. That option is the appointment of a "limited guardian," which is controlled by § 475.080:

> Appointment of limited guardian or conservator. If the court, after hearing, finds that a person is partially incapacitated, the court shall appoint a limited guardian of the person of the ward. The order of appointment shall specify the powers and duties of the limited guardian so as to permit the partially incapacitated ward to care for himself commensurate with his ability to do so and shall also specify the legal disabilities to which the ward is subject. In establishing a limited guardianship, the court shall impose only such legal disabilities and restraints on personal liberty as are necessary to promote and protect the well-being of the individual and shall design the guardianship so as to encourage the development of maximum self-reliance and independence in the individual.
> *3 Mo.Rev.Stat. § 475.080. [FN3]

The appointment of a limited guardian for the Debtor in this case will comport with the dictates of § 475.080: This Order specifies the powers and duties of the limited guardian, specifies the legal disabilities to which the Debtor is subject, and the hearing requirement has already been met. The Court held a hearing on September 2, 1999, at which the Debtor appeared by telephone, to determine whether she presently has the ability to competently assist in her bankruptcy case. [FN4] The Court determined then that she does not. This conclusion was based primarily on a consideration of three things: a) the District Court's determination that Moss is presently incompetent to assist in her criminal defense; b) Moss' irrational behavior; and c) Moss' apparent inability to comprehend the administration of her bankruptcy case.

a. The District Court's Determination of Incompetency

On July 21, 1999, Judge Gary A. Fenner of the District Court for the Western District of Missouri held a hearing pursuant to a Motion for a Judicial Determination of Defendant's Mental Competency (filed by Moss pursuant to 18 U.S.C. §§ 4241(a)

and (b)) and a Motion for Hearing and Commitment filed by the United States pursuant to 18 U.S .C. § 4241(d). [FN5]

The District Court, basing its decision on a report by Dr. James Shadduck, Forensic Psychologist, [FN6] found that "[t]he defendant, Marilyn M. Moss, is presently suffering from a mental disease or defect rendering her unable to understand the nature and consequences of the criminal proceedings against her and unable to assist properly in her defense," and the court ordered that she be "committed to the custody of the Attorney General for hospitalization and treatment."

While the Court has not had the benefit of Dr. Shadduck's report, the Court is confident in its reliance on the ruling of the District Court, particularly in view of the fact that Moss and her attorney stipulated to the District Court's consideration of the report and have not contested the District Court's determination that Moss is presently suffering from a mental disease or defect which renders her incapable of understanding the criminal proceedings filed against her and assisting in her defense. This Court is likewise convinced that Moss does not properly understand the bankruptcy proceedings in which she is involved, both as debtor and as defendant.

b. Irrational Behavior

The first instances of Moss' irrational behavior also lie at the root of the pending criminal charges. And although it has not been determined that she was suffering from a mental illness at the time she allegedly made the false representations to the bankruptcy court, this conduct nonetheless warrants some consideration here.

Moss filed a Chapter 7 bankruptcy petition, pro se, on August 6, 1998, apparently for the purpose of halting the efforts of two California law firms to collect a $750,000.00 civil judgment against her and to set aside some purportedly fraudulent transfers of real property. Shortly after the Debtor filed bankruptcy, she represented to the Court, in a "declaration," that she was suffering from the advanced stages of multiple sclerosis and, as a result, could not use her legs, control her bladder, speak, or travel. She also submitted a declaration by a Dr. Joseph Lindsay that purported to substantiate her claims of disability. It has since become apparent that these claims were false and the "doctor's" declaration was a forgery.

***4** Then, on November 23, 1998, a pleading entitled "Notification of Death of Debtor Marilyn Moss" was submitted to the Court. The "Notification," signed by "Jonathan Lindstrom, Administrator," stated that Moss had been rushed to a hospital on November 15 and had died of a brain aneurysm in the emergency room. It further stated that "the few assets left in the estate must be used to pay for Marilyn Moss (sic) coffin and tombstone." Needless to say, these notifications were false; Moss is still very much alive. [FN7]

The other instances of the Debtor's irrational behavior which the Court considers here are found in three letters which the Court has received from the Debtor. In each one of these, the Debtor proclaims that she is not Marilyn Moss and that she is only using this name under protest. She also maintains that she never filed the bankruptcy at all; that the Trustee is, among other things, lying, harassing her family and friends, and trying to steal her money; and that she is being tortured in jail. She also stated in court on August 17 that she was being "framed."

The Court does not purport to have psychiatric expertise; however, the Court can appreciate the fact that the Debtor is acting irrationally, in a way that prevents the bankruptcy case from proceeding efficiently, and in a way that will likely prevent her from protecting her own rights throughout the administration of her bankruptcy case.

c. The Debtor's Failure to Comprehend Implications of Filing Bankruptcy

The Court does not expect a pro se debtor to have a complete, or even informed, understanding of the Bankruptcy Code, nor do we expect a debtor to agree with all of the actions taken by the Court or Trustee. However, a rudimentary understanding of the bankruptcy process, or at least the absence of irrational, contrary conceptions, is necessary to make progress in the administration of the Debtor's bankruptcy estate. The Debtor has not displayed this understanding; rather, Moss' behavior in this case shows her to be confused and even paranoid in respect to the administration of her bankruptcy case.

She misunderstands the role of the Trustee; she doesn't understand that the case won't be dismissed just because she wants it to be; and she doesn't appear to understand that the bankruptcy estate may encompass assets that have been transferred to others.

Additionally, because of Moss' incarceration and the uncertainty as to her competency, the Trustee (and the Court) have been unable to proceed with two adversary proceedings that were filed months ago (on April 23, 1999 and on April 28, 1999) and that would, in the normal course of events, have been completed by now. In short, Moss' obvious incompetency has impeded the prompt and efficient administration of this bankruptcy estate, and will continue to do so unless the Court takes steps to remedy the present situation.

Based on the foregoing, the Court concludes that for purposes of Rule 1016, Marilyn Moss is mentally incapable of aiding in or proceeding with the administration of the bankruptcy estate and her bankruptcy case, including the adversary proceedings filed against her.

2. "IN THE SAME MANNER, SO FAR AS POSSIBLE"

***5** It is clear that the language, "the estate shall be administered ... in the same manner, so far as possible, as if the death or incompetency had not occurred," contemplates that a bankruptcy court may need to take extraordinary steps in order to administer the estate of a debtor who has died or is incompetent. A contrary reading would render the language "so far as possible" superfluous, and the statute would simply require that the case proceed as normal, without making allowances for the unique issues that would undoubtedly arise if a debtor died or became incompetent. Therefore, the only questions the Court must address are whether it would be possible to proceed in the same manner as if the incompetency had not occurred, and if not, whether the appointment of a limited guardian would be an appropriate measure.

In this case, the Court does not believe that the estate can be administered as usual. While it might be technically possible to proceed with the case if a limited guardian is not appointed at this time, practically it would be extremely difficult, and it would be impossible to proceed with the case in a manner that would adequately protect the Debtor's rights.

It is not uncommon to have an uncooperative debtor, nor is it uncommon to have an uncooperative debtor proceeding without an attorney, as is Marilyn Moss. [FN8] But there are two aspects to this case that distinguish it from the usual case with an uncooperative debtor. First of all, the Debtor's failure to cooperate can be attributed more to her current mental state than a disregard for the Court. An uncooperative debtor might do things such as evade service or not appear for hearings, but it is unlikely that someone without mental difficulties would go to the extremes Moss has, i.e. deny her own identity, deny that she even filed bankruptcy at all, or attempt to fake her own death.

Second, the Debtor's mental illness will likely prevent her from taking the actions necessary to avail herself of the benefits of the bankruptcy process and to protect her rights in adversary proceedings. In this sense, it would be impossible to proceed with the case as usual. If Moss' mind is occupied with her illness, she will not be able to focus on and devote her efforts to the administration of her bankruptcy case. If a limited guardian is appointed, however, her rights would be adequately protected and she would be more likely to receive the various protections provided a debtor in the Bankruptcy Code and by the bankruptcy court. This would be especially true with a limited guardian who is familiar with bankruptcy law, and the Court has made that one of the criteria in its selection of a limited guardian for Moss.

Finally, the Court finds that the appointment of a limited guardian is necessary to conserve judicial resources and facilitate judicial economy. There are already two adversary proceedings pending against the Debtor, and as the Trustee indicated at the September 2 hearing, more adversary proceedings against the Debtor are in the works. Pursuant to Rule 7017, if the Court determined that the Debtor was incompetent (which it has), a guardian ad litem or next friend would need to be appointed to handle each of those adversary proceedings for the Debtor. By appointing a "permanent" limited guardian, it saves the trouble and expense of appointing a guardian each time an adversary proceeding is filed and thereby facilitates the expeditious administration

of the estate, in addition to the other benefits of appointing a limited guardian discussed above.

*6 Having determined that it would be impossible to administer the case in the same manner as if the Debtor was competent and that the best course of action at this point in the case would be to appoint a limited guardian as outlined in Mo.Rev.Stat. § 475.080, we now turn to a consideration of the source of our authority to appoint a limited guardian.

The Bankruptcy Code does not specifically provide for the appointment of a guardian ad litem or, as is the case here, a limited guardian, for the general administration of a case, so we turn to the equitable powers accorded the bankruptcy court pursuant to 11 U.S.C. § 105. We also take direction from the liberal manner in which Rule 7017 has been interpreted as authorizing a guardian ad litem to file bankruptcy for a minor or incompetent.

Section 105 provides, in pertinent part:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

Since we have already determined that the appointment of a limited guardian is necessary and appropriate, our only inquiry here is whether the appointment of a limited guardian is necessary or appropriate to carry out the provisions of this title. The Court finds the appointment necessary and appropriate to carry out the provisions of this title because it will aid in the administration of the case, advance the goals of the Bankruptcy Code and process, and most importantly, follows directly from the way in which Rule 7017 has been interpreted and applied. See 2 COLLIER ON BANKRUPTCY ¶ 105.01[1] at 105-6 (15th ed. rev.1999) ("The statutory language thus suggests that an exercise of section 105 power be tied to another Bankruptcy Code section and not merely to a general bankruptcy concept or objective.").

As discussed above, Rule 7017 provides for the appointment of a guardian ad litem or next friend for adversary proceedings.

> If an infant or incompetent person does not have a duly appointed representative he may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Fed.R.Bankr.P. 7017.

Nothing in the text of Rule 7017, however, indicates that it is applicable to the general administration of a case or that it authorizes a guardian ad litem or next friend to file a bankruptcy petition for a minor or incompetent. Notwithstanding, a number of courts have found, without criticism, Rule 7017 to authorize the filing of a bankruptcy petition by a previously appointed guardian ad litem. See e.g., In re Murray, 199 B.R. 165 (Bankr.M.D.Tenn.1996); Brown v. Financial Enterprises Corp. (In re Hall), 188 B.R. 476, 483 (Bankr.D.Mass.1995); In re Kjellsen, 155 B.R. 1013, 1018- 20 (Bankr.D.S.D.1993) overruled on different grounds by Wieczorek v. Woldt, (In re Kjellsen), 53 F.3d 944 (8th Cir.1995); In re Zawisza, 73 B.R. 929 (Bankr.E.D.Pa.1987) (hereinafter "Zawisza ").

*7 Zawisza was the first case in which a court held that a guardian or next friend may file a bankruptcy petition for an incompetent. The court in Zawisza based its holding on a liberal interpretation and application of Fed.R.Civ.P. 17(c) (applicable to bankruptcy proceedings through Fed.R.Bankr.P. 7017). The court reasoned:

> Since the next friend may file every other type of federal action pursuant to F.R.Civ.P. 17, there is simply no reason to preclude a next friend from filing a bankruptcy petition and several reasons support the allowance of such an action.
>
> * * *
>
> This Court believes that the underlying purpose of F.R.Civ.P. 17(c) is to permit someone, the next friend of an incompetent, to act expeditiously, particularly where a guardian has not been appointed, in order to protect the interests of the incompetent. That purpose is served in the case sub judice, where the Debtor's interests could be

prejudiced if a bankruptcy petition could not be filed except by a duly-appointed guardian, as the appointment of a guardian is a process which could take some time, especially since no such proceeding has transpired to date. The activities precipitated by the filing of any federal law suit rarely await the possibly ponderous process of the appointment of guardian. This is particularly true of this case, as in many bankruptcies, where timing is apparently significant.

Zawisza, 73 B.R. at 935-36 (emphasis added). See also, In re Murray, 199 B.R. 165 (Bankr.M.D.Tenn.1996). [FN9]

The interpretation of Fed.R.Civ.P. 17(c) set forth in Zawisza is directly applicable to the instant case inasmuch as our primary goal in the appointment of a limited guardian for the Debtor, Marilyn Moss, is to protect her interests. And while the court in Zawisza only spoke to the question of whether a guardian could file bankruptcy for an incompetent, allowing a guardian to file bankruptcy for an incompetent necessarily implies that the guardian will be responsible for the debtor throughout the administration of the case, as the limited guardian for Moss will be. Note that we do not rely on Rule 7017 for the authority to appoint a limited guardian; that authority is found in § 105. Rule 7017 merely provides the statutory anchor for our use of § 105 to appoint a limited guardian for the Debtor.

Finally, the Court would emphasize that we have not made and are not attempting to make a finding of general incompetence as might be made by a state court in a guardianship proceeding under the state statutes. Our finding is narrowly limited to this case and the Debtor's bankruptcy proceedings, and for the purposes stated herein. It is hoped that the Debtor will recover her mental competence as a result of the treatment she receives at the Federal Medical Center in Texas. If she does, this Court will be more than willing to terminate the limited guardianship.

For the foregoing reasons, it is

ORDERED that the Trustee's Motion for Appointment of Guardian ad Litem or Next Friend be and is hereby GRANTED. It is

*8 FURTHER ORDERED that Patricia E. Hamilton, of the law firm Morrison & Hecker, L.L.P., be and is hereby appointed as the limited guardian of the Debtor, Marilyn M. Moss, for the limited purposes as set out in this Memorandum Opinion and Order, to serve until such time as there is a showing that Marilyn M. Moss is capable of competently participating in her bankruptcy case. This appointment shall be effective immediately after the period of appeal (as prescribed in Rule 8001, et seq.) has expired.

SO ORDERED.

FN1. Moss has been indicted on two counts of making false declarations to the bankruptcy court, in violation of 18 U.S.C. § 152(3).

FN2. The term "incompetence" does appear three times in the Code, but it is used to refer to practical abilities (as in a debtor-in-possession's ability to manage a business) and not mental competency. See 11 U.S.C. §§ 1104, 1106 and 1204.

FN3. See also, Ritter v. Walker (In the Matter of Walker), 875 S .W.2d 147 (Mo.Ct.App.1994) (applying § 465.080).

FN4. Although questions were raised at the hearing as to how a guardian for Moss might be compensated, and although counsel for the U.S. Trustee subsequently advised the Court that the U.S. Trustee intended to file written objections to the Motion for Appointment, no one has filed objections to the Motion and no one has made oral objections to it.

FN5. 18 U.S.C. § 4241 provides:

(a) Motion to determine competency of defendant.--At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

(b) Psychiatric or psychological examination and report.--Prior to the date of the hearing, the court may order that a psychiatric or psychological

examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) Hearing.--The hearing shall be conducted pursuant to the provisions of section 4247(d).

(d) Determination and disposition.--If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until--

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

FN6. The District Court's Order indicated that all of the parties stipulated to the court's consideration of the report. The psychologist's report has not been offered into evidence in these proceedings.

FN7. As Mark Twain might have said, "the rumors of her death were greatly exaggerated."

FN8. Moss has been unable to obtain counsel and there does not appear to be any likelihood that she will be able to in the foreseeable future. If she were able to obtain counsel, the Court would be willing to reassess the necessity of a limited guardian at that time.

FN9. In In re Murray, the court cited Rule 9029, Fed.R.Bankr.P., in addition to the rationale provided by Zawisza, in support its application of Rule 17(c) to the filing context. The court commented:

The Advisory Committee Note to the 1995 version of Federal Rules of Bankruptcy Procedure 9029(b) states: 'The rule provides flexibility to the court in regulating practice when there is no controlling law.' Specifically, it permits the court to regulate practice in any manner consistent with federal law, with rules adopted under 28 U.S.C. § 2075, with Official Forms, and within the district's local rules.... Pursuant to Fed.R.Bankr.P. 9029(b) it is appropriate to apply Rule 17 of the Civil Rules to determine capacity to file a Chapter 13 petition.

In re Murray, 199 B.R. at 172.

The use of Rule 9029 was proper in In re Murray because a guardian had already been appointed and it was merely a procedural matter as to who could file the bankruptcy. In the present case, however, Rule 9029 would not be directly applicable because the matter is not procedural; a guardian has not yet been appointed by a state court and the appointment of a guardian by the bankruptcy court implicates its authority to alter the substantive rights of the Debtor. Nevertheless, In re Murray 's application of Rule 9029 does provide collateral support of the Court's conclusions.

END OF DOCUMENT

234 B.R. 515
34 Bankr.Ct.Dec. 595
(Cite as: 234 B.R. 515)

In re Gloria J. KING, Debtor.

Bankruptcy No. 7-98-14211 MA.

United States Bankruptcy Court,
D. New Mexico.

April 21, 1999.

Permanent conservator appointed for missing person filed Chapter 7 petition on her behalf, seeking to protect her assets and to discharge her credit card debt. Trustee filed motion to dismiss. Addressing an issue of apparent first impression, the Bankruptcy Court, Mark B. McFeeley, Chief Judge, held that conservator could not file a bankruptcy petition on behalf of missing person.

Motion to dismiss granted.

[1] BANKRUPTCY ⚖2222.1
51k2222.1
Bankruptcy Code requires a person to reside or have a domicile or property in the United States in order to qualify as a debtor. Bankr.Code, 11 U.S.C.A. § 109(b).

[2] MENTAL HEALTH ⚖220
257Ak220
Under New Mexico law, a conservator is vested with title as trustee to all property of the protected person upon appointment as conservator. NMSA 1978, § 45-5-420.

[3] MENTAL HEALTH ⚖217
257Ak217
Under New Mexico law, court-appointed conservator has a fiduciary duty to preserve the protected person's estate. NMSA 1978, § 45-5-417.

[4] BANKRUPTCY ⚖2222.1
51k2222.1
Deceased persons are not afforded protection under the Bankruptcy Code.

[5] BANKRUPTCY ⚖2222.1
51k2222.1
Permanent conservator appointed for a missing person could not file a Chapter 7 bankruptcy petition on her behalf, even though, under New Mexico law, there was a presumption that debtor was alive for five years after her disappearance. Bankr.Code, 11 U.S.C.A. §§ 105(a), 109(a); NMSA 1978, § 45-1-107, subd. E.

***515** Ms. Christine Zuni Cruz, Attorney at Law, Mr. Michael A. Robinson, Practicing Law Student, UNM Clinical Law Programs, Albuquerque, NM.

Mr. Bill J. Sholer, Albuquerque, NM, Chapter 7 Trustee.

MEMORANDUM OPINION

MARK B. McFEELEY, Chief Judge.

THIS MATTER came before the Court on the Trustee's Motion to Dismiss. This well argued case raises the unique issue of whether a conservator may file a voluntary petition for bankruptcy on behalf of a debtor whose whereabouts are unknown. ***516** Having heard the arguments of counsel, considered the letter memorandum submitted by counsel for the Debtor, and being otherwise fully informed, the Court finds that a conservator cannot file a petition for bankruptcy under these circumstances and grants the Trustee's Motion to Dismiss.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Gloria J. King, the Debtor, has been missing since August 9, 1996. Since she disappeared, her son, Andre B. King, took steps to manage Ms. King's affairs, including making payments on her debts from his own personal finances. On June 27, 1997, Andre B. King was appointed permanent conservator for Gloria J. King [FN1]. As conservator on behalf of Gloria J. King, Andre B. King filed a voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code on July 8, 1998. The primary purpose for filing the bankruptcy petition was to protect Ms. King's assets and to discharge an unsecured credit card debt in the amount of approximately $5,000. The Trustee filed a Motion to Dismiss on September 17, 1998, requesting the Court to dismiss the case on grounds that the petitioner, Andre B. King, is not the Debtor and cannot file a petition on behalf of the Debtor.

FN1. See Order Appointing Conservator, filed on June 27, 1997 in New Mexico State District Court Case No. CV-PB 96-1057, styled, In the Matter of

the Conservatorship Proceeding for Gloria J. King

DISCUSSION

This is a case of first impression. While there is case law to support the proposition that guardians, guardians ad litem, or court appointed conservators have the power to file petitions for bankruptcy on behalf of protected persons [FN2], this Court has found no case law addressing this issue in the context of a missing debtor/protected person.

FN2. See Wieczorek v. Woldt (In re Kjellsen), 53 F.3d 944, 946 (8th Cir.1995) (guardian, not party holding durable power of attorney, proper party to file bankruptcy on behalf of debtor previously adjudicated incompetent); In re Murray, 199 B.R. 165, 172 (Bankr.M.D.Tenn.1996) (parent allowed to file voluntary petition for bankruptcy as "next-friend" on behalf of seven-year old child); In re Smith, 115 B.R. 84, 85 (Bankr.E.D.Va.1990) (court appointed guardian with authorization to file bankruptcy on debtor's behalf may file voluntary petition for bankruptcy on behalf of physically incapacitated debtor); In re Zawisza, 73 B.R. 929, 932 (Bankr.E.D.Pa.1987) (guardian may file bankruptcy on behalf of protected person even if guardianship papers do not specifically authorize guardian to do so); In re Kirschner, 46 B.R. 583, 584 n. 1 (Bankr.E.D.N.Y.1985)(guardian may file bankruptcy on behalf of protected person if court order appointing guardian authorizes it).

[1] A thorough evaluation of this issue should begin with a review of the relevant provisions of the Bankruptcy Code and the New Mexico conservatorship statutes. Section 109 of the Bankruptcy Code defines those parties who qualify as debtors under the Bankruptcy Code. Section 109(b) defines qualified parties by exclusion. [FN3] Since Ms. King is clearly not a railroad, or a foreign or domestic insurance company, bank, or similar entity, she appears to qualify as a debtor under Chapter 7 of the Bankruptcy Code, despite the ***517** fact that she is missing. The Bankruptcy Code also requires a person to reside or have a domicile or property in the United States in order to qualify as a debtor. 11 U.S.C. § 109(a). Ms. King may no longer reside in the United States. Indeed, she has been missing since 1996. She does, however, have property in the United States, so she qualifies as a debtor under 11 U.S.C. § 109(a).

FN3. 11 U.S.C. § 109(b) provides:

> A person may be a debtor under chapter 7 of this title only if such person is not -
> (1) a railroad;
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act; or
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

[2][3] Under New Mexico statutes, a conservator is vested with title as trustee to all property of the protected person upon appointment as conservator. NMSA 1978 § 45-5-420 (1995 Repl.). Conservators also have the power to "act without court authorization or confirmation, to.... prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets." NMSA 1978 § 45-5-424(C)(24) (1995 Repl.). Mr. King was appointed permanent conservator for Ms. King on June 27, 1997. As conservator he is vested with title to all of Ms. King's property, and he has all the powers conferred upon conservators by statute. Moreover, he has a fiduciary duty to preserve Ms. King's estate. NMSA 1978 § 45-5-417 (1995 Repl.). Filing bankruptcy on behalf of Ms. King, if allowed, would discharge Ms. King's remaining unsecured debts, and maximize her estate. Thus, though not specifically addressed in the statute, conservators appointed under New Mexico law appear to have the power to file bankruptcy on behalf of a protected person.

Courts considering whether guardians may file bankruptcy on behalf of a protected person have reached the same conclusion. In Wieczorek v. Woldt (In re Kjellsen), 53 F.3d 944 (8th Cir.1995), the Eight Circuit Court of Appeals determined that a court appointed guardian was the only party who had power to file bankruptcy on behalf of the protected person. In that case, the Court was faced with two competing parties: one party holding the protected person's power of attorney, and the other who was the court appointed guardian. The Eight Circuit

held that the guardian, not the attorney-in-fact, had the power to file bankruptcy on behalf of the protected person. Id. at 946. However, in Kjellsen, as in the other cases considering whether guardians may file bankruptcy on behalf of protected persons, the protected persons, though incapacitated, were present. [FN4] Ms. King is not present; therefore, that line of cases, though helpful, is not dispositive.

> FN4. But see In re Kirschner, 46 B.R. 583 (Bankr.E.D.N.Y.1985) (debtor dies shortly after wife as guardian ad litem filed bankruptcy on his behalf, so not present for most of bankruptcy proceeding, yet was present at time petition was filed).

Some courts have addressed the absent debtor situation. In those cases, a party holding the debtor's power of attorney filed bankruptcy as attorney-in- fact on behalf of an absent debtor. The courts are split as to whether it is permissible for an attorney-in-fact to file bankruptcy on behalf of another. [FN5] Courts considering this issue want assurance that the debtors have given express authority to their attorneys-in-fact to file bankruptcy on their behalf. Thus, most courts confronting this situation are reluctant to infer the power to file bankruptcy from a general power of attorney, but would allow an attorney-in-fact ***518** with a power of attorney giving specific authorization to file bankruptcy on the debtor's behalf to do so.

> FN5. See In re Brown, 163 B.R. 596, 597 (Bankr.N.D.Fla.1993) (court will not infer power to file bankruptcy from general power of attorney unless there are extraordinary circumstances, implying specific power of attorney authorizing attorney-in-fact to file bankruptcy would be acceptable); In re Sullivan, 30 B.R. 781, 782 (Bankr.E.D.Pa.1983) (attorney-in-fact may file bankruptcy on behalf of another and appear in his stead at § 341 meeting where limited power of attorney authorizes attorney-in-fact to file bankruptcy); cf. In re Ballard, 1987 WL 191320 (Bankr.N.D.Cal.1987) (attorney-in-fact holding general power of attorney may file bankruptcy on behalf of her husband who is in the army stationed in Europe); but see In re Raymond, 12 B.R. 906, 907 (Bankr.E.D.Va.1981) (wife holding husband-serviceman's power of attorney may not file bankruptcy on his behalf).

In sum, while somewhat instructive, neither the cases considering powers of attorney nor the cases considering guardians are completely analogous to the facts presented in this case. The cases involving a power of attorney involve debtors who are not present, but had the capacity to give consent to their attorneys-in-fact to file bankruptcy on their behalf. In the guardianship cases, the protected person, while incapacitated, was nevertheless present.

Ms. King did not affirmatively give her son the power to file bankruptcy on her behalf. Nor is she present. Mr. King was appointed as conservator for Ms. King, not because she lacked capacity, but because she is missing.

Counsel for the Debtor asserts that being incapacitated is tantamount to being missing, because neither the incapacitated person, nor the missing person would be able to take the stand to be questioned. Thus the cases holding that a guardian may file bankruptcy on behalf of an incapacitated debtor would apply. This analogy is appealing, but unpersuasive, in the context of bankruptcy. When a person is missing there exists a potential for abuse of the bankruptcy system. There is no way to be sure what the debtor's assets and liabilities are if the debtor's whereabouts are unknown. Although there is no evidence of bad faith on the part of this Debtor, the Court is reluctant to set a precedent that might encourage abuse of the bankruptcy system. Moreover, to allow a conservator to file bankruptcy on behalf of a missing person would frustrate a primary policy of the Bankruptcy Code: to provide debtors with a fresh start.

[4][5] Section 105 of the Bankruptcy Code gives the court equitable power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The Court is sympathetic to Mr. King, who has taken it upon himself to manage Ms. King's affairs in her absence. Given the circumstances of the Debtor's disappearance, it is likely that the Debtor is now deceased. But deceased persons are not afforded protection under the Bankruptcy Code. See Goerg v. Parungao (In re Goerg) 844 F.2d 1562, 1566 (11th Cir.1988); In re Estate of Whiteside, 64 B.R. 99, 102 (Bankr.E.D.Cal.1986); In re Jarrett, 19 B.R. 413, 414 (Bankr.M.D.N.C.1982); In re Estate of Hiller, 240 F.Supp. 504, 504 (N.D.Cal.1965)(interpreting prior Bankruptcy Act). Bankruptcy Court is not the proper forum to administer Ms. King's estate; probate court is. See

In re Brown, 163 B.R. 596, 597 (Bankr.N.D.Fla.1993). Despite the presumption under New Mexico law that missing persons are alive for five years after their disappearance, this Court cannot hold that a conservator for a missing person can file bankruptcy on behalf of the missing person. See NMSA 1978 § 45-1-107(E) (1995 Repl.). To do so would invite potential abuse of the bankruptcy system and frustrate the primary bankruptcy policy of providing debtors with a fresh start.

CONCLUSION

For the foregoing reasons, the Court concludes that Mr. King cannot file bankruptcy as conservator on behalf of Ms. King, a missing protected person. This opinion constitutes the Courts findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. An appropriate order will be entered.

END OF DOCUMENT

9

1MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: REMOVAL AND REMAND UNDER RULE 9027

DATE: FEBRUARY 21, 2000

Rule 9027(d)

At the last meeting, the Committee considered an amendment to Rule 9027 governing the removal of actions pending in a nonbankruptcy forum to the district court. In particular, the Committee considered proposals from Hon. Christopher Klein (Bankr. E.D. Cal.) and the Reporter, Professor Resnick. After significant discussion, the Committee tentatively agreed to the following version of Rule 9027(d). It corresponds generally to the Reporter's version but for the deletion of the last sentence of subdivision (d) from his proposal. A corresponding deletion was made to the Committee Note.

Rule 9027. Removal

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(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.

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 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.

Rule 9027(a)(3)

The Committee also considered an amendment to Rule 9027(a)(3) governing removal of actions initiated after the commencement of the bankruptcy case. The discussion concluded with a "near"consensus that the Rule should cover removal of these actions without regard to the current status of the bankruptcy case. Therefore, the language of the Rule would change and the Committee Note would likewise reflect the intention that the Rule should apply without regard to the current status of the bankruptcy case. There is also included below in brackets alternative language for the Committee Note. The Rule and Note would read as follows:

Rule 9027. Removal

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(a) **Notice of Removal**

(3) TIME FOR FILING; CIVIL ACTION INITIATED AFTER COMMENCEMENT F

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~~ If a claim or cause of action is asserted in another court after the commencement of the case, 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.

COMMITTEE NOTE

Subdivision (a)(3) is amended to make it applicable when 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, dismissed, or closed. [Subdivision (a)(3) is amended to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.]

It may be appropriate to consider another addition to the Committee Note. The Note makes no mention of the reopening of the bankruptcy case. Removal is available under 28 U.S.C. § 1452(a) only if the district court has jurisdiction of the removed claim or cause of action under 28 U.S.C. § 1334. That section grants jurisdiction to the district court of bankruptcy cases, and civil proceedings that either arise under the Bankruptcy Code, or arise in or are related to bankruptcy cases. The language of § 1334(e) differs from that in § 1334(a) and (b) in such a way as to suggest that the bankruptcy case need not be reopened for the district court to exercise jurisdiction in the removed cause of action. Section 1334(e) speaks to the jurisdiction of the district court over the property of the estate, when "a case under title 11 is commenced or is pending." There is no similar reference in § 1334(a) or (b). Thus, it does not appear that the

court would have to reopen the underlying bankruptcy case to exercise the removal jurisdiction. To that end, should the Committee Note be amended by adding a limiting statement? The Note could be amended by adding at the end: "The additional language is not intended to suggest that the court must reopen the bankruptcy case to remove the action."

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: CHAPTER 11 DEBTOR REPORTS UNDER RULE 2015(a)(5)

DATE: FEBRUARY 22, 2000

Chapter 11 debtors must make quarterly payments to the United States trustee. 28 U.S.C. § 1930(a)(6). These payments are based on the total disbursements the debtor makes during the quarter. The statute was amended in 1996 to require the debtor to make the payments until the case is either converted or dismissed. Prior to that time, the quarterly payments were due only up to the later of the date of confirmation or the closing or dismissal of the case. Of course, many chapter 11 cases are neither dismissed nor converted. In those cases, a plan is confirmed and payments are made according to the terms of the plan. In that event, the statute now requires "the parties commencing the case" to pay the quarterly fee until the case is closed. 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., Inc., 159 F.3d 989 (6th Cir. 1998); United States Trustee v. Gryphon at the Stone Mansion, Inc., 166 F.ed 552 (3d Cir. 1999).

Rule 2015(a)(5) currently requires the debtor to file quarterly reports of the disbursements along with a statement of the amount of the quarterly fee "until a plan is confirmed or the case is converted or dismissed." This is inconsistent with the amended statute. As noted in the Report to the Committee at the September meeting, § 608 of the House version of H.R. 833 would amend 28 U.S.C. § 1930(a)(6) to provide that quarterly United States trustee fees are no longer

payable after the earlier of confirmation of a plan or the conversion of the case. The Senate's substitute version of H.R. 833 does not include a comparable provision. The Conference Committee, which has not yet been formed, obviously will have to resolve the conflict between the two bills. In the meantime, it seems appropriate to begin the rules amendment process to bring Rule 2015(a)(5) into conformity with the statute. To that end, I would recommend the following amendment to the Rule..

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, fie and transmit to the United States Trustee a statement of the 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 cnverted or dismissed, whichever occurs first." This rule requires the debtor in possession or the trustee to file the appropriate reports from which the amount of the quarterly fee is calculated.

Postponing consideration of this amendment now seems unwise. It will be entirely noncontroversial in that it simply conforms the rule to the governing statutory provision. Three courts of appeals have upheld the statute thereby removing any uncertainty about its application to postconfirmation disbursements. Given the necessary time lag of the rules process, it seems appropriate to recommend the rule for publication. If Congress amends the underlying statute in a manner consistent with current Rule 2015(a)(5), the proposed rule amendment can be withdrawn.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: NOTICE OF CONFIRMATION OF CHAPTER 13 PLANS

DATE: FEBRUARY 20, 2000

Rule 2002(b) provides for a twenty-five day notice to creditors of the hearing on confirmation of a chapter 13 plan, and Rule 3015(d) requires that the twenty-five day notice include with it either a copy of the plan or a summary of the plan. While Rule 2002(f)(7) requires notice by mail to the debtor and all creditors of "the entry of an order confirming a chapter 9, 11, or 12 plan," there is no requirement to send notice of the confirmation of chapter 13 plans. In some areas of the country, standing chapter 13 trustees or the clerk send notice to creditors of the confirmation of chapter 13 plans. In many other courts, however, no notice is sent.

Two reasons are offered for not sending notice of confirmation of the plan. First, and foremost, it is extremely costly to send the notices. The costs include photocopying and mailing costs as well as labor expenses. Second, creditors have already received a copy either of the plan or a summary of the plan. Thus, they should be aware of their treatment under the plan. That treatment includes not just the amount of payments that the debtor must make into the plan, but it should also indicate whether payments on some claims will be postponed until other claims are paid in full. If the debtor proposes a modification of the plan, notice must be given to all creditors because under § 1323(b), "the plan as modified becomes the plan." Therefore, the

modified plan or a summary thereof must be sent to creditors under Rule 3015(d). Sending a notice of confirmation would simply be unnecessary, the argument proceeds, because the creditors already have all the information they need. In fact, too many notices may be confusing.

The argument for sending notice of confirmation is that it is the confirmation order that affects the debtor-creditor relationship. The plan is simply a proposal, and it has no force until confirmation. Furthermore, there are frequently modifications of plans during confirmation hearings, and notifying creditors of those changes is only possible after confirmation. The notice of confirmation also provides an opportunity to provide creditors with more specific information regarding the payment of claims under the plan. If payment is to be postponed, creditors can be so informed and will not hold unrealistic expectations of more immediate payment.

I contacted several chapter 13 trustees to determine whether they send these notices and in any event whether they believed the addition of such a requirement in the rules would be beneficial. Not surprisingly, each trustee was very comfortable with their own way of dealing with the issue. Those who do send the notice argued that it provides an opportunity to "lock in" the creditors. Some of the notices include information as to whether each creditor had filed a claim. Therefore, there would be no argument as to whether a claim was filed (at least up to the time of the confirmation) because the creditor would have been specifically notified that no proof of claim was on file with the court and could then take corrective action. This was also asserted as a means to bolster the res judicata affect of the confirmation order under §1327(a).

The trustees who do not send these notices indicated that they have not had difficulty with excessive contacts from creditors. They also asserted that all of the necessary information is contained in the initial notice sent to creditors. Furthermore, they suggested that confirmation of

modified plans should not take place without notice to creditors. Giving the creditors notice after the plan is confirmed could deny those creditors their due process right to notice and an opportunity to be heard.

Several trustees argued that if other trustees were as careful and efficient as they were, there would be no problems with creditors after confirmation of chapter 13 plans. I interpreted this as a variation on the theme heard so frequently in response to the Litigation Package. That is, "A nationwide system is a good idea, as long as it is the way I do it in my district." Another common response to those earlier proposed rules was that the need for truly national solutions to many of these matters is questionable because most bankruptcy cases are truly local. That is especially the case under chapter 13. The debtors must be individuals, and there are still debt limits on eligibility. Those limits have now reached above $1,000,000 of total secured and unsecured debt, but most chapter 13 cases involve much less debt.

The Executive Office of the United States Trustee intends to conduct a survey of standing trustees to determine the practice throughout the country regarding notice to creditors of the entry of an order of confirmation in chapter 13 cases. That information may verify that there is a predominant practice among standing trustees. It might also demonstrate that there are nearly as many different ways to handle the problem as there are standing trustees and bankruptcy judges. It seems prudent to await the compilation of the information by the Executive Office of the United States Trustee before making any proposal on the topic.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 8014 - COSTS

DATE: FEBRUARY 24, 2000

Rule 8014 governs the taxing of costs against parties on appeal. It is patterned after Rule 39 of the Federal Rules of Appellate Procedure, but it does not contain all of the provisions of that Rule. In particular, there is no specific provision limiting the assessment of costs against the United States as set out in FRAP Rule 39(c), and there is no direction as to the timing for the submission of costs incurred or objections to such a list as set out in FRAP Rule 39(d). Hon. Paul Mannes (Bankr. D. Md.) has recommended that the Committee consider revising Rule 8014 to more closely conform to FRAP Rule 39. A copy of FRAP Rule 39 is attached.

FRAP Rule 39(c) protects the United States against the imposition of costs unless there is specific authorization by law for the assessment of those amounts against the United States. The provision apparently is included to prevent an expansive reading of FRAP Rule 39(a) that would render the government liable for these costs unless otherwise applicable law provided to the contrary. Thus, FRAP Rule 39(c) retains the default rule that the government is not liable generally for these costs. I have been unable to find any cases under Rule 8014 indicating that the United States is being ordered to pay costs in a manner inconsistent with FRAP Rule 39. Nevertheless, in the interest of consistency among the rules, it may be appropriate to amend Rule 8014 to make it consistent with FRAP Rule 39.

Rule 8014 is silent as to the timing of the submission of and the challenge to costs. FRAP Rule 39(d) sets out the time within which the prevailing party must submit their bill of costs and the time for filing objections to the list. It also directs the clerk to prepare and certify an itemized list of the costs. Given the absence of these provisions courts either must go to local rules or specific orders. For example, in Carp v. Inbar, 1991 WL 182271 (D. Mass., Sept. 3, 1991), the court applied Local Rule 54.3 (an adaptation of Fed. R. Civ. Pro. 54) to require the submission of costs within thirty days. The court noted that this time limit is significantly more generous than the fourteen days set out in FRAP 39(d)(1). See also D & B Countryside, L.L.C. v. S.P. Newell (In re D & B Countryside, L.L.C.), 217 B.R. 72 (Bankr.E.D.Va. 1998).

Having adapted Rule 8014 from FRAP 39, it seems logical to include the time limits regarding the submission of costs and the filing of objections thereto in the Rule. Since the Rule applies only when a matter is appealed, it seems more appropriate to adopt the appellate rule time limits than the time limits applicable to the district courts when exercising their general as opposed to appellate jurisdiction. Consider the following alternative. It retains most of the language of Rule 8014, but it is broken down into subdivisions much like FRAP Rule 39.

Rule 8014. Costs.

(a) Against Whom Assessed. Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs for and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 8014 only if authorized by law.

(c) Bill of Costs and Objections.

(1) A party who wants costs taxed must file with the clerk, with proof of service, an itemized list and verified bill of costs within 14 days after the entry of judgment.

(2) Objections must be filed within 10 days after service of the bill of costs unless the court, prior to the expiration of that period, extends the time.

(d) Costs on Appeal Taxable in the District Court or the Bankruptcy Appellate Panel. The following costs are taxable under this rule:

(1) the production of copies of briefs, the appendices, and the record;

(2) the transmission of the record;

(3) the cost of the reporter's transcript, if necessary for the determination of the appeal;

(4) the premiums paid for the cost of supersedeas bonds or other bonds to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

COMMITTEE NOTE

The rule is rewritten to conform more closely to Federal Rule of Appellate Procedure 39. Time limits for the submission of costs for which recovery is sought and the time for filing objections are now set out in the rule. Under the rule, all costs are taxed by the clerk of the bankruptcy court.

entry of judgment should be delayed until approval of the judgment in final form.

Rule 37. Interest on Judgment

(a) When the Court Affirms. Unless the law provides otherwise, if a money judgment in a civil case is affirmed, whatever interest is allowed by law is payable from the date when the district court's judgment was entered.

(b) When the Court Reverses. If the court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

The first sentence makes it clear that if a money judgment is affirmed in the court of appeals, the interest which attaches to money judgments by force of law (see 28 U.S.C. § 1961 and § 2411) upon their initial entry is payable as if no appeal had been taken, whether or not the mandate makes mention of interest. There has been some confusion on this point. *See Blair v. Durham*, 139 F.2d 260 (6th Cir., 1943) and cases cited therein.

In reversing or modifying the judgment of the district court, the court of appeals may direct the entry of a money judgment, as, for example, when the court of appeals reverses a judgment notwithstanding the verdict and directs entry of judgment on the verdict. In such a case the question may arise as to whether interest is to run from the date of entry of the judgment directed by the court of appeals or from the date on which the judgment would have been entered in the district court except for the erroneous ruling corrected on appeal. In *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 68 S.Ct. 1039, 92 L.Ed. 1403 (1948), the Court held that where the mandate of the court of appeals directed entry of judgment upon a verdict but made no mention of interest from the date of the verdict to the date of the entry of the judgment directed by the mandate, the district court was powerless to add such interest. The second sentence of the proposed rule is a reminder to the court, the clerk and counsel of the *Briggs* rule. Since the rule directs that the matter of interest be disposed of by the mandate, in cases where interest is simply overlooked, a party who conceives himself entitled to interest from a date other than the date of entry of judgment in accordance with the mandate should be entitled to seek recall of the mandate for determination of the question.

Rule 38. Frivolous Appeal—Damages and Costs

If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

(As amended Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Compare 28 U.S.C. § 1912. While both the statute and the usual rule on the subject by courts of appeals (Fourth Circuit Rule 20 [rule 20, U.S.Ct. of App. 4th Cir.] is a typical rule) speak of "damages for delay," the courts of appeals quite properly allow damages, attorney's fees and other expenses incurred by an appellee if the appeal is frivolous without requiring a showing that the appeal resulted in delay. See *Dunscombe v. Sayle*, 340 F.2d 311 (5th Cir., 1965), cert. den., 382 U.S. 814, 86 S.Ct. 32, 15 L.Ed.2d 62 (1965); *Lowe v. Willacy*, 239 F.2d 179 (9th Cir., 1956); *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.*, 269 F.2d 64 (1st Cir., 1959); *Ginsburg v. Stern*, 295 F.2d 698 (3d Cir., 1961). The subjects of interest and damages are separately regulated, contrary to the present practice of combining the two (see Fourth Circuit Rule 20) to make it clear that the awards are distinct and independent. Interest is provided for by law; damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant.

1994 Amendments

The amendment requires that before a court of appeals may impose sanctions, the person to be sanctioned must have notice and an opportunity to respond. The amendment reflects the basic principle enunciated in the Supreme Court's opinion in *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

Subdivision (d). The present rule makes no provision for objections to a bill of costs. The proposed amendment would allow 10 days for such objections. Cf. Rule 54(d) of the F.R.C.P. [rule 54(d), Federal Rules of Civil Procedure]. It provides further that the mandate shall not be delayed for taxation of costs.

1986 Amendment

The amendment to subdivision (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3) [rule 58(3), U.S.Sup.Ct.Rules). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

1979 Amendment

Subdivision (a). The Standing Committee added to the first sentence of Rule 40(a) the words "or by local rule," to conform to current practice in the circuits. The Standing Committee believes the change noncontroversial.

Subdivision (b). The proposed amendment would eliminate the distinction drawn in the present rule between printed briefs and those duplicated from typewritten pages in fixing their maximum length. See Note to Rule 28. Since petitions for rehearing must be prepared in a short time, making typographic printing less likely, the maximum number of pages is fixed at 15, the figure used in the present rule for petitions duplicated by means other than typographic printing.

1994 Amendment

Subdivision (a). The amendment lengthens the time for filing a petition for rehearing from 14 to 45 days in civil cases involving the United States or its agencies or officers. It has no effect upon the time for filing in criminal cases. The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 15 (a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing. In a case in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, the amendment provides that the court may do so by order. Although the first sentence of Rule 40 permits a court of appeals to shorten or lengthen the usual 14 day filing period by order or by local rule, the sentence governing appeals in civil cases involving the United States purposely limits a court's power to alter the 45 day period to orders in specific cases. If a court of appeals could adopt a local rule shortening the time for filing a petition for rehearing in all cases involving the United States, the purpose of the amendment would be defeated.

Rule 41. Mandate: Contents; Issuance and Effective Date; Stay

(a) Contents. Unless the court directs that a formal mandate issue, the mandate consists of a certified

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: ISSUANCE OF SUBPOENAS UNDER RULE 2004

DATE: FEBRUARY 25, 2000

At the September 1999 meeting, the Committee approved generally the proposed amendments to Rule 2004 set out below. At that time, Chris Kohn suggested that the Committee Note be amended to state that the authority of attorneys to issue subpoenas under Rule 45 F. R.Civ. P. applies to attorneys admitted pro haec vice. The Committee Note to Rule 45 includes such a reference, and the Committee Note to Proposed Rule 2004 is amended by inserting ", even if admitted pro haec vice" into the second paragraph of the Committee Note. We are now asking for final Committee approval of the Proposed Rule.

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, even if admitted pro haec vice, 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.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Bankruptcy Judges Division

DATE: February 15, 2000

FROM: Patricia S. Ketchum, Senior Attorney

RE: Privacy and Public Access to Bankruptcy Court Information and the Role of the Bankruptcy Rules and Official Forms

TO: Advisory Committee on Bankruptcy Rules

The growth of the Internet over the last five years – both in the quantity of information available and in its popularity with the public as a research and information-gathering tool – has begun to affect the courts, just as it has many other aspects of citizens' lives. Electronic media are changing the form in which courts keep their files and the method by which those who seek to examine the files gain access to them.

At least five bankruptcy courts already receive some or all of their filings electronically, computer-to-computer, over the Internet and offer access to the filed documents also over the Internet. Many more courts use "scanning" or "imaging" technology to convert paper documents to electronic ones and post these imaged documents on a court-maintained website where they are accessible to the public. As more and more courts adopt the new electronic case filing software now in the final stages of development for general court use, the availability "online" of every bankruptcy debtor's schedules, with all the information they contain, is not far in the future.

Does this new accessibility make a difference? Has the accessibility that is intended to enable the citizen to monitor how fairly and efficiently a court conducts its business become a vehicle for gratuitous intrusion into that same citizen's private life? Has "accessibility" evolved into publication? If it has, or even if it has become simply easy and instant, does that warrant changes in the rules, forms, or court policies?

Although bankruptcy court case files are public records "open to examination by an entity at reasonable times without charge" under 11 U.S.C. § 107(a), the documents contained in paper files have been effectively shielded from public view by their relative inaccessibility. A person who wanted to review a case file had to visit the courthouse, request the file, and sit in the public area of the clerk's office while examining the file. The documents, although nominally "public" were seen by few; they were "practically obscure." *United States Department of Justice v. Reporters Committee for Freedom of the Press,* 489 U.S. 749, 764 (1989).

When a court's records are available electronically, on the other hand, an attorney can remain in his or her office and review a court file using a personal computer and a telephone line,

a convenient and time-saving innovation for a busy practitioner. That same technology, however, also can make it easier to deliver extensive personal and other private information about bankruptcy debtors and creditors to the computers of nosy neighbors, identity thieves, stalkers, mailing list vendors and other commercial "miners" of court data, persons engaged in business espionage, and other criminals. In addition, information about third parties – the identity of patients treated at a bankrupt mental health facility, or proprietary information used by a debtor under a manufacturing license – can reach the Internet when included in a debtor's schedules, or when used connection with a motion filed in a bankruptcy case and not protected by being filed under seal.[1]

The proliferation of personal information on the Internet and the relative ease with which it can be gathered are matters of growing concern to all three branches of government. The executive branch is engaged in wide-ranging efforts to protect individual privacy with respect to information in the hands of government agencies and in the hands of private entities, including (at the Executive Office for United States Trustees) information held or generated by bankruptcy trustees. The legislative branch is responding to concerns expressed by citizens in varied circumstances, and Congress has pending many bills to protect the privacy of the information individuals provide to government and nongovernmental entities.

Conversely, both of the bankruptcy bills currently pending would require an individual debtor to disclose more information than the official forms currently require. At the request of the Judicial Conference, however, these bills also would provide for the judiciary to protect the "confidentiality" of a debtor's tax information in the granting of access to a debtor's tax returns and also, in a "sense of the Congress" provision, in the electronic publication of information about debtors. H.R. 833 (House Version) §§ 603(b) and 703; H.R. 833 (Senate Version) § 604.

The Judicial Conference, recognizing the sensitive nature of information in many types of court files, is seeking assistance from its committees in developing appropriate policies concerning public access to all types of court files in an electronic environment. The Committee on Court Administration and Case Management (CACM) has formed a subcommittee to study the issues, and liaisons from other interested committees have been appointed to work with the subcommittee. Gene Lafitte, Esquire, is the liaison from the Committee on Rules of Practice and Procedure. District Judge Sarah S. Vance and Bankruptcy Judge Dennis Montali are the liaisons from the Bankruptcy Administration Committee (Bankruptcy Committee). As a first step, at the

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[1]Section 107(b) of the Bankruptcy Code expressly authorizes the court to protect a trade secret, confidential research, and commercial information. The court also is authorized to protect a person from scandalous or defamatory matter in a filed document. 11 U.S.C. § 107(b). This section codifies for the bankruptcy court an authority that district courts exercise under a theory of inherent judicial power. Section 107(b), however, does not protect an individual who seeks bankruptcy relief but is being stalked or otherwise fears publication on the Internet of his or her address.

urging of the CACM subcommittee, the Director of the Administrative Office sent a memorandum to the courts suggesting that they notify parties that documents filed with the court may be placed on the Internet.

Although courts generally have the authority to limit access to their records, (*Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 596 (1978); *Los Angeles Police Department v. United Reporting Publishing Corp.*, 120 S.Ct. 483, 68 USLW 4005 (1999)), the Bankruptcy Code currently limits that authority with respect to bankruptcy courts. Section 107 of the Code provides:

> **§ 107. Public Access to Papers**
>
> (a) Except as provided in subsection(b) of this section, 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.
>
> (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may –
>
> (1) protect an entity with respect to a trade secret or confidential research, development, or commercial information; or
>
> (2) protect a person with respect to scandalous or defamatory material contained in a paper filed in a case under this title.

11 U.S.C. § 107. Accordingly, one of the options discussed by the CACM subcommittee – that of treating certain types of documents (*e.g.*, presentencing reports, wiretaps) as either presumptively sealed or as nonpublic portions of the case record – may not be available to the bankruptcy courts without legislative action to amend § 107.

The other options discussed by the CACM subcommittee and the Bankruptcy Committee were: limiting Internet access from remote locations to registered users with a password, (access through a courthouse terminal would not require a password); increased use of sealing and protective orders; delaying the electronic broadcasting of filed documents over the Internet to enable parties to request a protective order; amending the Bankruptcy Rules to direct that a debtor's schedules and statement of financial affairs (which are used primarily by trustees and creditors rather than the judge) be filed in the office of the United States trustee rather than the court; defining certain documents, such as the schedules and statement of financial affairs, as part of the "estate" file rather than the "case" file and storing them separately from the case file; and modifying the official forms to require less disclosure of information of a personally sensitive nature, perhaps by requiring only the last four digits of each Social Security or credit account

number.

The Bankruptcy Committee discussed the issue and these options at its January 2000 meeting and approved a resolution as follows:

> That the Committee (as part of the work being coordinated by the Committee on Court Administration and Case Management) study the issue and the possible policies that might be both practical to implement and sensitive to the competing interests of personal privacy and public access to court records, and that the Committee request the Advisory Committee on Bankruptcy Rules to consider whether the official Bankruptcy Forms should be modified to require less information to be filed and become part of the public record.

The CACM subcommittee met again in late January and discussed the pros and cons of all the options listed above. The subcommittee also heard from various interested outsiders: academics, the Social Security Administration, the Department of Justice, and the trial bar. In February, the Executive Office for United States Trustees (EOUST) sponsored a seminar on privacy issues to initiate the development of guidelines for case trustees in handling bankruptcy case information.

One of the speakers at the EOUST conference, a representative of the Center for Democracy and Technology, described a set of eight "Fair Information Principles," which he urged all who collect and hold information about individuals to observe.

- Notice should be given to the subject of the information.
- The collector should limit the information collected to that necessary to the transaction.
- There should be limits on the retention, use, and disclosure of the information.
- Every person should have access to the information about himself or herself.
- Every person should have the right to correct the information about himself or herself.
- Information should be accurate and complete, *e.g.*, no "naked" arrest records.
- There should be security measures in place to prevent unauthorized access to and use of personal information.
- There must be accountability (through oversight) and enforcement (through established means of redress) of the prior seven principles.

Although the "bankruptcy reform" bills would require clerks of bankruptcy courts to make available on the Internet, in bulk, all "public records" information held by a clerk in electronic form, and would require the Administrative Office to publish additional data, the bills also authorize the Judicial Conference to establish appropriate privacy safeguards. In addition, the House bill provision that would require debtors to file copies of their tax returns also directs the Director of the Administrative Office to develop procedures to safeguard the confidentiality of the information in those returns.

If a bankruptcy reform bill is enacted, the Committee will need to sort out conflicting directives on the issue of privacy vs. access. The attached discussion questions, which are based on those presented to the Bankruptcy Committee, can be used to help structure the Committee's discussion.

Attachment

PRIVACY DISCUSSION QUESTIONS

1. Should there be any restriction on Internet access to bankruptcy case information?

2. If so, how should this be accomplished:

    a. By keeping some documents off the Internet or other electronic mode of access entirely? (Example: "estate administration" documents, such as the schedules and statement of financial affairs.)

    b. By limiting access to persons who have obtained a password from the clerk?

    c. By requiring non-parties to obtain a password and pay a fee?

    d. By "layering" access so that different entities have different levels of access, *e.g.*, attorneys have remote access, bu the media and public must visit the courthouse (even to obtain information stored in electronic form)?

3. Should the "financial file" or "estate administration" documents be kept separate from the "litigation file" or "case file" even when the documents are filed on paper? Either

    a. By maintaining a separate, limited access file, such as is contemplated for tax returns in the bankruptcy reform legislation, or

    b. By amending the Bankruptcy Rules to require that those documents be filed with the U.S. trustee or bankruptcy administrator or case trustee?

4. Would amending Bankruptcy Rule 1005 and the Official Bankruptcy Forms to require an individual debtor to disclose only the last four digits of the individual's Social Security number provide the court clerks and creditors with enough information to correctly identify a debtor while affording the debtor some privacy?

5. Should the court delay the release to the Internet of filed documents, to give parties time after the filing to request that the document be sealed?

6. Should the parties in a bankruptcy case – debtors, creditors, and other parties in interest such as landlords and parties to executory contracts – be notified that documents containing information about them may or will be published on the Internet by the court?

7. If some restrictions on Internet access to bankruptcy case information are contemplated, should they be applied uniformly in every court, or should there be room for local options?

8. If some restrictions are to be pursued, what is the best mechanism? To seek rule changes, forms changes, legislative changes, Judicial Conference guidelines, or a combination of these?

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: FEASIBILITY OF SETTING TIME PERIODS IN MULTIPLES OF 7 DAYS

DATE: FEBRUARY 16, 2000

Some state court rules systems have adopted time periods based on multiples of seven days for actions to be taken or deadlines to expire. The purpose of these rules is to minimize the incidents of deadlines falling on weekends when courts are not open. There is still the possibility that some deadlines will fall on holidays (e.g., Monday holidays, Thanksgiving, Christmas, New Year's Day, July 4), so the need for a rule directing that some of these deadlines will expire on the next business day remains. Nevertheless, these occurrences are relatively few. The question was posed whether we should adopt a similar timing scheme for the Bankruptcy Rules.

The Bankruptcy Rules contain a number of different deadlines. Consider just the Rules in Part III. There are limits of 15 days (Rule3015(b)), 20 days (Rules 3001(e)(2) & (4), 3015(g)), 25 days (Rule 3017(a)), 30 days (Rules 3001(e)(5), 3002(c)(3), 3004, 3005(a), 3007), 90 days (Rules 3002(c) & (c)(4)), and 180 days (Rule 3002(c)(1)). There are literally hundreds of deadlines established throughout the Rules. The frequency of the deadlines and their variety are causes for concern regarding a substitution of a system of multiples of seven for these various deadlines. Attached is a table of the different time deadlines set out in the Rules. 1

Anytime that a change is made, one must choose either to lengthen or shorten a particular period. Yet, the difficulty of choosing between the longer or shorter period, like the frequency

and variety of the deadlines, is not a sufficient cause for refusing to adopt a system that appears to offer a significant reduction in frequency of weekend deadlines. In my opinion, there are other more important reasons for retaining the current timing provisions in the Rules.

First, Rule 5001(a) provides that the courts are always open. Consequently, a bankruptcy petition can be filed by or against a debtor on any day. I believe that the debtor filed its petition in Eastern Airlines on a weekend by filing it with the Bankruptcy Judge. In these circumstances, the many Rules triggered by the filing of the petition would continue to fall on a weekend throughout the case under a multiple of seven system. There is no compilation of the number of cases filed in this manner, so the problem may not be too great in practice. Furthermore, a general rule could be proposed that the filing of a petition on a Saturday or Sunday can be deemed to be filed on the next regular business day. If there is concern that some parties would use weekend filings to "get more time", then the default could be back to the first regular business day prior to the filing. If the Committee concludes that a "seven day system" is appropriate, I will draft such a rule. I would propose that it be included in Rule 9006, perhaps by inserting the new provision as Rule 9006(a)(1) and renumbering current Rule 9006 as Rule 9006(a)(2).

Even if one solves the problem presented by the possibility of weekend bankruptcy petitions, there are other difficulties presented by the Bankruptcy Code. It has a number of deadlines that are not subject to adjustment by the rules process. For example, § 1121 sets deadlines for filing and obtaining confirmation of plans in chapter 11 cases. Those deadlines follow from the date of the order for relief which, in most cases, is the day on which the debtor files a voluntary petition. Section 1221 requires chapter 12 debtors to file plans not later than

90 days after the order for relief. The pending bankruptcy reform legislation has even more deadlines that would not fit within a multiple of seven day system. For example, there are 30 and 45 day deadlines in the amendments to § 521 requiring the submission of information by the debtor, and five day periods for the court to make copies of the debtor's plan and schedules available to creditors who request them.

It is true that the Advisory Committee can proceed with a seven day system for the Rules while leaving the statutory deadlines unharmed. We can retain Rule 9006(a)'s directive regarding periods expiring on a Saturday, Sunday, or holiday. This would still leave a "dual" timing system in place to some extent. Given that the deadlines currently in the Rules have been there for quite some time, there is also some justification for retaining them on that basis alone. Practitioners have operated under the current timing system for many years, and there are a number of deadlines that have become entrenched.

Bankruptcy Rules Pamphlet
Norton Bankruptcy Law and Practice 2d
1999-2000 Edition
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William L. Norton, Jr.

APPENDIX A

Time Frames Under the Bankruptcy Rules

2 Days

Editors' Note: *Under Rule 9006(a), intermediate Saturdays, Sundays, and legal holidays are excluded in computing the period of time.*

Rule 1007(d): Involuntary Chapter 11 debtors must file a list of names and addresses of the 20 largest creditors 2 days after the order for relief.

Rule 4001(a): Hearing for motion by adverse party to reinstate stay where relief obtained ex parte.

5 Days

Editors' Note: *Under Rule 9006(a), intermediate Saturdays, Sundays, and legal holidays are excluded in computing the period of time.*

Rule 4001(d)(3): Notice of a hearing on objections to an agreement under Rule 4001 must be at least 5 days.

Rule 6004(b): Notice of objections to use, lease or sale of property must be filed and served within 5 days before such action.

10 Days

Rule 1007(h): Within 10 days of information debtor is to file supplemental schedules for property acquired within 180 days after the filing of the petition.

Rule 7004(f): A summons must be served within 10 days of issuance.

Rule 7052: Findings by the Court may be amended by motion within 10 days.

Rule 8002: Notice of appeal must be filed within 10 days of the entry of the order or judgment to be appealed.

The Bankruptcy Judge may extend the time for a period not to exceed 20 days.

Rule 8006: Appellant has 10 days to designate items to be included in the record within 10 days after filing notice of appeal.

Rule 9020(c): Objection to contempt.

Rule 9023: New trials must be made within 10 days after entry of judgment.

Rule 9033(b): Objection to the proposed findings of fact and conclusions of law in noncore proceedings.

15 Days

Rule 1007(a)(2): Involuntary debtor must file a list of the names and addresses of each creditor within 15 days after entry of order for relief, unless a schedule of liabilities has been filed.

Rule 1007(a)(3): Chapter 11 debtor must file detailed list of names and addresses of equity security holders of each class within 15 days of the order for relief.

Rule 1007(c): Voluntary debtor who has filed a list of all creditors and their addresses has 15 days from filing petition to file schedules and statements.

Involuntary debtor has 15 days from entry of the order for relief to file schedules and statements.

Rule 2016(b): Disclosure of compensation paid or promised to attorney.

Rule 3015(b): If Chapter 13 plan is not filed with the petition, plan must be filed within 15 days thereafter.

Rule 4001(b)(2): Hearing on the Motion To Use Cash Collateral.

Rule 4001(c)(2): Hearing on Motion To Obtain Credit.

Rule 4001(d)(2): Objection to agreement to furnish adequate protection.

Rule 6004(d): Objections to the sale of estate property aggregating less than $2,500 must be filed within 15 days of the mailing of the notice of sale.

Rule 6007(a): Objections to the trustee's or debtor's abandonment of property must be filed within 15 days of the mailing of the notice of abandonment.

20 Days

Rule 1011(b): Defenses and objections to the petition for relief must be filed and served within 20 days after service of the summons.

Rule 2002(a)(1): Notice of the meeting of creditors under Code § 341 must be given at least 20 days prior to the meeting.

Rule 2002(a)(2): Twenty-day notice by mail must be given of the proposed use, sale, or lease of property other than in the ordinary course of business.

Rule 2002(a)(3): Notice of a hearing on the compromise or settlement of a controversy other than approval of an agreement pursuant to Rule 4001(d) must be given at least 20 days prior to the hearing.

Rule 2002(a)(4): Twenty-day notice must be given of the date fixed for filing claims against a surplus in an estate to the debtor, the trustee, all creditors and indenture trustees.

Rule 2002(a)(5): Twenty-day notice must be given of the hearing on the dismissal or conversion of a case under Chapter 7, Chapter 12 or Chapter 11 to another chapter.

Rule 2002(a)(6): Notice must be given of the time fixed to accept or reject a proposed modification of a plan.

Rule 2002(a)(7): Hearings on applications for compensation or reimbursement of expenses in excess of $500 require 20-day notice.

Rule 2002(a)(8): Twenty-day notice must be given of the time fixed for filing proofs of claims pursuant to Rule 3003(c).

Rule 2002(a)(9): Twenty-day notice must be given of the time fixed for filing objections and the hearing to consider confirmation of a Chapter 12 plan.

Rule 2002(o): Notice of the entry of the Order for Relief in case of an individual with consumer debts.

20 to 40 Days

Rule 2003(a): Except for Chapter 9 and Chapter 12 cases, meetings of creditors pursuant to Code § 341 must be held not less than 20 nor more than 40 days after the order for relief.

20 to 35 Days

Rule 2003(a): Meeting of creditors pursuant to Code § 341 for a Chapter 12 must be held not less than 20 nor more than 35 days after the order for relief.

25 Days

Rule 2002(b)(1): Twenty-five-day notice must be given to parties in interest of the time fixed for objecting to and the hearing to consider approval of a disclosure statement.

Rule 2002(b)(2): The time fixed for objecting to and the hearing to consider confirmation of a Chapter 9, Chapter 11 or Chapter 13 plan requires 25-day notice to parties in interest.

Rule 3017(a): The Court shall hold a hearing on disclosure statement on not less than 25-day notice. [same as 2002(b)(1)]

Rule 4004(a): Twenty-five-day notice must be given of the time for creditors to object to a discharge in a Chapter 7 or 11 case.

30 Days

Rule 2015(a)(1): Trustee or debtor in possession in a Chapter 7, or if the court directs, in a Chapter 11 case must file an inventory within 30 days after qualification.

Rule 3005(a): Guarantor, surety, indorser or other codebtor may file a proof of claim if the creditor does not file a proof of claim within the 90-day period, by filing within 30 days thereafter.

Rule 3007: Objections to claims shall be mailed or delivered to the claimant at least 30 days prior to the hearing.

Rule 4003(a): Dependent of a debtor may file a list of exemptions within 30 days after the time specified if the debtor fails to claim them.

Rule 4003(b): Objections to the debtor's claimed exemptions must be filed within 30 days after the conclusion of the meeting of creditors.

Rule 4007(c): The Court shall give all creditors not less than 30-day notice of the time fixed to file complaints for the determination of the dischargeability of debts, which complaints may not be filed later than 60 days following the first date set for the meeting of creditors. Compare this 30-day notice with the 25-day notice to object to discharge specified in Rule 4004(a).

Rule 4008: Reaffirmation hearings are to be held not more than 30 days following the entry of an order granting or denying a discharge.

Rule 7012(a): Answers to complaints in adversary proceedings must be served within 30 days after the issuance of the summons. Note: The summons must be served within 10 days of issuance per Rule 7004(f).

60 Days

Rule 2003(a): Holding of the Meeting of Creditors at a place not regularly staffed by the clerk.

Rule 4004(a): Complaints objecting to the debtor's discharge in a Chapter 7 case under Code § 727(a) must be filed within 60 days following the first date set for the meeting of creditors.

Rule 4007(c): Complaints objecting to the dischargeability of debts in Code § 523(c) must be filed within 60 days following the first date set for the meeting of creditors.

90 Days

Rule 1019(6): Postpetition claims in a Chapter 11, 12 or 13 case converted to a Chapter 7 case must be filed within 90 days after order of conversion.

Rule 3002(c): Proofs of claim in Chapter 7, Chapter 12, or Chapter 13 cases must be filed within 90 days after the first date set for the meeting of creditors under Code § 341(a).

Rule 3002(c)(5): If a dividend appears likely after notice of no dividend, creditors may file proofs of claim within 90 days after the mailing of the notice by the Clerk.

Miscellaneous Time Frames

Rule 3003(c)(3): In Chapter 9 or Chapter 11 cases the Court shall fix the time for filing proofs of claim or interest.

Rule 3014: The Code § 1111(b)(2) election by secured creditors in Chapter 9 or 11 cases must be made before the conclusion of the hearing on the disclosure statement.

Rule 3016(a): Parties in interest other than the debtor may file Chapter 9 or 11 plans before the conclusion of the hearing on the disclosure statement.

Rule 8002(c): The Bankruptcy Judge may extend the time for filing the notice of appeal 20 days from expiration of last date for filing notice of appeal.

Rule 9006(a): When the act to be done falls on the last day on which the weather or other conditions makes the clerk's office inaccessible.

- When the time prescribed is less than 8 days, the intermediate Saturdays, Sundays and legal holidays, including Martin Luther King's birthday, are not to be counted.

Rule 9006(b)(1): The Court may allow enlargements of time on motion within the specified time and thereafter for excusable neglect.

Rule 9006(b)(2): Enlargements are not permitted under the following rules:

- Rule 1007(d): Filing with petition the list of the 20 largest creditors.
- Rule 1017(b)(3): Thirty-day notice of dismissal for failure to pay filing fee.
- Rule 2002(a): Twenty- to forty-day notice of creditors' meeting.
- Rule 2003(d): Disputed election to trustee not subject of motion within 10 days of the dispute; the interim trustee continues to serve.

Rule 9006(b)(3): Enlargements are limited to the extent allowed under the following rules:

- Rule 1006(b)(2): Fee installments not to exceed 120 days.

- Rule 1017(e): Sixty-day limit for United States Trustee to file or Court to serve notice of motion for dismissal pursuant to Code § 707(b).
- Rule 3002(c)(2): The Court may extend time to file proof of claim by an infant or incompetent.
- Rule 4003(b): Objections to exemptions within 30 days after conclusion of the meeting of creditors.
- Rule 4004(a): Sixty days following first date set for meeting of creditors to object to the debtor's discharge in a Chapter 7 case.
- Rule 4007(c): Sixty-day rule for objecting to dischargeability of debts.

Rule 9006(c)(2): Reduction in time not permitted for the following rules:

- Rule 2002(a)(4): Twenty-day notice to file claims against surplus.
- Rule 2002(a)(8): Twenty-day notice for the time to file proofs of claim.
- Rule 2003(a): Twenty- to forty-day notice (20 to 35 in Chapter 12 case) of the meeting of creditors.
- Rule 3002(c): Ninety-day period in which to file proofs of claim under Chapter 7, Chapter 12 or Chapter 13.
- Rule 3014: The time for secured creditors to make the Code § 1111(b)(2) election before the conclusion of the disclosure statement hearing.
- Rule 3015: Chapter 13 plan to be filed within 15 days after filing the petition. Chapter 12 plan to be filed within the time prescribed by § 1221 of the Code.
- Rule 4003(a): Thirty-day period for dependents to file list of exemptions.
- Rule 4004(a): Sixty days to object to discharge of Chapter 7 case.
- Rule 4007(c): Sixty days to object to dischargeability of debts.
- Rule 8002(a): Ten days to file notice of appeal.

Rule 9024: Relief from judgment or order carries a one year maximum limitation under Rule 60b FR Civ P.

Memorandum

To: Advisory Committee on Bankruptcy Rules

From: Bob Kressel

Re: Forms Subcommittee Report

Date: January 21, 2000

At its September 1999 meeting, the Advisory Committee referred to the Forms Subcommittee four letters that it had received regarding current forms. The letters, as well as Alan Resnick's August 17, 1999, memorandum regarding the letters follows this report. The Committee has considered the letters, Professor Resnick's memorandum, and comments made at the September Committee meeting and reports the following:

1. The first letter is from Judge Sonderby in Chicago who suggested changing Form 20B, the form for objecting to a claim. Although we agreed that the form needs work, as does Form 20A, the form is only two years old and the Committee thought that tinkering with the form now makes no sense. We should wait a few years to see if other suggestions and problems arise and try to address them all at the same time.

2. Judge Mannes wrote with some suggested improvements to the recently adopted Director's Form B240, Reaffirmation Agreement. This project started with the National Bankruptcy Review Commission recommendation that the Rules Committee adopt an official form of motion requesting approval of a Reaffirmation Agreement. The Forms Subcommittee and the full Advisory Committee decided that it would be more appropriate to have a form agreement, rather than a form motion. In the meantime, various acts of Congress have been percolating which would statutorily require certain things to be included in Reaffirmation Agreements. Rather than publish an official form, the Committee sent a form to the Director who only recently issued it as a Director's Form. Because the form is so new and because changes may be required by pending legislation, the Subcommittee thought it inappropriate to address Judge Mannes's suggestions at this time, although they are all good ones.

3. We also received a complaint from A. Thomas DeWoskin, a trustee, about the notice of meeting of creditors being used in his district. He was unhappy because his name was the most prominent name on the form and the form also included his name, address, and telephone number. Partly he was confused because the prominent name that he indicated was his name and address inserted by the BNC on his copy in the place where a creditor's name would appear on its copy. His name, address, and telephone number did appear in a

smaller form on all notices. However, the Subcommittee felt that part of being a trustee in a bankruptcy case involved being accessible to talk to creditors. Because this is yet another recently modified and adopted form and because the Subcommittee had little sympathy for Mr. DeWoskin's complaints, it thinks that it is inappropriate to change the form.

4. Lastly, we received a letter from Joel Tabas, also a trustee, complaining about the Proof of Claim Form. Over the course of the last few years, an enormous amount of work, both by the Forms Subcommittee and by the Advisory Committee itself, has gone into changing the Proof of Claim Form in an attempt to make it better. It was intended to be easier to use and read, but it remains a fact of life that people do not follow directions. In particular, they check the box indicating that they have priority claims when in fact they do not. We have had a number of similar complaints in the few years that the form has been in use. Perhaps someday this problem can be eliminated, but in light of the fact that this is a fairly new form, it is probably a good idea to wait awhile and accumulate more suggestions and problems before trying to address them and making another stab at improving the form.

In short, the Forms Subcommittee recommends taking no action on any of the suggestions.

Attachments

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

(312) 435-5646

CHAMBERS OF
SUSAN PIERSON SONDERBY
CHIEF JUDGE

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

2812 Liberty Landing Court
Florissant, MO 63033

A. Thomas DeWoskin
Attorney at Law
10 S. Broadway, Ste 2000
St. Louis, MO 63102

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) Telephone number	Bankruptcy Trustee (name and address) Telephone number

Meeting of Creditors:

Date ___/___/___ Time ( ) A.M. ( ) P.M. Location _____

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

Deadline to File a Complaint Objecting to Discharge of the Debtor *or* to Determine Dischargeability of Certain Debts:

Deadline to Object to Exemptions:
Thirty (30) days after the *conclusion* of the meeting of creditors.

Creditors May Not Take Certain Actions

The filing of the bankruptcy case automatically stays certain collection and other actions against the debtor and the debtor's property. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code, you may be penalized.

Please Do Not File A Proof of Claim Unless You Receive a Notice To Do So

Address of the Bankruptcy Clerk's Office: Telephone number	For the Court: Clerk of the Bankruptcy Court
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
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, 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	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 9 1999

3233221

THIS SPACE IS FOR COURT USE ONLY

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.

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	Nancy 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

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.

US BANKRUPTCY COURT SO. DISTRICT OF FLORIDA
FEB 16 1999
FILED RECEIVED
THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

Check here if this claim ☐ replaces ☐ amends a previously filed claim dated: _____

1. Basis for Claim
☐ Goods sold
☑ Services performed
☐ Money loaned
☐ Personal injury/wrongful death
☐ Taxes
☐ Other _____

☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
☐ Wages, salaries, and compensation (fill out below)
Your SS #: ____ ____ ____
Unpaid compensation for services performed
from _____ (date) to _____ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 5/3.22
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 $ 513.22
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):

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 Jason Howe Tricia Howe	Case Number 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
FEB 18 1999
FILED
RECEIVED

THIS SPACE IS FOR COURT USE ONLY

Name of Creditor (The person or other entity to whom the debtor owes money or property):
Acosta Braids
Name and Address where notices should be sent:

Acosta Braids
21001 SW 172nd Avenue
Miami FL 33187

Telephone Number: (305) 252-6442

☐ 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: N/A

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: 11-09-97 through 03/18/98

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 1093.60
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 $ 1093.60
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):
2-10-99	Flora Beatriz Gonzalez (ST)

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.

15

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

3233243

THIS SPACE IS FOR COURT USE ONLY

Name of Creditor (The person or other entity to whom the debtor owes money or property):
T & B Truck Brokage
Name and Address where notices should be sent:

T & B Truck Brokage
PO Box 5617
Pearl MS 39288

Telephone Number: 601-939-8088

- ☐ 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: MAY 1997

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ 1500.00
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 $ 1500.00
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):
2-18-99	William B. Tucker President William B. Tucker

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.

11

Agenda Items 17 and 18 will be oral reports.

19

Rule 4004. Grant or Denial of Discharge

****

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) the debtor is not an individual,

(B) a complaint objecting to the discharge has been filed,

(C) the debtor has filed a waiver under § 727(a)(10)

(D) a motion to dismiss the case ~~pursuant to Rule 1017(e)~~ under § 707 is pending;

(E) a motion to extend the time for filing a complaint objecting to discharge is pending, or

(F) 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 present 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 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 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.

(Official Form 1) (9/97)

FORM B1

United States Bankruptcy Court
_____ District of _____

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 6 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 6 years (include married, maiden, and trade names):
Soc. Sec./Tax I.D. No. (if more than one, state all):	Soc. Sec./Tax I.D. No. (if more than one, state all):
Street Address of Debtor (No. & Street, City, State & Zip Code):	Street Address of Joint Debtor (No. & Street, City, State & Zip Code):
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address):	Mailing Address of Joint Debtor (if different from street address):
Location of Principal Assets of Business Debtor (if different from street address above):	

Information Regarding the Debtor (Check the Applicable Boxes)

Venue (Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☐ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

Type of Debtor (Check all boxes that apply)

☐ Individual(s) ☐ Railroad
☐ Corporation ☐ Stockbroker
☐ Partnership ☐ Commodity Broker
☐ Other _____

Nature of Debts (Check one box)

☐ Consumer/Non-Business ☐ Business

Chapter 11 Small Business (Check all boxes that apply)

☐ Debtor is a small business as defined in 11 U.S.C. § 101
☐ Debtor is and elects to be considered a small business under 11 U.S.C. § 1121(e) (Optional)

Chapter or Section of Bankruptcy Code Under Which the Petition is Filed (Check one box)

☐ Chapter 7 ☐ Chapter 11 ☐ Chapter 13
☐ Chapter 9 ☐ Chapter 12
☐ Sec. 304 - Case ancillary to foreign proceeding

Filing Fee (Check one box)

☐ Full Filing Fee attached
☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form No. 3.

Statistical/Administrative Information (Estimates only)

☐ Debtor estimates that funds will be available for distribution to unsecured creditors.

☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors	1-15	16-49	50-99	100-199	200-999	1000-over
	☐	☐	☐	☐	☐	☐

Estimated Assets	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Estimated Debts	$0 to $50,000	$50,001 to $100,000	$100,001 to $500,000	$500,001 to $1 million	$1,000,001 to $10 million	$10,000,001 to $50 million	$50,000,001 to $100 million	More than $100 million
	☐	☐	☐	☐	☐	☐	☐	☐

Voluntary Petition
(This page must be completed and filed in every case)

Name of Debtor(s):

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):

.....
.....
.....
.....

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or had possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee and any person selected as trustee that immediate precautionary action may be necessary.

Form 7
(9/00)

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 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," 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 six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or 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 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.

---

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

---

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

---

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

---

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

---

13. Setoffs

None ☐ List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

---

14. Property held for another person

None ☐ List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor

None ☐ If the debtor has moved within the **two years** immediately preceding the commencement of this case, list all premises which the debtor occupied during that period and vacated prior to the commencement of this case. If a joint petition is filed, report also any separate address of either spouse.

ADDRESS	NAME USED	DATES OF OCCUPANCY

---

16. Spouses and Former Spouses

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

---

17. 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

---

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

---

18 . 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 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 **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 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 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 **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 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 **six years** immediately preceding the commencement of this case.

NAME	TAXPAYER I.D. NUMBER	ADDRESS	NATURE OF BUSINESS	BEGINNING AND ENDING DATES

None ☐ b. Identify any business listed in response to subdivision a., 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 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 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.)*

19. Books, records and financial statements

None ☐ a. List all bookkeepers and accountants who within the **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

20. 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

21 . 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

22 . 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

23 . 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

24. 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

---

25. 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

---

* * * * * *

[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

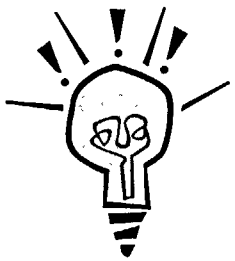
X _____ _____
Signature of Bankruptcy Petition Preparer Date

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.

COMMITTEE NOTE

The form has been amended to provide more information to taxing authorities, pension fund supervisors, and governmental units charged with environmental protection and regulation. Four new questions have been added to the form, covering community property owned by a debtor and the debtor's non-filing spouse or former spouse (Question 16), environmental information (Question 17), any consolidated tax group of a corporate debtor (Question 24), and the debtor's contributions to any employee pension fund (Question 25). In addition, every debtor will be required to state on the form whether the debtor has been in business within six years before filing the petition and, if so, must answer the remaining questions on the form (Questions 19-25). This is an enlargement of the two-year period previously specified. One reason for the longer "reach back" period is that business debtors often owe taxes that have been owed for more than two years. Another is that some of the questions already addressed to business debtors request information for the six-year period before the commencement of the case. Application of a six-year period to this section of the form will assure disclosure of all relevant information.

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)

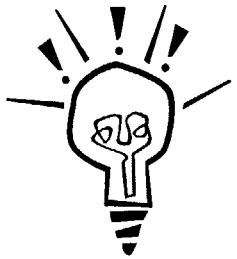
Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

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

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

2004, 4004,
9014
Form 1

1007, 2002 (c) and (g),
3017, 3020, 9006,
9020, 9022

Form 7

1017, 2002(a),
4003, 4004, 5003

1006, 2002(f)(7),
2004, 2014,
2015(a)(5), 8014,
9027

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC
2/2000

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2000

1017
2002(a)
4003
4004
5003

December 1, 2001

1007
2002(c)
2002(g)
3016
3017
3020
9020
9022

December 1, 2002

1006
2002(f)(7)
2004
2014
2015(a)(5)
8014
9027
[Previously Approved Proposed Amendments Awaiting Transmission to Standing Committee with Request for Publication:
2004
4004
9014]

The next meeting of the Committee will be held

September 21 - 22, 2000

at

Arden House Conference Center
Harriman, New York

****

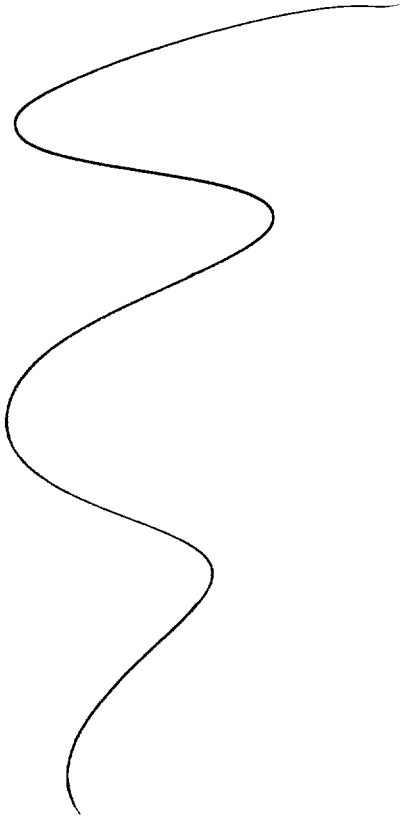
The Committee will discuss dates and locations
for the March 2001 meeting.

Supplemental

Agenda

Book

Materials



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 1, 2000

MEMORANDUM TO BANKRUPTCY RULES COMMITTEE

SUBJECT: *Civil Rules Comments Pertaining to the Three Day Rule*

For your information, I am attaching comments to the proposed amendments to the Civil Rules, which pertain to the Three Day Rule.

John K. Rabiej

Attachments

99-CV-001

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&
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*Certified Mediator

September 20, 1999

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

Re: *Preliminary Draft of Proposed Amendments to the Federal Rules of Practice and Procedure*

Dear Mr. McCabe:

Thank you for offering me the opportunity to comment on the captioned matter. The only comment which I wish to make is that I would favor that the 3-day rule be extended to any method of service other than personal delivery. This would cover those situations where electronic service is made on week-ends or the recipient is away from their home or office for three days or less.

Since I have never practiced either bankruptcy or intellectual property law, it would not be appropriate for me to comment on the proposed rules relating to those areas. The other amendments appear to make good sense.

Sincerely,

Robert F. Baker

Robert F. Baker
Fellow, American College of Trial Lawyers

RFB: rfb

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James E. Seibert
United States Magistrate Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF WEST VIRGINIA
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xxxxx304-232-0011
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99-CV-003

September 30, 1999

PETER G. McCABE, SECRETARY
COMMITTEE ON RULES OF PRACTICE AND
PROCEDURE OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES
THURGOOD MARSHALL FEDERAL JUD. BLDG.
WASHINGTON, D.C. 20544

Re: Federal Rules of Civil Procedure
Rule 6(e)

Dear Mr. McCabe:

I respectfully request the Committee consider extending the three day rule to include electronic service. My reasoning is that there will be less confusion if the same rule applies to all service, other than personal delivery. I also believe that there is some merit in being consistent with the bankruptcy rules.

Very truly yours,

James E. Seibert

JES/jlk

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PLEASE RESPOND TO:

99-CV-005

November 11, 1999 Cleveland

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

Dear Mr. McCabe:

I write to voice my objection to the Committee's preliminary conclusion preventing the three day rule in the electronic service cases. I envision electronic service at late on a Friday. I suppose most attorneys would be discomfitted to learn on the following Monday that the response time has just been cut down by the intervening weekend. Pity the lawyer that left just a bit early on Friday to start a week long vacation. Upon their return ten days gone from the response time. There are enough sources of pressure on our practices without imposing a new one.

I say the three days should continue to enlarge the response time.

Very truly yours,

John P. Calandra
Baran, Piper, Tarkowsky, Fitzgerald & Theis Co., L.P.A.

JPC/jr

PHEBUS & WINKELMANN

ATTORNEYS AT LAW—ESTABLISHED 1895

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99-CV-006

November 29, 1999

Rules Committee Support Offices
Administrative Office of the United States Courts
One Columbus Circle, N.E.
Washington, D.C. 20544

Gentlemen:

I asked the individual that is under contract to maintain this firm's computer system for his comments from a computer-specialist perspective as to the proposed rule changes.

Rather than endeavoring to paraphrase his comments, I am passing them on directly to you.

Sincerely yours,

J.W. PHEBUS

JWP/tap
Enclosure

From: "Jeff Facer" <jfacer@areawidenet.com>
To: Urbana GW Domain.Urbana GW Post Office(JOE)
Date: Sun, Nov 21, 1999 7:21 PM
Subject: E-Mail

Joe,

Regarding the information you sent me about the Committee on Rules of Practice and Procedures, I have read the article, and believe your concerns to me deal with electronic transmission (e-mail) of legal documents, the actual 'recording' or 'logging' of the transmission time, and whether or not you will receive any 'notification' if the e-mail does not make it to its destination.

For simplicity sakes, let me address each of these issues individually.

As a quick review, you are using Novell's GroupWise as your E-Mail Server. This is a full featured e-mail system that is POP3 and IMAPI compliant.

The GroupWise Internet Agent, which handles the Internet e-mail, poles the Server every 30 seconds to see if there is 'new' e-mail to be sent, or to be received from the outside world. At these 30 second intervals, e-mail is transmitted and received from the outside world, aka - the Internet.

Issue #1: Does the actual 'time' and 'date' of an e-mail get recorded and/or logged? The answer to this is 'yes'. GroupWise date and time stamps the e-mail message. You will see this as you print out one of the e-mails that you have sent. GroupWise also date and time stamps e-mail that you receive. Given the statements on Page #39 of the memo:
1. ....electronic service should be complete upon 'dispatch' by the person making the service.
2. The person being served, by giving consent, assumes the responsibility to monitor the agreed-upon mode of delivery.

I would assume that the date and time stamping of your e-mails would be all the proof you would need that you had indeed 'sent' the message.

2. The second issue pertains to receiving notification if the e-mail you sent did NOT reach the intended party. The memo states:
1. Page #39: The transmitter's actual knowledge that delivery has not been made defeats the presumption that service is complete on transmission.
2. Page #47. As with other modes of service, however, actual knowledge that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete on transmission.

In order to address this issue, let me provide a brief explanation of the way Internet e-mail works. You have an e-mail Server in your office. This runs the e-mail program GroupWise. You are connected to the Internet via a 'relay host', that being PDNT. They basically provide you with access to the Internet, whether it be for e-mail, or surfing the Web. When you send an e-mail, your Server delivers the mail to the relay host. PDNT then passes the mail onto the relay host of the intended recipient. For example, if you were to send a message to johndoe@soltec.com, your server would route the message to PDNT, they would route it to Soltec, and Soltec would deliver it to John Doe. If the recipient is not a valid e-mail user, you will get a notification, typically within the hour. The complication arises if the relay host to which the message is being delivered is down. In the above example, this would be Soltec. The standard Internet delivery scheme is for the relay host to attempt delivery every 20 minutes for four hours, then every four hours for the next forty-eight hours. If no delivery is made within than time, you will get a notification accordingly.

The ultimate answer to the question of 'Will I get notification if an e-mail that I sent does not reach its intended address', is yes.

Lastly, on Page #41 of the memo, "The article invites comment on 'whether electronic service should be made complete on 'transmission', or whether instead it should be made complete only on 'receipt' or some other event." My feelings would be that the simple act of 'transmitting' the e-mail would suffice. With the date and time stamp logging, and with the eventual notification that the e-mail did not find its intended addressee, I would think this would suffice.

If I can be of any further assistance, please let me know.

Thanks,

Jeff

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A RESTRICTED PROFESSIONAL COMPANY
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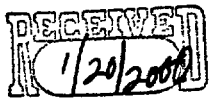

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99-CV-007

FAX: (215) 568-5872

January 18, 2000

John K. Rabiej, Esquire
Chief, Rules Committee Support Office
Administrative Office of U.S. Courts
Wahington, D.C. 20544

Dear Mr. Rabiej:

Thank you for your telephone call. As we discussed, I withdraw my request to testify in person.

Please accept this letter as my comment to two of the three questions posed by Civil Rules Committee, namely: (1) "Whether electronic service should be made complete on 'transmission,' or whether instead it should be made complete only on 'receipt' or some other event," and (2) "Whether additional time should be provided in Civil Rule 6(e) to respond to papers served by electronic means or by other means permitted with the consent of the person served." I do not have any comment to the Committee's third question.

I believe that electronic service should be deemed complete upon transmission. This is most consistent with current practice, and will allow more predictability in due dates for responding papers. I also believe that the additional three days provided for responding to papers served by regular mail should be expanded to include electronic service. This will encourage the served party to agree to electronic service.

A. Electronic Service Should Be Deemed Complete Upon Transmission To Preserve Predictability And Ease Of Computation

According to one leading treatise, "very few reported cases deal with the computation of time after the filing of a lawsuit." 1 J. Moore et al., Moore's Federal Practice § 6.04[1] n.1 (3d ed. 1999). The reason for the paucity of reported cases is obvious: clarity and ease of computation lead to few disputes, hence few reported cases. That will change if electronic service is deemed complete upon receipt.

My practice is mostly in federal court, and mostly in complex cases. I have served and received countless papers (discovery requests and motion papers) whose response time is calculated using Fed. R. Civ. P. 6. I have encountered a few disputes regarding when responses are due, but those disputes have evaporated once both parties read the rule carefully.

The main reason the disputes evaporate is that the serving party always appends a "Certificate of Service" to the served papers indicating the date and method of service. The parties then calculate the response time based on the Certificate, because we now have a complete-upon-mailing rule. Fed. R. Civ. P. 5(b).

I have never encountered a situation where the served party claimed that the Certificate was inaccurate. However, current practice would make it likely that the served party in that instance would challenge the supposedly incorrect Certificate upon receipt, i.e., well before the response date.

The problem with deeming service complete upon receipt is that the serving party will not know for sure when a response is due until she confers with opposing counsel to ascertain the receipt date. This will lead to unnecessary work, such as the routine practice of sending letters like these: "This letter will confirm our telephone conversation of today, in which you told me that you received Defendants' Second Request For Production of Documents on January 1, 2000." What a waste. Even the served party may lose track of the response date unless he immediately notes the receipt date on his calendar.

Absent these precautions (which are unnecessary under the current Rule and practice, and which would be unnecessary under a "complete upon transmission" rule), a "complete upon receipt" rule will create ambiguity about the response date. The ambiguity will likely lead to more litigation over whether responsive papers are timely, which now is rare. This will undercut one of the principles of the Federal Rules, i.e., focusing litigation on the merits.

The ambiguity caused by deeming service effective upon receipt will be worsened when papers are served on a Friday afternoon (as they often are). In that case, there will be a four-day window of plausibility (Friday through Monday) for receipt. The window of plausibility would be extended by

holidays, vacations, or even business trips by the served party's attorney.

Moreover, under a complete-upon-receipt rule, the outcome of the inevitable timeliness litigation will hinge on factual issues, which will be burdensome to litigate. Expect legal secretaries to take the stand to testify as to whether or not the firm's file server was down on a particular day. This is in contrast to the current rare litigation, which (as far as I can tell) has been limited to legal issues regarding interpretation of the rule. See, e.g., Kuck v. Bensen, 649 F. Supp. 68, 70 (D. Me. 1986) (Veteran's Day is national holiday and therefore excluded from computation).

B. The Additional Three Days For Responding To Papers Served By Mail Should Also Apply To Electronically Served Papers To Encourage Electronic Service

As I understand Judge Niemeyer's May 11, 1999 Memorandum, the debate over whether to amend Rule 6 to allow the extra three days' response time for electronically served papers boils down to a difference of opinion over which is more important: encouraging serving parties to ask their opponents to consent to electronic service, or encouraging served parties to consent when asked.

In my opinion, failure to amend Rule 6 (i.e., not allowing the extra three days) will not significantly encourage serving parties to seek their opponents' consent for electronic service. For this reason, I support the Alternative Proposal amending Rule 6.

My decision as to method of service has never been driven by my opponent's response time. In other words, I have never chosen personal service over mail service in order to deprive my opponent of the extra three days provided by Rule 6(e). It is my impression that my opponents have never served papers on me personally in order to deprive me of those three days, either.

Of course, any lawyer who wants to can legitimately serve her opponent personally if she wants to minimize her opponent's response time. That option will still be available even under the Alternative Proposal. My point is that it is a sufficiently rare occurrence that the Alternative Proposal will not discourage mutually voluntary electronic service significantly.

The simple fact is that e-mail is not yet as reliable as the United States Postal Service. Our office occasionally receives documents by e-mail that are garbled and completely unreadable. The observation that "practicing attorneys often consent to electronic or other modes of service now" is well taken; however, I believe that electronic service accounts for only a tiny fraction of all served papers. My practice involves the service or receipt of papers whose response time is governed by Rules 5 and 6 on an approximately weekly basis (sometimes, two or three times a week). I have never asked to serve, or been asked to receive, papers electronically.

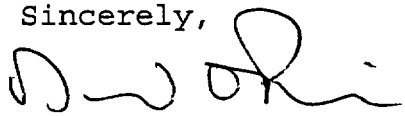
My feeling is that the major impediment to electronic service of papers will be the served party's fear that the documents will never adequately be delivered, rather than the serving party's reluctance to grant her opponent an extra three days. An attorney who receives a completely garbled discovery request may need a few days to notify her opponent and receive a legible "hard copy."

At the least, the served party will be reluctant to agree to bear the risk of incompatibility of word processing systems or other risks that electronic delivery won't work. Not amending Rule 6 will put the served party in the position of choosing between assuming that risk and refusing electronic service.

Most law firms have the technical capability to serve and receive papers electronically, but few actually do so. The best way to encourage electronic service is to allay the served party's fears by giving them an extra three days to respond. Perhaps in the (probably near) future when e-mail is more reliable and <u>perceived</u> as more reliable, the extra three days will not be necessary to encourage its use for service of papers. As for now, I believe it is.

Thank you for your consideration of my thoughts.

Sincerely,

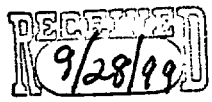


David E. Romine

W:\docs\DAVID\rabiej00.wpd

you trying to send this message to?

_____ Reply Separator



Received + responded via Internet.

Subject: RE: Message not deliverable
Author: Charlie Schlumberger <cschlumberger@wlj.com> at ~Internet
Date: 9/22/99 8:27 AM

Given my objections to the proposed amendment to Rule 5(b), I find it interesting that I am having trouble electronically transmitting my comments to you. This is my second attempt.

99-CV-008

-----Original Message-----
From: Administrator@ao.uscourts.gov
[mailto:Administrator@ao.uscourts.gov]
Sent: Tuesday, September 21, 1999 5:29 PM
To: Charlie Schlumberger
Cc: Administrator@franklin.ao.dcn
Subject: Message not deliverable

Commentor:

Charles L. Schlumberger
Wright, Lindsey & Jennings LLP
200 West Capitol Avenue, Suite 2200
Little Rock, AR 72201
(501) 212-1282
cschlumberger@wlj.com

Rule 5(b):

I oppose the amendment to Rule 5(b) to permit service under Rule 5(a) by electronic means. I begin with the assumption that "electronic means" encompasses e-mail and other internet communications vehicles, and facsimile machines. I oppose this amendment fully realizing that it provides that service can be so made only on consent by the person to be served. The reasons for my opposition follow.

(1) It does not save paper. If someone e-mails a pleading to me, I will run it off on the printer, no matter what, and I imagine that everyone would do the same.

(2) We do not need life or litigation to run any faster than it is already going. Hand deliveries and overnight delivery services are bad enough, as is.

(3) Inevitably, and unfortunately, the rule would be abused. I already have experienced lawyers who - on the mistaken belief that they could effect valid service by doing so - fax pleadings to my office well into the later hours of the evening, long after my office has closed. The comments to the proposed amendment state that by giving consent, a party accepts the responsibility "to monitor the appropriate facility for receiving service." Does this mean that the recipient is required to have round-the-clock monitoring of its fax machines? Does this mean that I have to likewise monitor my e-mail? What if I am out of town? I have a desktop,

not a laptop, and so I won't be able to access my e-mail when out-of-town.

Moreover, our office policy is that computer and e-mail access is restricted by individual, so that no one, including my secretary, can access my e-mail (and vice versa, of course). My secretary, however, opens my postal materials.

(4) In situations where pleadings contain proprietary or other sensitive or protected information, absent incryption the internet offers no reliable means of security.

(5) On the matter of consent, does the rule contemplate open-ended consent, or consent on a pleading-by-pleading basis? Can consent be withdrawn? if this rule is adopted, these matters should be clarified.

(6) The proposed amendment would only give one more source of disputes for our already overburdened judges to referee. Was it sent or wasn't it? Why was it sent so late in the day? Did the recipient have good cause not to check his e-mail for ten days? Should a protective order issue to prohibit the sender from issuing stream-of-consciousness interrogatories and requests for production that he conjures up at 3 a.m. and fires off, via cyberspace, to his hated opponent? These are just a few examples - and unfortunately they really aren't all that outlandish.

(7) The comments reference positive experiences that clerks have had in receiving filings by electronic means. I have no problem with the existing rules permitting filing by electronic means, even though I rarely take advantage of them. But service is a different matter, and I am loathe to venture that far.

Rule 6(e). Of course, I'm opposed to the proposed amendment to Rule 5(d). But if it passes, I understand (I think) the Advisory Committee's rationale for opposing an extension of the three-day rule to service by electronic means - if this type of service is virtually instantaneous, it should be treated the same way as hand deliveries, right? But ultimately, who really cares? If someone needs three days, they're going to get the extension in just about every case, unless they've managed to badly get on the wrong side of the judge. Frankly, I'd drop the three-day rule altogether and simply stretch all current deadlines by three to five days.

Rule 65, 81 and abrogation of the Copyright Rules of Practice. Agree, wholeheartedly. In the pamphlet circulated by the Administrative Office of the US Courts, mention is made of the fact that there are some lawyers who are unaware of the existence of the copyright rules. There are some judges who fall into that category, too!

Rule 77. I don't mind a rule permitting the clerks to issue notices of entries of orders and judgments electronically. I am a participant in the Eighth Circuit's VIA program, and it seems to work satisfactorily. In short, when it comes to electronic transmissions, I trust the clerks but not the lawyers.

Thank you for your consideration of these remarks.

J. MICHAEL SCHAEFER*
JOSEPH E. PAGE**

SCHAEFER & ASSOCIATES
Law Offices

99-CV-11

2000-CV-A

January 19, 2000

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

copy: Daniel F. Polsenberg, Esq. fax 385-9447
State Bar of Nevada

At a seminar this date on changes in the federal rules, conducted by Judge Philip Pro and two Magistrate Judges, the audience was invited to send you comments for changes in the federal rules. Here is my input:

1. It pains me that California mandates that service of post-summons-service pleadings, like motions, notices, etc. must be done by a non-party; I applaud the federal and Nevada rules that permit anybody to make such service, and sign certificate of such service. I know this isn't the decision of your office, but if you ever have an opportunity to confer with the California Bar's liason on rules changes, please share with them the concern of many sole practicioners that the 'nonparty' requirement for California's CCP 1013a, is a royal pain in the rear, and many of applaud the federal Rule 5 as reflecting common sense. I do a lot of pro per for family interes

2. The new rules permitting fax tranmission of such post-summons-service pleadings are concerned that there be some limitation. I have had 50 pages faxes dumped into my machine, creating a burden to deal with unattached bulk paper and dissipating a tonor supply. The rule requires consent of adverse counsel, but consent for letter-exchanges and brief pleadings, is deemed unfettered wide-open consent. If I were writing the rules, I'd require that any pleading exceeding 10 pages requires the specific consent of the recipient.

3. Calif. CCP 1987(b), having written notice to a party to appear be the same as service of a subpoena, makes a lot of sense. In federal actions wherein I am a party, I am frankly irritated at being bothered by process servers hunting

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LAS VEGAS, NV. 89119
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FAX (702) 792-6721

me down to serve a subpoena to appear, as if I would not appear as a plaintiff or a defendant???? Not only is this an imposition on parties to litigation, to be subpoenaed, when they all plan to appear anyway, it serves only to create "make work" services and costs for the other side. I must ask that the Committee give serious consideration to adopting a version of CCP 1987(b) into our federal rules.

4. Iaam not aware that we provide trial setting priority for Old Folks. California does, see attached CCP 36. Out of respect for our elders, we should speed up justice. And the legislative intent that produced CCP 36 in the California legislature, should be grounds for the Congress similarly evaluating our aging society and how well they are served by the judicial system.

Very truly,

J.MICHAEL SCHAEFER
Public Interest Attorney

cc: Honorable Philip M. Pro
US DISTRICT JUDGE

Enclosures: CCP 1987
CCP 36

1929, c. 110, p. 197, § 1; . § 2, operative Jan. 1, 1958; 2.)

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overnment Code § 11510.
e Penal Code § 1326.
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Code §§ 12550, 12560.
e Harbors and Navigation Code

Code §§ 13910, 13911.
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Code § 33034.
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on, see Labor Code § 92.
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§§ 45311, 88130.
nent Code § 11181.

duces tecum, but who is not required to personally attend a deposition away from his or her place of business, shall be those prescribed in Section 1563 of the Evidence Code. *(Added by Stats.1961, c. 1386, p. 3159, § 1. Amended by Stats.1986, c. 603, § 4.)*

§ 1987. Subpoena; notice to produce party or agent; method of service; production of books and documents

(a) Except as provided in Sections 68097.1 to 68097.8, inclusive, of the Government Code, the service of a subpoena is made by delivering a copy, or a ticket containing its substance, to the witness personally, giving or offering to the witness at the same time, if demanded by him or her, the fees to which he or she is entitled for travel to and from the place designated, and one day's attendance there. The service shall be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance. The service may be made by any person. When service is to be made on a minor, service shall be made on the minor's parent, guardian, conservator, or similar fiduciary, or if one of them cannot be located with reasonable diligence, then service shall be made on any person having the care or control of the minor or with whom the minor resides or by whom the minor is employed, and on the minor if the minor is 12 years of age or older.

(b) In the case of the production of a party to the record of any civil action or proceeding or of a person for whose immediate benefit an action or proceeding is prosecuted or defended or of anyone who is an officer, director, or managing agent of any such party or person, the service of a subpoena upon any such witness is not required if written notice requesting the witness to attend before a court, or at a trial of an issue therein, with the time and place thereof, is served upon the attorney of that party or person. The notice shall be served at least 10 days before the time required for attendance unless the court prescribes a shorter time. If entitled thereto, the witness, upon demand, shall be paid witness fees and mileage before being required to

testify. The giving of the notice shall have the same effect as service of a subpoena on the witness, and the parties shall have such rights and the court may make such orders, including the imposition of sanctions, as in the case of a subpoena for attendance before the court.

(c) If the notice specified in subdivision (b) is served at least 20 days before the time required for attendance, or within such shorter time as the court may order, it may include a request that the party or person bring with him or her books, documents or other things. The notice shall state the exact materials or things desired and that the party or person has them in his or her possession or under his or her control. Within five days thereafter, or such other period as the court may allow, the party or person of whom the request is made may serve * * * written objections to the request or any part thereof, with a statement of grounds. Thereafter, upon noticed motion of the requesting party, accompanied by a showing of good cause and of materiality of the items to the issues, the court may order production of items to which objection was made, unless the objecting party or person establishes good cause for nonproduction or production under limitations or conditions. The procedure of this subdivision is alternative to the procedure provided by Sections 1985 and 1987.5 in the cases herein provided for, and no subpoena duces tecum shall be required.

Subject to this subdivision, the notice herein provided shall have the same effect as is provided in subdivision (b) as to a notice for attendance of that party or person. *(Enacted 1872. Amended by Stats.1963, c. 1485, p. 3049, § 3; Stats.1968, c. 933, p. 1783, § 1; Stats.1969, c. 311, p. 678, § 1; Stats.1969, c. 1034, p. 2013, § 1.5; Stats. 1981, c. 184, p. 1105, § 2; Stats.1986, c. 605, § 2; Stats.1989, c. 1416, § 28.)*

Cross References

Administrative adjudication, service of subpoenas by agency, see Government Code § 11510.
Concealment of witness, see Code of Civil Procedure § 1988.
Copy of supporting affidavit required to be served with subpoena, see Code of Civil Procedure § 1987.5.
Criminal proceedings, service in, see Penal Code § 1328.
Legislator's privilege, see Const. Art. 4, § 14.
Process servers, compensation, see Code of Civil Procedure § 1033.5.
Processors of farm products, see Food and Agricultural Code § 55782.
Produce dealers, see Food and Agricultural Code § 56472.
Service of legislative subpoena, see Government Code § 9403.
Sheriff, duty to serve process, see Government Code § 26608.
Sheriff's fee for service, see Government Code § 26743.

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§ 1987.3. Service
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Cross References

New trials, restricted applicability of article governing, see Code of Civil Procedure § 655.

§ 35. Election matters; precedence

Proceedings in cases involving the registration or denial of registration of voters, the certification or denial of certification of candidates, the certification or denial of certification of ballot measures, and election contests shall be placed on the calendar in the order of their date of filing and shall be given precedence. *(Added by Stats.1971, c. 980, p. 1893, § 1.)*

§ 36. Motion for preference; party of age 70; party under age 14; medical reasons; interest of justice; time of trial

(a) A party to a civil * * * action who * * * is over the age of 70 years * * * may petition the court * * * for a preference, which the court shall grant if the court makes all of the following findings:

(1) The party * * * has a substantial interest in the action as a whole.

(2) The health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation.

(b) A civil action to recover damages for wrongful death or personal injury shall be entitled to preference upon the motion of any party to the action who is under the age of 14 years unless the court finds that the party does not have a substantial interest in the case as a whole. A civil action subject to subdivision (a) shall be given preference over a case subject to this subdivision.

(c) Unless the court otherwise orders, notice of a motion for preference shall be served with the memorandum to set or the at-issue memorandum by the party serving the memorandum, or 10 days after such service by any other party; or thereafter during the pendency of the action upon the application of a party who reaches the age of 70 years.

(d) In its discretion, the court may also grant a motion for preference served with the memorandum to set or the at-issue memorandum and accompanied by clear and convincing medical documentation which concludes that one of the parties suffers from an illness or condition raising substantial medical doubt of survival of that party beyond six months, and which satisfies the court that the interests of justice will be served by granting the preference.

party or a party's attorney, or up
cause stated in the record. * *
shall be for no more than 15 day
than one * * * continuance for p
be granted to any party.

(g) Upon the granting of a m
pursuant to subdivision (b), a par
upon a health provider's allege
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*(Added by Stats.1979, c. 151, p. 34
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1989, c. 913, § 1; Stats.1990, c. 4*

§ 36.5. Motion for preference; af

An affidavit submitted in supp
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§ 37. Preference; action for dam felony; time

(a) A civil action shall be entit
the action is one in which the
damages * * * which were alleged
by the defendant during the com
offense for which the defendant
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(b) The court shall endeavor to
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*Stats.1982, c. 514, p. 2297, § 1. An
c. 938, § 1, eff. Sept. 20, 1983.)*

CHAPTER 2. COURT OF IM [HEADING REPEA

§ 38. Repealed by Code Am.188 Stats.1933, c. 743, p. 1835, § 61

CHAPTER 2.5. THE JU COUNCIL [REPEA

§§ 39 to 39.6. Repealed by Stats.1

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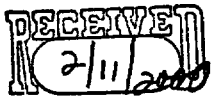
February 7, 2000



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

99-CV- 012

RE: **Proposed Amendments to Federal Rules of Civil Procedure 5 and 6**

Dear Mr. McCabe:

I submit the following comment on behalf of the Committee of the United States Courts of the State Bar of Michigan. The committee is a standing committee of the state bar composed of practitioners and federal judges and addresses matters regarding federal court practice. This comment was adopted by the committee by a unanimous vote at a duly noticed meeting. Please note that this comment is the comment of the committee and does not necessarily represent the policy of the State Bar of Michigan.

The committee supports the proposed amendment to Fed.R.Civ.P.5 that would authorize service by electronic or other means, with one exception. The committee recommends that the rule provide that, when facsimile service is used, the sender must also send a copy by mail on the same day. This is similar to a proposal for facsimile service now pending before the Michigan Supreme Court. The mailing requirement would assure that recipients will receive clean legible copies of the papers and would also serve to alert the recipient in the case of facsimile malfunction. This recommendation applies only to facsimile service under the proposed rule, not to service by other means that the amendment would permit.

The proposal also solicits comments on whether the time for responding to papers served by these alternative means should be extended by three days, as it is for service by mail. In view of our recommendation to require a concurrent mailing, we recommend against extending the time for response by three days, which would remove the advantage of serving by facsimile.

Sincerely,

Joanne Fitzgerald Ross, Chair
Michigan State Bar Committee
on the United States Courts

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
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NEW YORK, NY 10036-6689
(212) 382-6600

99-CV-013

February 14, 2000

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

Re: Preliminary Draft of the Proposed Amendments to the Federal Rules of Practice and Procedure

Dear Mr. McCabe:

The Litigation Committee and the Federal Courts Committee of The Association of the Bar of the City of New York ("The Association") have reviewed the proposed amendments to the Federal Rules of Civil Procedure and have noted the request for comments with respect to these proposals. In response to the request for comments by the Judicial Conference Committee on Rules of Practice and Procedure, we offer the following for your consideration.

The Proposed Amendments to the FRCP

The Judicial Conference's Advisory Committee on Civil Rules has proposed amendments to Rules 5(b) and 77 of the FRCP to authorize service by electronic means, or any other means not listed in Rule 5(b)(2)(A)-(C), but only if consent is obtained from the person served. It would apply only to service under Rule 5(a) and under Rule 77(d) (notice by the court); it would not apply to initial service of process under Rule 4.

Under the proposal, present FRCP Rule 5(b) would be deleted and replaced by a new Rule 5(b). The substantive change regarding service by electronic and other consented means is in a new subparagraph (D), set forth below.

FRCP Rule 5

(b) Making Service

* * *

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

* * *

(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.

Request for Comment on Specific Issues

In addition to general comment, the Advisory Committee has solicited comment on the following specific questions, among others, (Report of the Advisory Committee on Civil Rules, dated May 11, 1999 (the "Report"), p. 41):

1. Whether electronic service should be complete on "transmission," or whether instead it should be complete only on "receipt" or some other event.

2. Whether additional time should be provided in Civil Rule 6(e) to respond to papers served by electronic means or by other means permitted with the consent of the person served.

Position of The Association

The Association supports the proposed amendments to the FRCP authorizing electronic service. We believe that procedures in the federal courts should embrace advances in communications and delivery methodologies that have found acceptance in the business world and in the general population to achieve maximum speed and reliability of communication, so long as the rights of the parties to due process are not thereby abrogated.

The Association believes that the proposed requirement of consent on the part of the person to be served and the fact that the proposed new electronic service would not apply to initial service of process under FRCP Rule 4 provide adequate safeguards to due process rights.

Concerns and Considerations

Consent - Per Litigation or Per Service?

The proposed amendment does not purport to define the term "consent" or otherwise describe the circumstances contemplated for consent to service by electronic or other means.

Questions arise regarding whether the consent contemplated is a one-time consent applicable throughout the litigation or consent on a per-service basis and whether the proposed rule should specify which of the two is intended.

Requiring consent to service upon each occasion of service is inefficient. Counsel frequently agree to service by facsimile or courier of particular papers (although in many instances as a supplemental, courtesy service, with official service authorized under the FRCP to follow). This requires personal communication and may require negotiation between counsel, perhaps destroying the benefit of speedier communication.

Providing that consent to service by electronic means (or other means) shall be effective for the duration of the litigation facilitates efficient service because it does not require communication and negotiation for each service occasion. Monitoring delivery of communications may become a concern because papers may be served without any foreknowledge on the part of the person to be served. This would require a monitoring capability that would function even in the absence of the particular attorney in charge of the matter. While this is the same burden that practitioners already have with respect to personal or mail delivery, it may require a technical office capability that is currently unavailable to some practitioners.

Due to these concerns, consent for the duration of the litigation should be encouraged but not required. We recommend that counsel be provided with a Consent Form at the outset of the litigation and be requested to consent to specified forms of service (e.g., facsimile, e-mail, courier). The Consent Form should include particularized address information and should be filed with the court. Counsel should be permitted to file the Consent Form at any time during the course of the litigation, which consent would be effective thereafter for the duration of litigation. Absent consent to specified forms of service given in a filed Consent Form, specific consent must be obtained in each instance from the party to be served. Requiring a written form of consent helps to assure accuracy, and filing the writing with the court would facilitate service of notice of orders by the court under FRCP Rule 77(d).[1]

Completion of Service Upon "Transmission" or "Receipt"?

The Association agrees with the proposal that service by electronic means should be complete upon "transmission" rather than receipt but only if additional time to respond to such service is provided under Rule 6(e). (See discussion of Rule 6(e) below.)

---

[1] We call attention to a technical change to be made to line 6 of Rule 77(d) regarding the clerk's making a note in the docket, where the term "mailing" should be changed to "transmission."

The Association is concerned that on occasion there may be a gap of time (hours or even a day or more) between transmission and receipt of communications by facsimile or e-mail and that there may also be occasions when transmission itself is delayed. Technical failures can cause delay in transmission or receipt of e-mail messages and facsimile transmissions. Many times, e-mail messages must travel through multiple servers, compounding the risk of technical failures. It would be impracticable to measure completion of service by receipt and inconsistent with the method of measuring service by mail, which is complete upon the delivery to the mail repository. However, there should be some additional time to respond to accommodate the possibility of less-than-instantaneous communication by electronic means.

Additional Time Under FRCP Rule 6(e)

The Association recommends that additional time be provided under FRCP Rule 6(e) for response to papers served by electronic means and also to papers served by courier.

The Advisory Committee on Civil Rules has proposed not to amend FRCP Rule 6(e) to provide additional time for response to papers served by electronic or other consented means. It has, however, included in its proposals an "alternative proposal," on which it seeks comment, that would amend Rule 6(e) to allow an additional 3 days whenever service has been effected under FRCP Rule 5(b)(2)(D) (Report, pp. 48-49).

The Association shares the concerns of the Advisory Committee on Civil Rules with respect to allowing 3 additional days for service by electronic or other consented means. If 3 additional days were to be allowed to the party receiving expedited service, it might act as a disincentive to the party choosing whether to make service in an expedited manner or serve by mail. A similar concern arises with respect to adding no additional days for service by electronic or other consented means. If no additional days were to be allowed to the party receiving such service, it might act as a disincentive to the party whose consent to such service is being sought. We combine these competing concerns with our previously mentioned concern about gaps of time which may occur between transmission and receipt of service. We concluded that a middle ground that encourages utilization of these expedited service methods without penalizing either party would be most appropriate.

That middle ground could be achieved by amending Rule 6(e) to provide one (1) additional day should be provided where service has been by electronic means or by overnight courier. Three additional days should be reserved for non-overnight courier service, as well as for

the service methods presently afforded 3 days: service by mail and service by leaving the papers with the clerk of the court.

Very truly yours,

Barry R. Satine
Chair
Litigation Committee

Guy Miller Struve
Chair
Federal Courts Committee

Dorothea W. Regal
Chair
Subcommittee on Proposed Amendments
to Federal Rules

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

2/15/2000

February 14, 2000

99-CV-014

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: U.S. Department of Justice Comments on Proposed Civil Rule Changes

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on the proposed amendments to Rules 5, 6 and 77 of the Federal Rules of Civil Procedure, which would authorize service of pleadings and other papers by electronic and other means upon a party's consent to such service. As the nation's largest litigator in the Federal courts, the Department would like to share with this Committee its experience with the practice of electronic filing that would be affected by the proposed amendments. The Department values its relationship with the Committee and looks forward to working with you on this and other rules amendments.

Amendment to Rule 5

The Advisory Committee on the Civil Rules has proposed that Rule 5, which addresses service and filing of pleadings and other papers, be amended to authorize service of these pleadings – in addition to the current methods of personal delivery and mail service through the U.S. Postal Service – through "[d]elivering a copy by any other means, including electronic means, consented to by the person served." See Proposed Amendment to Rule 5(b)(2)(D). As the proposed amendment states, and the Committee underscores in the proposed notes accompanying the proposed amendment, service under Rule 5(b)(2)(D) is valid only if the party to be served consents to service by these new means.

The Department fully supports expansion of Rule 5 to permit service through new technology such as facsimile machines ("fax") and electronic mail ("e-mail"). We also concur with the Advisory Committee's assessment that service through these new means should be contingent upon consent of the parties. Until such time as these new technologies become as dependable and accepted as personal service or mail service, and the merits or demerits of electronic service become understood, requiring consent is a sound way of assuring that service via these new technologies is reliable.

Our main concern is that the proposed amendment might be interpreted to permit "implied consent" to service through fax or e-mail. Thus far, several state courts and legislatures have deemed litigants to have consented impliedly to service via fax or e-mail simply by including a fax number or e-mail address in their signature block.[1] If consent could be implied in such a fashion under the Federal Rule, the purpose of consent – ensuring that parties are expecting, and prepared, to receive pleadings through these new means – could be undermined.

Accordingly, we recommend amending proposed Rule 5(b)(2)(D) and the accompanying Committee Notes to make clear that consent to service be in writing and specific as to its scope and duration. The requirement of written consent would avoid the problems associated with implied consent. A written consent requirement would also reduce (or at least simplify) disputes over whether consent was granted, and over the scope of that consent. Including such comments would, moreover, eliminate the need for the local rules to fill in the gaps with potentially inconsistent standards.

More specifically, we recommend adding the words "in writing" following "consented to" in the first sentence of Rule 5(b)(2)(D). The proposed Rule 5(b)(2)(D) would then read as follows (new language in bold):

> (D) Delivering a copy by any other means, including electronic means, consented to **in writing** 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 the delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

In addition, we recommend adding the following language in the proposed Committee Notes after the sentence "Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication.":

> To be valid under subparagraph (D), consent must be explicit and in writing, and may not be implied. Parties are encouraged to specify the scope and duration of the consent, including, at a minimum, the persons to whom service should be made, the appropriate address or location for such service (*e.g.*, for electronic service, the e-mail address or fax machine number), the format to be used for attachments, and the filings within a lawsuit to which the consent applies (*e.g.*, the consent applies to all filings, only certain filings, or

---

[1] See Levin v. Levin, 160 Misc. 2d 388, 390-91 (N.Y. Sup. 1994); see also PA. R. CIV. P. 205.4(g)(2) (permitting service by e-mail "if the parties agree thereto or an electronic mail address is included on an appearance or prior legal paper filed with the court in the action"); PA. R. CIV. P. 440(d)(1) (same rule for service by fax). In Oregon, Louisiana, and South Dakota, consent could conceivably be implied from maintaining an operating fax machine, or from using that fax machine to serve another party in the same case. See OR. R. CIV. P. 9(F); LA. REV. STAT. ANN. § 13:3471(8); S.D. CODIFIED LAWS § 15-6-5(f).

all non–jurisdictional filings). Such written consent may be provided through electronic communication.

Amendment to Rule 6(e)

Although the Advisory Committee has recommended against changing Rule 6(e) to allow additional time for litigants served through electronic or "other means," the Committee has nevertheless solicited comments on such a proposal. Because most of the discussion in the Committee's notes and comments has focused on whether an extension of time is warranted for service by "electronic means," we will concentrate our comments on "electronic service" as well.[2]

At this point in time, the Department favors granting at least one day of additional time for parties responding to documents received through electronic service under the proposed Rule 5(b)(2)(D).[3] There are three reasons why the Department supports an amendment to Rule 6(e) to provide additional time for documents served by electronic means, similar to the additional time currently allotted to documents served by mail. First, allowing additional time is justified by the current state of technology. With the technology in use today, e-mail transmission is not always instantaneous and is not uniformly reliable. Some messages do not get through at all and some do not get through in a timely manner. Most systems also do not support a "return receipt" mechanism that would, at minimum, allow the sender to know whether an e-mail reached its destination. In addition, the large volume of material that can be rapidly transmitted may exceed the ability of equipment to store or print the electronically transmitted data. As a result, there is a need for additional time.

Second, granting additional time would also further the Advisory Committee's goal of encouraging the use of electronic service. Granting parties who consent to service by electronic means additional time to respond would likely encourage more parties to consent. The increased use of electronic service would, in turn, likely result in the more rapid development of legal and technical standards to support the widespread use of electronic media to accomplish service. It would also prompt lawyers to develop consistent mechanisms for processing incoming faxes and e-mails that parallel the procedures for handling traditional mail. In the Department's view, these incentives to innovate are a third and valuable reason to favor an amendment to Rule 6(e).

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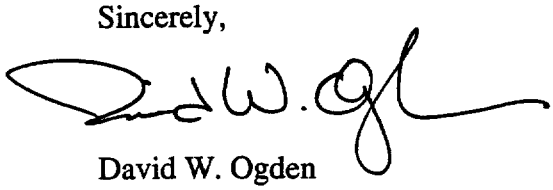
[2] Electronic service encompasses both service by fax and service via e-mail. Both methods of service are similar in that they are still relatively new, and legal, practical or technical standards have not yet fully developed to govern their use (or their failure to accomplish service). They are not identical, however, as there are reliable methods of assessing whether a fax transmission was successfully completed, but few e-mail systems have similarly reliable "return receipt" mechanisms. For purposes of our comments, however, the relative novelty of both media warrants similar treatment.

[3] In the bankruptcy context, the United States Trustees Program, the Department of Justice, recently expressed its support for a proposed amendment to Bankruptcy Rule 9006(f) that would grant a three-day grace period for electronic filings in bankruptcy proceedings.

We thank the Committee for this opportunity to share our views. If you have any further questions, or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,



David W. Ogden
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99-CV-017

February 15, 2000

DAVID C. MCINTYRE

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DIRECT DIAL 650.858.7685

VIA FACSIMILE (202) 273-1826

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the U.S.Courts
One Columbus Circle, N.E.
Washington, D.C. 20054

Re: Comments on Proposed Revisions to Federal Rules of Civil Procedure and Copyright Rules

Dear Mr. McCabe:

The following comments concerning the Copyright Rules Proposals and changes to the Federal Rules of Civil Procedure proposed by the Civil Rules Advisory Committee in April, 1999 are respectfully submitted on behalf of Fenwick & West LLP. Fenwick & West, headquarted in Palo Alto, California, is a law firm of over 250 attorneys specializing in all aspects of high technology law, including copyright law.

We respectfully request that the following comments be considered by the Secretary and the Advisory Committee ("the Committee").

1. Copyright Rules Changes.

We agree with, and fully support, the Committee's proposed abrogation of the Copyright Rules of Practice and accompanying amendments of Civil Rules 65 and 81(a)(1). We agree that the Copyright Rules of Practice are arcane and fundamentally unfair, and should therefore be abrogated.

2. Proposed Changes to the Federal Rules of Civil Procedure Re: Service.

Although we agree in general with the Committee's proposed revisions to Rules 5 and 77 of the Federal Rules of Civil Procedure, we have a number of suggested modifications to those revisions as set forth below.

(a) Rule 5(b)(1). The proposed addition of the language that "[S]ervice . . . on a party represented by an attorney **is made** on the attorney . . ." (emphasis added) should instead state that "[S]ervice on a party represented by an attorney **shall be made** on the attorney" (proposed

change in bold). This modification would eliminate any potential ambiguity in the Committee's proposed revision of Rule 5(b)(1) and shall indicate clearly that this provision is mandatory.

(b) Rule 5(b)(2). We recommend that the proposed language "Service under Rule 5(a) is made by:" be changed to read: "Service under Rules 5(a) **and 77(d) shall be** made by:" (proposed changes in bold). We believe that the addition of the reference to Rule 77(d) here, and the proposed elimination of an entire sentence from existing Rule 77(d) (discussed below), makes clearer a parties' service obligations under both Rules 5(b) and Rule 77(d) than does the version of these two rules proposed by the Committee.

(c) Rules 5(b)(2)(B) & (C). The language in both of these proposed revisions refer to the "address" of the person to be served. The Committee should clarify whether this is a reference to a person's home address, office address, both, or either.

(d) Rule 5(b)(2)(D). The Committee's proposed revision to this rule provides that "[S]ervice by electronic means is complete on transmission . . . " The precise meaning of the term "transmission" as used here is ambiguous. Does it mean the point in time when the sender hits the "send" button on his or her computer, does it mean when the copy has been successfully received by the intended recipient, or something else? We respectfully suggest that this ambiguity be clarified either in the rule itself or in the notes accompanying the rule to provide that service is complete upon successfully serving the document from the sender's server to the e-mail address designated in court papers by recipient. In addition, we suggest that the Committee consider adding a specific requirement that transmission be to the electronic address that is contained in the parties' written consent or in the pleadings filed by that party in order to clarify which of several potential electronic addresses that an individual may have is the proper one for service of pleadings.

(e) Alternative Proposal Re: Rule 6. The Committee has solicited feedback on whether Rule 6 should be amended to give a party who has been served electronically three extra days to respond. We agree that a party should be given this extra time to respond, even if they are served electronically. We believe that this is the better rule because: 1) giving a party less time to respond to a notice or pleading served electronically would discourage parties from consenting to being served electronically; 2) there is the potential for delay in a document being transmitted or accessed by a party that could unfairly shorten the actual time that a party has to respond to an electronically served notice or pleading; and 3) a shorter time might encourage parties to engage in litigation gamesmanship that would undermine the efficiencies posed by electronic filing.

(f) Rule 77(d). Delete the following sentence from Rule 77(d): "Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers." We believe that such deletion, when combined with the proposed minor alteration to Rule 5(b)(2) set forth above, would eliminate excess verbiage from the rules.

We thank the Committee in advance for considering Fenwick & West's comments on the proposed rule changes. Please note that we are available to further discuss the foregoing comments and/or provide additional comments on these proposed rule changes should the Committee so desire.

Very truly yours,

FENWICK & WEST LLP

William A. Fenwick
David M. Lisi
David C. McIntyre
Mitchell Zimmerman

1999 CIVIL COMMENT CHART

99-CV	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLO W UP
001	Robert F. Baker, Esq.	9/24	5, 6	12/3	
002 (Also BK-001)	Hurshal C. Tummelson, Esq.	9/28	5, 65, 77, 81	12/6	
003	Judge James E. Seibert	10/5	6	12/3	
004 (Also BK-002)	Jack E. Horsley, Esq.	11/1 11/8 11/16	77 Copyright 9, 10, 13 5	12/6	
005	John P. Calandra, Esq.	11/16	5, 6	12/3	
006	J.W. Phebus, Esq.	12/2	5, 6	12/3	
007	David E. Romine, Esq.	12/22 Request to testify. 1/20 Comments.	Electronic service	2/9	
008	Charles A. Schlumberger, Esq.	9/28	5, 6,65, 77, 81	12/29 Received & responded via Internet.	
009	Prof. Peter Lushing	9/29	81	12/29 Received & responded via Internet.	
010 (Also BK-007)	Judge Susan Pierson Sonderby, on behalf of the bankruptcy judges of the Northern District of Illlinois	1/24	5, 77	2/9	

99-CV	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLO W UP
011 (Also 00-CV-A)	J. Michael Schaefer, Esq.	1/24	5	2/9	
012	Joanne Fitzgerald Ross, Esq., on behalf of the Michigan State Bar Committee on the U.S. Courts	2/11	5, 6		
013	Barry R. Satine, Esq.; Guy Miller Struve, Esq.; and Dorothea W. Regal, Esq., on behalf of the Association of the Bar of the City of New York Litigation and Federal Courts Committees	2/15	5, 6, 77		
014	David W. Ogden, Acting Assistant Attorney General	2/15	5, 6, 77		
015 (Also 99-BK-010)	Ralph W. Brenner, Esq.; David H. Marion, Esq.; and Stephen A. Madva, Esq.	2/15	Electronic Service		
016 (Also 99-BK-011)	Francis Patrick Newell, Esq.	2/15	Electronic Service		
017	William A. Fenwick, Esq; David M. Lisi, Esq; David C. McIntyre, Esq.; and Mitchell Zimmerman, on behalf of Fenwick & West LLP	2/15	5, 6, 77, 65, and 81		
018 (Also 99-BK-013)	Michael E. Kunz, Clerk of Court	2/17	5, 77		

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

JUDGE WILLIAM H. BARBOUR, JR.
JUDGE PETER W. BOWIE
JUDGE MARY BECK BRISCOE
JUDGE WILLIAM O. BRYSON
JUDGE GERALD B. COHN
JUDGE JOSEPH A. DICLERICO
JUDGE J.L. EDMONDSON
JUDGE JAMES H. JARVIS
JUDGE STEPHEN N. LIMBAUGH
JUDGE DANIEL A. MANION
JUDGE THOMAS N. O'NEILL, JR.
JUDGE WILLIAM L. OSTEEN
JUDGE JUDITH W. ROGERS
JUDGE MARY M. SCHROEDER

JUDGE CAROL BAGLEY AMON
CHAIRMAN

TELEPHONE
(718) 260-2410

MARILYN J. HOLMES
COUNSEL
(202) 502-1100

March 8, 2000

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

Dear Judge Scirica:

I am writing to report to you on the Codes of Conduct Committee's discussion of the corporate disclosure reporting provisions under consideration by the Committee on Rules of Practice and Procedure. At our meeting January 13 to 15, the Committee generally endorsed the views I provided to you in my letter of December 29, 1999. My letter had commented on the three proposals then under consideration by the Rules Committees. Following receipt of your letter of January 11, the Codes of Conduct Committee focused on the single revised draft proposal, labeled Rule 7.1, which was developed at the January meeting of the standing Rules Committee.

The Codes of Conduct Committee's report to the March 2000 Judicial Conference contains a summary of the committee's views, which I enclose for your information (Enclosure A). I have set forth below more detailed information about the committee's views. We have attempted to identify all of the issues that we believe need to be addressed. To more fully convey our views, I enclose some tentative language that reflects approaches we believe would be usefully adopted. Were time constraints less pressing, we would have attempted to provide you with more fully developed proposals. We actively solicit a continuing exchange of views to refine and enhance these proposals.

Content of the corporate disclosure requirement.

The Codes Committee recommends that the proposed corporate disclosure rule be patterned substantially after Rule 26.1 of the Federal Rules of Appellate Procedure, with the addition of an updating provision requiring the parties to supplement their disclosures upon a change in the information disclosed. Draft Rule 7.1 contains these essential elements in sections 7.1(a)(1) and 7.1(b).

We note that the language of the proposed draft may be read to suggest that the parties must file disclosures identifying not only their own corporate parents, but the corporate parents of other parties as well. We assume it was not your intention to impose on plaintiffs the burden of identifying the corporate parents of all defendants, and vice versa. Information of this nature may be difficult for others to obtain, rendering the resulting disclosures of doubtful accuracy. We recommend rephrasing the disclosure requirement to clarify that parties must identify only their own corporate parents.

We understand that the advisory rules committees are considering adding disclosure requirements to the civil, criminal and bankruptcy rules. We support adoption of rules for all three types of proceedings. Some variations will be necessary in these differing rules. I enclose for your review some tentative proposals for provisions to be added to the civil, criminal and bankruptcy rules. See Enclosures B, C, and D. Some special considerations relating to the proposed bankruptcy rule are discussed below.

The draft committee notes following proposed Rule 7.1 indicate that the parties should file a negative report. The Codes of Conduct Committee endorses this provision but recommends that it be incorporated into the text of the rule.

We also commend to you for consideration an issue that may be useful to include in the commentary to each rule. That is, the commentary should indicate that the disclosure requirement does not compel identification of all entities whose participation in a matter might disqualify the judge due to the judge's financial interest. As a practical matter, it is simply impossible to guarantee this result. We believe the disclosures will identify most such entities and will be of great value. However, judges must remain vigilant to other possible disqualifying situations not covered by the disclosure requirement.

The bankruptcy rule disclosure requirement.

A bankruptcy corporate disclosure requirement presents special challenges because of the number of participating creditors in many bankruptcy proceedings and the difficulty of determining which creditors and other participants should be considered parties for these purposes and at what point their party status should trigger the disclosure requirement. Bankruptcy judges are subject to the statutory and Code of Conduct recusal provisions, which

require judges to disqualify themselves when they have a financial interest in a party. This Committee's advice for these purposes is as follows:

> For purposes of recusal decisions in bankruptcy proceedings, the following are deemed to be parties: the debtor, all members of a creditors committee, and all active participants in the proceeding; but merely being a scheduled creditor, or voting on a reorganization plan, does not suffice to constitute an entity a "party." Bankruptcy judges are expected to keep informed as to their investments in firms which are active participants in the proceeding, but ordinarily need not familiarize themselves with the scheduled creditors.

Compendium of Selected Opinions § 3.1-6[5](a) (1999).

The enclosed draft bankruptcy rule includes language addressing two issues I want to highlight: the identity of parties required to file disclosures (subsection (a)) and the events that trigger this obligation (subsection (b)). As to the identity of parties, we incorporated language drawn from our previous advice, set out above. In addition, we made a preliminary effort in the draft to address the treatment of active participants in contested matters, whose presence in a case may disqualify the judge. We did so by including within the definition of party for these purposes three specific groups of participants: those participants actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien. Please note that this definition will not capture the entire universe of active litigants in contested matters whose participation in a case may be disqualifying. We see no obvious way to do so without appearing to include participants who do no more than file a proof of claim or request relief from an automatic stay, where the relief is uncontested. If your Committee is likewise unable to devise a universal approach that is appropriately limited, we suggest extending the disclosure requirement to defined groups, as we have done. This approach will reach many if not most disqualifying situations, and it does have the virtue of clearly defining the parties obligated to file a disclosure form.

As to the triggering event for bankruptcy parties, we added language indicating that designation as a member of a creditors committee is a triggering event. We also added a specific provision for filings by active litigants in contested matters. The triggering event here is filing of an opposition; participants that file an opposition must make the disclosure form simultaneously, while other participants in the contested matter (i.e., those adverse to the opposition filer) must file the disclosure form promptly after the opposition is filed.

We did not add anything to subsection (b) to exclude filing of proofs of claims, petitions for relief from the automatic stay, or similar routine filings from the triggering events. Participants who make such filings – but play no greater role in the proceeding –

should not be required to make the disclosures required by the proposed rule, because they do not fit the definition of party in subsection (a). We believe this is clear from the format of the enclosed proposed rule but commend the issue to you for consideration.

We also note an issue that may be appropriate for inclusion in the commentary to the bankruptcy rule. In our view, a judge's financial interest in a creditor that is actively litigating a contested matter may not disqualify the judge from the entire bankruptcy proceeding but only from the contested matter. Judges should be encouraged to examine the disclosures made pursuant to this rule to determine the extent to which disqualification is necessary.

Use of a disclosure form.

Draft Rule 7.1(a)(2) requires the parties to use a disclosure form. This requirement has two apparent purposes: to ensure national uniformity of the disclosures and to permit the Judicial Conference to expand the information to be disclosed outside of the formal (and lengthy) rulemaking process.

The Codes of Conduct Committee supports the first of these goals. We believe it would be useful to develop a national disclosure form for use in all federal courts and we enclose a draft for your consideration (Enclosure E). Indeed, if we omitted references to the proposed rules, such a form could be distributed to the courts even before adoption of any national rules in order to encourage the courts to begin seeking corporate parentage disclosures from the parties. The Codes of Conduct Committee tentatively agreed to contact chief district and bankruptcy judges in each circuit to provide them with the corporate disclosure form, should our committees agree to this approach. In our view, use of a uniform disclosure form could be mandatory or voluntary. Of course, if use of the form is to be mandatory, the rule should so indicate and should also either incorporate the form or advise parties and their counsel where it can be obtained.

As to the second aspect of the disclosure form – a requirement that parties disclose whatever additional information is mandated on the form – we believe it is unnecessary and recommend against including it. On several occasions our Committee has examined the scope of information to be disclosed under Fed. R. App. R. 26.1 and corresponding local rules. The Federal Judicial Center examined this same question in their recent studies on court disclosure requirements. Neither our examination nor the FJC studies identified any additional information necessary for judges to determine when they are automatically disqualified due to a financial interest in a party, beyond the information about corporate parents and 10% owners already addressed in Rule 26.1 and proposed Rule 7.1. (I refer below to other disclosures that might assist judges in making certain recusal determinations, but they differ from the question of corporate parentage).

In our view, the additional flexibility that is the hallmark of this provision is simply not needed. We surmise that there may be some risk that use of this unconventional approach would affect Congressional approval of these provisions.

Local rule variations.

We share your observation that there has been a striking proliferation of local rules on this subject. In our assessment, much of the information requested in these rules is not needed for judges to determine whether they must recuse due to a financial interest in a party. The draft committee notes following proposed Rule 7.1 seem to reflect the view that additional disclosures may be needed, and this may be read as encouraging courts to adopt local rules expanding the information required to be disclosed. For the reasons discussed above, the Codes of Conduct Committee believes that courts should be discouraged from adopting broadened local disclosure requirements. However, we defer to your expertise on the question of preemption of local rules.

Other issues.

In considering the issue of corporate parents, our Committee noted other areas in which disclosures might be useful to judges in determining their recusal obligations. These include the identity of corporate criminal victims who may be entitled to restitution (the Committee advises judges to recuse if they own stock in a criminal victim that may be entitled to restitution) and the composition of partnerships, joint ventures, and other unincorporated associations, which may be composed of corporations in which a judge owns stock. The disclosure requirements under consideration do not address all possible recusal scenarios that may arise. This is, in our assessment, an appropriate way to proceed. We recommend adoption of a straightforward rule addressing the most serious and substantial problems with due recognition of the fact that the rule does not and cannot cover all potential recusal concerns.

I hope the foregoing observations and our enclosed drafts are of assistance to the standing and advisory Rules Committees. Please let me know if you would like to discuss any of these issues.

For the Committee,

Carol Bagley Amon

Carol Bagley Amon
Chairman

cc: Honorable Will L. Garwood
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
Honorable W. Eugene Davis
John K. Rabiej

Enclosure A - Report Excerpts

Agenda F-6
Codes of Conduct
March 2000

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON CODES OF CONDUCT

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Codes of Conduct met from January 13 to 15, 2000. All members were present. The Administrative Office was represented by Marilyn J. Holmes, Associate General Counsel, and Barbara Denham, Staff Assistant. Ms. Jody George of the Federal Judicial Center's Judicial Education Division also attended a portion of the meeting.

JUDGES' RECUSAL OBLIGATIONS

The Committee on Codes of Conduct reviewed a number of initiatives to assist judges in meeting their recusal obligations, continuing efforts begun in previous years.

Recent Efforts

The Committee received a report summarizing the following recent accomplishments. In September 1999, the Administrative Office released conflicts screening software for use in district and bankruptcy courts using the ICMS database system. The Director of the Administrative Office sent a memorandum to all judges announcing the software's availability and established a web site on the judiciary's J-Net containing extensive information about the software and permitting courts to download it directly. Over 40 district and bankruptcy courts

check for conflicts themselves. The Chairman appointed a subcommittee to consult with Administrative Office staff on the development of the CM/ECF conflicts screening function.

Corporate Disclosure Requirements

Last year, the Codes of Conduct Committee asked the Committee on Rules of Practice and Procedure to consider amending the federal rules to require parties in district and bankruptcy courts to identify their corporate parents, much as Fed. R. App. P. 26.1 now requires in the courts of appeals. Judge Scirica, Chair of the standing Rules Committee, provided the Codes of Conduct Committee with progress reports on the Rules Committees' consideration of this subject and requested further guidance.

In December 1999, the standing Rules Committee requested the Codes Committee's views on several alternative disclosure provisions under consideration. Judge Amon provided her initial views on behalf of the Codes Committee. She expressed a preference for a narrowly tailored rule, patterned after Fed. R. App. P. 26.1 and incorporating a provision requiring the parties to update information that changes. The Codes Committee subsequently endorsed Judge Amon's initial response.

At the Codes Committee meeting, members focused on the Rules Committee's request for comments on another alternative under consideration. This alternative would require the parties to disclose the information required by Fed. R. App. P. 26.1 and any additional information required by the Judicial Conference pursuant to a disclosure form, which would be developed with the assistance of the Codes Committee. The Codes Committee discussed this option and agreed that it would be useful to develop a national disclosure form for use in the federal courts. However, the Committee was unable to identify additional information, disclosure of which might be useful for purposes of financial interest recusal determinations.

A report of the Federal Judicial Center prepared for the Rules Committee confirmed this assessment, in the view of the Codes Committee. The FJC report examined several local rules requiring more extensive disclosures and determined that the information was requested by courts for asserted prophylactic reasons although it did not appear to be necessary for financial interest recusal purposes. The Committee recommended that courts be discouraged from mandating broadened local disclosure requirements.

The Codes Committee agreed to draft a model disclosure form and provide it, with additional comments, to the Rules Committee for review at the advisory committees' spring 2000 meetings. The Codes Committee also agreed to examine further the possibly differing imperatives for corporate disclosure in civil, criminal, and bankruptcy proceedings and to continue reviewing these issues with the Rules Committee.

Financial Disclosure

The Codes Committee received a report on recent developments pertaining to release of judges' financial disclosure reports, including the Financial Disclosure Committee's recent denial of reports to a news organization that had expressed the intention of publishing the reports on the Internet. Although financial disclosure reports are widely assumed in the media to be useful in assessing judges' conflicts of interest, the Committee expressed the view that much of the information required on the reports is irrelevant to recusal determinations. The Committee also noted its continuing concern that judges are burdened with tracking their financial interests in two separate environments: for disclosure reporting and for recusal purposes. It was generally agreed that, should legislation be proposed as a result of these developments, the Codes Committee should consider recommending legislative revisions pertaining to recusal.

Enclosure B – Civil Rule Language

DRAFT – March 3, 2000

Federal Rules of Civil Procedure

_____. **Disclosure Form.**

(a) **Required Form.** In a civil proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** A party must file the disclosure form with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure C – Bankruptcy Rule Language

DRAFT – March 3, 2000

Federal Rules of Bankruptcy Procedure

_____. **Disclosure Form.**

(a) **Required Form.** In a bankruptcy proceeding, any nongovernmental corporate party must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a party means the debtor, a member of a creditors committee, a party to an adversary proceeding, and a participant actively involved in litigation arising from opposition to (i) a petition for relief from the automatic stay, (ii) an objection to a proof of claim, or (iii) a motion for avoidance of a lien; and a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** A party must file the disclosure form with its first appearance, designation as a member of the creditors committee, pleading, petition, motion, response, or other request addressed to the court; in the case of a participant actively involved in litigation arising from opposition to a petition, objection, or motion described in subsection (a), the participant must file the disclosure form with the opposition or promptly thereafter. A party must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Received Time Mar. 8. 4:25PM

Enclosure D – Criminal Rule Language

DRAFT – March 3, 2000

Federal Rules of Criminal Procedure

____. Disclosure Form.

(a) **Required Form.** In a criminal proceeding, any nongovernmental corporate defendant must file two copies of a form identifying all its parent companies or stating that it has no parent companies. For purposes of this rule, a parent company means a publicly held corporation that controls the party (directly or through others) or owns 10% or more of the party's stock.

(b) **Time for filing.** The defendant must file the disclosure form at arraignment. The defendant must promptly file two copies of a supplemental disclosure form upon any change in the information required by Rule ____ .

Enclosure E – Disclosure Form

DRAFT – March 3, 2000

Form 36. Corporate Disclosure Under Rule ___

[Caption and names of parties]

This form is to be filed only by nongovernmental corporate parties. Check the appropriate box:

[__] The filing party, a nongovernmental corporation, identifies the following parent companies:

[Here list the names and addresses of each publicly held corporation that controls the filing party (directly or through others) or owns 10% or more of the party's stock.]

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

[__] The filing party has no parent companies.

Signed: _____
Filing Party's Representative

Address: _____

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

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EVIDENCE RULES

January 11, 2000

Honorable Carol Bagley Amon
United States District Court
United States Courthouse
225 Cadman Plaza East
Brooklyn, NY 11201

Dear Judge Amon:

Thank you again for taking the time last Friday to provide the Committee on Rules of Practice and Procedure with your input on the financial disclosure issue. Your insights were most helpful to the Committee. Attached is a first draft of the proposed disclosure rule (including Committee and Reporter's Notes) that we discussed with you.

The Standing Rules Committee agreed in principle with the approach of this draft rule, which will now be considered by the Advisory Committees on Appellate, Civil, and Criminal Rules at their meetings in April 2000. Although the Advisory Committee on Bankruptcy Rules will consider a parallel approach, it recognizes that pursuing a similar rule in the bankruptcy context raises many difficulties, given the sheer number of parties and interests that may be involved.

As to the specific disclosure form to be required, it seems to us that the Codes of Conduct Committee would best be able to devise the appropriate document, assisted by the Administrative Office. We also thought that implementation should not await the lengthy process of rule-making, but could be accomplished under direction of the Judicial Conference. The Judicial Conference could urge adoption of a national form long before a national rule could become effective, and might even find authority to direct adoption. Given the nature of the subject matter, we thought your Committee might properly play the lead role on this front. We would assist in any way you deem appropriate.

As we discussed, there remains the issue whether district and appellate courts would be allowed to supplement national disclosure requirements via local rule. In reviewing the report of the Federal Judicial Center, Informing Judicial Recusal Decisions: Party Disclosure of Financial Interests Information, we were struck by the

current variance in disclosure rules among several district and circuit courts. The local rules issue touches deeply-rooted sensitivities. It seems to us premature to attempt to resolve the local rules question before a form is developed. If it proves possible to develop a form which commands a consensus, preemption may be wise. If the choices made in developing the form prove difficult, it may be better to allow variation in local rules, at least initially. Accordingly, we believe that the local rules matter is best taken up after a proposed disclosure form is circulated for review.

I look forward to hearing from you after your Codes of Conduct Committee meeting.

Sincerely,

Anthony J. Scirica

Attach.
cc: Marilyn J. Holmes

Rule 26.1 Combined with Judicial Conference Form

7.1 Disclosure Form

(a) Required Form. A party to [that appears in] an action or proceeding in a district court must file two copies of a form that:

(1) identifies all parent corporations of a nongovernmental corporate party and also identifies any publicly held company that owns 10% or more of the nongovernmental corporate party's stock; and

(2) provides all additional information required by the Judicial Conference of the United States.

(b) Time for Filing. A party must file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court. A supplemental statement must be filed promptly upon any change in the circumstances that Rule 7.1(a) requires the party to identify.

Committee Note

Rule 7.1(a)(1) adopts the minimum disclosure requirement now embodied in Appellate Rule 26.1. Space for providing this information will be included in the form developed by the Judicial Conference of the United States. In addition, the Judicial Conference — working on the advice of relevant committees and the Administrative Office of the United States Courts — will prescribe additional disclosures in developing the form. The Judicial Conference will be able to adapt disclosure requirements to developing experience with the need for disclosure and with emerging technological capabilities. There is little reason to expect that it will be possible to require complete disclosure of every possible bit of information that might bear on disqualification of a judge. It will be important, however, to exact as much information as seems feasible in relation to all common bases for disqualification. Developing technology should make it easier for litigants to provide information and for a court to match the information with individual disqualification profiles for each of the court's judges. The first screening, based on

information provided by the plaintiff or petitioner, might be accomplished automatically as part of a random assignment process. Even when technology is fully developed, it will remain important that the court clerk transmit the disclosure form to any judge called upon to perform any function in the case.

Rule 7.1 requires every party to file a disclosure form. In adopting forms, the Judicial Conference will determine the contents of the required disclosures. It seems likely that many parties, and particularly individual parties, will not have any information that falls within the required categories. The Rule 7.1(a) requirement is satisfied by filing a form that indicates that there is nothing to disclose as to any of the required categories.

Reporter's Notes

The bracketed alternative at the beginning of Rule 7.1(a) is designed to flag the question whether disclosure should be required as to a party who defaults. It may be better not to undertake a clear answer to this difficult question; referring vaguely to "a party to an action or proceeding" may be the better course.

The subdivision (b) provision is simply one of the several versions provided in these drafts. Mix-or-match is easy.

This draft does not include the provision found in some drafts that allows the Judicial Conference to excuse filing in designated categories of actions or proceedings. If we believe the power to exempt is desirable, the power could be stated in the rule. It also would be possible to state in the Committee Note that the form can include directions identifying cases that do not require filing, but that might not provide sufficient guidance to court clerks.

There has not been much interest in filing by attorneys or amici curiae. The rule could easily be changed to include them if that seems desirable.