ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 9-10, 2004
Half Moon Bay, California

Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Bankruptcy Judge Eugene R. Wedoff, a new member of the Committee; District Judge Robert W. Gettleman, a former member of the Committee; Professor Jeffrey W. Morris, Reporter; and Ms. Patricia S. Ketchum, advisor to the Committee, attended the meeting. Circuit Judge R. Guy Cole, Jr., a member of the Committee; District Judge Ernest C. Torres, a member of the Committee; and Dean Lawrence Ponoroff, a new member of the Committee, were unable to attend.

District Judge David F. Levi, chair of the Committee on Rules of Practice and Procedure (Standing Committee); Circuit Judge Harris L. Hartz, liaison from the Standing Committee; Peter G. McCabe, secretary of the Standing Committee; Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); and Clifford J. White, III, Deputy Director, Executive Office for United States Trustees (EOUST), attended. Professor Daniel R. Coquillette, reporter of the Standing Committee, and Lawrence A. Friedman, Director, EOUST, were unable to attend.

James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research

Division, Federal Judicial Center (FJC), also attended the meeting. Ms. Lonnie Gandara of Glen Ellen, California attended part of the meeting.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold**.

Introductory Matters

The Chairman welcomed Judge Wedoff to the Committee, and congratulated Judge Zilly on his appointment as the new chairman of the Committee. The Chairman announced that Judge McFeeley has been reappointed to the Committee and that Mr. Frank's term has been extended one year. The Chairman welcomed the members, liaisons, advisers, and guests to the meeting. The Chairman praised Professor Wiggins, whose term ends with this meeting, for her work with the Committee, including her keen eye for exact wording and punctuation. The Chairman thanked Mr. Wannamaker and the staff of the Rules Committee Support Office for the expedited production of the agenda book.

Judge Levi recognized Judge Small's service as chairman and indicated that he is looking forward to working with Judge Zilly as the new chairman.

The Committee approved the minutes of the March 2004 meeting.

The Chairman briefed the Committee on the June 2004 meeting of the Standing Committee. The Standing Committee gave its final approval to the proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006; Official Forms 16D and 17; and Schedule G of Official Form 6. The Standing Committee approved for publication the proposed amendments to Rules 1009, 2002, 4002, 7004, and 9001, and Schedule I of Official Form 6.

Judge Levi discussed the Standing Committee's consideration of the proposed amendment to Appellate Rule 35(a) (en banc determinations) and proposed new Appellate Rule 32.1 (citing judicial dispositions), which attracted hundreds of public comments. The Standing Committee gave its final approval to the proposed amendment to Rule 35(a) and returned proposed new Rule 32.1 to the Advisory Committee on Appellate Rules with a recommendation that the FJC undertake an empirical study of the impact of the citation of unpublished opinions on the courts' workload in the circuits which have authorized the practice. Judge Levi praised the contribution to the rule-making process of studies by the FJC. The Standing Committee approved for publication a package of electronic discovery rules, which Judge Levi stated presented some very difficult issues.

Judge Montali reported on the June 2004 meeting of the Bankruptcy Administration Committee. Judge Montali stated that the Bankruptcy Administration Committee has been

overwhelmed by budget issues even though it has primary responsibility for only three budget areas: temporary law clerks, recalled bankruptcy judges, and the bankruptcy administrator program. Judge Marjorie O. Rendell, the chair of the Bankruptcy Administration Committee, has written the chief judges and clerks of the bankruptcy courts requesting their advice on cost-saving ideas and suggestions for further dialogue on sharing administrative services. Judge Montali stated that the use of shared administrative services, more efficiencies in the use of recalled judges, the centralization of processing chapter 7 cases, and a higher threshold for recommending additional bankruptcy judgeships are under study. Judge Montali stated that the Bankruptcy Administration Committee is conducting its biennial study of the need for additional bankruptcy judgeships, which will include on-site surveys of six districts, and is planning a time study and re-examination of the case weights used in judgeship surveys.

Action Items

"Fast Track" Consideration of Amendments to Rules 2002, 9001, and 9036. Proposed amendments to Rules 2002, 9001, and 9036 were published for comment in August 2004. The deadline for comments is February 15, 2005. The proposed amendments to Rules 2002 and 9001 would allow creditors and notice providers to establish their own process for delivery of notices. The proposed amendments to Rule 9036 would delete the requirement that the sender of an electronic communication receive confirmation of receipt in order for the notice to be considered complete. The proposals could produce savings to the Judiciary by increasing the use of electronic noticing and thus reducing postal fees and handling costs.

If approved and promulgated in the normal course, the proposed amendments would be effective on December 1, 2006. If the Committee and the Standing Committee consider and approve the comments by e-mail ballot, the proposed amendments could be considered by the Judicial Conference at its meeting in March 2005 and transmitted to the Supreme Court prior to the May 1 deadline for the Court to transmit proposed amendments to Congress. As a result, if approved and in the absence of Congressional action to the contrary, the amendments would be effective on December 1, 2005, one year early. The Chairman stated that the Standing Committee and the Court have indicated that they are willing to consider the proposed amendments on an expedited basis, provided there is no significant opposition.

Mr. Shaffer stated that the deletion of the confirmation of receipt requirement in Rule 9036 creates an implication of a more lenient standard for the electronic service of notices than for the electronic service of pleadings and other papers under Civil Rule 5, which states that electronic service is ineffective if the party making service learns that the attempted service did not reach the person to be served. He asked whether incorporating the provision from Civil Rule 5 in the proposed amendment to Rule 9036 would require republication. The Chairman stated that it probably would be considered a substantive change which requires republication.

The Reporter stated that Civil Rule 5 only specifies that electronic service is ineffective if the sender learns that the papers did not reach the person to be served. There is no such

restriction on service by mail. Judge Zilly stated that parties make service under Civil Rule 5 and the clerk serves notices under Rule 9036. The Chairman stated the Bankruptcy Noticing Center automatically sends a paper copy of the notice if it learns that an electronic notice did not reach the intended recipient. Judge Wedoff stated that he doubted that a party could prevail with an argument that an electronic notice was effective even though the intended recipient did not receive the notice. Judge Montali stated that a hearing can be rescheduled if the notice is ineffective. He noted that the time for appeal continues to run even if notice of the entry of the judgment is ineffective.

Judge Swain stated that there is a technological barrier to the use of Rule 9036 as written because email providers no longer provide confirmation of receipt. She stated that Rule 9036 is about permission to send notices electronically, not the effectiveness of those notices. Mr. Waldron stated that the Committee has been advised that electronic notices are no less reliable than first class mail. He stated that there is a risk of nondelivery with either means of transmission. Professor Resnick stated that a great deal of care went into the drafting of Rule 9036 because in 1993 it was the first electronic notice rule. He stated that in 2004 a party gives its email address to the court for electronic noticing, just as the party gives its postal address to the court for paper notices. The Committee discussed the treatment of returned emails and returned mail when notices cannot be delivered as addressed and the parties' responsibility to maintain a current address with the court. Judge Zilly stated that Civil Rule 5(b)(3)'s provision that service by electronic means is ineffective if the sender knows that the attempted service did not reach the person to be served operates in certain proceedings in bankruptcy. Civil Rule 5(b) is incorporated by Rule 7005 in adversary proceedings and by Rule 9014 for the service of subsequent papers in contested matters.

Professor Resnick said that a vote of a majority of the Committee should not be required to take the proposed amendments off the "fast track;" significant minority opposition should be sufficient to remove the amendments from the "fast track." He said that the full Committee should discuss the matter if there is a single substantive public comment. Judge Zilly stated that he would be inclined to pull the proposed amendments off the "fast track" if there is any significant dissent on the Committee to continuing the expedited treatment. Judge Zilly moved that the Committee consider the public comments on the "fast track" schedule. **With one dissent, the Committee agreed to leave the proposed amendments on the "fast track," subject to a decision by the new chairman to take the matter off the "fast track" based on public comments, concerns of Committee members, and judicial wisdom.** In an informal straw poll on the merits of the proposed amendment to Rule 9036, the Committee favored the proposal by a vote of 9-5.

Mandatory Use of Electronic Filing. The Committee on Court Administration and Case Management (Court Administration Committee) has requested that the Advisory Committees on Civil Rules and Bankruptcy Rules amend those rules to encourage electronic filing. Responding to budgetary concerns, the Court Administration Committee suggested that Civil Rule 5(e) and Bankruptcy Rule 5005(a)(2) be amended to authorize the courts to "require" the use of electronic filing with appropriate exceptions.

The Chairman stated the proposed amendment could be effective on December 1, 2007, if published in August 2005 and considered in the normal manner. If published late this year and if considered by the Advisory Committee and the Standing Committee next spring, the proposed amendment could be considered by the Judicial Conference at its meeting in September 2005 and take effect on December 1, 2006. If published immediately and considered on an expedited basis, the proposed amendment could be effective on December 1, 2005.

Judge Zilly stated that so many courts are already requiring electronic filing that it may not be necessary to consider the proposed amendment on the "fast track." Mr. Rabiej stated that some courts are reluctant to require electronic filing because of the wording of the national rule. Judge Levi indicated that, if the proposed amendment authorizing the courts to require electronic filing on a local basis is not considered on the "fast track," an amendment may be proposed which requires electronic filing on a national basis. The Committee discussed the desirability of creating a single national standard for filing documents and that the standard be electronic filing.

One Committee member suggested publishing a supplemental Committee Note to the existing rule as an alternative to amending the rule. Professor Resnick stated that Committee Notes are published only with proposed amendments. Rule 5005(a)(1) provides that the clerk shall not refuse to accept papers for filing solely because they are not presented in proper form. Several Committee members suggested that filing a paper document in a court which mandates electronic filing may be matter of form. As a result, the filing would be subject to sanction by the judge, but the clerk could not refuse to accept the document for filing.

Judge Levi stated that the Court Administration Committee's belief that the proposed amendment would produce cost savings should be given deference. He said that, from the rules point of view, the question is whether this is a noncontroversial matter which can be dealt with quickly, or whether there are substantive issues which should be considered more fully. The Committee discussed whether the economic impact of proposed amendments or some other standard should be used to select matters for "fast track" consideration. Judge Levi said "fast track" matters usually respond to legislative changes or technical corrections. Mr. McCabe stated that in the past the Standing Committee declined to set a standard for "fast track" amendments.

Mr. Waldron said mandatory electronic filing is more efficient but that the savings have already been incorporated by reducing the staffing formula for the clerks' offices in bankruptcy courts. Several Committee members expressed concern about the impact of mandatory electronic filing on access to the court for pro se parties, out-of-district attorneys, and infrequent bankruptcy practitioners. **Judge Zilly asked staff to research existing local rules which require electronic filing.** Judge Wedoff stated that access should be addressed separately and that the question is whether the existing rule discourages courts from mandating electronic filing. Mr. McCabe stated that when courts ask about the rule, the courts are told that the current rule was not intended to include mandatory electronic filing, but that interpretation of the rule is up to the courts.

Judge Klein moved to amend Rule 5005(a)(2) to "permit or require" documents to be filed, signed, or verified by electronic means. **Judge Klein's motion carried without dissent.** Mr. Frank suggested the Committee Note state that local rules should provide appropriate safeguards to ensure access to the court. Professor Resnick suggested that the Committee Note state that many courts have interpreted the existing rule to permit the adoption of local rules which require electronic filing and that the proposed amendment supports that interpretation. Judge Walker moved for early publication of the proposed amendment and a three-month comment period with the goal of an effective date of December 1, 2006. Judge Zilly expressed concern about whether the bench and bar would have time to respond. The Reporter stated that the proposed civil, appellate, and bankruptcy amendments would look the same and would be published as a single package, thus permitting a more focused review by the bench, bar, and public. **Judge Walker's motion carried with three dissenting votes.**

Template Rule to Protect the Privacy of Persons Identified in Court Filings. The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of documents when they are filed electronically. Judge Swain discussed the development of a template privacy rule for consideration by the Bankruptcy, Civil, Criminal, and Appellate Rules Committees with the expectation that, as adopted, the rule would be as uniform as is possible. The Chairman stated that it is important to tell the other committees that the Committee will adopt the template with only minor exclusions.

The Reporter presented a draft rule which incorporated the Civil Rule version of the template with an exemption from the redaction requirement for the name of a minor who is the debtor in the case. The Reporter stated that the full name of a debtor who is a minor should be included on the petition and the caption of adversary proceedings and contested matters in the case in order to ensure that creditors are given appropriate notice. Several Committee members questioned whether the person preparing the list of creditors would know whether a creditor is a minor and how creditors who are minors would be given notice if their initials were used in place of their names on the mailing matrix. Judge McFeeley stated that the main concern was protection of the debtor's children and that the 2003 amendments to the schedules and statement of financial affairs had already taken care of that. He said there was little danger from including the names of creditors who are minors on the schedules or mailing matrix as long as the creditors are not identified as minors. The Chairman stated that because the Judicial Conference's privacy policy includes the names of minors, the names should be left in the template rule with exceptions as needed.

The statute provides that a party which makes a redacted filing may also file an unredacted document under seal. Judge Montali stated that the Committee Note should indicate that the unredacted filing is sealed automatically without requiring a motion and order to seal. The Reporter suggested that the Bankruptcy Rules incorporate the Civil Rule version of the template rule in the rules governing adversary proceedings and that the new rule be added to the list of rules that apply in contested matters under Rule 9014. Several Committee members questioned whether that approach would cover the petition, schedules, statement of financial

affairs,"first day" orders, applications to employ counsel, proofs of claim, and other case papers which are not part of an adversary proceeding or a contested matter. The Reporter stated that the new rule could be included in Part IX of the rules. Professor Resnick stated that the Bankruptcy Rules use the term "infant" instead of "minor" and suggested that the new rule do the same. Judge Levi stated that the restyled version of the Civil Rules drops the term "infant."

The Committee agreed in principle that a new rule incorporating the template rule should be included in Part IX of the Bankruptcy Rules. The new rule would provide that a minor's name be excluded from the redaction requirement when the minor is either the debtor or a creditor who is not identified as a minor. A final recommendation will be made at the March meeting after the Committee has had the benefit of comments from the other advisory committees.

Proposed Revision of the Statement of Financial Affairs. At the request of the EOUST, the Committee approved for publication an amendment to Schedule I of Official Form 6 that would require disclosure of a non-filing spouse's income in a chapter 7 case, as is already required in a chapter 12 or chapter 13 case filed by a married debtor. At its meeting in March 2004, the Committee considered briefly whether Official Form 7, the Statement of Financial Affairs, also should be amended to require information on a non-filing spouse in a chapter 7 case, as well as in a chapter 12 or chapter 13 case. The matter was referred to the Subcommittee on Forms, which recommended that the Statement of Financial Affairs not be amended.

Mr. White stated that the schedule gives the United States trustee and the trustee a snapshot of the debtor's financial affairs. He said expanding the Statement of Financial Affairs would provide historical information which would help protect the integrity of the bankruptcy system. Judge Walker, the chair of the Forms Subcommittee, stated there is no question that requiring information on a non-filing spouse would be helpful in some cases, but that it also is clear that the information would not be helpful in most cases and would be extremely intrusive. He said requiring the disclosure would be unnecessarily intrusive when other remedies exist in the cases where it is needed.

Mr. Frank stated that the disclosure did not appear to be a major issue for the integrity of the system because the EOUST did not include the proposal in the EOUST's package of amendments requiring additional disclosure. Mr. White said a number of private trustees would support the change if they knew it was being considered. He stated that the disclosure would not be intrusive in chapter 7 cases because it is already required in chapter 12 and chapter 13 cases. Judge Small asked if any Committee members wished to pursue the matter further. **There was no response and the Committee accepted the Subcommittee's recommendation not to proceed.**

Notice of Transfer of Claim. At its March 2004 meeting, the Committee considered a proposed new Director's Form entitled "Notice of Transfer of Claim" submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. After a discussion, the proposed form was referred to the Forms Subcommittee. Ms. Ketchum reviewed the Subcommittee's changes

to the proposed form including deleting most of the language referring to the transaction between the transferor and the transferee, rearranging the columns, and adding a statement that the notice has been filed as evidence of the transfer.

Judge Montali asked whether the notice form was intended to cover scheduled claims deemed to have been filed under section 1111(a) of the Bankruptcy Code. Professor Resnick stated that Rule 3001(e) was originally intended for chapter 11 cases and that deemed filed claims are treated as filed claims which may be transferred under Rule 3001. Ms. Ketchum agreed that including a reference to deemed filed claims is a good idea.

The Chairman stated that the proposed new form is a Director's Form, which does not require approval by the Committee. Ms. Ketchum stated that Director's Forms are submitted to the Committee for its input and suggestions. Judge Zilly stated that the proposed notice form appears to be a good step forward but expressed concern that Director's Forms are not published in some bankruptcy books. **Judge Zilly suggested that the Administrative Office explore how many Director's Forms are used on a regular basis and whether some ought to be designated as Official Forms.** Ms. Ketchum explained that the Director's Forms are available on the Judiciary's website and that many of the procedural forms have been incorporated in software used by the clerks or by bankruptcy attorneys.

Revision of the Proof of Claim. At its March 2004 meeting, the Committee considered a proposal for amending Official Form 10, the Proof of Claim, submitted by the Bankruptcy CM/ECF Working Group's claims subgroup. The Committee was sympathetic to the Working Group's goal of facilitating the electronic filing, processing, and review of claims, but identified several proposed revisions that Committee members believed would conflict with the Bankruptcy Code and Rules. The proposal was referred to the Forms Subcommittee. The Subcommittee discussed the proposal in a series of conference calls and at a meeting on September 8, 2004. In addition, the Subcommittee received additional input from the Working Group.

Judge Walker stated that one issue is whether the form should function as a matter of math with the total claim equal to the sum of the secured, priority, and unsecured amounts. After discussing whether the sum of the three components could exceed the designated total in box 1, the Subcommittee submitted a draft revision which negated the strict math function favored by some clerks and trustees. The creditor would state the amount of the claim in box 1 and complete the boxes for secured and priority claims only if a portion of the claim is secured or entitled to priority.

Judge Walker stated that the biggest discussion concerned attachments. He stated that Rule 3001 anticipates that the required supporting documents will be attached but that the current form states that the filer should attach a summary if the supporting documents are voluminous. The electronic filing environment assumes that there is some limitation on the size of the attachments because large attachments can slow down the operation of the CM/ECF system, and they take longer to file or to call up on a computer. Judge Walker said there was lots

of sentiment on the Subcommittee to increase the 10-page limit on attachments suggested by the Working Group, but uncertainty about the proper limit. **The Subcommittee left the page limit blank on the draft revision and asked for guidance from the CM/ECF project staff on the page limit.**

Judge Zilly stated that Rule 3001(c) requires that, if a claim is based on a writing, the writing shall be filed and that Rule 3001(d) requires that evidence of perfection of a security interest be filed, but that filing relevant excerpts may make more sense in the electronic world than filing the entire documents. Mr. Shaffer stated that the proof of claim is not just an opening salvo and that it would better to either divide the attachments into a number of documents or to require the filer to make copies of the complete documents available on request. Mr. Waldron said a number of courts require that lengthy attachments be divided into segments but that multiple documents still impact CM/ECF system performance by increasing the size of the database and slowing network traffic. Judge Wedoff stated that documents which included thousands of pages were divided into 50-page segments in the United Airlines case and that it was little different from filing lengthy paper documents, which could clog up the clerk's office, too. He stated that it is just a matter of getting bigger computers and more bandwidth.

Judge Walker stated that limiting the size of documents is a matter of controlling the use of resources. Judge Walker stated that, if one arm of the Judiciary says the limitations are important, that should be given some deference. Judge Montali stated that, with the exception of a few mega cases, most proofs of claim are only four to five pages long. **Judge Walker said the Subcommittee hoped to have a final draft ready for the March 2005 meeting and invited the Committee members' input.**

Joinder of Objections to Claims with a Demand for Rule 7001 Relief. The Committee considered a possible amendment to Rule 3007 at its March 2004 meeting. The existing rule attempts to provide a procedural framework for situations in which the parties join a request for relief that should have been brought as an adversary proceeding with an objection to claim. The rule provides simply that the hybrid objection is deemed to be an adversary proceeding without addressing the consequences of the characterization. The Committee referred the matter to the Subcommittee on Attorney Conduct and Health Care. The Subcommittee met by teleconference in late April and recommended an amendment which prohibited joining a demand for Rule 7001 relief with an objection to claim. The proposed Committee Note stated that the two may be joined by filing an adversary proceeding.

Judge Montali asked whether the existing rule is a problem. Judge Klein said the existing rule creates difficulties for clerks because it leaves so many procedural questions unanswered, including just how the transformation to an adversary proceeding takes place. It is unclear whether the person requesting Rule 7001 relief must pay a filing fee, serve the demand for relief with a summons, or repeat anything done earlier. Judge Montali stated that the proposed amendment creates an unnecessary obstacle by requiring a separate adversary proceeding. Instead of an absolute bar, he suggested allowing the party to join the objection and demand for relief and stating in the Committee Note that a filing fee is required. The Reporter said the

Subcommittee found it easier to separate the two concepts than to specify how the deemed adversary proceeding would be treated.

Professor Resnick suggested stating that a party may join the objection and demand for relief by commencing an adversary proceeding. Judge Wedoff suggested adding "but an objection to claim may be included in an adversary proceeding" at the end of the Subcommittee's draft. Professor Resnick suggested substituting "with' for "to" in line 9. Mr. Frank suggested inserting "If a party files a separate adversary proceeding," at the beginning of the third paragraph of the Committee Note. Professor Resnick suggested deleting the second paragraph of the Committee Note. He suggested replacing "matter" with "proceeding" in the second line of the first paragraph of the Committee Note and inserting "or for other relief specified in Rule 7001" after "claimant" in the penultimate line of the paragraph. **With no dissenting votes, the Committee approved the proposed amendment to Rule 3007 for publication with the revisions suggested by Professor Resnick, Judge Wedoff, and Mr. Frank.**

Effect of 2003 Amendments to Civil Rule 23. Professor Resnick stated that Civil Rule 23 was amended effective December 1, 2003, to add new subdivisions (g) and (h). Rule 23(h) establishes new procedures for the award of attorney fees in class actions and states that Civil Rule 54(d) applies to awards of attorney fees in class actions. Bankruptcy Rule 7023 applies all of Civil Rule 23 in adversary proceedings. Therefore, it appears that new Rule 23(h) applies in adversary proceedings. Bankruptcy Rule 7054(a) applies Civil Rule 54(a)-(c) in adversary proceedings, but not Civil Rule 54(d). At its meeting in March 2004, the Committee discussed whether Bankruptcy Rule 7023 or Rule 7054 should be amended to address the amendment of Civil Rule 23.

The Chairman referred the matter to the Subcommittee on Business Issues, which voted 5-1 to recommend that no changes be made to the Bankruptcy Rules at this time with respect to the application of Civil Rule 54(d) in class action adversary proceedings. The reasons for the recommendation included the rarity of class actions in bankruptcy, concern about raising complex and controversial issues relating to the use of special masters and magistrate judges in bankruptcy proceedings, and the desire not to deal with the complex issue of attorney fees in bankruptcy in the context of class actions only. Professor Resnick suggested that the Committee defer action and see what develops in the case law. Judge Montali suggested carving out references to magistrate judges and special masters in Rule 23(h)(4). Professor Resnick stated that doing so could be a lightning rod for controversy. **The Committee agreed not to amend Rules 7023 or 7054 at this time.**

Limiting the Application of Rule 7026 in Adversary Proceedings. As a result of the Committee's discussion of the possibility of exempting specific categories of adversary proceedings from the operation of the mandatory disclosure requirements of Civil Rule 26, Mr. Niemic conducted a study of the use of mandatory disclosure in adversary proceedings. The survey demonstrated that the views of the bankruptcy judges were quite mixed. The Committee discussed the study at its March 2004 meeting and referred the matter to the Subcommittee on

Privacy, Public Access, and Appeals. Mr. Adelman, the chair of the subcommittee, stated that the Subcommittee recommended doing nothing because there was no real consensus on which categories of proceedings to exclude and because the parties can stipulate that the "mandatory" disclosures will not be required.

The issue was discussed at the roundtable meeting of bankruptcy judges held in conjunction with an FJC seminar held in Seattle in August 2004. The consensus of the judges was that the system is working and should not be changed. Another sentiment expressed was that amending the rule would highlight that the "mandatory" disclosures are not made in many proceedings. Judge Klein stated that Rule 7026 requires the disclosures but nobody complies. Judge Zilly stated that the rule allows the parties to stipulate that the disclosures are not needed and that is what the parties are doing, explicitly or implicitly. **The Committee agreed not to amend Rule 7026.**

Retroactive Extension of the Deadline to Object to Exemptions. Judge Wedoff has requested that the Committee consider an amendment to Rule 4003(b) to allow the retroactive extension of the time to object to claims of exemptions in certain circumstances. Judge Wedoff suggested that late objections be permitted when there is no good faith basis for the debtor's claim of exemptions and for secured creditors when the debtor files a lien avoidance under section 522(f)(1) of the Bankruptcy Code. Judge Walker suggested that the standard should be whether the debtor had no reasonable basis for the claim of exemptions. Judge Montali suggested specifically requiring that the objection be filed before the case is closed.

Mr. Frank expressed concern about the amendment's effect on finality and questioned whether a change is needed. He stated that the possibility of a bankruptcy fraud prosecution or Rule 9011 sanctions keeps debtors from getting a free ride to file false claims of exemption. Judge Walker stated that there is little chance of prosecution for this. Several Committee members discussed the use of the good faith standard. Professor Resnick suggested that the standard be whether the debtor knowingly and intentionally made a false claim of exemptions. Judge Montali suggested using the "knowingly and fraudulently" standard in section 727(a)(4) of the Code. Instead of extending the objection period, Judge Hartz suggested using equitable estoppel with the time to object running from when there were reasonable grounds to object.

Judge Klein stated that the same change would be needed in a number of rules with parallel construction and that creditors have standing to object and should be charged with protecting their own interests. Judge Montali stated that the proposed amendment was an effort to override Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), in which the Court held that a trustee who failed to object timely to the debtor's claim of exemptions was barred from raising the issue outside of that deadline. He said Taylor required the trustee to do the trustee's job. Judge Wedoff said Taylor enforced the rule and the amendment is an effort to say what the rule should be on the basis of Rule 9011. Professor Resnick said that focuses on the culpability of the actor, and the facts on which the actor believed he was entitled to the exemption. **The Committee agreed to refer the issue to the Subcommittee on Consumer Matters.**

Separate Document Requirement for Judgments. Bankruptcy Rule 9021 requires that a judgment entered in an adversary proceeding or a contested matter be set forth in a separate document, which is comparable to the separate document requirement in Civil Rule 58. Rule 9021 states that a judgment is effective when entered as provided in Rule 5003. Civil Rule 58 applies in bankruptcy cases except as otherwise provided in Rule 9021. Civil Rule 58(b) states that if a separate document is required, the judgment is entered when the separate document is entered on the docket and when the earlier of two events occurs: the judgment is set forth in a separate document or 150 days has run from the entry on the docket.

The Chairman stated that there is a question whether a judgment is effective when the judge rules from the bench and directs a party to prepare the order or when the formal judgment is entered. Just as attorneys may ignore the mandatory disclosure requirements in Civil Rule 26, judges sometimes ignore the separate document requirement. The Reporter stated that, in many contested matters, the order is set out in a docket entry and there is no separate document. Judge Klein said the 150-day limit applies to any appealable order in an adversary proceeding or contested matter unless it is set out in a separate document. Because there may be a question about the application of the 150-day alternative in bankruptcy cases, the Reporter suggested revising Rule 9021 either to delete the separate document requirement or to clarify the application of Rule 58 by only incorporating the provisions of subparts (a), (c), and (d) of the Civil Rule. **The Chairman referred the matter to the Subcommittee on Privacy, Public Access, and Appeals for further study.**

Debtor-in-Possession Duties under Rule 1019(5)(A). R. Bradford Leggett, an attorney in North Carolina, requested that the Committee consider amending Rule 1019(5)(A), which requires a post-conversion report by a former debtor-in-possession. Mr. Leggett stated that the conversion to chapter 7 terminates the debtor's status as a debtor-in-possession. The Chairman said the courts require the former DIP to prepare the report but that the real problem is that the attorney for the DIP is not paid for preparing the report. The Chairman asked whether the problem was serious enough to change the rule. Mr. Adelman said he considered preparing the report part of the cost of doing business as counsel to the former DIP and that the attorney should have access to the information needed for the report.

Judge Klein asked whether the attorney for the former DIP could be retained as special counsel to the chapter 7 trustee under section 327(e) of the Bankruptcy Code to prepare the post-conversion report. The Chairman said a bankruptcy court denied Mr. Leggett's request to be designated as special counsel on the basis of the Supreme Court's holding in Lamie v. U.S. Trustee, 124 S.Ct. 1023 (2004). The Supreme Court held in Lamie that the chapter 7 debtor's counsel could not be paid out of the estate because section 330(a)(1) does not authorize payment of fees to the debtor's counsel in chapter 7 cases. Relying on Rule 1019(5)(A) and Lamie, the bankruptcy court held that preparing the post-conversion report is the DIP's obligation, not the trustee's.

Judge Klein suggested incorporating in Rule 1019(5)(A) the concept of Rule 1007(k), which governs the preparation of lists, schedules, and statements on the debtor's default. Under

Rule 1007(k), the court may order the trustee, a petitioning creditor, committee, or other party to prepare any of these papers and be reimbursed from the estate as an administrative expense. Professor Resnick stated that it would cost more to prepare an application for retention under section 327(e) than it would cost to prepare the post-conversion report. Judge Walker asked if the rule was "broken" and moved that the Committee take no action. **With no dissenting votes, the Committee agreed to take no action.**

Time for Filing Corporate Ownership Statements under Rule 7007.1. The current version of Rule 7007.1 requires that any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, file a corporate ownership statement with its first pleading in the adversary proceeding. The first filing by a defendant in an adversary proceeding may not be a "pleading," as that term is defined in Civil Rule 7, which is applied in adversary proceedings by Bankruptcy Rule 7007. The Reporter suggested that Rule 7007.1 be amended to require filing the ownership statement with the party's "first appearance, pleading, petition, motion, response, or other request addressed to the court."

Judge Montali suggested requiring the statement with the party's first filing. Professor Resnick stated that electronic filings are considered papers under Rule 5005(a). Judge Klein suggested incorporating Rule 7007.1 in Rule 1018. The Reporter suggesting incorporating it in Rule 1010, instead. The Reporter stated that Rule 7007.1 is about recusal and should be applied only where recusal is possible. He said the corporate ownership statement is required in adversary proceedings under Rule 7007.1 and in voluntary petitions under Rule 1007, but not in involuntary petitions or contested matters. Judge Klein moved to use the language of Civil Rule 7.1 in the proposed amendment to Rule 7007.1 and to amend rule 1010 to require the corporate ownership statement when an involuntary petition is filed. **The motion carried with one dissenting vote as to Rule 7007.1. The proposed amendment to Rule 7007.1 will be submitted to the Standing Committee with a request that it be approved without publication as a conforming or technical amendment.**

Joint Subcommittee on Venue and Mega-Cases. The Joint Subcommittee on Venue and Mega Cases (Joint Subcommittee) is composed of members of the Committee and members of the Bankruptcy Administration Committee. The Subcommittee, which is chaired by Mr. Shaffer, held its first meeting in Seattle in August 2004. Mr. Shaffer stated that the Joint Subcommittee hopes to make the system fairer and more efficient for mega cases. Mr. Shaffer outlined a four-prong effort to improve the system by (1) amending the rules to specifically authorize sua sponte venue changes, (2) making the rest of the country more user friendly for large chapter 11 cases like the handful of districts which receive the majority of these cases now, (3) recognizing that the large chapter 11 practice is a national practice and making the system work better for out-of-town creditors and attorneys, and (4) identifying the real problems that cannot be solved in the rules context and providing guidance to the judges on these matters.

Rule 1014: Although legislation has been proposed to authorize sua sponte motions to transfer venue, Mr. Shaffer stated that he believed this could be accomplished by amending Rule 1014. Judge Zilly stated that a civil action in the district court can be transferred under section

1404 of title 28 only to a district where the action could have been filed and asked whether the transfer of a bankruptcy case or proceeding under section 1412 is subject to the same limitation. Judge Montali stated that section 1412 provides for the transfer of a bankruptcy case or proceeding to a district in the interest of justice or for the convenience of the parties. Mr. Adelman asked whether the rules amendment went beyond scope of section 105 of the Bankruptcy Code, which refers to carrying out the provisions of title 11, not the provisions of title 28. Professor Resnick stated that the rule provides who may make the motion, which is procedural.

Judge Wedoff said he had no opposition to the amendment because bankruptcy judges either already have the power to transfer cases sua sponte or the amendment gives the judges more discretion. Judge Walker stated that a specific reference in Rule 1014 to sua sponte motions could imply that the court cannot act on its own motion in other instances. Professor Resnick stated that he was not concerned about the inference. He said Rule 1017 refers to dismissal under section 707(b) on motion by the United States trustee or on the court's own motion. Professor Resnick stated that a party in interest must make a timely motion but that the court could act at any time. Judge Swain stated that the court is acting in the interest of justice and should have the broadest interpretation of time.

Professor Resnick suggested reversing the phrases so that the amendment would refer to a timely motion of a party in interest or on the court's own motion. **The Committee agreed.** Judge Klein stated that the Committee Note should state that the amendment clarifies that the court may act sua sponte, rather than it provides that authority. **The Committee agreed. Mr. Adelman's motion to approve the amendment for publication was approved without dissent.**

Rule 3007: Mr. Shaffer stated that the proposed amendment to Rule 3007 would provide needed guidance to the courts. He said there is concern about the practice in at least one district of permitting omnibus objections to claims on the merits. Judge Montali stated that disallowing a claim is substantive but that proposed Rule 3007(c) draws a distinction based on whether the objection goes to the merits. He stated that the question is whether these types of objections can be lumped together without going to the merits. Professor Resnick asked what is wrong with joining objections to claims on any grounds, including substantive grounds. Professor Morris stated that the nature of the defenses and the ease of resolving the objections differ, depending on whether the objections are substantive.

The Chairman stated that proposed Rule 3007(c) would permit the objections to claims listed in that subsection to be joined without court approval, but that court approval would be needed to join the objections to claims listed in proposed Rule 3007(b). Judge Zilly suggested that the Committee Note state that Rule 3007(c) is intended to cover objections to claims which do not go to the merits. Judge Wedoff stated that the lack of supporting documents is not a basis for the invalidity of a claim under section 502 of the Code. Professor Resnick suggested striking section 3007(c)(7). Professor Resnick stated that the references in lines 9-10 and lines 13-14 to "objections to claims held by more than one claimant" would include individual objections to

joint claims. **The Committee agreed to change the references to "objections to more than one claim."**

Judge Walker stated that the proposed rule is really guidance for better practices and that it would be better to prepare a manual than to try to develop a rule acceptable to everybody. Judge Montali responded that a revised edition of the megacase manual and other resources for judges are planned. The Chairman stated that proposed Rule 3007(d) incorporates both best practices and due process. Judge Klein stated that creditors may have difficulty finding their claims in the omnibus objections that are being filed now. He stated that the claims may not be listed in alphabetical order and that a claim may be included in multiple categories of objections. Mr. Shaffer said the debtor in the United Airlines case included page references to creditors in its omnibus objections. Mr. Adelman said the complexity of the omnibus objections to claims in the K-Mart case prompted more objections.

Professor Wiggins stated that the text to be deleted from Rule 3007 should be set out in the draft. **The Committee agreed.** Judge Klein suggested that the Committee Note state that the amendment is an exception to the Restatement on finality for appeal. **A motion for the Reporter to present a final draft of the proposed amendment at the March meeting carried without dissent.**

Rule 6006: Mr. Shaffer stated that the proposed amendment to Rule 6006 concerning omnibus assumption, rejection, or assignment of executory contracts and unexpired leases parallels the proposed amendment for omnibus objections to claims. The proposed amendment permits omnibus motions to reject but requires permission from the court for omnibus motions to assume or assign. Professor Resnick suggested that line 2 be revised to refer to "requests for court approval." He stated that motions to assume should not be combined in an omnibus motion without court permission unless the executory contracts or unexpired leases are held by the same party. Judge Swain suggested adding a provision that the motions could be combined if the contracts and leases are held by the same party.

Judge Zilly asked why no more than 100 executory contracts and unexpired leases was chosen as the maximum that could be combined. Judge Montali said the limit changed several times in earlier drafts and that the number is arbitrary in a sense. Mr. Shaffer asked whether the rule should permit some motions to assume or assign to be combined without court permission, perhaps if the contracts or leases arose in the same transaction. Professor Resnick suggested a carve out for assumptions and assignments as part of a sale under section 363 of the Code. **The Committee agreed to combining assumptions and assignments in a section 363 sale provided that the omnibus motion is subject to proposed Rule 6006(f).**

Professor Resnick stated that the proposed amendment should deal with the assumption or assignment of contracts and leases in a plan. Judge Montali stated that Rule 6007(a) excludes plans. He stated that plans should be required to follow a "user friendly" approach to omnibus assumptions. **The Committee agreed that there should be a provision for omnibus assumption or assignment in plans but not in Rule 6006.** Judge Klein suggested renumbering

sections (e) and (f) as sections (c) and (d). Mr. Shaffer stated that renumbering could cause problems with research. Professor Resnick suggested breaking section (e) into sections (e)(1) and (e)(2). Professor Wiggins suggested either deleting the word "other" in line 27 or making the wording of proposed Rule 6006(g) parallel with that of proposed Rule 3007(e). **A motion to approve the proposal in concept with a provision for the combination of related assumptions and assignments carried without dissent.**

First Day Orders: Mr. Shaffer stated that the Joint Subcommittee would make recommendations at the March meeting on what can be done on the first day of a chapter 11 case. He said the concept is similar to the interim approval of compensation for professionals, *i.e.*, that you can not bind the world forever on the first day. He said that, absent a clear showing of an emergency, the estate should not be bound by major expenditures, obligations, and waivers before the creditors' committee is organized and creditors have a chance to evaluate what is going on. Judge Wedoff stated that critical vendor payments in the United Airlines case were made on an interim basis subject to disgorgement.

Mr. Adelman stated that the provision in Rule 4001(b) for the emergency use of cash collateral for 15 days before the hearing is a perfect solution for limiting first day orders. The Chairman stated that the process should be slowed down because first day orders often are unfair to underfinanced debtors, to creditors who do not have time to review lengthy proposals, and to the court. The Committee discussed interim approval of the employment of counsel and interim payments while the court and creditors review the applicant's disclosures for possible conflicts. Judge Montali stated that it is fair to say the professional takes the risk but it may not be fair to say the professional knows the risk. Mr. Shaffer stated that waiting 15 days to review the application is not unfair and that the proposed rule may not have to provide one way or the other on disgorgement. He stated that the proposed rule would cover transactions outside the normal course of business under sections 362, 363, 364, and 365 of the Code. The Chair suggested adding waivers under section 506(c). **Mr. Shaffer stated that the Joint Subcommittee would address the issue at its meeting in January and will present a draft rule at the March meeting.**

Case Information and Pro Hac Vice: Mr. Shaffer stated that the Joint Subcommittee is also considering how to encourage the courts to post relevant information on their websites, such as a summary of the case prepared by the debtor, case management orders, calendars, notice lists, and the like.

Mr. Adelman stated that the Joint Subcommittee is considering the feasibility of a national rule for pro hac vice admission of attorneys, especially for claims allowance and preference actions. The Subcommittee may start by developing ideas for the use of CM/ECF, teleconferences, video conferences, and limited appearances. Judge Keeley stated that requiring local counsel had been very valuable to her court. She stated that the jurisdiction of the bankruptcy rules may be challenged if the rules do not require local counsel and that the provision could reduce the fees collected for pro hac vice admission. Mr. Adelman stated that the Subcommittee was not trying to affect those fees. Judge Keeley said requiring local counsel

familiar with the judges and local procedures is especially important in a small court where out-of-state attorneys appear infrequently and the court has limited control over their conduct. In addition, if the out-of-state attorney drops out of the case, the local attorney continues to represent the party.

Judge McFeeley stated that the court can sanction out-of-state attorneys but that referring disciplinary matters to an out-of-state bar may be ineffective. Mr. Adelman said Judge Rendell had suggested that out-of-state attorneys be required to consent to discipline by the local bar and to pay a fee for pro hac vice admission. Judge Schell stated that his court does not require local counsel but does require out-of-state attorneys to read the local rules and standards of practice. **Mr. Adelman stated that the Subcommittee hopes to present a more full treatment of the issues at the next meeting.**

Information Items

Extending the Appeal Time. Judge McFeeley suggested that the time for filing a notice of appeal be extended. The existing 10-day period runs from the entry of the judgment but the parties may have only six days to act because it takes two days to process the notice of the entry at the Bankruptcy Noticing Center and another two days for the notice to arrive by mail. The Reporter stated that the Committee could extend the time for appeal, change the rule to run the time for appeal from service of the notice, or change the way time is computed under Rule 9006.

Professor Resnick stated that a party could monitor the electronic docket to determine when the judgment is entered. Judge Walker stated that is a problem for pro se parties. Professor Resnick outlined the history of efforts to standardize the computation of time in the federal rules. Mr. McCabe stated that Judge Edward Leavy, the former chair of the Committee, had proposed that all the federal rules use multiples of seven days. Judge Montali stated that many courts mail notice of the entry themselves or direct the prevailing party to do so, rather than relying on the BNC to serve the notice. Judge Klein stated that the 10-day appeal period is unique in federal practice and is a barrier to entering bankruptcy practice. Judge Walker stated that the short time for appeal and the delay at the BNC reinforce the perception that a small core of attorneys are the exclusive users of the bankruptcy system. Judge Klein suggested considering permitting the time for appeal to be reopened retroactively, as is done under Appellate Rule 4. **The issue was referred to the Subcommittee on Technology.**

National Rules for Electronic Filing. The Chairman stated that the Judicial Conference has adopted model rules for electronic filing, which the courts can follow or not. He asked whether the Committee should start considering national rules for electronic filing now or wait for further technical developments and for the development of best practices in the courts. He said the Committee should not start too early but that it takes a long time to adopt rules. Judge Wedoff stated that many large courts are just starting electronic filing and suggested waiting a little more time. Judge Zilly stated that the courts with mandatory electronic filing are just working through the glitches in their local rules. **The Committee agreed to wait in order to**

have the experience of more courts. The matter will remain on the agenda for consideration in the future.

Cross Reference to Rule 4004 in Rule 9006(b)(3). The Committee discussed whether a cross reference to Rule 4004(b) should be added to Rule 9006(b)(3) or whether the existing cross reference to Rule 4004(a) should be broadened to cover Rule 4004 generally. Mr. Frank asked if the issue had ever arisen in a case. **The Committee agreed to defer the matter until such time as more substantive changes to Rule 9006 are considered.**

Servicemembers Relief Act. Judge Joan Feeney asked whether the Committee is considering proposing national rules to implement the Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-117. **There was no sentiment to pursue a national rule at this time.**

After-the-Fact Extensions of Time to File Proofs of Claim. The Committee discussed Judge Dennis Michael Lynn's suggestion to amend Rule 9006 to make after-the-fact extensions of time to file a claim under Rule 3004 or Rule 3005 more in line with the extension of time to file a claim under Rule 3002 or Rule 3003. **The Committee agreed to defer consideration of the change to such time as more substantive changes to Rule 9006 are considered.**

Revision of Final Decree. Mr. Wannamaker stated that the Director's Procedural Form entitled "Final Decree" includes a provision cancelling the trustee's bond. At the time the form was developed, many trustees had a separate bond for each case and the bond was cancelled when the case was closed. Most trustees now use "blanket" bonds which cover all of their cases. The provision is no longer needed in the Final Decree because the trustee's "blanket" bond continues in effect for other cases. **No action was required by the Committee.**

Other Information Matters. The other Information Items are set out in the agenda materials for the meeting.

Administrative Matters

Judge Zilly, the new chairman, stated that he intends to continue the existing subcommittees with Judge McFeeley taking his position as chair of the Technology and Cross Border Insolvency Subcommittee. Judge Swain would replace Judge Zilly on the Subcommittee on Business Issues and Judge Wedoff would replace Professor Wiggins on the Subcommittee on Consumer Issues. Judge Zilly asked Committee Members to contact him within 10 days if they would like to change their subcommittee assignments. Judge Small praised the new chairman and the subcommittee chairs. Judge Small stated that he is leaving the Committee with a good feeling about what the Committee is doing and where it is going.

The Committee's next scheduled meeting will be at the Sarasota Hyatt Hotel, Sarasota, FL, on March 10-11, 2005. Judge Zilly discussed several locations as possible sites of the fall

2005, meeting, including Jackson Hole, WY, Santa Fe, NM, and Lake Tahoe, CA/NV. September 15-16 and September 29-30 are the most likely dates.

Respectfully submitted,

James H. Wannamaker, III