MINUTES OF THE OCTOBER 1961 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The second meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on October 23, 1961, at 9:30 a.m. The following members were present during the session:

Phillip Forman, Chairman
Edward T. Gignoux
Charles A. Horsky
G. Stanley Joslin
Norman H. Nachman
Stefan A. Riesenfeld
Charles Seligson
Estes Snedecor
Arthur J. Stanley, Jr.
Elmore Whitehurst
Frank R. Kennedy, Reporter

The following members were unable to attend:

George D. Gibson
John B. Sanborn
Roy M. Shelbourne

Others attending were Professor James William Moore, a member of the standing Committee; Edwin L. Covey, Chief, Division of Bankruptcy, and special Advisor to the Committee; and Aubrey Gasque, Assistant Director of the Administrative Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

The Chairman opened the meeting by extending a welcome to Judge Gignoux, who was absent from the first meeting, and to the two new members of the Committee, Messrs. Joslin and Machman.

The minutes of the last meeting were considered and without objection were accepted as correct as distributed.

It was mentioned for the record by the Chairman that the Supreme Court adopted the Amendments to the General Orders and Official Forms in Bankruptcy on May 29, 1961, and that these became effective as of July 19, 1961.

The Chairman informed the Committee that H.R. 7405, a bill to provide the Supreme Court with rulemaking power in Bankruptcy, was not passed by the Congress and asked Mr. Gasque, who maintains liaison between the Congress and the Judicial Conference, to brief the members on the subject.

Mr. Gasque stated that the bill was passed by the House, but by the time it reached the Senate, Senator Ervin had introduced a bill providing that all of the amendments of the Committees on Rules of Practice and Procedure to the various rules lay over in Congress for a full year before becoming effective. Mr. Gasque reported that he was in contact with the Senator and pointed out to him that this one-year provision would delay the workings of the Rules Committees needlessly in many instances. Judge Maris, too, was concerned about this, and, tentatively, it was agreed that as a matter of practice all

rules amendments would be put before the Judicial Conference in September of each year; the Court would then have until January to act upon them and, if adopted, they would be transmitted to the Congress early in January. In this way, the rules amendments would be placed before Congress at a time when the Congress was not under such heavy pressure. Mr. Gasque expressed optimism that the bill would be approved and sent to the President for signature in the early part of 1962.

AGENDA ITEM (1): Proposed amendment of General Order 45.

The Reporter recalled the Committee's attention to the action by the Committee in December approving General Order 45 and a new proposed General Order 46. He stated that the Judicial Conference had subsequently referred to the Committee a proposal dealing with a disqualification provision, namely, that "No person who is an employee of the Judicial Branch or the Department of Justice shall be eligible for appointment or employment as an auctioneer, accountant or appraiser." The Reporter incorporated this Judicial Conference proposal into the draft the Committee had already approved. He continued to explain that this draft of the Judicial Conference would automatically include disqualification of U. S. Marshals. He raised the issue as to whether the disqualification should extend to attorneys (G.O. 44) and to accountants (G.O. 46). The Reporter did not deem the issue serious enough to warrant inclusion of such disqualifications.

Professor Seligson disagreed, and he even suggested that all employees of the Federal Government should be disqualified.

In his memorandum of September 27, 1961, Professor Seligson also suggested the possibility of incorporating a proviso which would allow the retention of employment of an accountant at least for normal bookkeeping and maybe professional accounting operations.

Professor Seligson asked why a distinction should be made between an employee of the Judicial Branch or the Department of Justice and an employee of the Legislative Branch. ~~Why disqualify one and not the other?~~ Referee Snedecor agreed that Professor Seligson's point was well taken and that all employees of the Federal Government should be disqualified.

Professor Riesenfeld stated that unless there should be a possible conflict of interest problem, we should not make second-class employees out of federal employees. Mr. Nachman expressed his view that whatever the committee does ought to be related to this problem of conflict of interest and how it affects bankruptcy administration.

After some further discussion, the Chairman placed the issues before the Committee: (1) whether to adopt the original language as proposed by Professor Kennedy in line with the Judicial Conference draft; (2) whether to disqualify all Government employees entirely; or (3) whether to add no new language in G. O. 45 (this last alternative being suggested by Mr. Whitehurst).

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Mr. Horsky suggested that it might be considered ~~also in the light of Mr. Kennedy's problem of~~ whether ~~or not~~ a similar disqualification should be put in General Orders 44 and 46.

Mr. Nachman expressed apprehension regarding the elimination of all Government employees from acting as auctioneers and appraisers, stating that this might possibly lead to situations which would be extremely embarrassing and which would actually impede bankruptcy administration if such broad language were to be adopted.

Mr. Whitehurst suggested the following language: "No active, full-time officer or employee of the Federal Government shall be paid a fee from bankruptcy funds for services as an auctioneer or [redacted] as appraiser." Mr. Nachman expressed approval of this language, but Professor Kennedy ~~disagreed stating~~ objected to a rule disabling a qualified person to receive compensation for services it was not necessary to go this far.

A vote was taken and it was the general consensus to adopt Professor Kennedy's proposed language as outlined in Enclosure No. 1 to his memorandum of August 11, 1961, but with an insertion of the words "officer or" before "employee" in the second sentence and the words "United States" both after "judicial branch" and immediately preceding "Department of Justice." This sentence would then read: "No officer or employee of the judicial branch of the United States or of the United States Department of Justice shall be eligible . . ."

Professor Moore stated that General Order 45, as presently adopted by the Committee, was sound for ordinary bankruptcy

cases, but that it doesn't seem practical to have a special order every time a piece of property over $25,000 is to be appraised. He was referring specifically to problems arising in railroad reorganization cases. Mr. Horsky suggested revising G.O. 49 rather than 45 in this regard. Mr. Horsky also said that there is before Congress a general reorganization of Section 77. The Chairman suggested ~~a possible solution by offering to~~ (that the point raised by Professor Moore be considered in connection with a study of G.O. 49.) ~~("tickler") the revision of 77 with a notation that you must look to 49 with regard to its relationship to 45.~~ Professor Moore agreed to this, and the Reporter was instructed to keep (the relation of 45 and 49) in mind.

The Committee then turned attention to Professor Seligson's problem with regard to G.O. 46 -- whether or not "G.O. 46 should specifically provide that the court may authorize a receiver, trustee or debtor in possession to retain accountants previously engaged by the debtor, when such appointment is found by the court to be in the interest of the receiver, trustee, debtor in possession or the estate." Mr. Horsky mentioned that this language should also apply to G.O. 44. He moved to adopt Professor Seligson's language in principle. Judge Stanley seconded the motion, and without objection it was carried.

COFFEE BREAK

The Committee resumed discussion of General Order 46. Mr. Nachman suggested that the word "debtor" be inserted in the first line of G.O. 46 after the word "trustee." Several

members expressed various opinions on this point, and it was moved by Professor Seligson that this be left to the Reporter for examination and recommendation to the Committee. Without objection, the motion was carried.

Mr. Nachman suggested a second language change in G.O. 46, and it was agreed that the last sentence of the Order should read: "If any accountant acting for a receiver or trustee or debtor in possession shall hold or without disclosure shall have represented any interest adverse to the receiver, trustee . . ." G.O. 44 should be revised accordingly.

Professor Riesenfeld suggested that the caption of G.O. 46 should read "Appointment of Accountants" to be consistent with 44.

AGENDA ITEM (2): Proposed revision of General Order 35(4) and new Official Form to deal with installment fees.

The Reporter outlined briefly the material contained in his memorandum of June 8, 1961.

The proposed language under new section c., "after hearing on notice to the bankrupt," was revised, after some discussion, to read "after notice and opportunity for hearing."

Mr. Whitehurst suggested that the words "or obtained by" be inserted before the words "the attorney" in new section b. of G.O. 35(4). Prof. Joslin strongly stated that he would refuse to approve any accusation against the profession by an outsider as in his opinion is indicated in 35(4)b. Prof. Joslin suggested the elimination of the use of the word "attorney." He expressed the view that this point should be handled on a local level.

Messrs. Horsky and Nachman stated that they definitely do not regard this statement in section b. as an accusation, but just as a recognition of good business practice. Mr. Nachman went on to explain that there is a rule in Chicago which requires that a petition be accompanied by an affidavit of the petitioner's attorney setting forth these facts rather than placing the responsibility on the petitioner himself, and in this affidavit the attorney states that he has received no compensation and that he will not receive any until the filing fees are paid.

Mr. Horsky made a motion to reaffirm the Committee's basic position, which was for disclosure by the bankrupt. The Chairman requested a showing of hands. Seven members being in favor, and two opposed, the motion was carried.

Following a very brief discussion of section d., Mr. Horsky moved to omit paragraph d. of General Order 35(4) as unnecessary. Seven members in favor of the motion, it was carried.

The next item for consideration by the members was Form No. 1A. For the sake of clarity, Mr. Nachman proposed the following language for the last paragraph of the form: "Wherefore this applicant prays that the court fix the amount, number and dates of payments of such installments . . .". A question arose as to whether the words "presenting for" in paragraph 1 of the form should remain, or be deleted. No definitive action was taken, and Mr. Horsky moved to leave this to the discretion of the Reporter. There was a second and the motion was carried.

Referee Whitehurst raised the question as to whether Form 1A should be addressed to the judge. It was the consensus of the Committee that it should be addressed "To the United States

District Court for the District of _____ In Bankruptcy."

The Committee then reverted [redacted] to 35(4) and agreed to the following revisions in section a.: the words "and examination of the bankrupt or debtor" were eliminated, and the word "shall" was changed to "may." Section a. would then read: "At the first meeting of the creditors or any adjournment thereof, the court, after hearing, may . . ."

The Reporter suggested that the new language in the last sentence of 35(4) be amended to read: ". . . shall state that the petitioner has made no payment to his attorney . . ." Professor Seligson offered a further amendment in the form of a motion -- that the debtor be permitted to pay or secure his attorney out of exempt property. This last statement would affect both 35(4) and 35(4)b.

LUNCHEON

The members resumed discussion of 35(4) and whether or not the filing fee should be paid out of exempt property. Judge Snedecor felt the fee should be paid from exempt property. Referee Whitehurst suggested deleting the words "and cannot obtain." Judge Snedecor agreed. Professor Riesenfeld stated that for the sake of consistency, if the words "and cannot obtain" were deleted, the words "paid any money" should remain. In other words, if the petitioner has exempt cash, he has to use it. Mr. Horsky made the motion to amend 35(4) by leaving out the words "and cannot obtain" in the order and in the form and to leave in the words "has not paid any money to his attorney" in both places. The motion was carried.

Professor Seligson made the motion that it be the consensus of the committee that the General Order prescribe the payment of money to the attorney by an applicant under G.O. 32(4), before or after the filing of the application for installment payments, and that the drafting should be left to the Reporter. The motion was carried.

AGENDA ITEM (3): Proposed revision of forms for use in debtor-relief proceedings.

The Reporter outlined his memorandum of August 14, 1961, re revision of forms for use in debtor-relief proceedings and explained that since these forms conform to G.O. 23, which requires orders of referees to contain recitals about the notice and the manner thereof, it may be well to amend G.O. 23 or possibly to eliminate the General Order. Professor Moore stated he would leave out the mandatory requirement for recital in the General Order. Professor Seligson saw no need for G.O. 23. Professor Kennedy recommended its abrogation.

The Chairman summarized by saying that subject to Professor Kennedy's looking further into this, ~~and contrary to the general consensus, it would be agreed that~~ the Committee ~~would~~ recommends the deletion of G.O. 23. ~~This was agreed to.~~

Form No. 50: The form should be addressed to "The United States District Court ~~for~~ In Proceedings for an Arrangement."

Professor Kennedy revised his proposed Form No. 50 to read: "the above-named debtor, respectfully represents that the proposed arrangement under chapter XI of the Bankruptcy Act filed on the .... day of .... 19.., has been duly accepted,

in accordance with the provisions of this chapter, and that the deposit [or deposits] required by the chapter and by the arrangement has [or have] been made." This would be immediately followed by the prayer. There was no objection to this amended form.

Form No. 51: The first paragraph was revised to read: "A proposed arrangement under chapter XI of the Bankruptcy Act having been filed on the .... day of ...., 19.., [if altered, so indicate] and duly accepted in writing by all creditors affected thereby; and". The remainder of the first paragraph would be eliminated.

The second paragraph of Form No. 51 would generally comply with the revisions of the Act.

Form No. 52: The first paragraph was revised to read: "The application of ...., the above-named debtor, for confirmation of the proposed arrangement under chapter XI of the Bankruptcy Act, filed on .... day of ...., 19.., [if altered, so indicate] having been heard and duly considered; and". The remainder of the first paragraph would be eliminated.

The second paragraph was revised to read:
"It appearing that the arrangement has been duly accepted in accordance with the provisions of this chapter, and that the deposit [or deposits] required by the arrangement having been made."

It was the consensus of the Committee that the language in the third paragraph of Form No. 52 should encompass somewhat that of 366, and should generally ~~comply with~~ conform to that in Form No. 51. The Reporter agreed to draft such general language.

Form No. 55: The caption was revised to read: "Application for Confirmation of an Arrangement Proposed by a Debtor under Chapter XII." This form will conform substantially to Form 50.

Form No. 56: The caption was amended by adding the phrase "Proposed by a Debtor." The language of Form No. 56 would be comparable to that in Form No. 51. Professor Riesenfeld was doubtful about adding the phrase "Proposed by a Debtor" to 56, and the Reporter agreed to look into this.

The signature element in Form 56 was amended to read:

....
United States District Judge
[or: Referee in Bankruptcy]

Form No. 57: This will be adapted to Form No. 52.

Form No. 60: This will conform generally with Form No. 55. Professor Riesenfeld suggested a parenthetical phrase under the caption of Form No. 60 to aid the attorney in knowing when to use this form.

Form No. 61: This will be adapted to Forms 51 and 56.

Form No. 62: This will be adapted to Forms 52 and 57.

AGENDA ITEM (4): Proposed amendments of General Order 48 and Official Form No. 48.

The Reporter briefed the Committee by outlining his memorandum of September 25, 1961, calling attention to pages 6 and 7 of this memorandum and his proposals therein to amend Official Form No. 48 and General Order 48(3). He stated that these revisions were suggested as a way of satisfying a request from the Securities and Exchange Commission for copies of Chapter XI petitions. Judge Forman wondered whether it was

really necessary to amend the General Orders, especially since Mr. Covey reported that the Administrative Office furnishes monthly IBM-run lists, including corporate cases, to the SEC. Referee Whitehurst moved that no action be taken. There was a second and the motion was carried.

AGENDA ITEM (5): Proposals to implement the policy of encouraging wider use of trustees in no-asset cases.

The Reporter gave a short briefing on the subject, stating that this might possibly entail revisions of G.O. 15, Section 44 of the Bankruptcy Act, and G.O. 14. He reported that the National Association of Referees in Bankruptcy, according to the Journal edited by Referee Whitehurst, recommended that G.O. 15 be abrogated because it is incompatible with the Bankruptcy Act.

At this time Mr. Covey was asked to brief the Committee on the results of a survey made in the endeavor to secure certain information regarding the administration of no-asset bankruptcy cases. Mr. Covey distributed copies of the questionnaire which was sent to referees in those districts selected to be studied, together with sheets indicating the replies to the questionnaire in tabulated form.

After Mr. Covey's detailed explanation of the material distributed, Mr. Horsky said that even though there is a wealth of material here, it would be impossible for the members to digest it at this meeting, and suggested that it may be well

it and come up with some conclusions.

Referee Snedecor requested that he be permitted time in the morning to distribute for consideration by the members a specific draft of the amendments and revisions of G.O. 15 which would impose upon the referee the duty to examine each bankrupt. This draft, he explained, would place G.O. 15 in harmony with the Act.

Professor Seligson suggested deferring any action on G.O. 15 until the evaluation of the survey had been made by Messrs. Covey and Kennedy and consideration had been given to Referee Snedecor's proposal. It was agreed that this course of action would be followed.

[The following morning, Referee Snedecor announced he would yield the time given him for consideration of his draft and would prepare a memorandum on the subject for distribution to the members before the next meeting.]

Adjourned at 5:10 p.m., 10/23/61
Reconvened at 9:00 a.m., 10/24/61

[Mr. Horsky was absent on the second day.]

AGENDA ITEM (6): Proposed revision of General Order 21 and Official Forms No. 18, 19, and 28-31

Professor Kennedy distributed to the members his proposal for revision of General Order 21. Mr. Nachman raised the question ~~as to~~ whether there ~~was~~ is any justification for the necessity for an agent to state the reason the proof is not made by the claimant in person and suggested this be eliminated. Referee Whitehurst was strongly of the same view. Professor Seligson suggested

saying that a proof of claim may be made by the claimant or any authorized agent. The drafting of such language was left to the Reporter.

Professors Moore and Seligson opposed the deletion of the phrase that proofs of claim shall be filed with the trustee. Messrs. Nachman, Joslin, and Snedecor expressed views to the effect that the change should be made, i.e., that proofs of claim shall be filed with the clerk without reference to the trustee. A vote was taken and it was agreed to delete the language encompassing the filing with a trustee.

Professor Riesenfeld proposed to accept Professor Kennedy's suggestion that the reference to proofs of claim received by any trustee shall be deleted and that it be made clear that proofs of claim should be filed with the referee or with the clerk. Following this, he said, there should be language that should a claim be received by the trustee, it should be filed forthwith by the trustee with the referee or the clerk. Professor Joslin agreed, but stated that this should be put in G.O. 17. The consensus of the Committee was that this should be incorporated in 17.

Due to the close relationship of G.O. 20 to G.O. 21, Professor Kennedy outlined the proposal of Referees Heisey and Owens to delete G.O. 20 and to incorporate it with 21. As Professor Kennedy explains in his memorandum of October 16, 1961, he thinks this unwise and has, therefore, proposed a new General Order 20 which appears in the memorandum.

Mr. Nachman suggested the insertion of the words "to a referee" after the word "Act" in the first sentence. Professor Seligson suggested the phrase "including proofs of claim" after the word

"papers" in the last sentence. Professor Riesenfeld preferred changing the caption to read: "Filing of Papers Before and After Reference." He also suggested reversing the order and placing the last sentence first. It was agreed that the Reporter should attempt to consolidate General Orders 2 and 20 and should give consideration to Professor Riesenfeld's request.

With the adoption of the new G.O. 20, it was agreed to delete the last two sentences of G.O. 21(1).

G.O. 21(2) was amended to read: "(2) Any creditor or his duly authorized agent, attorney, or proxy may file with the referee a request that all notices to which he may be entitled shall be addressed to him at a designated address; thereafter, until some other designation shall be made, all notices shall be so addressed. In other cases notices shall be addressed to each creditor at the place stated in the proof of claim or, if no proof of claim has been filed or if filed and no address is therein stated, at the place shown in the list of creditors."

G.O. 21(3) Approved with the exception of the substitution of the word "transfer" for "assigned" throughout the general order.

G.O. 21(4). Mr. Nachman suggested the elimination of the failure to file clause. Professor Seligson agreed. Professor Riesenfeld was strongly against this proposal, stating this would be contrary to 57(i). A suggestion was made to amend this phrase with appropriate language to state, in effect, failure to file at the first meeting. This was satisfactory to Professor Riesenfeld, and it was agreed that this should be done.

Referee Whitehurst suggested placing a period after the word "liable" in the second sentence and beginning the third sentence with the word "No." This was agreed to.

G.O. 21(5). In his proposal the Reporter recommended the elimination of the requirement of acknowledgment and the requirement that a power of attorney be accompanied by an oath that the person executing it is a member of the partnership or a duly authorized officer of the corporation. This would require a modification of Forms 18 and 19 so as to delete the language dealing with acknowledgments. Referee Snedecor was of the opinion that the Committee should adhere to the requirement of acknowledgment of the power of attorney and so moved. The motion was carried unanimously.

As to the second issue raised by the Reporter's recommendation, i.e., the deletion of the requirement of the oath, it was the consensus that the last two sentences of the order should be deleted and agreed that the order would then read as follows: "A power of attorney to represent a creditor shall be prepared substantially in the manner prescribed by Official Form No. 18 or Official Form No. 19. Any power of attorney shall be acknowledged and may be acknowledged before any of the officers enumerated in Section 28 of the Act."

G.O. 21(6) Due to the limitation of time, no definitive action was taken on the Reporter's proposal of 21(6) and the Chairman stated that this item would be placed on the agenda for the next meeting.

The next meeting was tentatively scheduled for April 25, 26, and 27, 1962. The meeting was adjourned at 1:00 p.m.