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OF THE
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WASHINGTON, D.C. 20544

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January 18, 1991

Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, MA 02109

Dear Judge Keeton:

The purpose of this letter is to recommend that Bankruptcy Rules 5011(b) and 9027(e) be amended, on an expedited basis, as indicated in Appendix A to this letter. These amendments, which are required by the clear purpose of recent legislation, will enable bankruptcy judges to enter orders regarding certain abstention and remand motions. The Advisory Committee on Bankruptcy Rules has approved these amendments at its meeting on January 17, 1991.

The Advisory Committee recommends that the Standing Committee on Rules of Practice and Procedure approve these amendments at its meeting on February 4, 1991, without publication for public comment, so that they can be approved by the Judicial Conference and adopted by the Supreme Court as part of the comprehensive package of Bankruptcy Rules amendments that will become effective on August 1, 1991.

As you know, on December 1, 1990, the President signed the Judicial Improvements Act of 1990. Title III of the Act ("Implementation of Federal Courts Study Committee Recommendations") includes section 309 which, among other things, amends 28 USC § 1334(c)(2) and 28 USC § 1452(b).

Section 1334(c)(2), which deals with mandatory abstention regarding certain proceedings related to a bankruptcy case, has been amended as follows [new language is underlined]:

"(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action,

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2nd 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500,

et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeline or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, -----U.S. -----, 108 S.Ct 1496 (1988).

Rule 1102. Amendments

1 Amendments in the Federal Rules of Evidence may
2 be made as provided in section ~~2076~~ 2072 of title
3 28 of the United States Code.

COMMITTEE NOTE

The amendment is technical. No substantive change is necessary.

related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain or not to abstain made under this subsection is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy."

A similar change has been made to § 1452(b) which deals with remand of a proceeding relating to a bankruptcy case that has been removed to under § 1452(a):

"(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title."

Although a similar amendment has been made to 11 USC § 305 governing abstention from entire bankruptcy cases, there is no Bankruptcy Rule dealing with § 305 motions.

The effect of these statutory amendments is to remove the prohibition of an appeal to the district court of an order of a bankruptcy judge in response to a motion to abstain under 28 USC § 1334(c)(2) or a motion to remand under § 1452(b). The sole purpose of these changes is to permit the bankruptcy court to decide these issues subject to traditional appellate review by the district court. This purpose is set forth in the Federal Courts Study Committee report, the implementation of which is the purpose of Part III of the Judicial Improvements Act:

"The proposed amendment [to 28 USC §§ 1334(c)(2) and 1452(b)] would authorize bankruptcy judges to enter binding orders subject to review in the district court. Speeding the disposition of such motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals." Report of the Federal Courts Study Committee, April 2, 1990, page 77.

However, the purpose of these statutory amendments will be frustrated if Bankruptcy Rules 5011(b) and 9027(e) [to be

redesignated as Rule 9027(d) under the proposed 1991 amendments] are not amended to permit the bankruptcy court to enter orders on these motions. Currently, these rules provide that the bankruptcy judge shall make recommendations to the district court on these matters, but may not enter orders. In essence, these motions are now treated the way that non-core matters are treated under Rule 9033. The reason for limiting the bankruptcy judge's role in this manner under the present rules was the concern that it would be inappropriate for a bankruptcy judge to enter binding orders that are not reviewable by an Article III judge. By permitting appellate review by the district court, the recent legislation has removed this concern. Nonetheless, unless and until Rules 5011(b) and 9027(e) are revised to permit bankruptcy judges to enter orders on these matters, the sole purpose of the recent legislation will not be realized.

It is important to note that, technically speaking, these rules are not in direct conflict with the letter of the new legislation, although they are clearly inconsistent with its sole purpose and spirit. It is possible for the bankruptcy judge to make recommendations to the district court in accordance with the present rules, while the statutes provide that the district court's order is not appealable to the court of appeals or Supreme Court. This situation heightens the urgency for changing the rules because we can not find comfort in the belief that lawyers and courts will merely disregard Rules 5011(b) and 9027(e) on the ground that they have been overruled by the recent legislation. The only way to effectuate the clear purpose of the recent legislation is to amend these rules.

The Advisory Committee suggests, therefore, that Rules 5011(b) and 9027(e) be amended to delete the limitation on the bankruptcy judge's role and, instead, to provide that such motions are contested matters governed by Rule 9014. Bankruptcy judges will then treat such abstention and remand motions as core proceedings and will enter orders determining the motions. In addition, Rule 5011(b) should include a provision requiring service of the motion on the parties to the proceeding which is the subject of the abstention motion. Such a provision is already in Rule 9027(e).

We believe that it is important to revise Rules 5011(b) and 9027(e) without the delay that would be caused by publication for public comment. Although we always welcome public comment in connection with rules changes, we believe that the attached revisions are required in view of the recent legislation and that there could not be any controversy from the bench and bar.

I am aware of one instance of precedent for revising, without publication for public comment, a package of rules amendments after it has been approved by the Judicial Conference and prior to Supreme Court promulgation. In 1976, Chapter IX of the former Bankruptcy Act (adjustment of debts of municipalities) was amended substantially by Congress. Prior to

the statutory amendments, the rules package that had been formulated for Chapter IX cases and approved by the Standing Committee and the Judicial Conference had been sent to the Supreme Court for promulgation. After the 1976 legislation, the Reporter to the Advisory Committee on Bankruptcy Rules drafted necessary changes to the rules package and distributed them to the Advisory Committee members by mail for approval. They were then approved, without publication for public comment, by the Standing Committee and the Judicial Conference. The rules package, including the last minute revisions, was forwarded to Congress by the Supreme Court in April of 1976.

I recommend that the same procedure be followed at the present time. If the Standing Committee agrees, the attached amendments to Bankruptcy Rules 5011(b) and 9027(e) [redesignated as Rule 9027(d)] can be submitted to the Judicial Conference at its March 1991 meeting. If the Judicial Conference agrees, these amendments could then be included in the package of Bankruptcy Rule amendments currently before the Supreme Court for promulgation. They could then take effect with that package on August 1, 1991.

Respectfully submitted,

Edward Leavy
Chairman
Advisory Committee on
Bankruptcy Rules

cc: Members of the Standing Committee