ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

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