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03-BK-C

July 3, 2003

Advisory Committee on Bankruptcy Rules
Attn: Hon. A. Thomas Small, Chairman
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Advisory Committee on Bankruptcy Rules
Attn: Prof. Jeffrey W. Morris, Reporter
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Re: Federal Rule of Bankruptcy Procedure 9001:
Definition of "Regular Associate"

Dear Judge Small and Professor Morris:

I believe that the definition of "regular associate" in Fed. R. Bankr. P. 9001(9) logically needs to be expanded to include an *accountant* as well as an attorney. The present definition of regular associate limits, inadvertently I think, the scope of two other portions of the Federal Rules of Bankruptcy Procedure.

I begin with Fed. R. Bankr. P. 2014(b), titled, "Services Rendered by Member or Associate of Firm of Attorneys or Accountants." With references to attorneys omitted, the rule reads in relevant part:

"If an accounting partnership or corporation is employed as an accountant, or if a named accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as accountant so employed, without further order of the court."

Federal Rule of Bankruptcy Procedure 9001(6) defines "firm":

"(6) '**Firm**' includes a partnership or professional corporation of attorneys or accountants."¹

¹ A separate question is whether this definition is strictly necessary, since the Code's definitions of "accountant" and "attorney" already includes professional association, corporation, or partnership. 11 U.S.C. § 101(1), (4). "Firm" therefore literally includes a professional corporation of professional corporations. "Firm" could instead be defined to include nonindividual accountants and nonindividual attorneys, although my wording seems clumsy.

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Finally, Rule 9001(9) defines "regular associate":

"(9) **'Regular Associate'** means any attorney regularly employed by, associated with, or counsel to an individual or firm."

"Regular associate," or at least the concept that that defined term seeks to capture, should include any *accountant* regularly employed by an individual or firm. The heading of Rule 2014(b) contemplates, by its terms, a member *or associate* of a firm of accountants. Rule 2014(b) itself refers to a *partner, member, or regular associate* of an approved accountant (whether that approved accountant is an accounting partnership, an accounting corporation, or an individual accountant). The definition of "firm" includes a partnership or professional corporation of accountants.

Yet if "regular associate" is limited to an attorney (and excludes accountant), confusion follows. With respect to accountants, the heading of Rule 2014(b) would be limited to "a member or *attorney* associate of a firm of accountants." The Rule itself would mean that an approved accountant (whether accounting partnership, accounting corporation, or individual accountant) could, without further court order, obtain assistance from a regular associate, so long as that associate were an attorney, but if the associate were an accountant, then a further court order would be required. Similarly, under Rule 9001, although an accounting partnership or professional corporation would be a "firm," the "regular associates" of that accounting firm would include attorneys and *exclude* accountants.

I do not believe that the above implications reflect the intent of the rules and its draftsmen. Although many accountants, especially nowadays, employ attorneys, often in the tax arena, I do not think that the interplay of Rules 2014(b) and 9001 was intended to be restricted to those somewhat unusual situations. Further, I note that Rule 2014(b) is based in large part on former Bankruptcy Rule 215(f). Rule 215(f) uses the term "regular associate," and former Rule 901 defines "accountant" and "attorney," but I cannot find a former rule that restricts "regular associate" to an attorney only.

If I am correct — the intent of the Rules is to allow *accountants* employed by court-approved accountants to be utilized without further court order— then the definition of Rule 9001(9) should be changed to allow that to happen. This might require some complicated drafting. "Associate" is a common description of an employee attorney of another attorney; it may be less common in the accounting world. And "counsel" would seem limited specifically to lawyers. Thus, the definition, and perhaps even the defined term itself, might need to be

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rewritten or restructured. Perhaps something like "affiliated professional," although "affiliate" is itself a defined term under the Code.

If I am wrong — the limitation to attorney that I describe is deliberate and intentioned — then I would suggest that Rule 2014(b) needs to be rewritten and clarified.

I realize that in light of the important work that the Advisory Committee does year after year, this small definitional glitch is not momentous. Nevertheless, I look forward to the benefit of your comments on this matter. Thank you.

Very truly yours,



Robert R. Barnes

July 24, 2003

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*Re: Your Suggestion for Amendment to Federal Rules of Bankruptcy Procedure 9001
(Docket Number 03-BK-C)*

Dear Mr. Barnes:

Thank you for your letter of July 3, 2003, to Judge Small and Professor Morris suggesting that the definition of "regular associate" in Rule 9001 of the Federal Rules of Bankruptcy Procedure be expanded to include an accountant as well as an attorney. Your letter will be considered by the Advisory Committee on Bankruptcy Rules.

The federal rulemaking process under the Rules Enabling Act is exacting and time-consuming. You may follow progress of the suggestion by logging on to the Judiciary's web site at www.uscourts.gov/rules. You may also contact the Rules Committee Support Office at (202) 502-1820 for a status report.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable A. Thomas Small
Professor Jeffrey W. Morris