ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 11 - 12, 1997

Williamsburg, Virginia

Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman

District Judge Eduardo C. Robreno

District Judge Bernice B. Donald

District Judge Robert W. Gettleman

Bankruptcy Judge Robert J. Kressel

Bankruptcy Judge Donald E. Cordova

Bankruptcy Judge A. Jay Cristol

Bankruptcy Judge A. Thomas Small

Gerald K. Smith, Esquire

Henry J. Sommer, Esquire

Professor Charles J. Tabb

Professor Kenneth N. Klee

R. Neal Batson, Esquire

Leonard M. Rosen, Esquire

J. Christopher Kohn, Esquire, United States

Department of Justice

Professor Alan N. Resnick, Reporter

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

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

In addition, David B. Foltz, Jr., Esquire, from Houston, Texas, and Alan S.Tenenbaum, Esquire, of the Environment and Natural Resources Division, United States Department of Justice, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

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

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

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

the new forms would become mandatory.

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

Professor Resnick said the Standing Committee has been examining over the past several years a few areas of practice in federal courts in which issues of attorney conduct have arisen, with a view toward ascertaining whether any uniform federal rules might be either appropriate or helpful in a field that traditionally has been regulated by the states and local federal district courts. The various state rules and the American Bar Association's model code are often inconsistent, especially with respect to defining and addressing conflicts of interest, a situation that can leave practitioners subject to contradictory rules. Professor Resnick said he had spoken with Professor Daniel R. Coquillette, Reporter to the Standing Committee, who stated that he planned to draft an amendment to Federal Rule of Civil Procedure 83 that would prohibit courts from making local rules that would conflict with "Appendix A." Professor Coquillette told Professor Resnick that he also planned to draft an "Appendix A" to the civil rules that would contain five to eight "core" federal rules of attorney conduct.

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

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

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

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

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

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

Ms. Wiggins said the FJC presently transfers district and appellate court data to the Interuniversity Consortium for Political Research, which makes the data available to other researchers, and is working with the Statistics Division of the Administrative Office to make bankruptcy data available also. Professor Resnick reported that he had attended a conference held in April 1997 under the sponsorship of the Rand Corporation and the EOUST which had included social scientists, academics, and a National Bankruptcy Review Commissioner, John A. Gose. Professor Resnick said he was concerned about privacy issues that arise with widespread distribution of information disclosed by debtors in bankruptcy cases. For example, he said, there is a 10-year limit on including bankruptcy information in a credit report, but information placed on the Internet cannot be erased. Ms. Wiggins said the FJC is sensitive to the privacy issues and is working to purge certain items from the bankruptcy data. She said the FJC intends to work with the General Counsel of the Administrative Office and with the Bankruptcy Committee on the matter. Judge Duplantier asked if the Committee ever had been asked to add social

science questions to the official forms. The Reporter said requests had been made in the past, such as a request to add the question whether the debtor is male or female.

Notice to the Government

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

Professor Resnick summarized the elements of the various proposals that the Committee had considered at the March 1997 meeting; 1) amending Rule 1007 to require that wherever a debt to a governmental unit is listed a debtor state the name of the agency through which the debt was incurred; 2) amending Rule 5003 to require the clerk to keep a register of mailing addresses for government agencies; 3)requiring the debtor to use the register address if the entity listed is a unit of the federal government or of the government of a state; 4) providing a "safe harbor" for the debtor who uses the address in the register but providing also that use of a different address does not bar the discharge if the governmental unit involved receives actual notice of the bankruptcy case;[(1)] 5) amending Rule 2002 to provide that when notice to the United States attorney also is required, that the name of the agency through which the debt was incurred be included in the notice to the United States attorney; 6) requiring disclosure in the Statement of Financial Affairs of additional information about the debtor's personal and business relationships that would enable taxing authorities to investigate the status of the debtor's tax obligations and about environmental claims, both actual and potential; and 7) requiring a debtor to mail a copy of the environmental part of its Statement of Financial Affairs to the relevant government agencies.

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

Notice to the Government -- Rules 2002 and 5003

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

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

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

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

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

Mr. Kohn said he does not like limiting an agency to one address and would prefer to give the clerk discretion in the matter. Judge Duplantier asked how the debtor would know which one to choose if several addresses were listed. Kohn suggested that the addresses could be distributed by counties, but Mr. Heltzel said the government agencies are not all organized the same way, that their boundaries seldom match those of the court districts. His district, for example, comprises parts of three IRS districts, he said. Professor Tabb asked if there should be a safe harbor provided for a debtor who has only a one-in-three chance of choosing the right address. Mr. Heltzel questioned what will happen when people move. He also said he had been sampling matrices filed in his district to determine how well debtors are complying with the addresses posted in the local roster of government agency addresses that he has maintained for many years; he found compliance is only about 50 percent.

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

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

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

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

A motion by Mr. Rosen that in the draft of Rule 2002(g)(1), lines 10 - 11, a provision be inserted that a creditor that wants a different address used in subsequent notices must file a request and serve copies on the debtor and trustee carried by a vote of 9 - 3. The Committee then reconsidered the matter, based on the amount of paper that would be generated. Professor Resnick suggested amending proposed subdivision (g)(2) at lines 17 - 19 to carve out subdivision (g)(1), but Mr. Sommer said it would be a mistake to carve out of subdivision (g)(1) the requirement to use the address on the matrix or any later-filed schedule unless a request is filed to use a different address. Mr. Heltzel said the real process of sending notices is highly computerized, with the actual printing and mailing performed by a contractor at a remote site. As a practical matter, he said, the clerk can't make corrections, but simply adds any new addresses received and sends notices to all.

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

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

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

National Bankruptcy Review Commission

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

Notice to the Government -- Rule 1007

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

Notice to the Government -- Official Form 7

(Tax and Environmental Questions)

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

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

Judge Small introduced the discussion of the proposed environmental questions by noting that they pertain to identified claims only and do not include the disclosure of "imminent danger" on property of the debtor, which Mr. Kohn advocates. Mr. Klee said he would want question 24.a. limited to disclosure of notices actually received by the debtor and would want the clerk, rather than the debtor, to mail the part of the statement containing the disclosures. The Reporter said any requirement to mail part of the statement to creditors should be in the rules and that Rule 1007 could provide for it. Mr. Batson asked whether affording environmental protection agencies with extra information could open the door to requests for similar service by other agencies. **There was consensus that merely adding an instructional note to the form would not be sufficient to require a debtor to mail a portion of its statement to certain creditors and that, if the Committee approves such a requirement, it must be stated in the rules.**

Mr. Smith said he thinks the "imminent danger" information should be disclosed. Mr. Klee said that goes beyond the debtor-creditor relationship and had Fifth Amendment implications. Judge Robreno suggested that such information would be appropriate to inquire about at a § 341 meeting. Judge Gettleman asked whether such disclosures would go beyond what the environmental laws would require. Judge Cristol said environmental issues generally arise in a chapter 7 case where there is a fight between the bank, the trustee, and the other creditors over who will bear the expense of cleanup, and the sooner the existence of an environmental problem is known the better it is for all. Mr. Sommer asked whether it is so important that the participants in the case need the information sooner than the § 341 meeting. Mr.

Patchan said it should be known to the U.S. trustee, who appoints the case trustee, before the appointment is made and suggested that there should be a requirement in the rules for separate notice. Mr. Foltz stated that question 24, as drafted, would not have disclosed the problems he has encountered, which included representing a debtor that had hazardous biomedical material on its premises. Mr. Foltz said he would like the substance creating an "imminent danger" to be identified and thinks it should be disclosed immediately. Mr. Klee said there should be a distinction between different types of debtors and what is required of them. He said he supports requiring disclosure by a business and thinks the standard should be that the substance does, rather than may, pose a hazard. Mr. Batson suggested that the standard should be "imminent threat to public health and safety," including environmental safety.

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

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

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

Litigation Subcommittee -- Rules 9013 and 9014

The Reporter introduced the discussion by reviewing the Committee's action at the March 1997 meeting approving in principle the subcommittee's proposed amendments, subject to further refinement, review by the Style Subcommittee, and deferral of certain issues. He said he had submitted the drafts to the Style Subcommittee of the Standing Committee for its recommendations, and that the Advisory Committee's own Style Subcommittee had gone over those recommendations in a telephone conference in which the Litigation Subcommittee chairman, Mr. Klee, also had participated. Professor Resnick said that during the summer he also had reviewed the rules generally to identify those that would require conforming

amendments. He said that as a result of this review he also wanted to bring back to the Committee the matter of amending Rule 9034, which governs notice to the United States trustee. A proposal to amend that rule had been defeated at the March 1997 meeting, but deleting notice to the U.S. trustee as part of the conforming of rules to the proposed Rules 9013 and 9014 might cause the Committee to take a different view of amending Rule 9034, he said. Professor Resnick described the various agenda materials: Exhibit A contains the style revision, with portions related to deferred issues shown in brackets; Exhibit B is identical to Exhibit A, but marked to show some additional proposals from the Reporter that resulted from his review of other rules; Exhibit C lists proposed amendments to 20 rules to conform to the proposed amendments to Rules 9013 and 9014; Exhibit D contains proposed amendments to Rule 1006, deferred at the March 1997 meeting; and Exhibit E shows proposed amendments to Rule 1007 that were approved in principle at the March 1997, subject to further refinement.

Judge Duplantier said that, although the Committee had approved in principle the proposed amendments to Rules 9013 and 9014, the proposals were open to reconsideration and he noted that Judge Robreno had written a letter describing a different approach. Judge Robreno's letter, which was distributed to the Committee separately from the agenda book, would be discussed at the appropriate moment, he said. Speaking for himself, Judge Duplantier said his objective in managing litigation is to identify the big case early on, so it can be singled out for special attention and management. The routine matters, however, should not be unduly burdened with requirements that are needed only in a big case. He suggested as targets for deletion from proposed Rule 9014 two items that he thinks will burden routine matters and can be specially provided for when needed: the list of witnesses, and the 25-day response time. He said that motion practice is similar to discovery; the problems are in the big cases.

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

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

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

The next bracketed subdivision is (a)(11), which addresses a request for examination under Rule 2004,

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

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

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

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

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

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

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

said, because studies show that in most cases discovery takes less than three hours, and a need for more than the rule permits forces the parties to go to the judge. If the draft of Rule 9014 is amended to make the response time ten days, he said, that would have a similar result of sending the parties in a complex matter to the judge with a request for more time. **The motion to substitute Judge Robreno's draft for the subcommittee's draft of Rule 9014 failed by a vote of 3 to 9.**

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

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

The Committee then began a subdivision-by-subdivision review of the subcommittee's draft. In response to a question about the inclusion in subdivision (a)(2) of the approval of a disclosure statement and the confirmation of a plan as matters to which Rule 9014 would not apply, the Reporter said no motion or status conference is required for these matters now, that the Code requires the court to hold a confirmation hearing, and that Rule 9014 would allow the court to skip the confirmation hearing if no objection were filed. **A motion to apply Rule 9014 procedures to Rules 3017, 3019, and 3020(b) carried by a vote of 6 to 5.** Judge Kressel said it is the objection to a disclosure statement or to confirmation of a plan that triggers Rule 9014 now, and that should continue. The Reporter said any motion involving valuation needs an attached appraisal under the subcommittee's draft, which may not be appropriate for a disclosure statement or a plan. **A motion that Rule 9014 apply to these matters but that the objection be the initiating "motion" failed by a vote of 3 to 6.** Mr. Klee reiterated that the survey showed people think there are too many different procedures in the rules. The Reporter noted that there also is a conflict with existing Rule 2002(b), which requires a 25-day notice of a hearing on approval of a disclosure statement or confirmation of a plan. **A motion to reconsider and carve out Rules 3017 and 3020(b) from Rule 9014 carried by a vote of 10 to 1. A motion to retain the reference to Rule 3015(g), modification of a chapter 13 plan, in subdivision (a)(2) carried 8 to 2. [Subsequently, the Committee determined that Rule 3015(g) is to be governed by Rule 9014.] The Committee then agreed to amend Rule 3019 to provide that a request for a determination that a class be deemed unaffected by a plan is governed by Rule 9014. The Committee decided to delete as redundant, however, the reference to Rule 3017.1, because it is included in Rule 9013(a) which is carved out generally.**

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

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

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

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

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

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

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

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

Litigation "Package" -- Conforming Amendments to Other Rules

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

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

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

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

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

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

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

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

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

Rule 3007. The Reporter noted that conforming the procedure for objecting to a claim would shorten the response time from 30 days to 15 and change the procedures generally, by requiring that the matter be set for hearing and a status conference be held. Judge Kressel said he thinks the existing rule contemplates that some basis for the objection will be stated in the papers filed. Several members thought the response

time should be longer, wanted to retain the 30 days, and change the response time in Rule 9014 to 30 days also (subdivision (c)(1), line 43). Mr. Patchan said the Rule 9014 procedures would burden the pro se party and generate unnecessary paper to get the matter before the court. **The Committee approved the Reporter's draft with the following changes. In line 2, insert "except that the motion shall be served and filed at least 30 days before the hearing" after "Rule 9014"; in line 6, change "If" to "But", and delete the word "is" before the word "joined"; and, line 7, delete the comma and substitute "is" for "it becomes."**

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

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

Rule 3015. Subdivision (f), objection to confirmation, the Reporter said, would be a stand alone procedure, and the changes from the current rule would be to provide for service as in Rule 9014 and to make discovery available. A member raised the issue of whether there should be a deadline for filing an objection, and **the Committee decided to delete the word "timely" from line 14. The Committee also struck the text of subdivision (g), subject to review by the Reporter. Subdivision (g) is to remain, but simply say that modification of a plan after confirmation is governed by Rule 9014. The Committee approved the Reporter's draft with the changes specified.**

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

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

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

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

Rule 6007. **The Committee restored the phrase "or debtor in possession" on lines 3 and 4,** which had been marked for deletion by the Reporter, **and inserted in line 15 after the word "is" the phrase**

"treated as a motion." The Committee also directed that Rule 6007(b) also be amended to provide that Rule 9014 applies. The Committee approved the Reporter's draft, subject to the changes stated.

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

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

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

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

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

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

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

Rule 2002(a)(6)

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

Rule 2002(g)

This rule requires the clerk to use the address provided by a creditor in a filed proof of claim, if that address differs from the one listed on the schedules filed by the debtor. The rule allows the clerk to ignore any new address on a proof of claim, however, if a notice of no dividend has been given. The Reporter noted that Bankruptcy Judge Paul Mannes, the former chairman of the Committee, had suggested that, in a case in which assets later appear and a further notice of possible distribution must be sent, any address provided by a creditor on a proof of claim should be used. **A motion to adopt the**

Reporter's draft, except the portion that requires the use of an address provided in a proof of claim, failed by a vote of 3 to 9. A motion to adopt the Reporter's draft carried by a vote of 9 to 0. A member requested that the Style Subcommittee give particular attention to this amendment, especially to clarifying the purpose and use of the word "subsequent" in line 10.

Alternative Dispute Resolution Subcommittee

Professor Tabb stated that the subcommittee is in a watching mode. The FJC has completed a survey aimed at discovering whether problems exist, he said. A second survey to explore any problems found in the initial one remains a possibility, he said. Mr. Niemic reported on the preliminary results of the survey. He said a very small number of problems had been reported, leaving the Committee to consider whether any problems in the areas of mediator confidentiality and ex parte communication between the mediator and the judge should be tolerated. Mr. Klee indicated he would be interested in whether the results of the survey differed depending on whether the mediator was paid or was a volunteer. He said he also is interested in how frequently the ex parte contact between the judge and the mediator was with the consent of the parties.

Field Trip to Courtroom 21

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

Miscellaneous Matters

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

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

Respectfully submitted,

Patricia S. Channon

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