ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 15 -16, 2001
New Orleans, Louisiana

Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Robert W. Gettleman
District Judge Bernice B. Donald
District Judge Norman C. Roettger, Jr.
District Judge Thomas S. Zilly
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Ernest C. Torres was unable to attend. District Judge Thomas W. Thrash, Jr., liaison to the Committee on Rules of Practice and Procedure (Standing Committee), attended. District Judge Adrian G. Duplantier, former chairman of the Committee attended part of the meeting, and Bankruptcy Judge Donald E. Cordova, a former member, also attended. Bankruptcy Judge Dennis Montali attended as a representative of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts (Administrative Office), also attended.

The following additional persons attended the meeting: Martha L. Davis, Acting Director of the Executive Office for United States Trustees (EOUST); James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office; Patricia S. Ketchum, Bankruptcy Judges Division, 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 Matters

The Chairman welcomed the members, liaisons, advisers, and guests who were attending their first meeting.

The Committee approved the minutes of the September 2000 meeting.

The Chairman reported that he and the Reporter had attended the January 2001 meeting of the Standing Committee, but that there were no actions taken affecting the Committee.

Judge Gettleman said he and the Reporter had attended the January 2001 meeting of the Standing Committee's working group on attorney conduct. The group discussed a draft Federal Rule of Attorney Conduct (FRAC 1) that would prescribe "dynamic conformity" with the attorney conduct rules of the state in which the federal court is located. Professor Morris said that Congress may require the judiciary to prescribe rules on attorney conduct and that the Department of Justice would prefer a uniform national rule governing its attorneys. He added that if a FRAC 1 ever is prescribed there may be a need to develop a FRAC 2 for bankruptcy courts, but that the Committee does not need to take any action now.

Professor Morris said he also attended a meeting of the mass torts working group of the Advisory Committee on Civil Rules which is considering amendments to Civil Rule 23 governing class actions. The proposals the group is considering, he said, include establishing an appointment process for an attorney for a class. Other proposals include affording greater preclusive effect to a court's order refusing to certify a class and any order de-certifying a class or approving a settlement.

Action Items

The Committee took up consideration of the comments to the preliminary draft amendments that were published in August 2000.

Rule 2014. The Reporter summarized the comments the Committee had received, and noted that the proposed amendments to Rule 2014 also had been the focus of the Committee's public hearing, held January 26, 2001, in Washington, DC. Commentators who opposed the proposed amendments included Chief Judge Carolyn Dineen King, United States Court of the Appeals for the Fifth Circuit, and Judge Edith Hollan Jones, a member of that Court. Professor Morris said that Professor Todd Zywicki, George Mason University Law School, who testified at the hearing, had reiterated many of the views expressed by Judge King and Judge Jones. All had opposed revising the current rule's standard of the disclosure of "all connections" with the parties, parties in interest in the case, and the professionals employed by them to the published proposal that would require disclosure of those connections "relevant to determining whether the person is disinterested under § 101."

Some Committee members said that they were surprised that some commentators interpreted the proposed amendment as designed to restrict the disclosures a professional must make and noted that at least one witness at the hearing, Robert A.Greenfield, Esquire[1], had said he did not consider the proposed amendment to require less disclosure than the current rule. Some members noted that the existing rule is not being complied with, that professionals already screen out connections they believe are not relevant, such as "an old fraternity brother who is president of a major creditor, a credit card issued by a creditor bank that has an outstanding balance, or a life insurance policy with a creditor." One member said professionals, especially those who are members of large firms, do so to avoid filing 2-inch thick disclosures full of mostly trivial connections which can overwhelm the court and the United States trustee with information. Chairman Small said he had sent a transcript of the hearing to Judge Jones and had received a second letter from her that indicated she might be amenable to some amending of the "all connections" standard. Based on a conversation, he said, he believed Judge Jones might accept a "relevant" standard for attorneys and accountants employed by parties and parties in interest and something in between "all" and "relevant," something that is "not de minimus," as to principals.

A member pointed out that a debtor's attorney often does not know the identities of the attorneys and accountants for the various creditors and cannot appropriately obtain this information. Yet, the existing rule does not contain any mitigating phrase like "to the best of the professional's knowledge" with the respect to the disclosure statement to be submitted by the professional, although the applicant (*e.g.,* the debtor) is required to disclose only "to the best of the applicant's knowledge." (See Rule 2014(a).)

Professor Morris said the Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements, had met in January by conference call and during the afternoon before the meeting and had determined that the best way to meet the comments opposing the proposed amendments was to present to the Committee the two re-drafts contained in the agenda book and certain further modifications, which Professor Morris described. The subcommittee's objectives were to propose relevancy standards for attorneys and accountants employed by creditors and other parties in interest and to reassure Judge Jones and others that the Committee is not proposing to lower the standard for disclosure. Professor Resnick expressed concern about using two standards. He asked why "relevant" would not work for creditors if it would work for attorneys. Professor Morris said the sense of the subcommittee was that a connection with a party is more serious than a connection with someone who merely represents a party. Judge Cristol said there seemed to be a clear understanding at the hearing, and among the bench and bar generally, that the attorney remains at risk should the court later determine that the person has a conflict of interest (11 U.S.C. § 327(c)) or is not disinterested (11 U.S.C. § 328(c)). Judge Gettleman said the "debacles" under the existing rules, (See In re Leslie Fay), show that the goal should be to draft a rule that will be complied with. Mr. Adelman said he disagreed with Judge

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[1]Mr. Greenfield, of Stutman, Treister & Glatt, Los Angeles, CA, appeared on behalf of the National Bankruptcy Conference.

King and Judge Jones that lawyers will underdisclose if the amendments published by the Committee are adopted. Rather, he said, they will overdisclose, and Judge Duplantier added that overdisclosure effectively equals no disclosure.

Judge Duplantier suggested borrowing the language used in 28 U.S.C. § 455 as the standard for disqualifying a judge from deciding a case, that the individual's "impartiality might reasonably be questioned." Mr. Shaffer suggested that such an adaptation possibly could be phrased as "connections that may cause the court or a party in interest reasonably to question whether the person is disinterested." **The Chairman asked the Reporter to prepare a new draft for the following day's session that would incorporate the changes approved by the subcommittee and the language suggested by Mr. Shaffer.**

Ms. Davis inquired whether, under the second draft rule developed in response to the comments, an attorney would disclose "an adverse interest." Judge Montali responded that if the adverse interest were de minimus, the judge would approve the employment anyway. More troublesome, he said, are the applications that state that the attorney is disinterested and holds no adverse interest "except," and the disclosures that follow clearly show connections that are more than de minimus and interests that are adverse.

Judge Gettleman called the Committee's attention to a provision in the re-drafts that would require the attorney or other professional to disclose the procedures used to develop the information in the statement and said the subcommittee was uncertain whether including such a provision would require republication. Ms. Davis said the United States trustees would like to have the information, but that she was unsure whether requiring it in every case would be productive. Judge Small said he does not think conflict-checking procedures should be disclosed at the time the employment is approved, because it might imply approval of the procedures and compromise any later decision that a particular undisclosed connection or conflict requires the termination of the employment and disgorgement of fees. Judge Walker said he would be unable to assess the adequacy of an attorney's conflict-checking procedures without substantial information about the nature and depth of the law firm's database and would prefer not to have the information unless a party objects to the employment. Judge Small agreed that the professional's conflict-checking process properly is a defense to be considered only if an objection is raised.

Professor Resnick, on behalf of Bankruptcy Judge Allan L. Gropper, a new judge in the Southern District of New York, raised a question about subdivision (c) of the rule, the provision that specifies the service list for the application. Judge Gropper was concerned, he said, because it might conflict with the customary practice in his district whereby the judge will sign an interim retention order on the first day of the case, when there has not been time to serve those named on the service list. Professor Morris responded that the Committee Note already states that the court can act without a hearing, that a party can object, and that the court can vacate the order. He said the Committee always has assumed that the court would act on the first day. Professor Resnick requested that the Committee Note be amended to add that the court can act before the parties

have been served. Judge Cristol said a court that has concerns about the timing of service can put in its order that any party can object and request and immediate hearing.

Mr. Frank noted that in the re-drafts the requirement that an attorney provide the information required to be disclosed under § 329(a) of the Code had been deleted. He said he was not convinced that Rule 2016(b) is adequate for the situation in which an application for employment would be filed under Rule 2014. The statement prescribed in Rule 2016(b) is not required to be filed for 15 days after the case is commenced, he said, and is intended to provide the court with information about fees paid in cases in which fee applications are not filed. **There was no objection to his suggestion that the provision referring to § 329(a) be restored.** Professor Wiggins noted that in the first re-draft, at tab 5a, page 16, line 22, there was an unnecessary "that." The Reporter said he was aware of several similar lines and intended to review the entire amended rule, once the Committee had approved the substance, for the purpose of deleting all extraneous "thats." He noted also that all amendments approved by the Committee would be reviewed by the Style Subcommittee and by the Standing Committee's Style Subcommittee.

On the second day of the meeting, the Committee considered a new draft that the Reporter had prepared based on the Committee's discussion. The Reporter explained that the new draft contained a subdivision (b)(3) that included the phrase "not de minimus" and provided three alternative subdivisions (b)(4) on the theme of "reasonably questioning." Professor Resnick said he would strike subdivision (b)(3) ("not de minimus") and proceed only with one of the versions of subdivision (b)(4). He noted that in all other respects, this action would retain the published draft. Mr. Adelman said the Committee should keep lines 24-26 of subdivision(b)(3), keeping disclosure of any interest in the debtor and avoiding variation from the statutory standard for "disinterested" in § 101 of the Code. In addition, he said, the Committee should keep one of the versions of subdivision (b)(4). In response to a question about whether the word "reasonably" is redundant in the context of the rule, Professor Resnick said it would require broader disclosure than would "relevant," because the lawyer or other professional could not be conclusory or subjective but would have to think about what others could or might consider as questionable. **A motion to proceed using lines 24 - 26 and lines 33 -35 passed without objection, subject to review by the style subcommittee.** Thus subdivision (b)(3) through (b)(4) would read:

(3) any interest in, relationship to, or connection the person has that is not de minimis with the debtor;

(4) any interest, connection, or relationship the person has that may cause the court or a party in interest to reasonably question whether the person is disinterested under § 101;

Rule 9014(d). The Reporter said the proposed amendment to Rule 9014(d) had drawn the largest number of comments, most of them opposed to the change. The Committee's intent, in

referencing Civil Rule 43(a), to emphasize the similarity between contested matters initiated by motion and civil trials, appeared to have been misunderstood by some commentators. In civil actions, motions governed by Rule 43(e) are not comparable to motions that initiate contested matters in bankruptcy cases, because motions in civil actions generally do not result in final resolution of the underlying matter. Many courts, however, have a long-standing practice of accepting direct testimony by affidavit, subject to the right of the opposing party to conduct live cross examination of the witness. Moreover, both the Ninth Circuit and the Second Circuit have authorized this practice. The Chairman suggested that changing the Rule 43(a) reference to simply "Rule 43" would accommodate those who had opposed the amendment. Judge Donald agreed that the Chairman's approach would provide needed flexibility without disturbing what courts are doing now. Judge Small said the Committee also could delete any reference to Rule 43 and state that testimony should be taken as in an adversary proceeding, leaving Rule 9017 to prescribe the procedure. Judge Klein asked why Rule 9014 needs to say anything when Rule 9017 unquestionably applies. Professor Resnick responded that the reason is historical; the Committee decided several years prior to the meeting that a contested matter is litigation and, if there is a factual dispute, it should be heard according the trial rules. He added that, rather than refer simply to "Rule 43," he would prefer to state that testimony in a contested matter should be taken as in an adversary proceeding. Judge Zilly said, if there are some facts at issue–such as competing valuations--but no material issue, the use of affidavits alone should be permitted, rather than requiring the parties to bring in a distant witness. **A motion was made to amend the preliminary draft to add the word "material" in line 33 and delete the reference to Rule 43(a).** Judge Zilly said the motion still would deprive parties of the ability to stipulate that the matter should be determined on affidavits. He said **the phrase "at trial" also should be deleted so the rule would require testimony simply "as in an adversary proceeding," and there was no objection to amending the motion.** Professor Resnick said, if the phrase "at trial" were deleted from the rule, the reference to Rule 43(a) should remain in the Committee Note. Others disagreed. After further discussion, **the motion passed by a vote of 7 to 4. A motion to delete from the Committee Note the sentence referring to Rule 43(a) failed by a vote of 3 to 8. A sentence will be added to the note concerning agreement of the parties to submission of a matter on affidavits.**

The Committee, by consensus, approved one new rule and amendments to the following rules as published for comment: Rule 1004, new Rule 1004.1, Rule 2004, Rule 2015, Rule 4004, Rule 9014(e) and Rule 9027.

Official Form 1. In light of the concern about possible self-incrimination expressed in the comment on the form as published, Mr. Shaffer suggested amending proposed Exhibit "C" to delete from numbered paragraph 2 the word "dangerous." **The Committee approved the form as so amended and further approved requesting the Judicial Conference to prescribe an effective date of December 1, 2001, to permit publishers and bankruptcy software vendors to print and distribute the form. The Committee also approved adding a checkbox labeled "Clearing Bank" to the form** to conform to amendments to the Bankruptcy Code creating a new subchapter under which these entities can be liquidated.

Official Form 15. At its September 2000 meeting, the Committee approved an amendment to the form to conform it to an amendment to Rule 3020 that is expected to become effective December 1, 2001. **The Committee approved requesting the Judicial Conference to prescribe an effective date for the form of December 1, 2001,** to match the expected effective date of the amendment to Rule 3020.

Official Form 5 and Official Form 17. The Bankruptcy Administration Committee had requested the Committee to consider amending the involuntary petition form (Official Form 5) and the notice of the appeal form (Official Form 17) to include a notice that a child support creditor or child support creditor's representative who files a form stating the details of the child support debt, its status, and "other characteristics" is exempt from paying filing fees. The Director of the Administrative Office has issued a form that a child support creditor or child support creditor's representative can use for the purpose of qualifying for the filing fee waiver. **The Committee approved proposed amendments with the addition of the phrase "in connection with the filing of the involuntary petition" at the end of the notice on Official Form 5 and the moving of the notice to the second page of the form, and with the further insertion of the words "filing or docketing" before the word "fee" on Official Form 17.**

Rule 2003(b) and Rule 2009. The Reporter explained that the proposed amendments would conform the rules to the newly enacted provisions of the Bankruptcy Code concerning the liquidation of uninsured State banks that operate as multilateral clearing organizations ("Clearing Banks"). After a short discussion, **the Committee approved the Reporter's draft amendments subject to review by the Style Subcommittee.** As these amendments only conform the rules to statutory changes, Mr. Rabiej said publication would not be necessary.

Rule 1007 and New Rule 7007.1. The Reporter introduced the proposed new rule, as modified by the Subcommittee on Attorney Conduct Including Rule 2014 Disclosure Requirements, during its January conference call and at a meeting on March 14. The proposal was drafted at the direction of the Standing Committee acting at the request of the Committee on Codes of Conduct. The Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules published similar draft rules in August 2000, he said, and had not received any adverse comment.

The subcommittee had decided to limit the scope of the rule to adversary proceedings only, Professor Morris said, because in many circumstances that arise in contested matters it would be difficult – or even impossible – to obtain compliance and afford the court time to review the volume of disclosures that could be received. In motions seeking relief from the automatic stay, for example, the motion may be filed on behalf of a national organization by a local attorney who does not have access to the information required. There is no requirement in Rule 9014 that a party file a response, and bankruptcy cases present many situations – such as multiple liens on the same collateral, settlements, plan confirmations – in which affected creditors fail to respond or respond shortly before the commencement of a hearing, effectively preventing the disclosure rule from operating. Moreover, Rule 9014 would authorize the

presiding judge to direct that Rule 7007.1 should apply in any particular contested matter in which disclosures appeared to be warranted. The subcommittee determined that the debtor should make its disclosures at the beginning of the case, so the judge could review them before signing the orders presented on the first day of the case. A proposed amendment to Rule 1007 had been drafted to accomplish that, the Reporter said.

The subcommittee's draft language differs in certain respects from that published by the other advisory committees, the Reporter noted. The subcommittee limited disclosures to any nongovernmental corporation to prevents entities such as Amtrak from having to file disclosures. The subcommittee chose the phrase "equity interests" rather than "stock," he said, because the definition of "corporation" in § 101 of the Bankruptcy Code includes entities that do not issue stock. The subcommittee also changed the reportable ownership interest to ten percent of any class of equity interests, because ownership of 90 percent of one class might not amount to ten percent ownership of the whole but still would be significant. The subcommittee determined that interests owned "directly or indirectly" should be disclosed and would propose that as an improvement on the drafts already published. The subcommittee deleted any reference to a parent corporation, because the members could not think of any ten percent ownership situation that would not include a parent. The subcommittee also deleted the phrase limiting the corporate owners that must be disclosed to those that are "publicly held," because many organizations that have broad distribution of equity interests are not publicly traded. Finally, Professor Morris said, the subcommittee changed the title of the rule from "Disclosure Statement," used in the civil and criminal drafts, to the more informative "Corporation Ownership Disclosure Statement."

Judge Gettleman said the Committee Note should mention that the debtor is required to make similar disclosures under Rule 1007, and Professor Resnick noted that the Committee Note retains a reference to publicly traded corporations. Judge Montali expressed concern about limiting the rule to adversary proceedings. He said if a judge acts in a "big" motion or signs first day orders, but information later shows that judge should have been disqualified, the court system could be subject unfavorable publicity. **A motion to limit the scope of the rule to adversary proceedings passed by a vote of 6 to 5.**

A member suggested adding "or local rule" to the draft language of Rule 7007.1(a)(2) concerning additional information that may be required by the Judicial Conference. Other members, however, said attorneys and parties will not know where to find any Judicial Conference requirements. It is unwise, they said, to put in a rule that there may be something else the person needs to check. **A motion to delete subdivision (a)(2) and the final sentence of the Committee Note passed by a vote of 10 to 0.** The consensus was that the Committee Note should be edited, particularly in paragraph 3, to reflect the Committee's actions, and that the note could retain a mention that the Judicial Conference might add further disclosure requirements.

The Chairman asked the Reporter to send our changes and explanations to the other Advisory Committees in time for their April 2001 meetings in the form of comment and suggestions they might want to consider in connection with their own drafts. Professor Morris

said he would include in those materials his concern for the length of time it would take to amend the rule to implement and make public any further requirements the Judicial Conference might prescribe in the future.

The Committee approved the draft amendments to Rule 1007 concerning disclosure by the debtor. If approved by the Standing Committee, new Rule 7007.1 and the amendments to Rule 1007 would be published for comment in August 2001.

Official Forms - Individual Privacy. At its September 2000 meeting the Committee determined to publish for comment amendments to the official forms that would require only the last four digits of a debtor's Social Security number or debtor's account number to be disclosed. Official Forms marked with these potential amendments were presented for consideration. Judge Cristol said the last four digits often are used as PIN numbers and could be a source of mischief when files are posted on the Internet. Mr. Waldron said he had some concern that the last four digits are not unique enough, and Mr. Kohn noted that some responses to the judiciary's request for comment on privacy policy proposals said they are not. Mr. Heltzel said that redacting or selectively holding back information is extremely difficult with paper or imaged documents. He also said the electronic files system would be giving creditors other pieces of information, such as aliases and addresses, to match up and arrive at a correct identification. Mr. Kohn responded that having to use other information would require the Internal Revenue Service to perform "manual triangulation" to arrive at a correct identification and that, while engaged in that task, would be exposed to liability for stay violation, as would other creditors. Mr. Kohn added that it should be sufficient to exclude only part of the Social Security number but continue to require the full Taxpayer ID Number used by corporations and other employers. He suggested this could be done by switching the order in which the request for the numbers is stated on the form, so that it would read "Taxpayer ID Number / Last Four Digits of Social Security Number."

Judge Walker said he and other members of the Subcommittee on Privacy and Public Access had looked at the forms for what disclosures might be eliminated, but did not find much. He suggested that one approach might be to permit a debtor to file a "privacy disclosure document" that a proper party could access, but that would not be public without further court order. This document would contain the Social Security number and any other information from the schedules or statement of financial affairs that the debtor might want to keep private, and that preparing the document would make the debtor think about the sensitivity of the information the debtor is making public. Professor Resnick said the Committee probably would be amending the official forms extensively to conform to the pending bankruptcy reform legislation. He suggested delaying publication of the privacy-related amendments until the legislation-driven amendments also are ready.

Rule 6, Federal Rules of Appellate Procedure(FRAP). At its March 2000 meeting the Committee approved requesting the Advisory Committee on Appellate Rules to amend FRAP 6 to include a reference to Bankruptcy Rules 9019 and 7041, to prevent settlements at the circuit court level from becoming final without notice to other creditors in the bankruptcy case. Judge

Small said the Appellate Advisory Committee had agreed to the request but wanted the Committee to provide a specific proposed amendment. Judge Montali asked whether the proposed language would cause the court of appeals to think it has to do something; Rule 9019 directs the parties to give notice and obtain approval from the bankruptcy court, he said. Mr. Kohn expressed concern about the bankruptcy court's jurisdiction to act without a formal remand; he suggested going forward with the proposed amendment but notifying the Appellate Advisory Committee of the problem. Professor Wiggins questioned whether FRAP 6 is the appropriate location for the amendment; she suggested FRAP 33 (settlement) and FRAP 42 (voluntary dismissal). Judge Cordova said the Reporter's draft should be rearranged to make it clear that Rule 9019 applies to appeals and Rule 7041 to dismissals. Professor Resnick suggested amending FRAP 6 to say simply that Rules 9019 and 7041 apply, **and there was no objection.** The Committee could then amend Rule 7041 to broaden it to include settlements of appeals. Mr. Niemic said he meets regularly with the chief mediators for the courts of the appeals and can attest that they know about Rule 9019. The mediation programs operated by the courts of appeals have grown, however, and knowledge of the bankruptcy rule has become uneven with that growth. He said that FRAP 33, the rule that applies to mediators, may be the best place for the amendment. **The Chairman directed the Reporter to proceed with the FRAP 6 amendment as modified and recommend to the Appellate Advisory Committee that it also put the same language or a cross-reference in FRAP 33 and FRAP 42.**

Rule 7026. The Reporter said Rule 7026 was before the Committee in order to determine whether it should be amended in light of the December 1, 2000, amendments to Civil Rule 26 that removed the opt-out provisions under which courts formerly could exempt parties from certain discovery requirements such as mandatory initial disclosures and a mandatory meeting before the scheduling conference. Under the philosophy that federal rules should be consistent, Mr. Frank and other members said Civil Rule 26 as amended should apply in adversary proceedings without modification. Judge Cristol said, since the purpose of Rule 26 is to prevent delay, he would favor a modification allowing local rules to provide for shorter times than are specified in Rule 26. Judge Cordova said Rule 26 does not require the parties or the court to take the full time and does not prohibit shortening the times. The rule only prohibits extending the prescribed times, he said. Judge Klein noted that Rule 26(a) contains a list of case types that are excepted from the mandatory disclosure requirements, including student loan cases. Mr. Kohn said the United States attorneys would like to see the exception extended to bankruptcy proceedings, because application of Rule 26 otherwise would slow these matters down in the bankruptcy courts. **The consensus was to leave Rule 7026 unchanged.**

Rule 9014. With respect to the application of Rule 26 to contested matters, **the Committee approved inserting on line 6 of the Reporter's draft, at the beginning of the new sentence, "Unless the court directs otherwise."** Under generally accepted vocabulary conventions in the rules, the verb "order" means the court can act only on a case-by-case basis. The verb "direct," however, means the court can act either on a case-by-case basis or by issuing a local rule, unless the national rule limits the court's discretion with a modifying phrase such as "in a particular matter," (used in lines 14 - 15 of the Reporter's draft). The Committee Note

should say the verb "directs" was chosen to signal that the court may regulate the application of Rule 26 to contested matters by local rule or on a case-by-case basis. Accordingly, proposed amendments to Rule 9014 would provide that subdivisions (a)(1), (a)(2), (a)(3), and (f) of Rule 26 would not apply in contested matters unless the court "directs otherwise." The consensus was that these modifications are appropriate and defensible, because of the need for speedy resolution in contested matters. These amendments would be published for comment in August 2001.

Information Items

Bankruptcy Case Files on the Internet -- Privacy Considerations. Judge Montali, who is the Bankruptcy Administration Committee's alternate liaison to the Privacy Subcommittee of CACM, described for the Committee the alternative policy options concerning which that subcommittee had recently sought comment. The general policy options offered for comment were 1) no policy, 2) continuation for electronic files of the policy in effect for paper files, 3) redefining the contents of the "public file" to better accommodate privacy interests, and 4) limiting the level of remote access to certain categories of information. The bankruptcy files options on which comment was solicited were 1) requiring less information on schedules and statements, 2) creating an "estate" or "administrative" file that would be available only to parties in interest, 3) reducing Social Security and other account numbers to only the last four digits, and 4) seeking amendment of § 107(b) of the Code to broaden a judge's authority to seal documents to include privacy as a reason. He noted that bankruptcy case files are the only ones that are public by statute; the Judicial Conference has more latitude to make policy concerning files in other types of cases.

Contemporaneously with the Committee meeting, the Privacy Subcommittee was holding a public hearing in Washington, DC, to receive oral comments to supplement the 240 written comments that had been submitted. The hearing was scheduled to be taped by C-Span and might be broadcast, although no date had been specified, he said. The Subcommittee planned to meet following the hearing to begin formulating its recommendations to the Judicial Conference. These are scheduled to be reviewed by other interested committees, including the Standing Committee, at their June meetings, and to be presented to the Judicial Conference in September. Mr. McCabe added that the Subcommittee may decide that one policy does not suit all types of cases and, for example, might recommend different treatment for criminal files than for bankruptcy files. Enforcing any policy, he said, will be a continuing challenge, as it is impossible to control what happens to information once it is in the hands of third parties.

Model Local Rules for Electronic Case Filing. Ms. Ketchum reported that CACM also had formed a subcommittee to develop model local rules for electronic case filing. The first meeting of the subcommittee would be held April 6, 2001, and she expected that any proposed model rules drafted by the subcommittee would be presented to the Committee for its review and comment.

Administrative Matters

The Committee discussed how it might organize the work that would be needed in the likely event that major bankruptcy reform legislation would be enacted within weeks following the meeting. The pending bills contain provisions for an effective date of 180 days after enactment. The consensus was that suggested interim rules for local adoption would be necessary, together with new and amended forms. There was further consensus that interim rules should be approved at least by the Standing Committee and perhaps by the Judicial Conference. Official Forms, both new and amended, that were required by the legislation or otherwise implemented it could either be approved without public comment or issued as interim forms, with feedback from users serving as the equivalent of formal comment. Mr. Rabiej said the Judicial Conference could act on as little as two days' notice, if necessary. He suggested advising the Standing Committee at its June meeting of the Committee strategy for implementing the legislation and using mail ballots for any approvals that might be required afterwards.

Ms. Davis said the EOUST had developed a draft form for means testing. She said the form had not been cleared yet by the Department of Justice, but she would bring it to the Committee once that had been accomplished. She said completing the form properly would depend on the debtor's ability to do math. Judge Small asked about whether the EOUST also might have a standard chapter 11 plan form it could offer the committee, but she said no such form is available. Professor Resnick said he had met two or three years prior, in connection with an earlier version of the bankruptcy reform legislation, with a committee of United States trustees organized by a previous director of the EOUST, and that some members of that committee had provided him with copies of local chapter 11 plan forms. He said he would attempt to locate these in his files.

Professor Morris said he had drafted a memorandum to the Chairman suggesting topical areas of the reform legislation that might be assigned to various subcommittees once the final version of the legislation is known. Professor Resnick said another approach that the Reporter and Chairman might consider would be to start with the existing rules and go through them part by part to see which ones need to be amended. He said that method had been effective in amending the rules to implement the 1986 legislation and would avoid having two groups working on the same rule from different perspectives. He said he was unsure whether the rule-oriented approach would serve better than starting with the statutory provisions this time, however. Mr. Rabiej said he was arranging to contract with up to three consultants to work with the Committee in drafting the rules and amendments and forms that would be required.

The Chairman invited the members to contact him concerning their areas of interest as he would be forming the necessary subcommittees during the weeks following the meeting.

The Committee agreed to March 21-22, 2002, as the dates for its spring 2002 meeting and discussed Tucson, Arizona, Santa Fe, New Mexico, and the Monterey and Napa Valley areas of California as possible meeting sites.

Respectfully submitted,

Patricia S. Ketchum