ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the January 8, 1988 Meeting

The meeting of the Advisory Committee on Bankruptcy Rules was held in San Diego, California, on January 8, 1988. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edith H. Jones
District Judge Thomas A. Wiseman
District Judge Joseph L. McGlynn, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Joseph Patchan, Esq.
Herbert P. Minkel, Jr., Esq.
Ralph R. Mabey, Esq.
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

Norman H. Nachman, a former member of the Advisory Committee attended for the purpose of presenting recommendations concerning certain proposals received from the Securities and Exchange Commission. Professor Walter J. Taggart, former Reporter to the Committee, attended to assist the transition of the reporting function to Professor Alan N. Resnick.

Peter G. McCabe, Assistant Director for Program Management, and Patricia S. Channon, Staff Attorney, attended the meeting from the Administrative Office of the United States Courts. Barbara O'Connor, Senior Counsel, Executive Office for United States Trustees, also attended, as did Richard G. Heltzel, Clerk of the Bankruptcy Court for the Eastern District of California, William R. Parker, Clerk of the Bankruptcy Court for the Southern District of California, and Gordon Bermant, of the Research Division of the Federal Judicial Center. District Judge Morey L. Sear, Chairman of the Committee on the Administration of the Bankruptcy System and former Chairman of the Advisory Committee, attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the written recommendations submitted by the Executive Office for United States Trustees, various memoranda prepared by Professor Taggart, and the materials concerning Official Forms drafted by the Administrative Office, all of which were distributed to members prior to or at the meeting. An additional copy of each these documents will be filed with the minutes in the office of the Secretary to the Committee on Rules of Practice and Procedure. Advisory Committee actions and assignments by the Chairman appear in **bold**.

Introductions and Thanks to Mr. Nachman and Professor Taggart

Chairman George, after taking note of the many new members of the Advisory Committee, introduced himself. At the Chairman's request, all in attendance introduced themselves in turn. Chairman George then expressed to those present the regrets of the members whose prior commitments made it impossible for them to attend the meeting: Circuit Judge Edward Leavy, District Judge Franklin T. Dupree, Jr., Bernard Shapiro, Esq., and Harry D. Dixon, Esq.

Chairman George observed that Norman Nachman had been a distinguished member of the Advisory Committee since its inception and throughout his long service had imparted a "spirit of understanding and of importance and seriousness" to the Advisory Committee and its work. Chairman George said he doubted the possibility of properly reflecting in the minutes the quality and magnitude of Mr. Nachman's contributions, adding that "whatever we say, Norman, it's inadequate in terms of expressing our gratitude."

The Chairman presented to Professor Taggart a plaque thanking him for outstanding service as Reporter for the Advisory Committee.

Policy Issues Relating to 1986 United States Trustee Legislation

1. Structure of Amendments

Professor Resnick began the discussion by noting that the United States Trustee system was created in the Department of Justice by the 1978 Bankruptcy Code, which provided for a pilot program in 18 judicial districts. Initially, the Advisory Committee treated the United States Trustee in separate rules called "Part X," which were effective only in pilot districts. The 1986 Bankruptcy Amendments both extended the United States Trustee program nationwide and afforded to the United States Trustee additional powers not granted in the 1978 Code. The most important of these is contained in the new § 307 of title 11 which confers on the United States Trustee the right to "raise . . . appear and be heard on any issue," except that the Trustee may not file a chapter 11 plan. Specific rights, such as the right to move for dismissal on particular grounds, were added to other sections of the Code by the 1986 Amendments.

Accordingly, the threshold policy question before the Advisory Committee was a structural one: whether to retain the separate Part X format or integrate procedures involving the

United States Trustee into Parts 1 through 9, the main body of the Bankruptcy Rules.

The Advisory Committee voted unanimously to integrate provisions for the United States Trustee into Parts 1 through 9 of the Bankruptcy Rules.

With respect to the six judicial districts comprising the states of Alabama and North Carolina, which are not expected to enter the United States Trustee program until October 1, 1992, the Advisory Committee discussed how best to provide rules governing the activities of the Bankruptcy Administrators serving those districts. Peter McCabe explained that the position of Bankruptcy Administrator, which also was created by the 1986 Amendments, was intended by Congress to function similarly to the United States Trustee but under the regulation of the Judicial Conference. The Conference has promulgated regulations for the program. Guidelines covering the full range of duties and responsibilities have been written by the Administrative Office under the direction of the Committee on the Administration of the Bankruptcy System. Mr. McCabe noted that there are some statutory differences between Bankruptcy Administrators and United States Trustees.

Joseph Patchan suggested that Part X might be retained and amended to serve as rules for Bankruptcy Administrator districts or, alternatively, that the definitions could be expanded to include the Bankruptcy Administrator. Professor Resnick added that the Advisory Committee also could leave the matter to local rule-making, as it necessarily is now and will remain until the effective date of the new rules, no earlier than August 1, 1990. Ralph Mabey suggested that as the Reporter works on the integration of the United States Trustee, he study the question to determine whether the Bankruptcy Administrator needs to be treated differently from the United States Trustee and, depending on the need ascertained, recommend either a definitional approach or separate treatment as appropriate. Professor Taggart noted that the principal difference between a United States Trustee district and one served by a Bankruptcy Administrator is that more functions are performed by the court because the Bankruptcy Administrator does not have all of the statutory powers of the United States Trustee.

The Reporter will obtain from the Administrative Office information concerning the Bankruptcy Administrator program and draft appropriate provisions for Bankruptcy Administrator districts.

2. Case Closing

The Executive Office for United States Trustees has proposed an amendment to Rule 5009 which would permit the court to accept "a determination by the United States trustee that the [case] trustee has fully administered the estate" and that "[u]pon such a determination . . . the chapter 7 trustee shall be paid the fee provided by § 330(b) of the Code." Section 704(9) requires the case trustee to file a final report and final account of the administration of the estate with both the United States Trustee and the court. Under 28 U.S.C. § 586(a), the United States Trustee has the responsibility for supervising the performance of case trustees. The court, however, has the responsibility for closing a case, but only "[a]fter an estate is fully administered and the court has discharged the trustee." (11 U.S.C. § 350(a).)

The Executive Office supports the proposed change on two grounds: 1) it would avoid the duplication of effort found in some courts which require the clerk's office also to review the final report; and 2) it would speed payment to chapter 7 trustees of the statutory $45 fee which is payable even in no asset cases pursuant to § 330(b), disbursement of which normally is triggered by the closing of the case for statistical purposes, sometimes as much as one year after the final report is filed. The Executive Office noted that a "certification" procedure has been adopted in the "Joint Interim Guidelines Between United States Trustees and Bankruptcy Courts"[1] whereby, upon receipt of a United States Trustee's certification that the estate has been fully administered, the clerk issues a voucher authorizing payment to the trustee.

The Advisory Committee agreed unanimously that the case trustee's administration should be reviewed only once and that the United States Trustee, as the person statutorily responsible for supervising trustee performance, should make the review.

Professor King observed that the problem of expediting payments to trustees appeared to be an administrative matter of simply "changing the trigger" for effecting the disbursement, not amending the rules. Judge Jones and Herbert Minkel both expressed reservations about any change that would make the United States Trustee the sole gatekeeper for the closing process. Both indicated concern that delays might arise in the offices of the United States Trustee and urged that any amendment

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[1]The "Joint Interim Guidelines Between United States Trustees and Bankruptcy Courts" were developed in December 1986 by the Executive Office and the Administrative Office with input from a group of bankruptcy clerks.

preserve the right of a case trustee or debtor to move or apply for an order closing a case. William Parker suggested that to expedite the closing of no asset cases, it might be appropriate to impose a time limit on the United States Trustee.

Professor Taggart stated concerns about the second sentence of the draft language proposed by the Executive Office, which appears on page 2 of Thomas Stanton's December 16, 1987, letter to the Chairman. Professor Taggart suggested that the draft "comes close to the [Rules] Enabling Act limits"[2] by requiring payment to the trustee upon the United States Trustee's determination that administration is complete. Professor Taggart cautioned the Advisory Committee against approving language that would allow a court to forgo its statutory responsibility to determine when an estate has been fully administered. The Reporter agreed and restated doubts he had expressed earlier about "certification," a concept for which there is no statutory authority. The Reporter recommended a procedure by which the United States Trustee would file a motion or application for closing which would contain an allegation that the final report had been reviewed and the case fully administered.

The Reporter will draft an amended Rule 5009 for the Advisory Committee to consider at the next meeting, keeping in mind both the concerns expressed by the Advisory Committee and the limits of the Enabling Act.

3. Dismissal Under § 707(b)

The Bankruptcy Amendments and Federal Judgeship Act of 1984 contained a series of "consumer bankruptcy" provisions, one of which created a new § 707(b) to the Bankruptcy Code. As enacted in 1984, § 707(b) provided that, after notice and a hearing, the court sua sponte, "but not at the request or suggestion of any party in interest," could dismiss the chapter 7 petition of an individual debtor whose debts were primarily consumer debts if it found that the granting of relief would be a "substantial abuse" of the provisions of chapter 7. The Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986 added the United States Trustee as the only party other than the court that may bring a motion for dismissal under § 707(b).

Bankruptcy Rule 1017(e), drafted in response to the 1984 enactment, requires that the notice of any § 707(b) hearing advise the debtor of all matters which the court will consider at the hearing. One problem, noted on pages 15 and 16 of Professor Taggart's memorandum of October 22, 1987, and on page 4 (item 7)

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[2] 28 U.S.C. § 2075.

of Thomas Stanton's letter of December 16, 1987, would occur when such a motion is brought and noticed by the United States Trustee but the court has independent grounds to be considered. The debtor, under Rule 1017(e) and general principles of due process, should not be subject to dismissal on grounds other than those set forth in the notice.

A second issue discussed in Mr. Stanton's letter is the ambiguity which arises from the retention in § 707(b) of the prohibition against the raising of the issue at the request of a "party in interest" in light of the statement in the Conference Report on the 1986 Amendments indicating an intent by Congress that the United States Trustee be permitted to proceed on information supplied by the case trustee, who unquestionably is a party in interest. The Executive Office takes note of a decision, In re Restea, 76 B.R. 728 (Bankr. S.D. 1987), which held that the United States Trustee cannot bring a § 707(b) motion at the request or suggestion of any party in interest.

A third issue, raised by the Reporter, concerns the relationship between dismissal of a case and discharge of the debtor. Dismissal has the effect of denying the debtor a discharge. Rule 4004(a) establishes a time limit for the filing of a complaint objecting to the granting of a discharge, and based upon the similarity in effect of dismissing the case, the Reporter suggested that the Advisory Committee consider setting a time limit on the filing of a § 707(b) motion to dismiss for substantial abuse, although there is no time limit on motions to dismiss on any other ground.

The Advisory Committee discussed the danger of entering a substantive area such as disclosure by the United States Trustee of the source of information forming the basis for the motion, the complexity of the notice problem, and the disadvantage of a time limit in cases in which abuse is not apparent at the outset.

The Advisory Committee deferred a final vote on these issues pending review at the next meeting of a draft amendment to Rule 1017(e) which would provide for such motions by the United State Trustee.

4. Chapter 11 Quarterly Fees of United States Trustee

The Executive Office for United States Trustees has requested two amendments regarding these fees. One would permit the United States Trustee to proceed by application rather than motion for an order to compel payment of overdue quarterly fees. The other would amend Rule 1017(d) to provide that conversion of a chapter 11 case to chapter 7 or dismissal of a chapter 11 at

the request of a debtor be conditioned on payment of any outstanding quarterly fees.

The Reporter stated that imposing a condition on a request for conversion would appear to conflict with § 1112(a) of the Code which establishes an absolute right subject only to very specific limitations which do not include payment of these fees. Professor Taggart pointed out that the Executive Office, on page 3 of Thomas Stanton's December 16, 1987, letter, further takes the position that unpaid quarterly fees in a converted case qualify as chapter 7 administrative expenses entitled to priority under § 726(b) of the Code. The Reporter said that overall the subject appeared to be substantive rather than procedural.

The request for an amendment to Rule 1017(d) was defeated by unanimous vote. (Agenda Item 9(b).)

Joseph Patchan objected to permitting the United States Trustee to proceed by application for an order to compel payment of quarterly fees. He noted the Advisory Committee's past policy of conforming to civil practice as much as possible, with the result that the Rules presently provide for applications to be used only for six purposes, primarily "intramural" in nature: approval of employment of professionals, approval of payment of the filing fee in installments, approval of professional fees, etc. Barbara O'Connor stated that the reasons for the request were primarily to take advantage of the limited notice required for applications and the opinion of the Executive Office that all requests for fees should be treated similarly. Professor King noted, however, that the chapter 11 quarterly fees are fundamentally different from professional fees, because the United States Trustee is seeking to force payment from an unwilling debtor.

The consensus of the Advisory Committee, stated by the Chairman, was not to make any change. (Agenda Item 9(c).)

5. Notice of Fee Applications, Rule 2002(a)(7)

The 1986 legislation amended § 330(a) of the Code to provide that notice of an application for an award of compensation must to given to "any parties in interest and to the United States Trustee." Bankruptcy Rules 2002(a)(7) provides that notice must be given to the debtor, the trustee, and all creditors and indenture trustees of any fee hearing when the amount requested exceeds $500. The Executive Office requests an additional provision to require that the United States Trustee be given notice of all fee applications, leaving the $500 cutoff for others.

[See Professor Taggart's memorandum of October 22, 1987, pages 11-12, and Thomas Stanton's letter of December 16, 1987, page 6; item 11 in both documents.]

The Reporter stated that the present rule may go beyond the scope of rules, as § 330(a) does not provide for any exceptions to the notice requirement. Senior members of the Advisory Committee indicated that the inserting of a cutoff was done out of practical considerations for the noticing and calendaring burden, and Chairman George noted that the clerks are requesting that the cutoff be raised. Concerns were raised about whether a cutoff can be justified at all and, if it can, whether a higher amount should be considered. Joseph Patchan suggested a two-step solution of noticing the United States Trustee of all applications but requiring a general notice only when the amount requested exceeds the cutoff.

The Reporter will draft a proposed amendment and, if a limitation on noticing can be justified, a memorandum setting forth the justification.

6. Standing of the United States Trustee

The Executive Office has suggested the amending of Rule 9001 to include a definition of a "party in interest" which would state that this term, as used in the Rules, is not intended to exclude the United States Trustee. Alternatively, the United States Trustee could be inserted in rules dealing with motions by parties in interest. The basis for this request is the addition to the Code in 1986 of § 307 giving the United States Trustee the right to raise and be heard on any issue. [Letter of Thomas Stanton, December 16, 1987, page 8, item 5.]

The Reporter stated that he was experiencing difficulty discerning Congressional intent on the question of the United States trustee as a party in interest. As an example, the Reporter noted that in §§ 1112(b) and 1307(c), dealing with dismissals of chapter 11 and chapter 13 cases, the statute reads "on request of a party in interest or the United States trustee," but that in § 1208(c), which concerns chapter 12 dismissals, only "a party in interest" is mentioned. Similarly, in § 1128(b), dealing with chapter 11 confirmation hearings, the statute says "a party in interest" may object to confirmation; yet § 307 affords standing on any issue, and no one would contest the right of the United States Trustee to object to confirmation of a chapter 11 plan.

Barbara O'Connor explained that the rationale employed in drafting the 1986 amendments inserting the words "or the United States Trustee" was to distinguish the role of the United States

Trustee in those cases in which the United States appears as a party in interest pursuing a claim, e.g. a tax claim of the IRS or an SBA loan. The purpose was to make it clear that the United States Trustee appears in a supervisory role and not as an adversary or litigant.

Professor King observed that the Advisory Committee deliberately had avoided defining a "party in interest" for 28 years because it was too dangerous to attempt. Professor Taggart said that the enactment of § 307 into the statute made it unnecessary for the rules to treat this subject.

By consensus the Advisory Committee directed that no changes relating to use of the term "party in interest" be made in the Rules.

7. Motions to Dismiss by the United States Trustee

The Reporter noted that the 1986 amendments added provisions to §§ 707(a), 1112(e), and 1307(c)(9) of the Code giving the United States Trustee the exclusive right to request conversion or dismissal of a case if the debtor fails to timely file the list, schedules, and statement required by § 521(1). Professor Taggart, in his memorandum of October 22, 1987, suggests that the procedure for relief should be by motion under Rule 9013 rather than as a contested matter under Rule 9014. The Executive Office concurs as to chapters 7 and 13 but disagrees for chapter 11. In chapter 11, the Executive Office prefers the procedure prescribed in Rule 1017(b) for dismissals based on the debtor's failure to pay an installment of the filing fee and for which the clerk gives the required notice. [Letter of Thomas Stanton, December 16, 1987, page 7, item 23.]

The discussion diverged to another issue when Herbert Minkel questioned whether the United States Trustee can have an economic problem in providing the notice required under Rule 9013 when the basis for the motion - failure of the debtor to file the list of creditors, schedules, etc. - also effectively prevents notice from being given, because the addresses of the creditors are lacking. Ralph Mabey suggested that consideration be given to providing in the Rules for the courts to grant leeway concerning the filing of the list of creditors (which Rule 1007(a) now requires to be filed with the petition), at least in large cases. Professor King indicated that the resulting delay in notice of the filing would mean that the § 341 meeting also should be delayed, so that creditors would not be denied the right to participate, and that other time periods now provided in the Rules also would be impacted. Richard Heltzel and William Parker stated that the filing of "skeleton" petitions with incomplete and inaccurate lists of creditors is a pervasive problem which

results in much duplicative effort and increased costs by clerks' offices when additional creditors appear on the late-filed schedules and that creditors' rights often are jeopardized by the receipt of notice only after the § 341 meeting has been concluded. Mr. Parker suggested that requiring the debtor who files a "skeleton" petition to provide notice of the filing and starting the various time periods from the date schedules are filed, rather than as at present from the date the petition is filed, could alleviate many of the difficulties which now confront both clerks and creditors.

Returning to the original issue, Professor King indicated that the dismissal involved here is not the automatic type such as occurs when filing fees are not paid and that, accordingly, the abbreviated procedure suggested by the Executive Office is not appropriate. Full notice and a hearing should be required.

The Advisory Committee concluded that the list of creditors presents a major issue requiring extensive consideration. At the Reporter's request, William Parker will prepare a memorandum for consideration at the next meeting describing the problem in detail.

The Reporter will prepare a draft rule providing a procedure for motions by the United States Trustee.

The Advisory Committee also discussed two subsidiary issues relating to motions to dismiss filed by the United States Trustee.

a. Motions to Dismiss for Failure to Timely File § 521(2) Statement of Intention

The Reporter noted an apparent conflict between § 521(2), which limits to chapter 7 cases the requirement that the individual debtor file a statement of intention with regard to personal property securing consumer debt and § 1307(c)(10) which gives the United States Trustee the right to file a motion to dismiss a chapter 13 case for failure to file the statement. At present Rule 1007(b)(3) prescribes the form and notice requirements for the statement only for a chapter 7 individual debtor.

The Advisory Committee determined that Rule 1007(b)(3) should not be changed and that no comment should be made in the Advisory Committee notes. The reason for leaving the Rule unchanged, the apparent legislative drafting oversight, should be stated in the Chairman's transmittal letter to the Standing Committee.

b. Time Allowed for Filing in Involuntary Chapter 11

Herbert Minkel raised the matter of a possible conflict between § 1112(e) and the second sentence of Rule 1007(d). Section 1112(e) specifies a time for filing the documents required by § 521 and permits the court to allow additional time for filing this material. Rule 1007(d), on the other hand, prescribes only a two day period for the filing of the list of 20 largest creditors in an involuntary chapter 11. Mr. Minkel suggested that inserting the words "or such other time as the court may allow" would eliminate any possible conflict.

The Reporter agreed to examine the suggestion and prepare a recommendation for consideration at the next meeting.

8. Rule 5002, Prohibited Appointments

The Reporter noted that the present Rule prohibits bankruptcy judges from appointing relatives as case trustees and raised the question whether the Rule should be amended to prohibit United States Trustees from appointing relatives as case trustees. The Executive Office discusses this issue briefly in Thomas Stanton's letter of December 16, 1987, page 8, item 1.

Barbara O'Connor stated that such an amendment might not be necessary because the Code of Federal Regulations contains Department of Justice rules regulating appointments of panel and standing trustees by United States Trustees. She stated further than federal statutes provide criminal penalties for any federal employee who shows favoritism in making appointments.

Professor King noted that Rule 5002 also covers approval by the judge of the employment of professionals, authority which bankruptcy judges continue to exercise. Thus he favored letting the Rule stay as it is pending examination of the other regulations mentioned by Ms. O'Connor to determine their sufficiency. After further discussion which raised additional concerns, Chairman George observed that this is an area which presents complex ethical questions and "invites out attention" in depth.

Chairman George requested that Barbara O'Connor provide to the Reporter and all members copies of the regulations and statutes to which she referred, including any relevant internal guidelines, and directed the Reporter to provide the Advisory Committee with recommendations at the next meeting.

Ralph Mabey called to the attention of the Reporter errors in the references made in Rule 5002 to the Code section dealing

with appointment of a chapter 11 trustee. The correct reference is to § 1104.

9. Admissibility of Recordings of § 341 Meetings

Thomas Stanton, in item 2 on page 8 of his letter of December 16, 1987, raises the question whether Rule 5007 ought to be amended to cover recordings of § 341 meetings. The Advisory Committee Note to the present Rule refers only to proceedings before a bankruptcy judge.

Judge Jones indicated that recordings of § 341 meetings already are admissible in adversary proceedings under the Federal Rules of Evidence. Professor Taggart stated that the rule supplements 28 U.S.C. § 773 which dealt with records of court proceedings and court reporters. When the first bankruptcy rules were promulgated in 1973, sound recording of proceedings was relatively common in bankruptcy courts but quite rare in district courts. The Advisory Committee note to the original 1973 rule provides detailed background on the origin of the rule as a means of affording appropriate status to sound recordings as official records of the case. Professor Taggart suggested that any proposal for amending the rule should be considered in the context of the original 1973 Advisory Committee Note.

The Reporter will research the question and prepare a recommendation for the Advisory Committee.

10. Rule 6003, Countersignatures

The Advisory Committee had no objection to abrogating this Rule on the basis that the United States Trustee now supervises the administration of estates. [Thomas Stanton letter of December 16, 1987, page 8, item 3.]

11. Rule 6005, Appraisers and Auctioneers

The Executive Office has established a policy directing United States Trustees to object to the employment of the same individual as both appraiser and auctioneer in a case and has proposed the amending of Rule 6005 to state a prohibition of such employment. [Thomas Stanton letter of December 16, 1987, page 8, item 4.] Judge Jones opposed such an amendment as unenforceable in rural areas such as Mississippi where the available expertise is extremely limited.

The consensus of the Advisory Committee was to leave this matter to internal regulation by the Executive Office.

12. Rule 5008, Funds of the Estate

Thomas Stanton's letter of December 16, 1987, takes note of the Advisory Committee's prior agreement to redraft Rule 5008 to substitute the United States Trustee for the court in parts (a), (b), and (c) of the Rule. [Stanton letter, pages 1-2, item II, 2; Taggart memorandum, page 13, item 14.] Ralph Mabey suggested that, in light of the statutory mandate to remove the court from administrative supervision of trustees, the substitution of the United States Trustee for the court in the Rule should be expanded also to parts (g), (h), and possibly (i). Professor King stated that the reason Rule 5008 has no equivalent in Part X is that the Advisory Committee felt the subject should be governed by internal Department of Justice regulation and suggested abrogration of the Rule. Barbara O'Connor stated that a major reason to keep the Rule is to require compliance by banks, many of which lack knowledge of § 345 of the Code.

The Chairman asked Ms. O'Connor to address this subject further with a memorandum to the Advisory Committee.

13. Rule 2007, Pre-petition Committees

Ralph Mabey raised a question concerning Rule 2007 which deals with the appointment of a creditor's committee that was formed prior to the commencement of a case. The Rule requires that such a committee be fair and representative, but does not specify who determines whether the pre-existing committee is fair. Herbert Minkel said it appeared that the initial determination should be made by the United States Trustee, with any continuing problem brought before the court for resolution. Ralph Mabey noted that the Rules are silent also concerning the procedure when someone feels that a (post-petition) committee appointed by the United States Trustee is not representative.

Several Advisory Committee members asked that the Reporter, in reviewing the Rules, be sensitive to potential issues involving the United States Trustee's and the court's authority in this area and others which may appear at first to be non-controversial.

The policy to be followed is that when the statute allows the United States Trustee to perform administrative functions, the Rule allow the Trustee to do that, but that instances of doubt be resolved in favor of retaining power in the court, in recognition of the fact that the United States Trustee is not a judicial officer. The Reporter intends to provide the Advisory Committee with alternatives on all issues.

Proposals of Bankruptcy Clerks

Peter McCabe summarized a series of informal proposals for amendments compiled by bankruptcy clerks of court. Chairman George noted that some of the requirements of the rules also have a substantial fiscal impact on the court system which the Advisory Committee should take into consideration in its deliberations. The Chairman asked Mr. McCabe and the bankruptcy clerks present to address the fiscal aspects of the proposals during the presentation.

1. Rule 2002(g)

This rule presently requires that if a proof of claim is filed giving a different address than is shown on the schedules, the subsequent address be used to contact the creditor. The impact of this rule is very burdensome, as the clerk's office must devote substantial resources to checking the address on every proof of claim in every asset case against the address shown for the creditor in the debtor's schedules. Richard Heltzel stated that in his court this task requires the full time effort of two deputy clerks. The clerks would like to have the final sentence of Rule 2002(g) deleted, so that creditors would have to notify the clerk separately of any change of address under the remaining part of the Rule.

Patricia Channon noted that a revised proof of claim form, which was preliminarily approved by the Advisory Committee in 1987 for testing in the courts, provides a box for the creditor to check indicating that a new address has been shown. Ms. Channon suggested that this form change might solve the problem, as those proofs of claim containing new addresses could be identified easily.

The Chairman directed that this problem be taken up at the next meeting, with written input from the clerks and an update on the testing of the new form. Patricia Channon was assigned to organize the requested report.

2. Rule 4004(g)

This rule requires the clerk to send to all creditors a copy of the final order of discharge. The rule makes this a non-delegable noticing function of the clerk. With well in excess of one million notices a month being generated by the bankruptcy courts and the bulk of the cases having no assets, the Judiciary is incurring a significant expense to provide creditors with a document that imparts little information. Two suggestions have been made: 1) return the mailing of this document to the delegable category, or 2) revise the § 341 notice to include a

statement that "unless you receive further notice, the debtor will be discharged according to law" and affirmatively require the clerk to give notice of the filing of any objection to discharge.

Discussion of these suggestions raised the issue of the injunction which issues with the discharge and which is narrower in scope than the automatic stay in effect prior to discharge. Members were concerned that contempt of discharge actions might increase if creditors are not reminded of the injunctive provisions and, conversely, that creditors need to be informed concerning when collection of non-dischargeable debts safely may be resumed. Reservations were expressed about the efficacy for these purposes of the present form with its bare statutory references. Judge Jones expressed strong support for writing all forms in plain english. Herbert Minkel viewed with favor a permissive procedure whereby the debtor could provide the notice under the court's imprimatur.

By consensus, this issue is to be considered further at the next meeting.

3. Rule 2013(c) Record and Rule 2013(c) Report

The suggestion was made to change the rule to require the United States Trustee to keep the record and prepare the report prescribed by the Rule, as the United States Trustee now is the appointing authority for case trustees. A number of objections were raised including the fact that the court may award a different amount than is requested in the application and the principle of the court's having a responsibility to provide a facility for people to come in and look at the report, while 28 U.S.C. § 586 imposes no equivalent responsibility on the United States Trustee.

This suggestion was defeated by consensus of the Advisory Committee.

4. Rules 3004 and 1019(1)(A)

Proposals to relieve clerks of the duty to notify a creditor on whose behalf the debtor ~~or trustee~~ has filed a proof of claim and to require the filing of new schedules upon conversion of a chapter 11, 12, or 13 case to chapter 7 (proposed on behalf of case trustees), were defeated by consensus of the Advisory Committee.

The Chairman directed Peter McCabe to coordinate with the clerks and with the Reporter in preparing a report for the next meeting on those issues raised by the clerks which the Advisory

Committee had decided to consider further, in particular, the problem of debtors who fail to file schedules and the impact of this failure on the personnel and financial resources of the system. This report is also to include discussion of issues raised by the expansion of the United States Trustee system and whether clerks should continue to perform certain functions now statutorily assigned to the United States Trustee. The Chairman further requested Barbara O'Connor to confer with those preparing the report, with a view toward producing a joint report. The joint report is due 30 days prior to the next meeting.

Official Forms

The Chairman introduced the subject, advising the members that a Task Force on forms had been at work for some time to update and modernize all bankruptcy forms, both Official and unofficial. He informed the members that two Official Forms as revised by the Task Force had been approved by the Advisory Committee previously for experimental use in selected courts. The Chairman noted that the Advisory Committee was not in agreement concerning whether the testing procedure violates the Bankruptcy Rules or the rules of the standing Committee on Rules of Practice and Procedure. He stated that he and others had studied the Committee's rules but could find no mention of forms, leaving no clear direction concerning the propriety of testing or whether a period of public comment is needed when changes are proposed. The Chairman added that the chairmen and reporters of all of the Advisory Committees would be meeting with the standing Committee on February 4, 1988, and that the question of procedures for Official Forms would be raised.

The Chairman also reminded the members that many of the Bankruptcy Rules refer to the Official Forms and that in some cases the reference is to a specific form by number. Thus changing the Official Forms or deleting some of them may require amending of Rules as well.

Professor King said he dissents from the program of testing the two forms preliminarily approved "if they are in violation of Rule 9009." Chairman George stated that he supports the idea of testing the revised forms in a limited number of districts to provide the Advisory Committee with hard information on their potential effectiveness, even though the revised versions probably do violate Rule 9009.

The Chairman indicated his intention to seek from the Standing Committee and the Judicial Conference authorization to use the revised forms on a pilot basis.

Chairman George posed four policy questions for decision by the Advisory Committee:

1. Should the number of Official Forms be reduced? (Agenda Item 3)

2. Should the Advisory Committee be "in the forms business" at all?

3. If the number of Official Forms is reduced, should the Advisory Committee create a new, quasi-official category of forms reviewed by the Advisory Committee but not by the Judicial Conference? (Agenda Items 3 and 7)

4. If public scrutiny of proposed changes to the forms is wise, what is the appropriate period for publication and receipt of comments?

The discussion of these questions and agenda items elicited diverse views. Some members, including Judges McGlynn and Barta, appeared to favor transferring full responsibility for all forms to the Administrative Office and questioned whether the Advisory Committee needs to be involved with Official Forms at all. Judge Jones endorsed retaining as official only the forms listed in the first two groups in Agenda Item 3 plus the § 341 meeting notice. Professor King opposed most of the proposals for deletions or revisions, except those treating matters now statutorily assigned to the United States Trustee.

The reason given for proposing the retaining of some forms as official and the dropping of others centered on the need for uniformity in the information requested by the court from the public and provided by the court to the public. Patricia Channon stated, however, that the question is complicated by the advent of automation, which will require greater uniformity in format than now exists, and by certain of the proposals of the Forms Task Force for revising the petition (Official Form No. 1) to provide the Administrative Office with statistical data. Professor King said that Rule 9009 permits alterations to Official Forms as appropriate and that he doubted absolute uniformity could be imposed without an amendment to the Rule. Chairman George recalled that Professor Taggart had proposed another standard for evaluating the official status of forms based upon whether the form is one used by litigants or one used by judges and suggested that these earlier recommendations again be made available to the members.

Patricia Channon said that the purposes of Advisory Committee-approved forms would be to facilitate changes when needed and to obtain for certain important but non-official forms

the benefits of widespread publication now enjoyed only by the Official Forms. Peter McCabe stated that the non-official bankruptcy forms drafted and printed by the Administrative Office as Director's forms number more than 100 and that there was doubt that commercial publishers would be willing to print all of these. Rather, the Administrative Office believes that publishers would print a selected group of forms approved by the Advisory Committee.

The Advisory Committee voted to retain the concept of Official Forms but to reduce the number of forms that are official.

The proposal to create a third category of less-than-official, Advisory Committee-approved forms was defeated.

The Administrative Office will revise for the next meeting the proposals of the Forms Task Force concerning forms to be retained as official and those which no longer would be official and will address those considerations of uniformity and any other factors of which the Advisory Committee should be aware. Chairman George directed the Reporter also to prepare recommendations concerning forms that should be removed from the official category, using as a basis Professor Taggart's earlier memorandum. Barbara O'Connor was requested to prepare recommendations on behalf of the United States Trustees.

Chairman George indicated that the Advisory Committee would have an interest in reviewing all bankruptcy forms now in use and requested Peter McCabe to provide copies for the next meeting.

Consideration of the specific proposals of the Forms Task Force for revisions to the petition, schedules and statements (Official Form Nos. 1, 4, 6 through 8A, and 10) was deferred to the next meeting. Corrected copies of the proposals will be provided to the members in advance of the meeting.

The Administrative Office also will report at the next meeting on the progress of the testing of the proof of claim and § 341 notice.

Chairman George requested that Judge Sear be provided with copies of all proposals for changes to the Official Forms.

Proposals from the SEC

Norman Nachman referred the members to Professor Taggart's memorandum on this subject dated December 29, 1987. Mr. Nachman noted also that the SEC proposals did not emanate from the Commissioners. Rather, they are proposals of counsel to the

Commissioners. SEC counsel transmitted the proposals to the Advisory Committee directly to assure their consideration at an early stage in the drafting process.[3]

The first proposal is that Exhibit "A" be made part of the body of the petition in a corporate case and that Rule 1002 be amended to require filing of the exhibit, because some debtors fail to complete and file the exhibit. Mr. Nachman stated that the current petition prescribes filing of the exhibit, that Rule 9009 says the Official Forms are to be followed, and that he did not think the form or Rule 1002 should be changed.

William Parker noted that the Forms Task Force has suggested that Exhibit "A" be made applicable also to partnership cases in order to make the information concerning affiliates and beneficial owners available to trustees and other interested parties in partnership cases. Herbert Minkel pointed out that after the 1978 Bankruptcy Code was enacted the SEC, in an official release by the Commission, went on record against allocation of scarce resources to routine participation by its staff in chapter 11 cases.

The second proposal would require the debtor to give to all shareholders a general notice of their right to participate. Mr. Nachman said that in the case of any major publicly-owned corporation, there is a committee to represent shareholders which is well-represented by capable attorneys. The proposal states that the Commission has received some letters from individuals who claimed they did not know what was going on in the chapter 11 case. Mr. Nachman pointed out that since shareholders in a large corporation change daily, some shareholders who receive copies of the court-approved disclosure statement later in the case may, in fact, be learning details of the case for the first time. Notice at the beginning of the case, however, would not solve this problem for the shareholder who purchases after the case is underway. Mr. Nachman said that monitoring of a publicly-held debtor's chapter 11 case for the shareholders is best left to the professionals and recommended no change in the rules.

The third proposal concerns requiring notice to shareholders of any proposed sale of assets or of a single, substantial asset. Professor Taggart noted that in the 1987 rules, Rule 2002(d) was amended to provide shareholders with notice of any proposed sale of "substantially all of the debtor's assets." Mr. Nachman noted that the proposal also includes a single asset, especially one

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[3]SEC general counsel Daniel L Goelzer and assistant general counsel Richard A. Kirby appeared in support of their proposals at the November 20, 1986, meeting of the Advisory Committee.

which provides significant income. He noted further, however, that the proposal assumes no counsel are participating, an unrealistic view. Herbert Minkel noted that case law has developed requiring notice by publication of the sale of any substantial asset outside the provisions of a plan of reorganization. The rationale of these cases includes statements concerning the difficulty of providing timely notice to shareholders when most of the shares are held in street names. Mr. Nachman recommended against any change in the rules.

The fourth proposal would "clarify" that published notice is required under Rules 2002(d) and (k) of the bar date for filing claims to afford notice to creditors whose names do not appear in the debtor's schedules. Publication of a bar date is not mandatory now, but Mr. Nachman said that it is in the self-interest of the debtor to publish such notice. Mr. Nachman stated that he had no problem with making publication mandatory and noted a December 29, 1987 decision on rehearing of the 10th Circuit case in Standard Metals Corp. stressing the importance of affording due process to potential claimants in a bankruptcy case.

Herbert Minkel objected because the only effective publication in the case of a publicly traded corporation would be in the Wall Street Journal at $60,000 per day, an amount which may exceed the available assets. He said that Mullane v. Manufacturers Hanover Bank requires due process. Professor Taggart said that the SEC also is concerned with making the discharge viable and ensuring that the shareholders who vote on the plan get the bargain they expected. Mr. Nachman noted that some debts may be exempt from the discharge that accompanies confirmation; in such cases, the shareholders may find the value of their shares eroded when there is a substantial non-dischargeable debt to be paid in addition to the payments called for in the plan. Thus the SEC appears to be seeking to protect the shareholders and not the creditors. Mr. Nachman noted that publication can be only a supplement at best, since due process requires that actual notice be given to all whose names and addresses are known. The Reporter noted that publication appears to be common in large cases and can be requested in any case.

Professor King made a motion that notice by publication not be mandatory, which carried by unanimous vote.

The fifth proposal would permit the filing of class proofs of claim. Mr. Nachman noted that the original decision in the Standard Metals case (which was reversed in the December 29, 1987, decision on rehearing) had held against allowing class proofs of claim. The decision on rehearing did not reach this issue but the matter does arise in a 7th Circuit case, American

Reserve, in which a decision is imminent. Mr. Nachman said he would recommend against a change in the Rules but suggested that the Advisory Committee might want to await the 7th Circuit's decision before acting. Professor King stated his view that any change permitting class proofs of claim would have to be statutory and could not be accomplished in the Rules. Ralph Mabey raised the point that most attempts to file such claims involve claims that are unidentifiable because of an illness not yet manifest such as asbestosis. Mr. Mabey said he supported the motion but on grounds that a decision by the Advisory Committee to permit class claims would be premature.

Professor King made a motion that no change in the Rules be considered, which carried unopposed.

The sixth proposal would amend the Rules to give the SEC the absolute right to intervene. Mr. Nachman noted that the SEC may raise and may appear and be heard on any issue in a chapter 11 case under § 1109(a), but may not appeal. He noted also that the Standard Metals decision reiterated the SEC's right to participate in any appeal brought by another party. Mr. Nachman recommended against accepting this proposal.

Professor King moved that no change in the Rules be considered, which carried unopposed.

The seventh and final proposal would have the Rules provide for the debtor to obtain from the record holders ("the street names") the number of beneficial owners so that the correct number of plans, ballots, etc. can be provided, with the record holders required to file affidavits concerning the implementing of the distribution of the documents, the vote tally, etc. The proposal also would require the debtor to reimburse the record holder for the cost of distributing the documents to the beneficial owners. Mr. Nachman said that this procedure already is followed in many cases and that organizations exists to provide this service to debtors. Moreover, he stated that the general powers of the bankruptcy court are sufficient, in his opinion, that the names and addresses could be disclosed to the debtor under a protective order if the circumstances warranted. He also expressed concern about requiring a procedure which would impose extra cost on the debtor. He recommended against the proposal.

Professor King moved that the Rules not be changed, and the motion carried unanimously.

Professor King also made a motion that all seven SEC proposals be rejected. This motion also carried unanimously.

Rule 9006 - Agenda Item 6

Professor King stated that a mistake had been made in the 1987 Rules when Rule 9006(a) was amended to increase from seven days to eleven days the time period from which computation of the running of the time may exclude weekends and holidays. The reason the Rule was changed was so that the Bankruptcy Rule would track amended Rule 6 of the Federal Rule of Civil Procedure. The effect, however, has been to increase what formerly were strict time periods in the Bankruptcy Rules, especially the 10-day period for filing a notice of appeal. The increase now enlarges a formerly strict 10-day time period to as much as 14 days and also makes vague the time when an order becomes final. Professor King recommended amending the rule to restore the former seven day period.

Professor King further requested that, if the Advisory Committee approved the change, it also approve expediting of the process of effecting the amendment. He suggested that the Chairman present the amendment to the standing Committee in time for the Judicial Conference to consider the matter at its March 1988 meeting, a procedure which would allow the Supreme Court to transmit the amendment to Congress before May 1, 1988, and the amendment to take effect August 1, 1988.

The suggested procedure would bypass any public comment period, and the Chairman inquired whether any precedent existed for such action. Professor King stated that the standing Committee and the Judicial Conference had permitted a similar expediting after Congress in 1976 added chapter IX to the Bankruptcy Act, so that implementing rules could be ready close to the effective date of the new chapter. Professor King indicated that expediting could be justified based on the technical nature of the amendment, which would do no more than return bankruptcy practice to what it was prior to August 1, 1987.

Professor King made a motion that Rule 9006(a) be amended to restore to seven days the time period (now eleven days) which may be computed exclusive of any intervening Saturdays, Sundays, and legal holidays, and that expediting of the amendment process be sought. Judge Barta seconded the motion. Judge Wiseman and Judge Mannes voted against the motion. The Chairman announced the motion as carried.

Chapter 11 Scheduling Orders

Judge Sear requested that the Advisory Committee consider approving a rule to require the entry, in the early stages of a chapter 11 case, of a scheduling or operating order similar to

that required by Rule 16 of the Federal Rules of Civil Procedure. Judge Sear said such a rule would assist the Committee on the Administration of the Bankruptcy System in its efforts to improve case management procedures in bankruptcy courts. Judge Sear further requested that once the rule were approved it be circulated immediately as an interim rule with a recommendation for adoption as a local rule pending amendment of the national Bankruptcy Rules. Professor King requested that the Bankruptcy Committee transmit to the Reporter draft language for the Advisory Committee to consider.

The Chairman directed that the matter be placed on the agenda for the next meeting.

Assignments

Judge George assigned to each member special responsibility for a part of the Bankruptcy Rules as follows:

Judge Leavy-	Part 8	Judge McGlynn-	Part 7
Judge Jones-	Part 5	Judge Barta-	Part 4
Judge Dupree-	Part 1	Judge Mannes-	Part 5
Judge Wiseman-	Part 8	Jerry Patchan-	Part 1
Ralph Mabey-	Part 2	Herb Minkel-	Part 3
Harry Dixon-	Part 6	Barney Shapiro-	Part 7

Larry King- Part 9

Next Meetings

The Advisory Committee set the following dates for further meetings:

May 13-14, Chicago
July 8-9, Lake Tahoe
September 23-24

The location of the September meeting is not firm. The members expressed a preference for Bar Harbor or another site in Maine. The Chairman assigned Judge Wiseman to secure a location.

Deferred Topics

The Advisory Committee deferred to the next meeting consideration of chapter 12 amendments and oversight of local rules.

Respectfully Submitted,

Patricia S. Channon

Patricia S. Channon
Staff Attorney
Division of Bankruptcy

Dated:

Attachment: Joint Interim Guidelines Between United States Trustees and Bankruptcy Courts