Advisory Committee on Bankruptcy Rules

Minutes of the Meeting of

January 17-18, 1991

The Advisory Committee met January 17 and 18, 1991, commencing at 9 a.m. each day, at the Ritz Carlton Hotel, Laguna Niguel, California. The following members were present:

Circuit Judge Edward Leavy, Chairman
Circuit Judge Edith H. Jones
District Judge Joseph L. McGlynn, Jr.
District Judge Malcolm J. Howard
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Bankruptcy Judge James W. Meyers
Professor Lawrence P. King
Joseph Patchan, Esquire
Harry D. Dixon, Esquire
Ralph R. Mabey, Esquire
Bernard Shapiro, Esquire
Herbert P. Minkel, Jr., Esquire
Professor Alan N. Resnick, Reporter

The following persons also attended the meeting:
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California
Peter G. McCabe, Assistant Director, Administrative Office of the U.S. Courts
Patricia S. Channon, Bankruptcy Division, Administrative Office of the U.S. Courts
Gordon Bermant, Federal Judicial Center
John E. Logan, Director, Executive Office for U.S. Trustees

Bankruptcy Judge Lisa Hill Fenning, Central District of California, attended as an observer.

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 to the Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in bold.

Expedited Amendments to Rules 5011 and 9027

The Reporter provided the following background:

On December 1, 1990, the President signed the Judicial Improvements Act of 1990, (Pub. L. No. 101-650). Title III of the Act, "Implementation of Federal Courts Study Committee Recommendations," includes section 309 which, among other things, amends 28 U.S.C. §1334(c)(2) and 28 U.S.C. § 1452(b). These provisions govern abstention from particular proceedings in bankruptcy cases (§ 1334(c)(2)) and remand of an action removed to the bankruptcy court (§ 1452(b)). The effect of the amendments is to remove the prohibition of an appeal to the district court of a determination by a bankruptcy judge in a motion to abstain under 28 U.S.C. § 1334(c)(2) or a motion to remand under § 1452(b). The purpose of the statutory changes is to permit the bankruptcy court to decide these issues subject to traditional appellate review by the district court as recommended by the Federal Courts Study Committee. See Report of the Federal Courts Study Committee, April 2, 1990, page 77. Implementation of this report is the purpose of Title III of the Act.

The congressional intent could be frustrated, however, if Bankruptcy Rules 5011(b) and 9027(e) [to be redesignated as Rule 9027(d) under the proposed 1991 amendments to the rules] are not amended to permit the bankruptcy court to enter orders on these motions. Currently, these rules provide that the bankruptcy judge shall make a recommendation to the district court but not enter an order. The reason for limiting the bankruptcy judge's role in this manner under the present rules was concern that it would not be appropriate for a bankruptcy judge to enter a binding order that is not reviewable by an Article III judge. By permitting appellate review by the district court, the recent legislation has removed this concern.

Shortly after enactment of the statutory amendments, Professor King had written a letter to the Chairman concerning the desirability of prompt conforming amendments to the rules and stating that precedent existed for expediting such amendments. In 1976, after the Committee had drafted rules for Chapter IX cases under the Bankruptcy Act of 1898, the Congress substantially amended Chapter IX of the Act. The Committee quickly approved conforming amendments to the package which already had been submitted to the Supreme Court. These amendments were transmitted to the Congress as part of the Chapter IX rules package without any public comment on the later submission. Professor King stated that the proposed amendments to Rules 5011 and 9027 are, if anything, less controversial than were the Chapter IX amendments.

The Reporter recommended that the Committee request similar treatment for the amendments he had drafted to implement § 309 of the 1990 Act and stated that he had also prepared a transmittal letter for Judge Leavy's signature outlining the request to the Chairman of the standing Committee. Professor Resnick added that the new statute and the current rules could co-exist for the two years that would be required if normal procedures were followed, but that delaying rules to implement the statutory amendments would frustrate the congressional purpose set out in the legislative history.

No opposition having been expressed to the proposed amendments or to their expedited approval, the Chairman signed the transmittal letter. The proposed amendments and transmittal letter were sent immediately by overnight courier to the Chairman of the standing Committee, and copies were sent from the meeting site by regular mail to all members of the standing Committee.

Report of Subcommittee on Chapter 13

Ralph Mabey reported that the subcommittee had met December 6, 1990, in Raleigh, NC, with some of the proponents of suggestions for Chapter 13 rules changes and with representatives of both the debtors' and the creditors' bar. Following the meeting, Professor Resnick had written a memorandum (dated 12/10/90) which provides a framework for further discussion and the developing of appropriate draft amendments for consideration by the Committee, probably at its June 1991 meeting. Mr. Mabey stated that while changes to accommodate Chapter 13 cases are not urgent, the meeting in Raleigh had convinced him that a review of the rules applicable to Chapter 13 cases is long overdue.

The Reporter reminded the Committee that in considering specific items put forth by the Chapter 13 Subcommittee, the Committee should keep in mind that the proposals are intended to be part of a package, that draft language has not been prepared, and that actual language of any proposals would be submitted at a future meeting. Accordingly, votes would be more in the nature of an agreement in principle to certain changes in the rules.

Technical Amendments. Two proposals were described by Professor Resnick as technical. The first would amend Rule 1017(d) to provide that the date of the filing of the notice of conversion under § 1307(a) of the Code will be deemed to be the date of the entry of the order of conversion and such duties of the debtor as the filing of a schedule of postpetition debts under Rule 1019 would be triggered. The second proposal would establish a deadline for filing a plan when a case is converted to Chapter 13 by adding a sentence to Rule 3015(b) to provide that a plan must be filed within 15 days after conversion to Chapter 13. A motion to approve the two amendments in principle

carried, unopposed. Professor King requested that the Reporter research § 348 and any related sections of the Code for the possibility that either amendment might create a conflict with a statutory provision.

Time Periods. The next topic was whether the time periods in the rules should be amended to accommodate those districts that desire to hold the § 341 meeting and the confirmation hearing on the same day. An underlying issue is whether nationwide uniformity is necessary. One thing that became clear at the Subcommittee meeting, Professor Resnick said, is that uniformity does not exist now. The Subcommittee favored permitting local variations to continue and amending the rules to accommodate them.

If the rules were to allow for holding the § 341 meeting and the confirmation hearing on the same day, one or more of the time periods now prescribed would have to be adjusted. The necessary adjustment could be accomplished several ways: lengthening by five days the permissible time within which the §341 meeting is to be held, shortening from 25 to 20 days the notice period for the confirmation hearing, and shortening from 15 to 10 days the time for filing the plan. The Subcommittee opposed shortening the time to file a plan, however.

The Reporter recommended extending the time for holding the § 341 meeting rather than shortening the notice given to creditors. The attorney for ChemBank who attended the Subcommittee meeting had objected strongly to shortening the notice given to creditors, he said. Large creditors, especially, often need the full 25 days notice, and if the § 341 meeting and the confirmation hearing are to be held the same day, the extra five days to prepare would become even more important. Accordingly, the Reporter recommended extending to a maximum of 45 days the time for holding the § 341 meeting.

Mr. Minkel questioned whether a five day extension really would be long enough and to enable all courts to comply with the rule. Professor Resnick said the trouble with a longer extension would be the corresponding extension of many other deadlines, *i.e.*, filing claims, filing motions to dismiss for substantial abuse, and filing complaints relating to the debtor's discharge. Judge Howard and Mr. Logan both stated that the proposed change probably would be helpful in the districts where Chapter 13 works well but might not help elsewhere.

A motion to instruct the Reporter to draft an amendment permitting the § 341 meeting to be held up to 45 days after the filing of the petition drew a tie vote, (5-5). The Chairman then voted in favor of the proposal, and the motion carried. The Chairman said he had been persuaded by Judge Howard's statement

that many districts do not follow the present rules in Chapter 13 cases.

Filing of Claim by Secured Creditor. The Reporter stated that Rule 3002(a) creates an ambiguity because the use of the word "unsecured" gives the impression that the filing of a claim is the key to allowance only for unsecured creditors, whereas, in fact, a secured creditor that does not file will not have an allowed claim. The secured creditor's lien will remain valid, however. Confusion arises because not filing a claim affects the secured creditor's participation in the case but does not affect that creditor's lien. A further problem is that secured creditors often erroneously think that Rule 3002(c), (prescribing the filing deadline), does not apply to them. Thus secured creditors often file late and courts then modify confirmed plans accordingly, because there is no objection. The Reporter suggested that both ambiguities could be cleared up by deleting the work "unsecured" from Rule 3002(a).

In Chapter 13 cases, Professor Resnick said, a further problem arises in districts that delay the confirmation hearing until after the claims bar date. In those districts, a secured creditor who did not file a claim but wants to object to confirmation of the plan can be denied the right to do so because that creditors has a valid lien but not an allowed claim.

Professor King stated that the original draft of Rule 3002(a) was written as the Reporter now recommends. The public comments, however, asserted that requiring a secured creditor to file conflicts with the statute. As a result of these comments, the Committee had inserted the word "unsecured." Professor King said that if the amendment were approved he would want a legal memorandum on whether requiring a secured creditor to file a claim conflicts with the statute. Mr. Minkel said that if the rule were so amended, the Committee Note would need to explain that a secured creditor's rights under § 506(d) of the Code are not affected and neither is the creditor's lien.

A motion to approve deleting the word "unsecured" from Rule 3002(a) carried by a vote of seven to four, (7-4).

Rule 3004. The issue is whether a secured creditor should have an opportunity to correct a claim filed by the debtor on the creditor's behalf. The Subcommittee recommended that a secured creditor be afforded a period of 30 days or until the bar date, whichever is later, to correct a claim filed by the debtor. No similar right would be afforded an unsecured creditor. The absence of such an opportunity for the creditor to correct, it was noted, can subject the debtor to later relief from the stay or foreclosure on the lien. A motion to amend Rule 3004 to permit a secured creditor to correct a claim filed by the debtor

within 30 days or before the bar date, whichever is later, carried with one (1) opposed.

Requirement of Confirmation Hearing. Mr. Mabey stated that one very controversial area was whether the court must hold a confirmation hearing. Those who think not, he said, interpret §1324 of the Code in light of the flexibility afforded by § 102 of the Code ("'after notice and a hearing', or a similar phrase"). The Committee voted, with three (3) opposed, to refrain from considering any amendments related to mandatory vs. optional confirmation hearings on the basis that the issue is a substantive one.

Rule 5005 and Filing of Claims. A number of persons have suggested permitting claims to be filed with the Chapter 13 trustee. The Subcommittee opposes this, but Judge Howard said he disagrees with the Subcommittee on the issue. Judge Howard said he favors amending Rule 5005 to permit claims to be filed with the clerk or the clerk's designee. He added that claims are processed by Chapter 13 trustees in many districts and that the practice is not restricted to Chapter 13 but also occurs in large Chapter 11 cases. Mr. Minkel observed that the Chapter 11 examples involve claims in only one case, while the Chapter 13 trustee handles many cases, so that the likelihood of errors is multiplied. He asked what protection there would be for a creditor in the event of a mistake. Professor Resnick said he was concerned that the Chapter 13 trustee's office be open and properly staffed for the filing of claims. Mr. Logan said that the operations of Chapter 13 trustees vary widely in quality and he is not confident, if discretion existed to permit filing of claims with trustees, that this discretion would be used wisely. Mr. McCabe described some of the safeguards required by the Judicial Conference when claims in a Chapter 11 case are processed by a person other than the clerk and said that these safeguards often include supervision of the work by the clerk, even when the function is performed outside the court and by personnel paid by the debtor. A motion to amend Rule 5005 to permit claims to be filed either with the clerk or the clerk's designee drew a tie vote, (6-6). The Chairman then voted against, and the motion failed. Judge Leavy said he voted to defeat the motion because he believes strongly that "what a court does is no better than its records, and this is a step toward poor recordkeeping."

Mr. Mabey recited a number of other suggestions that the Subcommittee is continuing to study. He said the Subcommittee intends to circulate a comprehensive report in time for consideration of the final recommendations at the June 1991 meeting.

Rule 2016 (Agenda No. 3)

The Reporter had been requested to consider and report on the following questions concerning Rule 2016:

(1) Should the rule be amended so that chapter 7 and chapter 13 case trustees in small cases will not have the burden of keeping detailed time records?

The Reporter said he was not recommending a change in the rule to accommodate trustees in small cases, but that, in the event the Committee wanted to amend the rule, he had drafted a proposed subsection (c) to Rule 2016 that would waive the requirement for detailed time records when the total amount of compensation requested to be paid from the estate does not exceed $150.

Professor King said that waiving the requirement of time records would conflict with the statute, and Judge Howard said he did not support any eroding of judicial discretion in this area. Judge Meyers said that a trustee who has many cases does not know, at the inception, which will have recovery of assets. Accordingly, many trustees do not keep any records.

A motion not to change the present rule carried, with two (2) opposed.

(2) Should the rule be amended so that investment advisors and other professionals who usually are not paid on an hourly basis will not have the burden of keeping detailed time records?

The Reporter had drafted a proposed subsection (d) that would relieve certain professionals of the requirement to submit detailed time records if compensation on a basis other than time spent, as permitted by § 328(a), has been approved.

Professor King noted that § 328(a) also contains an escape clause if the originally approved terms later prove to have been improvident and permits the court to reconsider the basis as well as the amount of the compensation at issue. Accordingly, from a policy standpoint, he believes it would be best to continue the requirement of time records.

A motion to leave Rule 2016 unchanged carried, unopposed.

Mr. Dixon requested that a subcommittee be appointed to study the full range of fee issues, *e.g.*, how retainers are to be treated, rather than considering various suggestions piecemeal, and that it study the issues in chapter 7 and 13 cases as well as chapter 11 ones. **A motion to this effect produced a tie vote. The Chairman then voted against, and the motion failed.**

Requirement of Holding Hearings in Rules 6002, 6004, 6006, 6007, and 9019

The Reporter stated that he had considered the suggestions of Bankruptcy Judge Leif Clark (TX-W) concerning the necessity for hearings in connection with certain activities and had concluded that several rules should be amended because they are inconsistent with the Bankruptcy Code.

Rule 6004. Judge Clark had said he could ascertain no statutory basis for the rules to treat sales free and clear of liens differently from other sales of property of the estate. Accordingly, the Reporter had proposed amendments to subdivisions (b), (c), and (e) of the rule that would change the procedure for sales free and clear of liens to a notice rather than a motion under Rule 9014 as required by present Rule 6004(c). A hearing would be held concerning such a sale only if a party in interest objected, the same procedure as already is used for sales that do not involve liens. Absent objection, this type of sale would be effected pursuant to the notice, without a court order.

Judge Howard made a motion to adopt the Reporter's draft but said that for real estate purposes he wanted an order at least when the sale is free and clear of liens. Professor King, however, said that requiring an order would conflict with the statute (§ 363 of the Code). Professor King also observed that a motion does not require a hearing and that one can file a motion that simply specifies the date of any hearing that may occur. He said he also was concerned that the proposed draft places more burden on the objector than on the movant and that the draft contained no assignment of who is to tell the court whether there will be a hearing.

Judge Howard said he thought his motion was consistent with the present rule except that if his motion carried the courts and the bar would be sure there is no need for a hearing unless someone objects to the sale. **He then accepted Professor King's recommendation that the present rule not be changed as an amendment to his motion. The motion, as amended, carried, unopposed.**

Rule 6007. Subdivision (c) mandates the setting of a hearing if a party in interest seeks by motion to require or compel the trustee to abandon property, although no provision in the Code requires the court to hold a hearing. The Reporter had drafted amendments to make it clear that no hearing is required unless an objection is filed. **A motion to leave the rule as it is drew a tie vote.** Mr. Patchan said he believed it to be the sense of the Committee that there should not have to be a hearing. The Reporter suggested, as an alternative, that subdivision (c) be abrogated. **A motion to abrogate subdivision (c) carried, unopposed.** The Reporter stated that he would draft

an appropriate Committee Note. **A motion to adopt the Reporter's draft amendment to subdivision (a), which directs the court to set a hearing if an objection is made, carried, unopposed.** [The draft amendment appears at lines 9 - 12, page 9, Reporter's memorandum dated 11/1/90.]

Rule 6006. The Reporter said he agreed with the suggestion of Judge Clark that Rule 6006(c) be amended to delete the requirement of a hearing on motions dealing with the assumption and assignment or rejection of an executory contract, unexpired lease, or time share interest. **A motion to adopt the Reporter's draft amendment carried, unopposed.**

Rule 9019(a). The Reporter recommended amending Rule 9019(a) so that a hearing on a proposed settlement or compromise would be required only if an objection is filed. **A motion to adopt the Reporter's amendment carried, unopposed.**

Rule 6002(b). In addition, the Reporter proposed a similar, conforming amendment to Rule 6002(b) concerning consideration by the court of the propriety of the administration by a prior custodian of property of the estate. **A motion to adopt the Reporter's draft amendment carried, unopposed.**

Rule 3009 (Agenda No. 5)

The Reporter stated that at the August 1990 meeting the Committee had requested him to analyze the suggestion of Bankruptcy Judge Jeremiah E. Berk (NY-S) that the first sentence of Rule 3009 be amended to change the word "court" to "the United States trustee" so that the court will not have to approve distributions in chapter 7 cases. Judge Berk believes approval of distributions is an administrative matter to be performed by the United States trustee and not the courts. Moreover, Judge Berk had said, the bankruptcy clerks no longer are reviewing proposed distributions in chapter 7 cases. Consequently, the judges are approving distributions without any staff or other mechanism for verifying that the distributions are proper. Professor Resnick noted that he had attached to his memorandum of 11/20/90 concerning Judge Berk's suggestion a copy of an order by another bankruptcy judge which raises the same concerns.

The Reporter pointed out that the Code does not require the court to approve or order any distribution in chapter 7 cases. Accordingly, the first sentence of the rules is not mandated by the Code and could be eliminated. Concerning the suggestion to amend the rule to require the United States trustee to perform this function, however, the Reporter disagreed. He recommended that the entire rule be abrogated.

Professor King said that the rule contains other provisions, beyond the one that requires the court to issue an order. Professor Resnick said he was recommending abrogation of these also, on the basis that they are purely administrative. Mr. Minkel said that simply having a rule on the subject does not intrude on administration.

A motion was made to end the first sentence of the rule after the word "practicable," and leave the rest of the rule unchanged. The motion carried, unopposed.

Rule 5005 (Agenda No. 6)

The Reporter noted that the Committee had voted at its August 1990 meeting to amend Rule 5005, Filing and Transmittal of Papers, to incorporate the substance of a proposed amendment to Rule 5 of the Federal Rules of Civil Procedure that will prohibit the clerk from refusing to accept papers because they are not in the proper form. The amendment to Rule 5 will apply automatically to adversary proceedings because Rule 5 is incorporated by Bankruptcy Rule 7005. The Committee, however, wanted the principle to apply to all papers in a bankruptcy proceeding. In drafting the amendment to Rule 5005, the Reporter said he had added to the language of proposed Rule 5 so that it would be clear that the rule applies to the petition as well as other papers. During a short discussion, various members expressed their belief that it should not be the responsibility of the clerk to reject anything presented for filing, but rather, that all papers should be accepted and at least "lodged" if not "filed." Any decision to reject a paper, several members said, should be a judicial one. **A motion to adopt the Reporter's draft amendment carried, with three (3) opposed.**

Rule 2002(j)(1) -- SEC Request (Agenda No. 7)

The Reporter stated that the Securities and Exchange Commission had requested an amendment to Rule 2002(j)(1) which would reduce the number of notices which the SEC receives automatically in chapter 11 cases. The SEC would continue to receive plans and disclosure statements under Rule 3017(a). The proposed amendment also would give the SEC the right to receive notices in cases other that chapter 11 ones. The SEC had provided a sample text of the rule showing language the Commission would like deleted and a proposed Committee Note.

Professor King questioned whether the Committee would want to accede to the SEC's request to receive notices other than in chapter 11 cases (in which the SEC has standing by statute under § 1109). He noted that the SEC could request notices in any case in the normal way. **A motion was made to amend the rule as**

requested except that existing language restricting receipt of notices to chapter 11 cases will not be deleted, which carried, unopposed. The motion expressly did not include the SEC's suggested Committee Note; the Reporter will write a Committee Note.

Rule 4001 -- Agenda No. 8

Bankruptcy Judge David S. Kennedy (TN-W) had submitted proposed amendments to Rule 4001 for the Committee's consideration. The Reporter noted that several of Judge Kennedy's proposals, *e.g.*, providing a list of parties to receive notice of motions filed pursuant to the rules, have been included in the 1991 rules changes which will take effect August 1, 1991. Professor Resnick suggested that the Committee might prefer to wait and see how the 1991 amendments actually work before amending the rule further. A motion was made to adopt the Reporter's recommendation for no further changes at this time. The motion carried, unopposed.

Notice Other Than by Mail -- Agenda No. 9

Ms. Channon reported that the Judicial Conference Committee on Automation and Technology, at its meeting one week prior, had requested that the Committee consider amending the Bankruptcy Rules to permit notice to be given by methods other than mail (*e.g.*, by electronic means) if a creditor so requests and the other means is technically feasible. The Automation Committee also requested that the Committee amend the rules to fix the time when such method of sending the notice is complete, *i.e.*, when the clerk or other sender has discharged the obligation to send a notice by an authorized method other than mail. [Rule 9006(e) provides that the giving of notice by mail is complete on mailing.]

This request arises in connection with the proposed National Noticing Print Center. The Committee on Automation has been supervising the establishment of such a print center, which is expected to be operated by one or more private contractors. The Advisory Committee on Bankruptcy Rules had requested that the Automation Committee reconsider at its January 1991 meeting a prior recommendation that use of the National Noticing Print Center be mandatory for all bankruptcy courts. This recommendation had been made in May 1990 by the Automation Committee's predecessor subcommittee. Ms. Channon reported that the Automation Committee had reconsidered the matter in light of provisions in the Bankruptcy Rules that give to the court exclusive authority to designate who shall provide notices in each bankruptcy case. The Automation Committee now will recommend that the bankruptcy courts be urged, but not required, to utilize the

print center. The Subcommittee on Automation and Technology, chaired by Judge Barta, also has been monitoring the Automation Committee's deliberations on this project.

Professor King commented that more that Rule 2002 would have to be changed if the Committee were to agree in principle to permit noticing by a means other than mail. Judge Barta said that the Subcommittee on Automation and Technology contemplates presenting a comprehensive package of specific amendments for the Committee's consideration, perhaps as early as the next meeting. Judge Barta said he would, however, like to inform the Automation Committee promptly if the Committee were willing in principle to accommodate other methods of noticing in the rules. He asked that the matter be placed on the agenda for the next meeting. Judge Leavy said there was no objection, but that the matter needs be on the agenda only if the subcommittee is ready with its proposals at that time.

Mr. McCabe said that the specifications for the National Noticing Print Center would be designed to build in safeguards to assure completion of performance. In response to a question from Mr. Patchan, he added that electronic transmission probably would be tested initially as an additional form of notice before it would be permitted to function as the sole method of notice to any creditor. Both Mr. McCabe and Mr. Heltzel mentioned that large savings on postage could result from electronic noticing. Mr. Heltzel also stated that technology is available that would allow the notice sender to confirm that the information was received and get an acknowledgment, which actually is more reliable than placing notices in the mail after which they are presumed received.

Claims Register/Bar Coded Proofs of Claim (Agenda No. 15)

Several courts that have significant numbers of large cases and must process a heavy volume of proofs of claim have been investigating methods for streamlining the process of creating the claims register required by Rule 5003(b). One inexpensive method involves pre-printing of claims forms with bar-coded information containing the case number and creditor number for each creditor listed by the debtor. The bar-coded information is printed in one of the open boxes on the form that is reserved for court use. Once the claim form has been completed and filed by the creditor, the bar-coded information can be used with the court's computer to produce a claims register containing the names and addresses of all creditors who have filed claims. The present claims register form issued by the Administrative Office, however, requires the clerk to record the amount of each claim in addition to the name and address of the creditor and the claim number. As the amount of the claim cannot be pre-printed with

bar-coding, this information still must be entered manually, a factor which diminishes the savings realized.

The Subcommittee on Automation and Technology had reviewed the bar-coding project, Judge Barta said, and recommended that the Committee endorse the preprinting of bar codes on proof of claims forms in selected cases pursuant to the general license granted in Rule 9009 to make "appropriate" alterations to official forms. To facilitate implementation, Judge Barta on behalf of the Subcommittee also made a motion that the Committee authorize the Administrative Office to change the claims register form so that recording the amounts of the claims would be optional, a matter left to the discretion of the court. The motion carried, unopposed.

Report of Subcommittee on Automation and Technology

Judge Barta said that in addition to the items on electronic noticing and bar-coding of proof of claim forms, the Subcommittee wanted to report on the issue of using fax machines to file papers with the court. He said it seems clear that the technology needs to develop further before fax filing could become feasible, and that other problems such as personnel to monitor the machines also need to be addressed. Judge Barta said the problems are more difficult for bankruptcy courts because of the heavy volume of papers filed there. He noted that the proposed amendments to the appellate and the civil rules contain provisions that would authorize acceptance of faxed papers subject to Judicial Conference guidelines. Such guidelines have not yet been developed. Judge Barta said the Subcommittee favored awaiting developments with the civil rules and recommended against considering any similar amendment to the Bankruptcy Rules at this time.

Subcommittee on Alternative Dispute Resolution

Judge Meyers reported that the Subcommittee had met for the first time on January 15. At the meeting, Bankruptcy Judge Malugen and two members of the San Diego bar had given a presentation on the court's mediation program, which primarily involves adversary proceedings. He said that, as 95 percent of district court litigation settles anyway, there is some question about what alternative dispute resolution really is accomplishing. It appears that settlements occur earlier in ADR settings, he said, and San Diego's experience corroborates that in terms of fewer status conferences on the docket. The participation of the bar also appears to be beneficial, although the benefits seem to flow to the members of the bar (who enjoy their role as mediators) rather than to the court. Ultimately, he said, empirical survey

data should be obtained to ascertain whether the effort is worthwhile.

Judge Meyers said he had found the diverse credentials of the Subcommittee members and their preparation for the meeting very impressive. Judge McGlynn, he noted, is involved in an extensive mandatory, non-binding arbitration program, and Mr. Minkel had provided a paper on the case law concerning the enforceability of arbitration clauses in the debtor's prepetition contracts. One thing that had become clear at the meeting, Judge Meyers said, was the need to define terminology. There were varying interpretations of the phrase "binding arbitration," for example.

There is some question, Judge Meyers, said about the authority of the courts to establish ADR programs in light of the statutory designation of certain districts to operate congressionally authorized arbitration plans under chapter 44 of title 28, United States Code. (28 U.S.C. § 651 et seq.) He said the Subcommittee planned to request a legal opinion on the limits to the courts' freedom in this area.

In addition, he said, the Subcommittee had discussed briefly whether existing Rule 9019(c), which authorizes the court to permit the parties to any contested matter to submit their dispute to binding and final arbitration, should be abrogated as possibly in conflict with the provisions of chapter 44 of title 28. The Subcommittee had no recommendation at present, however. The Subcommittee will monitor the actions of the Advisory Committee on Civil Rules in this area and continue to consider whether any rule, rule change, or model local rule would be appropriate. Mr. McCabe mentioned that the recently enacted civil justice reform act requires all courts to develop a plan for utilizing ADR techniques, and that the Committee could await the playing out of many of the issues under that legislation. Judge Leavy said he favored caution and that he had many concerns, particularly about the potential loss of judicial immunity and the opportunities for malfeasance.

Subcommittee on Local Rules

Mr. Shapiro said that review of the local rules from many districts had confirmed the existence of opposing philosophies of local rules, the "practice guide" approach on the one hand and the "minimal necessities" approach on the other. Both have loyal adherents. He said he had found that most districts get along comparatively well with relatively few rules.

He had discovered that the accessibility of unfamiliar local rules is greatly improved when the court provides a table of contents or index. There is much variety in these, he said, and

most are good, except for those that are too detailed. He noted that the District of Maryland has a particularly good table of contents.

The question of a uniform or recommended numbering system continues to elude definitive answer, he said. Should local bankruptcy rules be numbered like those of their district court? Should they be numbered like the national rules? Some districts now track the national rules, but the results are not entirely successful. The rules for the Southern District of New York contain references at the bottom of each rule to the district court rules and to the national rules, by number, a feature that he had found extremely helpful.

The issue of uniformity is a difficult one, he said. The fact is that in multi-judge courts the practice is not uniform within the court, and it is further a fact that attorneys who routinely practice in more than one district seem to manage under different rules. Even some districts with very few rules will include variations; an example would be the preferred order forms of the various judges, (IL-N).

He said it appeared there ought to be a way to standardize the elements of a fee application. He noted that the District of Massachusetts has a specimen fee application and makes available a floppy disk for copying the prescribed forms. Another area in which uniformity may be helpful, he said, motion practice. Judge Fenning suggested that a recommended organizational outline or conceptual structure would be most helpful. She said that neither the district court rules nor the national rules provide a framework that works well for bankruptcy proceedings. Judge Fenning said that one very important function of local rules is filling in gaps in the national rules. As an example, she said, guidance on how to implement the "notice and opportunity for hearing" process would be helpful and perhaps should take the form of a national rule.

Judge Jones inquired about how the circuit councils are exercising their review powers. She said that in the 5th circuit staff attorneys who do not know bankruptcy are reviewing the local rules and that the Committee's assistance probably would be welcome. Mr. Shapiro responded that the councils' authority is limited to matters involving conflict with statutes and national rules. The councils do not regulate other matters and, therefore, some "rules about rules" may be helpful. Professor King suggested that the Committee could help identify conflicting rules perhaps by doing the review for the circuits. The Reporter said that review should not be restricted to looking for conflicts but also for rules that purport to restate the substantive (and usually get it wrong). Judge Meyers suggested that the circuits should be surveyed to ascertain what they are doing about reviewing local bankruptcy rules.

Mr. Shapiro said it seems clear there is a philosophy problem concerning local rules which is exemplified by marked differences among districts in the number of local rules and the level of detail provided. Judge Fenning said that if there are no rules, all becomes unwritten, but Mr. Shapiro said that having written rules does not do away with unwritten rules. It also is clear that rules do not correct sloppy practice or teach people what the law is, he said. There will have to be some local rules, as few as possible but with some accommodation for multi-judge courts and courts with heavy pro per filings (resulting in a need for more detailed rules).

Judge Howard raised the subject of model local rules. If this were undertaken, he said, the model rules should be kept short.

Professor King suggested that the next step should be to identify areas for uniformity, such as motions and fee applications, and consider writing a national rule.

Mr. Shapiro noted that the work of Subcommittee has been slowed because its members either chair or serve on other subcommittees which have generated substantial work. The Subcommittee does intend to tinker with model rules, however. It also plans to attempt a recommended numbering system, and Mr. Shapiro said he believes such a system is workable if there are not too many rules. In response to a question from the Reporter, he said the Subcommittee has not come to any conclusions on the wisdom of or methodology for integrating local bankruptcy rules with the local district court rules.

Amendment to Official Form 7 -- Agenda No. 16

Ms. Channon reported that a recent letter from the Equal Employment Opportunity Commission had stated that the agency has difficulty obtaining notice of bankruptcy proceedings in time to a claim. The EEOC, OSHA, and federal and state environmental protection agencies normally conduct lengthy administrative proceedings before filing suit against an entity. Question 4.a. of Official Form 7, the Statement of Financial Affairs, however, requires the debtor to disclose only suits, executions, garnishments, and attachments. There is no requirement in the schedules or the statement to disclose administrative proceedings even though these may result in adverse financial consequences for the debtor.

The proposed amended language would have limited disclosure to those proceedings which could result in a monetary award against the debtor. Professor King, however, said disclosure should not be limited, but all proceedings should be disclosed.

The Reporter suggested simply adding "administrative proceedings" to the list of matters to be disclosed, and a motion to adopt this suggestion carried, unopposed. A motion to expedite the amendment was withdrawn.

Release of "Source Code" for § 341 Meeting Notice Form

The programming staff of the National Interim Bankruptcy System (NIBS) has sequestered the "source code" for the computer-generated form for the § 341 meeting notice. This action was taken at the request of the Advisory Committee as part of the testing of the new forms. Courts can not make local changes to the form without the source code; they can, however, program a completely new replacement form. The testing of the forms now having been completed, the NIBS staff had requested authorization to release the source code. A motion to authorize release of the source code carried, with one (1) opposed.

Time Periods in Rules

Judge Leavy reminded the Committee of his frequently expressed interest in converting all of the time periods prescribed in the rules to seven days and multiples of seven days, (*i.e.*, 7, 14, 21, 28), and asked of there were any support for this concept among the members. Professor Resnick said he remembered Judge Peterson having expressed interest in such a proposal at a meeting of the standing Committee on Rules of Practice and Procedure. He said also that the standing Committee has made clear its preference for as much uniformity in days as possible in the several bodies of federal rules. Professor Resnick said he saw the major obstacle being the ten day periods presently given in the rules, as these would have to go either to seven days or fourteen days. He said there also may be a problem with the reference in Rule 9006 to statutory time periods that the rules cannot change. Professor Resnick offered to circulate a list of the rules which prescribe specific numbers of days so that the Committee could consider the merits of changing the existing time periods. Judge Leavy approved this procedure and added that he thought the Committee should "test it out at home" before proposing the concept to the other advisory committees.

Recognition of Prior Chairman

Mr. Patchan raised the matter of appropriate recognition for the Committee's former chairman, Judge Lloyd D. George. Mr. Shapiro added that recognition ought to be given also to Judge Morey L. Sear who preceded Judge George. At Judge Leavy's request Mr. Patchan agreed to look into what might be done or

given to the prior chairman at a cost not to exceed a contribution of $10 per member for each chairman.

Miscellaneous

Judge Leavy stated that several letters had been referred to him by the standing Committee. One, from a person in the Second Circuit, concerned § 362(h) of the Code, which limits recovery of damages for violation of the automatic stay to individual debtors, thereby excluding corporations from such recovery. The Chairman stated that this appeared to be a statutory matter and thus outside the purview of the Committee. With the Committee's approval, the Chairman stated that he intended to so respond in a letter drafted by the Reporter. Another letter, also referred by the standing Committee, concerned Rule 3001 and trading claims. Judge Leavy said he intended to respond, with the Committee's approval, in a letter drafted by the Reporter, as follows: that the Committee had considered this subject at length, that what was done was done deliberately, and that the Committee has exhausted its wisdom on this subject. A third letter, from a person named Beck, appeared to concern a request for documents of the United States trustee. With the Committee's approval, the Chairman said, this letter would be referred to Mr. Logan for response. The Committee expressed no objection to the actions proposed by the Chairman.

The Chairman read a message of greeting and good wishes from W. Reece Bader, Esquire, former liaison from the standing Committee on Rules of Practice and Procedure.

Ms. Channon described briefly a memorandum on the role of Judicial Conference committees which was included with the agenda materials at the direction of L. Ralph Mecham, Director of the Administrative Office.

Mr. Logan reported that negotiations are continuing between the Executive Office for United States Trustees and the Administrative Office on the draft Memorandum of Understanding on case closing responsibilities. He said several drafts had circulated since the Committee's last meeting and that final agreement appeared very near. The Memorandum of Understanding is intended to provide direction to both the bankruptcy courts and the United States trustees in implementing the closing of cases under amended Rules 2015(a), 3022, and 5009.

Future Meetings

Herbert Minkel reported that the private club which was the tentative site for the June 20-21, 1991, meeting in Hyannis, MA, would not be able to accommodate the Committee on one of the two

meeting days. Mr. Minkel suggested June 27-28 as alternative dates. Judges Howard and Mannes stated that they would be unable to attend on those dates, as they would be at the Fourth Circuit Judicial Conference. Judge Jones also would not be able to attend. Accordingly, the Committee decided to hold the June meeting on the previously agreed dates of June 20-21 in Boston, MA, at a downtown hotel.

The Chairman also appointed a subcommittee to research and propose locations for all future Committee meetings, beginning with the June meeting in Boston. The subcommittee is also to recommend dates for future meetings and circulate its suggestions prior to the June meeting. The members of the subcommittee are Judge Howard, Judge Mannes, and Patricia Channon.

Respectfully submitted,

Patricia S. Channon

Patricia S. Channon

February 14, 1991