ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26 - 27, 1998

Winrock International Conference Center

near Morrilton, Arkansas

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

Professor Charles J. Tabb

Professor Kenneth N. Klee

Henry J. Sommer, Esquire

Gerald K. Smith, Esquire

R. Neal Batson, Esquire

J. Christopher Kohn, Esquire, United States

Department of Justice

Professor Alan N. Resnick, Reporter

Circuit Judge A. Wallace Tashima, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), Bankruptcy Judge Paul Mannes, former chairman of the Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), also 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 on behalf of that committee.

The following additional persons attended the meeting: Joel Pelofsky, United States Trustee in Kansas City, Missouri, who represented Joseph G. Patchan, Director of the Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; 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 Judge Tashima, Mr. Pelofsky, and the guests, and welcomed them to the meeting.

The Committee approved the draft minutes of the September 1997 meeting.

The Chairman reported on the January 1998 meeting of the Standing Committee. The Committee had no action items before the Standing Committee at the meeting. There were several topics discussed, however, on which the Standing Committee requested feedback from the Advisory Committees. One of these was whether there should be federal rules on attorney conduct which, the Chairman noted, was on the Committee's agenda for discussion later in the meeting.

Another topic was whether there should be a uniform date of December 1 on which local rules and amendments to local rules would take effect. The Reporter noted that local rules now take effect throughout the year, and an attorney can easily make the mistake of relying on a local rule that was changed a week or month earlier. The advantage of a uniform effective date, its proponents at the Standing Committee argued, is that practitioners would know they could rely on a rule for 12 months. Judge Mannes commented that a uniform date of December 1 sounded like a good idea, because it would mean that the local rules published in the various bankruptcy reference works would be the current ones. Mr. Kohn said he thought there should be provision for emergencies. The consensus was that random timing of local rules amendments is not a very significant problem, but that mandating a uniform effective date would be acceptable if there were provision for emergencies. The Committee noted that in bankruptcy there is the further problem of conforming to an ever-changing statute. Courts may need to prescribe interim rules to govern until conforming amendments to the national rules take effect about three years after statutory amendments are enacted.

The suggestion also was made at the Standing Committee meeting, the Reporter said, that the current procedure whereby local rules must be sent to the circuit council but take effect without any action by those entities should be reversed. In other words, the suggestion was, a local rule should not become effective until the circuit council had reviewed and approved it. The Reporter noted that implementing this suggestion would require amending 28 U.S.C. § 2071. The consensus was that any review and approval responsibility would require more resources than currently available, and that circuit councils likely would review proposed local rules in the same manner as they review rules under the current review procedure. Judge Gettleman said such a review seems unnecessary when local attorneys participate in the drafting and many people review local rules before a district court prescribes them. The consensus of the Committee was that this proposal is not a good one.

A third topic is whether the rules committees should accept comments on published drafts sent by electronic mail ("e-mail"). The proposal, said the Reporter, is for a two-year experiment. E-mailed comments would receive only truncated response and would not have to be summarized by the reporters.

Mr. McCabe noted that Judicial Conference procedures currently require that every written comment be acknowledged and that the author later receive a second letter describing what action was taken on that comment. Judge Kressel said the problem seems to be that the full-blown response may not be warranted for every comment, regardless of how it is transmitted. Professor Resnick said he did not want to become a censor of the comments, but would prefer that all comments be forwarded to the entire Committee. Some members said the Committee should see every comment, but not afford a full work-up to each one. Judge Robreno said the Committee should consider whether it really wants comments or not; he said he believed comments should come from as broad a group as possible. Judge Cordova said it would be best to see whether e-mailed comments actually become burdensome and, if they do, deal with the problem then. The consensus of the Committee was to try e-mail for a period, but treat e-mailed comments the same way written comments are treated now.

Lastly, the Reporter said, the rules committees had received letters from District Judge Terrell Hodges, chairman of the Executive Committee of the Judicial Conference, asking the committees to consider whether the rules process could be shortened, in order to expedite the process of amending rules. The consensus was that there should be an effort to speed up the process.

Judge Robreno reported on the recent meeting and activities of the Advisory Committee on Civil Rules ("Civil Rules Committee"). He noted that the Civil Rules Committee is proposing to revamp the discovery rules to restrict the scope of discovery in various ways, for example by limiting a deposition to one day or seven hours with court permission needed for going beyond that time. Proposed amendments to the discovery rules will be presented to the June 1998 meeting of the Standing Committee with a request that they be published for comment, he said. Judge Robreno also reported that the opt-out under the Civil Justice Reform Act would be ended, so that mandatory disclosure and a pre-discovery meeting of the parties would be required in every district. In addition, he said, the Chief Justice has appointed a group to work under the auspices of the Civil Rules Committee on problems in mass tort litigation. The group involves members of the Bankruptcy Committee and the Committee on Court Administration and Case Management and is to complete its work in one year.

Judge Kressel asked whether the bankruptcy rules should continue to permit opt-out, given the impending change in the civil rules. The Reporter said "the litigation package," to be considered later in the meeting, would not make mandatory disclosures applicable in administrative motion matters, but that the amendment to the civil discovery rules would apply to adversary proceedings. Mr. McCabe said the Civil Rules Committee is working on a way to exempt simple cases, possibly by proposing an amendment to Rule 16. The overall plan for the civil and bankruptcy rules amendments would involve two litigation amendment packages moving together. Neither committee, however, has yet seen the other's work. It would be a mistake, he said, to publish inconsistent packages, and, therefore, each group needs to review the other's proposals. His preliminary review, he said, indicates that there is no inconsistency between the civil and bankruptcy proposals.

Action Items

Review of Comments to Preliminary Draft Amendments Published August 1997

The Reporter introduced the discussion and noted that the Committee had received 18 comment letters, 14 included in the agenda book and four received late and distributed with a separate memorandum. He also said that in reviewing the proposed amendments, he had discovered a need for a technical, conforming amendment to Rule 9006 that was not part of the published package. The published amendments would delete as unnecessary subdivision (b)(3) of Rule 1017, but Rule 9006 contains a reference to that subdivision. Accordingly, the Reporter recommended that Rule 9006 also be amended to delete the reference. **The Committee approved this recommendation.**

Professor Resnick also explained that the styling process with the Standing Committee had resulted in style differences between Rule 1017(e) as published with the draft amendments and Rule 1017(e) as it is proposed as part of "the litigation package." The Reporter said he planned to use the most recent version in both groups of amendments, avoiding changes to substantive amendments, however.

Most of the comments were directed to the amendments to the Rule 7062 package. Those who opposed the amendments did so on the ground that the amendments will slow down a case. The bankruptcy judges in California and Oregon, in particular, do not want a stay applied to an order lifting the automatic stay. One commentator suggested that a stay should apply only if a matter were really contested, and the Bankruptcy Law Section of the New Jersey State Bar suggested a three-day stay, rather than a ten-day stay. Professor Klee said an agreed order should not need a stay, and that since relief from stay seemed to have drawn the most objections, perhaps a three-day stay could be applied there. Judge Kressel, who chaired the subcommittee that developed the amendments, said the subcommittee had addressed all the matters raised in the comments and had rejected similar suggestions. It is sometimes difficult to know , after the fact, whether a matter was contested, he said. Moreover, people need to be able to ascertain later whether there was a stay in effect, he said. **The consensus was to leave the published draft unchanged.**

The comments were generally favorable on the proposed amendment to Rule 2002(a)(4) to delete the requirement to send notice to all creditors of a hearing on a motion to dismiss a case for failure by the debtor to file schedules and statements, although one writer did not appear to realize that creditors would receive notice if the case actually were dismissed. A member of the Committee, however, noted that Rule 2002(f), which provides for the later notice, does not have a time limit for sending the notice and does not include all entities that may have entered an appearance or filed a request for notice of everything filed. **The consensus, however, was to leave the published draft unchanged.**

The proposed amendments to Rules 4004 and 4007 would make it clear that the deadlines for filing a complaint objecting to discharge or to determine the dischargeability of a debt run from the first date scheduled for the meeting of creditors and not from the date the meeting actually was held, and that a motion to extend the deadline must be filed before the deadline expires. One commentator noted that the amendment also should afford guidance concerning what happens when a court does not rule on a timely filed motion until after the 60-day deadline expires. There is a split of authority on whether the motion becomes moot or the deadline is tolled. **The consensus was that this point should be addressed**, but not in the current proposed amendment, because the proposal had not been published. A member asked if there were a reason why Rule 4004(a) provides for 25 days notice of the deadline in a chapter 11 case and in Rule 4007(d) for 30 days notice in a chapter 13 case. The Reporter said that he was unaware of any reason and that conforming the notice periods also should be addressed at a future meeting.

The proposed amendments to Rule 1019(6) provide that the holder of an administrative expense claim incurred before a case is converted to chapter 7 must file a request for payment under § 503(a) of the Code, rather than a proof of claim. The Reporter noted that the comments on this amendment said that having to file a motion is a burden. In light of the comments, he asked whether the Committee wanted to consider adding to "a request for payment" the phrase "or a written statement requesting payment of an administrative expense." Judge Kressel said there is no requirement for an order to pay an administrative expense; most administrative expense claimants simply send bills that are paid. Professor Resnick responded that there appears to be a common perception that an order is required. Mr. Heltzel suggested permitting administrative expense claimants to use a proof of claim, a suggestion previously considered and rejected by the Committee, or drafting a new form to avoid the motion issue. Mr. Sommer said there is no requirement to file a motion, and the Committee should leave the proposed amendments as they are. He added that an administrative expense has no prima facie validity, like a proof of claim does, and the court may have to determine whether the expense was for the benefit of the estate. A member suggested that the Committee Note include a statement that the rule does not dictate the form of request. Professor Klee said the 90-day filing period prescribed by the rule should be changed to "a date fixed by the court," because in a chapter 11 case the 90-day period prescribed for cases under chapters 7, 12, and 13 does not apply. In order to accommodate the longer filing period afforded to a governmental unit under § 502(b)(9) of the Code, the suggestion was made to change the sentence that addresses claims of governmental units to "within the later of the time fixed by the court or 180 days." **The proposed amendment, as changed so that the court would fix the time, was approved without objection.** The Reporter inquired whether the Committee thought the proposed amendments could go forward without republication. Professor Resnick said he believed they could. The Chairman requested that the Committee Note also be edited to reflect the discussion.

On the second day of the meeting, the Reporter distributed a revised draft that reflected the changes approved by the Committee. In addition, the Reporter asked whether the Committee would want to withdraw the proposed conforming amendment to Rule 9006(c) that would deprive the court of discretion to shorten the filing period. **The consensus was to withdraw the proposed amendment to Rule 9006 and to delete from the Committee Note the reference to that rule.**

The Reporter said that the proposed amendments to Rule 7001(7) had drawn little comment until after the official comment period had expired, but that the Department of Justice and the Securities and Exchange Commission had sent comments which had arrived recently.

Both agencies opposed the proposed amendments as affording opportunities for a plan proponent to obscure the presence of injunctive provisions, sidestep the procedural safeguards otherwise required to obtain injunctive relief, and thereby prejudice one or more parties in the case. Professor Klee said the proposed amendment would not shift the burden to the party against whom any injunctive provision would operate, in terms of the law, although in practice that might be so. He said that in partnership cases, injunctive provisions against non-contributing partners are necessary for the plan to work. Mr. Kohn said steamrolling does happen and that appeal of an order confirming a plan is often impractical for a private creditor, because of the requirement to post a bond. Professor Resnick noted that § 524(g) of the Code, which was enacted as part of the 1994 amendments, ratifies pre-existing channeling injunctions in asbestos cases. Mr. Tenenbaum said that without the procedural safeguards of an adversary proceeding, a plan proponent could bury a moratorium on environmental enforcement or similar provision in a plan, and Mr. Kohn noted that sometimes the person affected is not a creditor, but some third party. Mr. Batson said that sometimes an adversary proceeding is not practical. An example, he said, was the Dalkon Shield case in which there were 250,000 claimants against whom the channeling injunction was to operate.

The Reporter suggested that language could be added to the amendment to the effect that an adversary proceeding is required unless the plan provides "in conspicuous language" for one or more injunctive provisions. A member suggested tracking the language of Civil Rule 65(d) and adding language similar to "and the plan and order confirming the plan are in the form required by Rule 65(d)," but leaving out the part of Rule 65(d) that limits the injunctive effect to the parties to the action. Judge Robreno said he doubted the proposal really would prevent what he called the "drive-by injunction." Mr. Smith said every plan leads to an injunction today, binds everyone, and that it may be difficult to separate what is injunctive in a plan and what is not. Moreover, he said, § 524 says a discharge is an injunction. Professor Klee said the current rule is out of step with what occurs today. **A motion to adopt the amendments to Rule 7001 with the addition of a provision that, if the order confirming the plan includes an injunction it must be in the form required by Rule 65(d), carried.**

On the second day of the meeting, the Reporter distributed a revised draft that added, starting on line 26, "and the order confirming the plan is in the form required by Rule 65, F.R.Civ.P," with an explanatory sentence also added to the Committee Note. Mr. Sommer said the proposed change was not an improvement, because it is often hard to ascertain what is injunctive. Judge Kressel also opposed the change on the ground that it leaves very unclear what is required or prohibited in a plan. Professor Klee suggested returning to the published draft, with its carve-out for a plan, and making only a stylistic change in line 2 to substitute another word for "Any." The Chairman suggested that the sentence should read: "The following are adversary proceedings:." **A motion to reinstate the published draft of Rule 7001 with the style change suggested carried with no objection.** Mr. Kohn said he remained concerned about specificity and consequences to affected parties and might bring the matter back to the

Committee in the future.

The Reporter said the proposed amendments to Rules 1019(1)(b), 2003(d), and 7004(4) drew either no comments or only favorable ones.

There was no opposition to a motion to transmit the package of proposed amendments, as amended further in light of the public comments, to the Standing Committee with a recommendation for their adoption.

"The Litigation Package"

The Reporter introduced the package of amendments, explaining initially that the proposed amendments had been assembled in the agenda book in numerical order, rather than with Rules 9013 and 9014 first, as previously. He noted that the package had been approved, with some changes, at the September 1997 meeting, and subsequently had been reviewed by both the style subcommittee of the Standing Committee and the Committee's own style subcommittee, which met by conference call with the additional participation of Professor Klee. There remained, however, several open questions, he said.

Among the amendments approved at the September 1997 meeting, he said, was the deletion of Rule 9006(d), which governs the time for serving notice of hearings on motions and of any responsive affidavits. The reason for the proposed abrogation was potential conflict with the proposed amendments to Rules 9013 and 9014. Upon reconsideration, however, the Reporter said he believed Rule 9006(d) should not be abrogated but rather limited, so that it would affect only motions made in adversary proceedings and procedural motions and dispositive motions within Rule 9014 administrative proceedings, types of motions that are excluded from the scope of Rule 9014. Some members said they thought the cross-references in the draft amendment were unclear and suggested alternative approaches. Mr. Smith said resolution of the drafting problems should be left to the discretion of the Reporter. **A motion to approve the principle addressed in the draft amendment to Rule 9006(d) was unopposed.**

In addition, the Reporter said, he now believed the substance of Rule 9013, as it exists currently, does not appear in the proposed amendments and needs to be restored. Current Rule 9013 contains the basic requirements for a motion, *e.g.,* a motion "shall state with particularity the grounds therefor," etc. He had changed to the draft amendments to accomplish this objective by incorporating a cross-reference to Civil Rule 7(b)(1) in draft Rule 9014(m). **A motion to approve the amended draft was unopposed.**

The Chairman stated that votes on the above motions would be considered without compromise of the vote to be taken later in the meeting on the litigation package as a whole.

The Reporter next noted that the Committee previously had approved amendments that would provide new procedures for requests for court approval of the employment of professional persons, but had been unable to agree on new language to define the information that must be disclosed by the professional. Although the draft Rule 2014 would not be governed by Rule 9014, and would be a free-standing rule procedurally, the improvements already approved could go forward with the litigation package, leaving to further deliberation the issue of the scope of disclosure by the professional. Professor Klee said the Committee had been frustrated in its attempts to provide guidance in the rule by the language of § 101(14) and § 327(a) of the Code and that he favored going forward with the proposed amendments. Mr. Pelofsky said the United States trustee system especially supports the proposed requirement to supplement initial disclosures. The Reporter said that Mr. Rosen had telephoned with a suggestion that subdivisions (f) and (g) of the draft should be transposed to make it clear that the arrival of a new partner in a firm can necessitate supplemental disclosure. In addition, members suggested substituting "becoming aware of" for "discovering" in line 76 of the draft and inserting in the Committee Note language to make it clear that the intent of the rule is to require supplemental disclosure whether the fact of which the professional became aware occurred before or after the earlier disclosure. **The Committee approved including the amendments to Rule 2014, with the changes noted, as part of the proposed amendments to be published for comment.**

The Reporter stated that the style subcommittee, during its review of the proposed amendments, had noted that Rule 3012 needed substantial stylistic improvement and had requested the Reporter to redraft it. In particular, the subcommittee had noted that the rule erroneously refers to valuation of a claim rather than of property and that the title of the rule also needed to be changed to make a similar correction. Professor Klee said the title should be further changed to read "Valuation of the Estate's Property Securing Lien." **The Committee approved the re-styling of proposed Rule 3012, including Professor Klee's suggestion.**

The Reporter said further that at the September 1997 meeting the Committee had requested that he include a motion to modify a chapter 12 or chapter 13 plan after confirmation under Rule 3015(g) among the proceedings to which proposed Rule 9014 would apply. He said he had drafted amendments to Rule 3015(g) to accomplish that, but had placed in brackets at lines 24 - 26, the language indicating that a response to such a motion does not have to be served on creditors, and at lines 27 - 29, the complementary language to require the movant to include with the motion the names and addresses of creditors affected by the modification. Mr. Sommer said he favored the language dispensing with service of a response on creditors, but said the rule should require that any response be served on the movant. He suggested inserting in line 25, after the word "creditor," the phrase "other than the movant." **The Committee approved the new draft, including Mr. Sommer's addition, and rejected the bracketed**

language at lines 27 - 29.

The Reporter then directed the Committee's attention to the draft subdivision (c) of Rule 1006 which provides a procedure for a court to consider a request for waiver of the filing fee, if applicable law permits such waiver. This provision had been added, the Reporter said, at a time when a pilot program for *in forma pauperis* filing of bankruptcy cases had been in effect in six judicial districts. The pilot program had expired, leaving no authority for waiving the filing fee, and the Reporter recommended deleting the proposed amendment. Mr. Sommer, however, said that the definition of "filing fee" included in the rule covered fees other than the statutory fee prescribed in 28 U.S.C. § 1930(a) and these might be waivable, either under circuit decisions or under the terms of the miscellaneous fee schedule itself. Ms. Channon said that Judicial Conference policy is that no miscellaneous fee can be waived unless explicit authority to do so appears in the fee schedule. In addition, she said, the $15 trustee surcharge fee, which is payable at filing is prescribed in 11 U.S.C. § 330(b)(2) and is not tied to the chapter 7 filing fee as is the $45 trustee fee authorized under § 330(b)(1); rather, it must be paid by the judiciary to the trustee regardless of whether any money is collected. **The consensus was to delete subdivision (c) from the draft.**

The Chairman called for a motion on forwarding the litigation package and amendments to Rule 2014 to the Standing Committee with a request that the proposed amendments be published for comment, which motion was made and seconded. Judge Robreno stated that he incorporated his earlier comments on the amendments. **The motion carried by a vote of 8 to 2, with two members absent from the room. Judge Donald stated that she held Judge Cristol's proxy in favor of the motion, which would make the vote 9 to 2, and Judge Cristol stated on his return that he ratified her action.**

Introduction to the Litigation Package. Professor Resnick explained that this introduction, which the Committee had requested to be added to the package of amendments at the September 1997 meeting, had been drafted by himself and Professor Klee and circulated early for comments from Committee members. He said the introduction had been redrafted to reflect those comments and appeared in the agenda book together with an underline-and-strikeout version to show the changes that had been made.

Judge Robreno asked the purpose of the introduction, whether it was intended to promote support for the amendments or to explain alternatives. The Reporter said the purpose is to explain the package of amendments and how motion practice would be conducted if the amendments are adopted. National rules for motion practice are a new phenomenon and judges and practitioners probably will want some background and history of the amendments, along with an explanation. For example, he said, the proposed amendments will be published in numerical order, and without some introduction, readers of amendments to Rule 1006 will not know they are reading conforming amendments and that the heart of the package is on page 60 or later, where Rules 9013 and 9014 will appear. Some members requested assurance that the Standing Committee would be informed that the Committee is divided concerning this

package, and some wanted the fact of a minority view included in any published introduction. The Chairman said the Standing Committee would hear about the dissenting view, but he did not favor including that information in any published introduction. Other members agreed that no purpose would be served and that comments opposing the amendments and suggesting alternative approaches are certain to be received.

Professor Klee suggested that in line 127 the word "usually" should be inserted before the word "unrelated." Another member suggested that on page 9 of the draft a sentence should be added to highlight that subdivision (o) of Rule 9014, which provides for suspension of any requirement of the rule in a particular case, is not intended as a license to issue a general order or local rule effectively abrogating Rule 9014. The Reporter agreed to add a sentence to the introduction and to the Committee Note to Rule 9014 stating that the requirements of Rule 9014 may not be abrogated by general order or local rule. **The consensus was to forward the introduction, as amended at the meeting, to the Standing Committee with a request that it be published together with the Litigation Package, if the Standing Committee approves the Litigation Package for publication.**

Rule 9020

The Reporter introduced the proposed amendments, which would change the current rule to permit a bankruptcy judge to issue an order in a civil contempt proceeding that would be effective immediately, subject to appellate review. If the matter involved criminal contempt, the amendments would require the bankruptcy judge to submit proposed findings of fact and conclusions of law to the district court, and any order would issue from the district court. Amendments to Rule 9020 initially were proposed by Judge Small, who said, in a letter to the Chairman, that the rule's 10-day stay of the effect of a bankruptcy judge's order of contempt is unnecessary in light of circuit court decisions holding that bankruptcy judges have inherent power to punish for civil contempt. The Chairman said he would prefer a general statement that bankruptcy judges have authority to punish for contempt to the draft rule, which appeared to him to contain much legislating. Judge Gettleman said that subdivision (b)(2) was inappropriately restrictive; sometimes when the contempt involves disrespect or criticism of a judge, he said, the same judge should preside. Judge Tashima noted that civil contempt can involve long periods in jail and agreed with the concerns of the Justice Department about inviting questions regarding how far a bankruptcy judge constitutionally can go. Judge Kressel said the current rule also legislates, and that the line between civil and criminal contempt is not distinct and may have to be drawn by the courts. He suggested abrogating Rule 9020 entirely and stating in a Committee Note that the action does not indicate any lack of contempt authority. Judge Small said he is agreeable to abrogating the rule. Its original intent, he believed, was to increase the authority of a bankruptcy judge but that the rule now inhibits that authority. **The Chairman appointed a subcommittee to recommend appropriate action concerning Rule 9020 at the next meeting. He appointed Judge Kressel to serve as chair and Judge Robreno, Judge Small, and Mr. Kohn as members.**

Attorney Conduct

The Standing Committee, which has been studying whether there is a need for any federal rule or rules governing attorney conduct in federal courts, has reached the stage of presenting options and draft rules to the various advisory committees and requesting feedback from them, both on the options and the drafts themselves. The materials and draft rules were prepared by Professor Daniel R. Coquillette, Reporter to the Standing Committee. Professor Resnick said the Standing Committee recognizes that bankruptcy proceedings represent a special situation, due in part to the fact that the Bankruptcy Code prescribes a standard for conflicts, and that the Standing Committee is prepared to consider separate rules for bankruptcy. The various alternatives presented center around Professor Coquillette's draft "core" rules. One is to take draft Rule 1, which states explicitly that the rules of the state in which the court is located govern an attorney's conduct in a federal matter. (All details would be left to the various state rules.) A second alternative would be to recommend adoption of Rule 1 plus the additional substantive Rules 2 - 10. Professor Resnick noted that bankruptcy proceedings are carved out of the reach of Rules 2 - 10 in subdivision (c) of Rule 1, so that the Advisory Committee would be free to adapt draft Rules 2 - 10 as necessary or draft entirely new rules of its own.

Concerning the draft rules, a member commented that draft Rule 2 might be acceptable, although the Weintraub[(1)] case says a trustee can waive a corporate debtor's attorney-client privilege. Draft Rule 3, concerning conflicts, presents deeper problems, a member said, because under its terms an attorney for a debtor in possession could represent an adverse party just by obtaining consent, which would be a violation of the Bankruptcy Code. A possible solution might be to add language stating the rule applies except when it would conflict or be inconsistent with the statute. Draft Rule 4, which covers business transactions by an attorney, also would need to be changed, because 18 U.S.C. § 154 forbids officers of a bankruptcy estate from purchasing property of an estate and offers no "reasonable transaction" exception. The Chairman said the Standing Committee wants a broad response on whether any rules are needed on this subject and , if so, whether the rules should resemble the proposed drafts. In an initial poll, 3 members favored no federal rules on attorney conduct, 7 members favored adopting Rule 1, with an explicit exception for any inconsistency with the Code or other federal law, and 2 favored adopting the full series of "core" rules, with appropriate exceptions for bankruptcy.

A question was raised whether bankruptcy should have its own rules. The Chairman said he doubted people would accept the idea that bankruptcy has different rules. Appropriate exceptions, he believes, would be alright, but not different rules. Judge Robreno asked, if a "core" rule is so important as to displace a state rule, why is bankruptcy different? Mr. Smith said one reason for core rules in bankruptcy cases is that there is no definition of an adverse interest. For example, he asked, to whom does the attorney for a debtor in possession owe the fiduciary duty: the estate, the corporation, the creditors? Appropriate rules for bankruptcy could fit into Professor Coquillette's framework, he said, but would displace the draft rules, at least to some extent. Mr. Foltz suggested that one approach might be to have different rules for the general counsel for a debtor in possession than for a special counsel. He noted that the client changes over time and cited as an example the fact that under state ethical rules, the attorney cannot use client confidences learned before filing against that now former client; yet the Bankruptcy

Code requires the attorney for the debtor in possession to act in the interest of the estate. He suggested drafting bankruptcy rules and then working to convince the states to adopt them. **The consensus was to report to the Standing Committee that the Advisory Committee supports the concept of draft Rule 1 with an exception to the applicability of state rules when they are inconsistent with bankruptcy statutes. In addition, the Advisory Committee would not oppose the "core" federal rules approach (draft Rules 2 - 10) for the civil rules. If that approach is followed, however, more comprehensive study and drafting would be necessary to formulate "core" bankruptcy rules. Such an effort would be a long term project, probably requiring at least three years to complete.**

Notice to Governmental Units

The Reporter reviewed the Committee's actions at the September 1997 meeting by which the Committee had approved amendments to Rule 2002(j) that would require that the particular department, agency, or instrumentality of the United States through which a debt is owed to the federal government be identified in the address of the notice that must be sent to the United States Attorney. Proposed amendments to Rules 1007 and 5003 had been referred back to the subcommittee on government noticing. The chairman of the subcommittee, Judge Small, reviewed the new draft and described the changes made since the September 1997 meeting.

In Rule 5003, the changes related to the registry of addresses to be maintained by the clerk. They would require the clerk to update the registry annually, limit an agency to a single address but give the clerk the option to include more than one address, and provide a safe harbor if the registry address were not used, which the Reporter was to draft by tracking as closely as possible the language of § 523(a)(3) of the Code. In tracking § 523(a)(3), lines 20 -24 of the draft rule extend safe harbor protection to a debtor that used a different mailing address if the governmental unit had notice or actual knowledge of the case or proceeding in time to participate in it. Mr. Kohn, who had circulated a memorandum dated February 2, 1998, to the subcommittee opposing the safe harbor provision, reiterated his objections. He suggested that Rule 5003 should provide a safe harbor only if the registry address is used and that similar proposed amendments to Rule 1007 should not be forwarded. The Reporter suggested as an alternative, changing line 21 of proposed Rule 5003 to say that failure to use the registry address "does not invalidate any notice that is otherwise effective under applicable law," leaving out any mention of actual knowledge. Professor Klee said he thought the concept of actual knowledge in time to protect the government's rights should stay in the rule. Mr. Kohn said there are decisions in many circuits saying knowledge of the existence of a bankruptcy case is not enough, that a creditor has no obligation to monitor a case continuously, and that due process requires that the creditor receive specific notice of important events such as the claims bar date, which in chapter 11 is not provided by rule but must be set by the court. **A motion to adopt the draft as proposed by the subcommittee passed by a vote of 9 to 2. Mr. Heltzel said the clerk should be able to include in the registry a municipal governmental unit's address, at the clerk's option, and there was no opposition from the Committee to amending the Committee Note to accommodate this request.**

A member raised again the issue of knowledge by the government of the case or proceeding, and alternatives to the draft language were suggested. The Chairman said that using a different address could not invalidate a notice. Any notice that would suffice otherwise should suffice under the rule, he said. Alternatives again were suggested, including "but the failure to use the mailing address in the register does not invalidate the legal effect of any notice," and "but this paragraph does not preclude use of a different mailing address." **On a motion to reconsider the vote on this issue, there was no opposition to amending the draft starting at line 20 to say "but the failure to use that mailing address does not invalidate any notice that is otherwise effective under applicable law."** In conformity with this action concerning Rule 5003, **there was no opposition, with regard to Rule 1007, to changing the final sentence of proposed subdivision (m)(1) to "Failure to comply with this paragraph does not affect the debtor's legal rights." There also was no opposition to deleting proposed subdivision (m)(2) and conforming the Committee Note to the actions taken on the draft rule.**

The question of how to provide notice of potential imminent harm to public health or safety emanating from a debtor's property, together with proposed additional questions to the debtor's statement of financial affairs that are of interest to government agencies had been considered at the September 1997 meeting and referred to the subcommittee on forms. Mr. Sommer, the chairman of the subcommittee, first noted several corrections to the texts of the forms as printed in the agenda book.

Concerning the notice of imminent harm, Mr. Sommer recalled that the Committee had been troubled that placing the information in the statement of financial affairs and then requiring that portion of the statement to be sent to certain government agencies might require an enabling rule change. Accordingly, at the suggestion of the Reporter, the subcommittee now proposed to amend the voluntary petition by adding an "Exhibit C" checkbox to the form and an exhibit to be filed if any imminent danger needed to be reported. Professor Klee expressed concern about Fifth Amendment implications if a debtor's statement might be incriminating. Mr. Sommer said the subcommittee had not discussed the issue, but it seemed no different to him than the debtor's schedules. As with any other matter in a case, he said, a debtor could refuse to answer and let the court treat the matter as it would under § 344 of the Code. Judge Gettleman said he did not view "Exhibit C" as incriminating and believed the question would be a fairly innocent one for almost anyone. **The Committee approved the proposed amendments to the voluntary petition (Form 1) and the proposed new "Exhibit C" without opposition.**

With respect to the statement of financial affairs, Mr. Sommer said, the subcommittee had considered five new questions and, in the course of addressing them, had amended current question 16 and moved it, and had amended the instructions concerning the obligation to complete the "business questions" portion of the form. Question 16, which asks whether the debtor is or has been "in business," would become question 17 and be answered by every debtor and would cover the full six years prior to filing rather than only two years. The instructions also would be amended to require a debtor to complete the business questions if the debtor is or had been in business, as defined in the form, during the six years prior to filing. Mr. Sommer noted that some of the business questions request information covering six years, and

the changes described would assure that all debtors that would be required to answer any question in the business section of the form would know they need to complete it. One of the new questions would be added as (new) question 16 and would address community property owned by a debtor and a nonfiling spouse or former spouse. The subcommittee had approved the question in part but had reserved for consideration by the full Committee the issue of whether a debtor should be required to disclose the Social Security number of a nonfiling spouse or former spouse. Mr. Kohn said a nonfiling spouse's name may change over time and the Social Security number is, therefore, important to creditors of the marital community. Of the remaining questions and amendments as proposed by the subcommittee, Mr. Sommer indicated that questions 17 - 22 were simply renumbered and that questions 16 and 23 - 25 were new. He noted that question 25, which requires various disclosures concerning environmental matters, contains no time limits. **The Committee disapproved requiring disclosure of the Social Security number of a nonfiling spouse in proposed question 16 of the statement of financial affairs (Form 7), but otherwise approved, without opposition, the proposed amendments to the form.**

Mr. Sommer observed that when proposed amendments are published, judges and practitioners tend to comment on the entire form rather than just the portions to be amended. He asked if the Committee would want the forms subcommittee to consider the rest of the statement of financial affairs for possible amendments prior to publication. The Reporter said that the proposed amendments to the forms are part of the larger government noticing package of amendments to the rules and forms. He said there would not be time to consider amendments to the rest of the form before the June 1998 meeting of the Standing Committee and that allowing time for that consideration would, therefore, delay the government noticing package. **The Committee directed that only the amended questions and new questions be published.** For the **new questions, the Committee directed the inserting of a signal such as, "The following question is new,"** rather than using the underline/strikeout format, which would result in the underlining of the entire question.

National Bankruptcy Review Commission Report

The Reporter observed that most of the recommendations that relate to rules involve proposals that would implement recommended amendments to the Code. Until and unless Congress enacts the legislation, it would be inappropriate for the Committee to propose rules, he said. **The Committee agreed.** Accordingly, the Committee considered only those recommendations that could be characterized as "stand alone" recommendations, those which do not require legislation. In addition, Judge Robreno noted that the Commission's recommendations are not the mandate of Congress and that the Commission itself was deeply divided on many of the recommendations.

The Commission recommended further amending Rule 9011 to require an attorney to make a reasonable inquiry into the accuracy of the information in the debtor's schedules, statement of affairs, lists, and amendments thereto. Judge Tashima noted that this would only make explicit what many think already is

implicit in the rule. A member said any amendment should avoid turning a "reasonable inquiry" into an audit of the debtor by the attorney. **The Committee agreed to consider amending Rule 9011 in the manner recommended by the Commission at the Committee's next meeting.**

The consensus was that the Commission's recommendation that an official form be created for a motion for approval of a reaffirmation agreement was a good one, and the Chairman referred the matter to the forms subcommittee.

Concerning the recommendation that a creditor who does not receive notice of the bankruptcy should be afforded an extension of time to file an objection to the debtor's discharge or to seek revocation of the discharge, the consensus was to take no action.

With respect to the recommendation that the petition, list of largest creditors, and schedules of liabilities should require more specific disclosures concerning employee-related obligations, Mr. Sommer said the Committee could add more categories to the schedules but that the information mentioned by the Commission is required under the current schedules. **The consensus was to take no action on this recommendation.**

The Commission recommended amending Rule 2004(a) to include examiners among those who may seek an order authorizing an examination under the rule. The Reporter stated that an examiner usually is appointed for cause and charged with investigating or examining specific matters, while Rule 2004(b) is a "fishing expedition" authorized by a court order. Mr. Batson said an examiner occasionally may need an order to do the job, and Professor Tabb said the authority to issue an appropriate order appears to exist under section 105 of the Code. **The consensus was that no amendment is necessary, but that the Reporter should monitor the cases and bring the issue to the Committee if future developments warrant.**

The Commission recommended that an attorney's admission to practice in one bankruptcy court should entitle the attorney to practice in any bankruptcy court without the need for any other admission procedure. Some members thought the Committee could consider this proposal, and whether the bankruptcy rules have the authority to address the matter, as part of the work on the proposals for governing attorney conduct. Others said the subject really could be addressed only by the district courts. **The consensus was to take no action.**

The Commission also recommended in the section of its report titled "Taxation and the Bankruptcy Code," that notice to governmental units be improved and that a registry of addresses of governmental units be established and maintained by each bankruptcy clerk. The Committee noted that it already had approved publication of proposed amendments to implement both recommendations.

Rules 4003(b) and 1017(e)(1)

Rule 4003(b). The Reporter stated that the amendment's purpose is to permit an extension of time in which to file an objection to a debtor's claim of exemption when a court does not rule on a timely filed motion to extend the time until after the original time for filing an objection has expired. **The Committee approved the Reporter's draft without objection.**

Rule 1017(e)(1). As a companion measure, the Reporter presented an amendment that would also permit a timely filed motion to extend the time to file a motion to dismiss a case under § 707(b) of the Code to be granted after the expiration of the original time to file such a motion. **The Committee approved the Reporter's draft without objection.** Judge Kressel suggested that Rule 4004(c) also should be amended to permit the court to withhold a debtor's discharge while a motion to extend the time for filing a motion to dismiss the case under § 707(b) is pending. **The Reporter agreed to add the suggested amendment to Rule 4004(c).**

Rule 2002(g)

Proposed amendments to this rule were approved by the Advisory Committee in 1997. The Reporter stated that Mr. Rosen, who was unable to attend the meeting but had reviewed the materials, believed the rule to be ambiguous and had suggested changing the order of the sentences, to make it clear that the address in the last-filed document should be used. Professor Klee, although not objecting to changing the order of the sentences, said doing so would not cure the problem if the proof of claim happened to be the first-filed document. Mr. Heltzel said he always would prefer that a separate document be filed for an address change. He said the clerk's office procedure with a proof of claim is to enter the address shown and run a matching program in the computer. If the address is a duplicate, the program will throw out one; if the address is different, the program will retain both and the creditor may receive two notices. As a practical matter, he said, the effect is that the latest address is used. **The Reporter suggested withdrawing this subdivision from the package of rules to be submitted to the Standing Committee with a request for publication and considering revised proposals for amendment at the next meeting. The Committee agreed.** (Other proposed amendments to Rule 2002, however, will go forward.)

Rule 9022

Mr. Heltzel raised his proposal, set forth in a letter to the Reporter dated July 14, 1997, to authorize the court to direct a person other than the clerk to serve notice of the entry of a judgment or order. Mr. Heltzel said he recognized the possible incentive for delay and prejudice to the other party when the appeal time is only ten days. He noted, however, that the person directed to give notice also must file a certificate of service, thus putting any delay in the record, and that the losing party also can monitor the docketing of the order by checking the court's PACER service. Judge Kressel opposed the amendment, because of the prejudice that could result from any delay. Judge Duplantier said that departing from the procedure specified in the civil rules would raise questions among the members of the Standing Committee. **The Committee declined to take any action to amend the rule.**

Rule 9009

The Committee discussed whether Rule 9009 should be amended to remove from the court and the parties the ability to make "alterations as may be appropriate" to the official forms in light of the delay in implementing the amended § 341 notice forms (Official Forms 9A-9I) caused by changes requested by individual courts. A member said some forms, such as the ballot and various other notices used in chapter 11 cases, are intended to be changed as required in every case. It also had appeared, after investigation into the current delays at the Bankruptcy Noticing Center, that the changes being requested are appropriate and that the problem resulted primarily from inadequate planning on the part of the noticing center. Accordingly, **the Committee took no action**.

Official Forms

Ms. Channon reported that the Schedule of Creditors Holding Unsecured Priority Claims (Form 6E) and the Proof of Claim (Form 10) are scheduled to be automatically amended to reflect automatic adjustments to certain dollar amounts in the Bankruptcy Code which appear in those forms. The forms showing the new dollar amounts had been distributed to the courts, to automation staff, and to publishers and software vendors. Recipients of the new forms had commented that the language on the forms stating that the dollar amounts "are subject to adjustment on 4/1/98 and every 3 years thereafter" is very confusing now that the first adjustment has been made. It is unclear, the commentators said, whether the new amounts include the 4/1/98 adjustment. **The consensus was that the language should be clear and that clarity could be achieved by considering the date as part of the automatic adjustment process,**

so that the date could change with the dollar amounts every three years.

Technology Developments

Professor Resnick reported that the Standing Committee had established a technology subcommittee with Gene W. Lafitte, Esq., as chairman, representatives from all of the advisory committees, and with the reporters to the advisory committees as *ex officio* representatives. From the Advisory Committee on Bankruptcy Rules, the designated member is Judge Cristol, and Mr. Heltzel has been appointed a consultant. The role of the new subcommittee is to monitor technological developments and ensure that any amendments to rules that are needed to facilitate appropriate use of technology in court proceedings can be coordinated among all the bodies of federal rules. Ms. Channon reported that five bankruptcy courts now accept electronic filings: the Southern District of New York, the Eastern District of Virginia (Alexandria Division), the Northern District of Georgia, the District of Arizona, and the Southern District of California.

Alternative Dispute Resolution (ADR)

Professor Tabb, who chairs the ADR subcommittee, announced that the final draft of the study of ADR activities in bankruptcy courts by the Federal Judicial Center has been completed. The subcommittee, however, had not had time to consider it and evaluate whether rules amendments should be proposed. Mr. Niemic, who directed the study and drafted the report, said that 31 courts now are engaged in ADR programs. He said the problems identified in the study were confidentiality, which scored higher as a problem for parties than for mediators, and having a mediator who was not disinterested. The bankruptcy estate paid the mediator's fee in 21 percent of the matters referred, and mediators played a role in plan development in nine percent of matters referred. Confidentiality was a problem both when confidential information was disclosed and when the failure to disclose information prevented the judge from knowing something the judge needed to know about the case. Professor Tabb noted that Congress may act on the ADR recommendations made by the National Bankruptcy Review Commission, which would affect any proposals that might be made by the ADR subcommittee.

Subcommittees

The Chairman suggested that two subcommittees appear to have fulfilled their purpose and could be discharged, the local rules subcommittee and the Rule 2004 subcommittee. **The consensus was to**

discharge both subcommittees. Judge Cordova said that if the issue of whether to permit an examiner to request an examination under Rule 2004 begins to generate conflicting case law, the subcommittee might need to be reestablished. He also indicated that he would be willing to serve as chairman if the subcommittee were needed again.

Meeting Dates

The Committee chose January 29, 1999, as the date for a public hearing on the amendments being submitted with a request for publication. The hearing would be held in Washington, D.C., and could be extended to January 30, if there are too many witnesses to be heard in one day. The Committee also selected March 18 -19, 1999, as the dates for its next spring meeting. The probable location for the meeting will be the Airlie Conference Center near Warrenton, VA. The Committee also decided to request that the public comment period close on February 1, 1999, to allow sufficient time to review what the Committee expects will be a large number of written comments.

Recognition

Ms. Wiggins thanked Judge Kressel and Professor Klee for reviewing the material prepared by the Federal Judicial Center for a computer-assisted learning program on the bankruptcy rules for use by deputy clerks in bankruptcy courts. She said both members had contributed many hours of time to the project, which now has been completed.

Respectfully submitted,

Patricia S. Channon

1. Commodity Futures Trading Commission v. Weintraub, 471 U.S. 343 (1985).