# Advisory Committee on Bankruptcy Rules

## Meeting of February 28, 1992
## Pasadena, California

## Minutes

The Advisory Committee held a public hearing on the Preliminary Draft of Amendments to the Bankruptcy Rules in the Pasadena courthouse of the United States Court of Appeals for the Ninth Circuit. Immediately following the hearing, the Committee met in the courthouse to consider written and oral comments received on the Preliminary Draft and to transact other business. Present at the meeting were:

Circuit Judge Edward Leavy, Chairman
Circuit Judge Edith Hollan Jones
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Professor Lawrence P. King
Ralph R. Mabey, Esquire
Herbert P. Minkel, Jr., Esquire
Henry J. Sommer, Esquire
Professor Alan N. Resnick, Reporter

District Judge Thomas S. Ellis, III, liaison to the Advisory Committee from the Committee on Rules of Practice and Procedure (Standing Committee), also attended the meeting, as did the following additional persons: Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; John E. Logan, Esquire, Director, Executive Office for United States Trustees; Gordon Bermant, Director of Planning and Technology, Federal Judicial Center; Peter G. McCabe, Assistant Director, Administrative Office of the United States Courts; and Patricia S. Channon, Deputy Assistant Chief, Division of Bankruptcy, Administrative Office of the United States Courts.

Four members of the Committee were absent: District Judge Harold L. Murphy, District Judge Malcolm J. Howard, Harry D. Dixon, Esquire, and Bernard Shapiro, Esquire.

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.

Votes and other actions by the Committee and assignments by the Chairman appear in bold.

Rule 5005(a). The proposed amendment to this rule, which would prohibit the clerk from rejecting papers not in proper form, was the subject of much of the oral testimony heard by the Committee and also generated the greatest number of written comments. Of the written comments, the Reporter noted, only two were in favor. All of the other comments were against the change, as was the oral testimony. Most of the negative comments were from clerks and all focussed on the burden to the clerk and the judge of having to process defective papers.

Two of the written comments pointed out a perceived ambiguity in the rule as drafted, which could cause people to think that the words "or other paper presented for that purpose" on line 12 of the draft amendment means that the rule would apply only to a petition or other paper intended to be a petition. The Committee's actual intent is for the rule to cover all papers tendered to the clerk for filing. The Reporter recommended that the Committee approve an alteration in the wording of the rule to remove the ambiguity. A motion to adopt the altered wording suggested by the Reporter to remove the ambiguity carried, with none opposed. After this vote the proposed amendment to Rule 5005(a) reads: "The clerk shall not refuse to accept for filing any petition or other paper presented for the purpose of filing solely because it is not presented in proper form as required by these rules or any local rules or practices."

Ralph Mabey commented that the draft Committee Note to the rule states that the Committee's policy is that it is not the proper role of the clerk to refuse to file papers that do not conform to "certain" requirements of form. Mr. Mabey said this language gives the impression that while the clerk may not refuse papers that fail to meet "certain" requirements, it would be permissible to refuse papers that don't meet other requirements. As the intent of the Committee is to ban all refusals by the clerk, he said, he suggested deleting the work "certain" from the note. The Reporter said he believed he had taken the language from the Committee Note to the civil rule, but would check. Judge Ellis suggested checking whether the word is in the civil rule's note for a reason before deleting it from the bankruptcy rule. Judge Leavy suggested deleting the word unless the Reporter discovers there is a reason for its presence.

The Committee then discussed the testimony that had been presented in the morning by judges and clerk's office personnel from the Bankruptcy Court for the Central District of California. In connection with testimony opposing the proposed amendment to Rule 5005(a), the judges had described problems they are encountering with what they call "unlawful detainer" filings, in which persons file bankruptcy cases solely to avoid eviction, or so-called "petition mills" file cases for them. Judge Jones said she had previously supported the proposed amendment, but has become concerned that the bankruptcy process is being used "to completely

disrupt landlord-tenant relations" and that the practical problems of the clerks should not be dismissed lightly in a system that is expected to handle a million cases a year. Henry Sommer said it seemed to him that the petition mills are a fraud on tenants too, a massive consumer fraud that should be dealt with by direct action, not by permitting rejection of papers by the clerk. The Committee discussed the dismissal procedures in the Bankruptcy Code and Rules and the due process provisions included in them. Judge Leavy and Judge Jones engaged in a dialogue concerning the public admission by two judges that they do not follow the national rules and whether having a rule that creates requirements (e.g. Rule 1005) and another rule that says papers are to be accepted regardless of whether they meet those requirements (Rule 5005 as amended) creates an internal conflict within the rules themselves. Judge Leavy said he is concerned because "the statute allows itself to be used a certain way," but the judges of the Central District "are protecting us from people who do that." Judge McGlynn said bankruptcy courts could justify a more restrictive rule on what papers will be accepted because in bankruptcy court simply filing a paper triggers an injunction without any order of a judge. Several members suggested that the Committee lacks empirical information on the extent of the problem of defective pleadings and should defer final decision on this amendment. Judge Barta described a deficiency notice procedure used successfully in his court, and Judge Meyers said it would help the system to have a list of specific papers that should not be rejected because time considerations give importance to their being accepted. **A motion to consider at the March 1992 meeting an expanded Committee Note or further amendment to the rule that would describe acceptable procedures for handling defective papers, such as Judge Barta's deficiency notice, passed by a vote of 4 to 3.**

Rule 2003. After discussing the comments received, both oral and written, and having concluded that successful chapter 13 scheduling practices vary widely, the Committee voted to adopt the proposed amendment, with none opposed.

Rule 9036. Several members supported the written comment that suggested that the court ought not to be authorized to require a debtor that is being directed to give notice to give or pay for the giving of notice electronically without that debtor's consent to the requirement. Others, however, said that a statutory provision, 28 U.S.C. § 156(c), seems to give the court this authority already, and Richard Heltzel said that electronic noticing generally costs less than mail anyway. **A motion to adopt the proposed new rule carried, with none opposed.**

Rule 3002(a). Herbert Minkel said that with the revival of the concept of summary jurisdiction and the consequence that filing a proof of claim now can be held to mean consent to summary jurisdiction, he has come to believe that the amendment could jeopardize a secured creditor. Professor King also strongly

opposed the amendment. Ralph Mabey and Henry Sommer supported it, on the basis that the present rule is confusing. The Reporter noted that Rule 3021 states that distribution under the plan is for allowed claims only -- that is, claims for which the creditor has filed a proof of claim. A motion not to change the present rule failed by a vote of 4 to 5. A motion to adopt the proposed amendment carried by a vote of 5 to 4. The Reporter stated that this amendment will have to be reported to the Supreme Court as controversial. Judge Leavy asked Professor King to provide the dissenting report on this rule. There was some concern among the members about the comment of the Department of Justice which said there shouldn't be a requirement if there can be no sanction for failing to perform. The U.S. waives its sovereign immunity by filing a claim and, therefore, may choose not to do so. Yet the U.S. can't be penalized because it is the sovereign.

Rule 3002(c)(7). The Reporter noted that the comments received had been evenly split. Four correspondents said they have flexibility to deal with late claims now, want to keep it, and oppose the amendment because they perceive the amemdment as restricting their flexibility. The other four said there is a strict rule now and they oppose the amendment because it would give too much flexibility. The Reporter said a recent case from the Sixth Circuit already had approved a very liberal interpretation of excusable neglect, much more liberal than the example given in the proposed Committee Note of a creditor who had no notice of the case. Ralph Mabey said he preferred restricting the rule itself to unscheduled creditors as suggested at the bottom of page 13 of the Reporter's Memorandum of February 11, 1992. A motion to table action on this rule until the March meeting when the Reporter could present a draft of the more restrictive language carried, with none opposed.

Rule 3009. The Reporter summarized the comments received, in which trustees opposed the amendment as exposing them to greater liability and from a bankruptcy judge who is concerned about lack of notice to creditors in cases in which less than $1500 in net proceeds is realized. The Reporter stated that he personally is aware of at least two bankruptcy judges who support the amendment, although neither of them wrote a letter to that effect. After discussion, a motion to adopt the amendment carried, with none opposed.

Rule 3015. Bankruptcy Judge Ralph Kelley had commented that there appeared to be a technical error in the amendments separating rules dealing with confirmation in chapter 12 and chapter 13 cases from rules dealing with confirmation in chapter 9 and chapter 11 cases. In drafting the amendments, the Committee did not carry over subsection (b)(2) of Rule 3020 with the other parts of Rule 3020 that were carried over. The Reporter said subsection (b)(2) was left out deliberately, because the bankruptcy judges on the chapter 13 subcommittee thought that including it would create an inference

that the court does have to take evidence on the other elements for confirmation. Professor King said he thinks Judge Kelley is right, that Rule 3020(b)(2) should be in Rule 3015. He said the provision was drafted originally because the two elements mentioned in it -- that the plan has been proposed in good faith and not be any means forbidden by law -- are difficult to prove. Accordingly, the court ought to be able to confirm without taking evidence if there is no objection based on either element. A motion to bring Rule 3020(b)(2) into the amendments to Rule 3015 carried by a vote of 7 to 1. The sense of the Committee was that this further amendment is technical and does not require public comment.

Concerning other aspects of the proposed amendments, commentators wrote that there should always be a modification hearing regardless of whether there is an objection, that notice of a motion for post-confirmation modification by a creditor should go to the debtor as well as the debtor's attorney, and that the debtor should not have to give notice to all creditors (including those "not affected"). A motion to approve Rule 3015 with the addition of Judge Kelley's suggestion approved earlier carried by a vote of 9 to 0. Henry Sommer said he would like to see more specificity in the rule on the contents of a motion for modification and a requirement of clear notice to debtors of both what is proposed and the consequences to the debtor of failing to respond when a motion to modify is filed by a creditor. Judge Leavy said this idea is not shut out for the March 1992 meeting. Professor King noted that the title of the rule says "Confirmation," but the text only mentions objections to confirmation. He suggested that the Reporter might consider amending the title to conform to the text.

Rule 3018. The only change being proposed is the amending of the title to reflect the fact that the rule will now apply only in cases under chapters 9 and 11. A motion to adopt the amendment carried by a vote of 9 to 0.

Rules 6002, 6006, 6007, and 9019. These amendments simply make it clear that no hearing is required in the absence of objection. A letter from Robert F. Mitsch suggested that affirmative findings by the court ought to be required on some matters, bu the Committee declined to consider further amending its proposals. A motion to adopt the amendments as drafted carried by a vote of 9 to 0.

Rule 9019. Mr. Mitsch, in his written comments, also suggested that this rule be amended to include reaffirmation agreements. A motion to decline to consider this suggestion carried by a vote of 9 to 0.

Rules 1010, 1013, and 1017. The amendments to these rules are technical and drew no comments. A motion to adopt these amendments carried by acclamation.

## Other Matters

Professor King stated that a substitute bill for S. 1985, a bankruptcy bill introduced in November 1991 by Senators Heflin and Grassley, is soon to be marked up. The substitute bill contains a provision that would amend Rule 7004 to require that service on a corporation or partnership be by certified or registered mail. He said the rule has provided for service by first class mail since 1976. That was a change, he said, from the original rule promulgated in 1973, which had specified certified or registered mail. The reason for the 1976 change, Professor King said, was that the Committee had learned that first class mail was more reliable in achieving service, becaused many persons would refuse to sign for the registered or certified envelopes. He asked whether the Committee should do anything. Judge Ellis said the Committee should make its opposition known to Judge Keeton, chairman of the Standing Committee, so that he could address the issue with the Senate Judiciary Committee. Peter McCabe said that the normal position of the Judicial Conference is that there is a rules process and the rules should not be amended legislatively. Judge Leavy asked Professor King to draft something to send to the Standing Committee, and he agreed to do so. A motion to respond to the bill in this manner carried by a vote of 9 to 0.

The Reporter stated that he had received a letter from Professor Tom Baker, who is chairman of the long range planning subcommittee of the Standing Committee. Professor Baker requested information about long range planning activities of the Advisory Committee. The Reporter asked the members to provide him with input to be used in responding to Professor Baker.

The Reporter announced also that the Standing Committee had appointed a style committee chaired by Professor Charles Alan Wright, and that this style committee would be reviewing the Advisory Committee's work. Professor Resnick said he had received a memo on this subject which he would circulate to the members.

Judge Leavy announced that Gordon Bermant will no longer be working with the Committee on research. Mr. Bermant is the new Director of Planning and Technology for the Federal Judicial Center, and a new research liaison will attend the March 1992 meeting. Mr. Bermant said that he would look forward to working with the Advisory Committee in the areas of planning and technology.

Respectfully submitted,

Patricia S. Channon

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Nov. 19, 1992
Date