ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 14-15, 2006
Seattle, WA

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
District Judge Irene M. Keeley
District Judge Richard A. Schell
District Judge William H. Pauley, III
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Dean Lawrence Ponoroff
K. John Shaffer, Esquire
J. Michael Lamberth, Esquire
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Circuit Judge Harris L. Hartz, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Karen Overstreet, as liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
Peter G. McCabe, secretary of the Standing Committee
Clifford J. White, III, Acting Director, Executive Office for U.S. Trustees (EOUST)
Donald F. Walton, Acting Deputy Director, EOUST
Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
Monique Bourque, Chief Information Officer, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Matthew I. Hall, Rules Clerk for Judge David F. Levi
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen "Scott" Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center (FJC)
Philip S. Corwin, Butera & Andrews, Washington, D.C.
Matthew R. Goldman, Baker & Hostetler LLP, Cleveland, OH

The following persons were unable to attend the meeting:

Circuit Judge R. Guy Cole, Jr., member
District Judge Laura Taylor Swain, member
Bankruptcy Judge Dennis Montali, liaison from the Bankruptcy Administration Committee
Patricia S. Ketchum, advisor to the Committee

The following summary of matters discussed at the meeting should be read in conjunction with the 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 Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed the members, liaisons, advisers, staff, and guests to the meeting. He expressed the regrets of Judge Cole, Judge Swain, Judge Montali and Ms. Ketchum who were unable to attend the meeting.

Agenda Item 1; Approval of Minutes for Chapel Hill Meeting

The Chairman directed the Committee's attention to the draft minutes of the March 9-10, 2006 meeting in Chapel Hill (*Agenda Item 1*). Judge Wedoff moved that language be inserted in the minutes to reflect that in approving the Small Business Disclosure Statement form recommended by the Business Subcommittee, the Committee discussed and acknowledged that its recommendation *did not* preclude the adoption of a similar form prepared by the EOUST as an alternative. **The Committee approved the Chapel Hill minutes as revised by Judge Wedoff's suggestion without objection.**

Agenda Item 2; Oral Reports on Meetings of other Rules Committees

The Chairman and Mr. McCabe briefed the Committee on the June 2006 meeting of the Standing Committee. Copies of the Standing Committee minutes were included in the materials at Agenda Item 2.

In Judge Montali's absence, the Chairman asked Judge Overstreet to report on the most recent meeting of the Bankruptcy Administration Committee (the "Bankruptcy Committee"). The Chairman asked that the minutes reflect Judge Montali's strong contributions to the Committee over the years.

Judge Overstreet described a number of issues considered by the Bankruptcy Committee including budget issues related to the low level of case filings post-BAPCPA. She also recapped recent fee increases, and fee increases under consideration.

Judge Walker reported on the most recent meeting of the Advisory Committee on Civil Rules. He said the Civil Rules Committee discussed Rule 12 notice pleading, and the need for particularity in summary judgment motions. He said there was also a lot of discussion about Rule 26 with respect to the admissibility of expert work product. Finally, he said the Civil Rules Committee had also been busy with the time computation project.

Judge Klein reported on most recent meeting of the Advisory Committee on Evidence Rules. He said the primary issue before the Evidence Committee concerned waivers, and that it had published a new proposed Rule 502, dealing with waiver of attorney-client privilege and work product.

Action Items

Agenda Item 3A; Rule 9011 Amendment Proposals

The Chairman and the Reporter recapped a letter sent by Senators Grassley and Sessions suggesting that the rules be amended to ensure that attorneys comply with the addition of §707(b)(4)(C) and (D) to the Bankruptcy Code.

By way of background, the Chairman reminded the Committee that it had previously considered a similar suggestion from Senator Grassley made shortly after the Interim Rules were published, and had concluded that it was not necessary to amend Rule 9011 to simply restate the statute. Despite this conclusion, however, the Committee asked the Subcommittee on Attorney Conduct to consider, in light of the amendments to § 707, as well as the sense of Congress provision set forth at § 319 of the 2005 Act, whether the forms or Rule 9011 should be amended.

Although the subcommittee believed that the statement of Congressional intent at § 319 was sufficiently strong to consider a change to Rule 9011, it was unable to recommend specific language. Further, it identified a number of drafting problems that would impact the current reach of Rule 9011. For example, Rule 9011 already contains language *similar*, but not identical to the language found in § 707(b)(4)(C). However, while Rule 9011 applies to all attorneys in all chapters, § 707(b)(4)(C) only applies in chapter 7. Repeating the § 707(b)(4)(C) statutory language in Rule 9011, and limiting its effect to chapter 7 cases, might infer that that there is different standard for the applicability of Rule 9011 outside of chapter 7. And the standard could change in cases that convert from chapter 11 or 13 to chapter 7. Ultimately, the subcommittee drafted alternative proposed changes to Rule 9011 for the Committee to consider. The subcommittee also recommended including language from § 707(b)(4)(D) in the debtor attorney certification at Exhibit B on Form 1.

Mr. Lamberth , a member of the subcommittee, elaborated on the subcommittee's proposal to enhance the debtor attorney certification on the petition. He thought adding the language from § 707(b)(4)(D) would reinforce the notion (new under the 2005 Act) that in signing the petition the attorney was representing that he or she "has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect."

Judge Wedoff agreed that a "Miranda type" warning in the Chapter 7 version of the petition would probably benefit attorneys and remind them of their obligations under the statute. He noted, however, that § 704(b)(4)(D) only applies in chapter 7 consumer cases, and he wondered whether the Committee should consider expanding the reach of the warning to all petitions. A majority of members agreed in concept with a warning of some sort on the petition, but thought it should be limited to chapter 7 consumer cases. And Mr. Brunstad suggested that the problem of creating a special petition form for use only in chapter 7 consumer cases could be avoided by using the underlined language at the top of page 94 of the materials, but changing the first clause from ~~In a chapter 7 case~~ to "In a case in which § 707(b)(4)(D) applies, …".

The Chairman asked whether the rule could or should be amended to parrot the language in § 704(b)(4)(C) and (D) and § 319 of the 2005 Act. Mr. Lamberth, said he thought that Rule 9011(a) *already* implements § 707(b)(4)(C), although with slightly different wording. He noted that the subcommittee recommended *against* expanding Rule 9011 to cover papers submitted to the trustee because it would dramatically expand the scope of the rule and could create situations that might actually delay delivery of documents requested by the trustee while the debtor's counsel undertook steps to verify the information in the requested documents. Instead, he recommended that if a change was made to Rule 9011 that it be limited to papers submitted to the court, similar to Alternative A of the Reporter's memo (at pages 85-86 of the Agenda book).

On behalf of the EOUST, Mr. White agreed with member comments that putting a notice in the petition would likely help educate the bar and would generally improve the accuracy of the schedules. He disagreed with the subcommittee's limited suggested change to the rule, however and instead supported expanding any change to include papers submitted to the trustee, as suggested by the § 319 sense of Congress, and also expanding the reach of any change to all attorneys, not just consumer debtor attorneys in chapter 7. In response, a number of committee members reiterated concerns that attorney fees in "Enron style cases" would skyrocket and case progress could grind to a halt if every paper submitted to the trustee in a case was "submitted only after … debtors' attorneys … made reasonable inquiry to verify …" the information in the papers.

Judge Klein identified a new issue of sanctions he thought the Committee should consider before recommending any change to Rule 9011. He noted that §704(b)(4)(A) and (B), which are new in the 2005 Act, give the bankruptcy judge the ability to shift fees "on its own initiative" if it finds a violation of §707(b) or Rule 9011. Because Rule 9011 currently requires that motion requesting sanctions be filed before fees can be awarded, Judge Klein wondered whether there could be any change to the rule without incorporating all of the language in § 707(b)(4), as opposed to just that set out in § 707(b)(4)(C) and/or (D).

After additional discussion, the Committee considered the following motions:

- Should the attorney certification on the petition be modified to include § 707(b)(4)(D) language "in any case where § 707(b)(4)(D) applies"? **The motion carried without opposition.**
- Should the Consumer Subcommittee be directed to draft a change to Rule 9011 to apply the § 707(b)(4)(D) language in all consumer cases? **Six members voted for the motion and six voted against the motion.**

- Should any change to the rule be limited to incorporating language from § 707 (as opposed to § 319)? **Eight members voted in favor of limiting any change in the rule to incorporating language from § 707.**
- Should the Consumer Subcommittee be directed to draft a change in the rule to incorporate the statutory language "in a case where § 707(b)(4)(D) applies?" **Seven members voted in favor, four against.**
- Judge Schell moved that the Committee consider incorporating § 707(b)(4)(C) language in Rule 9011 as well. Mr. Brunstad said that the issue should be returned to the subcommittee to consider along with the sanctions issue identified by Judge Klein. **The Committee voted against incorporating § 707(b)(4)(C) language in the rule at this time.**

In light of the alternative votes, the Chairman asked the subcommittee to draft an amendment to Rule 9011 incorporating the statutory language "in a case where § 707(b)(4)(D) applies;" to consider whether the change should be made applicable to all consumer cases regardless of chapter; to consider incorporating § 707(b)(4)(C) language in the rule; and to consider the applicability of the court's sanctioning power under § 707(b)(4)(A) and (B) in light of the various proposed changes to Rule 9011.

Agenda Item 3B; Judge Mannes's Corporate Representation Proposal

The Reporter summarized the Subcommittee on Attorney Conduct's review of a renewed request from Judge Paul Mannes to allow non-lawyer representation of corporations in matters involving less that $5,000. In his proposal, Judge Mannes noted that many states now allow such representation in small claims courts. He suggested a rule change that would allow the court to authorize non-attorney corporate appearance in small matters if such representation would be permitted under state law.

The subcommittee was spilt in its recommendation and ultimately recommended that no action be taken. No subcommittee member was in favor of changing the national rules; however two members were in favor of suggesting to Judge Mannes that a local rule might be adopted. And one subcommittee member voted against recommending either a national or local rule on the basis that actual practice may already reflect Judge Mannes's proposal. **After discussion, the Committee agreed with the subcommittee that no action should be taken.**

Agenda Item 4A; Chapter 15 Rules

The Reporter provided an overview of the work by the Subcommittee on Technology and Cross Border Insolvency regarding several new rules recommended by Judge Samuel Bufford for use in chapter 15 cases. He stated that after deliberation, the subcommittee suggested three new chapter 15 specific rules for the Committee's consideration: (i) a new Rule 15001 that would require the debtor to identify its center of main interests on the petition, and that would establish a procedure for challenging the debtor characterization; (ii) a new Rule 15002 that would make all Part 7 rules of the Federal Rules of Bankruptcy Procedure applicable in chapter 15 cases; and (iii) a new Rule 15003 that would govern the establishment of protocols concerning coordination of the case with an ancillary of cross-border case. The Reporter said

that the subcommittee recommended adoption of the new Rules 15001 and 15003, but that it was split over the need for proposed Rule 15002.

After discussion, the Committee decided that proposed Rule 15002 was unnecessary because Rule 7001 already sets out the scope of the Part 7 rules, and nothing in Rule 7001 suggests that the Part 7 rules would not apply in a chapter 15 case.

With respect to proposed Rule 15003, Mr. Brunstad thought that 10 days notice of a hearing on a protocols motion was too short. Judge Klein agreed that 10 days notice was too short and suggested 20 days instead. He also suggested putting the proposed 15003 language in place of the existing language in Interim Rule 5012. Judge Overstreet suggested extending notice to parties who had made filings in the case requesting special notice, and Judge Klein suggested changing the title of the new Rule 5012.

In light of Judge Klein's suggestion that proposed 15003 be redesignated as Rule 5012 (to replace existing Interim Rule 5012 as the national rule in 2008), the Committee asked the Reporter to redesignate proposed Rule 15001 as a new proposed rule within the current rules numbering scheme.

The Reporter said the subcommittee also reviewed chapter 15 related comments to existing rules (as modified by the Interim Rules) received from the Commercial Law League of America ("CLLA") (comments at tab 18 of the materials), and from Daniel Glosband, the principal drafter of the model law that became chapter 15 (Mr. Glosband's comments are described in the Reporter memo at tab 4A).

The CLLA suggested changes to existing interim rules so that language would more closely track the terms used in chapter 15. The Reporter said that the CLLA suggestions were stylistic and would be considered at the March meeting along with other comments on the published rules.

Mr. Glosband suggested a change to Rule 1010 to prevent gamesmanship by eliminating any differences in service based on whether the petition designated the proceeding as a "foreign main" or a "foreign nonmain" proceeding. The Reporter recommended Mr. Glosband's suggested change.

And Mr. McCabe suggested a technical change to Rule 9001 to add 11 U.S.C. § 1502 to the list of definitional sections in that rule that govern the meaning of statutorily defined words and phrases when the same phrases are used in the rules.

The Committee approved all subcommittee suggested changes to the "chapter 15 rules" as modified by the member suggestions at the meeting. The Reporter compiled and distributed the changes in a handout the next day and the Committee approved proposed new Rules 1004.2 (in place of proposed Rule 15001 in the agenda materials), Rule 5012 (in place of proposed Rule 15003 and Interim Rule 5012), and also approved changes to Rules 5009, 1010, 9001 and 2002. The Chairman referred all changes to the Style Subcommittee for final revisions.

Agenda Item 4B; Smart Forms

The Chairman provided the Committee with an overview of the efforts by the AO and the EOUST to implement a voluntary standard for data-enabled forms, also known as "smart forms." He explained that smart forms, a subset of "fillable forms," use a programming code to "tag" and store the data entered in the form in a manner that makes the tagged information easily retrievable.

The Chairman said that the EOUST and the AO had held several meetings with forms vendors seeking voluntary adoption of a smart forms standard to facilitate the capture of certain statistical data required under BAPCPA. So far, however, only one of the software vendors appeared able or willing to implement smart forms unless such forms were mandatory. He said that because of the lack of vendor interest in a voluntary standard, the EOUST had recently approached him and staff at the AO and requested that the Committee consider amending the rules to *require* the use of smart forms.

The Chairman said that he, the Reporter, and AO staff discussed the EOUST's request and concluded that it was probably not necessary to propose a new rule requiring the use of smart forms because Rule 5005 (as amended effective December 1, 2006) allows courts to *require* that documents filed electronically conform to technical standards established by the Judicial Conference. They also thought that the EOUST's request raised policy issues and should be considered by the Bankruptcy Committee, the Information Technology Committee, and the Court Administration Case Management Committee instead of the Rules Committee.

The Chairman said the EOUST was actively pursuing a smart forms agenda item with the appropriate committees, but was attempting to "fast track" its efforts as much as possible, and that it was seeking this Committee's endorsement of its effort to change the technical standard.

Mr. White, acting director of EOUST, distributed a letter he recently sent to James Duff, the Director of the Administrative Office, regarding the need for smart forms. He said that the technical standards were set, but that he did not think vendors would implement smart forms unless they were mandatory. He said that the EOUST needs smart forms to facilitate new statutory duties including: automatic sorting of cases above and below state income medians; establishing asset and liability norms – and deviations from such norms – so that debtor audits can be done; and to facilitate studies on such things as household goods valuations and identification of domestic support orders.

Mr. White said that earlier in the week he had spoken with Mr. McCabe and received a commitment from the AO to put this matter before the Bankruptcy Administration Committee and the IT Committee with the purpose of getting the issue in front of the Judicial Conference as soon as possible. He said that although he did not believe there was significant opposition to smart forms, he thought some sort of endorsement from this Committee would facilitate their adoption. He asked that the Committee either endorse the letter he had just sent to the Director, authorize the Chairman to endorse the letter, or possibly send its own letter to the Director recommending smart forms.

Mr. McCabe said from the AO's perspective, adoption of smart forms was more of a long-term solution to its statutory data-gathering obligations, and that it had already made changes to CM/ECF to address its current obligations under BAPCPA. He reported that the AO was working with the EOUST, and was trying to get the smart forms agenda item in front of the appropriate committees as soon as possible. Although Mr. McCabe thought there were still some problems with the current technical standards, he did not think there was significant opposition to the concept of smart forms.

Judge Walker suggested that the Committee make a "Sense of Committee" motion that smart forms should be mandatory. And Mr. Waldron suggested that the Committee should also consider whether smart forms would be mandatory just for vendors, or for all parties. **After additional discussion, the Committee unanimously passed a motion establishing that it was the Sense of the Committee that the Committee and others take all necessary steps to advance the cause of data enabled forms in conjunction with the efforts of the AO and the Bankruptcy Administrator Committee.**

Agenda Item 5A; Separate Document Rule

The Chairman said that the Subcommittee on Privacy, Public Access, and Appeals had met be teleconference to discuss whether to recommend amending the bankruptcy rules that require a separate document for every judgment in a contested matter or adversary proceeding. He said that subcommittee recommended that the separate document rule continue to be applied in adversary proceedings, but that it was split on whether it should be applied in contested matters.

Committee members expressed strong opinions on both sides of the issue. Judges Klein and Walker thought that entry of a separate document for the judgment (distinct from the opinion) clarifies when a judgment takes effect and when time for an appeal begins to run. Mr. Waldron said that from the clerk's perspective, a separate document was very helpful because it eliminated guesswork by deputy clerks who might otherwise have to review orders and decisions in detail to determine whether a judgment had been made.

Judge Wedoff, and Mr. Brunstad argued against a separate document rule in contested matters. Judge Wedoff pointed out that unlike district court, there are many instances in contested matters where a separate document doesn't make sense, and there are lots of courts that do not enforce the requirement in some contested matters, such as a lift stay that is settled through a consent order. He said that in such courts the separate document rule merely creates a trap for the unwary. Mr. Brunstad added that even in district court practice, Rule 58 carves out a number of situations where a separate document is not required. And although it might be possible to carve out similar "bankruptcy specific" contested matters that don't require a separate document, Mr. Brunstad thought the better approach would be eliminate the requirement in contested matters altogether.

There were several comments about how the separate document requirement currently in Rule 9021 is being interpreted. One member believed that a strict reading of Rule 9021 requires

the judge to essentially sign two pieces of paper (the decision, and then the judgment) before an appeal could be taken. Even if such a reading were inaccurate, the member thought it would create unnecessary litigation. Other members (who supported the separate document rule) thought the "separate document" requirement in Rule 9021could be satisfied with a minute entry from the bench which could be docketed separately from the decision, or that the clerk's entry itself could satisfy the requirement.

After additional discussion, the Committee voted to eliminate the separate document rule in contested matters by a vote of 7-6.

The Committee then discussed how to amend Rule 9021 to eliminate the requirement for a separate document in contest matters, while leaving it in effect for adversary proceedings. **After discussion, the Committee voted 6-2 in favor of creating a new Rule 7058 that would make Rule 58 applicable in adversary proceedings. The Committee then voted, without dissent, in favor of: (i) amending Rule 9021 to say "A judgment or order is effective when entered under Rule 5003", and (ii) amending Rule 7052 to clarify that the reference in Civil Rule 52 to Civil Rule 58 should be construed in bankruptcy cases as a reference to Rule 5003.**

The Reporter provided a draft of new Rule 7058 and the changes to Rules 7052 and 9021 in a handout the next day. After reviewing drafts, the Committee approved the changes and directed that they be submitted to the Style Subcommittee.

Agenda Item 5B; Disclosure Statements and Modified Plans Under Rule 3019

Tabled.

Agenda Item 6; Report of the Forms Subcommittee

The Reporter said that the Forms Subcommittee had met by teleconference to consider possible amendments to Official Forms 10, 19A and 19B, and to consider whether to recommend that Director's Form 240 be revised and promulgated as an official form.

Form 240. Judge Walker reviewed suggested changes to Form 240 described at Agenda Item 6. He noted that the form was completely rewritten in 2005 to incorporate changes required by BAPCPA and that there had been several modifications to the form over the past year. He said that the AO was now asking the Committee to review and comment on a reorganization of the boxes on page one of the form, and changes to the attached order.

Judge Walker said the Forms Subcommittee approved all the described changes to Form 240, but that it did not recommend making the form an official form at this time because it would be harder to modify in the future. Judge Wedoff thought making the form an official form would be a good idea. **After additional discussion the Committee approved all the changes set forth at Agenda Item 6, and decided to table the issue of whether the form should be an official form until the fall meeting of 2007.**

Form 10. The Reporter described an issue in Form 10 with respect to the hanging paragraph at § 1325(a)(9) of the Bankruptcy Code. He said that there was a concern by some creditors that if they correctly described that value of their collateral as being less than the amount of their claim (as required by the form) that they might waive the right to "hanging paragraph" treatment of the claim as fully secured when the claim was based on purchase money security interest created in a motor vehicle within 910 days of the petition date.

Some subcommittee members suggested that a box could be put on Form 10 that would allow the creditor to identify its claim as a "910 claim." But the majority of the subcommittee thought such a box would likely be confusing and that the information was not really useful. **After discussion, the Committee agreed with the subcommittee and voted against making any change to Form 10 with respect to the 910 claim issue.**

Forms 19A and 19B. The Reporter said § 110(b) of the Bankruptcy Code requires bankruptcy petition preparers to sign the documents prepared for filing in bankruptcy cases and to list their name and address on the document as well. He said that Form 19A was designed to meet that statutory requirement. However § 110(b)(2) places additional requirements on bankruptcy petition preparers including the requirement that "before preparing any document for filing …, the bankruptcy petition preparer shall provide to the debtor a written notice …". Official Form 19B was designed to address the § 110(b)(2) requirement. Because all of the information in Official Form 19A is also in Official From 19B, and because 19B must be filed along with any document petition preparer prepares for filing in the case, the AO has been asked whether Form 19A could be abrogated and Form 19B be redesignated as Form 19. **A motion to combine both forms into a redesignated Form 19 (as described in the agenda materials) carried without opposition.**

Agenda Item 7; Review of Possible Change to Interim Rule 1007(c)

Judge Klein provided an overview of a problem with Interim Rule 1007. He said that some debtors fail to file the required statement concerning completion of a personal financial management course before the Rule 1007(c) deadline and the case is closed without a discharge. The debtor then attempts to reopen and the court is required to find cause to allow reopening. The Reporter suggested a change to 1007(c) that would allow the debtor to reopen the case without a showing of cause.

Some members thought getting rid of the deadline would be a better idea. But Judge Klein said that one reason to maintain the deadline is so the clerk has a date certain to close the case. The Chairman moved to table the matter until the spring meeting so that the consumer subcommittee could draft a fix. **The motion to table carried without opposition**.

Agenda Item 8; Review of Time Computation Template

Judge Klein reported on the efforts of the Time-Computation Subcommittee to establish a uniform method of counting time throughout all federal rules. He said a template has already been created (proposed Civil Rule 6 at page 232 of the agenda materials), and that the Committee has been asked to review the template and determine its applicability to the bankruptcy rules. Mr. Kohn suggested that there would be a need to ensure that the proposed

changes did not override a prescribed statutory period. And there was an extensive discussion among Committee members about whether the proposed changes adequately addressed many of counting problems that occur in bankruptcy cases. The Reporter suggested that a committee note to a bankruptcy version of proposed Civil Rule 6 could address certain counting problems by adding examples.

After additional discussion, the Chairman said he would divide up the list of deadlines complied by the Reporter among several committee members and ask for reports at the spring meeting.

Information and Discussion Matters

Agenda Item 9; Civil Rules Restyling Project.

The Chairman said that only a few bankruptcy rules would be impacted by the civil rules restyling project. He said that he and the Reporter would address changes and would report back to the Committee at the spring meeting.

Agenda Item 10; Oral Report on Joint Subcommittee on Venue and Chapter 11 Matters.

The Chairman and John Shaffer provided an oral report of the joint subcommittee's work.

Agenda Item 11 – Judge Walker Letter Regarding Future Format of Forms

The Chairman said Judge Walker's letter was a long range look at how information currently collected through forms could be collected and utilized more efficiently. Judge Walker added that one problem with the form format in the electronic era is fitting information into a particular box. He thought that developing an input system that allowed the filer to enter the information once so that the court or a program could produce forms as needed would be much less cumbersome.

Mr. McCabe suggested creating a working group that would develop a prototype to illustrate the concept, and then bring in vendors to develop how it could be implemented. In his view, a change in the way forms information was collected raised issues beyond the scope of the rules process and he thought that the working group should include members from outside the rules committees. And Mr. Shaffer said the project would likely require as much thought about how information comes out of the system as to how it gets into the system.

Agenda Item 12; Rules Tracking Docket.

The Chairman asked to Committee to review the rules tracking docket for any needed changes.

Agenda Item 13; Oral Report on Electronic Submission of Agenda Materials.

The Chairman told the Committee that there would likely be a shift in the future toward distributing agenda materials in electronic from only.

Agenda Item 14; Report on "fillable PDF" Forms on the U.S. Courts Website.

The Chairman said that this item was addressed in the context of the EOUST's report on smart forms.

Agenda item 15; Report on Pending Legislation to Increase Chapter 7 Filing Fees.

Mr. Wannamaker reported on proposed changes to filing fees that are currently being considered in Congress. If implemented, the changes would require some changes to Form 3B (the existing in forma pauperis form) and possibly to some Director's Forms.

Agenda Item 16; Report on Director's Forms 104 and 281.

Mr. Wannamaker reported on recent changes to Director's Forms 104 and 281. He explained that the change to Form 104, the adversary proceeding coversheet, was timed to coincide with the implementation of CM/ECF 3.1. He said that the primary change was to increase and regroup the nature of suit codes to correspond with the subdivisions of Rule 7001. The changes to Form 281, Appearance of Child Support Creditor, dealt with privacy matters. **All members voted in favor the changes.**

Agenda Item 17; Comment by Judge Geraldine Mund.

The Chairman reviewed Judge Mund's comment that the rules currently do not provide for any restriction on payment to a bankruptcy petition preparer in situations where the debtor subsequently seeks a waiver of the filing fee. The effect of granting the waiver would be that the petition preparer would be paid, but the chapter 7 trustee would not. Judge Mund doubted that Congress intended such a result. There was a split of opinion on the Committee as to whether a change was needed. **The Chairman referred the matter to the Consumer Subcommittee.**

Agenda Item 18; Commercial Law League Position Paper on Chapter 15.

The Reporter indicated that the suggested stylistic changes were in the nature of comments and would be considered along with any other comments to the affected rules.

Agenda Item 19; Request from CM/ECF Working Group to Review Rules 8006 and 8007 Concerning Transmission of the Record on Appeal.

The Chairman referred the matter to the Appeals Subcommittee.

Agenda Item 20; Next Meeting Reminder

The Spring Meeting will be March 29 and 30, 2007 in Marco Island, Florida. The Chairman asked members to e-mail suggested locations for the Fall 2007 meeting. He said the current dates under consideration were September 6 and 7, 10 and 11, or 12 and 13.

Supplemental Agenda Item A; ABA Attorney Discipline Proposal.

The Chairman reviewed an ABA proposal to amend the rules to clarify the authority of the bankruptcy courts to discipline attorneys. He said he was not sure the proposal was really a rules issue, and suggested referring it to the Attorney Conduct Subcommittee.

Mr. Brunstad provided background for the proposal stating that he thought the ABA was attempting to head-off a legislative response. Mr. Rabiej said that the Judicial Conference first addressed this issue about 25 years ago and came up with model local rules. He said that Standing Committee also attempted to address the issue about 15 years ago but that it turned into a quagmire because so many players were involved.

Several members were in favor of the Chairman's suggestion that the matter should considered by a subcommittee. And Mr. Walton said that a representative of the EOUST should participate in any subcommittee meetings on the matter. **After additional discussion, the Chairman referred the matter to the Attorney Conduct Subcommittee and requested a report in the spring.**

Supplemental Agenda Item B; Possible Rule 4004 Amendment

Judge Wedoff described a need to amend Rule 4004. He said that § 1328(f) provides a limitation on a chapter 13 discharges that did not exist before, which raises several issues. For example, does the 2 or 4 year limitation period begin on the filing date of the prior case, or on the date of the prior discharge? And how will the change be enforced?

In anticipation of this agenda item, Mr. Waldron surveyed the court clerks and found that most courts will deny a discharge in a chapter 7 case (which has historically had time-related discharge limitations) only if someone initiates an objection to discharge complaint. He said that many courts, however, will close the case without a discharge if no complaint is filed.

Judge Wedoff suggested revising Rule 4004 to require an objection to deny the discharge in chapter 13, as most courts already require in chapter 7. Mr. Brunstad suggested sending the matter to a subcommittee. Judge Overstreet agreed the issue should be considered by a subcommittee, and she suggested that the complaint procedure is too cumbersome to deal with this matter, and that a motion procedure might be better. **The Chairman referred the matter to the Consumer Subcommittee.**

Supplemental C; Proposed Revision to Form 8

The Reporter reviewed a suggestion from Bankruptcy Judge Elizabeth L. Perris to revise Form 8, Debtor's Statement of Intention, to clarify that debtors must indicate both whether the property is claimed as exempt, and whether the debtor intends to surrender, reaffirm, or redeem the property. **The Chairman referred the matter to the Consumer Subcommittee.**

Supplemental D; Recommendation to Adopt Rule Expanding Methods to Invest Estate Funds

The Reporter reviewed a suggestion from the law firm of Baker & Hostetler that the rules be amended to allow for the investment of estate funds in certain approved accounts without the need to post a bond. Providing background, the Reporter said that 11 U.S.C. §345 generally requires the trustee or DIP to seek a court order to invest estate funds in a non-FDIC insured account without posting a bond or collateral for the investment. Baker & Hostetler suggested a rule that would provide investment safe harbors that the trustee could use without providing a bond or collateral. The Reporter identified at least two problems with the proposal: first, it was unclear whether a rule could be drafted that does not conflict with the statutory language in § 345; second, because the issue seemed to address policy, he thought it might more appropriately be considered by the Bankruptcy Administration Committee.

Mr. Walton advocated giving the matter to a subcommittee to determine whether an appropriate rule could be drafted. But Judge Wedoff questioned whether any rule could be drafted that would comply with § 345. Both Judge Wedoff and Judge Overstreet thought that it might make more sense for the EOUST to create a proposed general order that could be adopted by courts locally.

Judge Hartz indicated that the standing committee is currently looking at the limits of a standing order vs. a local rule. Mr. Shaffer thought that this was not rules issue. And Mr. Brunstad thought it should be considered by a subcommittee.

The Chairman referred the matter to the Business Subcommittee and indicated that he would send a copy to the chair of the Bankruptcy Administration Committee, Circuit Judge Marjorie O. Rendell. Judge Overstreet said she would present the matter to Judge Rendell.

Potential Changes to Schedules I and J and the IFP Waiver Form.

Mr. Wannamaker said he thought there would be a need to make certain technical changes to schedules I and J and the IFP notice with respect to net income. He said he would prepare something for review by the Forms Subcommittee.

Administrative Matters

The Chairman informed the Committee that a hearing on the rules published for comment in August, 2006 is tentatively scheduled for January 22, 2007. He requested that members keep their calendars clear in case hearings were held.

Judge Walker moved that the meeting be adjourned. Judge Wedoff seconded the motion. The Chairman commented that this would be Judge Walker's last meeting, as his second term on the Committee was expiring. And he thanked Judge Walker for his service. He then asked that the minutes reflect that for the first time in six years, Judge Walker made a motion that was seconded by Judge Wedoff. The meeting was adjourned.

Respectfully submitted,

Stephen “Scott” Myers