ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of March 26, 1992

Washington, D.C.

The Advisory Committee on Bankruptcy Rules met at 9:00 a.m. on March 26, 1992, in the sixth floor conference room of the Lafayette Building in Washington, D.C. The following members were present:

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

The following persons also attended the meeting:

District Judge Robert E. Keeton, Chairman, Committee on Rules of Practice and Procedure
John E. Logan, Director, Executive Office for United States Trustees, U.S. Department of Justice
Joseph F. Spaniol, Jr., Secretary, Committee on Rules of Practice and Procedure
Peter G. McCabe, Assistant Director for Judges Programs, Administrative Office of the U.S. Courts
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court for the Eastern District of California
James H. Wannamaker, Attorney, Bankruptcy Division, Administrative Office of the U.S. Courts
John K. Rabiej, Special Assistant, Office of Judges Programs, Administrative Office of the U.S. Courts
James B. Eaglin, Assistant Director, Research Division, Federal Judicial Center
Elizabeth C. Wiggins, Research Division, Federal Judicial Center

Two committee members were unable to attend: District Judge Joseph L. McGlynn, Jr., and District Judge Harold L. Murphy. District Judge Thomas S. Ellis, III, a member of the Committee on Rules of Practice and Procedure and liaison with this Committee, also was unable to attend.

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. References to the Preliminary Draft are to the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure, which was published for public comment in August 1991. References to the Standing Committee are 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.

Notice of a Motion to Modify

Mr. Sommer discussed his concern that a chapter 13 debtor against whom a motion to modify a plan has been filed should be given clear notice that the debtor's failure to respond would or could result in the motion being granted. Judge Mannes stated that advising the debtor that failing to respond would result in the modification of the plan implied that the judge has no role in the modification.

Mr. Sommer stated that pro se debtors, or debtors who have been abandoned by their attorneys, face similar pitfalls when they fail to understand the consequences of failing to respond to motions for relief from the automatic stay or to dismiss or convert the case. The Reporter indicated that Mr. Sommer was concerned that pro se debtors and parties may receive a number of notices which they do not understand. He stated that the debtor needs to be told the consequences of not acting in a general fashion and in plain language. The Reporter indicated that the notice requirement should be in the rule, not in a Committee Note.

Professor King moved that the matter be deferred for further study and discussion at a future meeting. **The motion carried without dissent. The Chair directed Mr. Sommer and the Reporter to discuss drafting an amendment to require such a notice.**

The Reporter asked whether the letters from Judge Lee M. Jackwig, dated March 23, 1992, and Jeffrey A. Apperson, dated March 17, 1992, and the memorandum dated March 24, 1992, from Terence H. Dunn should be considered as part of the record of public comment on the Preliminary Draft. **The consensus was that the letters and memorandum should not be considered as part of the record because they were received more than a month after the deadline for receipt of written comments, which was February 15, 1992.**

Rule 5005(a)

Mr. Sommer stated that when an attorney files a writing which the clerk believes to be defective the attorney should have a right to either file the paper in a new form or to tell the judge why the original paper is in the proper form. He indicated that the Committee Note should state that the clerk should inform the person presenting the paper that the clerk believes the paper is defective, not that "the paper is not in proper form". Mr. Sommer stated that, although most of the papers which now are rejected by the clerks are defective, the clerks should not make that decision.

Judge Jones indicated that she had talked to the clerk of the district court and the deputy in charge of the bankruptcy clerk's office in Houston, who told her that they handled defective papers in a manner similar to that outlined in the proposed Committee Note. She withdrew her opposition to the amendment. Mr. Minkel stated that he believed the amendment would not prohibit bankruptcy judges from delegating authority to reject papers offered for filing. Other committee members indicated that they were not sure such delegation would be possible.

Professor King moved to approve the proposed amendment to Rule 5005(a) as set out in the Reporter's memorandum of March 9, 1992. Mr. Minkel seconded the motion. Judge Meyers stated that clerks refuse defective papers because the clerks are implementing rules and enforcing policies. He indicated that accepting defective papers would undermine the rules and the policies. Professor King stated that the rule can be enforced as amended and represents a good policy. Judge Jones stated that any problems which arise from accepting defective papers could be solved by striking them.

Mr. Heltzel asked whether, under the proposed amendment, he should stamp "Order for Relief" on an unsigned petition if it was submitted for filing. The Reporter stated that the paper should be stamped "Filed" because relief is ordered by the statute, not by the clerk. The Chair stated that all the proposed rule says is that the clerk has to accept the paper for filing, which is no more than delivering physical custody of the paper. Professor King indicated that the real importance of the file stamp is to indicate the specific date and time the paper is submitted.

Judge Jones moved to strike the Reporter's suggested change in the Committee Note. The Chair suggested that the Committee vote first on Professor King's motion to adopt the proposed amendment to the rule. Judge Jones withdrew her motion. She suggested substituting the phrase "any paper" in the amendment for the phrase "any petition or other paper presented for the purpose of filing". The Reporter stated that the phrase had been

included for clarity after receiving a comment that there was some ambiguity in the previous phrasing. Judge Jones withdrew her suggestion.

Professor King's motion was approved by a vote of 8-2. The Reporter indicated that the Chief Justice had requested briefings on proposed amendments which are controversial. The Reporter asked whether he should distinguish between matters which spark controversy in the public comments and those which are controversial within this Committee. The Chair indicated that the Reporter should state that the proposed amendment has generated controversy and what the concerns are.

Mr. Sommer recommended changing the proposed Committee Note to clarify that the papers at issue are ones which the clerk believes are defective and to indicate that the filer should be given notice that the filer must, within a specified period, either correct the allegedly defective paper or show why it need not be corrected. The Reporter asked whether the second paragraph of the Committee Note should be deleted, leaving it up to the courts to decide how to handle allegedly defective papers. Mr. Dixon moved to strike the second paragraph of the Committee Note. Judge Meyers seconded the motion, which passed on a unanimous vote.

Judge Meyers asked why the phrase "judicial officer" was used in the Committee Note. The Reporter stated that the phrase came from the Committee Note to Fed. R. Civ. P. 5, upon which the proposed amendment was based. Judge Mannes moved to substitute the word "judge". The motion passed without dissent.

Rule 3015

At its last meeting, the Committee approved the proposed amendments to Rule 3015 published in the Preliminary Draft. The Committee also voted to add to proposed Rule 3015(f) the second sentence of Rule 3020(b) and directed the Reporter to prepare a Committee Note. In addition, Professor King suggested that the Reporter consider whether the title of Rule 3015 should be changed to reflect more accurately the contents of the rule as amended.

The Reporter presented drafts of the amendment to Rule 3015(f), the Committee Note, and amendments to the titles of both Rule 3015 and subsection 3015(f), as set out in his memorandum of March 9, 1992. Professor King moved to approve the three amendments and the proposed Committee Note. The motion was approved by a vote of 9-0.

Rule 3002

At its last meeting, the Committee approved an amendment to Rule 3002(a) which provided that, with certain exceptions, both secured and unsecured creditors must file timely proofs of claim in order to have allowed claims. Given the closeness of the 5-4 vote; Professor King's view that the amendment is inconsistent with the Bankruptcy Code; questions about the interplay between the amendment and various sections of the Code, including sections 722 and 726; and the debtor's right to file a claim for a creditor who does not file in a timely manner; the Reporter suggested that the amendment be withdrawn for further study. The Reporter stated that the problems might be resolved in a future amendment by unlinking the allowance of a claim and its timeliness.

The Reporter suggested that the Committee also might withdraw the amendment to Rule 3002(c)(7). He stated that the amendment, which was tabled at the last meeting, would no longer be needed if the amendment to Rule 3002(a) is withdrawn. The original amendment authorized the court to extend the filing period for a chapter 13 creditor who has not filed a timely claim due to excusable neglect. At its last meeting, the Committee had voted to restrict the scope of the amendment to unscheduled creditors who did not have notice of the case in time to file a timely proof of claim.

Judge Howard moved to reconsider and withdraw the amendment to Rule 3002(a). The Chair stated that a motion to reconsider a previous vote by the Committee should be made by a member who voted with the majority. Mr. Sommer stated that he voted with the majority and moved to withdraw the amendments to both Rule 3002(a) and Rule 3002(c)(7). Mr. Mabey staced that the issues raised by the Reporter are substantial but do not argue for leaving the current rule as it is. The Reporter stated that he intended to come back to the Committee with a memorandum and possible changes in the rule. He indicated that any new amendment would be published for public comment and, if approved by the Committee, included in a future package of amendments.

The motion to reconsider and withdraw both amendments passed on a vote of 7-3.

Rule 9029

The Reporter discussed his memorandum of February 6, 1992, which concerned two requests by the Standing Committee. The Standing Committee requested that this Committee propose an amendment to Rule 9029 which would require the uniform numbering of local rules and prohibit local rules which merely repeat provisions of the national rules. Similar changes were requested in the civil, criminal, and appellate rules.

Judge Keeton indicated that the purpose of uniform numbering is to make local rules easier to use. Professor King and Judge Meyers inquired whether the Standing Committee had asked if uniform numbers are a good idea or had asked for draft language to implement such a requirement regardless of whether this Committee feels it is advisable. The Reporter stated that the request was for draft language, which would be considered at the Standing Committee's meeting in June, 1992. In response to questions about whether any draft amendment would be published for comment by the bar and public, Judge Keeton stated that the Standing Committee could approve a technical amendment without public comment. Mr. Spaniol indicated that he believed the Standing Committee would consider the response to its request and then decide whether public comment is needed.

The draft amendment prepared by the Reporter, which was attached as Exhibit B to his memorandum of February 6, 1992, provided: "Local rules made by a district court or by bankruptcy judges pursuant to this rule shall be numbered or identified in conformity with any uniform system prescribed by the Judicial Conference of the United States." The Reporter stated that the amendment would not be effective until the Conference adopts a uniform numbering scheme for local rules.

The Reporter stated that the Bankruptcy Division is developing an alphabetical list of topics for local rules, followed by the districts which have a rule on a topic and the numbers of those local rules. The Chair stated that any dispute over whether a national numbering system or a local one is better could be avoided by adopting a hybrid system in which a local rule could have both a uniform national number and a local number.

The draft amendment also provided that local rules must be "consistent with, but not duplicative of," the national bankruptcy rules. The draft Committee Note stated that local rules which merely duplicate or restate the national rules may give rise to conflicting interpretations arising from minor inconsistencies between the wording of the national and local rules. In addition, significant local practices may be overlooked when included in local rules which are unnecessarily long.

Mr. Shapiro moved to accept the Reporter's draft amendment and Committee Note. The motion passed on a vote of 8-0.

Rule 8018

In response to the Standing Committee's request for uniform numbering and the prohibition of duplicative local rules, the Reporter suggested a similar amendment to Rule 8018. The proposed amendment and Committee Note were attached as Exhibit C to the Reporter's memorandum of February 6, 1992. Professor King moved to adopt the amendment and Committee Note. The motion carried unanimously.

Proposed Rule 9037

The Standing Committee also has requested proposed amendments providing that the Judicial Conference shall have the power to correct typographical and clerical errors and other purely verbal or formal matters in the rules. In response to the request, the Reporter presented the draft of a proposed new Rule 9037 and Committee Note. The draft was attached to the memorandum of February 6, 1992, as Exhibit E.

Although the Advisory Committee on Civil Rules is considering adding such a provision to its existing rule on forms, Fed. R. Civ. P. 84, the Reporter indicated that he believed the matter should be the subject of a new, separate rule. The proposed rule states: "The Judicial Conference of the United States may amend these rules to conform to statutory changes in terminology and to correct errors in grammar, spelling, cross-references, and other similar technical matters of form and style." Judge Keeton stated that the civil, criminal, appellate, and bankruptcy rules should all have the same provisions for expedited approval of technical amendments.

The Reporter questioned whether it is desirable to provide that the Conference may amend rules to conform to statutory changes unless the statutory changes relate merely to terminology. This is particularly so, he stated, in area of the law, such a bankruptcy, which is closely tied to the statute. Accordingly, the Reporter suggested striking the words "conform to statutory changes in terminology and to" from the second line of his draft. Professor King and Mr. Minkel questioned the use of the word "terminology" as overly broad. The Reporter indicated that he used the word in order to restrict the delegation of power.

Several committee members asked whether the amendment would allow the Conference to amend the rules without publishing the draft proposals for public comment or without consulting the advisory committees. Judge Keeton stated that the Judicial Conference does not act on bankruptcy rules without first having the advice of this Committee. He stated that both the Conference and the rules committees would continue to be bound by their

internal rules on the rule-making process. Judge Leavy stated that the change just permits the Conference to act without going to the Congress. The rest of the process, including the role of this Committee, remains the same. As for publication, Judge Leavy stated that, generally, if publication is required, the amendment is probably not a technical one as contemplated by the amendment.

Professor King moved to strike the words "to conform to statutory changes in terminology and" from the second line of the proposed rule and then to adopt the proposed rule. Judge Mannes seconded the motion. Mr. Minkel suggested substituting another phrase which would accomplish the same purpose. The Reporter indicated that the remaining portion of his draft would cover every conceivable technical change. Mr. Minkel suggested deleting the word "similar" from the last line of the draft in order to cover all technical matters.

Judge Keeton suggested changing the phrase "conform to statutory changes in terminology" to "make them consistent in form and style with statutory changes". Professor King declined the suggested amendment to his motion. Judge Barta stressed the importance of public notice of proposed changes in the rules. He moved to amend Professor King's motion by deleting the word "grammar" from the third line of the proposed rule. The vote on Judge Barta's motion was a 4-4 tie, which the Chair broke by voting "no". Judge Howard moved to amend Professor King's motion to include Judge Keeton's language. The Reporter stated that he understood the motion to be for the approval of the specific language, not of the concept of the simplified approval process. The motion passed by a 6-3 vote. It was moved to adopt the Reporter's original draft with Judge Keeton's substitute language. The motion carried on a 8-1 vote.

Judge Keeton asked why the proposed rule did not refer to Committee Notes. Professor King stated that the Judicial Conference, the Supreme Court, and the Congress do not promulgate Committee Notes, which are drafted by the advisory committees as aids to understanding changes in the rules. Judge Leavy suggested an amendment to provide that the Judicial Conference may not change Committee Notes. Judge Howard stated that this Committee is an appendage of the Conference.

Professor King moved that this Committee resolve that its vote with respect to Rule 9037 was on the understanding that the purpose of the rule was to make it unnecessary to follow the regular process of submitting changes for public comment and submitting rules to the Supreme Court and to the Congress when they come within the purview of this rule but it is not the purpose to have such rules or notes prepared or drafted by anyone other than the appropriate advisory committee.

Mr. Mabey indicated that he believed that the resolution is unnecessary and that adopting such a resolution might create a negative inference as to other matters approved by the Committee today, i.e., that the Judicial Conference could act on those matters without reference to this Committee. Judge Leavy asked for an objection from anyone who believed that the motion did not reflect reasons for the committee's decision. There was no opposition to the motion on the basis of its accuracy. Professor King's motion passed by a 6-2 vote.

The Reporter questioned whether the proposed rule is a wise change. Judge Barta stated that it goes too far. Judge Howard requested a second vote on proposed Rule 9037, as amended. By a vote of 6-2, the rule was approved a second time. Judge Howard asked for Judge Leavy's views on the matter. Judge Leavy described the motion as a bit of legislative history which explained why this Committee deviated from the draft under consideration by the Civil Rules Committee. Judge Mannes and Professor King suggested substituting the words "change in Rule 2005" for the words "various changes in the rules" in lines 7 and 8 of the Committee Note. The Committee agreed and approved the Committee Note with the suggested change.

Rule 1001

In his memorandum of January 23, 1992, the Reporter had discussed a number of proposed changes in the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure that may have an impact on the Bankruptcy Rules or bankruptcy practice. The proposed amendments have been published for public comment and may be approved by the Standing Committee in June of this year.

The Reporter proposed an amendment to Bankruptcy Rule 1001 to conform to the insertion of the words "and administered" to the second sentence of Civil Rule 1. According to the proposed Committee Note, the purpose of the addition is "to recognize the affirmative duty of the court to exercise the authority conferred by these rules to ensure that cases and proceedings are resolved not only fairly, but also without undue cost or delay." The Reporter stated that the same change should be made in the bankruptcy rule to avoid any possibility of a negative inference.

The Reporter indicated that the change possibly could be made without publication as a "conforming" amendment. Professor King disagreed, particularly in light of the proposed Committee Note. The Reporter agreed that the amendment was more than a stylistic change. Professor King moved to table the proposed amendment as a matter for future consideration and publication. He stated that it would be more appropriate to consider the

matter after the civil rule has been amended. The motion failed on a vote of 4-6.

Judge Mannes moved to reject the proposed amendment. Judge Jones stated that delay is the biggest problem in bankruptcy and asked why Judge Mannes opposed the amendment. He indicated that the amendment does nothing more than the current language which provides that the rules shall be "construed to secure the just, speedy, and inexpensive determination of every case and proceeding." Judge Leavy expressed concern about requiring the bankruptcy judge to "administer" cases. Judge Mannes withdrew his motion and the proposed amendment died for lack of a motion.

Rule 9002

The Reporter indicated that several changes are being proposed in Civil Rule 16, which is incorporated by Bankruptcy Rule 7016. One change would be to substitute the words "district judge" for "judge" in Rule 16. As a result, the Reporter stated, Bankruptcy Rule 9002 should be amended to conform to the use of the term "district judge" in Rule 16. The proposed amendment would state that "district judge" means bankruptcy judge if the case or proceeding is pending before a bankruptcy judge. Professor King moved to approve the proposed amendment.

The Chair inquired whether the motion was conditioned on approval of the amendment to Rule 16. Professor King said the motion was not so conditioned. Because the term "district judge" is not used anywhere else in the rules, he indicated, there would be no harm in including its definition even if Rule 16 is not amended. The motion carried on a vote of 8-0. The Committee Note was approved by consensus, subject to the deletion of the final sentence if Rule 16 is not amended.

Rule 9011

The Reporter briefly discussed the possibility of substantial amendments to Civil Rule 11, upon which Bankruptcy Rule 9011 is based. The Reporter did not recommend any action at this time with regard to the proposed amendments to Rule 11.

Discovery Rules

The Reporter indicated that the proposed amendments to the Civil Rules relating to discovery have drawn the greatest amount of public comment of any of the proposed changes to the Civil Rules. These rules are made applicable to adversary proceedings by Bankruptcy Rules 7016, 7026, 7029 - 7034, 7036, and 7037, and, except for Rule 16, to contested matters pursuant to Rule 9014.

Because the proposed amendments have drawn so much public comment and because they may be revised by either the Advisory Committee on Civil Rules or the Standing Committee, the Reporter suggested taking no action on the proposals at this time.

Rule 7056

The proposed amendments include a complete revision of Civil Rule 56, which is made applicable in bankruptcy proceedings by Bankruptcy Rules 7056 and 9014. The Reporter stated that he saw no reason why the changes should not be applicable in bankruptcy. He recommended no action.

Rule 9029

There are three proposed amendments to Civil Rule 83, which is similar to Bankruptcy Rule 9029. The first permits the adoption of experimental local rules which are inconsistent with the national rules if approved by the Judicial Conference and if limited to a period of five years or less. Another proposed new subdivision provides for "standing orders" by individual judges regulating practice. The third new provision states that local rules and standing orders "shall be enforced in a manner that protects all parties against forfeiture of substantial rights as a result of negligent failure to comply with a requirement of form imposed by such a local rule or order." The Reporter doubted that such changes could be made to Rule 9029 without publication for public comment. He suggested taking no action at this time.

Appellate Rules

The Reporter discussed the proposed amendment to Appellate Rule 4(a)(4), which deals with the effects of certain post trial motions on appeals to the court of appeals. Rule 4(a)(4) does not apply to appeals from the district court or bankruptcy appellate panel in bankruptcy cases, which are governed by Appellate Rule 6(a)(2)(i). The Reporter discussed whether this Committee should recommend that a similar change should be made in Rule 6(a)(2)(i) and offered a possible draft of such an amendment. Judge Jones indicated that the existing language of Rule 6(a)(2)(i) accomplishes the same purpose as the proposed amendment of Rule 4(a)(4).

Mr. Sommer recommended that this Committee request the Appellate Rules Committee to make it clear that the same standards apply to post trial motions under both Rule 4(a)(4) and 6(a)(2)(i), either by an amendment to Rule 6(a)(2)(i) or by a

Committee Note. Judge Barta moved to instruct the Reporter to convey Mr. Sommer's suggestions. The motion passed unanimously.

The Reporter indicated that Bankruptcy Rule 8015, which governs motions for rehearing in the district court or bankruptcy appellate panel, is similar to Rule 6(a)(2)(i) in that it is silent on whether a new notice of appeal must be filed after a motion for rehearing. Because an amendment to Rule 8015 would require publication, the Reporter stated that consideration of the matter could be deferred until the next package of amendments is prepared for publication.

The Reporter stated that Bankruptcy Rule 8002 is similar to Rule 4(a)(4) and also should be amended if that rule is changed. The Reporter indicated that this Committee could either defer the matter until the status of the proposed amendment to Rule 4(a)(4) is resolved or approve an amendment to Rule 8002 for publication while the amendment to the appellate rule is under consideration. Professor King suggested deferring the matter. The Committee agreed.

The Reporter stated that amendments have been proposed to Appellate Rules 4(c) and 25 to reflect the Supreme Court's decision in Houston v. Lack, 487 U.S. 266. He indicated that similar amendments may be needed in Bankruptcy Rules 8002 and 8008. The Reporter suggested deferring the matter while the amendments to the appellate rules are under consideration. The Committee agreed.

An amendment has been proposed to Appellate Rule 3(c) as a result of the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312. The Reporter suggested that there is no need to amend the Bankruptcy Rules in response to the Torres decision. He indicated that the [illegible] of the proposed amendment is unclear and that Bankruptcy [illegible] 8001(a) does not contain the same language as that now contained in Rule 3(c).

Overlapping Numbers

The Standing Committee has resolved that duplicate numbers should be eliminated in the various bodies of federal rules. The only duplications in the Bankruptcy Rules are with Evidence Rules 1001 through 1008. The Committee agreed that these numbers should be allocated to the Bankruptcy Rules. Professor King moved to request that the Advisory Committee on Evidence Rules agree to leave these numbers for bankruptcy use. Mr. Shapiro seconded the motion. It was agreed that, because there is no such Advisory Committee on Evidence Rules, the motion should be directed to the Style Committee. The amended motion passed without dissent.

ABA Resolution

In August 1991, the House of Delegates of the American Bar Association adopted Resolution 119A and an accompanying report dealing with the employment of attorneys and attorney's fees. Mr. Minkel stated that it is significant and unusual for the House of Delegates to consider a bankruptcy matter. The Reporter indicated that the resolution and report include several aspects: deleting the "disinterested" requirement in 11 U.S.C. § 327(a), amending Rule 2014 to be more specific in setting forth the facts which must be disclosed, protecting an attorney's right to compensation despite termination of employment if there was good faith compliance with the disclosure requirement, providing for interim employment followed by continued employment after notice and a hearing, requiring supplemental disclosures, and adopting a new Official Form for Attorney Disclosure.

The Reporter stated that amending § 327(a) is beyond the scope of the rules. He indicated that the courts have interpreted the disclosure requirements of Rule 2014 very broadly and have required attorneys to disclose any connections with the debtor which may be relevant. He stated that if the court approves the employment of an attorney but subsequently determines that the attorney was not disinterested, the courts have used § 328(c) to deny any compensation or reimbursement to the attorney. The Reporter indicated that he had read dozens of these disqualification cases and that they are generally limited to egregious facts and situations in which a reasonable person would have made a more full disclosure originally.

According to the Reporter, the proposed amendment to Rule 2014 raises a number of questions, including whether such a detailed list is needed; if so, what should be on the list; and whether a safe harbor is desirable for attorneys who make a good faith disclosure. He added that the amendment may not be needed if Congress deletes the requirement that the attorney be disinterested. The Reporter indicated that the "safe harbor" proposal appears worthwhile but that § 328(c) may bar this Committee from creating such a "safe harbor" through the Rules. He added that § 328(c) also may conflict with creating a bar date for objecting to the employment of an attorney, which was part of the ABA proposal.

Professor King moved to disapprove all of the ABA's proposals and suggestions. He indicated that the effect of the proposal would be to require less disclosure, allow attorneys to be paid even if they don't disclose, permit attorneys to work and be paid even without providing an opportunity for objections by other parties and without prior court approval, and provide a bar date for objecting to the employment of counsel. He indicated that the concept of the proposal is wrong in light of the public concern about attorney fees in bankruptcy.

Mr. Mabey disagreed and stated that he believes the proposal would provide for fuller disclosure and more notice. Mr. Dixon stated that there is a problem with the disclosure requirement in Rule 2014 and attorneys should be given some comfort by describing how to comply with the rule. He indicated that this Committee, at least, should study the matter further and consider an alternative to the ABA proposal.

Mr. Minkel stated that he agrees that this is a significant problem and that the ABA proposal would provide for fuller disclosure. He indicated that the disclosure requirements set out in the proposed amendment to Rule 2014 would require revision because they are so detailed that they would make it virtually impossible for many large law firms to reach the "safe harbor." The Reporter stated that the proposed amendment could be interpreted even more broadly than the current rule because it requires the attorney to disclose "any other interest, direct or indirect, with the debtor, creditors, United States Trustee or any employee of that office, or any other parties in interest".

Mr. Mabey stated that the current procedure for approving the employment of counsel is a real problem. He indicated that there are problems with either seeking immediate court approval on notice to the U.S. trustee alone or seeking approval on 15-day notice to all parties. If the attorney gives limited notice, a party may move to have the attorney disqualified later. Mr. Mabey indicated that a 15-day notice is unsatisfactory because the attorney cannot work until the employment is approved after the notice period. Mr. Mabey stated that the procedures for employment are rudimentary and vary widely from district to district, despite the development of a national bankruptcy practice. Mr. Shapiro stated that a bankruptcy judge would usually give an attorney a safe harbor for 15 days if the attorney said that time was needed to make a full disclosure.

The Committee approved Professor King's motion by a vote of 8-1. Judge Leavy indicated that the written response to the ABA should indicate that the Committee's action is not necessarily an attitude of hostility to some resolution of what the ABA sees as a problem. He indicated that the solution may have to come by legislation but there may be room for something to be done by way of procedures, as suggested by Mr. Mabey. **The Chair directed Mr. Minkel and the Reporter to draft a response.** The Chair noted that the procedures for conduct of business by this Committee provide that, to the extent feasible, the Secretary of the Standing Committee, in consultation with the Chair of this Committee, shall advise a person making a recommendation or suggestion of the action taken thereon.

Delegation of Orders

Judge Meyers reported that, in addition to a case management manual, the Case Management Subcommittee of the Bankruptcy Committee is working on a project dealing with the delegation of orders to the clerks. He indicated that Bankruptcy Judge David S. Kennedy, the chair of the subcommittee, has asked whether this Committee has any advice or thoughts about the delegation of orders.

Mr. Shapiro stated that the National Bankruptcy Conference's Committee on Administration had considered what kinds of orders are purely administrative and which ones are judicial. He indicated that the attorneys on the committee had an overwhelming, visceral reaction that clerks don't sign orders; judges sign orders. Several committee members indicated that the clerks in their districts sign orders extending time, orders closing no-asset cases, or orders granting permission to pay the filing fee in installments. Judge Meyers said that these clerks have been delegated authority to sign orders in certain specified circumstances, not just to use a signature stamp. Judge Keeton stated that it is better to have orders signed by the clerk than to have the clerk use the judge's signature stamp. Judge Leavy stated that the process is more honest if anything with the judge's name on it is done by the judge.

Judge Leavy noted that the civil rules authorize the clerk to sign the judgments of the district court. He indicated that it might be more straightforward to define what can be done by a clerk and that it may be possible to do so by rule. Professor King stated that this Committee had considered the possibility of clerks signing orders shortly after the enactment of the Bankruptcy Code and rejected the idea. He indicated that he believed that the Article III judges on the Committee led the opposition to the concept.

Judge Meyers suggested waiting until Judge Kennedy's subcommittee has made a list of orders which may be delegated and then reviewing the list and considering a possible rule. The Committee agreed.

Official Forms

Patricia Channon reported that the transition to the new Official Bankruptcy Forms went relatively smoothly but that some changes may be necessary in response to legislative action and comments on the new forms.

Form 1. Ms. Channon stated that two clerks have reported frequent problems with debtors, especially pro se ones, completing the statistical boxes incorrectly because they did not

understand that the asset and liability ranges are in thousands of dollars. Ms. Channon indicated that using the full numbers would look very cluttered and might not help. Judge Howard moved to take no action. **The motion passed by a vote of 6-1.**

Ms. Channon stated that several deputy clerks have noted that the penultimate box on page 2 of the Voluntary Petition varies from the language of § 322 of Pub. L. No. 98-343. Although the statute does not have such a limitation, the form states that only chapter 7 debtors need complete the box. She stated that the deviation is a reasonable one in that debtors who file under other chapters obviously choose not to file under chapter 7. Judge Howard moved to take no action. **The motion passed without dissent.**

Form 5. Ms. Channon recommended that the Committee amend the Involuntary Petition to require that the petitioning creditors and their attorneys date their signatures. Mr. Shapiro moved to approve the change. Judge Howard suggested that the change would be an administrative one which the Judicial Conference could approve without public notice. Ms. Channon agreed that public comment is not needed although the change must be approved by the Judicial Conference. **The motion was approved by a vote of 7-0.**

Form 6. Pub. L. No. 101-647, the Crime Control Act of 1990, added a new subsection (a)(8) to § 507 of the Code. Ms. Channon stated that the new, eighth priority should be included in Schedule E and offered a draft of the amendment. Judge Howard moved to make the change. Mr. Sommer asked if the language in the schedule could be more general. Ms. Channon stated that the statute lists these priority claims and that she would be reluctant to make it more broad. Professor King suggested adding a reference to section 507(a)(8) to the amendment. **The Committee agreed. The motion passed on a vote of 8-0.**

Form 7. Some practitioners have expressed confusion about whether this Committee intended for a debtor who is not "in business" to complete Questions 16-21 in the Statement of Financial Affairs. Ms. Channon suggested rearranging the order of the sentences in the second paragraph of the instructions for the form would clear up any ambiguity on the point. The second sentence would be moved behind the third and fourth sentences in order to make it clearer that only debtors who are "in business" must complete Questions 16-21. It was so moved. **The motion carried by a vote of 9-0.**

The addition of administrative proceedings to the matters to be disclosed in response to Question 4.a. of Form 7 was approved at the January, 1991, meeting. Ms. Channon included the change in her presentation as a matter of information.

Form 9. The title page of the Official Forms and the cover page to Form 9 identify this form as "Notice of Filing under the Bankruptcy Code, . . ." rather than as "Notice of Commencement of Case under Bankruptcy Code, . . .", the language used in the component forms themselves. Ms. Channon indicated that the title of the form should match the language used on the forms which make up Form 9. Professor King moved to adopt Ms. Channon's suggestion. The motion passed by a vote of 8-0.

In addition, the citation to Rule 9001(a) in Forms 9B, 9D, 9F, and 9H is incorrect. Ms. Channon stated that the "(a)" should be deleted. It was so moved. The motion was approved by an unanimous vote.

Ms. Channon also indicated that the words "Objecting to Discharge of the Debtor or" should be deleted from the block labeled "DISCHARGE OF DEBTS" on Form 9H, the form which is used for a chapter 12 case involving a corporation or partnership. She stated that there do not appear to be any provisions in the Code or the Rules for bringing such an action against a corporate or partnership debtor in chapter 12. It was moved to delete the words as recommended by Ms. Channon. The motion passed on a vote of 8-0.

Several courts have local rules fixing a bar date for filing claims in a chapter 11 case. Because the Official Forms do not accommodate this very well and the number of courts which routinely impose bar dates is growing, Ms. Channon prepared proposed alternative chapter 11 forms. The draft forms have a box labeled "FILING CLAIMS". If the court has sets a bar date, that date can be inserted in the box. If no deadline has been set, the phrase "If the court sets a deadline for filing claims, you will be notified." is inserted. It was moved to approve Ms. Channon's recommended changes as alternative forms. The motion passed on an 8-0 vote.

Form 10. Several courts have asked that the Proof of Claim require creditors to state the chapter under which the case is proceeding. Ms. Channon offered alternative versions of such a change. Judge Barta moved to approve the version of the change with a blank for stating the chapter. The motion passed by a unanimous vote.

Ms. Channon stated that the new, eighth priority needs to be added to the section for priority claims. It was noted that one of the double section marks in the line for other priority claims should be deleted. It was suggested that the Phrase "Circle one" be used in place of "Describe briefly". It was moved to make the three changes. The motion passed on a vote of 8-0.

Ms. Channon stated that one court is encountering difficulties with creditors who update the amount of their claims by including post-petition amounts. She suggested adding the words "at time case filed" to the last sentence of the first paragraph of Section 4 and the word "prepetition" to the line which starts "Amount of arrearage and other charges included". Professor King suggested using the phrase "at time case filed" in both sentences and deleting the word "prepetition" from Section 5. Ms. Channon agreed to his changes. Professor King moved to approve his suggested amendments. **The motion passed unanimously.**

Form 14. One court has requested that the Ballot for Accepting or Rejecting Plan be amended to include the class to which the claim belongs. Ms. Channon indicated that the information would be useful to any entity which receives and tabulates the ballots. Mr. Mabey suggested that any creditor who is in two classes should file a separate ballot for each class. Ms. Channon suggested inserting the phrase "which classifies this claim under class _____" at two places in the final sentence of the form. **The recommendation was approved by a 8-0 vote.** Professor King suggested changing the reference to "this claim or interest". **The Committee agreed by consensus.**

Miscellaneous Recommendations. Ms. Channon stated that she has received a number of suggested changes from Bankruptcy Judge Lisa H. Fenning in Los Angeles. These included requiring the inclusion of the debtor's consent to verification of the debtor's Social Security number, the name of the attorney or other preparer who assisted the debtor to complete the schedules, and a pro se debtor's telephone number. Judge Howard moved not to accept the suggestion for verifying the Social Security number. **The motion passed on a 5-3 vote.**

Ms. Channon stated that 40 percent or more of the petitions in Los Angeles are filed by pro se debtors, many of them with the help of a paralegal, an attorney not of record in the case, or some other undisclosed preparer. Professor King stated that legislation proposed by Senator Howard M. Metzenbaum of Ohio would go even further, requiring all preparers to sign the forms. If Judge Fenning's suggestion was approved, he indicated, passage of the legislation would require that the form be changed twice within a short time. Mr. Sommer stated that the debtor could be required to identify preparers by means of a local rule. It was moved to reject the suggestion to require the debtor to disclose the name of the preparer. **The motion passed on a vote of 6-3.**

Judge Jones stated that requiring pro se debtors to include their telephone numbers would be useful, especially when the clerk's office needs to contact the debtor to correct a deficient case paper such as an incomplete petition. Professor King moved to approve the amendment. **The motion passed unanimously.** The Reporter stated that he had received a verbal suggestion that the

debtor be required to disclose the debtor's occupation. It was noted that Schedule I, Current Income of Individual Debtor(s), already requires disclosure of the debtor's occupation. The Committee agreed by consensus that there was no need to act on the verbal suggestion.

Subpoena for Rule 2004 Examination

Ms. Channon stated that Judge Barta had suggested changing the phrase "taking of a deposition" in the Subpoena for Rule 2004 Examination to "taking of an examination". Ms. Channon indicated that amending the Director's Form would avoid any suggestion that the form undermines the rule or implies that an order is not needed for such an examination. It was suggested that the phrase "and testify at an examination under Rule 2004, Fed.R.Bankr.P., at the place, date, and time specified below" be substituted for the phrase "pursuant to a court order issued under Rule 2004, Fed.R.Bankr.P., at the place, date, and time specified below to testify at the taking of a deposition in the above case". Mr. Shapiro moved to approve the change. The motion carried on a vote of 7-0.

Ms. Channon indicated that she would present additional changes in the Director's Forms at the September meeting.

Style Subcommittee

The Reporter stated that he had received a number of recommendations from the Style Subcommittee of the Standing Committee. Judge Leavy suggested that the matter be referred to the Style Subcommittee of this Committee. It was moved and seconded to delegate authority to the Style Subcommittee to respond to the recommendations. The motion was approved unanimously. The subcommittee, which consists of Judge Barta, Professor Resnick, Professor King, and Mr. Minkel, initially agreed to meet in New York on April 3, 1992, to consider the recommendations. When it became apparent that this Committee would complete its meeting in one day, however, the Style Subcommittee decided to meet on Friday, March 27, 1992.

Approval of Minutes

Professor King suggested that consideration of the draft minutes of the meetings of February 28, 1992; June 20 - 21, 1991, and March 15 - 16, 1990, be deferred until the next meeting. The Committee agreed.

Date and Place of Next Meeting

The Chair suggested that the next meeting be held near Jackson Hole, Wyoming, in late September. Thursday and Friday, September 17 and 18, were chosen as the meeting dates. The meeting may begin at noon in order to accommodate committee members from the East Coast who have commitments on the day before. Thursday and Friday of the proceeding week were selected as alternative dates. The Jackson Lake Lodge was suggested as a meeting place. The Committee agreed.

It was moved that the committee adjourn. The motion carried without objection. The meeting was adjourned at 5:48 p.m. on March 26, 1992.

Respectfully submitted,

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