ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 22-23, 1994

New York City

Minutes

The Advisory Committee met at the headquarters of the Association of the Bar of the City of New York. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman

Circuit Judge Alice M. Batchelder

District Judge Eduardo C. Robreno

Honorable Jane A. Restani, United States Court

of International Trade

Bankruptcy Judge James J. Barta

Bankruptcy Judge James W. Meyers

Professor Charles J. Tabb

Henry J. Sommer, Esquire

Kenneth N. Klee, Esquire

Gerald K. Smith, Esquire

Leonard M. Rosen, Esquire

R. Neal Batson, Esquire

J. Christopher Kohn, Esquire, United States

Department of Justice

Professor Alan N. Resnick, Reporter

District Judge Adrian G. Duplantier was unable to attend.

The following representatives of the Committee on Rules of Practice and Procedure also attended:

District Judge Alicemarie H. Stotler, Chair

District Judge Thomas S. Ellis, III, liaison to the Advisory Committee

Professor Daniel R. Coquillette, Reporter

Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts, Secretary

The following additional persons attended all or part of the meeting: District Judge Paul A. Magnuson, Chair, Committee on the Administration of the Bankruptcy System; William F. Baity, Acting Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office of the United States Courts; Mark D. Shapiro, Rules Committee Support Office, Administrative Office of the United States Courts; and Elizabeth C. Wiggins and Robert Niemic, Federal Judicial Center.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure. Unless otherwise indicated, all memoranda referred to are included in the agenda book for the meeting.

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

INTRODUCTORY MATTERS

The Chairman introduced J. Christoper Kohn, Esquire, of the Department of Justice, who had recently been designated by the Attorney General to serve on the Committee. **The Chairman appointed Mr. Kohn to the local rules subcommittee.** The Chairman also welcomed to the meeting Judge Stotler, Judge Magnuson, and Professor Coquillette.

Minutes of the February 1994 Meeting. The Committee approved the minutes of the February 1994 with a change in wording concerning the Committee's having taken no action on the issue of the status of a late-filed proof of claim and the developing case law on that subject.

Report on the June 1994 Meeting of the Committee on Rules of Practice and Procedure (the "Standing Committee"). The Reporter noted that the Committee's recommended substitution of "nonwillful" for the originally proposed "negligent" as the standard for excusing non-compliance with a local rule imposing a requirment of form had been adopted by the Standing Committee. Accordingly, the proposed civil, criminal, appellate, and bankruptcy rules dealing with local rules all prescribe "nonwillful" as the standard. Judge Stotler confirmed that the Judicial Conference had approved these proposed rules earlier in the week. Professor Resnick reported that the proposed technical amendments rule, however, was not approved by the Standing Committee.

The Standing Committee did approve for publication the package of amendments requested by the Committee. In addition, the advisory committees on the appellate, civil, and criminal rules had adopted conforming amendments to permit electronic filing, which will be published for comment. Most importantly, all of the advisory committees had adopted the Committee's recommendation that any Judicial Conference standards on the subject be limited to "technical standards."

The Reporter said that the Standing Committee's consultant on style, Bryan Garner, had circulated among the reporters an interim draft of "Guidelines for Drafting Court Rules. Professor Resnick noted that the Advisory Committee on Bankruptcy Rules has a style subcommittee and that it is the only advisory committee which does. He also said that Mr. Garner had provided some style suggestions on the amendments that are being published for comment. These suggestions reached the Reporter too late for incorporation into the submission to the Standing Committee. Accordingly, they will be treated as public comments and considered with the other comments on the amendments package.

The Reporter thanked Judge Stotler for her letter to the chairman of the House Judiciary Committee opposing the provision in the pending bankruptcy bill that would amend Rule 7004 to require service of process on an insured depository institution to be made by certified mail in certain circumstances.

Judge Stotler called the Committee's attention to the new brochure summarizing the proposed amendments to the rules and to the new format of the pamphlet in which the full texts are published. Judge Stotler said the Standing Committee hopes to receive feedback on both the brochure and the new format of the pamphlet, which shows on the cover those rules subject to proposed amendments. Mr. McCabe said that he and the Standing Committee think they need more comment on proposed rules and from a broader spectrum of persons. To help achieve that, he said, the Standing Committee contacted all of the state bars and asked that these organizations name coordinators to read all proposed amendments, publicize them, and then assemble, digest, and transmit comments to the Standing Committee.

Report on Publication of Minutes via "Online" Computer Services. Mr. Shapiro stated that to date only Lexis and Westlaw have requested copies of minutes for such publication. The question was raised whether, in light of this wider availability of the minutes, the speakers at meetings should continue to be identified. The consensus was to continue the current practice.

RULES

Rule 9014. The Reporter's memorandum discussed Rule 9014 governing contested matters in light of the 1993 amendments to Federal Rule of Civil Procedure 26 and the applicability of certain other time

periods in the civil rules. The Reporter had drafted a proposed amendment to Rule 9014 to make parts of Rule 26 (Rule 26(a)(1)-(4) and (f)) inapplicable to contested matters unless otherwise ordered by the court. The Reporter stated that he would add to the draft a clause expressly permitting discovery to proceed under the first sentence of Fed. R. Civ. P. 26(d). An alternative draft would make these amendments and, in addition, would shorten time periods prescribed in other civil rules relating to discovery and summary judgment motions.

The representatives of the Federal Judicial Center distributed copies of the Center's most recent compilation concerning districts that have locally opted-out of all or part of Rule 26(a) in contested matters. This report shows that 42 districts have clearly opted-out of Rule 26(a) entirely. An additional 21 districts have opted-out of at least Rule 26(a)(1) and most have opted-out of a little more than that. Another group, 11 districts, have opted-out at least temporarily. Six more districts are studying the matter, which means that, while the rule is officially in effect there, it is not clear how thoroughly it is being enforced. In summary, approximately two- thirds of the districts have exercised their option to opt out of all or part of Rule 26(a) in contested matters. With respect to Rule 26(f), the Federal Judicial Center's compilation showed that 58 districts had clearly opted-out and 11 had temporarily opted- out, approximately the same two-thirds proportion as had opted-out of all or part of Rule 26(a).

The Reporter noted that any national rule amendment would not take effect until 1997. By then, courts may be settled with their local rules and a national rule may not be necessary. Yet, he said, it seems important for the national rules to lead the way, to establish what should be the "default mode" on discovery in contested matters. He said it is his view, as a general proposition, that the discovery provisions in question should not apply in contested matters. On the other hand, he noted, Mr. Smith had taken the opposing view in a memorandum circulated to Advisory Committee members.

Mr. Smith said he thinks the issue should not be left so much to local rule. Without a national rule, there will be proliferation of rules with no consistency. He also said he thinks the opt-out statistics indicate that districts simply do not know how to make the new discovery rules work. Professor Coquillette said that the Standing Committee and the Advisory Committee on Civil Rules both are concerned about how the Civil Justice Reform Act (CJRA) and the amendments to Rule 26 (with its opt-out provision) have led to a "balkanizing" of federal procedure. He noted that in the district courts some of the opt-outs are attributable to the fact that the district has a CJRA plan which contains an almost identical rule.

Several participants favored giving longer thought to the question of whether there should be a distinction between adversary proceedings and contested matters with respect to discovery. Judge Magnuson reported that under the new Rule 26 he has only had one Fed. R. Civ. P. 12 motion (on whether the statute of limitations had run) and cautioned against discarding the new provisions just over the time issue in contested matters. A consensus began to emerge that the Advisory Committee should take the time to consider what really would make sense in contested matters and perhaps draft a provision tailored to this special motion practice. **A motion to table the matter carried by a vote of 9-4.**

Rule 8002(c). The Advisory Committee previously had voted to amend this rule to clarify that a motion for an extension of time to file an appeal must be "filed" rather than "made" within the 10-day period prescribed. Before the amendment was presented to the Standing Committee, however, the Ninth Circuit issued a decision that the Reporter believed justified bringing the rule back for consideration of further proposals for amendments. That case is In re Mouradick, 13 F.3d 326 (9th Cir. 1994), in which a party

filed a motion for an extension of time in which to file a notice of appeal. The filing of the motion, however, occurred during the 20-day period following the initial 10-day appeal period, a time during which such a motion may be granted upon a finding of excusable neglect. The court did grant the motion but not until after the 20-day period had expired. The Ninth Circuit held to be untimely the notice of appeal filed within the time specified in the order granting the extension. The Reporter's memorandum noted that Federal Rule of Appellate Procedure 4, in the wake of a similar decision, had been amended to allow a notice of appeal to be filed within the time prescribed in the rule or ten days from the entry of the order granting the motion for extension, whichever occurs later.

The Reporter presented three options: 1) provide for early finality by requiring that the order granting an extension be entered within the additional 20-day period already provided in the rule, 2) protect a party that files a timely motion by permitting the notice to be filed within a specified period after entry of the order granting the motion, or 3) permit filing of the notice of appeal within a specified time after entry of the order granting the motion but also require the court to rule on the motion within a specified time. Although one member expressed concern about encouraging "games designed to prevent finality," discussion of a motion to adopt alternative #3 indicated substantial resistance to the tying of a party's rights to action by a judge within a specified time period. **A substitute motion to adopt the Reporter's Draft No. 2 - giving the party that has filed a timely motion 10 days from entry of the order granting the extension, regardless of when the court acts - carried by a vote of 10-3.** After this vote, however, further discussion raised the idea of excluding certain matters from any extension of time for filing a notice of appeal. If approved, some members said, these exclusions or "carve outs" should be listed at the beginning of the rule. **A motion to defer action on this rule to the next (3/95) meeting carried by a vote of 7 - 1.**

Rule 4003(b). Recent court decisions have raised questions about the interpretation of this rule and whether the time to object to a debtor's claim of exemption can properly be extended by the granting of a timely filed motion if the court does not act until after the period provided in the rule has expired. The Reporter presented three alternatives: 1) rewriting the rule to more clearly prohibit the court from acting after the deadline, 2) allowing an extension if the motion was timely filed, and 3) allowing the court up to ten days after the end of the period provided in the rule to act on a timely filed motion. One member questioned the wisdom of responding to every conflict in the cases with an amendment to resolve the issue. Mr. Smith observed that there always will be tension between a perceived institutional distaste for too many "little" amendments and a desire to reduce the number of "litigation points." **A motion to adopt alternative #2 failed by a vote of 5 - 8. A motion to amend both Rules 4003(b) and 9006(b) to forbid extensions altogether failed by a vote of 3 - 9. A motion to adopt alternative #3 failed for want of a second.**

Rule 3021. At a prior meeting, the Committee had approved for publication an amendment to this rule to permit the plan or order confirming the plan to fix a record date for equity security holders purposes of distribution. In working on the rule after that meeting, however, the Reporter had noted some problems with the terminology used in the rule with respect to holders of bonds and debentures. Accordingly, he suggested correcting these also before submitting any amendment to the Standing Committee. **A motion to adopt the Reporter's revised draft, with the substitution of "that" for "who" on line 6, carried by a vote of 12 - 0.**

Rules 3017(d) and 3018(a). At the February 1994 meeting, the Reporter presented proposed drafts to amend these rules to provide for flexibility in fixing a record date for determing the creditors and equity

security holders who will receive a copy of the plan, the disclosure statement, and a ballot, and who have the right to vote on the plan. Alternative drafts were proposed, but consideration was postponed until the September 1994 meeting. **A motion to adopt in principle Alternative B, which would allow the court to set the record date, passed by a vote of 8 - 2. The vote included a directive to add to the rule that any fixing of a date by the court should be "after notice and a hearing." The Reporter will present a revised draft at the March 1995 meeting.**

Rule 9011. The Committee discussed conforming the rule to Fed. R. Civ. P. 11 as amended December 1, 1993. The Reporter presented a draft for discussion. He noted that he inadvertently had omitted the petition from the list of documents to which a signatory certifies. **A motion to add the word "petition" on line 35 of the draft passed unanimously.** The Reporter also inquired whether the petition should be protected by the 21-day "safe harbor" provision of Rule 11 under which a challenged pleading can be withdrawn without penalty. There appeared to be a consensus that because a petition acts as a self-executing, ex parte injunction, it should not be protected. Additionally, in chapters 7 and 11 the debtor cannot dismiss a case, and the court can do so only for "cause" and after notice and a hearing. One member wanted to carve out a notice of appeal as well. Another, however, said there appears to be a fundamental difference between a matter of business judgment, such as a notice of appeal, and the injunctive effect of a petition. **A motion to adopt the Reporter's draft, as amended above and with the petition carved out of the "safe harbor," carried by a vote of 8-1. A further motion not to tinker further with the rule also carried with one opposed. The Reporter is to re-draft the rule.** [See below.]

[New] Rule 8020. The proposed new rule would authorize the district court or bankruptcy appellate panel to impose sanctions for filing a frivolous appeal. It is similar to Rule 38 of the Federal Rules of Appellate Procedure. **A motion to adopt the Reporter's draft carried unanimously.**

Rule 9006(f). The Standing Committee had requested that the Advisory Committees study whether the additional three days provided when service is made by mail should be enlarged to five days because of slower mail deliveries. The Reporter stated that the Postal Service standard for first class mail delivery is a maximum of three days within the contiguous United States and that the Postal Service's studies indicate that this standard actually is met for 80 percent of the mail, on average. Judge Robreno said the problem really is with attorneys who do not mail documents until the last day. Professor Coquillette stated that there will be an overall study undertaken of time periods in the rules, probably in 1996, and that mail service conditions then can not be predicted now. **There was a consensus that the**

Committee should recommend no action at this time.

Rule 3002. The Committee discussed the developing case law on the deadline for filing proofs of claim. The published cases still are unsettled on whether the deadline prescribed in Rule 3002 is effective in chapter 13 cases. None of the cases so far is inconsistent with the amendments to Rule 3002 approved by the Committee for publication. The Reporter will continue to monitor new cases.

SUBCOMMITTEES

Subcommittee on Technology. Judge Barta said the written report on technology and the rules will be presented at the March 1995 meeting. He said the draft guidelines for routine filing of papers with the court by facsimile that were proposed by another committee had been withdrawn, and the Judicial Conference, accordingly, had taken no action to expand the availability of "fax" filing. (An existing Judicial Conference guideline permits a court to accept a facsimile filing in an emergency.)

Subcommittee on Forms. Mr. Sommer reported that the subcommittee is working on rewriting several forms and on creating one or more new forms for giving notice of a motion. The subcommittee's goal is to maximize the use of "plain English" in notices that are sent to the public in large numbers. He said that, before any formal presentation of revised forms to the Committee, the subcommittee plans to circulate its final drafts for preliminary comment from the members.

Subcommittee on Alternative Dispute Resolution. Professor Tabb said the subcommittee presently is gathering information on how the various local programs are working. If the subcommittee believes a national rule is needed to cover such matters as controls, ethics, and confidentiality, it will return to the Committee with a recommendation and draft. Mr. Niemic said the Federal Judicial Study is conducting a study of ADR that includes both mandatory programs and voluntary ones, but the results are not yet available.

Subcommittee on Local Rules. Ms. Channon reported that preliminary comment on the uniform numbering system for local rules that the Committee had approved at the February 1994 meeting indicated that it might not be as workable or "user friendly" as the Committee had hoped. Accordingly, the subcommittee brought the matter back to the committee along with several alternative numbering systems that it had developed in response to the preliminary comments. Under any of the alter-natives, the citation would be "(District name) L.B.R. - ." One of these systems would simply use the existing related national rule number (where there is one) followed by a dash and another numeral. Local rules topics unrelated to any national rule would have a four-digit number created for them, which also would be followed by a dash and another numeral. After discussion, the **Committee voted unanimously to adopt this alternative, provided the use of the dash would not slow down the ability to conduct a topical search in a computer data base.** If the dash would slow a search, the dash is to be replaced with a decimal point. The proposed numbering system is to be published and comment sought from the bankruptcy community, as directed at the February 1994 meeting.

Subcommittee on Long Range Planning. Mr. Klee led the discussion. The first issue to be decided, he said, is whether the rules need only a "cosmetic fix" or a fundamental overhaul and restructuring. Judge Robreno said it would be best to obtain empirical data through an FJC study on how the current rules are working and whether the users perceive a need for change. Others suggested that the subcommittee give the Committee an outline of an ideal organization or a framework for a proposed organizational revision, so the Committee would have something specific to discuss. It was suggested that the subcommittee should also identify areas for change and areas where the rules seem not to work well with the statute. Several members recommended that work on two well known troublespots --- motions and discovery --- receive prompt attention. **The consensus was that a survey should be conducted, that the subcommittee should present specific ideas for areas the Committee should work on, and that once these have been done, the Committee can make an informed decision concerning the direction of its work.** With respect to the philosophical question of whether the rules are mandatory or simply guidelines, Judge Stotler suggested that the Committee might cull any rules that seem to be more hortatory and retain only what is essential.

There was further consensus that the Advisory Committee would want to be heard by any bankruptcy commission that might be formed if the pending bankruptcy legislation --- which provides for such a commission --- is enacted. At Judge Stotler's suggestion, the **Advisory Committee will present to the Standing Committee a request that the Judicial Conference authorize the Advisory Committee to communicate directly with a bankruptcy commission, if one is created.**

LIAISON WITH ADVISORY COMMITTEE ON CIVIL RULES

Judge Restani reported that she expects to attend a special symposium on Fed. R. Civ. P. 23 to be held in Philadelphia under the auspices of the Advisory Committee on Civil Rules. Mr. McCabe said another "hot" issue emerging for the civil rules is the granting of protective orders under Fed. R. Civ. P. 26(c) and when such orders can or should be lifted.

Respectfully submitted,

Patricia S. Channon