**ADVISORY COMMITTEE ON BANKRUPTCY RULES**

**Meeting of March 21-22, 2002**
**Tucson, Arizona**

**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 Ernest C. Torres
District Judge Thomas S. Zilly
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark McFeeley
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 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, and Henry J. Sommer, Esquire, a former member of the Committee, 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 all or part of the meeting: Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Acting Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; Professor Bruce A. Markell, and Professor Melissa B. Jacoby, consultants to the Committee; Bankruptcy Judge Eileen W. Hollowell, Tucson, AZ; John K. Rabiej, Chief, and James N. Ishida, staff attorney, 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 introduced the Committee's new member, Judge McFeeley, and welcomed all the members, liaisons, advisers, and guests to the meeting.

**The Committee approved the minutes of the March 2001 meeting.** [The meeting that had been scheduled for September 13-14, 2001, was canceled due to the September 11 attacks on New York City and Washington, DC.]

The Chairman briefed the Committee on the events of the June 2001 and January 2002 meetings of the Standing Committee and on certain actions taken by the Judicial Conference in September 2001. At the June 2001 Standing Committee meeting, the seven amended rules and one new rule the Committee had forwarded for adoption were approved and sent to the Judicial Conference, but amended Rule 2014 had drawn two negative votes. Later in the summer, Rule 2014 proved controversial again when the Judicial Conference's Executive Committee met to consider the calendar for the September meeting of the Judicial Conference. Rather than risk disapproval of the amendments, Judge Small said he and Judge Anthony J.Scirica, chairman of the Standing Committee, had decided to withdraw Rule 2014 from the package of proposed amendments and send the rule back to the Advisory Committee for further study. The Judicial Conference, which was in session on September 11 when the attacks occurred, adjourned and acted later by mail ballot to approve the reduced package of proposed rules amendments and to approve two further items of interest to the Committee, a compilation of "Model Local Bankruptcy Court Rules for Electronic Filing" and a "Policy on Privacy and Public Access to Electronic Court Files," both proposed by the Committee on Court Administration and Case Management (CACM). In January 2002, the Standing Committee approved publication of privacy-related amendments to Rule 1005 and eleven official forms previously considered by the Advisory Committee but withheld pending congressional action on bankruptcy reform legislation. Judge Small noted that Deputy Attorney General Larry D. Thompson had opposed publication of the privacy-related amendments at the Standing Committee meeting.

Judge Montali reported briefly on the January 2002 meeting of the Bankruptcy Committee. Of the matters currently before that committee, the one most likely to have an impact on the rules, he said, is the question of venue. Apart from the suggestion to amend the Bankruptcy Code to eliminate the state of incorporation as a basis for venue that has arisen from several quarters, he said, the Bankruptcy Committee is considering issues concerning the treatment of a case that is filed in an improper venue. Some of the questions are whether a bankruptcy judge can raise the question of venue sua sponte and whether a bankruptcy judge can

properly decide to retain a case filed in a wrong venue, once the question has been raised by a party.

## Action Items

Proposed Amendments to Rules 1007, 2003, 2009, 2016, Proposed New Rule 7007.1, and Proposed Amendments to Official Forms 1, 5, and 17 Published for Comment August 2001. Professor Morris noted that the Committee had received only a few comments and that most of the comments had addressed the requirements in the proposed amendments to Rule 1007 and proposed new Rule 7007.1 to provide the court with financial disclosures that will assist a judge in determining whether the judge is disqualified from handling a case or proceeding. Two bankruptcy judges had commented that the required disclosures should be broader and include more types of entities than the proposed rules contemplate. Professor Morris said the Committee initially had discussed a draft with broader requirements. The other advisory committees, however, already had approved quite a narrow rule, and the Standing Committee had expressed a strong desire for consistency on the subject in all federal rules. Accordingly, he said, the only variations from the text adopted by the other advisory committees had involved use of "equity" (rather than "stock") interests and "governmental unit," as those are defined terms under § 101 of the Code. The only other subject addressed in the comments, he said, was a suggestion to delete from Official Form 1, the Voluntary Petition, the certificate by a non-attorney bankruptcy petition preparer in favor of the separate form for the purpose, Official Form 19. As Official Form 1 is being amended only to conform to legislation adding a "clearing bank" to the categories of entities that may file a petition, the suggestion was not germane.

A member asked whether the Rule 7007.1 should require members of a creditors committee to make disclosure. Professor Morris said the subject had been discussed but did not seem workable. A member suggested that it would be a good idea for the Committee Note to mention that the reason for not listing the debtor as a party to make disclosure under Rule 7007.1 is that the debtor is required to disclose the information at filing under the proposed amendment to Rule 1007. **A motion to forward to the Standing Committee the proposed amendments to Rules 1007, 2003, 2009, and 2016, and new Rule 7007.1, with the addition of a sentence to its Committee Note referencing the requirement in the proposed amendment to Rule 1007 for the debtor also to make disclosures, with a recommendation that the amendments and new rule be adopted, passed unanimously. A motion to forward the proposed amendments to the Official Forms with a request that their effective date be delayed to December 1, 2002, also passed without opposition.**

Proposed Amendments to Rule 1005 and Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C,and 19 Published for Comment January 2002. Chairman Small announced that the hearing on the proposed amendments scheduled for April 12 had been canceled because no timely request to testify had been received. He observed that only three comments had been received, but that comments historically are filed close to the deadline, which for these proposals is April 22, 2002. A member noted that the comments received by CACM during the time it was

developing the policy adopted by the Judicial Conference in September 2001 had been balanced; advocates of full information available over the Internet and advocates for privacy both had contributed, with the Social Security number (SSN) the principal issue. Judge Walker said a member of CACM had told him that technology exists whereby court records can be searched either by name or by SSN. With this technology someone in possession of only an individual's name can search court records but will not learn the SSN, while someone in possession of an individual's nine-digit SSN can search the same database for a matching number. Such a system would enable a creditor having a person's SSN to determine whether that person had filed bankruptcy or, conversely, whether a specific bankruptcy debtor is the one who owes money to the creditor or simply has a similar name. A participant said the requirement to match a full SSN does not prevent identity theft, because a criminal-minded person can simply put in random nine-digit numbers until a name appears that the person wants to steal.

A member raised the matter of § 342(c) of the Code, which requires the debtor to provide the debtor's full SSN on any notice given by the debtor to a creditor, and another member suggested that the Judicial Conference policy seems to conflict with congressional policy as expressed in § 342(c). Judge Walker said CACM has submitted proposed amendments to the Bankruptcy Code to Congress and that his contact at CACM seems to believe that Congress will accede to the Judicial Conference on the issue of § 342(c). Chairman Small noted that the Judicial Conference policy is for the court to collect the full SSN, so it would be available to the trustee and other proper parties, but not to display it on the Internet. Mr. Sommer said that in 1994, when § 342(c) was enacted, there was no nationwide electronic access to bankruptcy court files. He said Congress now may hold the view that more protection of a debtor's SSN is needed and, therefore, be willing to amend the statute. He suggested that the SSN might be transmitted to the court in some way but not "filed," that it could be treated in the same way an attorney's login and password is handled under the electronic filing system. The court system uses the SSN to detect ineligible repeat filers. It also was suggested that some documents, such as summonses and § 341 Notices might include the SSN but be kept off the Internet by the court. Another member responded that every motion must be accompanied by a notice, which may result in many disclosures of SSN by a debtor and there could be practical problems for a court if these must be kept off the Internet.

Mr. Kohn said he is not comfortable with a simple "yes" or "no" vote on the published proposals and referred the Committee to the range of commentators and of comments submitted in response to CACM's proposals. Ms. Davis mentioned the new policy of the EOUST that requires each debtor to present a Social Security card together with some form of photo identification at the § 341 meeting as a means to combat fraud. She said the new requirement has produced about a one percent rate of mismatched SSNs when the trustee compares the SSN on the petition with the card presented at the meeting. Although some of the mismatches are typographical errors, she said, others are not. A member asked why the Committee should anticipate congressional policy and expressed concern about the idea that a debtor would submit a SSN that would be available only to the court and not to the creditors who also need it. He said he opposes the published proposal.

One participant in the meeting asked where the idea of truncating account numbers (in addition to SSNs) had originated, as such accounts likely are closed down and not useful to thieves. Others responded that the idea had originated in the Committee and that not all accounts are closed or useless, giving utility accounts as an example of the type that usually remain open. A member said that the Committee does not know whether four digits is enough, either for the SSN or for an account number. He said he doubted the Committee ever would know, although one reason for publishing the proposed amendments was to attempt to learn.

A member asked whether the Committee is bound by the Judicial Conference policy. Chairman Small said, although a Judicial Conference policy carries great weight with all committees, the Advisory Committee can decline to amend the rules and forms if it does not agree with the policy or believes it should not apply to the bankruptcy forms and rules. He added that he had told the Standing Committee that the Advisory Committee, although it had agreed to publish the proposed amendments, was not committed to conforming the rules and forms to the Judicial Conference policy. Judge Walker, who served as liaison from the Committee to CACM's privacy subcommittee starting in October 2001 said CACM expects the Committee to act to implement the policy, and act quickly, and said the Committee will be asked to explain any refusal to do so. He added that CACM expects Congress to amend § 107 of the Code to permit a bankruptcy judge to protect a filed document on privacy grounds and anticipates the development of a "privacy document" containing information that would be filed but not available over the Internet. Mr. Rabiej added that CACM also is working with the Department of Justice on a procedure for granting the Internal Revenue Service access to the full SSN. **A motion to refer the published amendments to the Subcommittee on Privacy and Public Access and directing the subcommittee to report at the next meeting passed without opposition.** Chairman Small suggested that the subcommittee should meet on April 12, the date formerly scheduled for a hearing on the proposed amendments, and invite representatives of interested entities for a "focus group" type of discussion on the published proposals. He suggested that representatives from CACM also could be invited, and **appointed Judge Walker and Mr. Shaffer as additional members of the subcommittee.**

Rule 2014. Chairman Small reviewed for the Committee the events of the summer of 2001 that led to the withdrawal of the Committee's proposed amendments from the package submitted to the September 2001 Judicial Conference. The Committee's proposed amendments had drawn two "no" votes and the June 2001 meeting of the Standing Committee, and two chief circuit judges who are members of the Judicial Conference's executive committee later had raised objections, thereby guaranteeing that the proposed amendments would be placed on the discussion calendar for the Judicial Conference where they possibly would have been defeated. Rather than risk the amendments' future, Chairman Small and Judge Anthony J. Scirica, chairman of the Standing Committee, had withdrawn the proposed amendments. One chief circuit judge, he said, opposes any change to the existing standard of disclosure, as the proposed amendments would establish a lower standard of disclosure, in that judge's opinion. The other chief circuit judge, he said, took issue with the proposed "catchall" disclosure of any interest, relationship, or connection that would lead the court or a party in interest reasonably to question

whether the professional seeking employment is disinterested in the case, apparently on the basis that such standard would substitute the professional's judgment for that of the judge. Mr. McCabe said he believed the judges who opposed the Committee's proposals want to retain the existing standard that the professional is required to disclose all "connections," no matter how trivial, and that the Judicial Conference would be uncomfortable with any standard that might appear to limit a judge's discretion. Other members commented that even good law firms violate the existing rule, with some stating in their applications that the firm performed a conflicts check on the largest 50 creditors in the case, admitting by implication that they did not go further. A member suggested routinely holding a hearing on an application for approval of employment 30 days after it was filed. Chairman Small said it could be dangerous to have a hearing when there is no issue, as the court then could appear to be blessing an arrangement that later proves to have been improper. Another member said the reported cases all arose from objections that were filed to fee applications and that one purpose of the proposed amendments would be to avoid allowing a firm to work for a year and not be paid. Others noted that using a hearing at the beginning of a case to create a "safe harbor" for professional would violate § 328(c) of the Bankruptcy Code, which authorizes the court to deny compensation to a professional if a conflict arises or is disclosed during the case, and that a professional takes the risk of such denial if the professional fails to make sufficient disclosure. One member commented that the Committee seemed to be facing a clear choice between bowing to political reality and making its point that the existing rule is not being complied with, and another said the risk of defeat looked so high that he would prefer the Committee to table the proposed amendments. **A motion to table the proposed amendments to Rule 2014 passed without opposition.**

Official Form 6 - Schedule G. The proposed amendments to Schedule G - Executory Contracts and Unexpired Leases were suggested as a means to provide notice of the bankruptcy case to those who are parties to executory contracts or unexpired leases with the debtor. One attendee commented that the proposed change might do more harm than good, because parties who are not owed any money might think they nevertheless need to file a proof of claim. Another said that in the context of intellectual property, especially computer software, nearly everyone is a licensee, and may not realize it or know either the identity or the address of the licensor. A member said a party to an executory contract with a debtor may have a "claim" under the broad definition of that term in the Bankruptcy Code but that the Committee probably does not need to amend the form to make it resemble a schedule of creditors. Another member said it might be sufficient to amend the existing instructions to delete the statement that entities listed will not receive notice of the bankruptcy case unless they also are listed on a schedule of creditors. The consensus was that the Committee could provide for giving notice to parties listed in Schedule G by amending Rules 1007 and 2002. **A motion not to adopt the proposed amended schedule passed without opposition.**

Rule 4003(c). The Reporter introduced the proposed amendment concerning the allocation of the burden of proof of any objection to a debtor's claimed exemptions , which was suggested by Bankruptcy Judge Barry Russell. Judge Russell stated, in a letter to the Committee, that the burden of proof under Rule 403 had been on the objecting party, as it is today under Rule

4003. The difference is that under § 522(l) of the Bankruptcy Code, claiming an item of property as exempt by the debtor makes it so, in the absence of objection by the trustee or other party in interest. Under the Bankruptcy Act of 1898, to which Rule 403 applied, the trustee filed a report of exempt property and the debtor could object. When the identity of the party filing an objection changed, there was a ripple effect that shifted the burden of proof to the trustee. Judge Klein said he understood Judge Russell to believe that Congress did not intend such a shift. Judge Russell, in his letter, cited *Raleigh v. Illinois Department of Revenue*, 530 U.S. 15, 120 S.Ct. 1951 (2000), in which the Supreme Court ruled that the burden of proof for tax claims is governed by substantive nonbankruptcy law, as support for his view that a debtor who claims exemptions under state law should bear the burden of proof in the event an objection is filed. **The consensus was to defer the proposal until the law has developed further, in light of the** *Raleigh* **decision.**

Rule 4008. The proposed amendment would provide a deadline for the filing of a reaffirmation agreement. The proposal arose from a suggestion by the Bankruptcy Judges Advisory Group that the absence of a filing deadline is leading to agreements being filed after the case is closed or not being filed at all, especially in courts which close a case immediately after the entry of the debtor's discharge. In addition, under Rule 4008, if the debtor was not represented by an attorney, the court must hold a hearing within 30 days of granting the discharge. If the agreement is not filed, the court has no way to know a hearing needs to be scheduled, and the deadlines Rule 4008 provides for noticing and holding the hearing may pass. Under section 524(c)(6) of the Code, the agreement is not enforceable if no hearing is held. One problem with amending the rule as suggested, the Reporter said, is that in order to give notice and hold the hearing within the existing deadline of 30 days after the entry of the discharge order, the court would have only a six-day window in which to hear the matter. Chairman Small inquired whether late filing of reaffirmation agreements were a problem for the courts, and received varying responses from members, all of which indicated that any problems are minimal. Mr. Sommer recalled having raised the issue some years previously and said the Committee had been skeptical about the need for an amendment at that time. A member noted that the Code contains a deadline for making the agreement but not for filing it, and another member suggested that what is needed is a deadline for filing the agreement when the procedure for any hearing left up to each court. **A motion to re-draft the rule to provide a deadline for filing a reaffirmation agreement but not for any hearing that might be required was not opposed.** The Report presented a new draft on the second day of the meeting. The chairman said he would delete the provision requiring a debtor not represented by counsel to file a motion for approval of the agreement. If the debtor does not have an attorney, the court automatically schedules a hearing, he said. Mr. Sommer noted that the Bankruptcy Reform Act would require a motion and provides the text it must contain. Members commented that the rule should provide for the creditor to receive notice of the hearing. It also was pointed out that a filing deadline could have a punitive effect on the debtor if the debtor were to lose a car or other property because the agreement were not filed. A member suggested providing for the court to extend the time, and another said the rule should require the creditor to file the agreement, with no penalty to the debtor permitted in the event the creditor fails to do so. **The consensus was to refer the**

**proposal to the Subcommittee on Consumer Issues.**

Rule 5002. The Reporter introduced the discussion and referred to his memorandum to the committee concerning a suggestion that Rule 5002(a) on the appointment of relatives be amended to forbid employment of a law firm in which a relative of the judge is a partner or other owner, but permit the judge to approve the employment if the relative is an associate or non-equity partner. Such a change would conform the rule to "Committee on Codes of Conduct Advisory Opinion No. 58" which the Committee on Codes of Conduct has interpreted to forbid a judge to handle a case in a participating law firm has a partner or other owner who is a relative of a judge. If the relative does not have an ownership interest, recusal is not required. Members suggested, however, that it may not be advisable to base a rules amendment on an advisory opinion and recommended looking to the relevant canon of the Code of Conduct for United States Judges. Another member noted, however, that the Canon is concerned with recusal of a judge, while the rule is concerned with the eligibility of a private individual for appointment to perform professional services in a bankruptcy case, and that the Canon might not solve the actual problem presented. Another noted that even associates receive bonuses and thus have an "interest" because they share in the profits of the firm, and another suggested that many firms would not want to invest an entire summer in someone who could never make partner. It also was pointed out that there are statutory provisions limiting the appointing authority of judges, in particular, 18 U.S.C. § 1910, which makes it a crime for a judge to appoint a relative as trustee, and 28 U.S.C. § 458, which forbids the appointment as an employee any relative of any judge of that court. **A motion to defer the matter indefinitely was not opposed.**

Rule 2002(j). The Reporter explained that shortly before the meeting a member had called to his attention that fact that the rule requires that notice to the Internal Revenue Service (IRS) be sent to the "District Director," a position the IRS has abolished. In addition, an amendment to Rule 5003 which took effect in late 2000 requires the clerk to maintain a register of addresses of government entities for notice purposes. Replacing the obsolete job title now in the rule with a cross reference to the Rule 5003 would resolve the problem, he said, adding that Mr. Kohn had reported that such an amendment would be acceptable to both the IRS and the Department of Justice. As a technical amendment reflecting a structural change within the IRS, the Reporter said, publication of the amendment should not be required. **A motion to approve the amendment and recommend its adoption without publication passed unanimously.**

## Information Items

Bankruptcy Abuse Prevention and Consumer Protection Act of 2001. The Committee discussed with its consultants and the Director and Acting Deputy Director of the EOUST the various provisions of the pending Bankruptcy Abuse Prevention and Consumer Protection Act of 2001 and the amendments to the rules and forms, as well as the new forms, that would be required in the event of the bill's enactment.

Rule 2002(g). The Administrative Office's Bankruptcy Noticing Working Group had requested the Committee to consider amending Rule 2002(g) so that a creditor receiving notices electronically could change its address centrally, rather than having to do so through each court individually. As most volume noticing for all courts now is done centrally by a contractor to whom each court sends the information to be used, amending the rule as suggested would speed the updating of a creditor's address and be more efficient for the courts as well. Although noting that the suggestion appeared to be designed also to facilitate actual notice to creditors, members of the Committee raised several concerns. A member said the certificate of service should say if the notice was sent to the address requested by the creditor. Another member asked whether there would be a similar system for registering addresses for paper notices not sent through the noticing contractor, and noted that it is not unusual for a creditor to have multiple addresses, with different ones used for different purposes during a bankruptcy case. Another asked whether creditor addresses registered at a court, especially those filed later as requests or on proofs of claim, are transmitted to the noticing center. Mr. Waldron said newly filed addresses for a creditor are added to existing lists and that automated systems are used by the contractor to reconcile variations on each creditor's name and to match name variants with registered addresses. **The Chairman referred the suggestion to the Technology Subcommittee for further study.**

## Suggestion for Amendment

Judge Klein suggested that Rule 7026 should be amended to allow exemption or selective opt-out from its requirements in the simpler adversaries and those involving low dollar amounts, such as student loan dischargeability actions filed by a debtor. A member said it might not be necessary to amend the rule, because the only sanction for noncompliance is that discovery is not available. The Chairman requested Judge Klein to compile a list of specific exceptions for the Committee to consider.

## Next Meeting

The Committee discussed Longboat Key, FL, as a possible location for the spring 2003 meeting, with Seattle, WA, as a possible alternate. The Committee also agreed on March 27-28 or April 3-4 as acceptable dates, with the choice to be made based on when the better hotel rates can be obtained.

Respectfully submitted,

Patricia S. Ketchum