ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

September 21-22, 2000
Harriman, New York

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 21-22, 2000
Arden Conference Center, Harriman, NY

Agenda

Introductory Items

1. Approval of minutes of March 2000 meeting.

2. Report on the June 2000 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

3. Report on the June 2000 meeting of the Committee on the Administration of the Bankruptcy System.

4. Status of "bankruptcy reform" bills.

Action Items

5. Proposed amendments to Rule 2016 to make the rule applicable to non-attorney bankruptcy petition preparers.

6. Proposed amendment to Rule 8014 concerning taxation of costs in an appeal.

7. Report of the Forms Subcommittee: a) Proposed amendment to Official Form 15, Order Confirming Plan, to conform to the proposed amendments to Rule 3020 concerning injunctions contained in a plan that have been published for comment; b) Request for guidance concerning whether the subcommittee should undertake a general review of the official forms at this time.

8. Report of the Subcommittee on Privacy and Public Access. Consideration of privacy issues and possible amendments to the rules [e.g., Rule 1005] and official forms to reduce Internet exposure of personal information.

9. Report of the Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements proposing a new Rule 7007.1 and conforming amendment to Rule 9014 requiring disclosure of financial interests by parties in adversary proceedings and contested matters.

10. Proposed amendments to Rule 3015(d) to de-link from the notice of a chapter 13 confirmation hearing the duty to provide a copy of the plan or a summary of the plan, and to require the debtor to provide a copy of the plan directly to the standing trustee and to each creditor.

11. Proposed amendment to Rule 2002(h) to provide that notice in a chapter 13 case need not be sent after the deadline for filing proofs of claim has passed to any creditor that has not filed a proof of claim.

12. Request that rules be amended to address interference in the service of pleadings by fraudulent alteration of postal bar codes.

Subcommittee Reports

13. Report of the Technology Subcommittee.

Information Items

14. Publication of Local Rules on the Internet.

15. Update on the Federal Judicial Center study of digital and electronic evidence.

16. Progress chart of proposed amendments.

17. Next meeting reminder: March 15 - 16, 2001, in New Orleans, LA

Administrative Matters

18. Consideration of subcommittee structure and appointments.

19. Discussion of dates and place for Fall 2001 meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Members:

Honorable Robert W. Gettleman
United States District Judge
Everett McKinley Dirksen
United States Courthouse
219 South Dearborn Street
Chicago, Illinois 60604

Honorable Bernice B. Donald
United States District Judge
United States District Court
167 N. Main Street, Suite 341
Memphis, Tennessee 38103

Honorable Norman C. Roettger, Jr.
United States District Judge
United States Courthouse
299 East Broward Boulevard
Fort Lauderdale, Florida 33301

Honorable Ernest G. Torres
United States District Judge
363 John O. Pastore Federal Building
Two Exchange Terrace
Providence, Rhode Island 02903-1779

Honorable A. Jay Cristol
United States Bankruptcy Judge
United States Bankruptcy Court
51 S.W. First Avenue
Chambers, Room 1412
Miami, Florida 33130

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Honorable Robert J. Kressel
United States Bankruptcy Judge
United States Courthouse, Suite 8W
300 South Fourth Street
Minneapolis, Minnesota 55415

Honorable Donald E. Cordova
United States Bankruptcy Judge
United States Bankruptcy Court
U.S. Custom House
721 19th Street
Denver, Colorado 80202-2508

Honorable James D. Walker, Jr.
United States Bankruptcy Court
433 Cherry Street
Macon, Georgia 31201-7957

Professor Kenneth N. Klee
University of California, Los Angeles
School of Law
Box 951476
Los Angeles, California 90095-1476

Professor Mary Jo Wiggins
University of San Diego
School of Law
5998 Alcala Park
San Diego, California 92110

Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, New York 11549-1210

Leonard M. Rosen, Esquire
Wachtell, Lipton, Rosen & Katz
51 West 52 Street
New York, New York 10019

Eric L. Frank, Esquire
Miller Frank & Miller
21 South 12th Street, Suite 640
Philadelphia, Pennsylvania 19107

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens,
Berish & Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, Illinois 60604

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
P.O. Box 875, Ben Franklin Station
Washington, D.C. 20044-0875

Reporter:

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469-2772

Liaison Member:

[Open]

Bankruptcy Clerk:

Richard G. Heltzel
Clerk, United States Bankruptcy Court
United States Courthouse
501 I Street
Sacramento, California 95814

Representative from Executive Office for United States Trustees:

Kevyn D. Orr, Esquire
Director, Executive Office for
United States Trustees
901 E Street, NW, Suite 700
Washington, D.C. 20530

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEES

Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements
Professor Kenneth N. Klee, Chair
Judge Robert W. Gettleman
Judge Donald E. Cordova
Judge Robert J. Kressel
Leonard M. Rosen, Esquire
Howard L. Adelman, Esquire

Subcommittee on Contempt
Judge Robert J. Kressel, Chair
J. Christopher Kohn, Esquire

Subcommittee on Forms
Judge Robert J. Kressel, Chair
Judge James D. Walker, Jr.
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire

Subcommittee on Government Noticing
[Open], Chair
Judge A. Jay Cristol
J. Christopher Kohn, Esquire
Richard G. Heltzel, Bankruptcy Clerk

Subcommittee on Injunctions in Plans
Leonard M. Rosen, Esquire, Chair
Judge Norman C. Roettger, Jr.
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
J. Christopher Kohn, Esquire

Subcommittee on Litigation
Professor Kenneth N. Klee, Chair
Judge Robert J. Kressel

Subcommittee on Style
Professor Alan N. Resnick, Chair
Judge Donald E. Cordova
Professor Kenneth N. Klee
Peter G. McCabe, ex officio

Subcommittee on Technology
Judge A. Jay Cristol, Chair
Judge Bernice B. Donald
Professor Kenneth N. Klee
Richard G. Heltzel, Clerk, ex officio

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Anthony J. Scirica
United States Circuit Judge
22614 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106

Honorable Will L. Garwood
United States Circuit Judge
903 San Jacinto Boulevard
Suite 300
Austin, Texas 78701

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Honorable Paul V. Niemeyer
United States Circuit Judge
United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201

Honorable W. Eugene Davis
United States Circuit Judge
800 Lafayette Street, Suite 5100
Lafayette, Louisiana 70501

Honorable Milton I. Shadur
United States District Judge
United States District Court
219 South Dearborn Street, Room 2388
Chicago, Illinois 60604

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159

Prof. Patrick J. Schiltz
Univ. of St. Thomas
School of Law
1000 La Salle Ave., TMH 440
Minneapolis, MN 55403-2005

Prof. Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, Ohio 45469-2772

Prof. Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215

Prof. David A. Schlueter
St. Mary's University
School of Law
One Camino Santa Maria
San Antonio, Texas 78228-8602

Prof. Daniel J. Capra
Fordham University
School of Law
140 West 62nd Street
New York, New York 10023

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 9 - 10, 2000
Key Largo, Florida

Draft Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Ernest G. Torres
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge James D. Walker, Jr.
Professor Kenneth N. Klee
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Bernice B. Donald and District Judge J.Garvan Murtha, liaison to this Committee from the Committee on Rules of Practice and Procedure ("Standing Committee") were unable to attend. Bankruptcy Judge Frank W. Koger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), attended, as did Professor Daniel R. Coquillette, Reporter to the Standing Committee, and Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"). Two former members of the Committee also attended: District Judge Eduardo C. Robreno and Gerald K. Smith, Esquire.

The following additional persons attended the meeting: Kevyn D. Orr, Acting Director of the Executive Office for United States Trustees ("EOUST"); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

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

Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Committee approved the minutes of the September 1999 meeting.

The Chairman welcomed Judge Torres as a new member and Mr. Orr, who was attending his first meeting as acting director of the EOUST.

January 2000 Meeting of the Standing Committee. The Chairman reported on the January 2000 meeting of the Standing Committee. The Committee had no action items before the Standing Committee, but informed the Standing Committee that the Committee had referred to the Advisory Committee on Appellate Rules a request to consider amending the Federal Rules of Appellate Procedure to make Federal Rule of Bankruptcy Procedure 9019 applicable when there is a settlement of a bankruptcy matter that is pending before a court of appeals. The Chairman said the Committee also had reported that it had responded to the Committee on Codes of Conduct supporting in principle a suggestion to extend to the federal rules generally the corporate disclosure requirements imposed on parties by Federal Rule of Appellate Procedure 26.1.

Local Rules on the Internet. The Committee had been asked to consider whether to support a proposal under which Internet users looking for a court's local rules could utilize a link from the Administrative Office's website to the website of the particular court. Each court would be responsible for establishing and maintaining an individual court website, posting its local rules to its website, and for keeping the posted rules current. Judge Cristol suggested amending Rule 9029 to provide that a local rule would not be effective until so posted. Judge Walker said that making local rules more easily available would counter the trend toward more national, uniform, rules. Making use of the Internet as proposed, so that all local rules were readily available, could modify the thinking of the national rules committees. Another member suggested posting local rules to the Administrative Office's website and amending Rule 9029 to provide that a local rule would not be effective until posted there. Mr. McCabe said that had been suggested one year previously and rejected as impractical, in part because compliance with 28 U.S.C. § 2072, which requires courts to provide copies of their local rules to the Director of the Administrative Office, is not conscientiously observed. Mr. Niemic said that the FJC, in researching local rules, has found that neither Lexis, nor Westlaw, nor the Administrative Office's paper library of local rules is reliably up-to-date, and that the FJC invariably must contact the individual court to obtain its current local rules.

The Committee unanimously approved a resolution to: 1) urge each bankruptcy court to establish and maintain a website, 2) strongly encourage each court to post its local rules on that website, and 3) establish a local rules link from the Administrative Office's website to that of each court.

January 2000 Bankruptcy Administration Committee Meeting. Judge Walker reported on the January 2000 meeting of the Bankruptcy Administration Committee, which he had attended as the Chairman's representative. He described briefly that committee's discussion of the "unanswerable" question of public access/personal privacy and its resolution requesting the Committee to consider whether the official forms might be amended to require less information from debtors, a matter which he noted was on the Committee's agenda for later in the meeting.

Attorney Conduct Rules. Mr. Smith reported that Standing Committee's subcommittee on attorney conduct had met twice since the last meeting of the Advisory Committee, on September 29, 1999, and again on February 4, 2000. The proposals, and most of the discussion about whether there should be federal rules on attorney conduct, have centered on civil and criminal practice. Bankruptcy practice, however, is understood to be important and its special problems are recognized, he said. Based on the proposed drafts that have been circulated and the discussions to date, he said, it seems likely there will be a "rule of dynamic conformity" with the individual state rules governing attorney conduct. Also likely, he said, is a special rule directed toward the role of United States attorneys in supervising criminal investigations of individuals who may have retained lawyers. Bankruptcy attorneys also need a special rule, he said, even though such a rule might be viewed as "substantive." If such a rule were to be drafted, he said, it should: 1) define the term "adverse interest," and 2) adjust the bilateral litigation rule that you can not sue an existing client for the "collective proceeding" environment that characterizes bankruptcy cases. He noted a similarity to judicial conflicts in bankruptcy cases and suggested that the key to problems with both rules in a bankruptcy setting likely would center on defining who is a "party."

Professor Coquillette described what may become "Federal Rule of Attorney Conduct 1," as a rule adopting for federal courts the standards of the state where the particular federal court is located. Under a "FRAC 1," he said, the approximately 150 conflicting federal local rules on the subject would be abrogated. In connection with a possible "FRAC 2," he referred to the "McDade amendment," enacted a few years ago, that requires Department of Justice attorneys to abide by state or local rules of attorney conduct and said the amendment has worked hardship, because the federal court's local rule often differs from the rule of the state in which the federal court is located. Professor Coquillette added that two bills currently are pending in Congress on the subject. One, he said, would simply repeal the McDade amendment, and the other would send the issue to the Standing Committee to address with a rule. A possible "FRAC 3," covering bankruptcy proceedings, he said, would be up to the Committee to draft.

Financial Disclosure by Parties. Professor Coquillette said no action by the Committee was needed yet, although Congress is looking for quick action by the judiciary to correct perceived shortcomings concerning recusal by trial court judges. He referred to the materials handed out at the meeting, which included materials from the Committee on Codes of Conduct and its chair, Judge Amon, a draft Rule 7.1 prepared by the Advisory Committee on Civil Rules, and proposed additions and variations for the civil, bankruptcy, and criminal rules prepared by the Committee on Codes of Conduct. Professor Coquillette said the Civil Rules Committee believes

its draft Rule 7.1 contains the minimum that should be required, that it is an open question whether any national rule should prohibit or encourage local rules, and contemplated developing a form to supplement the rule. The Committee on Codes of Conduct, on the other hand, clearly wants a uniform, national rule with no local options. The Committee on Codes of Conduct did not favor developing a form, he said, because the committee believes it would be easy to introduce local variations. Professor Coquillette said Judge Scirica would be agreeable to carving out bankruptcy cases and proceedings from any proposed civil rule and suggested the Committee would want to think about its options until its September 2000 meeting. There was no objection to bankruptcy being excepted from any general civil rule that might be proposed. Judge Duplantier said it would seem best for the Committee to approach a bankruptcy rule separately. Mr. Smith said the draft bankruptcy rule provided by the Committee on Codes of Conduct probably is too narrow. Judge Duplantier said he does not think a rule is the appropriate method for addressing disclosure by parties, but if there is a rule, local rules should be permitted to supplement it; a form and general order would be preferable, he said. The form would be due at a party's first appearance, he said, and no person or party's filing would be accepted without the form attached. Judge Torres said there should be an explicit requirement to file a new or supplemental form whenever a change of ownership occurs. A member suggested that Rule 9009 authorizes the Director of the Administrative Office to issue bankruptcy forms. Professor Coquillette said the Standing Committee is aware of that rule and would be agreeable to use of a form in bankruptcy matters. There was a consensus that a form issued by the Director would be appropriate and that local rules should be permitted to broaden the scope of any national rule. Professor Coquillette said the Committee would be asked to address the subject more fully in the fall.

Action Items

The Reporter reviewed the comments on the preliminary draft amendments published in August 1999. The publication included proposed amendments to the civil rules concerning electronic service of documents other than an initiating pleading such as a complaint and summons, as well as proposed amendments to the bankruptcy rules.

Rules 9006(f) and 9022, and Civil Rule 5(b)(2)(D). The Committee received a total of 13 comments, most of them directed to the electronic service proposals. One issue on which the advisory committees specifically had sought comment was whether a party receiving service electronically should be afforded the additional three days for response that is available to a party receiving service by mail. All of the commentators approved the concept of electronic service, and the majority preferred permitting the additional three days for response, while acknowledging the importance of having uniform federal rules regardless of whether the additional three days is approved. The Reporter said that of the comments received by the Advisory Committee on Civil rules, all were favorable, with the majority endorsing uniformity across the federal rules while expressing a preference for permitting the additional three days.

Mr. Smith said it is not feasible to obtain consent when there is a large number of creditors

in a case and that he hoped the Committee would consider authorizing electronic service outside the adversary proceeding context and without requiring consent. Mr. Kohn said that obtaining consent assures that the party giving notice will have the recipient's correct e-mail address. **The Committee approved without objection 1) the transmittal of Rules 9006(f) and 9022 to the Standing Committee with a recommendation for their adoption, and 2) notifying the Advisory Committee on Civil Rules that the Committee supports the amendments to Civil Rule 5 authorizing electronic service as published and, further, that the Committee supports permitting an additional three days for response when service is made electronically, as demonstrated by its approval of the proposed amendment to Rule 9006(f), but supports even more strongly the principle of uniformity among the civil and bankruptcy rules on this subject.**

Rule 2002(g). The proposed amendments would clarify that when a creditor files a proof of claim which includes a mailing address and a separate request designating a different mailing address, the last paper filed determines the proper address, and a request designating a mailing address is effective only with respect to a particular case. The comments submitted noted that it may be difficult in some situations for a clerk to determine what is the "last request" of a creditor designating a mailing address, and suggested that the proposed amendment should go further and permit a creditor to designate a mailing address for all cases. Mr. Heltzel said a clerk faced with multiple designations of mailing addresses for a creditor typically will simply add each new address to the mailing matrix without deleting any earlier addresses. This results in some duplication of mailings to the creditor, he said, but is more efficient because of the labor required to perform a deletion. A new paragraph that was added to the rule to ensure that notices to an infant or incompetent person are mailed to the person's legal representative identified in the schedules or list of creditors drew no comments. **The Committee approved the proposed rule as published.**

Rules 2002(c), 3016(c), 3017(f), and 3020(c). The proposed amendments to these rules would ensure that any creditor or other entity whose conduct would be enjoined under a chapter 9, 11, 12, or 13 plan is provided with adequate notice of the proposed injunction, the confirmation hearing, the deadline for objecting to confirmation of the plan, and the order confirming the plan. One means for achieving adequate notice is the requirement to use "bold, italic or highlighted text" to convey the injunctive provisions. The Reporter noted that Mr. Heltzel had stated at the September 1999 meeting that "highlighted" text can become illegible when it is copied or scanned for imaging or other electronic storage. **The Committee approved replacing the word "highlighted" with the word "underlined" in the proposed amendments to Rules 2002(c) (line 9) and 3016(c) (line 5).**

Two comments stated that providing procedures for notifying entities about the kinds of injunctions covered by the amendments may cause the rules to adopt a position at odds with the Bankruptcy Code. Professor Klee said these amendments are the second part of a deal the Committee reached with the Department of Justice and should go forward. Mr. Kohn said he does not think the Committee is condoning injunctions with these amendments and noted that the

Committee Notes say that explicitly. He suggested that the fourth paragraph of the notes explaining these amendments could be moved to the beginning of each note to make that point more clearly. Professor Resnick said that on December 1, 1999, the related amendment to Rule 7001 referred to by Professor Klee had taken effect. This amendment excepts injunctions in plans from the general requirement of an adversary proceeding, and the Committee Note to the Rule 7001 amendment clearly states the Committee's intent. Moreover, he noted, the 1994 amendments to § 524 of the Code expressly permit injunctions in asbestos cases. Professor Wiggins said the bankruptcy judges of the Ninth Circuit were deeply concerned about a possible substantive effect and she urged the Committee to make clear what it perceives as the scope of the rule. She asked that the Reporter include in the GAP report to the Standing Committee information about the Committee's good faith effort to respond to the concerns expressed about potential substantive consequences of these amendments. The Reporter said he would redraft the Committee Notes to reflect the Mr. Kohn's suggestion and submit the revisions for consideration on the second day of the meeting.

Judge Torres asked whether it would be a good idea to add notice to the caption of each document, as in "Plan of Reorganization and Request for Injunction." Professor Klee said he thought doing so would cause attorneys and parties to put the language in every plan caption, whether or not the plan contained an injunction, diluting the effect of the requirement. One comment suggested that the amendment should contain some mention of the effect of non-compliance with the notice requirements, but the Committee took no action on the suggestion.

On the second day, the Reporter circulated redrafts of the proposed amendments to Rules 2002(c)(c) and 3016 showing the change in wording from "highlighted text" to "underlined text" and the redrafted Committee Notes to the amendments to Rules 2002(c)(3), 3016, 3017, and 3020. After discussion, **the Committee determined to delete from the first paragraph of the redrafted notes to Rules 2002(c)(3), 3016, and 3020 the sentences that disclaimed any intent to affect a determination of whether or to what extent a plan may provide for injunctive relief. With these modifications, the Committee approved the proposed amendments to Rules 2002(c)(3), 3016, 3017, and 3020 for adoption.**

Rule 1007. **The Committee approved without objection the proposed amendments as published.**

Rule 9020. Martha L. Davis, Esquire, general counsel of the EOUST, had expressed strong opposition to the proposed amendments. Professor Klee said he agrees with Ms. Davis and asked the Committee to consider whether the power to punish contempt is an inherent power of any court in the federal system or is restricted only to Article III courts. He referred to In re Sequoia Auto Brokers Limited, Inc., 827 F. 2d 1281 (9th Cir. 1987), although noting that the decision had been superseded in Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F. 3d 278, 283-285 (9th Cir. 1996). Judge Kressel said he also agrees, but not about what should be done. He said he thinks the existing rule is substantive and that courts mistakenly rely

on it for authority. The best solution, he said, would be to amend the rule as proposed and let the courts rule on the issue of whether and to what extent bankruptcy judges have contempt authority.

Professor Resnick offered some background information for the benefit of the new members. He observed that the amendment does not mention "bankruptcy judge," and simply directs a party requesting an order of contempt to do so by motion. He said the Committee had considered simply abrogating the existing rule, but was concerned about creating a negative inference that could give the erroneous impression that a bankruptcy judge's contempt power was being abrogated by the rule abrogation. He noted that several circuits have ruled that bankruptcy judges have contempt authority as an inherent power of judicial office, and the proposed rule amendment is not intended to affect such holdings. He added that the Ninth Circuit is the only one to have relied on existing Rule 9020 to support its ruling that bankruptcy judges have civil contempt power. Judge Torres asked whether there were further reasons to amend the rule rather than abrogate it. Professor Resnick said that a Committee Note is not published to explain why a rule has been abrogated. The Committee believed abrogating the rule without explanation would be mis-read as a statement that bankruptcy judges do not have contempt authority, and the amendment gives the Committee a vehicle for writing a lengthy Committee Note. Professor Resnick said if the Committee were to write a rule that said a bankruptcy judge can rule on contempt, such a rule would be substantive; existing Rule 9020, however, is more restrictive than current case law. Mr. Orr agreed.

Judge Gettleman asked the purpose of the final sentence of the first paragraph of the Committee Note which states that neither the bankruptcy rules nor the civil rules provide procedures for sua sponte contempt orders. Judge Duplantier responded that it explains why, although the existing rule contains a subdivision governing sua sponte orders, there is no need to say anything about them in the rule as amended. **A motion to delete the sentence passed with 2 opposed. A further motion to transmit the proposed amendment to the Standing Committee with the Committee Note amended as above passed on a vote of 9 to 4.** Professor Klee explained that his "no" vote meant that if Rule 9020 is not to be abrogated entirely, he would prefer to retain the existing rule.

Rule 2014. The Reporter briefly reviewed his memorandum describing the proposed amendments which would alter for professionals seeking to be employed by the bankruptcy estate the standard for disclosure of relationships with creditors and their lawyers and accountants. The Chairman explained, for the benefit of the new members, that similar amendments to Rule 2014 had been adopted by the Committee earlier as part of its 1998 preliminary draft amendments (the "litigation package"). Although the package had been withdrawn after the public comment period, the Rule 2014 amendments had been among the few selected by the Committee for further consideration, he said. Mr. Adelman, a member of the subcommittee that had redrafted the proposed amendments, said the subcommittee's objective was to advise practitioners on what they must disclose. The published cases involving this rule, he said, present egregious violations of the rule, rather than conduct at the fringes of the line between acceptable and unacceptable. Accordingly, he said, the case law is not helpful to a practitioner faced with narrow choices. For

example, he said the subcommittee had adapted the "materially adverse interest" standard for disinterestedness in § 101(14) of the Code to "may give rise to an interest materially adverse" in the proposed amendments. Professor Resnick said the proposed draft is narrower than the existing rule and narrower than the draft that was published in 1998. Professor Klee said the subcommittee had tracked the statute in preparing the new draft. Mr. Smith said that using the word "materially" with "adverse" in line 29 would be controversial. The adverb "materially" is not in § 327 of the Code, although it is used in § 101(14). Circuit Judge Edith H. Jones, he noted, had opposed the addition of "materially" during the National Bankruptcy Review Commission's deliberations on this subject. Mr. Rosen said the Bankruptcy Code contains two standards, and the language used in line 29 and elsewhere in the proposed draft tracks the standard established in § 101(14).

Professor Resnick said the word "motion" in line 4, and the word "request" in lines 2, 17, and 49, and in the heading, should be changed to "application." Professor Klee questioned the introduction of a different term when there can be an ex parte motion. Professor Resnick said specifying a motion would make the item a contested matter with all the notice and service requirements Rule 9014 prescribes. Mr. Smith said notice should be given to the appropriate parties. He said, also, that the word "authorizing" in the heading should be changed to "approving" to track the language of § 327 and that proposed subdivision 6 at lines 39-43 of the draft should be deleted in favor of the bracketed alternative subdivision 6 that follows on lines 44-48. Professor Resnick said that directing a professional to state that he or she is eligible to be employed, in line 22, requires the person to draw a legal conclusion and suggested that the preamble would be a better place to cover that aspect of the procedure. Professor Klee said he would prefer that every directive after line 21 be qualified by the phrase "upon knowledge, information and belief formed after reasonable inquiry."

Mr. Smith said the proposed rule should disclose the scope of the attorney's conflicts check., but Mr. Rosen disagreed on the basis that these checks are so extensive the volume of disclosure would overwhelm a judge. Professor Wiggins said lines 63-4 should be revised to read "if the partnership has dissolved solely due to the addition or withdrawal of a partner." Judge Torres said the debtor and the debtor's attorney should be added to the list of those to be served with the application, and Professor Resnick suggested also adding to the service list the 20 largest unsecured creditors, if no committee has been appointed. He also suggested using the language already to be found in Rule 4001(b)(1). Professor Klee said the word "verified" should be deleted from line 69.

Returning to subdivisions (b)(3) and (b)(4) of the proposed draft, Professor Resnick said the intent is to make the rule "user friendly," because the existing rule is very broad, and the cases say "disclose everything." It is impossible to comply without disclosing too much, and there is no guidance concerning where to stop, he said. The members discussed differences in wording between subdivisions (3) and (4) and whether variations in wording–"connection" does not appear in subdivision (4), although "relationship" does-- represent a difference in meaning. Mr. Orr said that if the wording is not the same, there will be the same discussions in law firms that the

Committee was having at the meeting. Mr. Rosen said a prior draft of the proposed rule had avoided variations by combining subdivisions (3) and (4) and requiring disclosure of "any interest, connection, or relationship relevant to a determination that the person is disinterested under § 101 of the Code." **A motion to combine subdivisions (3) and (4) and accept Mr. Rosen's suggested wording passed with no objection.**

It was suggested that a new subdivision (4) be inserted to require disclosure of any relationship the person may have to the United States trustee and any person employed in the office of the United States trustee. A member said it might not be necessary, because Rule 5002 already addresses those relationships. Another member, however, noted that, although Rule 5002 provides that a relationship with a United States trustee or employee of a United States trustee potentially may disqualify a person for employment, there is no requirement in that rule to disclose the existence of a relationship.

It was suggested further that the Committee Note would need rewriting. Professor Klee asked that the word "parameters" be deleted from the final paragraph of the note. Judge Duplantier suggested that the last two sentences be deleted and replaced with a statement that the professional must exercise judgment in deciding what information is relevant. Professor Wiggins expressed reservations about directing lawyers to exercise judgment on the grounds that the subject is an ethical matter and is not appropriately addressed in a Committee Note. **The consensus was to delete all but the first sentence of paragraph 3 of the note and to delete the phrase "attempt to" from the first sentence.** The Reporter said he intended to rewrite the first paragraph of the note also, in light of the discussion at the meeting. **A motion to adopt the rule as agreed to during the discussion passed without objection.**

Rules 1006(b) and 2016. After an introduction by the Reporter, the Committee discussed the advisability of amending or abrogating Rule 1006(b)(3), which requires a debtor who applies to pay the filing fee in installments to postpone paying an attorney until the filing fee has been paid in full. Professor Klee said Rule 1006(b)(3) should be abrogated or amended to include non-attorney bankruptcy "petition preparers," whose compensation is not similarly delayed under the existing rule. Professor Resnick explained that the current rule treats petition preparers differently, because the court lacks the disciplinary authority that it has over attorneys and because petition preparers have no ethical duty to disclose to their clients the consequences of paying the petition preparer. **The Committee took no action on Rule 1006(b).**

With respect to the draft amendment to Rule 2016 requiring a petition preparer to file a statement disclosing the compensation paid, Professor Resnick recommended changing the 15-day deadlines in lines 2 and 8 of the draft to ten days, but also spoke against the proposal, because there is no statutory bar to fee sharing by petition preparers and § 110 of the Code already requires petition preparers to disclose their fees. Judge Duplantier asked whether there is enough money at stake to require petition preparers to disclose their fees. Judge Cristol said some petition preparers charge surprisingly high fees, up to several hundred dollars. Mr. Heltzel said the requirement in the draft to transmit the disclosure to the United States trustee in addition to filing

it would be an improvement over the current statutory procedure that requires only filing, because the United States trustee now must obtain the information from the court rather than receiving it directly. Judge Kressel asked why the draft requires the petition preparer to provide "particulars" when the existing Rule 2016(a) requires an attorney to provide "details." He asked if the intent is that the information disclosed be the same or different and recommended using the same word as in the existing rule to the extent possible. Mr. Rosen questioned whether the fee sharing language should vary from that applicable to attorneys in Rule 2016(a). Judge Duplantier said the draft should conform as closely as possible to the language the Committee is developing in its draft amendments to Rule 2014, in which the exclusion of employees appears at the beginning of the fee sharing provision. Professor Resnick suggested deleting from line 2 of the draft the clause authorizing the court to direct a different deadline from the one specified and cautioned generally against varying too much from the language of § 110 of the Code. **The consensus was to table the proposed amendment until after the Committee has finalized its draft amendments to Rule 2014.**

Rule 1004(a). The Reporter stated that Professor Klee, at the September 1999 meeting, had raised the question whether existing Rule 1004(a) is substantive and should either be amended or abrogated. Professor Klee said he favored the draft amendment. Professor Resnick said the draft appears to restrict the right of a non-filing partner to object to a filing, a right the existing rule preserves by requiring that an involuntary petition be filed unless all partners consent to the bankruptcy. The proposed amendment would authorize a filing under a partnership agreement that permits a majority of the partners to bind all. Professor Klee said that if state law allows a bankruptcy filing, the rule should not preclude it. Judge Gettleman suggested cross-referencing § 303(b)(3)(A). Judge Duplantier asked how the different wording, namely filing "on behalf of" in the proposed amendment to the rule and "against" in § 303(b) of the Code would affect the parties. Mr Adelman said the choice of wording would determine the standing of a non-filing partner. Under a partnership agreement that authorizes filing based on a two-thirds vote, he said, failure to achieve a two-thirds vote would require those who still wanted to file the bankruptcy to do so by an involuntary petition to which the dissenters could object. If two-thirds voted in favor of the filing, however, the dissenters would have no standing to object. **A motion to abrogate subdivision (a) of Rule 1004, delete "(b) Involuntary Petition; Notice and Summons" from existing subdivision (b), and re-title the rule "Partnership Involuntary Petition" passed with none opposed.**

Proposed New Rule 1004.1. The Reporter stated that the present draft had been prepared in response to the Committee's directive at the September 1999 meeting that the proposed new rule should track Rule 17(c) of the Federal Rules of Civil Procedure ("Infants or Incompetents") as closely as possible. Professor Klee said he agreed with that principle, but in light of In re King, 234 B.R. 515 (Bankr. D.N.M. 1999), which had been brought to the Committee's attention by Mr. Kohn, he thought the Committee also should suggest to the Advisory Committee on Civil Rules that it consider limiting the scope of Rule 17(c) to infants and incompetents "whose whereabouts are known." Judge Kressel questioned the need for the final sentence of the draft because it seemed to him unlikely a party would come to the bankruptcy court for appointment of a guardian

ad litem prior to filing a petition. Judge Duplantier said he thought the sentence in the civil rule refers to a defendant and, thus, would not be necessary in a rule about filing a bankruptcy petition. Judge Kressel suggested changing the word "person" to "debtor" in lines 6 and 8 to make it clear that the final sentence refers to post-petition orders by the court. Others disagreed with this departure from the wording of Civil rule 17(c), and Judge Torres said the Committee Note would be a better place to explain that the rule does not cover a person entering the case later or any person other than the debtor. Judge Robreno said he only supports departing from a related civil rule when there is a good reason to do so, and in this instance, he said, he believes there may be one. Mr. Rosen suggested that the choice of verb between "shall" and "may" offered by the Reporter on line 5 should be "may," and Judge Walker said using "may" would facilitate the issuing of an order that might not protect the infant or incompetent person, such as an order of dismissal if the court found that proceeding with the case would not be appropriate. **A motion was made to adopt the Reporter's draft using "including" in line 1 (rather than "such as") and using "shall" in line 5 (rather than "may"). A motion to amend the motion to change the word "person" in lines 6 and 8 to "debtor" passed with 2 opposed. A further motion to delete from line 4 the phrase "duly appointed," to preserve the right of a parent to file on behalf of a minor, failed by a vote of 4 to 8. The motion to adopt the draft as amended passed with none opposed. On reviewing the re-draft, the Committee also changed the word "Whenever" on line 1 to "If," and deleted from the Committee Note all except a statement that the rule is derived from Rule 17(c) Fed. R. Civ. P.**

Rule 9027(d). The Reporter introduced a proposed draft which was based on the Committee's discussion of the rule at the September 1999 meeting. After further discussion, **there was a motion to take no action, which passed without opposition.**

Rule 9027(a)(3). At the September 1999 meeting, the Committee appeared to have agreed that Rule 9027 should cover actions initiated after the filing of the bankruptcy case and then removed, without regard to the status of the bankruptcy case. Judge Gettleman said the words "under the Code" should be inserted following the word "case" in line 5 of the draft. Professor Resnick said the Committee Note should use the bracketed sentence. **A motion to adopt the draft amendment with the changes noted above passed with no objection.** Judge Gettleman added that the word "receipt," referring to a complaint or summons, in Rule 9027(a)(3) may soon be revisited by the Advisory Committee on Civil Rules as a result of a recent Supreme Court ruling that a party must be served with a summons or complaint before the time will begin to run for filing a notice of removal. He said he would recommend waiting for the civil rule to be amended before making any change to the bankruptcy rule.

Rule 2015(a)(5). The Reporter said the existing rule conflicts with 28 U.S.C. § 1930(a) and pending bankruptcy reform legislation might change the statutory language again. The draft amendment would be intended to conform the rule to the statute regardless of whether the statute is amended or remains as it is, he said. Professor Klee said he would like to see the rule amended to include in the events that cut off the obligation to make reports the closing of the case. Mr. Orr said it would be best to conform to the statute, which does not include the word "closed." Mr.

Frank asked the reason for the amendment when the rule already requires reports. Professor Resnick said the amendment is intended to make it clear that as long as the debtor must make quarterly payments the debtor also must file reports. He suggested that the amendment be redrafted to make the connection between reports and the debtor's payment obligations more explicit. The Committee approved the amendments in principle and asked the Reporter to present a redraft the following day. On the second day, the Committee reviewed the redraft and, at Mr. Orr's suggestion, changed the word "of" in line 1 to "after" and changed "the fee required pursuant to 28 U.S.C. § 1930(a)(6) that has been paid" to "the fee payable under 28 U.S.C. § 1930(a)(6)." The Committee also shorted the citation at the end of the Committee Note. **The consensus was to forward for publication the proposed amendments to Rule 2015(a)(15) as so revised.**

Notice of Confirmation of a Chapter 13 Plan. Rule 2002(f)(7) requires the clerk or other person as the court may direct to send notice to all creditors of the confirmation of a plan in a case under chapter 9, 11, or 12. A suggestion had been made to amend Rule 2002(f)(7) to add to the rule notice of the confirmation of a chapter 13 plan. The Reporter said it is puzzling why chapter 13 plan confirmations historically have been excepted from the notice requirement, but most likely it is because creditors expect confirmation in a chapter 13 case. Judge Walker said an amendment may not be necessary if, as he believed, all chapter 13 trustees can upload information about their cases to a central database accessible to creditors. Mr. Orr said such a central database is under development but is not yet available. He added that most of the trustees with large operations provide a dial-up service that creditors use to obtain information on the status of cases. Mr. Orr said a recent survey by his office indicated that 31 of the 88 chapter 13 trustees responding also send notice when a plan is confirmed. Four trustees had indicated that in their cases debtor's counsel sends a notice of confirmation, while the remaining trustees indicated that the practice is variable. He added that one company handles the automated systems for about 70 percent of the trustees and appears to have a central information service for its subscriber trustees. One competitor appears to serve the bulk of the other trustees, so that centralized information may already be obtainable through these private sources, he said. Mr. Heltzel noted that in many districts a creditor can have access to the actual plan and the order of confirmation by logging on to the court's website. **A motion to take no action was unopposed.**

Rule 8014. A suggestion had been received from a former Committee chairman to amend the rule to provide time limits for submitting and for objecting to a bill of costs related to an appeal to the district court or bankruptcy appellate panel, changes that would conform the rule more closely to Rule 39 of the Federal Rules of Appellate Procedure. Professor Resnick said he thought the rule should be more specific about which court and which clerk would act under the rule to achieve the same result as under Rule 39. Judge Roettger asked what would happen if an appeal were affirmed in part and reversed in part. There was a motion to re-commit the proposed amendments to the Reporter for re-drafting to track Rule 39, with underlining and striking out to indicate changes to existing Rule 8014, all to be considered at the next meeting. A member said the re-draft should state the source of substantive authority for taxing costs in a bankruptcy appeal, and another questioned the introduction of time limits, which are not in the existing rule,

especially when there is no provision for extending the times. A member noted that 28 U.S.C. § 1920 provides for taxing of costs by any court of the United States but that a bankruptcy appellate panel would not be included among such courts. **No vote was taken on the original motion, but a motion to take no action passed by a vote of 8 to 5.**

Rule 2004(c). The Reporter explained that the Committee previously had approved the proposed amendments and the only change being presented was in the Committee Note. At the suggestion of Mr. Kohn, he said, he had added a phrase from the Committee Note to Rule 45 of the Federal Rules of Civil Procedure stating that an attorney admitted in a district pro hac vice can issue a subpoena. A member noted that the spelling "haec," taken from the Committee Note to Rule 45 should be changed to "hac." Judge Torres questioned the authorization to issue a subpoena in a remote district, and Judge Robreno asked whether this rule would be sufficient to police attorney abuse of the subpoena power. Professor Resnick responded that this subdivision derives from Civil Rule 45, which contains no requirement for an order authorizing a deposition, while subdivision (a) of Rule 2004 requires a court order authorizing the examination for which the subpoena provisions of subdivision (c) would be used. Professor Klee noted that the amendments mention cases but not "proceedings," and Professor Resnick said the reference to Rule 9016, which does apply in "proceedings" indicates that Rule 2004(c) can be used in both cases and "proceedings." Professor Resnick also commented that the deviations in Rule 2004(c) from the exact wording of Rule 45 arise from the Standing Committee's requirement that all amendments follow the style guidelines issued in 1996. **A motion to adopt the amendment, including the addition to the Committee Note, passed without objection.**

Public Access and Privacy. Mrs. Ketchum introduced the discussion of this issue, which also is being examined by several Judicial Conference committees and in the legislative and executive branches of government. Five bankruptcy courts already accept filings electronically and many more "scan" or "image" all documents filed to produce an electronic record. Most, if not all, of these courts, also post these electronic documents on their websites, making them available 24 hours-a-day to anyone with access to the Internet, she said. Although court files always have been open to examination by the public, many in the judiciary have begun to question whether privacy interests of individuals may require some restrictions on access to electronic files. There also may be other methods by which the amount of private information potentially available from court files might be reduced. The Court Administration and Case Management Committee has established a subcommittee to study the issue, and liaisons have been appointed from other interested committees. In addition, the Bankruptcy Administration Committee, specifically, has requested the Committee to "consider whether the official Bankruptcy Forms should be modified to require less information to be filed and become part of the public record."

Mr. Heltzel said the schedules and other forms used to file a bankruptcy case contain most of the information privacy advocates are most concerned about, including a debtor's Social Security number. Judge Robreno suggested that lawyers should be more careful about the contents of documents and that some information currently filed could be labeled "administrative"

to restrict access. Professor Klee said the aliases or "other names used" provided in the petition are very valuable to creditors and that the petition, overall, is very basic and necessary to the case. He said the schedules also contain essential information that creditors need to know, especially in chapter 11 cases. The statement of financial affairs frequently contains sensitive information, he said, but it is information creditors need to participate in the case. He noted that § 521 of the Code does not require a debtor to file schedules and statements in every case but only "unless the court orders otherwise."

Mr. Orr drew a distinction between "data" and administrative information necessary to administer the case. He said the Committee might consider examining the uses of different types of filed information and consider changes such as filing with the United States trustee rather than the court based on those different uses. Judge Duplantier inquired whether documents submitted to the United States trustee are public. Mr. Orr said they are subject to the Freedom of Information Act but are not presumptively public as court filings are. Judge Duplantier said that fact might nullify the United States trustee's office as a solution. Mr. Smith suggested that the courts could leave cases filed by individuals off the Internet while posting the corporate cases. Any document filed in any court would be public but not necessarily on the Internet. Mr. Heltzel said his court has experienced a "tremendous" positive response to the posting of the files of consumer cases on the Internet. Concerning the proposal to limit access by issuing a password, he noted that he has no criteria for denying a password to anyone and that he has never denied such a request.

Mr. Rosen suggested that the Committee recommend a statute forbidding use of bankruptcy case information for commercial exploitation. Professor Resnick said he had attended a session on privacy sponsored by the Rand Corporation at which representatives of the credit card industry made it very clear they want the information contained in debtors' schedules and statements of financial affairs. He said it may be impossible to stop the flow of information to the Internet, because credit bureaus and other financial reporting organizations hire "stringers" to visit courthouses and gather information on bankruptcy filings which the organizations then publish on the Internet. Judge Duplantier said the Committee should look carefully at the Official Forms, because there may be some unnecessary items. Mr. Orr said the credit industry searches bankruptcy files for hypothecation paper, such as liens that can be bought or sold. Many understand, he said, that a discharged debtor is creditworthy, because the Code bars the debtor from receiving another discharge for seven years. Judge Torres said the bankruptcy system may be collecting more information than really is needed and that the Committee should consider whether any information that is needed should be separated from the public file. He said the Committee also should consider ways to limit or prohibit improper disclosure of information and keep in mind the administrative burden of caring for information.

Professor Morris suggested that § 107(a) may not be as broad as it looks initially, but that the Committee faces a difficult task because Congress, in the pending bankruptcy reform legislation, appears to be requiring more and more information from debtors. Mr. Heltzel said there appear to be two categories of information in bankruptcy cases: 1) information necessary to

effect notice and allow a creditor to identify the debtor correctly, and 2) the information in the schedules and statements that must be disclosed to the trustee to enable the trustee to administer the bankruptcy estate. It may be possible, he said, to put much of the information in the second category into a "trustee disclosure" mode, so that it would be provided to the trustee by "more traditional forms of disclosure." The financial data in the schedules and statement of financial affairs is crucial to trustees and creditors, he said, but neither group cares how they obtain the information as long as it is accurate, complete, and available. Judge Walker said one of the points made at the Bankruptcy Committee meeting is that privacy is a commodity. The proper question, the judges there said, is not whether an individual gives up privacy by filing bankruptcy or undertaking some other activity, but what the individual receives in return. There are other examples in modern life, he said, such as a Safeway club card that offers discounts as an inducement to allow the store to document a customer's purchases and the "cookies" that Internet merchandisers use to track those who visit their websites. The Chairman commented that the issue is a difficult one to which no solution is readily apparent. **He asked whether there was a consensus to examine the matter further and, hearing no objection, said he would appoint a subcommittee for that purpose.**

Feasibility of Setting Time Periods in the Rules in Multiples of Seven Days. The Reporter referred to his memorandum in which he described several problems with the suggestion to consider using seven days as a timing mechanism in the rules. The major obstacles, he said, are 1) the fact that the Code contains some deadlines that would conflict with a seven-day rules, 2) the fact that a case can be filed on a Sunday, causing all subsequent deadlines also to fall on a Sunday, and 3) the lack of popular outcry from the bankruptcy community over the existing time periods in the rules. Judge Gettleman said he is convinced that it would cause more trouble than it would create benefits to make the changes, effectively withdrawing the suggestion.

Subcommittee Report

Subcommittee on Forms. Judge Kressel reported that the subcommittee had considered the forms suggestions referred to it by the Committee at the last meeting. The subcommittee was recommending no action on the suggestions, even though many of the suggestions were good, because the forms at issue are still quite new. Mr. Heltzel repeated his request, made at the last meeting, that the subcommittee consider creating a separate or supplemental form filed only in business cases for the business questions on the Statement of Financial Affairs (Official Form 7). Mr. Kohn said he would not support any further delay in issuing the amendments to Form 7, which have been published and commented on; Mr. Heltzel said he did not intend his request to result in delay of the pending amendments. Judge Kressel said the bankruptcy system had separate business and non-business forms for many years and that he viewed dividing Form 7 as regressive. Mr. Heltzel also repeated he request that shading be eliminated from the forms, because it comes out looking black when a document is scanned, defeating the purpose of enhancing clarity. Judge Walker noted that the Committee probably will look at the forms again in connection with the electronic case filing project and that Mr. Heltzel's requests could be reconsidered in that context. Professor Klee said he favors eliminating shading on the forms.

The consensus was that shading is an artistic feature of the forms, not a substantive one, and that the shading on the amended Voluntary Petition (Official Form 1) approved for republication and further comment at the March 1999 meeting should be removed before the form is forwarded to the Standing Committee.

Information Item

Mr. Niemic reported that the Federal Judicial Center has been conducting a study of evidentiary issues related to electronic materials. He said there would be an update on the study available for the September 2000 meeting.

Administrative Matters

The Committee selected March 15-16 in New Orleans as the dates and location for its spring 2001 meeting.

Respectfully submitted,

Patricia S. Ketchum

2

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 7-8, 2000
Washington, D.C.

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Wednesday and Thursday, June 7-8, 2000. The following members were present for the entire meeting:

Judge Anthony J. Scirica, Chair
Judge Michael Boudin
Judge Frank W. Bullock, Jr.
Charles J. Cooper
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte
Acting Associate Attorney General Daniel Marcus
Patrick F. McCartan
Judge J. Garvan Murtha
Judge A. Wallace Tashima

Chief Justice E. Norman Veasey and David H. Bernick each attended one day of the meeting. Roger A. Pauley, Director of the Office of Legislation, also participated on behalf of the Department of Justice. In addition, Judge James A. Parker, former member of the committee and chair of its style subcommittee, attended the entire meeting.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, deputy chief of that office; Patricia S. Ketchum, senior attorney in the Bankruptcy Judges Division; and Lynn Rzonca, assistant to Judge Scirica. Abel J. Mattos, Chief of the Court Administration Policy Staff of the Administrative Office, also participated in part of the meeting.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Member
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Milton I. Shadur, Chair
Professor Daniel J. Capra, Reporter

Judge Tommy E. Miller, a member of the Advisory Committee on Criminal Rules, assisted in the presentation of the report of that advisory committee.

Also taking part in the meeting were: Joseph F. Spaniol, Jr. and Professor R. Joseph Kimball, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica thanked Judge Parker for his distinguished service as a member of the committee and as the chair of the style subcommittee. He pointed out that substantial progress had been achieved in restyling and improving the language of the federal rules, thanks to the excellent work of the style committee and the respective advisory committees. He noted that the revised, restyled body of appellate rules had been very well received by the bench and bar and that a complete set of restyled criminal rules was about ready for publication and comment.

Judge Scirica reported that no proposed rule amendments had been before the Judicial Conference at its March 2000 meeting for approval. He added that the Supreme Court had promulgated the rule amendments approved by the Conference in September 1999 — including the proposed changes to the discovery rules — and had forwarded them to Congress in accordance with the Rules Enabling Act. These amendments, he said, would take effect on December 1, 2000, unless Congress were to take action to reject them. He noted, however, that one lawyers' association had raised some objections to the discovery rules and that hearings might be convened in Congress to consider the amendments.

Judge Scirica pointed out that the committee and the Judicial Conference have an affirmative statutory responsibility to monitor and improve the federal rules. Nevertheless, he said, some proposed amendments to the rules have been controversial and have encountered opposition from parts of the bench or bar. As a result, he suggested, the rules process has become more visible, more political, and more difficult.

Judge Scirica reported that he and Professor Coquillette had met with the Chief Justice to keep him informed of on-going initiatives of the rules committees. He said that it

was also time for him to meet with the chairs of the advisory committees to take a fresh look at the rulemaking process and the future directions of the committees.

Judge Scirica reported that a provision in the omnibus bankruptcy legislation pending in Congress would provide for appeals — including interlocutory appeals — to be taken from the orders of bankruptcy judges directly to the courts of appeals as a matter of course. This would effectively eliminate the district courts from the bankruptcy appellate process. This provision, he said, was in conflict with the Judicial Conference's position that direct appeals to the court of appeals should be authorized only through a certification process limited to matters that raise important legal issues or questions of public policy. Judge Scirica reported that the Executive Committee of the Conference had been informed of the legislative problem and that negotiations with the Congress would be pursued.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2000.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the committee's two-year pilot program to receive public comments on proposed rule amendments electronically through the Internet had been successful. He said that the AO and the advisory committees would like to make the experiment permanent. Thus, all published amendments will continue to be posted on the Internet at the same time that they are distributed to the public in printed form. The bench and bar will continue to be invited to submit comments to the Administrative Office via the Internet.

The committee without objection approved making the pilot program permanent and continuing to accept public comments on proposed amendments in electronic form through the Internet.

Mr. Rabiej reported that the American Bar Association in February 2000 had passed a resolution calling for posting all local rules of court on a single Internet site maintained by the federal judiciary. He noted that the issue had been assigned to the Judicial Conference's Court Administration and Case Management Committee. That committee, he said, would expect input from the rules committees on the proposal.

Mr. Rabiej pointed out that more than half the federal courts had posted their local rules on their own, individual Internet sites. In addition, the judiciary's national web site, maintained by the Administrative Office, contains links to the sites of the individual courts.

He emphasized that the Standing Committee and the respective advisory committees had long supported the concept of posting all local court rules on the Internet as an effective means of providing prompt, accurate, and complete procedural information to the bar and public.

Mr. Rabiej reported that the advisory committees had discussed the proposal on several occasions and had reached a consensus that:

1. Individual federal courts should be encouraged to post their local rules on their own web sites.

2. Those courts without a web site should be encouraged to develop one, even if only to post their local rules.

3. Courts should be encouraged to post their local rules in a prominent location on their web site so that a user may readily locate them, such as by establishing a special icon designated for local rules information.

4. Courts should be encouraged to include a uniform statement immediately below the caption of the local rules to indicate that they are current.

5. Local court web sites should be directly linked to the national judiciary site maintained by the Administrative Office.

The committee approved the proposed actions outlined in Mr. Rabiej's presentation and asked that they be communicated to the Court Administration and Case Management Committee.

Mr. Rabiej pointed out that implementation of these recommendations would be voluntary for the courts, and inevitably not every rule of every court will be posted immediately. Judge Garwood added that the Advisory Committee on Appellate Rules had discussed on a preliminary basis the possibility of making local court rules ineffective until they are actually placed on the Internet or otherwise posted as prescribed by the Director of the Administrative Office.

One of the participants added that FED. R. CIV. P. 83(a) already requires the courts to send their local rules to the Administrative Office and to make them available to the public. He added that the rule could be used to mandate that every court establish an electronic link with the Administrative Office and keep its local rules up to date on its own site.

Another participant said that it was important to have two dates posted on the local rules web site: (1) the date of the most recent amendment to a particular rule; and (2) the date of the last general revision of the court's local rules as a whole.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary referred the members to a description of the list of various pending Federal Judicial Center projects, set out as Agenda Item 4.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Garwood's memorandum and attachments of May 11, 2000. (Agenda Item 5)

Judge Scirica reported that the Standing Committee at its January 2000 meeting had approved for publication proposed amendments to FED. R. APP. P. 1, 4, 5, 15, 24, 26, 27, 28, 31, 32, 41, 44 and FORM 6. But, he added, proposed amendments to FED. R. APP. P. 4(a)(7), defining the entry of judgment, had been withdrawn for further consideration at the June 2000 meeting. The amendments, he said, involved complicated and troublesome interfaces between the appellate and civil rules that needed to be addressed through the joint efforts of both the appellate and civil advisory committees.

Amendments for Publication and Comment

1. Electronic Service

FED. R. APP. P. 25(c) & (d), 26(c), 36(b), 45(c)

Professor Schiltz reported that the package of amendments to the appellate rules governing electronic service were identical to the proposed companion amendments to the civil rules (and companion amendments to the bankruptcy rules), except in one respect. He explained that under the proposed amendments to both the appellate rules and the civil rules:

- service by electronic means would be permitted, but only on consent of the parties;
- the document that initiates a case, *i.e.*, the complaint or notice of appeal, would be excluded from the electronic service provisions;
- electronic service would be complete upon transmission;
- the "three-day" rule, giving the party being served an additional three days to act, would be made applicable to service by electronic means;
- the court itself could use electronic means to send its orders and judgments to parties; and
- the court could choose to provide electronic service for the parties through court facilities.

Professor Schiltz said that the only difference between the proposals related to the issue of failed transmission. He noted that the appellate and civil advisory committees both agreed that if a serving party learns that its service is not effective, it must attempt to serve the appropriate document again. The appellate committee, however, was concerned about potential abuse of this provision. Therefore, it added a provision — not included in the proposed amendments to the civil rules — that would require a party being served to notify the serving party within three days after transmission that the paper was not in fact received.

Professor Cooper responded that the Advisory Committee on Civil Rules did not believe that the provision was needed. He added that there is a risk of unintended implication if the rules were to address failure of electronic service explicitly, but not failure of other types of service.

Professor Cooper was asked by the chair to describe the proposed amendments to the civil rules in further detail.

He reported that the electronic service proposal had been published in August 1999 and that some changes had been made in the amendments as a result of the public comments. He pointed out that the amended Rule 5(b)(1) makes it clear that electronic service will apply only to service under Rules 5(a) and 77(d), and not to the service that initiates a case.

Professor Cooper noted that new Rule 5(b)(2)(D) provides that electronic service — or service by means other than those specified in the current rule — must be consented to by the party being served. He added that the Department of Justice had commented that the rule should require that the consent be made in writing. Accordingly, the advisory committee had inserted new language in the amendment requiring explicitly that service be made in writing. The committee note, though, makes it clear that the writing itself may be in electronic form.

Professor Cooper explained that the amendment specifies that service is complete on transmission. A party, moreover, may make service through the court's transmission facilities, as long as the court authorizes the practice by local rule.

Professor Cooper pointed out that paragraph 5(b)(3) had been added by the advisory committee following publication. It states that electronic service is not effective if the party making service learns that the attempted service failed to reach the person intended to be served.

He explained that the advisory committee had relied on the committee note to make the point that failed service is not effective service. Nevertheless, inclusion of an explicit statement in the text of the rule itself was prompted by consideration of the draft rule prepared by the Advisory Committee on Appellate Rules (FED. R. APP. P. 25(c)) and the desire to achieve uniformity in substance and language among the different sets of federal rules.

Professor Cooper explained that the draft paragraph 5(b)(3), as originally considered by the advisory committee, had not been limited to electronic service for fear that it might generate unintended negative implications as to the status of failed service by other means. But, he said, after reviewing the case law on the subject and considering the narrower scope of the proposed appellate rule, the Advisory Committee on Civil Rules had decided to limit the scope of the paragraph to failure of service by electronic means.

He added, however, that the advisory committee did not believe that it was necessary to include a specific time limit for notifying the serving party of a failed transmission. Several participants agreed that failed service is simply not a problem in district court practice because parties always re-serve a paper that does not reach the party being served. Thus, no time limits need be specified in the rules. They argued that paragraph 5(b)(3) was not necessary because the problems resulting from failed transmissions can readily be resolved through the exercise of judicial discretion and the development of case law.

Judge Scirica noted that the proposed amendments to the civil rules governing electronic service — as well as the companion amendments to the bankruptcy rules had been subjected to the public comment process and were ready for final approval by the Judicial Conference. On the other hand, the proposed amendments to the appellate rules had been presented to the Standing Committee only for authority to publish.

Judge Scirica said that the provisions in the two sets of rules should be the same. He pointed out, however, that paragraph (b)(3) of the proposed amendments to FED. R. CIV. P. 5 — specifying that electronic service is ineffective if the serving party learns that it did not reach the person to be served — was new material added by the advisory committee after publication. As such, it would normally have to republished for additional public comment.

The committee reached a consensus that there should be only one, uniform version of the proposed electronic service rules and that the appellate version should be altered to conform to the proposed civil version.

The Committee approved the proposed amendments to FED. R. CIV. P. 5(b) without objection.

Judge Boudin moved to conform the appellate rules to the civil rules by deleting the reference to three days in proposed new Rule 25(c)(4) and approving the other proposed electronic service amendments for publication, i.e., FED. R. APP. P. 25(c), 25(d), 26(c), 36(b), and 45(c). The motion was approved without objection.

Judge Scirica added that the reporters of the civil and appellate advisory committees should consult further with each other to make sure that the language of the proposed amendments was essentially identical.

2. Financial Disclosure

FED. R. APP. P. 26.1

The proposed amendments to Rule 26.1 *(corporate disclosure statement)* were addressed as part of the general discussion on financial disclosure, addressed later in these minutes at pages 28-31 of these minutes.

3. Other Amendments

FED. R. APP. P. 5(c) and 21(d)

Judge Garwood reported that the proposed amendments to Rule 5(c) *(appeal by permission)* and Rule 21(d) *(writs)* would correct an inaccurate cross-reference in the current rules to FED. R. APP. P. 32. In addition, the amendments would impose a new 20-page limit on petitions for permission to appeal and petitions for a writ of mandamus, prohibition, or other extraordinary relief.

FED. R. APP. P. 4(a)(7)

Professor Schiltz noted that the advisory committee had presented proposed amendments to Rule 4(a)(7) at the January 2000 meeting of the Standing Committee that would resolve case law splits among the circuits as to the finality of district court judgments and the time limit for filing a notice of appeal. He pointed out that members of the Standing Committee had expressed concerns about the amendments because, among other things, they would decouple the running of the time to file post-judgment motions (governed by the civil rules) from the running of the time to file appeals (governed by the appellate rules). Accordingly, the proposed amendments were deferred to the current meeting. In the interim, the advisory committee was asked to conduct further research into when judgments become effective for all purposes. It was also asked to work with the civil advisory committee and attempt to develop an integrated package of proposed amendments to the appellate rules and the civil rules.

Professor Schiltz reported that the two advisory committees had produced a set of proposed amendments that would resolve the concerns of the members. He said that FED. R. CIV. P. 58(b) would be amended to specify that when a judgment must be "set forth" on a separate document, it will be considered so entered when: (1) it is actually set forth on a separate piece of paper; or (2) 60 days after entry of the judgment on the civil docket, whichever is earlier. This provision, he said, would set a 60-day outer limit in determining the finality of a judgment for purposes of both a post-judgment motion and a notice of appeal. A companion amendment to FED. R. APP. P. 4(a)(7) would simply provide that a judgment is considered entered for purposes of the appellate rules when it is entered for purposes of the civil rules.

The proposed amendments would also clarify whether an order disposing of a post-judgment motion must itself be set forth on a separate piece of paper. FED. R. CIV. P. 58 would be amended to specify that orders that dispose of post-judgment motions do not have to be entered on a separate document. FED. R. APP. P. 4(a)(7), as revised, would simply refer to Civil Rule 58. Thus, the civil rules will govern, and there will be no separate appellate provision.

Judge Garwood and Professor Schiltz said that the proposed, companion amendments to FED. R. CIV. P. 58 and FED. R. APP. P. 4(a)(7) might not solve all the problems regarding the effectiveness of a judgment, but they would resolve the most serious and most frequent problems. They added that the public comment period would provide a good opportunity to discover any additional problems.

The committee approved the proposed amendments without objection.

Informational Items

Judge Garwood announced that Professor Schiltz would leave his position with the Notre Dame Law School to accept the position of associate dean of the newly established St. Thomas Law School in Minneapolis, Minnesota.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Morris presented the report of the advisory committee, as set forth in Judge Duplantier's memoranda and attachments of May 11, 2000, and May 24, 2000. (Agenda Item 6)

Judge Duplantier summarized that the advisory committee was seeking final approval of amendments to eight bankruptcy rules and one official form. He pointed out that four of the proposed amendments deal with providing adequate notice to parties affected by an injunction included in a chapter 11 plan, and two deal with giving notice to infants or incompetent persons. He noted that the public hearings scheduled for January 2000 in Washington had been canceled for lack of witnesses.

Judge Duplantier reported that the advisory committee was also seeking authority to publish proposed amendments to six rules and one official form for public comment.

Amendments for Final Approval

FED. R. BANKR. P. 1007(m)

Judge Duplantier explained that the proposed amendment to Rule 1007 *(lists, schedules, and statements)* would require a debtor who knows that a creditor is an infant or incompetent person to include in the list of creditors or schedules the name, address, and legal relationship of any representative upon whom process would be served in an adversary proceeding against the infant or incompetent person.

FED. R. BANKR. P. 2002(c) and (g)

Judge Duplantier reported that two amendments were proposed to Rule 2002 *(notices)*. New subdivision 2002(c)(3) would require that parties entitled to notice of a hearing on confirmation of a plan be given adequate notice of any injunction contained in the plan that would enjoin conduct not otherwise enjoined by operation of the Bankruptcy Code.

Subdivision 2002(g) would be revised to make it clear that when a creditor files both: (1) a proof of claim that includes a mailing address; and (2) a separate request designating a different mailing address, the last paper filed determines the proper address. In addition, a new paragraph (g)(3) would be added to assure that notices directed to an infant or incompetent person are mailed to the appropriate guardian or other legal representative identified in the debtor's schedules or list of creditors.

FED. R. BANKR. P. 3016(c)

Judge Duplantier said that a new subdivision (c) would be added to Rule 3016 *(filing of plans and disclosure statements)* to require that a plan and disclosure statement describe in specific and conspicuous language all acts to be enjoined by the provisions of a proposed injunction and to identify any entities that would be subject to the injunction.

FED. R. BANKR. P. 3017(f)

Judge Duplantier stated that a new subdivision (f) would be added to Rule 3017 *(court's consideration of a disclosure statement)* to assure that adequate notice of a proposed injunction contained in a plan is provided to entities whose conduct would be enjoined, but who would not normally receive copies of the plan and disclosure statement — or any information about the confirmation hearing — because they are not creditors or equity security holders in the case.

FED. R. BANKR. P. 3020(c)

Judge Duplantier said that subdivision (c) of Rule 3020 *(confirmation of a chapter 11 plan)* would be amended to require that the court's order confirming a plan describe in detail all acts enjoined by an injunction contained in a plan and identify the entities subject to the injunction. It would also require that notice of entry of the order of confirmation be mailed to all known entities subject to the injunction.

FED. R. BANKR. P. 9006(f)

The proposed amendment to Rule 9006 *(time)* is part of the package of proposed amendments authorizing service by electronic and other means in the federal courts. The companion amendments to FED. R. CIV. P. 5(b) were approved by the Standing Committee earlier in the meeting as part of the discussion of proposed amendments to the Federal Rules of Appellate Procedure. (See page 7 of these minutes.)

Judge Duplantier pointed out that Rule 9006(f), as amended, would explicitly authorize a party who is served by electronic means an additional three days to take any required action, just as if the party had been served by mail. Judge Duplantier added that the Advisory Committee on Bankruptcy Rules was very supportive of extending the "three-day rule" to all methods of service — including electronic service — other than service by personal delivery. He added, however, that the advisory committee was most concerned that the bankruptcy rules and the civil rules be uniform on this matter.

FED. R. BANKR. P. 9020

Judge Duplantier explained that the existing provisions of Rule 9020 *(contempt proceedings)* provide that the effectiveness of a bankruptcy judge's civil contempt order is: (1) delayed for 10 days; and (2) subject to *de novo* review by a district judge. The proposed amendment would delete the procedural provisions in the existing rule and replace them with a simple statement that a motion for an order of contempt made by the United States trustee or a party is governed by Rule 9014, which covers contested matters.

He pointed out that the amended rule does not address a contempt proceeding initiated *sua sponte* by a judge. The advisory committee, he said, noted that there is no provision in the civil rules dealing with contempt on a judge's own motion. It decided, therefore, not to include any provision in the bankruptcy rules on this point.

FED. R. BANKR. P. 9022(a)

Judge Duplantier stated that Rule 9022 *(notice of a judgment or order)* would be amended to authorize the clerk of court to serve notice of the entry of a bankruptcy judge's judgment or order by any method of service authorized by amended FED. R. CIV. P. 5(b),

including service by electronic means. He pointed out that the proposal — which mirrors the proposed amendment to FED. R. CIV. P. 77(d) — is part of the general package of amendments authorizing electronic service in the federal courts. (See the discussion above under FED. R. BANKR. P. 9006(f).)

OFFICIAL FORM 7

Judge Duplantier reported that the advisory committee would add four new questions to Official Form 7 *(statement of financial affairs)*, to solicit information from the debtor about community property, environmental hazards, tax consolidation groups, and contributions to employee pension funds. He pointed out that new Question 17, requiring information as to environmental hazards, represented a compromise because governmental agencies had wanted to require the debtor to disclose a good deal more information.

The committee approved the proposed amendments to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022 and Official Form 7 without objection.

Amendments for Publication and Comment

FED. R. BANKR. P. 1004

Judge Duplantier and Professor Morris explained that subdivision (c) of Rule 1004 *(partnership petition)* would be deleted because it is substantive in nature. The amendments would make it clear that the rule merely implements § 303(b)(3)(A) of the Bankruptcy Code. They are not intended to establish any substantive standard for the commencement of a voluntary case by a partnership. The amended rule will deal only with involuntary petitions against a partnership.

FED. R. BANKR. P. 1004.1

Professor Morris stated that the proposed new Rule 1004.1 would fill a gap in the existing rules and address the filing of a petition on behalf of an infant or an incompetent person. He noted that it is patterned after FED. R. CIV. P. 17(c) and allows a court to make any orders necessary to protect the infant or incompetent person.

FED. R. BANKR. P. 2004(c)

Judge Duplantier reported that subdivision (c) of Rule 2004 *(examination)* would be amended to clarify that an examination may take place outside the district in which the case is pending. An attorney who is admitted to practice in the district where the examination is to be held may issue and sign the subpoena.

FED. R. BANKR. P. 2014

Judge Duplantier said that Rule 2014 deals with approval of the employment of a professional and with disclosure of the information necessary to determine whether the professional is "disinterested" under the Bankruptcy Code. He pointed out that the rule was being rewritten to make it conform more closely to the applicable provisions of the Code.

Professor Morris added that the revised rule might be controversial because it deals with employment standards and prerequisites for the payment of professionals. The current rule, he said, requires disclosure of the professional's connections with a broad range of persons and organizations. The revised rule would narrow the scope of the disclosures and leave the definition of disinterestedness exclusively to the Code.

FED. R. BANKR. P. 2015(a)(5)

Judge Duplantier said that paragraph (a)(5) of Rule 2015 *(duty to keep records, make reports, and give notice of case)* would be amended to provide that the duty of a trustee or debtor in possession to file quarterly disbursement reports will continue only as long as there is an obligation to make quarterly payments to the United States trustee. Professor Morris added that the change was technical in nature since it would merely conform the rule to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

FED. R. BANKR. P. 4004(c)

Judge Duplantier explained that subdivision (c) of Rule 4004 *(grant or denial of discharge)* would be amended to postpone the entry of a discharge if a motion to dismiss a case has been filed under § 707 of the Bankruptcy Code. The current rule, he said, is narrower, as only motions to dismiss brought under § 707(b) postpone a discharge.

FED. R. BANKR. P. 9014

Judge Duplantier reported that the advisory committee recommended two changes in Rule 9014 *(contested matters)* that would address complaints voiced by the bar about the way that contested matters are handled in some districts.

Judge Duplantier explained that the first proposed amendment, set forth as new subdivision (d), would govern the use of affidavits in disposing of contested matters. He said that a number of bankruptcy courts now routinely resolve contested matters on the basis of affidavits alone. He added that the practice was controversial, and there was a split of opinion as to its legality and advisability.

Judge Duplantier stated that the proposed amendment would provide that if the court needs to resolve a disputed material issue of fact in order to decide a contested matter, it must

hold an evidentiary hearing at which witnesses testify. It may not rely exclusively on affidavits in those circumstances. Contested matters, thus, would be handled in the same manner as adversary proceedings and trials in civil cases in the district courts under FED. R. CIV. P. 43.

The second amendment would address complaints from the bar that some courts schedule contested matters for a hearing without informing the parties in advance as to whether evidence will be taken from witnesses at the hearing. Lawyers, therefore, bring their witnesses to court, only to learn that live testimony will not be allowed. Judge Duplantier said that the proposed amendment would require the courts to establish procedures giving parties advance notice of whether a scheduled hearing will be an evidentiary hearing at which witnesses may testify.

FED. R. BANKR. P. 9027

Judge Duplantier said that Rule 9027(a)(3) *(notice of removal)* would be amended to make it clear that if a claim or cause of action is initiated in another court after a bankruptcy case has been commenced, the time limits for filing a notice to remove that claim or cause of action to the bankruptcy court apply, whether or not the bankruptcy case is still pending. In other words, he said, if a state court action is filed after a bankruptcy discharge has been granted, the action should be removable, whether or not the bankruptcy case is still pending.

OFFICIAL FORM 1

Judge Duplantier reported that the advisory committee recommended amending Official Form 1 *(Voluntary Petition)* to require that the debtor disclose the ownership or possession of property that may pose a threat of imminent and identifiable harm to public health or safety. He noted that the change may be controversial because it could be seen as calling for self-incrimination. But, he said, the advisory committee had drafted the language carefully to avoid the problem by requiring disclosure only of property that "to the best of the debtor's knowledge, poses or is alleged to pose" a threat to public health or safety.

Professor Morris pointed out that the petition form itself will require the debtor to check a box declaring whether there is any property posing an alleged harm. If so, the debtor must also attach new Exhibit C setting forth more detailed information about the alleged harm. This information, he said, would be filed by the debtor at the beginning of a case, so it would be flagged early for the attention of affected government agencies.

The committee approved the proposed amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, proposed new Rule 1004.1, and proposed amendments to Official Form 1 for publication and comment without objection.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal, acting for Judge Paul V. Niemeyer, the chair of the advisory committee, and Professor Cooper presented the report of the advisory committee, as set forth in Judge Niemeyer's memorandum and attachments of May 2000. (Agenda Item 7)

Rules for Final Approval

1. Electronic Service

FED. R. CIV. P. 5(b) and 6(e)

Professor Cooper pointed out that the proposed amendments to Rule 5(b) *(making service)* authorizing service by electronic means had been approved by the Standing Committee earlier in the meeting during its consideration of the report of the Advisory Committee on Appellate Rules. (See page 7 of these minutes.)

Professor Cooper explained that the advisory committee, in its August 1999 request for public comments, had *not* recommended that Rule 6(e) *(additional time after service)* be amended. The proposed amendment would extend the "three-day rule" to electronic service. Nevertheless, he said, the committee included it in its publication as an alternative proposal.

After reviewing the public comments and considering the proposed companion amendments to the bankruptcy rules, the advisory committee agreed unanimously to approve the proposed amendment to Rule 6(e). Thus, when service is made electronically — or by any means other than personal service — the party being served will be allowed an extra three days to act. He pointed out that electronic service is not in fact always instantaneous, and transmission problems may need some time to be straightened out. In addition, he said, inclusion of the three-day provision may encourage consents. Finally, he added, the advisory committee was convinced that the provisions of the civil rules should be consistent with those of the bankruptcy rules, which adopt the three-day rule.

The committee approved the proposed amendment to Rule 6(e) without objection.

FED. R. CIV. P. 77(d)

Professor Cooper noted that the proposed amendments to Rule 77(d) *(notice of orders or judgments)* reflect the changes proposed in Rule 5(b) and would authorize the clerk of court to serve notice of the entry of an order or judgment by electronic or other means.

The committee approved the proposed amendments without objection.

2. *Abrogation of the Copyright Rules*

Professor Cooper reported that the Advisory Committee recommended abrogation of the obsolete Copyright Rules of Practice under the 1909 Copyright Act. He noted that the advisory committee had urged elimination of these rules as long as 37 years ago.

FED. R. CIV. P. 65(f)

Professor Cooper pointed out that a new subdivision (f) would be added to Rule 65 *(injunctions)* to make the rule applicable to copyright impoundment proceedings.

FED. R. CIV. P. 81(a)

Professor Cooper said that Rule 81(a) *(proceedings to which the federal rules apply)* would be amended to eliminate its reference to copyright proceedings. In addition, the rule's obsolete reference to mental health proceedings in the District of Columbia would be eliminated, and its reference to incorporation of the civil rules into the Federal Rules of Bankruptcy Procedure would be restyled.

The committee approved abrogation of the copyright rules and the proposed amendments to Rules 65 and 81 without objection.

3. Technical Amendment

FED. R. CIV. P. 82

Professor Cooper reported that the proposed amendment to Rule 82 *(jurisdiction and venue not affected by the federal rules)* was purely a technical conforming change that could be made without publication. He said that the text of the current rule refers to 28 U.S.C. §§ 1391-1393. But Congress repealed § 1393 in 1988. Thus, the reference needed to be changed to 28 U.S.C. §§ 1391-1392.

The committee approved the proposed amendment without objection.

Amendments for Publication and Comment

1. Judgments

FED. R. CIV. P. 54(d) and 58

Judge Rosenthal noted that the Standing Committee had discussed the proposed amendments to Rules 54 *(judgments and costs)* and 58 *(entry of judgment)* earlier in the meeting as part of its consideration of the report of the Advisory Committee on Appellate

Rules and its approval of companion amendments to FED. R. APP. P. 4(a)(7). (See pages 8-9 of these minutes.)

She explained that Civil Rule 58(b) would be amended to provide that when the civil rules require that a judgment be set forth on a separate document, it will be deemed to have been entered for purposes of finality either: (1) when it is actually set forth on a separate document; or (2) when 60 days have run from entry on the civil docket, whichever is earlier.

Professor Cooper explained that under the rules a judgment is not effective until it is set forth on a separate document and entered on the civil docket. But, he said, in practice this requirement is ignored in many cases. Thus, failure to enter a final judgment on a separate document means that the time to file a post-judgment motion under the civil rules or a notice of appeal under the appellate rules never begins to run.

Professor Cooper added that the new Rule 58(b) is the central provision in the proposed amendments to integrate the civil and appellate rules. It would work in tandem with the proposed amendments to FED. R. APP. P. 4(a). As a result, a judgment would become final at the same time for purposes of both the civil and appellate rules.

Professor Cooper said that the proposed amendment to Rule 54(d) would delete the separate document requirement for an order disposing of a motion for attorney fees.

Professor Cooper suggested that the term "judgment," as used in the civil rules, is overly broad and may lead to a number of difficult theoretical problems. But, he said, the advisory committee had found no indication that the theoretical problems occur in practice. Thus, it saw no reason to reopen the definition of judgment in Rule 54(a). He added that the advisory committee had also decided not to reopen the separate document requirement of Rule 58.

The committee approved the proposed amendments for publication and comment without objection.

2. Financial Disclosure

The advisory committee's proposed new Rule 7.1 was discussed and approved by the Standing Committee later in the meeting as part of its consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

3. Applicability of the Rules to Section 2254 and 2255 Cases and Proceedings

FED. R. CIV P. 81(a)

Professor Cooper reported that Rule 81(a)(2) *(applicability of the rules in general)* would be amended to make its time limits consistent with the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

The committee approved the proposed amendment for publication and comment without objection.

Information on Pending Projects

Judge Rosenthal referred briefly to several projects pending before the advisory committee and pointed out that they were described in greater detail at Tab 7B of the agenda materials.

She noted that the advisory committee's discovery subcommittee was continuing to explore a number of discovery issues, particularly those flowing from discovery of computer-based information. She said that the subcommittee had conducted a mini-conference with lawyers, judges, and forensic computer specialists to hear from them about the problems they have encountered with discovery of information in automated form. She added that the subcommittee had identified and discussed in a preliminary way several problems cited by practitioners. The central questions, she said, are: (1) whether the current federal rules are adequate to deal with the impact of the new technology; and (2) whether any of the problems identified are subject to rule-based solutions.

Judge Rosenthal reported that a subcommittee of the advisory committee was continuing to look at Rule 23 *(class actions)* to determine whether any additional changes in that rule might be appropriate. She pointed out that the committee had been examining Rule 23 since 1991. It had collected a great deal of empirical information and opinions from the bar, which have been published in extensive working papers. She noted that the committee's earlier proposals to amend Rule 23 had stirred substantial controversy, and it had not been possible to reach consensus on key issues. In addition, she said, the substantive law of class actions had been addressed recently by the Supreme Court.

Judge Rosenthal said that the subcommittee's initial sense was that further changes are not called for in Rule 23. Nevertheless, it would continue to explore such discrete areas as attorney fees, procedures for approving settlements, the terms of settlements, and providing protection for absent class members.

Judge Rosenthal reported that a subcommittee had been appointed to study the use of special masters. She noted that the current Rule 53 focuses on special masters as fact finders, but courts are using masters increasingly for various pretrial management and post-judgment purposes. She pointed out that the Federal Judicial Center had presented the advisory

committee with an excellent empirical report on the use and practices of special masters in the district courts.

Finally, Judge Rosenthal reported that a subcommittee had been appointed to study the feasibility of creating an alternative set of simplified civil procedure rules that would be appropriate for some cases as a means of reducing costs and delays. The draft proposal would incorporate such features as early and firm trial dates, shorter discovery deadlines, reduced amounts of discovery, and curtailed motion practice.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis, Judge Miller, and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Davis's memorandum and attachments of May 8, 2000. (Agenda Item 8)

Amendments for Publication and Comment

Judge Davis reported that the advisory committee was seeking authority to publish three proposals for public comment:

1. a complete, restyled set of Criminal Rules 1-60, set forth in two separate packages;

2. proposed changes to the Rules Governing § 2254 Cases and § 2255 Proceedings; and

3. a new Criminal Rule 12.4, governing financial disclosure.

1. Comprehensive Review and Restyling of the Criminal Rules

Judge Davis said that the advisory committee had been working on restyling the entire body of Federal Rules of Criminal Procedure for more than a year. He noted, however, that several of the committee's proposed amendments had been under consideration before the restyling project began. And, as part of the restyling effort, the committee identified several amendments that might be considered substantive or controversial.

Therefore, he said, the advisory committee had decided to seek authority to publish the restyled body of rules in two separate packages. The first would consist of all the rules containing merely stylistic changes. The second would contain those rules in which the committee is proposing substantive changes, *i.e.*, Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43. He added that these substantive changes had been deleted from the purely "style"

package, and a reporter's note to the style package will explain that additional, substantive changes are being proposed and published simultaneously in a separate package.

Judge Davis noted that the revised Rules 1-31 had been approved for publication by the Standing Committee at its January 2000 meeting. He added that the advisory committee had considered the various suggestions made by members of the Standing Committee at that meeting, and it had incorporated them into a revised draft for publication. He proceeded to summarize the significant, non-style changes made by the advisory committee in Rules 1-31 following the January meeting.

Rules 1-31

FED. R. CRIM. P. 5

Judge Davis pointed out that the revised Rule 5 *(initial appearance)* would authorize an initial appearance to be conducted by video teleconferencing if the defendant waives the right to be present. He noted that the advisory committee would also publish an alternate version of the rule that would permit the court to conduct the appearance by video teleconferencing without the defendant's consent.

Judge Davis reported that the advisory committee had concluded that Rule 5 should be expanded to address all initial appearances. Thus, material currently located in Rule 40 *(commitment to another district)* would be moved to Rule 5. The revised rule also would provide explicitly that Rules 32.1 *(revoking or modifying probation or supervised release)* and Rule 40 *(commitment to another district)* apply when a defendant is arrested for violating the terms of probation or supervised release or for failing to appear in another district.

FED. R. CRIM. P. 10

Judge Davis reported that Rule 10 *(arraignment)* would be amended to allow video teleconferencing of arraignments upon the consent of the defendant. As with Rule 5, the advisory committee would also publish an alternate version of the rule permitting the court to conduct an arraignment by video teleconferencing without the defendant's consent.

FED. R. CRIM. P. 24

Judge Davis noted that the advisory committee had presented the Standing Committee in January 2000 with a proposed amendment to Rule 24 that would equalize the number of peremptory challenges at 10 per side. But, he said, the proposal would be controversial. Therefore, the advisory committee decided after further consideration to delete the proposed amendment from the restyling project and defer it for later consideration on the merits.

FED. R. CRIM. P. 26

Judge Davis reported that the proposed amendments to Rule 26 *(taking testimony)* would conform the rule in some respects to FED. R. CIV. P. 43. First, it would allow testimony from witnesses at remote locations. Second, it would delete the term "orally" from the current rule in order to accommodate witnesses who are unable to present oral testimony and may need a sign language interpreter.

Judge Davis noted that questions had been raised at the January 2000 meeting as to the possible impact of the amendments on FED. R. EVID. 804. He explained that the advisory committee had narrowed the proposed amendment to apply to those situations in which a witness is "unavailable" only within the meaning of paragraphs (4) and (5) of Evidence Rule 804(a).

Rules 32-60

Judge Davis reported that the advisory committee had considered proposed style revisions in Rules 32-60 at a special meeting in January 2000, at two subcommittee meetings, and at its regularly scheduled meeting in April 2000. He proceeded to discuss the rules that the advisory committee believed included one or more substantive changes or changes that warranted further elaboration.

FED. R. CRIM. P. 32

Judge Davis reported that Rule 32 *(Sentence and Judgment)* had been completely reorganized to make it easier to follow and apply. He pointed out that one proposed change in the rule may generate controversy. The current rule, he said, requires a court to rule on all unresolved objections to the presentence report. The revised rule would require the court to rule only on all unresolved objections to a "material" matter in the report.

Judge Davis noted that the Bureau of Prisons relies on the presentence report to make decisions about defendants in its custody. One member said that the current rule apparently requires judges to rule on matters that do not affect their sentence because the Bureau of Prisons may need the information for its own administrative purposes. During the discussion that ensued, various members offered the following points: (1) a court should not be burdened by having to decide matters not required for its sentencing decision because the Bureau of Prisons may need certain information; (2) defendants should not be penalized for non-essential information contained in the presentence report; (3) defense counsel have an obligation to ask the court to delete any objectionable information in the report; (4) the courts could ask probation officers to exercise greater discretion in keeping certain information out of the reports; and (5) the advisory committee could ask the Bureau of Prisons to reconsider some of its procedures.

Mr. Marcus said that the Bureau of Prisons needs and appreciates all the information it can obtain from the court. He pointed out that the Bureau has a difficult problem in obtaining relevant and accurate information from other sources, and it faces serious operational problems because of the volume of its caseload. He expressed concern about any effort that might restrict the Bureau from using any information that it currently receives from the court.

Judge Scirica recommended that the proposed rule be published for comment. He further suggested that the advisory committee take into account the various concerns expressed by the members and initiate discussions with the Bureau of Prisons. He said that the advisory committee should be prepared to address these matters when it returns to the Standing Committee for approval of the rule following publication.

Professor Schlueter reported that new paragraph (h)(5) would fill a gap in the current rules by requiring the court to give notice to the parties if it contemplates departing from the sentencing guidelines on grounds not identified either in the presentence report or in a submission by a party. He pointed out that this procedure is required by case law.

FED. R. CRIM. P. 32.1

Professor Schlueter said that Rule 32.1 *(revoking or modifying probation or supervised release)* had been completely restructured, but no significant changes had been made. He pointed out that language had been added that would govern an initial appearance when a person is arrested in a district that does not have jurisdiction to conduct a revocation proceeding.

FED. R. CRIM. P. 35

Judge Davis reported that Rule 35 *(correction or reduction of sentence)* would be amended to delete current subdivision (a), specifying district court action on remand, because it simply is not necessary.

Judge Davis said that subdivision (b) includes a substantive change that had been under consideration by the advisory committee before the restyling project. He pointed out that the amendment responds to the decision of the Eleventh Circuit in *United States v. Orozco,* 160 F. 3d 1309 (11th Cir. 1998), in which the court of appeals had urged an amendment to the current rule to address the unforseen situation in which a convicted defendant provides information to the government within one year of sentencing, but the information does not become useful to the government until more than a year has elapsed.

Concern was expressed by some of the members as to whether the proposed rule resolved all the issues raised by the *Orozco* case. Judge Davis and Professor Schlueter

suggested that the revised rule be published for comment and that the advisory committee consider the implications of *Orozco* further during the comment period.

FED. R. CRIM. P. 40

Judge Davis pointed out that much of the substance of Rule 40 *(commitment to another district)* would be relocated to Rule 5.

FED. R. CRIM. P. 41

Judge Davis reported that the advisory committee would make significant changes in Rule 41 *(search and seizure)*. First, he said, the revised rule had been substantially reorganized. Second, it would explicitly authorize "covert entry warrants" allowing law enforcement agents to enter property to obtain information, rather than to seize property or a person. He pointed out that two circuit courts of appeals had authorized this type of search warrant under the language of the current rule.

Judge Davis explained that the advisory committee would expand the definition of "property" in the text of the revised rule, at subparagraph (a)(2)(A), to include "information." Likewise, new paragraph (b)(1) would authorize a judge to issue a warrant, not only to search and seize, but also to "covertly observe," a person or property.

Judge Davis pointed out that new paragraph (f)(5) would require the holder of the warrant to notify the owner of the property by delivering a copy of the warrant within seven days. On the government's motion, the court could extend the time to deliver the warrant to the property owner on one or more occasions.

Judge Miller reported that he had used the Administrative Office's electronic list-server to ask all magistrate judges about their experience with covert searches. He said that the responses from the magistrate judges demonstrated that these searches were being used widely, especially in environmental cases. He added, though, that covert search warrants are a matter of general concern to magistrate judges because neither the rule nor a statute authorizes them explicitly. He added that magistrate judges were unanimous in asking the advisory committee for additional guidance and authority on the matter.

One member suggested that the proposed amendment may be inappropriate because it could be viewed as a substantive law. Professor Schlueter replied that the advisory committee had intended only to provide the procedures for a practice that has been in common use for years.

Judge Davis added that the advisory committee had agreed by a split vote to include covert entry warrants in the revised rule because it is better to have clear recognition of them in the rules, rather than to have judges rely on a limited body of case law. When asked to

elaborate on why some members of the advisory committee had opposed the provision, Judge Davis responded that the reasons cited included: (1) objections to covert entry searches as a matter of policy; (2) concerns over the adequacy of the notice provisions in the proposed rule; and (3) a sense the case law should be given additional time to develop.

FED. R. CRIM. P. 42

Judge Davis reported that revised Rule 42 *(criminal contempt)* sets out more clearly the procedures for conducting a contempt proceeding. It would also add language to reflect the holding of the Supreme Court in *Young v. United States ex rel Vuitton,* 481 U.S. 787 (1987), that the court should ordinarily request that a contempt be prosecuted by a government attorney. A private attorney should not be appointed unless the government first refuses to prosecute the contempt.

FED. R. CRIM. P. 43

Judge Davis said that Rule 43 *(defendant's presence)* requires the defendant to be present at various proceedings in a criminal case. But a new exception would be added to subdivision (a) to reflect the proposed amendments to Rules 5 and 10, allowing video teleconferencing of initial appearances and arraignments. Thus, the language of the revised rule would provide that the defendant must be present "(u)nless this rule, Rule 5, or Rule 10 provides otherwise."

FED. R. CRIM. P. 46

Professor Schlueter reported that subdivision (i) to Rule 45 *(release from custody)* had been difficult to restyle. It had been added to the rules by Congress and was awkwardly written. The advisory committee, he said, decided not to make any change in what appeared to be the intention of Congress.

FED. R. CRIM. P. 48

Professor Schlueter stated that Rule 48 *(dismissal)* gives a court authority to dismiss charges against the defendant due to government delay. He pointed out that it is a speedy trial provision that was in effect before enactment of the Speedy Trial Act. The advisory committee, he said, was concerned that if it merely restyled Rule 48, its action might have the unintended effect of overruling the Speedy Trial Act through the supersession clause of the Rules Enabling Act. 28 U.S.C. § 2072(b).

Professor Schlueter said that the advisory committee was of the view that the separate provisions of Rule 48 are still viable, as they cover pre-indictment delays. Therefore, it decided to state explicitly in the committee note that Rule 48 operates independently of the

Speedy Trial Act and that no change is intended in the relationship between the rule and the Act.

FED. R. CRIM. P. 49

Professor Schlueter reported that subdivision (c) of Rule 49 *(serving and filing papers)* would be broadened to reflect the changes being made in FED. R. CIV. P. 5(b) and 77(b) to permit a court to provide notice of its judgments and orders by electronic and other means.

FED. R. CRIM. P. 51

Professor Schlueter reported that the restyling of Rule 51 *(preserving claimed error)* raised another supersession clause issue. The advisory committee would add a new sentence at the end of the rule to state explicitly that any ruling admitting or excluding evidence is governed by the Federal Rules of Evidence. The committee, he said, was concerned that without the sentence an argument might be made that re-enactment of Rule 51 would supersede FED. R. EVID. 103.

FED. R. CRIM. P. 53

Professor Schlueter reported that the word "radio" would be deleted from Rule 53 *(courtroom photographing and broadcasting prohibited)*. In addition, he said, the advisory committee had been concerned as to whether other rules may allow video teleconferencing in light of Rule 53's blanket prohibition on broadcasting judicial proceedings from the courtroom. Therefore, it would add language to Rule 53 to recognize explicitly that the rules themselves may contain exceptions to the prohibition, such as the proposed amendments to Rules 5 and 10 authorizing video teleconferencing of initial appearances and arraignments.

The committee without objection approved for publication and comment:

1. **the package of proposed style revisions to Rules 1-60;**
2. **the separate package of proposed amendments to Rules 5, 5.1, 10, 12.2, 26, 30, 32, 35, 41, and 43.**

2. Rules Governing §§ 2254 and 2255 Proceedings

Judge Davis reported that the advisory committee had appointed an ad hoc subcommittee to review the Rules Governing § 2254 Cases and § 2255 Proceedings to determine whether any changes were required as a result of the Antiterrorism and Effective Death Penalty Act of 1996. In addition, he said, the subcommittee had tried without success to combine the two sets of rules.

RULE 1

Judge Davis said that advisory committee had recommended amending Rule 1 *(scope of the rules)* of both sets of rules to make them applicable to actions brought under 28 U.S.C. § 2241, which most commonly involve prisoners challenging the execution of their sentence. But, he said, a number of complications had been discovered recently, and the advisory committee decided to withdraw the proposed amendments to Rule 1.

RULE 2

Judge Davis explained that the language of Rule 2 *(petition)* of both sets of rules would be amended to conform to the usage of FED. R. CIV. P. 5(e). Thus, the reference would be to a petition "filed with" the clerk, rather than one "received by" the clerk.

RULE 3

Judge Davis said that Rule 3 of both sets of rules *(filing petition)* would also be amended to conform with the language of FED. R. CIV. P. 5(e). The first part of the rule would be deleted because it conflicts with the requirement of FED. R. CIV. P. 5(e) that the clerk must file any papers submitted, but may refer them to the court for consideration of any defects.

RULE 6

Judge Davis reported that Rule 6 *(discovery)* of the § 2254 Rules would be amended to correct a statutory reference to the Criminal Justice Act.

RULES 8 and 10

Judge Davis said that the only changes proposed in Rules 8 *(evidentiary hearing)* and 10 *(powers of magistrate judges)* would reflect the change in the title of United States magistrate to United states magistrate judge.

RULE 9

Judge Davis reported that the only substantive change proposed in the §§ 2254 and 2255 Rules was found in Rule 9 *(delayed or successive petitions)*. He said that both sets of rules would be amended to reflect the provisions of the Antiterrorism and Effective Death Penalty Act imposing limits on the ability of a petitioner to file successive habeas corpus petitions. The Act provides that a second or successive petition must first be presented to the court of appeals for an order authorizing the district court to consider it.

One of the participants suggested that the language of the proposed amendment, which would require the applicant to "move" for an order in the court of appeals, may be inadequate. He pointed out that petitioners will inevitably claim that they have in fact "moved" for an order authorizing the district court to consider the petition, whether or not the court of appeals has granted the order. Therefore, he suggested that the pertinent sentence be restructured to provide that a district court may not consider a petition until the court of appeals has authorized it to do so. Judge Scirica announced that there was a consensus on the committee to make the suggested change.

One of the members pointed out that there was a gender-specific reference on line 6 of Rule 3 of the § 2255 Rules that should be restyled. Professor Schlueter responded that the advisory committee had made only minimal changes in the rules, and it was not proposing any amendments to the part of the rule that contains the gender-specific reference. He added that the advisory committee had not attempted to restyle or modernize the §§ 2254 and 2255 Rules and had agreed to defer that project to a future date.

Some participants suggested that it would be very simple to take care of the specific reference in Rule 3. They added that all rules published for comment should be gender neutral as a matter of policy. Judge Scirica asked the chairs and reporters to work together to develop a uniform policy on this matter for all the rules.

The committee without objection approved for publication and comment the proposed amendments to the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Proceedings.

After the meeting, it was discovered that the materials before the committee contained the proposed corrections to the Criminal Justice Act references: (1) in Rule 6(a) of the § 2254 Rules, but not in Rule 8(c) of the § 2254 Rules; and (2) in Rule 8(c) of the § 2255 Rules, but not in Rule 6(a) of the § 2255 Rules. **The committee by mail vote approved correcting the Criminal Justice Act references in Rules 6(a) and 8(c) of both sets of rules.**

3. Financial Disclosure

The advisory committee's proposed new Rule 12.4 was discussed and approved separately, as part of the Standing Committees consideration of proposed financial disclosure rule amendments. (See pages 28-31 of these minutes.)

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Shadur and Professor Capra presented the report of the advisory committee, as set forth in Judge Shadur's memorandum and attachments of May 1, 2000. (Agenda Item 9)

Judge Shadur reported that he had informed the committee in January 2000 that the advisory committee had completed its review of all the evidence rules and it was now engaged in some specific projects. He pointed out, for example, that the advisory committee was looking at privileges, under the direction of a subcommittee chaired by Judge Jerry Smith. He added that the committee was very conscious of the controversial nature of attempting to do anything in the area of privileges.

Judge Shadur also pointed out that the advisory committee had considered proposed amendments to FED. R. EVID. 608 and 804, which would be brought to the Standing Committee at its next meeting.

Judge Shadur reported that Professor Capra had produced a study and report for the advisory committee on those rules of evidence in which the case law has diverged materially from either the apparent meaning of the rule or the committee note. The document, he said, would be very useful in avoiding traps for the unwary practitioner. He added that the Federal Judicial Center and others had agreed to publish it. He emphasized that the advisory committee makes it clear that the document had been prepared simply to assist the bar, and it does not constitute an official committee note.

FINANCIAL DISCLOSURE

Judge Scirica pointed out that the committee had spent a good deal of time on financial disclosure issues at its January 2000 meeting. He said that financial disclosure was not, strictly speaking, a procedural issue. Nevertheless, there had been some embarrassing incidents reported in the press, and the Codes of Conduct Committee was urging the rules committees to promulgate new federal rules on financial disclosure.

FED. R. APP. P. 26.1
FED. R. CIV. P. 7.1
FED. R. CRIM. P. 12.4

Judge Scirica said that the draft amendments to the appellate, civil, and criminal rules set forth in Agenda Item 11 of the materials were all based on current FED. R. APP. P. 26.1 *(corporate disclosure statement)*. Rule 26.1 requires a nongovernmental corporate party to file a statement with the court of appeals identifying all its parent corporations and listing any publicly held company that owns 10% or more of its stock.

Judge Scirica pointed out that there is currently no corresponding national rule requiring corporate disclosure in the district courts, although 19 district courts have adopted a version of FED. R. APP. P. 26.1 as a local rule. Moreover, many individual judges impose their own, additional disclosure requirements.

Judge Scirica said that the most recent proposal before the committee, submitted jointly by the reporters, contains a two-track proposal: (1) a national rule requiring minimal information; and (2) additional requirements that could be adopted by the Judicial Conference at a later date. He said that inclusion of this provision in the proposal would give the judiciary the flexibility to make adjustments promptly if circumstances change.

Thus, the proposed new FED. R. CIV. P. 7.1, and its counterparts in the criminal and appellate rules, would be based on the current FED. R. APP. P. 26.1, in that it would require a party to file two copies of either: (1) a statement that identifies its parent corporations and any publicly held company that owns 10% of more of its stock; or (2) a statement declaring that it has nothing to report under the rule. But a party would also have to file copies of any supplemental information required by the Judicial Conference. The statements would be filed by a party with its first appearance, pleading, petition, motion, response or request addressed to the court. A party would also be required to file a supplemental statement promptly upon any change in circumstances.

Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.

On the other hand, the advisory committees believe that simply adopting the appellate rule is insufficient. They contend that authorizing additional requirements is necessary because it would give the Judicial Conference authority to make changes from time to time, without having to invoke all the formality and take all the time required by the rulemaking process. In addition, he said, additional requirements could be developed by Judicial Conference resolution and put in place very quickly — well before the two to three years that it would take for new federal rules to take effect. One member added that immediate Conference action would be more impressive for political and public reasons than adopting a rule that would take up to three years to take effect.

Some participants suggested that the whole subject involved an administrative matter that does not belong in the federal rules. They argued that it should be handled by Judicial Conference resolution alone. They added that the Conference could simply ask the Director of the Administrative Office to issue a standard form that parties would have to complete for the clerk, similar to the form that parties must now complete disclosing whether they are involved in any related cases.

Other members replied, however, that the Judicial Conference was not likely to approve a form without a rule, especially when the Codes of Conduct Committee is opposed to having a form and is urging adoption of a rule. Another participant said that if the Judicial Conference were merely to issue a form, it would likely not have the authority to preclude

local variations. By acting through the rules process, there would be clear authority to require national uniformity.

Some members added that a federal rule on financial disclosure statements was both appropriate and beneficial because it would give direction to the bar and inform the parties of their obligations. It was also pointed out that FED. R. APP. P. 26.1 has been in place for more than a decade and has been very effective.

One member said that he would vote to approve both the new rule and the additional requirements, but he pointed out that the proposal was really unnecessary on the merits. He argued that it would not solve the real issues of recusal, nor would it address the kinds of problems that had generated the negative press reports. He argued that the matter was largely a political and media issue.

Professor Coquillette reported that the proposed new civil, criminal, and appellate rules on financial disclosure were identical, except in one respect. He explained that the Advisory Committee on Civil Rules was of the view that the rule should contain a specific requirement that the clerk of court actually deliver a copy of the disclosure statements to each judge acting in the case. Professor Cooper added that the advisory committee was convinced that the provision was justified by differences in district court practice from appellate practice. Judge Rosenthal commented that the issue was of concern to the district courts, as opposed to the courts of appeals, because district judges and magistrate judges cannot otherwise count on promptly receiving every piece of paper that is filed. Judge Davis added that the criminal rule should be the same as the civil rule. Judge Garwood pointed out, however, that the appellate rules committee saw no need for such a requirement in the courts of appeals.

Professor Coquillette said that another key issue was whether the new national rules should allow local court variations. He explained that FED. R. APP. P. 26.1 does not address the matter, but its accompanying committee note invites the courts of appeals to expand on the information that must be disclosed by corporate parties. He said that all but three of the circuits in fact do so, and they solicit information about such matters as subsidiaries, partnerships, and real estate holdings. He noted that the proposals now before the committee, like Rule 26.1, would not prohibit courts from expanding on the national disclosure requirements.

Judge Scirica added that there is no agreement among the courts themselves on what information should be disclosed, as illustrated graphically by the wide variety of local circuit court rules expanding on FED. R. APP. P. 26.1. He said that there might be strong opposition within the Judicial Conference to any proposed amendment that would eliminate the current authority of courts to add local disclosure requirements. Therefore, he said, it makes good sense to present the Conference with proposals that allow some local variations.

Professor Cooper pointed out that FED. R. APP. P. 26.1 had been narrowed recently to eliminate the requirement that corporate parties disclose their subsidiaries, although some circuits continue to require this information through local rules. He said that there is a bewildering array of material contained in the local circuit rules that could be considered for inclusion in the future, but the matter would best be handled through additional requirements set forth by the Judicial Conference.

Judge Scirica and Professor Coquillette said that the Codes of Conduct Committee was opposed to allowing local court variations from the national requirement, but it had indicated that it would defer to the rules committee on this matter.

The committee approved the proposed amendment to FED. R. APP. P. 26.1 and the proposed new FED. R. CIV. P. 7.1 and FED. R. CRIM. P. 12.4 without objection.

ATTORNEY CONDUCT

Judge Scirica reported that the special subcommittee on attorney conduct had conducted a superb conference with members of the bench and bar in February 2000 and had received many useful suggestions. He said that considerable progress had been made toward reaching a consensus on draft rules — if draft rules were to be promulgated — and that Professors Cooper and Coquillette had refined the earlier draft proposals. He pointed out that several alternatives were still under consideration, and that the subject matter of attorney conduct had been divided into three potential federal rules:

1. a suggested Federal Rule of Attorney Conduct 1 to govern attorneys generally;

2. a possible Federal Rule of Attorney Conduct 2 to address certain problems faced by federal government attorneys; and

3. a possible Federal Rule of Attorney Conduct 3 to address attorney conduct in bankruptcy practice.

Professor Coquillette said that the enabling statute requires the Judicial Conference to work towards procedural consistency in the federal courts. But, he said, attorney conduct is an area in which there is now virtually no consistency among the courts. He added that about 30% of the federal courts have not adopted local rules consistent with the conduct rules of their states.

Professor Coquillette said that the area in which the most progress can be made is with proposed Federal Rule of Attorney Conduct 1. He reported that there is now a clear

consensus that attorney conduct should be governed generally by the states. He added that his research, and that of the Federal Judicial Center, had revealed that there were very few issues of exclusively federal conduct. Therefore, promulgation of a general federal rule requiring that a federal court to follow the attorney conducts rules of the state in which they are located would eliminate about 200 existing local federal court rules and restore vertical consistency to the system.

Professor Coquillette said that Federal Rules of Attorney Conduct 2 and 3 could be taken up after Rule 1. He pointed out that there are legitimate federal interests that need to be protected, and he recognized that the Department of Justice has real concerns that must be addressed. He noted that pending legislation in Congress, if enacted, would require the judiciary to propose specific solutions to government attorney problems within prescribed one-year and two-year time frames. With regard to bankruptcy practice, he said, the Advisory Committee on Bankruptcy Rules has the expertise to address attorney conduct issues, but it would prefer to wait until final decisions are made regarding proposed Federal Attorney Conduct Rule 1.

Professor Coquillette reported that Professor Cooper had prepared six variations of a proposed Federal Attorney Conduct Rule 1, set forth in Agenda Item 10 of the committee materials. The six versions vary in the level of detail, he said, but all share the common theme that federal courts should look to state law on matters of professional responsibility. They also recognize, however, that federal courts must retain control over their own practice and procedure, and they have a statutory responsibility to control who may appear before them as an attorney.

Chief Justice Veasey said that the Conference of Chief Justices would support the simplest of the six variations, *i.e.,* a single sentence specifying that state attorney conduct rules apply. He expressed concern about proposed Federal Rule of Attorney Conduct 2. Professor Coquillette responded that the proposed rules will not be approved by the Judicial Conference unless there is a clear consensus for them. Mr. Marcus added that the Department of Justice had no problems with Federal Rule of Attorney Conduct 1, but it needed to have its special concerns and problems addressed, either by legislation or by a new Federal Rule of Attorney Conduct 2.

One member emphasized that there were essential federal interests at stake beyond those of the Department of Justice. He said that states may go too far in attempting to regulate conduct, as local bars or other interest groups within a state may seek to leverage ethics rules for their own purposes. Thus, it would not be appropriate to declare that anything a state chooses to include in its ethics rules should necessarily be binding on a federal court.

One member said that it was unlikely that there would be a resolution of the Department's concerns until after the next national election. He pointed out that negotiations between the Department and the states had not produced a final agreement on the issue of

contacts by government attorneys with represented parties. Moreover, he said, there were substantial differences in Congress, and between the two houses of Congress, on the appropriate roles of the Department of Justice and the states in controlling government attorney conduct. The McDade amendment, he said, is still law, although there is legislation pending to repeal or modify it. And the American Bar Association is in the process of actively considering these conduct issues as part of its Ethics 2000 project.

REPORT OF THE LOCAL RULES PROJECT

Professor Coquillette stated that the local rules project had three goals: (1) to identify inconsistent local rules, (2) to identify areas where there are subjects addressed in local court rules that should be addressed in the national rules; and (3) to encourage the courts to post orders and practices on the Internet in order to assist the bar. He noted that recent amendments to FED. R. CIV. P. 83(b), requiring an attorney to have actual notice of any procedural requirement not set forth in a local rule, had its genesis in the last local rules project.

Professor Squiers reported that she had been working on the new local rules project since the summer. She said that she had read all the local rules of the district courts and had entered them into a computer program, sorted by rule content and topic. She added that she had just started work on writing the report and would have substantial material to present to the committee at its January 2001 meeting.

Professor Squiers said that she had contacted the circuit executives to inquire about the activities of their respective circuit councils in reviewing local district court rules. She reported that the circuit executives had responded that neither they nor their circuit councils are directly involved in the rulemaking process for the district courts or in the actual promulgation of local district court rules. She added, however, that some circuits had on occasion suggested local rules for the districts to adopt.

Professor Squiers reported that all the circuit councils have some sort of review process in place to examine new local rules and amendments to existing local rules. But, she added, none of the circuits has written standards to determine what may constitute an "inconsistency" between a local rule and a national rule or statute. Rather, reviews of local rules and amendments are made by the councils on a case-by-case basis.

Professor Squiers also said that she had asked the circuit executives about the existence of standing orders, internal operating procedures, general orders, and other written directives that serve as the functional equivalent of local rules. She reported that there is generally no review of these directives in most of the circuits, but that councils clearly would act if any of these devices were seen as an attempt to avoid the local rulemaking process.

Some members stated that local orders and practices are a serious problem for the bar and have taken on the character of local rules. They recommended that Professor Squiers obtain copies of standing orders and similar documents. Judge Scirica agreed, and he suggested that Professor Squiers write to the chief judges of the circuits on the matter.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that one of the most important policy issues currently facing the judiciary is to identify and protect appropriate privacy interests as part of its implementation of the new Electronic Case Files project. The project, which is finishing its pilot stage and is about to begin national deployment, places the documents in a case file in electronic form and makes them available to the public through the Internet. He said that there is a tension between: (1) the long-established policy and common law right of public access to court records; and (2) the privacy interests of litigants and third parties when court documents contain sensitive personal, medical, financial, and employment records. These records, he said, to date have been "practically obscure" in court files, but would now be placed on Internet for world-wide distribution.

Mr. Lafitte pointed out that the Court Administration and Case Management committee had appointed a special subcommittee on privacy to sort out the issues and that he was the liaison to that subcommittee from the rules committees. He reported that the subcommittee was considering several alternatives and was seeking feedback from the rules committees and other Judicial Conference committees. Eventually, he said, the subcommittee would circulate a draft document for public comment and present its views to the various Judicial Conference committees at their winter 2000-2001 meetings. Then the Court Administration and Case Management Committee would likely make appropriate recommendations to the Judicial Conference in March 2001.

Mr. Lafitte said that six alternatives were under consideration. He noted that they were summarized very effectively in Professor Capra's memorandum in Agenda Item 12 of the meeting materials. The alternatives, he said, were as follows:

1. Do Nothing – Under this alternative, privacy interests would be decided on a case-by-case basis, as litigants could seek protective orders and sealing orders from the court by way of motion.

2. "Public is public" – Under this alternative, everything now available to the public in the court's paper file would be made available in electronic form. This alternative, Mr. Lafitte said, would be similar to the "Do Nothing" approach.

3. "Public is Public," But Limit What is Public – This alternative would treat paper files and electronic files in the same way, but the public file would be refined. Thus, certain kinds of sensitive information now available at the courthouse would be excluded from the public file, such as social security numbers or medical information.

4. Limited Remove Electronic Access – This alternative would allow electronic access to all public information at the courthouse, but certain categories of information could not be accessed remotely through the Internet. Mr. Lafitte said that members of the privacy subcommittee had expressed concerns over this approach because it would result in different access policies for the same information.

5. Waiting Period – Under this alternative, a waiting period would be imposed between the electronic filing of a document and its posting on the Internet. The parties would have an opportunity during this period to ask the court for a protective order on a document-by-document basis.

6. Case File Archiving – A policy would be developed to archive documents and limit the life span of a case on the Internet. Mr. Lafitte observed that this action did not address the main issues at stake.

Professor Capra said that the only option that was likely to require a rule-based solution was Alternative 3, limiting what is included in the public file. He said, however, that this approach would be controversial, and it would be bound to encounter objections from news organizations, which have enjoyed full access to all paper records for years.

Professor Capra pointed out that the new electronic system is technically capable of providing different categories of users with different levels of access. Thus, for example, the parties to a case might be given greater electronic access to the source documents in a case than the general public.

Professor Capra reported that the President had established a working group in the executive branch to study the issues of privacy in consumer bankruptcy cases and that Administrative Office staff would coordinate with the working group. In addition, he noted that the technology subcommittee has been in contact with the Advisory Committee on Bankruptcy Rules regarding privacy issues.

Mr. Mattos said that the Court Administration and Case Management Committee had not reached any conclusions on the key privacy issues. But, he said, there is a consensus on the committee that: (1) parties in a case should be given notice that their documents are public and may be placed on the Internet; and (2) the bar should be educated as to the public nature of the documents they file.

Several members suggested that consideration be given to the administrative burdens of operating an electronic system in which some official case documents are included and some are not. They said that if electronic public access is to be limited, the focus should be placed on excluding categories of cases, rather than categories of documents.

Professor Capra noted that the proposed new amendments to the federal rules that authorize electronic service — together with the current rules that authorize electronic filing — contemplate the use of local rules to implement a court's electronic procedures. He said that the technology subcommittee thought that it might be useful to prepare sample local rules and orders to assist the courts as they implement the electronic case files system. In addition, he said, Administrative Office staff could serve as an effective clearing house of information to inform courts about the rules, orders, and procedures that have been adopted by other courts.

STATISTICS

Mr. Rabiej reported that the Administrative Office was seeking better statistical data and other information on district court proceedings, which could be captured through the new electronic case management and case file system being developed. This effort is part of the implementation of Recommendation 73 of the *Long Range Plan for the Federal Courts,* which calls for the courts to "define, structure, and, as appropriate, expand their data-collection and information-gathering capacity" to obtain better data for judicial administration, planning, and policy development.

Mr. Rabiej said that the Administrative Office was asking the committee to identify any types of new data and other information that it might need to assist in its mission, such as empirical data on the impact of various procedural requirements set forth in the rules. He pointed out that Administrative Office and Federal Judicial Center staff had prepared preliminary tables identifying and prioritizing various types of case events that might be useful in conducting future research for the committees. He recommended that the reporters review the materials and offer suggestions to the staff.

NEXT COMMITTEE MEETING

The next committee meeting had been scheduled for January 4 and 5, 2001.

Respectfully submitted,

Peter G. McCabe,
Secretary

Items 3 and 4 will be oral reports.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: APPLICABILITY OF RULE 2016 TO PETITION PREPARERS

DATE: AUGUST 17, 2000

Rule 2016(b) implements Code § 329(a) by requiring every attorney for a debtor to disclose the attorney's compensation in connection with the case. The rule establishes the time limits for filing the statement and directs that the statement include information about any agreements to share the compensation with another person. The rule does not apply, however, to bankruptcy petition preparers who are not attorneys. Similarly, § 329 is inapplicable to petition preparers who are not also attorneys. Instead, Congress added § 110 to the Code in 1994 to govern the actions of "bankruptcy petition preparers" and to set out penalties for violations of that provision. Section 110(h)(1) requires bankruptcy petition preparers to file a statement disclosing all fees paid to them in the twelve months prior to the commencement of the case, and any unpaid fees charged to the debtor. This provision roughly parallels § 329(a). Therefore, it is appropriate to implement Code § 110(h)(1) by amending Bankruptcy Rule 2016. The Director of the Administrative Office issued Unofficial Form B280 in 1994 to gather the information that would be covered by Proposed Rule 2016(c).

The amendment would add a new subdivision (c) that would apply only to bankruptcy petition preparers. The proposal follows. Sections 110(h)(1) and 329(a) are not identical, so Proposed Rule 2016(c) does not include any requirement that the statement set out any fee

sharing arrangement that the bankruptcy petition preparer may have made with a third party. Section 329 contains such a specific limitation, but there is no comparable language in § 110(h)(1).

RULE 2016 COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES.

* * * * *

(c) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO BANKRUPTCY PETITION PREPARER. Every bankruptcy petition preparer for a debtor shall file a declaration under penalty of perjury and transmit the declaration to the United States trustee within 10 days after the date of the filing of the petition, or at another time as the court may direct, the statement required by § 110(h)(1). The declaration must disclose any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the case and all unpaid fees charged to the debtor. The declaration must describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A supplemental statement shall be filed within 10 days after any payment or agreement not previously disclosed.

COMMITTEE NOTE

This rule is amended by adding subdivision (c) which requires bankruptcy petition preparers to disclose under penalty of perjury the compensation paid or to be paid to them by or on behalf of the debtor. The rule implements § 110(h)(1) and is derived from Rule 2016(b) which implements § 329(b), a provision comparable to § 110(h)(1).

B 280
(12/94)

UNITED STATES BANKRUPTCY COURT

_____ DISTRICT OF _____

In re

Bankruptcy Case No.

Debtor
Address:
Social Security No(s).:
Employer's Tax Identification No(s). [if any]:

Chapter _____

DISCLOSURE OF COMPENSATION OF BANKRUPTCY PETITION PREPARER

1. Under 11 U.S.C. § 110(h), I declare under penalty of perjury that I am not an attorney or employee of an attorney, that I prepared or caused to be prepared one or more documents for filing by the above-named debtor(s) in connection with this bankruptcy case, and that compensation paid to me within one year before the filing of the bankruptcy petition, or agreed to be paid to me, for services rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

   For document preparation services, I have agreed to accept..... $_____

   Prior to the filing of this statement I have received..... $_____

   Balance Due..... $_____

2. I have prepared or caused to be prepared the following documents (itemize):

   and provided the following services (itemize):

3. The source of the compensation paid to me was:

   ☐ Debtor ☐ Other (specify)

4. The source of compensation to be paid to me is:

   ☐ Debtor ☐ Other (specify)

5. The foregoing is a complete statement of any agreement or arrangement for payment to me for preparation of the petition filed by the debtor(s) in this bankruptcy case.

6. To my knowledge no other person has prepared for compensation a document for filing in connection with this bankruptcy case except as listed below:

NAME SOCIAL SECURITY NUMBER

DECLARATION OF BANKRUPTCY PETITION PREPARER

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

x_____ _____ _____

Signature | Social Security Number | Date

Name (Print):
Address: _____

_____

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: TAXATION OF COSTS UNDER RULE 8014

DATE: AUGUST 17, 2000

Rule 8014 governs the taxation of costs against parties on appeal and is derived form Rule 39 of the Federal Rules of Appellate Procedure. It differs from FRAP Rule 39 in that Rule 8014 has no provision limiting the assessment of costs against the United States as provided in FRAP Rule 39(b). Rule 8014 also contains no time limits for the submission of costs or objections to those costs as set out in FRAP Rule 39(d). Hon. Paul Mannes (Bankr. D. Md.) has recommended that the Committee consider revising Rule 8014 to conform more closely to FRAP Rule 39. A copy of FRAP Rule 39 is attached.

The Supreme Court most recently amended FRAP Rule 39 in 1998. That amendment was primarily to "make the rule more easily understood" and to "restyle" the rule. Revising Rule 8014 to follow the format and language of FRAP 39 may also serve the same purposes.

There are very few reported decisions under Rule 8014. Most frequently, the cases simply note that the rule does not provide for the awarding of attorney fees among the costs. See, e.g., Y & T Distributors, Inc. v. Fantastic Merchandise, Inc. (In re Y & T Distributors, Inc.), 1999 WL 118776 (S.D.N.Y. 1999); In re Benhil Shirt Shops, Inc., 82 B.R. 7 (S.D.N.Y. 1987), reconsideration granted on other grounds, 87 B.R. 275 (S.D.N.Y. 1988). Other cases note the

absence of direction in Rule 8014 as to the timing of the submission of and the challenge to those costs. See, e.g., Carp v. Inbar, 1991 WL 182271 (D. Mass. Sept. 3,1991)(court noted the absence of deadlines for the submission of a list of costs and applied Local District Court Rule 54.3 to assess costs). FRAP Rule 39 includes much more specific directives, and revising Rule 8014 to conform more closely to the appellate rule would likewise improve the rule and provide more appropriate guidance to the court, the clerk, and the parties.

Subdivision (c) of the proposed rule contains a direction to the "clerk of the court deciding the appeal." This reference is intended to apply to the clerk of the district court or the clerk of the bankruptcy appellate panel, depending on which court is hearing the appeal. The bracketed language in the proposal would adopt instead the language contained in Rule 8001(c)(2), for example, when referring to the clerk of the court deciding the appeal.

RULE 8014. COSTS.

~~Except as otherwise provided by law, agreed to by the parties, or ordered by the district court or the bankruptcy appellate panel, costs shall be taxed against the losing party on an appeal. If a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court. Coasts incurred in the production of copies of briefs, the appendices, and the record and in the preparation and transmission of the record, the cost of supersedeas bonds or other bonds to preserve rights pending appeal and the fee for filing the notice of appeal shall be taxed by the clerk as costs of the appeal in favor of the party entitled to costs under~~

~~this rule~~.

(a) AGAINST WHOM ASSESSED. The following rules apply unless the paw provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee; and

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) COSTS FOR AND AGAINST THE UNITED STATES. Costs for or against the United States, its agency, or officer will be assessed under subdivision (d) of this rule only if authorized by law.

(c) BILL OF COSTS AND OBJECTIONS; INSERTION IN MANDATE.

(1) A party who wants costs taxed must file with the clerk of the court deciding the appeal [clerk of the district court or the clerk of the bankruptcy appellate panel], with proof of service, an itemized list and verified bill of costs within 14 days after entry of judgment.

(2) Objections must be filed within 10 days after service of

the bill of costs, unless the court extends the time.

(3) The clerk of the court deciding the appeal [The clerk of the district court or the clerk of the bankruptcy appellate panel] must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the bankruptcy clerk must, upon the request of the clerk of the court deciding the appeal [clerk of the district court or the clerk of the bankruptcy appellate panel], add the statement of costs, or any amendment of it, to the mandate.

(d) COSTS ON APPEAL TAXABLE IN THE BANKRUPTCY COURT. The following costs are taxable in the bankruptcy court for the benefit of the party entitled to costs under this rule:

(1) the production of copies of briefs, the appendices, and the record;

(2) the transmission of the record;

(3) the cost of the reporter's transcript, if necessary for the determination of the appeal;

(4) the premiums paid for the cost of supersedeas bonds or other bonds to preserve rights pending appeal; and

(5) the fee for filing the notice of appeal.

COMMITTEE NOTE

The rule is rewritten to conform more closely to Rule 39 of the Federal Rules of Appellate Procedure. The rule includes more specific direction to the parties and the clerks regarding the procedure for the assessment of costs. Categories of costs are enumerated, and the time for the submission of a list of costs and objections thereto are set forth. The rule also recognizes the limitations against the assessment of costs either for or against the United States.

752, 767 (1980), that notice and opportunity to respond must precede the imposition of sanctions. A separately filed motion requesting sanctions constitutes notice. A statement inserted in a party's brief that the party moves for sanctions is not sufficient notice. Requests in briefs for sanctions have become so commonplace that it is unrealistic to expect careful responses to such requests without any indication that the court is actually contemplating such measures. Only a motion, the purpose of which is to request sanctions, is sufficient. If there is no such motion filed, notice must come from the court. The form of notice from the court and of the opportunity for comment purposely are left to the court's discretion.

1998 Amendments

Only the caption of this rule has been amended. The changes are intended to be stylistic only.

Rule 39. Costs

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) Costs For and Against the United States. Costs for or against the United States, its agency, or officer will be assessed under Rule 39(a) only if authorized by law.

(c) Costs of Copies. Each court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix, or copies of records authorized by Rule 30(f). The rate must not exceed that generally charged for such work in the area where the clerk's office is located and should encourage economical methods of copying.

(d) Bill of Costs: Objections; Insertion in Mandate.

(1) A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk, with proof of service, an itemized and verified bill of costs.

(2) Objections must be filed within 10 days after service of the bill of costs, unless the court extends the time.

(3) The clerk must prepare and certify an itemized statement of costs for insertion in the mandate, but issuance of the mandate must not be delayed for taxing costs. If the mandate issues before costs are finally determined, the district clerk must—upon the circuit clerk's request—add the statement of costs, or any amendment of it, to the mandate.

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). Statutory authorization for taxation of costs is found in 28 U.S.C. § 1920. The provisions of this subdivision follow the usual practice in the circuits. A few statutes contain specific provisions in derogation of these general provisions. (See 28 U.S.C. § 1928, which forbids the award of costs to a successful plaintiff in a patent infringement action under the circumstances described by the statute). These statutes are controlling in cases to which they apply.

Subdivision (b). The rules of the courts of appeals at present commonly deny costs to the United States except as allowance may be directed by statute. Those rules were promulgated at a time when the United States was generally invulnerable to an award of costs against it, and they appear to be based on the view that if the United States is not subject to costs if it loses, it ought not be entitled to recover costs if it wins.

The number of cases affected by such rules has been greatly reduced by the Act of July 18, 1966, 80 Stat. 308 (1 U.S.Code Cong. & Ad.News, p. 349 (1966), 89th Cong., 2d Sess., which amended 28 U.S.C. § 2412, the former general bar to the award of costs against the United States. Section 2412 as amended generally places the United States on the same footing as private parties with respect to the award of costs in civil cases. But the United States continues to enjoy immunity from costs in certain cases. By its terms amended § 2412 authorizes an award of costs against the United States only in civil actions, and it excepts from its general authorization of an award of costs against the United States cases which are "otherwise specifically provided (for) by statute." Furthermore, the Act of July 18, 1966, *supra*, provides that the amendments of § 2412 which it effects shall apply only to actions filed subsequent to the date of its enactment. The second clause continues in effect, for these and all other cases in which the United States enjoys immunity from costs, the presently prevailing rule that the United States may recover costs as the prevailing party only if it would have suffered them as the losing party.

Subdivision (c). While only five circuits (D.C.Cir. Rule 20(d) [rule 20(d), U.S.Ct. of App. Dist. of Col.]; 1st Cir. Rule 31(4) [rule 31(4), U.S.Ct. of App. 1st Cir.]; 3d Cir. Rule 35(4) [rule 35(4), U.S.Ct. of App. 3rd Cir.]; 4th Cir. Rule 21(4) [rule 21(4) U.S.Ct. of App. 4th Cir.]; 9th Cir. Rule 25 [rule 25, U.S.Ct. of App.9th Cir.], as amended June 2, 1967) presently tax the cost of printing briefs, the proposed rule makes the cost taxable in keeping with the principle of this rule that all cost items expended in the prosecution of a proceeding should be borne by the unsuccessful party.

Subdivision (e). The costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond. They are made taxable in the district court for general convenience. Taxation of the cost of the reporter's transcript is specifically authorized by 28 U.S.C. § 1920, but in the absence of a rule some district courts have held themselves without authority to tax the cost (*Perlman v. Feldmann*, 116 F.Supp. 102 (D. Conn., 1953); *Firtag v. Gendleman*, 152 F.Supp. 226 (D.D.C., 1957); *Todd Atlantic Shipyards Corp. v. The Southport*, 100 F.Supp. 763 (E.D.S.C., 1951). Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits. *Berner v. British Commonwealth Pacific Air Lines, Ltd.*, 362 F.2d 799 (2d Cir. 1966); *Land Oberoesterreich v. Gude*, 93 F.2d 292 (2d Cir., 1937); *In re Northern Ind. Oil Co.*, 192 F.2d 139 (7th Cir., 1951); *Lunn v. F. W. Woolworth*, 210 F.2d 159 (9th Cir., 1954).

1979 Amendment

Subdivision (c). The proposed amendment would permit variations among the circuits in regulating the maximum rates taxable as costs for printing or otherwise reproducing briefs, appendices, and copies of records authorized by Rule 30(f). The present rule has had a different effect in different circuits depending upon the size of the circuit, the location of the clerk's office, and the location of other cities. As a consequence there was a growing sense that strict adherence to the rule produces some unfairness in some of the circuits and the matter should be made subject to local rule.

Subdivision (d). The present rule makes no provision for objections to a bill of costs. The proposed amendment would allow 10 days for such objections. Cf. Rule 54(d) of the F.R.C.P. [rule 54(d), Federal Rules of Civil Procedure]. It provides further that the mandate shall not be delayed for taxation of costs.

1986 Amendment

The amendment to subdivision (c) is intended to increase the degree of control exercised by the courts of appeals over rates for printing and copying recoverable as costs. It further requires the courts of appeals to encourage cost-consciousness by requiring that, in fixing the rate, the court consider the most economical methods of printing and copying.

The amendment to subdivision (d) is technical. No substantive change is intended.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding, the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only. All references to the cost of "printing" have been deleted from subdivision (c) because commercial printing is so rarely used for preparation of documents filed with a court of appeals.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for panel rehearing is granted, the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

ADVISORY COMMITTEE NOTES

1967 Adoption

This is the usual rule among the circuits, except that the express prohibition against filing a reply to the petition is found only in the rules of the Fourth, Sixth and Eighth Circuits (it is also contained in Supreme Court Rule 58(3) [rule 58(3), U.S.Sup.Ct.Rules). It is included to save time and expense to the party victorious on appeal. In the very rare instances in which a reply is useful, the court will ask for it.

7

Form 15. ORDER CONFIRMING PLAN

[Caption as in Form 16A]

ORDER CONFIRMING PLAN

The plan under chapter 11 of the Bankruptcy Code filed by _____, on _____ [*if applicable*, as modified by a modification filed on _____,] or a summary thereof, having been transmitted to creditors and equity security holders; and

It having been determined after hearing on notice that the requirements for confirmation set forth in 11 U.S.C. § 1129(a) [*or, if appropriate,* 11 U.S.C. § 1129(b)] have been satisfied;

IT IS ORDERED that:

The plan filed by _____, on _____, *[If appropriate, include dates and any other pertinent details of modifications to the plan]* is confirmed. *[If the plan provides for an injunction against conduct not otherwise enjoined under the Code, 1) describe in reasonable detail all acts enjoined, 2) be specific in its terms regarding the injunction, and 3) identify the entities subject to the injunction.]*

A copy of the confirmed plan is attached.

Dated: _____

BY THE COURT

_____
United States Bankruptcy Judge.

COMMITTEE NOTE

The form is amended to conform to the December 1, 2001, amendments to Rule 3020.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(c) *Order of Confirmation.*

(1) The order of confirmation shall conform to the appropriate Official Form ~~and~~ . If the plan provides for an injunction against conduct not otherwise enjoined under the Code, the order of confirmation shall (1) describe in reasonable detail all acts enjoined; (2) be specific in its terms regarding the injunction; and (3) identify the entities subject to the injunction.

(2) Notice of entry of the order of confirmation ~~notice of entry thereof~~ shall be mailed promptly ~~as provided in Rule 2002(f)~~ to the debtor, the trustee, creditors, equity security holders, ~~and~~ other parties in interest, and, if known, to any identified entity subject to an injunction provided for in the plan against conduct not otherwise enjoined under the Code.

(3) Except in a chapter 9 municipality case, notice of entry of the order of confirmation shall be transmitted to the United States trustee as provided in Rule 2002(k).

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to provide notice to an entity subject to an injunction provided for in a plan against conduct not otherwise enjoined by operation of the Code. This requirement is not applicable to an injunction contained in a plan if it is substantially the same as an injunction provided under the Code. The validity and effect of any injunction provided for in a plan are substantive law matters that are beyond the scope of these rules.

The requirement that the order of confirmation identify the entities subject to the injunction requires only reasonable identification under the circumstances. If the entities that would be subject to the injunction cannot be identified by name, the order may describe them by class or category if reasonable under the circumstances. For example, it may be sufficient to identify the entities as "all creditors of the debtor."

8

MEMORANDUM

DATE: August 16, 2000

FROM: Subcommittee on Privacy and Public Access

RE: Privacy Issues and the Bankruptcy Rules and Forms

TO: Advisory Committee on Bankruptcy Rules

Background

The subject of individual privacy in federal court litigation generally, and in bankruptcy cases specifically, continues to occupy and trouble the various Judicial Conference committees charged with studying it. The Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) met in June, and a summary of its discussion is attached. (Attachment A). The Privacy Subcommittee of the Committee on Court Administration and Case Management (CACM) held a conference call meeting in July to go over the various policy options that had been offered in the spring, but came to only one substantive conclusion – that the "no policy" option probably should be discarded. A revised alternatives chart, showing the results of the CACM subcommittee's discussion, also is attached. (Attachment B).

The Advisory Committee's Subcommittee on Privacy and Public Access met by conference call in early August, to review the outcomes of the June and July meetings of the Bankruptcy Committee and the CACM subcommittee and to consider possible recommendations to the Advisory Committee in light of those meetings and other related developments. Among those was the ordering by the President of a study of financial privacy of debtors in bankruptcy cases. A report of the study is due by the end of the year. A copy of the request for public comment by the study's sponsors on a series of questions concerning financial information about individuals and its dissemination in bankruptcy proceedings is attached. (Attachment C).

The common law right of access to court records, which had its origin as a means to facilitate public scrutiny of the honesty and efficiency of the courts, has become – in the bankruptcy courts of 21st century America – a mine of information about individual citizens and their financial condition.

Subcommittee Discussion

One member summarized his views on the privacy/public access issue as favoring a "slow policy" (rather than the rejected "no policy"). The electronic environment is new, and the discussion of its implications for privacy still evolving. It may be too soon to make decisions about the appropriate policy. The judiciary could benefit from learning the views of interested persons – both those who want greater access to information and those who advocate for less, both in the bankruptcy community and beyond. The subcommittee unanimously believes that the issue of privacy requires careful study and that the policy-making process should move at a pace which allows that.

The subcommittee noted the unfavorable reactions of other committees to certain alternatives, particularly the suggestion that less electronically stored information be available by remote access than would be available at the courthouse. The better approach, it seemed, might be to request the Forms Subcommittee to examine the official forms carefully with a view toward eliminating unnecessary information from the documents that are filed, and for the Advisory Committee to consider ways to be more creative about the means by which those who need detailed information can obtain it. On the other hand, the subcommittee believes the information requested in the official forms is relatively "bare bones" and appropriate for parties in interest to have available to them.

Although there is little or no empirical evidence of harm to debtors from the Internet posting of the information now required on the schedules, the subcommittee thought that review of the forms need not, and should not, await demonstrated harm to a debtor or other party. As

one member summarized his thinking, the public record needs to contain enough information to identify the debtor and support bankruptcy relief for the debtor but the detailed financial information now required to be filed probably exceeds what is necessary to justify granting relief to an individual debtor. One method suggested for getting the detailed information to those who need it without publishing it on the Internet would be to direct a debtor to prepare detailed financial information and exhibit it at the § 341 meeting, but specify that it be filed only upon a request by the trustee. Among the reasons for considering restricting the amount of information filed with the court are 1) the constraints in § 107 of the Code on limiting public access to filed documents, and 2) the impracticality of attempting to control the fate of case file information once it has been obtained by a creditor or other party.

Creditors, of course, want as much information as possible, and creditor groups are pressuring Congress to require more information of debtors rather than less. Creditors use the information filed by debtors in several ways. First, each creditor is interested in its own debtor. Beyond that, however, creditors want information to help them in making lending decisions and credit scoring of loan applicants. Creditors also sell the information they obtain. The judiciary may not be able to effectively restrict the use and sale of information by creditors, but the courts do not have to be the principal source of the information or make obtaining it convenient. A major question is whether the judiciary can segregate bankruptcy case information on its own, through policy decisions, or whether § 107 would have to be amended first.

Options and Constraints: A Framework for Advisory Committee Discussion

It may be extreme to say "privacy is no more," but it may also be the truth. Our communal sense of what is private is evolving. The sense of the subcommittee is: there is a chance that privacy does not exist for an individual who files for bankruptcy and that there is nothing the judiciary can do to stop the dissemination of personal information about individual debtors and others who may be listed in documents filed but not protected under § 107(b).

Assuming, however, that privacy does exist -- or at least some degree of it -- what options are available to preserve it?

- Do Nothing?
- Do a lot to frustrate the casual inspector?
- In conjunction with the above, support efforts to obtain amendments to § 107 to permit courts to restrict access to certain information filed with the court and to add individual safety or privacy to the grounds on which a court can protect information filed with the court?
- Work within existing statutory constraints to minimize exposure of "private" information?
- § 107(a)
- § 107(b)
- § 110(C)(2)
- § 342(C)
- § 521(1), (3), & (4)
- § 704(7)
- In conjunction with the above, amend Rule 1005 and any relevant official forms to require only the last four digits of the debtor's Social Security number?
- In conjunction with the above, review the Schedules (Form 6) and Statement of Financial Affairs (Form 7) to determine whether less information can be required?
- In conjunction with the above, amend the rules and official forms so that substantially less information would be filed with the court, with detailed information required to be brought to and exhibited at the § 341 meeting and filed only on request of the trustee?
- Reserve action until a clearer policy emerges from the Judicial Conference, the Congress, or both?

Recommendation: That the Advisory Committee discuss fully the issue of individual privacy interests and public access to documents filed in bankruptcy cases and refer to the Forms Subcommittee the request by the Bankruptcy Committee that the Advisory Committee consider amending the official forms to require less information to be submitted and to require only the last four digits of a debtor's Social Security number.

Side Issues: Fees for Access and Legislative Action on Social Security Numbers

At present, remote public access to electronically stored bankruptcy case files is free in many bankruptcy courts to anyone who has or can obtain connection to the Internet. The courts also provide docket information through a dial-up service called PACER. There is a charge for the PACER service of 60 cents per minute of usage, although certain classes of users, *e.g.*, bankruptcy trustees, can be exempted from charges. The judiciary recently introduced WEB PACER, a service that provides access to dockets and other traditional PACER information via the Internet and that can be used to obtain access to electronically stored documents, both digital and imaged. The Judicial Conference has prescribed a fee of seven cents per page for using WEB PACER.[1] This fee already is being charged in some courts and currently is a condition for receipt of the judiciary's new case management/electronic case files system (CM/ECF). In order to implement the billing for these charges, each remote access user must register and acquire a login and password. Anyone who visits a courthouse will be able to use the public terminals there to obtain the information from that court without registering or incurring any charges. The initiation of the WEB PACER fee creates an obstacle to access by the casual browser and may deter the malevolent searcher. Although the fee is being imposed for reasons unrelated to the

[1]The electronic access fee is charged under § 303 of Pub. L. No. 102-140, a provision of the judiciary's annual appropriations act. The revenues collected are paid into the Judiciary Automation Fund and used to reimburse expenses incurred in providing the electronic access services. There is a provision in the pending Federal Courts Improvement Bill that would codify in permanent legislation the imposition of charges for public access to electronically stored court records.

issue of privacy, the result will be to implement option/alternative #4 of the general policy alternatives set forth in Attachment B.

In a recent development, legislation has been introduced in both the House (HR 4857) and the Senate (S 2876) that would prohibit any federal or state government agency or instrumentality from "display[ing] to the general public any individual's social security account number, or any derivative of such number." (HR 4857, § 101(b).) Section 101(a) would also prohibit the charging of a fee for access to a social security account number. If this or similar legislation ever is enacted, it would appear that neither social security account numbers of individuals nor the last four digits of those numbers could be included in the court information available to the general public over the Internet, and that the imposition of a fee for access by parties and others willing to pay to see the documents might have to be discontinued. Accordingly, limiting Social Security number information to the last four digits of an individual's number may please neither the creditors, who would receive less information, nor the court, which would have to redact material from certain documents before granting access.

Attachments

BANKRUPTCY STATUTES, RULES, FORMS THAT REQUIRE THE DEBTOR OR OTHER PARTY TO PROVIDE A SOCIAL SECURITY NUMBER

In the Bankruptcy Code.

§ 110(c)(2) of the Code requires any individual who is a bankruptcy petition preparer (as defined in § 110(a)(1)) or individual who assists in preparing a bankruptcy petition to provide the individual's Social Security number on the document prepared (§ 110(c)(1)).

§ 342(c) requires the debtor to include the debtor's Social Security number on any notice to creditors prepared by the debtor.

In the Federal Rules of Bankruptcy Procedure.

Rule 1005 requires the petition to contain a caption that includes the title of the case. The title of the case is defined as including the debtor's Social Security number and tax identification number.

Rule 9004(b) requires every document filed to contain a caption that includes the title of the case. [Official Bankruptcy Form16B (Short title) modifies Rule 1005's definition of the title of the case for many documents.]

In the Official Bankruptcy Forms.

Social Security Number of the Debtor:	Forms 1 and 9 and Forms 16A and 16C (the forms of captions*). Through the caption requirements stated on each form: 12, 13, 14, 15, 17, 18, 20A, and 20B. * A complaint serves as a notice in initiating an adversary proceeding. Accordingly, when filed by a debtor it should contain the debtor's Social Security number.
Social Security Number of Creditor:	Form 10, when filed by a wage creditor.
Social Security Number of Bankruptcy Petition Preparer:	Forms 1, 3, 6 (on signature page), 7 (on signature page), 8, 19 (free-standing, for filing with any document in which it has not been included as part of the form).

SUMMARY OF BANKRUPTCY COMMITTEE ACTION REGARDING PRIVACY AND PUBLIC ACCESS TO ELECTRONIC CASE FILES (June 2000)

At the request of the Court Administration and Case Management Committee's Privacy Subcommittee, the Committee on the Administration of the Bankruptcy System (the Bankruptcy Committee) at its meeting on June 9, 2000, considered various general and bankruptcy-specific policy alternatives for possible adoption by the judiciary regarding privacy and public access to electronic case files. These options were presented in a paper entitled *Approaches to Electronic Case File Access and Privacy Issues: A Status Report and Review of Alternatives* prepared by Administrative Office staff.

After much discussion, the Bankruptcy Committee recommended that the following policy options among the bankruptcy case file alternatives presented in chart 4 of the paper may have merit and warrant further discussion and study by the Privacy Subcommittee:

- Policy option 1: Require less information on petition or schedules and statements.[1]

- Policy option 3: Reduce Social Security and other account numbers to the last four digits to protect privacy.[2]

- Policy option 4, subsections two and three: Amend Bankruptcy Code section 107 (which requires public access to all material filed with the bankruptcy courts, and gives judges limited sealing authority) by . . . (2) specifying that only "parties in interest" may obtain access to certain information, and (3) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosure based on privacy concerns.[3]

---

[1] At its January 2000 meeting, the Committee decided to request that the Advisory Committee on Bankruptcy Rules consider whether the Official Bankruptcy Forms should be modified to require that less information be filed and become part of the public record. That Committee has established a subcommittee to study this matter.

[2] Policy option 3 would also require consideration by the Advisory Committee on Bankruptcy Rules since it would require revisions to the Official Bankruptcy Forms.

[3] One Committee member commented that without specific language in section 107(b) authorizing the court to protect persons from disclosure of information based on privacy concerns, a bankruptcy judge making such a determination would have to rely on the general equitable powers of the court under section 105(a). This could potentially result in increased litigation as parties challenge the court's decision to seal information without specific statutory

The Committee specifically rejected policy option 2 (creation of an "estate" or "administrative" file - which the Committee interpreted as being maintained by the United States trustee - that would not be subject to public access, but would be accessible to "parties in interest" as specified in the Bankruptcy Code) as being burdensome and impractical.[4] The Committee was of the view, however, that segregation of some types of information in the bankruptcy case file and limitation of access to certain parties in interest (see policy option 4, subsection two) - through placement of such information on a separate form (paper or electronic) or through some other method - should be studied.[5]

---

authorization.

[4] Several Committee members noted that bankruptcy judges need ready access to information in the schedules and statements filed with the court to fulfill their responsibilities under the Bankruptcy Code. The Code, for example, places an independent obligation on bankruptcy judges - regardless of whether a party raises an objection - to determine whether a chapter 13 plan is feasible and to dismiss a case under section 707(b) if it finds that granting relief would be a substantial abuse. Concern was expressed that relying on the United States trustee to maintain and provide access to estate administration information could seriously hinder the court's ability to perform these responsibilities.

Another Committee member commented that giving the United States trustee responsibility for maintenance of a separate estate administration file to prevent the information therein from being accessible as a public court record under Bankruptcy Code section 107(b) might be circumvented by making a request for such information under the Freedom of Information Act.

[5] It was noted that most of the sensitive information that is the subject of privacy concerns (with the exception of the debtor's social security number, which is on the petition) is on the schedules and statement of financial affairs filed with the bankruptcy court. The Committee therefore was of the view that it might be relatively easy to move certain sensitive information from the schedules and statement into a separate form or otherwise separate the information. There was consensus among Committee members that the automatic sealing of such segregated information may be an option worthy of further study. The segregated information would be available to the judge, the United States trustee, case trustees, and other parties in interest, but not to the general public.

Committee members commented that maintenance of such information on a separate form subject to automatic sealing would not impose an undue burden on clerk's office operations because, among other things, no independent discretion would be necessary by deputy clerks in determining which information should be sealed. The work of the clerk's office would be almost negligible if such a form is filed and maintained electronically. (Continued on next page)

The Committee cautioned that its recommendations regarding further study of various policy options regarding bankruptcy case files do not address the issue of whether there is a need for such measures in the bankruptcy courts, but merely address possible solutions if the need exists. The Committee also determined that in any study of policy options, the experience of courts and the practical aspects of court operations should be examined.[6]

(Footnote 4 continued)

One Committee member noted that creation of a separate form for sensitive information would be analogous to use of the presentence report for criminal defendants in district court. The presentence report, which contains much third party information, is segregated by law and is automatically sealed from use by the general public by standing court order. The judge and other appropriate parties, however, have automatic access to the report (which is kept by the courts in separate folders). The Committee member said that the district court clerks' offices have not experienced any major problems using this procedure.

[6] Committee members, recognizing the many advantages to the court, trustees, attorneys, creditors, and other parties of making case information available through the Internet, expressed the view that any policy adopted by the judiciary should seek to strike an appropriate balance between the legitimate need for access to electronic information and the need to safeguard sensitive or personal information, especially with regard to innocent third parties.

The Committee discussed whether the courts' experience with electronic case files to date has shown problems with identify theft, stalking, or other abuses of the use of sensitive information in case files obtained through electronic means. Committee members noted that problems to date are largely anecdotal and theoretical, but they acknowledged that problems could increase as more courts implement the new electronic case filing systems.

Based on the experiences of their courts with electronic case files, two bankruptcy judges present at the Committee meeting cautioned against an overly-restrictive policy regarding access to information in electronic case files. One, the Committee member from the Western District of North Carolina (which has been a pilot court for the new CM/ECF system for the past three years), said that his court has received no requests for protective orders to seal information in case files, despite public notice (in the clerk's office and on the Internet) that information in the case files will be posted on the Internet. The court's electronic system has permitted the court, attorneys, trustees, and others to conveniently access information in the case files from remote locations, and has reduced the work burden on the clerk's office. A bankruptcy judge participant from Chicago noted similar advantages of the electronic case file system in the Northern District of Illinois. Both judges cautioned against adoption of a policy that would reverse these benefits and create more work for the court and clerks' offices. (Continued on next page)

The Committee did not take direct action regarding option 5 (study the interplay between the Fair Credit Reporting Act and judicial branch archiving requirements and ensure that privacy/access policy does not violate the act) presented in chart 4 of the policy alternatives paper. Several Committee members suggested this does not mean that option 5 should not be explored, but only that priority should be given to the options specifically identified by the Committee as having merit for further study.

With regard to the general privacy policy options presented in chart 1 of the paper, the Committee recommended that the Judicial Conference should develop a comprehensive national policy on privacy and electronic access to case files (rejecting policy option 1 of chart 1 - the "no policy" option) and that the same non-sealed information in case files available to users at the courthouse should be available to those using remote electronic access (rejecting policy option 4 of chart 1 and, impliedly, policy option 5 (which would implement a "waiting period" between electronic filing and Internet posting)).[7]

Several Committee members underscored the need for the judiciary to act expeditiously in developing a policy regarding privacy and public access to electronic information in view of the great interest in Congress regarding privacy issues and the President's recent action directing the Department of Justice and other agencies to study privacy and access to information in consumer bankruptcies. It was suggested that the judiciary will need to continually monitor federal privacy legislation to ensure that its electronic access practices do not violate enacted privacy measures. It was also suggested that the judiciary should be aware of state legislation regarding privacy.

(Footnote 5 continued)

Another Committee member, however, noted that Central District of California, by contrast, has experienced serious problems regarding the safeguarding of information in case files and there have been many requests for the sealing of information in high-profile cases.

[7] Committee members expressed the view that those accessing information at the courthouse and at remote locations should be treated equally. To create different restrictions for remote accessors of information would undermine the advantages of the Internet.

Attachment B

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

[DRAFT]

DATE: August 1, 2000

FROM: Robert Deyling, Attorney-Advisor
Article III Judges Division

SUBJECT: Status report

TO:

During the subcommittee conference call on July 13th I agreed to provide a summary of the discussion with reference to the "policy alternatives" paper I had drafted earlier this spring for use at several Judicial Conference committee meetings. Rather than providing narrative minutes of the conference call, which I do not think would be helpful to the overall effort, I have attached two documents that may provide a starting point for continued discussions on these complex issues.

The first document is simply the "policy alternatives" charts, annotated with a new third column that summarizes comments and observations based on the recent committee and subcommittee meetings.

The second document is my attempt at drafting an access/privacy policy, or guideline, based on the initial reactions to the policy alternatives. This document begins with a set of presumptions about the "general principles" and "key features" of a policy that might apply to all case or court types, and then moves to an outline-format discussion of guidelines for specific types of cases or courts. Recognizing that at this point there is not a clear consensus on most questions, I have highlighted alternative approaches as appropriate.

Chart 1: General Policy Alternatives		
Overall Policy Alternatives	**Open Issues, or Likely Implications**	**Conclusions or comments as of 7/2000**
1. The "no policy" option (i.e., do not take action at the national level to develop a comprehensive policy on privacy and electronic access to case files).	In the absence of guidance from the Judicial Conference or the Administrative Office, courts can be expected to adopt varied approaches. Based on a recent survey, prototype CM/ECF and imaging courts tend to apply "paper file" policies to the electronic file, including: 1) providing public access to all filed documents (unless sealed); 2) relying on litigants to seek protection via motions to seal; 3) not providing special notice to litigants regarding electronic public access policies. Ad hoc approaches are developing in CM/ECF prototype courts.	There appears to be little or no support for this alternative. Put another way, all of the JSUC committees that have considered this issue have concluded that some type of " national approach" to access and privacy issues should be pursued.
2. Through the development of a policy that is intended to apply to all courts, extend current "access presumptions" to electronic case files on a national basis.	This policy would make electronic case files publicly available to the same extent that paper files are available (i.e., there would be no distinctions between courthouse access and remote access to electronic files). It assumes the continued reliance on litigants to protect their own interests in non-disclosure. This could lead to an increase in motions to seal and motions by third parties to intervene regarding electronic access issues. This choice implicitly denies that there is any qualitative difference between access to paper and electronic files.	It appears that some judges (especially in the bankruptcy courts and courts that are operating imaging systems) see merit in continuing to rely primarily on litigants to protect their own privacy interests on a case-by-case basis. Others are attracted to this approach because it presumes that there will be remote electronic access to the entire "public" file (unlike #4 below), and because this approach does not contemplate the exclusion of sensitive information from the record unless it is sealed (unlike #3 below). Overall, however, many who support this option may also support certain aspects of #3 and #4 below, depending on the type of case or document at issue.

3. Through national policy development, redefine the contents of the "public file" to better accommodate privacy interests.	This policy would treat electronic and paper access the same, *but it assumes that "sensitive" information would be excluded from the public record or would be presumptively sealed.* It assumes that the entire public file would be available electronically without restriction. The challenge of this alternative is to identify, prospectively, case file information that may implicate privacy interests, and to justify excluding that information either from the public file itself, or from public access through the usual mechanism of sealing.	(The consensus is that this option is complicated, but there is support for it). The Rules Committee cautions against this option because it implies restrictions on access to information that has traditionally been publicly available unless sealed (but Rules would also support studying access restrictions based on case types, rather than types of information). The Bankruptcy Committee recommends further study of this option, and possibly amending Section 107 to make clear that only "parties in interest" are entitled to certain filed information
4. Provide limited remote electronic access to certain categories of information to address privacy concerns. **Note: The subcommittee has expressed reservations about a policy that presumes access to different information at the courthouse versus remote electronic access.**	This approach has three essential elements: 1) identify information that routinely should be granted "special" treatment *but not be sealed* (i.e., medical records, certain financial information, etc.) 2) provide electronic access to *all non-sealed information* at the courthouse 3) provide remote electronic access to subsets of case file information based on "levels of access" for judges, staff, litigants, the public, etc. Adopting this approach is likely to result in complaints that it is a burden to require someone to come to the courthouse to gain access to electronic records, while the same access is restricted from remote computers.	This approach appears to have little support, perhaps because it implies that there would be, in effect, an online public case file, and a larger at-the-courthouse public file. Nonetheless, there appears to be considerable support for using "levels of access" as either a short- or long-term tool to restrict access to a probably small number of discrete case types, document types, or information (e.g., medical, financial, proprietary)
5. Implement a " waiting period" between electronic filing and Internet posting to allow objections to electronic access to be resolved on a case-by-case basis by the judge/court.	In CM/ECF, this option is technically feasible. Adopting a waiting period is likely to have workload implications for both judges and court staff, depending on how this option would be implemented. It also could lead to an increase in motions and gamesmanship by lawyers and litigants, again depending on the terms of implementation.	There is little or no support for this alternative, mainly for the reasons outlined in the column to the left (workload implications, and the possibility of gamesmanship and satellite litigation).

6. Develop a case file archiving policy that addresses privacy interests	The electronic archiving question has at least three key elements that affect privacy issues, including: how an electronic file is defined for archiving purposes; how long case files must be maintained by the judiciary on the Internet; privacy interests that may require limits on the electronic life-span of a case file (if it is possible to implement such limits in the Internet context).	There is a consensus that the archiving issue requires further study, and that addressing it will require a national approach.
7. Develop special access policies for electronic trial records (transcripts and exhibits)	This may be a subset of any general access policy, but it should be addressed in light of new technology for creating and maintaining trial records (including real-time court reporting, electronic formats for trial exhibits, etc.)	There is consensus that new technology for creating trial records will have access and privacy implications that require further study.

Chart 4: Bankruptcy Case File Alternatives		
Policy Alternatives	**Open Issues, or Likely Implications**	**Conclusions or comments as of 7/2000**
Require less information on petition or schedules and statements.	There appears to be very little information that could be removed from filed bankruptcy documents. The bankruptcy courts, however, generally do not use all of the filed information. Much of the financial information, for example, is required mainly for the case trustees, and to allow creditors to pursue claims.	The Bankruptcy Committee is reviewing this issue, but notes that there is no consensus about whether electronic access to bankruptcy information is causing harm.
Create an "estate" or " administrative" file that would not be subject to public access, but would be accessible to "parties in interest" as specified in the Bankruptcy Code.	Who would keep this file? What items would it include?	The Bankruptcy Committee does not support a separate file that would be held by the U.S. Trustee, but does support the possibility of segregating certain information and making it available only to parties in interest. This could include certain information that, until this point, has been publicly filed and available at the courthouse.
Reduce Social Security and other account numbers to the last four digits to protect privacy.	This slight alteration to filing requirements may inhibit fraudulent uses of bankruptcy file information and provide a limited personal privacy protection.	There is support for limiting the display of the numbers of digits in an account number, perhaps to only the last four.
Amend Bankruptcy Code section 107. (Section 107 requires public access to all material filed with the bankruptcy courts, and gives judges limited sealing authority).	Several alternatives have been discussed, including: 1) clarifying information that need not, or should not be filed; 2) specifying that only "parties in interest" may obtain access to certain information; and 3) enhancing the 107(b) sealing provisions to clarify that judges may provide protection from disclosure based on privacy concerns.	The Bankruptcy Committee supports a change to 107(a) to specify that only "parties in interest" may obtain access to certain information; and enhancing the 107(b) sealing provision to clarify that judges may provide protection from disclosure based on privacy concerns.
Study the interplay between the Fair Credit Reporting Act and judicial branch archiving requirements; ensure that privacy/access policy does not violate FCRA.	Under the FCRA, certain information included in a person's credit report must be deleted after a specific number of years has passed. If bankruptcy records are electronic, this information may be available indefinitely through case files.	There is a consensus that this requires further study.

Attachment C

Billing Code: 4410-40, 4810-25, 3110-01

DEPARTMENT OF JUSTICE

DEPARTMENT OF THE TREASURY

OFFICE OF MANAGEMENT AND BUDGET

Public Comment on Financial Privacy and Bankruptcy

AGENCIES: Department Justice, Department of the Treasury, and Office of Management and Budget

SUMMARY: The Department of Justice, Department of Treasury and Office of Management and Budget, in consultation with the Administrative Office of the U.S. Courts, are conducting a study (the "Study") of how the filing of a bankruptcy affects the privacy of individual consumer information that becomes part of a bankruptcy case. The Study will consider how the privacy interests of debtors in personal bankruptcy cases are affected by the public availability of information about them in those cases. It will also consider the need for access to this information and accountability in the bankruptcy system. Finally, it will consider how changes in business practices and technology may affect all of these interests. To assist in the Study, these agencies are requesting public comment on a series of questions.

DATES: To ensure their consideration in the Study, comments and responses to the questions listed below, along with any other comments, should be submitted by September 8, 2000.

ADDRESSES: All submissions must be in writing or in electronic form. Written submissions should be sent to Leander Barnhill, Office of General Counsel, Executive Office for United States Trustees, 901 E Street, NW, Suite 780, Washington DC 20530. Electronic

submissions should be sent by email to USTPrivacyStudy@usdoj.gov The submissions should include the submitter's name, address, telephone number, and if available, FAX number and e-mail address. All submissions should be captioned "Comments on Study of Privacy Issues in Bankruptcy Data."

SUPPLEMENTARY INFORMATION:

I. Background

On April 30, 2000, the President announced the "Clinton-Gore Plan to Enhance Consumers' Financial Privacy: Protecting Core Values in The Information Age." As part of the Plan, the President directed three federal agencies to conduct a study on "how best to handle privacy issues for sensitive financial information in bankruptcy records," including "the privacy impact of electronic availability of detailed bankruptcy records, containing financial information of vulnerable debtors." The Study, to be jointly conducted by the Department of Justice, the Department of Treasury, and the Office of Management and Budget (the "Study Agencies"), will be prepared in consultation with the Administrative Office of the U.S. Courts, and will be completed by December 31, 2000. The Study Agencies are requesting public comment on a series of questions regarding privacy issues related to records that are established in the course of bankruptcy proceedings conducted in federal courts, including questions raised by electronic access to such bankruptcy records. The Study Agencies solicit responses to any or all of the questions listed below and welcome any other comments on these topics.

The Study Agencies also are aware of public attention in recent weeks focused on the troubling practice of organizations in bankruptcy seeking to sell personal data regarding their former customers, in violation of such organizations' privacy policies. Although this issue is outside the main scope of the Study – the privacy needs of debtors – the Study Agencies believe that this topic also involves the intersection of privacy and bankruptcy, and merits further attention. In part because of pending regulatory enforcement actions and/or pending legislation,

the Study Agencies are not making this subject part of the formal Study. Nevertheless, the Study Agencies invite comments about the effect that a business bankruptcy filing has on consumer/customer information that the business has collected. Comments should not address pending legislative proposals or regulatory activities. After reviewing the comments and any other developments, the Study Agencies will determine whether it is appropriate to examine this issue in greater depth.

Currently, there are two different types of data maintained and used in a bankruptcy proceeding. The first is information in a court record that is made available to any member of the public. The second is information held by trustees administering bankruptcy cases that is not generally available to the public. These two categories of data are referred to here as "public record data" and "non-public data," respectively, and they are described more fully below. Each is currently governed by a different set of rules and procedures, and the privacy and access interests in each may vary.

A. Public Record Data

A consumer or individual who files a case under either chapter 7 or chapter 13 of the Bankruptcy Code, 11 U.S.C. § 101 et seq., must provide detailed financial information as part of the schedules filed with the bankruptcy court. This includes a list of bank accounts and identifying numbers, credit card account numbers, social security numbers, balances in bank accounts, balances owed to creditors, income, a detailed listing of assets, and a budget showing the individual's regular expenses. By statute, 11 U.S.C. § 107(a), all documents filed with the court are "public records and open to examination by an entity at reasonable times without charge." Bankruptcy trustees (private entities appointed by U.S. Trustees) obtain this information in the course of administering cases assigned to them.

Much of the information provided in connection with a bankruptcy case is similar to financial information that, in other contexts, such as banking and credit reporting, may be covered by a system of regulation designed to ensure the confidentiality of such information. For example, in other contexts, an individual would be given notice of what uses might be made of the individual's bank account information or social security number, and would have some degree of choice as to how such information will be used. Security safeguards may also attach to the information.

In the past, access to public court record data has as a practical matter been quite limited. The individuals who obtained individual case files from the courts were those willing to spend considerable time, effort, and sometimes money. The development of electronic databases and other technologies allows for more widespread dissemination of information in bankruptcy records, along with far more convenient access, including access via the Internet. In some instances, courts are adopting technologies to convert their paper files to electronic form. This could result in a high volume of court records, including records containing sensitive personal information, appearing on the Internet.

B. Non-Public Data

While substantial amounts of personal data are filed by debtors in the bankruptcy courts, additional data are gathered by bankruptcy trustees in the course of administering the cases assigned to them. The trustee often will collect information about claims filed by creditors in a given case. The trustee also may find it necessary to supplement information that a debtor has provided in the bankruptcy schedules, and may request tax returns, as well as supporting information about the value of the debtor's assets, amounts of liabilities, and routine living expenses. The trustee's files also may contain information gathered from investigations about alleged wrongdoing in the case. In chapter 13 cases, the trustee tracks a debtor's payments to creditors under a payment plan. In general, only the parties in interest in a bankruptcy case (as defined by the court) receive both public and non-public data. By statute, the trustee "shall, unless the court orders otherwise, furnish such information concerning the estate and the estate's

administration as is requested by a party in interest." 11 U.S.C. §§ 704(7), §1302(b)(1). However, there are no well-defined limits on the trustee's authority to provide this information to others, nor on the authority of such third parties to use, sell, or transfer this information. In addition, some trustees and creditors are considering compiling information contained in

bankruptcy records electronically for easier administration of bankruptcy cases in which they have a claim. They may also envision some possible commercial use.

II Elements of the Study

The Study will examine:

- The types and amounts of information that are collected from and about individual debtors, as well as analyzed and disseminated, in personal bankruptcy cases.

- Current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings.

- The needs of various parties for access to financial information in personal bankruptcy cases, including specifically which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances.

- The privacy issues raised by the collection and use of financial and other information in personal bankruptcy cases.

- The effect of technology on access to, and the privacy of, a debtor's personal information.

- Business or governmental models that can provide access to, and protect debtors' privacy interests in, bankruptcy records.

- Principles for the responsible handling of information in bankruptcy records, and recommendations for any policy, regulatory, or statutory changes.

II Questions to be Addressed

The Study Agencies seek comment and supporting information from all sources, including bankruptcy professionals, consumer representatives, privacy advocates, creditors, information brokers, the academic community, and the general public. The Study Agencies will summarize the comments in the Study. Views are welcome on any aspect of this subject, but the following questions are offered to stimulate thought in specific areas of interest.

1.01 **What types and amounts of information are collected from and about individual debtors, analyzed, and disseminated in personal bankruptcy cases?**

(1.1) What types of information are collected, maintained, and disseminated in bankruptcy?

(1.2) Which of these data elements are public record data?

(1.3) Which are non-public record data held by bankruptcy trustees?

(1.4) How much data is at issue?

(1.5) Are certain types of data more sensitive than others; that is, are there types of data in which debtors would have a stronger privacy interest? If so, which ones?

(1.6) How valuable is the information in the marketplace?

2.0 What are the current practices, and practices envisioned for the future, for the collection, analysis, and dissemination of information in personal bankruptcy proceedings?

(2.1) What methods of data collection and aggregation are now used by the courts, creditors, trustees, and other private actors to collect, analyze, and disseminate public record data and non-public data?

(2.2) What methods are being contemplated for the future?

3.0 What access do various parties need to financial information in personal bankruptcy cases? Which individuals or entities require access to which particular types of information, for what purposes, and under what circumstances?

(3.1) What entities currently access public record data?

(3.2) What entities currently access non-public data from trustees?

(3.3) What specific data elements do they need, and for what purposes?

(3.4) Are the purposes for which the information is sought consistent with the public interest?

A. Public Record Data

(3.5) What data elements in public record data should remain public for purposes of accountability in the bankruptcy system? For other purposes?

(3.6) Is there certain information that need not be made available to the general public, but could be made available to a limited class of persons?

(3.7) If so, what are these data elements, to whom should they be made available, and for what

purpose?

(3.8) Is there a need to make the following data elements publicly available: (a) social security numbers, (b) bank account numbers, (c) other account numbers?

B. Non-Public Data

(3.9) What issues, if any, are raised by existing limitations on trustees' handling of personal information?

(3.10) Are all of the data elements held by bankruptcy trustees necessary for case administration purposes? If not, which data elements are not?

(3.11) What interests would be served by private or commercial enterprises collecting, compiling electronically, and redistributing information from bankruptcy cases?

4.0 What are the privacy issues raised by the collection and use of personal financial and other information in personal bankruptcy proceedings?

A. Public Record Data

(4.1) Do debtors have privacy interests in information contained in public record data made available through the bankruptcy courts? If so, what are those interests? Do they vary by data element? If so, how?

(4.2) What are the benefits of a public record system for court records in bankruptcy cases?

(4.3) What are the costs of collecting and retaining data in bankruptcy cases?

(4.4) To what extent do individuals who file for bankruptcy understand that all of the information contained in the public bankruptcy file is available to the public?

(4.5) Should debtors in bankruptcy be required to forego some expectation of privacy that other consumers have under other circumstances?

(4.6) Are there characteristics about debtors in bankruptcy that raise special concerns about wide public dissemination of their personal financial information?

B. Non-Public Data

(4.7) What are debtors' expectations about what uses and disclosures of information will be made by bankruptcy trustees?

(4.8) What, if any, privacy interests lie in non-public bankruptcy data held by bankruptcy trustees?

(4.9) If non-public data were made widely available to the public or to creditors for other non-bankruptcy purposes, what might be the consequences?

(4.10) Are privacy interests affected if the distribution of non-public data bankruptcy information is for profit?

5.0 What is the effect of technology on access to and privacy of personal information?

(5.1) Do privacy issues related to public record data in bankruptcy cases change when such data are made available electronically? On the Internet? If so, how?

(5.2) Do privacy interests in non-public data change when such data are compiled electronically for ease of administration of bankruptcy cases? For commercial use? For other use?

(5.3) Are new technologies being used to improve access to court records? Non-public bankruptcy data? Should they be? Why or why not?

6.0 What are current business or governmental models for protecting privacy and ensuring appropriate access in bankruptcy records?

(6.1) What statutes, rules, or policies can serve as models for maintaining appropriate levels or access and privacy protection for public bankruptcy records? For non-public bankruptcy information held by trustees?

(6.2) What statutes, rules, or policies are ineffective in providing appropriate access and

privacy interests?

(6.3) What statutes, rules, or policies, are otherwise relevant to this Study?

7.0 What principles should govern the responsible handling of bankruptcy data? What are some recommendations for policy, regulatory or statutory changes?

Public Record Data

) To what extent are privacy safeguards appropriate for public record data? If safeguards are appropriate, what should they be? How should they be crafted to ensure that they do not interfere with legitimate public needs to access certain bankruptcy data?

) Should notice about the public nature of bankruptcy filings be provided to individuals who file for bankruptcy? What form should such notice take?

) Should there be any restrictions on the degree of accessibility of such information, such as rules that vary if information is made available electronically? via the Internet? If so, what should they be? Should policies on the handling of information in bankruptcy cases be technology neutral, so that the rules for dealing with information are the same regardless of what medium is used to disclose such information? Why or why not?

) Are there any data elements in public record data that should be removed from the public record and held instead as non-public data by bankruptcy trustees or courts?

) Is there some experience with other public records that is relevant to the privacy and access issues in bankruptcy cases? Do any records or filing systems, for example in the courts, provide instruction in this regard?

Non-Public Data

) To what extent are privacy safeguards appropriate for non-public data held by bankruptcy trustees in bankruptcy cases? If some safeguards are appropriate, how should they be structured?

How should they be crafted to ensure that they not interfere with the needs of bankruptcy trustees to administer their cases?

Should debtors receive notice of what uses and disclosures will be made of their information in the hands of bankruptcy trustees? What would be the effects of such disclosures?

Should restrictions be imposed on the use and disclosure of information held by bankruptcy trustees? If so, what types of restrictions? What would be the effects of such restrictions?

Should debtors be permitted to access the information held about them by bankruptcy trustees? If so, under what circumstances? What would be the effects of such access?

If bankruptcy data are compiled and made easily and widely available to users outside of the bankruptcy system, should these users be charged for the collection and distribution process? How would the amount of the charge be set?

Kevyn Orr
Director, Executive Office For United States Trustees
Department of Justice

Gregory A. Baer
Assistant Secretary for Financial Institutions
Department of the Treasury

John T. Spotila
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget

USTP Press Release

For Immediate Release
July 26, 2000

JUSTICE, TREASURY, OFFICE OF MANAGEMENT AND BUDGET SEEK PUBLIC COMMENT FOR STUDY ON FINANCIAL PRIVACY AND BANKRUPTCY

WASHINGTON -- The Clinton-Gore Administration is seeking public comment on privacy protection and the treatment of sensitive financial information such as social security numbers, credit card and bank account numbers in bankruptcy cases. In April, the President announced the Clinton-Gore Plan to enhance consumers' financial privacy, including a study of privacy needs of debtors in bankruptcy. As part of the plan, three federal agencies are now asking the public for input on how to protect privacy in bankruptcy cases, particularly in the information age.

The study is being conducted by the Department of Justice, the Department of Treasury, and the Office of Management and Budget. It will examine how the privacy interests of debtors in personal bankruptcy cases are affected by the public availability of information they submit as part of the bankruptcy process. The study also will examine the need for public access to information filed in bankruptcy cases. In both the privacy and open access areas, the study will focus on the impact of changes in business practices and in technology.

The agencies' request for public comment will appear in the Federal Register shortly and also will be posted on the Justice Department web site at www.usdoj.gov/ust.

The agencies are aware of public attention in recent weeks on the troubling practice of organizations in bankruptcy seeking to sell personal data regarding their former customers, in violation of such organizations' privacy policies. In part because of pending regulatory enforcement actions and pending legislation, the agencies are not making this issue part of their formal study. Nevertheless, the agencies invite comments about the effect that a business bankruptcy filing has on consumer/customer information collected by the business. Comments should not address pending legislative proposals or regulatory activities. After reviewing the comments and any other developments, the agencies will determine whether it is appropriate to examine this issue in greater depth.

* * *

A person who files for bankruptcy provides detailed financial information *[see sample bankruptcy petition in Portable Document Format]* as part of the schedules filed with the bankruptcy court. This includes a list of bank accounts and identifying numbers, credit card account numbers, social security numbers, balances in bank accounts, balances owed to creditors, income, a detailed listing of assets, and a budget showing the individual's regular expenses. By statute, all documents filed with the court are open to any member of the public.

In the past, access to public court record data has as a practical matter been quite limited. The people who obtained individual case files from the courts were those willing to spend considerable time, effort, and sometimes money. The development of electronic databases and other technologies, however, raises the potential that anyone can access sensitive data found in other people's bankruptcy files, right from their own home. Aggregation and electronic distribution of bankruptcy data could lower costs, but it also could make information easily available to neighbors, employers, marketers and predators looking for those most likely to be lured by scams.

Bankruptcy trustees, the people responsible for administering bankruptcy cases, have access to the public record information, and often receive other sensitive data about debtors. For example, some trustees will get debtors' tax returns, an account of their routine living expenses, and their payment schedules to creditors -- all of which may be necessary to administer bankruptcy cases. Trustees most often provide this information to creditors, attorneys, and other entities with a direct and legitimate interest in the case. However, there are no well-defined limits on the trustee's authority to provide this information to others, nor on the authority of such third parties to use, sell, or transfer this information. In addition, some trustees and creditors are considering compiling information contained in bankruptcy records electronically for easier administration of bankruptcy cases in which they have a claim.

The DOJ / Treasury / OMB study will focus on the privacy and open access issues in both the public record data and also the data held by trustees administering bankruptcy cases.

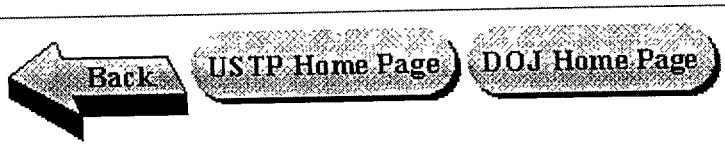
Deadline for Submissions

The notice directs submissions to be sent in writing or in electronic form to: Leander Barnhill, Office of General Counsel, Executive Office for United States Trustees, 901 E Street, NW, Suite 780, Washington DC 20530. Electronic submissions should be sent by email to USTPrivacyStudy@usdoj.gov.

The Executive Office for United States Trustees is a component of the Justice Department that monitors the administration of bankruptcy cases nationwide.

Public Information Officer
Executive Office for United States Trustees
(202) 305-7411

[End]



Page Last Updated on Frii., July 27, 2000
U.S. Trustee Program/Department of Justice
usdoj/ust/ogc/ldb

Attachment D

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: August 8, 2000

FROM: Abel J. Mattos

SUBJECT: HR 4857

TO: CACM Subcommittee on Privacy and Electronic Access to Case Files

As you may be aware, the Subcommittee on Social Security of the Ways and Means Committee of the House of Representatives has reported a bill to the full Ways and Means Committee which would, among other things, prohibit any agency of the Federal Government 1)from displaying any individual's social security number or any derivative thereof and 2) selling any social security number or derivative thereof. This bill is HR 4857 and is entitled the "Privacy and Identity Protection Act of 2000." It was introduced by Representative Clay Shaw (R-FL), chair of the Subcommittee on Social Security, on July 13, 2000 and was marked up by that Subcommittee on July 19, 2000. A companion bill has been introduced in the Senate. It has the same name and is S 2876. It was introduced by Senator Jim Bunning (R-KY) on July 14, 2000 and has been referred to the Senate Committee on Finance. To date, there has been no committee action on the Senate bill.

Relevant portions of HR 4857, as amended and reported to the full Ways and Means Committee, are attached for your reference. From discussions between the Office of Legislative Affairs at the Administrative Office and a key staffer of the Subcommittee on Social Security (the Subcommittee), it appears that the full Ways and Means Committee may mark up this bill upon returning from the August recess. For that reason, the Office of the Judicial Conference Executive Secretariat (OJCES) has determined that CACM may need to be prepared to evaluate

the legislation on an expedited basis.

The portion of the bill most relevant to court operations appears to be Title I, Section 101 (b) "Prohibition of Public Access to Social Security Account Numbers Possessed by Governmental Agencies." This section reads:

> No agency or instrumentality of the Federal Government or of a State or political subdivision thereof may display to the general public any individual's social security account number, or any derivative of such number. Each such agency or instrumentality shall ensure that access to such numbers, and any derivative of such numbers, is restricted to persons who may obtain them in accordance with applicable law. For purposes of this subclause, the term 'display to the general public' in connection with a social security account number, or a derivative thereof, means the intentional placing of such number, or a derivative in a viewable manner on an Internet site that is available to the general public or in material made available or sold to the general public.

The initial opinion of the Administrative Office's Office General Counsel is that the courts would be viewed as an agency or instrumentality of the Federal Government and, thereby, subject to the prohibition on the display of social security numbers and derivatives as defined by the bill. The Subcommittee staffer agreed that this provision was intended to cover the federal courts. This could impact the way in which a court handles every court form and document which contains a social security number or any part of such a number.

A second portion of the bill which may be relevant to court operations is the prohibition on the sale of social security account numbers by a government agency or instrumentality contained in Title I, Section 101(b). The Subcommittee staffer indicated that this provision could apply to courts because of charges levied for copies of documents which contain a social security number and for on-line viewing of electronic court records which contain a social security number.

HR 4857, by its own terms, is not retroactive and the prohibition on the display of social

security numbers would apply "to all displays originally occurring 2 years after the date of the enactment" of the legislation. Thus, it appears that if this bill were enacted, it would not require any alteration to forms or documents "displayed" prior to the date of enactment.

A later section of the bill also calls for the Comptroller General of the United States to study:

> the current usage, by agencies and instrumentalities in all branches of the Federal Government . . . of the social security account numbers of individuals, and derivatives of such numbers, for the purposes of identification of such individuals and . . .the most effective means by which any such usage extending beyond the original purpose of the social security account number may be minimized.

The Comptroller General is to file a report of this study with the House and Senate within one year of the enactment of this bill. The report is to include proposals, including legislative changes, deemed appropriate by the Comptroller General.

We have done some initial research into what specific court forms require a social security number. So far, we have identified the following:

> 1) Bankruptcy Rule of Procedure 1005 requires the petition to contain a caption which includes the title of the case. This title is defined as including the social security number or the tax identification number of the debtor.
>
> 2) Bankruptcy Form 9, the debtor's notice to creditors, requires the debtor's social security number (11 U.S.C. § 342(c));
>
> 3) Bankruptcy Rule of Procedure 9004(b) requires every document filed to a contain a caption of the case, which includes the case's title. That title may require the debtor's social security number. This impact forms 1, 9, 12, 13, 14, 15, 16A, 16C, 17, 18, 20A and 20B. It should also be noted that a complaint, containing the social security number in the caption, serves as the notice for the initiation of an adversary proceeding. Thus, a debtor's social security number is included in all adversary proceedings initiated by debtors.
>
> 4) Bankruptcy Form 10, a creditor's proof of claim form, requires the social security number of a creditor claiming wages, salary or compensation; and
>
> 5) Title 11 U.S.C. 110(c)(2) requires the social security number of a non-attorney paid

preparer or assistant to the preparer to be included on any document prepared. This includes the petition and forms 1, 3, 6, 7, 8 and 19.

We have not found any form or rule of civil or criminal procedure which requires the use of a social security number. We have, however, found at least 25 district courts which do require the appellant in a Social Security case to include his or her social security number in court filings. A few courts have a specific local rule requiring the number to be included in the caption of the complaint. (See, e.g. District of Massachusetts). If this complaint is later displayed electronically, courts with this type of rule would likely be seen as being in violation of the legislation.

Still other courts have a local rule for pleadings in special matters, which include social security cases, or have a specific local rule requiring the inclusion of social security numbers in pleadings. The majority of such local rules require the complaint to include the social security number of the worker on whose wage record the application for benefits is filed in cases involving retirement, disability, health insurance and black lung benefits and the social security number of the appellant in cases involving claims for supplemental security income benefits. (See, e.g. Eastern District of California). Once again, if the complaint in a social security case is displayed electronically, these districts would likely be affected by the legislation. The District of Maine had included as an appendix to its local rules a form complaint in a social security appeal. This form included the social security number in the body of the complaint. This form, which has since been revised to eliminate the use of the social security number, suggested that the inclusion of a social security number was required in the district and thus, would likely have caused the type of display which the statute prohibits.

Several courts have a local rule requiring that the appellant include his or her social

security number on a separate sheet of paper attached to the copy of the complaint served upon the Secretary of Health and Human Services and include in the body of the complaint a statement that the social security number has been attached to the copy of the complaint served on the Secretary. (See, e.g. District of Alaska). With this procedure, it does not appear that the court actually requires the social security number to be included in any pleading or retains the social security number for its own use. Thus, it is not likely that courts using this procedure would be in violation of the legislation. Some appellants in Social Security cases include their social security numbers on the face of the complaint without the court asking them to do so. It is not clear whether courts which later electronically display these complaints would be in violation of the legislation.

It is also possible that social security numbers may be included in district court pleadings in student loan collection cases, or civil forfeiture actions. However, our research has not found any court forms that require the inclusion of the numbers in these cases.

At the circuit court level, any social security number which is part of the district court record will be included. Our brief research has not revealed any rule of appellate procedure or circuit court internal operating procedure which requires an individual's social security number.

We have spoken with the Office of Legislative Affairs and OJCES about the need for an official Judicial Conference position on this legislation. It is their opinion that the issues in the bill reach beyond the judiciary and that the judiciary may not have much influence regarding the bill's provisions. Therefore, it may be best for the judiciary to take no position at this time. Judge Hornby is of the same opinion. He has asked that this legislation be brought to the attention of the members of the Subcommittee for your review. If the members of the Subcommittee desire to discuss the legislation and whether the judiciary needs to weigh in, we

can arrange a conference call. Please contact Katie Simon at 202-502-1563 or Katie_Simon@ao.uscourts.gov by August 15, 2000 to let her know if you feel the need to discuss these issues. If a conference call is needed, it will likely take place during the week of August 21.

cc: Alternate Liaisons

AO and FJC Staff

Attachment

(7) Consequently, Congress should enact legislation that will offer individuals assigned such numbers necessary protection from the sale and purchase of social security account numbers in circumstances that might facilitate unlawful conduct or that might otherwise likely result in unfair and deceptive practices.

TITLE I—PROVISIONS RELATING TO THE SOCIAL SECURITY ACCOUNT NUMBER

SEC. 101. GOVERNMENTAL USE AND TREATMENT OF SOCIAL SECURITY ACCOUNT NUMBERS.

(a) RESTRICTIONS ON THE SALE OF SOCIAL SECURITY ACCOUNT NUMBERS BY GOVERNMENTAL AGENCIES.—

(1) IN GENERAL.—Section 205(c)(2)(C) of the Social Security Act (42 U.S.C. 405(c)(2)(C)) is amended by adding at the end the following new clause:

"(x) No agency or instrumentality of the Federal Government or of a State or a political subdivision thereof in possession of any individual's social security account number may accept an item of material value in exchange for such number, or any derivative thereof, except to the extent specifically authorized by this Act.".

(2) EFFECTIVE DATE.—The amendment made by this subsection shall apply with respect to violations occurring after 180 days after the date of the enactment of this Act.

(b) PROHIBITION OF PUBLIC ACCESS TO SOCIAL SECURITY ACCOUNT NUMBERS POSSESSED BY GOVERNMENTAL AGENCIES.—

(1) IN GENERAL.—Section 205(c)(2)(C)(viii) of such Act (42 U.S.C. 405(c)(2)(C)(viii)) is amended by adding at the end the following new subclause:

"(V) No agency or instrumentality of the Federal Government or of a State or a political subdivision thereof may display to the general public any individual's social security account number, or any derivative of such number. Each such agency or instrumentality shall ensure that access to such numbers, and any derivative of such numbers, is restricted to persons who may obtain them in accordance with applicable law. For purposes of this subclause, the term 'display to the general public' in connection with a social security account number, or a derivative thereof, means the intentional placing of such number or derivative in a viewable manner on an Internet site that is available to the general public or in material made available or sold to the general public.".

(2) EFFECTIVE DATE.—Agencies and instrumentalities shall comply with the requirements of subclause (V) of section 205(c)(2)(C)(viii) of the Social Security Act (added by this subsection) as soon as practicable after the date of the enactment of this Act. Such subclause (V) shall apply with respect to all displays originally occurring after 2 years after the date of the enactment of this Act.

(c) REPORT BY GENERAL ACCOUNTING OFFICE ON USE BY GOVERNMENTAL AGENCIES AS PERSONAL IDENTIFICATION NUMBER.—

(1) STUDY.—The Comptroller General of the United States shall undertake a study of—

(A) the current usage, by agencies and instrumentalities in all branches of the Federal Government and by agencies and instrumentalities of States and political subdivisions thereof, of the social security account numbers of individuals, and derivatives of such numbers, for purposes of identification of such individuals, and

(B) the most effective means by which any such usage extending beyond the original purposes of the social security account number may be minimized.

(2) REPORT.—Not later than 1 year after the date of the enactment of this Act, the Comptroller General shall submit a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate setting forth the results of the study conducted pursuant to this subsection. Such report shall contain such recommendations, including proposals for legislative changes, as the Comptroller General deems appropriate.

(d) PROHIBITION OF USE OF SOCIAL SECURITY ACCOUNT NUMBER ON CHECKS ISSUED FOR PAYMENT BY GOVERNMENTAL AGENCIES.—

(1) IN GENERAL.—Section 205(c)(2)(C) of the Social Security Act (42 U.S.C. 405(c)(2)(C)) (as amended by subsection (a)) is amended further by adding at the end the following new clause:

"(xi) No agency or instrumentality of the Federal Government or of a State or a political subdivision thereof may include the social security account number of any individual, or any derivative of such number, on any check issued for any payment by the Federal Government, any State or political subdivision thereof, or any agency or instrumentality thereof.".

9

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: PROPOSED RULE ON FINANCIAL DISCLOSURE

DATE: AUGUST 17, 2000

Since 1989, Federal Rule of Appellate Procedure 26.1 has required nongovernmental corporate parties to identify its parent corporations and any publicly held company that owns 10% or more of the party's stock. The Rule requires the disclosure to assist the courts in determining whether the judge has a financial interest in a party that would require recusal under 28 U.S.C. § 455. The Committee on Rules of Practice and Procedure has asked each of the Advisory Committees to consider adoption of a similar rule to require disclosure under the Civil, Criminal, and Bankruptcy Rules. The Appellate Rules Committee also considered amendments to its current Rule 26.1. The Appellate, Civil, and Criminal Rules Committees each proposed a rule to the Standing Committee for publication. The Committee on Codes of Conduct also has considered the matter and offered its position on the issue. Our Subcommittee on Attorney Conduct met by telephone on July 18, 2000, to discuss the matter and to consider proposed language for a rule governing financial disclosure. The proposed Rule 7007.1 that followed from that discussion is set out below.

As a disclosure rule, FRAP 26.1 is somewhat limited. It requires disclosure only by nongovernmental corporate parties. It also limits disclosure to the parent companies of the

corporate party and any publicly held company that owns at least 10% of the stock of the party. The Standing Committee and the other Advisory Committees recognized that this limitation of the rule to corporate parties effectively excludes publicly held partnerships and similar legal entities such as limited liability companies from the rule, and they concluded that the restriction was appropriate. Consequently, their proposals continue the limitation of the rule to corporations. We are not able to carry this limitation forward in the Bankruptcy Rules version of the rule. Bankruptcy Rule 9001 provides that the definitions in Bankruptcy Code § 101 govern in the Rules. Section 101(9) defines corporation very broadly to include entities such as limited partnerships and limited liability companies. Those entities are not "corporations" under applicable state law and would not be subject to the disclosure requirements of FRAP 26.1. Nevertheless, their inclusion in the definition of a corporation in § 101(9) means that those entities will fall under the proposed Rule 7007.1. The proposed rule reflects this broader reach in line 7 by referencing "membership interests" as well as stock.

Subdivision (a)(1)(A) of the proposal has two suggested additions to the provision. First, line 5 includes bracketed language that would extend the disclosure requirement to a listing of "affiliates" of the corporate party. The argument is that the court should be made aware of affiliates of the parties, even if those affiliates are not 10% or greater shareholders of the party, because a judge's financial interest in an affiliate may justify recusal. The contrary argument is that including "affiliates" in the rule may stretch the rule too far. The other Advisory Committees and the Standing Committee (as well as the Committee on Codes of Conduct) have attempted to tailor the rule narrowly so that its disclosure requirements are clear and that those disclosures are not so extensive as to become meaningless or unduly burdensome to the parties

and the court. The Subcommittee concluded that the Committee should consider whether to include affiliates within the disclosure requirements of the rule.

There is another reason why it may not be appropriate to include affiliates in Proposed Rule 7007.1. "Affiliate" is defined in § 101(2) in such a manner that it applies only to entities that own or are owned by the debtor and to persons who operate the debtor's business or whose business the debtor operates. Therefore, including "affiliates" in the Proposed Rule would only reach disclosure by the debtor and not by any other party. Moreover, the other Advisory Committee proposals do not include any reference to affiliates, and introducing the concept into Proposed Rule 7007.1 would unnecessarily alter the reach of the rule as compared to the other versions.

Line 6 sets out the second proposed addition to the draft and would limit the disclosure to the ownership of common stock. Ownership of other classes of stock, such as preferred stock, are more in the nature of claims than interests. Since the rule is intended to identify entities that may hold an ownership interest in a party, limiting the disclosure to common stock ownership may be sufficient. Again, however, the proposed rules of the other Advisory Committees are not limited to particular classes of stock ownership. Inserting "common" before "stock" in the Proposed Rule would make it inconsistent with the rules proposed by the other Advisory Committees.

Proposed Rule 7007.1(a) is set in Part VII of the Bankruptcy Rules because it requires disclosure only by parties to adversary proceedings and contested matters. There is a corresponding change to Rule 9014 to cross reference its applicability to contested matters. The Proposed Rule does not require the debtor to file a disclosure statement along with the petition or

schedules. Subdivision (b) requires a party to file the disclosure statement "with its first pleading in an adversary proceeding or contested matter." This language recognizes that the purpose of the financial disclosure rule is to identify parties in active disputes before the court that the judge must adjudicate. If the party does not appear in the matter and relief is ordered by default, the judge is not acting to resolve disputes or make factual findings in favor of a party who has not participated in the matter. Moreover, the adverse party in the action cannot file a statement with the information relevant to the opposing party. Therefore, the Rule recognizes that as a practical matter the judge must be allowed to sign orders in the absence of any information identifying a potentially disqualifying financial interest.

The Subcommittee also included an alternative Subdivision (c) to Proposed Rule 7007.1. This provision is taken from Proposed Civil Rule 7.1. Neither the Proposed Criminal Rule 12.4 nor the revised FRAP 26.1 contain a comparable provision. The Civil Rules Advisory Committee offered two primary reasons for the proposal. First, there was concern that the clerk's office needed more specific direction to ensure that the clerk would deliver the disclosure statements to the judge. Unlike the case file in an appeal, the judge may see only a portion of a file at any one time, and the proposed direction to the clerk in the rule would reinforce the importance of providing the disclosure information to the judge. Secondly, there are many times when a judge other than the judge to whom the case is initially assigned is called upon to enter an order on some aspect of the case. Subdivision (c) would thus remind the clerk to deliver the information to each judge who might be called upon to act in the case. It was the second reason that caused the Subcommittee on Attorney Conduct to include an alternative Subdivision (c) in the version of Proposed Rule 7007.1. Opponents of the provision assert that the provision is

unnecessary and is unduly paternalistic to the clerk. If the disclosure statements are included in the file for the adversary proceeding or contested matter, they will be delivered to the judge acting in the proceeding or matter.

RULE 7007.1 DISCLOSURE.

(a) Required Disclosure. A party to an adversary proceeding or contested matter shall:

(1) if it is a corporation that is not a governmental unit, file a statement that—

(A) identifies [all of its affiliates and] any publicly held corporation that owns 10% or more of its [common] stock or membership interests, or

(B) states that there are no entities to report under subdivision (a)(1)(A) of this Rule; and

(2) file a statement providing any additional information required by the Judicial Conference of the United States.

(b) Time for Filing. Except with respect to a proof of claim filed under these Rules or a notice of appearance filed under Rule 9010(b), a party shall file the statement required by subdivision (a) of this Rule with its first pleading in an adversary proceeding or contested matter. A supplemental statement shall be filed promptly upon any change in the circumstances that this Rule requires the

party to identify.

[(c) Form Delivered to Judge. The clerk shall deliver a copy of each statement or filed under this Rule to each judge acting in the adversary proceeding or contested matter.]

COMMITTEE NOTE

This Rule is derived from Rule 26.1 of the Federal Rules of Appellate Procedure. The information that parties must supply will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c) of the Code of Conduct for United States Judges. This Rule does not cover all of the circumstances that may call for disqualification under the subjective financial interest standard of Canon 3C, and does not deal at all with other circumstances that may call for disqualification.

The Rule applies only to adversary proceedings and contested matters. It is in those circumstances that the court is called upon to render decisions, and the standards for disqualification are therefore most applicable. It directs parties to list those publicly held companies that hold significant ownership interests, including membership interests in limited liability companies and similar entities that fall under the definition of a corporation under the Bankruptcy Code. [The parties [debtor] also must identify any publicly held corporation that is an affiliate.]

Subdivision (a)(2) of the Rule requires all parties to file an additional statement if the Judicial Conference of the United States acts to require further disclosure.

Parties must file the statement with the first document (other than a proof of claim or notice of appearance) that they file in the case or proceeding. The Rule also requires parties to file supplemental statements promptly whenever changed circumstances require new identifications of parent corporations or others.

[There may be occasions in which a judge is called upon to hear a matter when the matter has been handled previously by another judge. Consequently, subdivision (c) directs the clerk to deliver a copy of the statement to any judge who may hear or rule on a matter.]

RULE 9014 CONTESTED MATTERS.*

*****

(c) APPLICATION OF PART VII RULES. Unless the court directs otherwise, the following rules shall apply: 7007.1, 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage direct that one or more of the other rules of Part VII shall apply. The court shall give notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

Subdivision (c) is amended to include a cross reference making Rule 7007.1 applicable to contested matters. That rule requires parties to file a financial disclosure statement together with the first pleading in the matter.

* This version of Rule 9014(c) reflects the proposed changes to the Rule as published for comment in August 2000.7

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: SERVICE OF CHAPTER 12 AND 13 PLANS – AMENDMENT TO RULE 3015(d) and (g)

DATE: AUGUST 17, 2000

Rule 3015(d) currently provides that the debtor, if required by the court, must furnish sufficient copies of the plan or a summary of the plan to the clerk to enable the clerk to effect service on the trustee and creditors under Rule 2002. Both Rule 2002(a)(8) governing notice of the time for filing objections and the hearing on confirmation of a chapter 12 plan, and Rule 2002 (b)(2), the comparable notice provision for chapter 13 plans, authorize the court to direct that the notice be given by someone other than the clerk. Rule 3015(d) states that the plan or a summary must be included with the notice of the hearing on confirmation. In many instances, it may be more cost effective to have the debtor serve a copy of the plan or summary of the plan. As the rules are currently written, it is not possible to have the debtor serve a copy of the plan or a summary of the plan separate from the notice of the confirmation hearing. The same situation is presented for postconfirmation modifications of plans under Rule 3015(g).

The linking of the service of the plan or summary of the plan and the notice of the hearing on confirmation is set out in Rules 3015(d) and (g). Those rules could be amended to separate

those functions and create greater flexibility with respect to the service of plans and the service of the notice of the confirmation hearing. The court must be involved in the notice of the confirmation hearing because it requires the scheduling of the hearing as the court's docket and the rules otherwise permit. The service of the plan or a summary of the plan, however, need not involve the court or the clerk at all.

There may be some concern that the debtor as the party serving the notices is not sufficiently reliable particularly compared to the clerk. It may also prove to be more expensive (or at least not less expensive) than continuing to have the clerk serve the plan or a summary along with the notice of the confirmation hearing. There also has not appeared to be any significant call for a change in the rule.

The following amendment to the rule is offered in the event that the Committee believes that a change is appropriate.

RULE 3015. FILING, OBJECTION TO CONFIRMATION, AND MODIFICATION OF A PLAN IN A CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT OR A CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASE.

* * * * *

(d) NOTICE AND COPIES. The debtor, or some other person as the court may direct, shall serve on the trustee and all creditors [and indenture trustees] the plan or a summary of the plan. ~~The plan or a summary of the plan shall be included with each notice of~~

~~the hearing on confirmation mailed pursuant to Rule 2002. If required by the court, the debtor shall furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.~~

(1) In a Chapter 12 case, service shall be made at least 20 days prior to the hearing to consider confirmation of the plan.

(2) In a Chapter 13 case, service shall be made at least 25 days prior to the hearing to consider confirmation of the plan.

* * * * *

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan ~~pursuant~~ under § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors [and indenture trustees] not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. ~~A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a~~

~~sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice.~~ The plan proponent shall serve a copy of the proposed modification, or a summary thereof, on the debtor, the trustee, and all creditors [and indenture trustees] at least 20 days prior to the hearing to consider confirmation of the modified plan. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

The rule is amended to separate the debtor's obligation to provide copies of the plan or modified plan to the clerk from the requirement of notice of a hearing to consider confirmation of a plan or modified plan. Instead, the rule requires the plan proponent, unless the court directs otherwise, to serve a copy of the plan or summary of the plan on the debtor, the trustee, and creditors. Separating this action from the notice of the hearing to consider confirmation reduces costs by eliminating the transfer of the copies of the plan or summary to the clerk. Instead, the plan proponent serves the copies directly on the parties entitled to service.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 2002 AND LATE FILED CLAIMS IN CHAPTER 13 CASES

DATE: AUGUST 17, 2000

Section 502 of the Code governs the allowance of claims. Rule 3002 implements that section by establishing time limits for the filing of claims and setting out other procedural requirements for the filing of a proof of claim. Rule 3002(a) provides also that an unsecured creditor must file a proof of claim for that claim to be allowed. Prior to 1994, § 502 did not include the failure to file a timely proof of claim as a ground for the disallowance of the claim. The court in In re Hausladen, 146 B.R. 557 (Bankr. D. Minn. 1992)(Kressel, B.J.) noted this apparent inconsistency between the rule and the Code, and held that tardily filed claims were allowable in chapter 13 cases. The court surmised that "the drafters of the new Rule 3002 hastefully copied the substance of old Rule 302 without paying any attention to the major change in the underlying statute." Id. at 559. The statutory change to which the court referred was the absence of a requirement in § 502 of the Code of any requirement of a timely filed claim as a prerequisite to allowance of the claim as compared to § 57(n) of the Bankruptcy Act that explicitly required timely filed claims. The decision generated significant attention, and the courts came to a variety of conclusions regarding the proper treatment of tardily filed claims in chapter 13 cases. Congress responded to the problem in 1994 by enacting § 502(b)(9). That

section "reinstated" tardy or late filing of claims as a ground for disallowance of the claim. Consequently, tardily filed claims are now disallowable even in chapter 13 cases.

Hon. James A. Pusateri (Bankr. D. Kan.) has requested that the Committee consider proposing an amendment to Rule 2002(h) to reflect the addition of § 502(b)(9) to the Bankruptcy Code. That provision currently authorizes the court to dispense with giving the notices required by Rule 2002(a) to creditors who have not timely filed proofs of their claims. This exception to the noticing requirements applies, however, only in chapter 7 cases. Judge Pusateri notes that the limitation of the rule to chapter 7 cases may have been appropriate up to the time that Congress added § 502(b)(9) to the Code, but that the ability to disallow claims now makes it proper to include chapter 13 within the rule. Thus, he has proposed that Rule 2002(h) be amended to authorize the courts to direct that notices not be sent to creditors who have not timely filed a proof of claim in chapter 13 cases. Although he did not so indicate, his reasoning is equally applicable to chapter 12 cases.

There are several problems with the Judge Pusateri's proposal. First, he seems to assume that Rule 2002(h) authorizes a court to dispense with notice to any creditor who files a claim after the filing deadline has expired. The rule does not so provide. Rather, it states that the court can order that notices be sent only to creditors who have filed claims. It does not authorize the court to order that notices be sent only to creditors who have *timely* filed claims. Indeed, § 502(a) of the Code provides that a claim is allowed, even if tardily filed, in the absence of an objection to that claim. Consequently, Rule 2002(h) does not provide that the court can dispense with sending the Rule 2002(a) notices to creditors who have tardily filed their proof of claim. Nevertheless, adding chapters 12 and 13 to Rule 2002(h) would not be inappropriate solely on

that ground.

Rule 2002(a) notices that might be given in chapter 13 cases after the claims filing deadline include those for the proposed use, sale, or lease of property other than in the ordinary course of business, the approval of settlements, and the time fixed to accept or reject a proposed modification of a plan. These notices may well include information that is vitally important to a creditor who has not timely filed a claim. In particular, the notices relating to the sale of property of the estate and the settlement of controversies may include information that the debtor's financial status has improved so dramatically that he or she is solvent. Under § 1307(c), the creditor might seek to have the debtor's case dismissed for cause. The creditor would not have that opportunity in the absence of notice of the debtor's new financial status. The creditor also might move for conversion of the case to chapter 7 on the same grounds. Upon conversion of the case, Rule 1019(2) provides that a new claims filing period arises as long as the converted case was not originally a chapter 7 case in which the time for filing claims had already expired.

There are probably relatively few instances in which creditors will be significantly disadvantaged by not receiving the notices. By the same token, there are probably relatively few notices given under Rule 2002(a) that are now sent to creditors in chapter 13 cases who have not timely filed a proof of claim. Thus, the savings effected by excluding tardily filed claims from the list of creditors receiving Rule 2002(a) notices should be very modest. On balance, in my opinion, amendment of the provision is not necessary at this time. If the Committee believes that amendment of the Rule is proper, the change is both brief and simple as set out below.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE.

* * * * *

(h) NOTICES TO CREDITORS WHOSE CLAIMS ARE FILED. In a chapter 7, 12, or 13 case, after 90 days following the first date set for the meeting of creditors under § 341 of the Code, the court may direct that all notices required by subdivision (a) of this rule be mailed only to the debtor, the trustee, all indenture trustees, creditors that hold claims for which proofs of claim have been filed, and creditors, if any, that are still permitted to file claims by reason of an extension granted ~~pursuant to~~ under Rule 3002(c)(1) or (c)(2). In a case where notice of insufficient assets to pay a dividend has been given to creditors ~~pursuant to~~ under subdivision (e) of this rule, after 90 days following the mailing of a notice of the time for filing claims ~~pursuant to~~ under Rule 3002(c)(5), the court may direct that notices be mailed only to the entities specified in the preceding sentence.

COMMITTEE NOTE

Subdivision (h) is amended to extend to chapter 12 and 13

cases the authorization of the courts to dispense with mailing the notices enumerated in subdivision (a) of the rule to creditors who have not filed proofs of claim. In 1994, Congress added Code § 502(b)(9) making tardiness in the filing of claims a ground for disallowance of the claim, thereby overruling decisions that had held to the contrary. Since tardily filed claims are objectionable, eliminating notices to those creditors in chapters 12 and 13 along with chapter 7 will result in economies in time and expense.

Other amendments to the rule are stylistic.

United States Bankruptcy Court
District of Kansas

215 United States Courthouse
444 South East Quincy Street
Topeka, Kansas 66683

James A. Pusateri
Chief Bankruptcy Judge

Telephone
(785) 295-2786

July 31, 2000

Professor Jeffrey W. Morris, Reporter
Advisory Committee on Bankruptcy Rules
University of Dayton School of Law
300 College Park
Dayton, Ohio 45469-2772

Dear Professor Morris:

A matter has recently come to my attention that seems to warrant an amendment to the Federal Rules of Bankruptcy Procedure. Currently, Rule 2002(a) requires various notices to be sent to "all creditors." Subdivision (h) provides that after the claims bar date has run in a chapter 7 case, the court may direct that notices under subdivision (a) be sent only to creditors that have filed claims or still have time to file them. The Advisory Committee Note (1983) explains that creditors who have not filed timely claims in a chapter 7 case are not entitled to share in the estate (with limited exceptions) and that the "elimination of notice to creditors who have no recognized stake in the estate may permit economies in time and expense." At one time, it was unclear whether a claim could be disallowed in a chapter 13 case on the ground it was not timely filed. Consequently, it was probably not appropriate then for Rule 2002(h) to apply in chapter 13 cases.

However, in 1994, Congress added subsection (9) to 11 U.S.C.A. §502(b) to provide that a late-filed claim must be disallowed if an objection is made to it. This provision applies in chapter 13 cases. One or more of the notices required under Rule 2002(a) concern events that occur in chapter 13 cases after the claims bar date has run. Now that late-filed claims are to be disallowed in chapter 13, the rationale for subdivision (h) of Rule 2002 appears to be applicable in chapter 13 as well as chapter 7. That is, once the claims bar date has passed, creditors who have not filed their claims have no recognized stake in the estate, so notice to them could normally be excused. While the time and expense of noticing such creditors may not be significant in the typical chapter 13 case, it would be in at least a few cases and would certainly be significant in the aggregate if such noticing were eliminated in most chapter 13 cases.

Please forward this suggestion to your committee. Thank you for your assistance.

Very truly yours,

THE HONORABLE JAMES A. PUSATERI,
CHIEF BANKRUPTCY JUDGE

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FORM: JEFF MORRIS, REPORTER

RE: FRAUDULENT SERVICE OF PLEADINGS

DATE: AUGUST 17, 2000

The Committee (along with the Advisory Committee on Civil Rules) received a request from Mr. Tom Scherer to consider amendments to the rules to prevent the fraudulent service of pleadings through manipulation of postal service bar coded Zip Codes. Mr. Scherer has alleged that opposing counsel in a matter intentionally altered the bar code Zip Code on the envelopes that included mailed notices or other pleadings in a case for the purpose of denying him adequate notice. He indicated that he has had no success in the courts in rectifying the wrong he has suffered, and he has requested that the Rules Committees take action to prevent continued injustice in these situations. A copy of his correspondence is attached.

Assuming that the facts support Mr. Scherer's complaint, it does not appear that amendment of the rules is the proper solution. Under FRCP 5, made applicable to adversary proceedings by Bankruptcy Rule 7005, in an adversary proceeding service can be made by mailing a copy of the applicable document to the party at the party's last known address. If a notice or pleading is mishandled by the postal service, the service of the paper is nonetheless effective because FRCP Rule 5(b) provides that service is complete upon mailing. A notice or

pleading that is not addressed to the party's last known address, however, does not meet the requirements of the rule and would not be effective. New York Life Ins. Co. v. Brown, 84 F.3d 137, 142 (5th Cir. 1996)(no service is effected under FRCP Rule 5 when a court attempts to serve a party at an address that the court knew or should have known was incorrect). Thus, the rules already adequately address the problem Mr. Scherer has presented. Further amendment of the rules is unnecessary.

Monday, June 19, 2000

Attn: Judy Kridit for
Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
One Columbus Circle, NE
Washington, DC

00-BK-G

00-CV-D

Dear Ms Kridit,

Attached is a copy of the letter that I sent to Mr. McCabe. Since that time, I have tried to address the issue here in Kansas City. I filed a complaint with the Federal Court in Wichita, KS as per local Rule 83.6.3.United States District Court of Kansas. They have taken no action on the attorney complaint.

I then contacted the acting Chief Judge of the 10th Circuit, Judge Tacha per the Office of the Chief Judge Seymour who was absent. Her response to no action on the disciplinary action was to issue a gag order to me stating the Federal Courts did not have any jurisdiction.

I also filed a request before the District Court of Kansas to amend a complaint against the law firm for the manipulation and alleged intent to defraud. The Federal Judge stated at a motion hearing on March 23rd that he considered the matter minor. The law clerk for the judge who has not taken any action with regard to the complaint stated the Federal Judge was "entertaining a motion to dismiss" and therefore, I do not even get the opportunity to have the issue even addressed in Federal court.

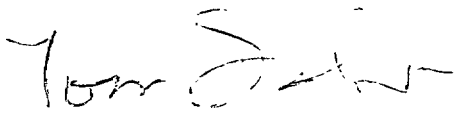
The Federal Judge for the District of Kansas also denied the Rule 60 motion to recall the case appealed to the 10th Circuit (97-2680). I do not agree that manipulation of the US Mail containing Federal court documents to be minor and believe the judge abused his judicial discretion when he refused to recall the case that was decided without the opportunity to respond due to the manipulation of the mail.

With a federal judge stonewalling my case against the attorney, I have done 3 things.

1) I have filed a request for a congressional inquiry with Congressman Moore, 3rd District of Kansas and they are closely monitoring the actions of the Tenth Circuit.
2) Filed a judicial complaint against the District Court of Kansas Judge for interference in due process and
3) Filed a civil lawsuit against the United States, District Court of Kansas for violation of Federal and Constitutional issues.

It is apparent the 10th Circuit does not care or want to address the issue of manipulation of the US mail through case precedent or attorney disciplinary action.

Therefore it is imperative that your committee either ignore and allow the practice to continue (malfeasance) or take some initiative to this manifest injustice.



Tom Scherer
7916 West 60th St.
Merriam, KS 66202-3009
(913) 831-3654

Naïve Pro Se plaintiff
Case 97-2680 under appeal, 10th Cir., *Scherer v. GE Capital*
Case 99-2166, District of Kansas-*Scherer v. GE Capital*
Case 99-2172, District of Kansas, *Scherer v. GE Capital*
Case 99-2566, District of Kansas, *Scherer v. Bioff, Singer, and Finucane, LLP*, defendant Attorneys for failure to produce ERISA documents and intent to defraud.

PROCEDURE IN DISCIPLINARY CASES

(a) Jurisdiction. Any lawyer admitted to practice law in this court, including any formerly admitted lawyer with respect to acts committed prior to resignation, suspension, disbarment, or transfer to inactive status, or with respect to acts subsequent thereto which amount to the practice of law in violation of these rules or of the Standards of Professional Conduct or any rules or standards subsequently adopted by the court in lieu thereof, and any lawyer specially admitted for a particular proceeding, or any lawyer not admitted to the bar of this court or the bar of Kansas who practices or attempts to practice law in this court is subject to the disciplinary jurisdiction of this court.

(b) Complaints Generally. Any person seeking to complain against an attorney practicing in this court for any cause or conduct which may justify disciplinary action shall do so in writing and under oath except that a complaint by a judge or magistrate judge of this court need not be verified. All complaints shall be filed in the record office of the clerk at Wichita and shall be referred by the clerk to the Disciplinary Panel for such action as may be required or authorized by these rules.

(c) Initial Action by Disciplinary Panel. If, after due consideration, the Disciplinary Panel shall:

(1) Find from the face of the complaint that it is frivolous, groundless or malicious, dismiss it. In which event the order shall recite the reasons for dismissal. When a complaint is dismissed under this subparagraph, the clerk shall mail a copy of the order of dismissal to the complainant by certified mail, return receipt requested;

(2) Find from the face of the complaint that the misconduct charged in the complaint would, if true, justify the imposition of disciplinary sanctions, it shall refer the matter to the chairperson of the Committee on Conduct of Attorneys who shall name a hearing panel consisting of three members of the Committee on Conduct of Attorneys, one of whom shall be designated as chairperson of the hearing panel.

(d) Hearing Panel. A hearing panel shall sit as a panel of inquiry and, upon reasonable notice to the complainant and

all be recorded verbatim pursuant to 28 U.S.C. § 753(b). The chairman of the hearing panel conducting the inquiry is hereby designated and appointed master with authority to cause subpoenas to be issued commanding the appearance of witnesses, the production of books, papers, documents or tangible things designated therein at such hearings or such other time designated in the subpoena. The chairman of the hearing panel, as such master, is further authorized to administer oaths to the parties and witnesses. Should any witness fail or refuse to attend or to testify under oath, the name of that witness may be certified to the Disciplinary Panel which may order the initiation of contempt proceedings against such witness.

(e) Investigation by Disciplinary Counsel.

(1) The chairman of the Committee on Conduct of Attorneys with the concurrence of the hearing panel and the approval of the Chief Judge may appoint one or more members of the bar of this court (or if circumstances require of the bar of another court) in good standing, as Disciplinary Counsel whose duty it shall be to investigate, present and prosecute charges and prepare all orders and judgments as directed by the hearing panel.

(2) Disciplinary Counsel shall conduct an initial investigation of the charges and shall submit a written report to the hearing panel recommending dismissal of the complaint, informal admonition of the attorney concerned, or prosecution of formal charges before a hearing panel. Disposition shall thereupon be made by a majority vote of the hearing panel unless it directs further investigation.

(3) If informal admonition is contemplated the attorney involved shall first be notified and may, by written request to the chairman of the Committee on Conduct of Attorneys, demand a formal hearing.

(f) Formal Charges.

(1) If formal prosecution is directed or demanded, Disciplinary Counsel shall, after making such additional investigation as he deems necessary, prepare and file with the clerk a formal complaint which shall be sufficiently clear and specific to inform the respondent of the alleged misconduct. A copy of the complaint, together with a summons in the general form of a civil summons issued pursuant to Rule 4, Fed.R.Civ.P., shall be served

Thursday, March 02, 2000

COPY

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the US Courts
One Columbus Circle, NE
Washington, DC

Dear Mr. McCabe,

I wanted to inform you of my situation with the Federal Courts in Kansas in a practice called **"hardball tactics."** I talked with an attorney in your office yesterday. He provided confirmation and acknowledgment of the manipulation of addresses and bar codes on pleadings filed with the Federal Courts.

I am a former examiner with the IRS and a fraud investigator and also have a Masters in Computers. I fully am aware of manipulation of documents. However, I was amazed when an attorney tried this "tactic" on me in not one but two federal court cases. The second time the law firm manipulated the bar codes, I was able to determine what happened. The first time it happened, I thought it was simply a common mistake or an act of negligence. In the second case, the zip+4 bar code was changed to Amarillo, TX creating a 19 day delay in my receipt of a motion in opposition to a request for summary judgment.

This also happened in the previous case against the same attorney. I was unable to timely reply and the Chief judge granted summary judgment. I informed the US Postal Inspectors here in Kansas City. They don't care. They stated there is no law against manipulation of the bar code. I do not agree. The bar code when it is placed on the envelope becomes the zip code, not the numeric zip code. I stated that it was intent to defraud. They still don't care and did very little.

I have taken all available actions available to me. I simply find it hard to believe that the Federal court Chief judge's response to intent to deceive in a federal court case simply requires the offending attorney to simply refile the pleading with proper service. If we allow felonious conduct in our courts by attorneys, there most certainly is a severe problem in the fundamental backbone of our judiciary that in my opinion constitutes malfeasance. If a party is aware of conduct and does nothing about that conduct, that party can be held accountable. That party by failure to do anything about it, is acting in the role of an enabler. By doing nothing, the government is allowing these "hardball tactics to continue. Even your agency is aware.

I would appreciate some assistance in this case, would be most cooperative in providing any documents to support. Rule 60 provides some relief but I am unable to find any case citations. Hopefully, my case will also present some merit to the claims. However, what I am afraid of is the Courts do not want these "hardball tactics" known to the general public—part of that good old boy thing.

By the power and authority of your committee, I hope you can provide some modification in the rules and procedures to deal with these tactics. If I would have known the court would not do anything by ruling that a party cannot prove intent, then I would have considered using such tactics myself. Therefore, the defendant attorneys in my case had an unfair advantage. Therefore, there was not a fair trial.

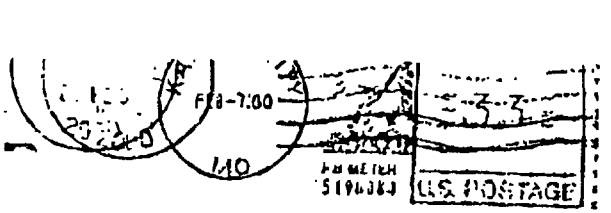
Tom Scherer
7916 West 60th St.
Merriam, KS 66202-3009 or per the opposing attorney 79166-0662
(913) 831-3654

Naïve Pro Se plaintiff
Case 97-2680 under appeal, 10th Cir., *Scherer v. GE Capital*
Case 99-2166, District of Kansas-*Scherer v. GE Capital*
Case 99-2172, District of Kansas, *Scherer v. GE Capital*
Case 99-2566, District of Kansas, *Scherer v. Bioff, Singer, and Finucane, LLP*, defendant Attorneys for failure to produce ERISA documents and intent to defraud.

ATTORNEYS AT LAW
THE STILWELL BUILDING
SUITE 400
104 W. NINTH STREET
KANSAS CITY, MISSOURI 64105-1718

(1) The First and Last Bar are the Frame Bars

(2) Each code character is 5 bars (see pg. 50 for the numeric value

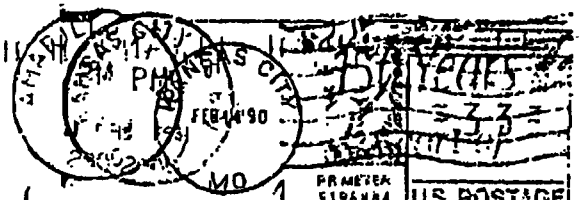


RECEIVED FEB 2 6 2000

Thomas E. Scherer
7916 West 60th Street
Merriam, Kansas 66202

Frame bar → ← Frame Bar
10 bars
Nine Digit Zip+4 code
52 Bars - CJ Field
Delivery Point Bar Code

Zip digit
7 9 1 6 6
2'5"



3 Cancellations

BIOFF SINGER AND FINUCANE, LLP
ATTORNEYS AT LAW
THE STILWELL BUILDING
SUITE 400
104 W. NINTH STREET
KANSAS CITY, MISSOURI 64105-1718

1/8"

ANGLE IS FROM THE TOP OF THE MAILPIECE

This is called Pattern SKEW

Thomas E. Scherer
7916 West 60th Street
Merriam, Kansas 66202

5° SKEW

Because of this

RECEIVED FEB 2 6 2000

Pink Bars Indicate a "picture" was taken because scanner could not read the delivery address

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

July 11, 2000

Mr. Tom Scherer
7916 West 60th Street
Merriam, Kansas 66202-3009

Dear Mr. Scherer:

Thank you for your letters of June 19, 2000, which reached my desk yesterday. I must apologize to you for the confusion that occurred in the processing of your correspondence. It is my consistent policy and practice to respond to all suggestions promptly.

We appreciate your suggestion to prevent the manipulation of bar codes in mailings. A copy of the suggestion has been sent to the chairs and reporters of the Advisory Committees on Bankruptcy and Civil Rules for their consideration.

We welcome your interest in the rulemaking process.

Sincerely,

Peter G. McCabe

cc: Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
Honorable A. Thomas Small
Honorable David F. Levi
Professor Jeffrey W. Morris
Professor Edward H. Cooper

Items 13 and 14 will be oral.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE N.E.
WASHINGTON, DC 20002-8003

FERN M. SMITH
DIRECTOR

TEL: (202) 502-4160
FAX: (202) 502-4099

August 15, 2000

MEMORANDUM FOR:

Advisory Committee on Bankruptcy Rules

RE: Update on Center Research on Electronic Evidence

Attached is an update of the project I described in my letter of December 1, 1999. Beth Wiggins and Meghan Dunn of the FJC research staff are directing this project and can provide more information.

Sincerely,

Fern M. Smith

Enclosure

Update on Electronic and Digital Evidence Project
Prepared for the Advisory Committee on Bankruptcy Rules
Federal Judicial Center
August 15, 2000

In November 1999, the Center began a research project to learn more about the nature of electronic and digital evidence, including computer animation; digital documents, photographs, and recordings; videotaped evidence; and videoconferencing. The goal of the project is to collect information to assist judges in assessing the admissibility of such evidence and to assist rules committees in evaluating any need for rules changes to accommodate these new forms of evidence.

In addition to compiling legal and social science literature reviewing the role of such evidence in the courtroom, we have also begun work on a Handbook for Courtroom Technology, begun planning an experimental laboratory trial with Courtroom 21, and discussed the possibility of holding a research conference. Each of these projects is explained in more detail below.

Handbook on Courtroom Technology:

We are working with the National Institute for Trial Advocacy to develop a handbook on courtroom technology. This handbook, designed principally for judges, will explain the principal aspects of courtroom technology and will set out case-management options that judges might consider when confronted by requests from lawyers in particular cases. In addition to discussing various forms of digital evidence (e.g., digital photographs, videotapes, videoconferencing, and computer animations), the handbook will also cover case-management issues raised by electronic evidence presentation systems such as evidence cameras and real-time court reporting.

We have established a group of judges and attorneys to advise us in developing the handbook, and on subsequent projects. The judges represent the district, appeals, and bankruptcy courts and varying degrees of experience with technology. They include members of Judicial Conference Committees with jurisdiction related to the use of courtroom technology (Committee on Automation and Technology, Committee on Court Administration and Case Management, and the Committee on Rules of Practice and Procedure). The three attorney members have considerable knowledge and experience with courtroom technology. One typically represents clients with large interests at stake and another represents clients with smaller interests. A list of the Advisory Committee members and their affiliations is attached to this update.

Laboratory Trial Project at Courtroom 21:

We have been in contact with Professor Frederic Lederer, the director of Courtroom 21 at the William and Mary Law School. A critical component of the Courtroom 21 educational and experimental agenda is the annual Laboratory Trial, which is the culmination of the Law School's Legal Technology seminar. As ordinarily planned, the Lab Trial is a one day jury trial put together by the seminar students and the Courtroom 21 staff, and is presided over by a United States District Judge.

The Lab Trial is designed to provide an experimental vehicle for a wide range of experiments that concentrate on courtroom technology use and its effects on the human beings involved in the trial process. Although the trial cannot yield scientifically valid results due to its lack of adequate experimental controls, it can provide useful observations, insights, and directions for future research. Professor Lederer has invited us to participate in this year's Lab Trial by helping to structure the trial so it examines some of the most important empirical issues surrounding electronic evidence. Additionally, we may serve as advisors to students in the seminar who want to produce a research-based course report (e.g., a literature review; research proposal; or a research report, to the extent data can be collected).

Research Conference:

We are exploring the idea of holding a research conference to help identify the most pressing empirical issues, and how we and others might go about studying them. Participants would include users of the technology (judges, attorneys, and court staff) and social and behavioral scientists. We are currently working on a background paper for the conference and for publication. When it is complete, it will (1) identify the evidentiary and policy issues that arise with each type of electronic/digital evidence; (2) describe the social and behavioral science research that speaks to these issues; and (3) identify important knowledge gaps and propose research that the FJC or others might undertake to fill those gaps. In doing this, we have kept in mind the following overarching questions: (1) How does electronic and digital presentation of evidence affect jurors' and judges' comprehension of factual issues? (2) How does it affect the ability of witnesses to present their testimony, and the parties to present their case? (3) When is electronic and digital evidence "unduly prejudicial", and how effective are judicial admonitions in ameliorating potentially prejudicial effects? (4) How does familiarity with technology affect jurors' and judges' reactions to the evidence? (5) To what extent do emerging technologies facilitate the participation of jurors, witnesses, and attorneys of persons who have difficulty communicating in the traditional courtroom (blind, deaf, non-English-speaking persons)?

At the conference, the practitioners' experience in the day to day handling of electronic evidence will inform and guide the development of research programs for social scientists on these questions.

For more information:

For more information about this project, please contact either Beth Wiggins (410-367-6315) or Meghan Dunn (202-502-4082) on the Center's research staff.

Advisory Committee for Electronic and Digital Evidence Project

District Judges

Paul J. Barbadoro – New Hampshire (Committee on Automation and Technology)
Frank W. Bullock, Jr. – Middle District of North Carolina (Standing Committee)
Edward C. Prado – Western Texas
James M. Rosenbaum – Minnesota
Roger G. Strand – Arizona (Committee on Automation and Technology)
Donald E. Walter – Western Louisiana
Samuel Grayson Wilson — Western Virginia (Committee on Court Administration and Case Management)

Court of Appeals

Jon O. Newman - 2nd Circuit

Bankruptcy Judges

Larry E. Kelly, U.S. Bankruptcy Court, Western Texas

Attorneys/Professors

Prof. Stephen P. Saltzburg, George Washington University Law School
Gregory Joseph, Esq.
Ric Gass, Esq.

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

FERN M. SMITH
DIRECTOR

TEL. 202-502-4160
FAX. 202-502-4099

December 1, 1999

MEMORANDUM FOR:

Judge Anthony Scirica, Chair, Standing Committee on Rules of Practice and Procedure
Judge Paul Niemeyer, Chair, Advisory Committee on Civil Rules
Judge W. Eugene Davis, Chair, Advisory Committee on Criminal Rules
Judge Adrian G. Duplantier, Chair, Advisory Committee on Bankruptcy Rules
Judge Milton Shadur, Chair, Advisory Committee on Evidence Rules
Judge Edward W. Nottingham, Chair, Committee on Automation and Technology

RE: Center Research on Electronic Evidence

The Center has begun a research project to learn more about the nature of evidence presented by means of computer simulation, videotape and video transmission, and related technologies that have been endorsed by the Judicial Conference.

We hope to develop information that can help judges in assessing the admissibility of such evidence and that may be of value as well to the rules committees in considering whether there is need for rules changes to accommodate these new forms of evidence.

Enclosed is a paper prepared by Elizabeth Wiggins and Meghan Dunn of the Center that describes, at this point, the methods we envision and the products we hope to provide. Methods and products are both subject to adaptation as the project proceeds.

I want you and your committees to know about the project and encourage you and the members to offer any comments or suggestions that may make the research more helpful to the work of your committees.

We will be pleased to provide you additional reports on the progress of the research and, at an appropriate time, brief any of your committees about it, if you wish.

Let me also take this opportunity to wish you and yours a happy and healthy holiday season and a peaceful new year.

Sincerely,

Fern M. Smith

cc: Mr. Rabiej
Mr. Bryson
Dr. Wiggins
Ms. Dunn

Enclosure

Electronic Evidence Project—Staff Concept Paper
Federal Judicial Center
November 15, 1999

Introduction

The purpose of this project is to develop information and analysis that will help judges deal with electronic evidence as they preside over cases and evaluate any need for procedural or evidentiary rules changes. To develop this information and analysis we will: (1) identify evidentiary and policy issues that arise regarding each type of electronic evidence; (2) describe the social and behavioral science research that speaks to the evidentiary and policy issues, and identify important knowledge gaps; and (3) propose additional research that the Center or others might undertake to fill these gaps. As the project progresses, we will disseminate information and analysis through research reports and other means that can inform the rule-making process, and through the Center's judicial education forums to help judges in their judicial work.

Any general definition of electronic evidence would probably be too inclusive for the purpose of this project. Our starting point, therefore, is to list technologies that exemplify what we mean by electronic evidence. Certainly included are video-evidence presentation systems, videoconferencing, videotaped testimony, animations, simulations, digitally-rendered materials (digitized voice, photos, videos). Other technologies may also be included.

Issues Involving the Application of, and Possible Need for Changes in the Rule of Evidence

Our analysis will help judges as they determine how to apply the rules of evidence and general principles of case management to these emerging types of electronic evidence, and will inform decisions about whether the Federal Rules of Evidence are sufficient to deal with the admissibility questions raised by electronic evidence. The following two examples illustrate the kind of analysis the project can provide.

Example 1. How should judges evaluate an objection that computer generated evidence (e.g., a simulation) is unduly prejudicial? If the objection is well taken, can judicial admonitions ameliorate the potentially prejudicial effects? One way for judges to decrease the potential prejudicial effect of computer simulation is to remind the jury that the simulation is based on one side's assumptions about the case. Experienced judges and lawyers have well developed senses about the effectiveness of such an admonition, There is also a body of empirical research on jurors' reactions to inadmissible testimony that can help predict juror behavior and thus provide additional referents for judges (Carretta & Moreland, 1983; Fein, McCloskey, & Tomlinson, 1997; Kassin & Sommers, 1997; Pickel, 1995; Sue, Smith, & Caldwell, 1973; Thompson, Fong, & Rosenhan, 1981).

A great deal of social psychological research has examined the effect of inadmissible testimony on verdicts, with mixed results. Some studies have found that judges' instructions to disregard inadmissible evidence have no impact on jurors, and that juries use the inadmissible evidence in reaching their verdicts despite the instructions (Carretta & Moreland, 1983; Sue, Smith & Caldwell, 1973). Other studies, however, have

found that jurors are able to disregard inadmissible evidence when so instructed (Fein, McCloskey, & Tomlinson, 1997; Schul & Manzury, 1990). The determining factor in whether jurors disregard inadmissible evidence appears to be the reason for which the judge rules it to be inadmissible. Jurors are motivated more by the desire to do justice (i.e., reach a factually correct result) than by a concern for process. Thus, when a judge's instruction to disregard points out the unreliability of the evidence (Schul & Manzury, 1990) or emphasizes the questionable motives of the examining attorney (Fein, McCloskey, & Tomlinson, 1997), jurors are capable of discounting the evidence. However, when jurors believe the evidence is probative, but has been ruled inadmissible on a "technicality," jurors ignore judges' admonitions and take the inadmissible evidence into consideration when reaching a verdict (Kassin & Sommers, 1997; Pickel, 1995).

This body of research *suggests* that jurors are capable of discounting and disregarding types of evidence if they believe it will not help them reach the "right" verdict. When confronted with a computer simulation, jurors may make their own judgments about the utility and validity of it. If they believe the simulation provides information crucial to the decision-making process, jurors will use that information in reaching their verdict. But if the judge's warning triggers suspicion about the motives of the side presenting the simulation, jurors may discount the simulation's importance.

Although suggestive, the research on inadmissible testimony does not directly address the issue of whether jurors can properly weigh visual animations. For example, jurors may be better able to completely discount information (as with inadmissible statements) than to regulate the influence realistic visual evidence has on their decision. Recent research on bias correction indicates that people are not always able to recognize when something influences their decisions (Wegener & Petty, 1995; Wegener, Petty, & Dunn, 1998). Thus, jurors may be unable to follow the judge's instruction to discount information provided by electronic evidence because they are unaware of how much influence that information has on their decisions. Only by directly studying the effect of electronic evidence can we determine how jurors will respond to such evidence.

Example 2. How does jurors' familiarity with video technology affect their fact-finding ability and the potentially prejudicial effects of computer animations, simulations, and testimony by video? Federal trial judges are well aware of the potential effect of the medium of evidentiary presentation on jurors. For example, some judges discourage using professional actors to read depositions into evidence, out of a concern that the actor's pauses, inflection, and tone would unfairly distort the witness's deposition testimony. Video presentations, in all their forms, present another challenge. Some commentators argue that video presentations (whether computer animations, simulations, or testimony presented by video) is inherently prejudicial because jurors are part of a "television generation" accustomed to receiving much of their information from television. The claim is that jurors are so used to obtaining information (especially news) from television they are likely to accept the truth of other information presented by that medium. On the other hand, it might be argued that television viewers are accustomed to seeing both fact and fiction on television, and are aware of uses of television to persuade or to distort reality, and can evaluate content independent of medium. With increasing public familiarity with computers and how they can be used to manipulate information such as images, juror skepticism levels may be appropriate or even too high.

Because computer animation technology is relatively new, judges have little experience assessing its particular implications for jurors, and there is little empirical work to assist them. Research in jury decision-making and the persuasive powers of narrative structure can be applied, as can research about the educational efficacy of various modes of presenting information.

One influential theory of jury decision-making posits that jurors construct a narrative story to fit the evidence presented in a trial (Pennington & Hastie, 1986), and provides a starting point for research into the effects of electronic evidence. Consistent with this "story model", Pennington and Hastie (1988) found that presenting evidence in narrative order (as opposed to the manner in which evidence is ordinarily presented at trial) facilitated the decision making of mock jurors: arguments presented in a narrative order were more persuasive than arguments presented in traditional witness order. The model *suggests* that video displays may influence the way in which jurors cognitively organize the evidence presented at a trial. When an attorney introduces a computer-animated display, that attorney presents the jury with a ready-made narrative account of the event in question. Because jurors are no longer required to construct their own narratives when confronted with computer animation, they may be unusually willing to accept the scenario depicted by the animated display, regardless of how media-savvy they are. Other theories of decision-making suggest other potential effects of video-presentations on juror fact-finding and decision-making, all of which could be subjected to empirical validation.

A critical issue in education research is the relative efficacy of different modes of presenting information. Early research examined the effects of written versus oral communication, and the enhancing effects of pictures and other illustrations. More recently, the focus has shifted to learning via video-programs, computer-assisted instructional programs, and similar technologies, in relation to student's familiarity with the technology. This work should provide a useful framework for understanding how jurors respond to electronic evidence in the courtroom.

More General Policy Issues Involving, e.g., Fairness in the Litigation Process and Public Perceptions of the Judicial System

Our analysis will go beyond the evidentiary issues to discuss broader policy questions. For example, some judges worry that a party that can afford to tell its story though an animated narrative may have a substantial advantage over an opponent that cannot. Should the court be able to require the wealthier party to bear the costs of an opponent's expert or alternative animation? When would such equalization of advantages be warranted? How—if at all—does unequal access to electronic evidence technology differ from unequal access to other litigation elements (e.g., quality of attorneys)?

More generally, what effect—if any— does the use of various technologies have on the perception of the court by litigants, attorneys, jurors, and the public? Does it undermine or bolster confidence in the fairness of court process and decisions? For example, judges might seek information to help them decide whether—and if so to what degree— a witness's testifying from a remote location impedes the witness's effectiveness as opposed to one testifying on-site, and whether any differences that may exist vary depending on the nature of the litigation.

Judicial Conference, AO, and Center Activity

Judicial Conference Action

Based on the recommendation of the Committee on Automation and Technology (CAT), in March 1999 the Judicial Conference endorsed the use of "technologies in the courtroom, including video evidence presentation systems, videoconferencing systems, and electronic methods of taking the record[1]" and urged that, "subject to the availability of funds and priorities set by CAT," courtroom technologies (a)" be considered as necessary and integral parts of courtrooms undergoing construction or major renovation, and (b) . . . be retrofitted into existing courtrooms or those undergoing tenant alterations, as appropriate" (Report of the Judicial Conference, March 1999, p. 8).

This policy is based, at least in part, on the findings of the Electronic Courtroom Project Assessment. In June 1997, CAT approved a study plan and court selection criteria for this project. Its purpose was to assess the current use and applicability of the three technologies listed above plus "access to external databases" in a variety of courtroom settings and proceedings, including district, bankruptcy, and appellate courts.

The findings were presented to the Committee at its June 1998 meeting. The committee's September 1998 report to the Judicial Conference concluded that:

> this assessment confirmed earlier views that the use of technology in the courtroom can facilitate case management, reduce trial time and litigation costs, and improve fact-finding, jury understanding, and access to court proceedings. Judges participating in the assessment indicated that video evidence presentation technologies improved their abilities to understand witnesses and testimony and to manage proceedings. Courts are using videoconferencing in a variety of proceedings as well as for other purposes, including administrative meetings and training sessions.

CAT continued its discussion of the technologies at its January 1999 meeting, and made the recommendation that was accepted by the Judicial Conference. Also at this meeting, CAT requested that the Administrative Office conduct a usage assessment of courtroom technologies in FY2003, when a sufficient number of courtrooms will have been equipped.

Our study would complement both the completed Electronic Courtroom Project Assessment and the usage study. The Electronic Courtroom Project demonstrated that new technologies have a useful role in the courtroom, but did not address and did not intend to address the specific evidentiary and policy issues we pose here or analyze whether evidentiary and procedural rule changes and new case management strategies were needed. The assessment of the Electronic Courtroom Project that CAT received also may not generalize well to all courts because it was largely based on the experiences of 17 courts that had voluntarily used court funds to install the new technologies (and to a less extent on 20 other courts who had been recently funded to do so). The AO's usage

[1] The Judicial Conference had also earlier endorsed the use of realtime record transcription by official court reporters in the district court to the extent funding was available to support its use. JCUS-SEP, p.49.

study will determine the extent to which the courts use the new technologies and help assess the appropriate funding levels for them. Its findings will help the Center determine the resources it should expend in empirically studying the related evidentiary and policy issues. The more popular the technologies become, the more important it will be to study how electronic evidence affects the judicial process.

FJC and Administrative Office Information and Educational Projects

Both the FJC and the Administrative Office have produced relevant informational and educational programming about aspects of electronic evidence. *Courtroom Technologies*, an AO-produced videoprogram shown on the FJTN in 1999, describes the use of videoconferencing and evidence presentation technologies in a variety of courtroom settings and proceedings. District and bankruptcy judges explain how, in their experience, these technologies facilitate case management, reduce trial time and litigation costs, and improve fact-finding and juror understanding of the evidence.

Computer-Generated Visual Evidence, a 1998 FJC educational program (also broadcast on the FJTN), examines the issues posed by computer-generated evidence, including the bearing their use has on authentication, fairness, hearsay, discovery, Fed. R. Evid. 403, and case management. This program and its written materials offer a solid foundation for the current project.

Method

To meet the project objectives, we will:

1. Review the legal literature. We have already put together an extensive bibliography and have copies of most of the listed articles (see attachment 1).
2. Review the social and behavioral sciences literature. We have begun to identify the relevant psychological research (see attachment 2), but have made little headway into the research of other disciplines — education, sociology, computer science applications, business, geographic information systems (which links computer mapping technology with social science data), science and technology studies (which looks at the impact of science on society), and economics.
3. Interview or survey judges and attorneys with experience with different forms of electronic evidence.
4. Identify and meet with commercial preparers of electronic evidence. About two years ago, we met with representatives of Forensic Technology, Inc. in Annapolis which helped us understand the realm of possibility in developing electronic evidence and the associated legal and psychological issues. Meeting with other diverse stakeholders would further enhance our understanding.
5. Identify and meet (in person or cyberspace) with representatives of groups and professional organizations that are interested in electronic media and education. Not surprising, a number of these groups have well-developed websites that offer a wealth of information. The Association for Computers and the Social Sciences (ACSC) is a prime example. Based at North Carolina State University, this eight-year old organization is dedicated to promoting research and scholarly exchange on social science computer applications, use of technology in social science education, and the study of social impacts and issues related to information technology. ASCS has a regularly maintained website, publishes a traditional paper journal, and will hold an on-line conference this spring — all three are sources of information relevant to this project.

Products

Products of the project will include:

1. Internal working paper describing the findings of our work — setting forth the typology of evidence and related evidentiary and policy issues; describing/analyzing the social and behavioral science research that speaks to the evidentiary issues; and proposing in general terms research that the Center or others might undertake to fill any knowledge gaps. This paper, of course, will continue to evolve throughout the course of the project, and will provide the basis for other project products.
2. Recommendation for empirical research the Center should undertake, with a description of research issues and methods.
3. Educational presentations and materials for judges, including (a) a monograph for judges, drawing on research findings but focused to provide guidance in dealing with electronic evidence, (b) presentations at FJC judicial education seminars (both live and through FJTN). Potential forms of presentations include moot court formats (e.g.,

hearing on a motion in limine) and panel discussions.

4. Offers to make presentations to the Evidence, Automation and Technology, and Civil Rules Committees.

5. Paper to encourage research by others. This paper could be published in hard copy by the Center or in a law review or other journal, and/or published via our web-site and the web-sites of organizations who have an interested membership.

The target date for completing an initial draft of the internal working paper and the recommendation for Center-based empirical research is February 15, 2000. The due dates for the other products are to be determined.

Attachment 1
Law Reviews, Other Legal Periodicals, and Law Books

Bardelli, E.J. (1994). The use of computer simulations in criminal prosecutions. Wayne Law Review, 40, 1357-1377.

Bennett, R.B., Leibman, J.H., & Fetter, R.E. (1999). Seeing is believing; Or is it? An empirical study of computer simulations as evidence. Wake Forest Law Review, 34, 257-294.

Berkoff, A.T. (1994). Computer simulations in litigation: Are television generation jurors being misled? Marquette Law Review, 77, 829-855.

BloomBecker, B. (1988). The power of animated evidence. California Lawyer, 47-50.

Borelli, M. (1996). The computer as advocate: An approach to computer-generated displays in the courtroom. Indiana Law Journal, 71, 439-56.

Boyle, J.R. (1994). State v. Pierce: Will Florida courts ride the wave of the future and allow computer animations in criminal trials? Nova Law Review, 19, 371-413

Bulkeley, W.M. (1992, August 18). Information age: More lawyers use animation to sway juries. Wall Street Journal, p. B1.

Carbine, J.A., & McClain, L. (1998). Does computer-generated evidence need its own rules? Computer Law Strategist, 14, 6.

Carbine, J.A., & McClain, L. (1999). Proposed model rules governing the admissibility of computer-generated evidence. Santa Clara Computer and High Technology Law Journal, 15, 1-72.

Carey, J.H. (1998). Using user-friendly computer generated demonstrative evidence to keep the jury awake. The Practical Litigator, 9, 47-60.

Chatterjee, I.N. (1995). Admitting computer animations: More caution and new approach are needed. Defense Counsel Journal, 62, 36-46.

Cerniglia, T.W. (1994). Computer generated exhibits – demonstrative, substantive, or pedagogical – their place in evidence. The American Journal of Trial Advocacy, 18, 1-35.

Clancy, J.T. (1996). Computer generated accident reenactments: The case for their admissibility and use. The Review of Litigation, 15, 203-228.

D'Angelo, C. (1998). The Snoop Doggy Dogg Trial: A look at how computer animation will impact litigation in the next century. University of San Francisco Law Review, 32, 561-585.

Danois, D. (1995, July 17). Computer animation helps win cases. Pennsylvania Law Weekly, p. S8.

DiDomenico, C. (1996). Animation gets a jury's attention and illustrates key points of case. New York Law Journal, 216, 5.

Dombroff, M.A. (1983). Dombroff on Demonstrative Evidence. New York: Wiley Law Publications.

Ellenbogen, M.A. (1993). Lights, camera, action: Computer-animated evidence gets its day in court. Boston College Law Review, 34, 1087-1120.

Estis, D.A., Kennedy, E.R., & Vento, J.S. (1994). Admissibility of computer-generated evidence. Construction Lawyer, 14, 1.

Fadely, K.G. (1990). Use of computer-generated visual evidence in aviation litigation: Interactive video comes to court. The Journal of Air Law and Commerce, 55, 839-901.

Farley, M.J. & Moyer, B. (1997). Effectively utilizing computer animation in environmental litigation. Michigan Bar Journal, 76, 190-193.

Filter, D., & Johnson, B.E. (1997). Visual communications in court: Adopting some surprising technologies. Utah Bar Journal, 10, 10-13.

Fulcher, K.L. (1996). The jury as witness: Forensic computer animation transports jurors to the scene of a crime or automobile accident. University of Dayton Law Review, 22, 55-76.

Gore, R.A. (1993). Reality or virtual reality? The use of interactive, three-dimensional computer simulations at trial. Rutgers Computer and Technology Law Journal, 19, 459-493.

Hansen, M. (1996). A failure of analysis? Critics blast firm's re-creation of Menendez shootings. American Bar Association Journal, 82, 18-20.

Hannan, E.A. (1996). Computer-generated evidence: testing the envelope. Defense Counsel Journal, 63, 353-362.

Hennes, D.B. (1994). Manufacturing evidence for trial: The prejudicial implications of videotaped crime scene reenactments. University of Pennsylvania Law Review, 142, 2125-?

Jones, G.T. (1996). Lex, lies & videotape. University of Arkansas at Little Rock Law Journal, 18, 613-644.

Joseph, G.P. (1995). Computer evidence. Litigation, 22, 13-16.

Joseph, G.P. (1995). Modern Visual Evidence. New York: Law Journal Seminars-Press.

Joseph, G.P. (1997). Getting computer-generated material into evidence. Practical Litigator, 8, 31-44.

Joseph, G.P. (1996). Virtual Reality Evidence. Boston University Journal of Science and Technology Law, 2, 12-29.

Katsh, M.E. (1995). Law in a Digital World. New York/Oxford: Oxford University Press.

Kelly, M.C., & Bernstein, J.N. (1994). Virtual reality: The reality of getting it admitted. John Marshall Journal of Computer and Information Law, 13, 145-173.

Kelly, M.J. (1995). Computer generated evidence as a witness beyond cross examination. Journal of Products and Toxics Liability, 17, 95-115.

Kousoubris, E.D. (1995). Computer animation: Creativity in the courtroom. Temple Environmental Law and Technology Journal, 14, 257-275.

Lamprey, W.T. & Schirle, S.L. (1996, August). Prosecution exhibits presented to the jury

on video. United States Attorneys' Bulletin, pp. 15-16.

Lederer, F. I. (1996). Technologically augmented litigation – systemic revolution. Information and Communications Technology Law, 5, 215-225.

Lederer, F.I. (1999). Trial Advocacy: The road to the virtual courtroom? South Carolina Law Review, 50, 799-843.

Lee, W.F., Strother, M.B., & Morgan, J.C. (1997). Computer-generated animation as evidence at trial. IP Litigator, 3, 11-15.

Lehr, L.A. (1990). Admissibility of a computer simulation. For the Defense, 32, 8-11.

Lopez, K.J. (1997). The admissibility of animation. New Jersey Law Journal, 150, 471.

Loucks, M.K. (1996, August). Litigation and new technology: Can the two mesh? United States Attorneys' Bulletin, pp. 9-15.

Lovett, W.J. (1996, September 23). Demonstrative Evidence Displays a Broader Appeal. National Law Journal, p. B14.

Mallett, R. (1996, May 6). Computer simulation in court. New York Law Journal, p. S6.

Martin, E.X. (1994). Using computer-generated demonstrative evidence. Trial, 30, 84-88.

Menard, V.S. (1993). Admission of computer generated visual evidence: Should there be clear standards? Software Law Journal, 6, 325-52.

Meyer, P.N. (1996). "Desperate for love II": Further reflections on the interpretation of legal and popular storytelling in closing arguments to a jury in a complex criminal case. University of San Francisco Law Review, 30, 931-961.

Mnookin, J.L. (1998). The image of truth: Photographic evidence and the power of analogy. Yale Journal of Law and the Humanities, 10, 1-74.

Munsterman, G. T., Hannaford, P.L. & Whitehead, G.M. (Eds.) (1996). Jury Trial Innovations. Williamsburg, Va.: National Center for State Courts. (Section IV-9.)

O'Donnell, M.L., & Barkley, R. (1995). Admissibility of computer simulations. Colorado Lawyer, 24, 289.

Pinsky, M.I. (1993, December 17). Jury out on high-tech courtroom. Los Angeles Times, p. A1.

Plowman, J.K. (1996). Multimedia in the courtroom: A valuable tool or smoke and mirrors? The Review of Litigation, 15, 415-430.

Rediker, J.M. (1995). Computer technology helps win cases. Trial, 31, 26-30.

Reynolds, J.R. (1999, August 30). Scientific and engineering animations advance. New York Law Journal, p. S5.

Richter, D. J. (1996, October 28). 3D animation almost as good as an eyewitness. New York Law Journal, p. S3.

Schutz, R.J., & Lueck, M.R. (1995, September 11) Computer animation tutors jury: in complex litigation tech graphical presentations help the jury understand difficult issues. National Law Journal.

Selbak, J. (1994). Digital litigation: The prejudicial effects of computer-generated animation in the courtroom. High Technology Law Journal, 9, 337-367.

Seltzer, R.F. (1990). A strategic approach to demonstrative evidence. Litigation, p 379 (PLI Litigation and Admin. Practice Course Handbook Series No. 387)

Sherman, R. (1992, April 6.). Moving graphics: Computer animation enters criminal cases. National Law Journal, p. A1.

Simmons, R.L., & Lounsbery, J.D. (1994). Admissibility of computer-animated reenactments in federal courts. Trial, 30, 78-81.

Sprowl, J.A. (1976). Evaluating the credibility of computer-generated evidence. Chicago-Kent Law Review, 52, 547.

Stix, G. (1991). Seeing is believing. Scientific American, 265, 142.

Thomas, E., & Vistica, G.L. (1998, July 20). Fallout from a media fiasco. Newsweek, 24-26.

Tripoli, L. (1997). Winning with visuals...with lower cost and broader access, who isn't using animation to make their case? Inside Litigation, 11, 1.

Turbak, N.J. (1994). If a picture's worth a thousand words... Trial, 30, 62-64.

Venning, R.S. & Parrish, S.D. (1997, February 3). Use of videotape in opening statements expands. National Law Journal, pp. C2-C4.

Wasserman, D.T. & Robinson, J.N. (1980). Extra-legal influences, group processes, and jury decision-making: A psychological perspective. North Carolina Central Law Journal, 12, 96-159.

Weinberg, D. (1995). Animation in the court: Scientific evidence or Mickey Mouse? The Judges' Journal, 34, 11-12.

Wholey, B.J. (1991). Admissibility of computer simulation evidence in New York courts. New York Law Journal, 205, 1.

Wilson, A.C., Jones, S.G., Smith, M.A., & Liles, R. (1997). Tracking spills and releases: High tech in the courtroom. Tulane Environmental Law Journal, 10, 371-394.

Attachment 2
Social and Behavioral Science Articles and Books

Arce, R. (1995). Evidence evaluation in jury decision-making. In R.Bull & D. Carson (Eds.). Handbook of Psychology in Legal Contexts. pp. 565-579. Chichester: Wiley.

Bell, B.E., & Loftus, E.F. (1985). Vivid persuasion in the courtroom. Journal of Personality and Social Psychology, 49, 659-654.

Bell, B.E., & Loftus, E.F. (1989). Trivial persuasion in the courtroom: The power of (a few) minor details. Journal of Personality and Social Psychology, 56, 669-679.

Biggers, T., & Pryor, B. (1982). Attitude change: A function of a emotion-eliciting qualities of environment. Personality and Social Psychology Bulletin, 8, 94-99.

Brekke, N.J., Enko, P.J., Clavet, G., & Seelau, E. (1991). Of juries and court-appointed experts: The impact of nonadversarial versus adversarial expert testimony. Law and Human Behavior, 15, 451-475.

Browne, K. (1978). Comparison of factual recall from film and print stimuli. Journalism Quarterly, 55, 350-353.

Caramazza, A., McCloskey, M., & Green, B. (1981). Naïve beliefs in "sophisticated" subjects: misconceptions about trajectories of objects. Cognition, 9, 117-123.

Chaiken, S. & Eagly, A.H. (1976). Communication modality as a determinant of message persuasiveness and message comprehensibility. Journal of Personality and Social Psychology, 34, 605-614.

Chaiken, S. (1980). The heuristic model of persuasion. In M.P. Zanna, J.M. Olson, & C.P. Herman (Eds.). Social influence: The Ontario symposium (Vol 5; pp 3-39). Hillsdale, NJ: Erlbaum.

Chaiken, S., Wood, W., & Eagly, A. (1997). Principles of persuasion. In E.T. Higgins & A.W. Kruglanski (Eds.). Social psychology: Handbook of basic principles. pp. 702-742. New York: Guilford.

Christianson, S., & Loftus, E.F. (1987). Memory for Traumatic Events. Applied Cognitive Psychology, 1, 225-239.

Christianson, S., & Loftus, E.F. (1991). Remembering emotional events: The fate of detailed information. Cognition and Emotion, 5, 81-108.

Christianson, S., Loftus, E.F., Hoffman, H., & Loftus, G.R. (1991). Eye fixations and memory for emotional events. Journal of Experimental Psychology: Learning, Memory, and Cognition, 17, 693-701.

Cooper, J., Bennett, E.A., & Sukel, H.L. (1996). Complex scientific testimony: How do jurors make decisions? Law and Human Behavior, 20, 379-394.

Dougherty, M.R.P., Gettys, C.F., & Thomas, R.P. (1997). The role of mental simulation in judgments of likelihood. Organizational Behavior and Human Decision Processes, 70, 135-148.

Douglas, K.S., Lyon, D.R., Ogloff, J.R.P. (1997). The impact of graphic photographic evidence on mock jurors' decisions in a murder trial: Probative or prejudicial? Law and

Human Behavior, 21, 485-501.

Dunn, M.A. (1995). The effects of computer animation on jury decision-making. Unpublished manuscript, Williams College.

Eagly, A.H. (1974). Comprehensibility of persuasive arguments as a determinant of opinion change. Journal of Personality and Social Psychology, 29, 759-773.

Feigenson, N., Park, J., & Salovey, P. (1997). Effect of blameworthiness and outcome severity on attributions of responsibility and damage awards in comparative negligence cases. Law and Human Behavior, 21, 597-617

Fishfader, V.L., Howells, G.N., Katz, R.C., & Teresi, P.S. (1996). Evidential and extralegal factors in juror decisions: Presentation mode, retention, and level of emotionality. Law and Human Behavior, 20, 565-572.

Furnahm, A., Benson, I., & Gunter, B. (1987). Memory of television commercials as a function of the channel of communication. Social Behavior, 2, 105-112.

Furnham, A., & Gunter, B. (1985). Sex, presentation mode and memory for violent and non-violent news. Journal of Educational Television, 11, 99-105.

Furnham, A., & Gunter. B. (1989?). The primacy of print: immediate cued recall of news as a function of the channel of communication. Journal of General Psychology, 116, 305-310.

Furnham, A., Gunter, B., & Green, A. (1990). Remembering science: The recall of factual information as a function of the presentation mode. Applied Cognitive Psychology, 4, 203-212.

Furnham, A., Proctor, E., & Gunter, B. (1988). Memory for material presented in the media: The superiority of written communication. Psychological Reports, 63, 935-938.

Gaziano, C., & McGrath, K. (1986). Measuring the concept of credibility. Journalism Quarterly, 63, 451-462.

Gerrig, R.J. (1994). Narrative thought? Personality and Social Psychology Bulletin, 20, 712-715.

Gerrig, R.J. (1993). Experiencing narrative worlds: On the psychological activities of reading. New Haven: Yale University Press.

Gerrig, R.J., & Prentice, D.A. (1991). The representation of fictional information. Psychological Science, 2, 336-34.

Greenberg, M.S., Westcott, D.R., & Bailey, S.E. (1998). When believing is seeing: The effect of scripts on eyewitness memory. Law and Human Behavior, 22, 685-694.

Gregory, W.L., Cialdini, R.B., & Carpenter, K. (1982). Self-relevant scenarios as mediators of likelihood estimates and compliance: Does imagining make it so? Journal of Personality and Social Psychology, 43, 89-99.

Gunter, B., & Furnham, A. (1986). Sex and personality differences in recall of violent and non-violent news from three presentation modalities. Personality and Individual Differences, 7, 829-837.

Gunter, B., Furnham, A., & Leese, J. (1986). Memory for information from a party

political broadcast as a function of the channel of communication. Social Behavior, 1, 135-142.

Hans, V.P. (1992). Jury decision making. In D.K. Kagehiro & W.S. Laufer (Eds.). Handbook of Psychology and Law, pp 56-76. New York: Springer-Verlag.

Heuer, L., & Penrod, S.D. (1995). Jury decision-making in complex trials. In R.Bull & D. Carson (Eds.). Handbook of Psychology in Legal Contexts. pp. 527-541. Chichester: Wiley.

Juhnke, R., Vought, C., Psyzcynski, T., Dane, F., Losure, B., & Wrightsman, L. (1979). Effects of presentation mode upon mock juror's reactions to a trial. Personality and Social Psychology Bulletin, 5, 36-39.

Kassin, S.M., & Dunn, M.A. (1997). Computer-animated displays and the jury: Facilitative and prejudicial effects. Law and Human Behavior, 21, 269-281.

Kassin, S.M., & Garfield, D. (1991). Blood and guts: General and trial specific effects of videotaped crime scenes on mock jurors. Journal of Applied Social Psychology, 21, 1459-1472.

Klein, K., & Holt, D. (1991). The relationship of need for cognition and media credibility to attitudes toward the Persian Gulf war. Contemporary Social Psychology, 15, 166-171.

Kosslyn, S.M., Brunn, J., Cave, K.R., & Wallach, R.W. (1984). Individual differences in mental imagery ability: A computational analysis. Cognition, 18, 195-243.

Larkin, J.H., & Simon, H.A. (1987). Why an illustration is (sometimes) worth ten thousand words. Cognitive Science, 11, 65-99.

Leippe, M.R., & Elkin, R.A. (1987). When motives clash: Issue involvement and response involvement as determinants of persuasion. Journal of Personality and Social Psychology, 52, 269-278.

Mandl, H., & Levin, J.R. (Eds.). (1989). Knowledge acquisition from text and pictures. Amsterdam: North-Holland.

Markman, K.D., Favanski, I., Sherman, S.J., & McMullen, M.N. (1993). The mental simulation of better and worse possible worlds. Journal of Experimental Social Psychology, 29, 87-109.

Marks, D.F. (1973). Visual imagery differences in the recall of pictures. British Journal of Psychology, 64, 17-24.

Mayer, R.E., & Sims, V.K. (1994). For whom is a picture worth a thousand words? Extensions of a dual-coding theory of multimedia learning. Journal of Educational Psychology, 86, 389-401.

McCloskey, M., & Kohl, D. (1983). Naïve physics: The curvilinear impetus principle and its role in interactions with moving objects. Journal of Experimental Psychology: Learning, Memory, and Cognition, 9, 146-156.

McCloskey, M., Washburn, A., & Felch, L. (1983). Intuitive physics: The straight-down belief and its origin. Journal of Experimental Psychology: Learning, Memory and Cognition, 9, 636-649.

Miller, R.D. (1991). The presentation of expert testimony via live audio-visual communication. Bulletin of the American Academy of Psychiatry and the Law, 19, 5-20.

Miniard, P.W., Bhatla, S., Lord, K.R., Dickson, P.R., et al. (1991). Picture-based persuasion processes and the moderating role of involvement. Journal of Consumer Research, 18, 92-107.

Oliver, E., & Griffitt, W. (1976). Emotional arousal and "objective" judgment. Bulletin of the Psychonomic Society, 8, 399-400.

Paivio, A. (1986). Mental representations: A dual coding approach. Oxford, England: Oxford University Press.

Pennington, N., & Hastie, R. (1986). Evidence evaluation in complex decision-making. Journal of Personality and Social Psychology, 51, 242-258.

Pennington, N., & Hastie, R. (1988). Explanation-based decision making: Effects of memory structure on judgment. Journal of Experimental Psychology: Learning, Memory, and Cognition, 14, 521-533.

Pennington, N., & Hastie, R. (1992). Explaining the evidence: Tests of the story model for juror decision making. Journal of Personality and Social Psychology, 62, 189-206.

Reyes, R.M., Thompson, W.C., & Bower, G.H. (1980). Judgmental biases resulting from differing availabilities of arguments. Journal of Personality and Social Psychology, 39, 2-12.

Richardson, J.T.E. (1980). Mental imagery and human memory. New York: St. Martin's Press.

Scott, L.M. (1994). Images in advertising: The need for a theory of visual rhetoric. Journal of Consumer Research, 21, 252-273.

Shedler, J. & Manis, M. (1986). Can the availability heuristic explain vividness effects? Journal of Personality and Social Psychology, 51, 26-36.

Slee, J.A. (1980). Individual differences in visual imagery ability and the retrieval of visual appearances. Journal of Mental Imagery, 4, 93-113.

Sparks, G.G., Sparks, C.W., & Gray, K. (1995). Media impact on fright reactions and belief in UFOs: The potential role of mental imagery. Communication Research, 22, 3-23.

Taylor, S.E., & Thompson, S.C. (1982). Stalking the elusive "vividness" effect. Psychological Review, 89, 155-181.

Thibaut, J., & Walker, L. (1975). Procedural justice: A psychological analysis. Hillsdale, NJ: Erlbaum.

Thornton, B., Kirchner, G., & Jacobs, J. (1991). Influence of a photograph on a charitable appeal: A picture may be worth a thousand words when it has to speak for itself. Journal of Applied Social Psychology, 21, 433-445.

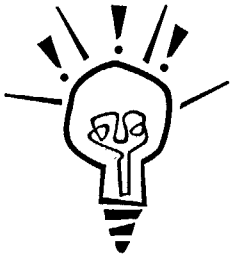
Unnava, H.R., Burnkrant, R.E., & Erevelles, S. (1994). Effects of presentation order and communication modality on recall and attitude. Journal of Consumer Research, 21, 481-490.

Whalen, D.H., & Blanchard, F.A. (1982). Effects of photographic evidence on mock juror judgment. Journal of Applied Social Psychology, 12, 30-41.

Willows, D.M., & Houghton, H.A. (Eds.). (1987a). The psychology of illustration: Volume 1. Basic research. New York: Springer-Verlag.

Young, C.E., & Robinson, M. (1992). Visual connectedness and persuasion. Journal of Advertising Research, 32, 51-59.

THE GESTATION OF AN AMENDMENT



YEAR 1

1.Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.

2. This period is of indeterminate length.

3. Proposals come from Committee members, the Reporter, judges, clerks, or the public, or result from statutory changes, case law developments, or experience.

Advisory Committee approves draft of proposed amendments. (January-May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited.

(August)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). Public comment period closes.

(January - March)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate).

(March -April)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress.

(March or April)

(must be by May 1)

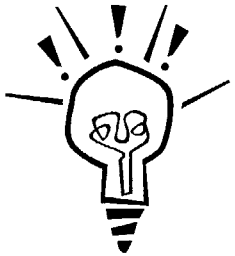
Congress can alter or reject during the next seven months. If Congress does not act, amendments take effect December 1.

Proposed amendments may be at different stages of the process at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

3/99

THE GESTATION OF AN AMENDMENT



YEAR 1

YEAR 2

YEAR 3

2016, 3015(d), 5009, 8014, Official Form 15

1004, 1004.1, 2004, 2014, 2015(a)(5), 4004, 9014, 9027, Official Form 1

1007, 2002, 3016, 3017, 3020, 9006, 9022, and Official Form 7 (Civil Rule 5)

1017, 2002(a)(6), 4003(b), 4004(c), new 5003(e), 5003(f)

(Civil Rule 26)

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

8/2000

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2000

1017
2002(a)(6)
4003
4004
5003

December 1, 2001

1007
2002(c)
2002(g)
3016
3017
3020
9020
9022

December 1, 2002

1004
1004.1
2004
2014
2015(a)(5)
4004
9014
9027

17-19

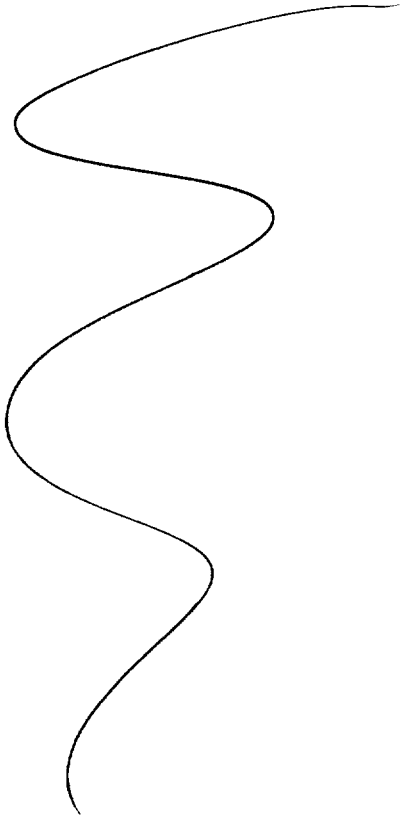
Items 17 - 19 will be oral.

Supplemental

Agenda

Book

Materials



RULE 2016 COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES.

* * * * *

(b) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO ATTORNEY FOR DEBTOR. ~~Every~~ [An] attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code, including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. ~~A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.~~ ~~Every [An]~~ The attorney shall file a supplemental statement and transmit a copy of the statement to the United States trustee within 15 days after any payment ~~of~~ or agreement not previously disclosed.

(c) DISCLOSURE OF COMPENSATION PAID OR PROMISED TO BANKRUPTCY PETITION PREPARER. A bankruptcy petition preparer's declaration filed under § 110(h)(1) shall disclose

any fee, and the source of any fee, received from or on behalf of the debtor within 12 months of the filing of the ~~case~~ and all unpaid fees charged to the debtor. The declaration shall state whether the bankruptcy petition preparer has shared or agreed to share the compensation with any other entity and shall include the particulars of any such sharing or agreement to share. The declaration shall describe the services performed and documents prepared or caused to be prepared by the bankruptcy petition preparer. A bankruptcy petition preparer shall file a supplemental declaration within 10 days after any payment or agreement not previously disclosed.

COMMITTEE NOTE

This rule is amended by adding subdivision (c) to implement § 110(h)(1). The declaration includes information necessary for the court to determine whether the bankruptcy petition preparer has complied with that section. The bankruptcy petition preparer also must transmit a copy of the declaration to the United States trustee to facilitate the trustee's review of the preparer's actions.

~~Other amendments are stylistic~~.

Bankruptcy

I. M[illegible] [illegible] appeal

[illegible] [illegible] [illegible] Cal[illegible] [illegible] + Bk. meeting

II § 2016 (b) [illegible] note [illegible] [illegible] + shall

[illegible] First section duplicates statute + is unnecessary also inconsistent with statute's time deadline which requires 10 days (no reference to ct's authority to change time table)

M. [illegible] Strike line 1 [illegible] ?
Morris will amend the rule
Deferred until tomorrow

[illegible] of [illegible] court [illegible] [illegible] by clerk of bk. ct (not [illegible] of dist. clerk ~~[illegible]~~ acting as bk clerk)

Reference is Note to Civil Rule 54

Add new (c) to parallel FRAP 39(c).

Suggestion to ~~[illegible]~~ remove costs of [illegible] [illegible] of briefs not included in FRAP

(Talk to Schlitz about FRAP 39(c) - [illegible] different court (dist. + circuit)

Motion to settle audit

9-4

Tabled

Tab ?

Revision of Form 15 to handle injunctions with merely reference to ~~the~~ Rule that states the contents of ~~the~~ order.

Request to Expand ~~the~~ Form to include more information

Kravel Says that old form included more info but ~~the~~ ~~the~~ later editions eliminated much of this info. because of fear that something will be missed

Refer to next meeting

* Need a Form Subcommittee (Maybe look into ~~a Form~~ hiring a Form Professor)

Privacy + Issues

Recommendation to Move Slowly

Issues over the suggested options

Problem with social security # + credit card # - Proposal to include of last 4 digit on the Forms

New Form Subcommittee should consider whether the last 4 digits should be included on the forms

Forms + Privacy Subcommittee should meet together and

Notify CACM Privacy Access of [issue of soc. sec # + credit cards] our plans to eliminate 4-digit rules + other changes to forms (tentative)

Rule 3015

Move Not to Adopt

Agreed

Rule 2002

Tabled

Item 12

Altered Bar Code

Rule is adopted to hold the pattern

Rejected

[redacted] Friday

Rule 2016 revised

2016(b) Changes not approved since

Not to be held

Final Decision

Will be mailed to [redacted] Decision at Conclusion of the Case

Proposed a Common Stock

Subsidiaries —

Billing - Full Consulting

10% directly or indirectly

Technology

3 main issues - just questions

Privacy issue regarding bankruptcy

Electronic Signatures - Act

Case Mgmt

PDF Writer

Electronic Signatures

Calfee

Clerk Rls. Rls to see whether local rules are not effective until the rule on actually filed with the AO

Next Meeting

March 15-16, 2001
New Orleans

Subcmte call July Sell

Fall 2001
[redacted] September 13 + 14