

TO: Honorable Alicemarie H. Stotler, Chair
Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 2, 1997

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 11-12, 1997, in Williamsburg, Virginia.

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Santa Barbara, California, on January 8-9, 1998.

III. Information Items

- A. Rule Amendments Effective December 1, 1997. On April 11, 1997, the Supreme Court promulgated amendments to 12 Bankruptcy Rules (Rules 1010, 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, and 9035) and promulgated four new Bankruptcy Rules (Rules 1020, 3017.1, 8020, and 9015). Most of these amendments and new rules were designed to implement or conform to the Bankruptcy Reform Act of 1994. These amendments and new rules became effective on December 1, 1997.
- B. Amendments to the Official Bankruptcy Forms Promulgated in September 1997. At its June 1997 meeting, the Standing Committee approved proposed amendments to nine Official Bankruptcy Forms (Forms 1, 3, 6, 8, 9, 10, 14, 17, and 18), and added two new Official Bankruptcy Forms (Forms 20A and 20B). Most of the amendments were designed to clarify the forms, provide plain English instructions for users, and to make them easier to complete. The amended and new forms were promulgated by the Judicial Conference in September. Although the amended and new forms may be used at this time, they will not become mandatory until March 1, 1998.
- C. Publication of Proposed Rule Amendments. At its June 1997 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to 16 Bankruptcy Rules. The preliminary draft was published in August for comment by the bench and bar. A public hearing is scheduled for January 30,

1998, in Washington, D.C., and the deadline for submitting comments is February 15, 1998. The Advisory Committee will consider all comments at its next meeting to be held on March 26-27, 1998, and it is expected that proposed amendments will be presented for approval by the Standing Committee at its June 1998 meeting.

- D. Work-in-Progress on Proposed Amendments to Revise Litigation Procedures. The Advisory Committee's Subcommittee on Litigation has been working for more than two years on a package of proposed amendments that would substantially revise the rules governing litigation in bankruptcy cases, other than adversary proceedings. This effort is the result of a survey conducted by the Federal Judicial Center at the Advisory Committee's request which indicated that, although judges and practitioners are generally satisfied with the Federal Rules of Bankruptcy Procedure, there has been significant dissatisfaction with the rules governing motion practice.

The proposed amendments would revise procedures for obtaining court orders, both for routine administrative matters that usually are unopposed and for resolving more complex disputes that now constitute "contested matters" under the Bankruptcy Rules. Confusing terminology would be eliminated (such as the phrase "contested matter" which, in many cases, is not contested at all), and greater national uniformity in litigation procedures would be achieved. Preliminary drafts of complete revisions of Bankruptcy Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), as well as related amendments to more than 20 other Bankruptcy Rules, were presented to the Advisory Committee at its September 1997 meeting. These drafts, as revised at the meeting, were approved subject to further refinement and stylistic improvements.

Preliminary drafts of proposed amendments to Rules 9013 and 9014 have been reviewed by the Standing Committee's Style Subcommittee and its comments have been received by the Advisory Committee. Drafts of proposed amendments to other rules were forwarded to the Style Subcommittee for its comments. At its March 1998 meeting, the Advisory Committee expects to approve a revised draft of this package of amendments, including stylistic improvements, and to present the package to the Standing Committee in June 1998 with a request that these proposed amendments be published for comment by the bench and bar.

- E. National Bankruptcy Review Commission. The National Bankruptcy Review Commission was created by the Bankruptcy Reform Act of 1994 and was charged with performing a comprehensive two-year study of the American bankruptcy system. The Chairman of the Commission, Brady C. Williamson, and Commissioner James I. Shepard attended part of the Advisory Committee's September 1997 meeting.

The nine-member Commission completed its work and submitted its final report to the President, Congress, and the Chief Justice on October 20, 1997. The report is approximately 1300 pages in length (including almost 300 pages of dissenting opinions and separate views of individual Commissioners) and contains 172 recommendations for improving the bankruptcy system. Although some recommendations had unanimous or wide support of the Commissioners, others were controversial and were adopted by a divided vote (often 5-4).

Most of the Commission's recommendations are addressed to Congress and call for legislative amendments to either title 11 or title 28. Many recommendations are substantive and, if adopted by Congress, would not require any Bankruptcy Rule amendments. Other recommendations for legislative changes would, if adopted, require conforming rule amendments. For example, if Congress follows the Commission's recommendation to amend title 28 to provide for the appointment of Article III bankruptcy judges (which would eliminate the need to distinguish between core and noncore proceedings), extensive conforming rule amendments would be required. Similarly, if Congress adopts the Commission's recommendation to permit appeals from bankruptcy court orders directly to the court of appeals (i.e., eliminating appeals to the district court or bankruptcy appellate panel), Part VIII of the Bankruptcy Rules would have to be repealed.

Several Commission recommendations are expressly directed to the Advisory Committee on Bankruptcy Rules and suggest amendments to the Rules or the Official Bankruptcy Forms, but only if related legislative changes are enacted. For example, the Commission recommends Code amendments that would permit the court, after notice and a hearing, to waive or simplify requirements relating to disclosure statements in "small business" chapter 11 cases. It also recommends that, "within a reasonable time after enactment" of these legislative changes, the Bankruptcy Rules be amended to provide standard forms for disclosure statements and plans in small business cases.

Other Commission recommendations call for amendments to the Bankruptcy Rules or the Official Forms and are not dependent on related legislation. For example, the Commission recommended to the Advisory Committee that the language of Rule 9011 be changed to make explicit that an attorney's responsibility to make a reasonable inquiry into the accuracy of information extends to the lists, schedules, and statement of affairs (these documents are now excluded from the attorney signature requirements of Rule 9011). Another example is the Commission's recommendation that Rule 2004(a) be amended to include examiners as persons who may examine witnesses under that Rule.

The Reporter is in the process of analyzing the Final Report of the Commission and will present to the Advisory Committee before its March meeting summaries of those recommendations that call for changes to the Bankruptcy Rules or the Official Bankruptcy Forms. In addition, the Advisory Committee will closely monitor legislative activity that could impact on the Rules or Official Forms.

- F. Notice to Governmental Units. The Advisory Committee has been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. Several proposals were considered and refined at the Advisory Committee's September 1997 meeting and have been referred to the Subcommittee on Government Noticing for further review. In addition, proposals designed to require disclosure of certain information relating to governmental claims, including information regarding environmental claims, violations, or hazards, have been referred to the Subcommittee on Forms for further review. The Committee expects to consider proposals in these areas at its March 1998 meeting.
- G. Rules on Attorney Conduct. At the Advisory Committee's request, the Federal Judicial Center is preparing an appropriate form to be used in a survey to identify areas regarding attorney conduct that have caused significant problems in bankruptcy cases and proceedings. The survey results will be used by the Advisory Committee in determining the need for (and possibly the formulation of) new or amended Bankruptcy Rules that govern attorney conduct. This is an extension of Professor Coquillette's efforts in formulating national rules governing certain aspects of attorney conduct in district and circuit courts.

H. Survey on Mediation in Bankruptcy Cases. The Federal Judicial Center, at the Advisory Committee's request, is conducting a survey to assess the need for national rules on mediation in bankruptcy courts. The survey will seek to identify problems or concerns, such as mediator conflicts of interest and confidentiality. The Advisory Committee will consider the results of the survey in determining whether there is any need for Bankruptcy Rules governing mediation.

I. Automatic Dollar Adjustments. The Bankruptcy Reform Act of 1994 amended § 104 of the Bankruptcy Code to provide for automatic dollar adjustments of particular monetary amounts in specified sections of the Code every three years. These dollar adjustments, which are based on changes in the Consumer Price Index for All Urban Consumers, will be made on April 1, 1998, and on April 1 of every third year thereafter. Each dollar adjustment becomes effective only for bankruptcy cases that are filed on or after the effective date of the adjustment.

Some of the monetary amounts that will be changed every three years appear on two of the Official Bankruptcy Forms (Form 6, Schedule E - Creditors Holding Unsecured Priority Claims, and Form 10 - Proof of Claim). When these forms were amended in 1995, a warning was included in the forms stating that the dollar amounts stated therein are subject to adjustment on April 1, 1998, and every three years thereafter, for cases filed on or after the effective date of the adjustment.

In anticipation of these dollar adjustments, the Standing Committee (at the Advisory Committee's suggestion) recommended to the Judicial Conference that it approve automatic revisions to the Official Bankruptcy Forms to conform to automatic dollar adjustments made under § 104 of the Code. The Judicial Conference followed that recommendation and, in March 1996, authorized such automatic revisions without the need for any additional action by the Judicial Conference. On April 1, 1998, and at each 3-year interval thereafter, the Administrative Office may send to the courts and to publishers copies of the forms that have been revised to conform to automatic dollar adjustments under § 104.

Attachment:

Draft of minutes of the Advisory Committee meeting of September 11-12, 1997.