

**TO: Hon. David F. Levi, Chair  
Standing Committee on Rules of Practice and Procedure**

**FROM: Hon. A. Thomas Small, Chair  
Advisory Committee on Bankruptcy Rules**

**DATE: December 15, 2003**

**RE: Report of the Advisory Committee on Bankruptcy Rules**

## **I. Introduction**

The Advisory Committee on Bankruptcy Rules met on September 18-19, 2003, in Stevenson, Washington. The Committee considered a number of issues and will continue discussion of several matters at its next meeting. The Committee also adopted several proposed amendments to the Bankruptcy Rules and Forms for recommendation to the Standing Committee.

## **II. Action Items**

A. *Preliminary Draft of Proposed Amendments to Bankruptcy Rules 5005(c) and 9036*

1. Synopsis of Proposed Amendments

A. Rule 5005(c) is amended to include the clerk of the bankruptcy appellate panel among the persons who can transmit erroneously delivered papers to the clerk of the bankruptcy court. Under the existing Rule, the United States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, district judge, and clerk of the district court are authorized to forward erroneously filed papers. The clerk of the bankruptcy appellate panel was not included in the list because those courts were not in place when the rule was originally promulgated. The amendment corrects that omission. The amendment also adds both the clerk of the bankruptcy appellate panel and a district judge to the list of persons who can transmit erroneously filed papers to the United States trustee when that is appropriate. This amendment similarly corrects an omission in the rule.

B. Rule 9036 is amended to delete the current language that requires the sender of an electronic notice to have received confirmation of receipt of that notice for the notice to be complete. At the time the rule was promulgated, the sender of an electronic communication generally would receive a notification that the recipient of the notice actually received it. For the vast majority of internet service providers, these receipt notifications are no longer given. Moreover, the general level of confidence with electronic communications has increased to the point that it is presumed that these messages are received in the proper course, at least to the extent that other forms of notice (such as by regular mail) also are received. The amendment affirmatively states that the notice is complete upon its transmission. This is consistent with the treatment of notice by regular mail under the Bankruptcy Rules. It is also consistent with Civil Rule 5(b)(2)(B) and (D) that provide that service by mail and by electronic means is complete upon transmission.

The text of the proposed amendments to Bankruptcy Rules 5005(c) and 9036 are set out at the end of this Report.

### **III. Information Items**

#### *A. Publication of Proposed Amendments*

At the June 2003 meeting, the Standing Committee authorized the publication of a preliminary draft of amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006. The deadline for submitting comments on these proposals is February 16, 2004. A public hearing on the proposals is tentatively scheduled for January 30, 2004. The Advisory Committee will consider all of the comments submitted on these proposals at its meeting in March 2004. The Advisory Committee anticipates that it will present these amendments in June 2004, to the Standing Committee for its approval and transmittal to the Judicial Conference.

#### *B. Amendments Proposed by the Director of the Executive Office of the United States trustee*

The Director of the Executive Office of the United States trustee has submitted several proposed rules and forms amendments to the Advisory Committee. The Advisory Committee began its consideration of these proposals at its last meeting in September 2003. A Subcommittee of the Advisory Committee is continuing the study of these proposals. The Subcommittee will be conducting a focus group meeting on January 30, 2004, in Washington, D.C., to obtain the views of interested parties of the proposals. The Subcommittee will make its recommendations to the Advisory Committee which will address the matter at the March 2004 meeting.

*C. Proposed Bankruptcy Legislation*

The House of Representatives passed H.R. 975 on March 19, 2003. That bill has been sent to the Senate, but no action has been taken on the proposal to date. The bill is essentially the same bill passed by the House in the 107<sup>th</sup> Congress, but it does not include a dischargeability provision contained in the Senate version of the bill that was passed in 2002. This provision has caused the bill to stall in the past. The Senate is not expected to address H.R. 975 until the Spring.

Attachments: Proposed Amendments to Bankruptcy Rules 5005 and 9036  
Draft of Minutes of the Advisory Committee Meeting of September 18-19, 2003

**PROPOSED AMENDMENTS TO THE FEDERAL  
RULES OF BANKRUPTCY PROCEDURE\***

**Rule 5005. Filing and Transmittal of Papers**

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(c) ERROR IN FILING OR TRANSMITTAL. A paper

3

intended to be filed with the clerk but erroneously delivered

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to the United States trustee, the trustee, the attorney for the

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trustee, a bankruptcy judge, a district judge, the clerk of the

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bankruptcy appellate panel, or the clerk of the district court

7

shall, after the date of its receipt has been noted thereon, be

8

transmitted forthwith to the clerk of the bankruptcy court. A

9

paper intended to be transmitted to the United States trustee

10

but erroneously delivered to the clerk, the trustee, the attorney

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for the trustee, a bankruptcy judge, a district judge, the clerk

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of the bankruptcy appellate panel, or the clerk of the district

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court shall, after the date of its receipt has been noted thereon,

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be transmitted forthwith to the United States trustee. In the

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\*New material is underlined; matter to be omitted is lined through.

2 FEDERAL RULES OF BANKRUPTCY PROCEDURE

15 interest of justice, the court may order that a paper  
16 erroneously delivered shall be deemed filed with the clerk or  
17 transmitted to the United States trustee as of the date of its  
18 original delivery.

COMMITTEE NOTE

The rule is amended to include the clerk of the bankruptcy appellate panel among the list of persons required to transmit to the proper person erroneously filed or transmitted papers. The amendment is necessary because the bankruptcy appellate panels were not in existence at the time of the original promulgation of the rule. The amendment also inserts the district judge on the list of persons required to transmit papers intended for the United States trustee but erroneously sent to another person. The district judge is included in the list of persons who must transmit papers to the clerk of the bankruptcy court in the first part of the rule, and there is no reason to exclude the district judge from the list of persons who must transmit erroneously filed papers to the United States trustee.

**Rule 9036. Notice by Electronic Transmission**

1 Whenever the clerk or some other person as directed by  
2 the court is required to send notice by mail and the entity  
3 entitled to receive the notice requests in writing that, instead  
4 of notice by mail, all or part of the information required to be

5 contained in the notice be sent by a specified type of  
6 electronic transmission, the court may direct the clerk or other  
7 person to send the information by such electronic  
8 transmission. ~~Notice by electronic transmission is complete,  
9 and the sender shall have fully complied with the requirement  
10 to send notice, when the sender obtains electronic  
11 confirmation that the transmission has been received. Notice  
12 by electronic means is complete on transmission.~~

#### COMMITTEE NOTE

The rule is amended to delete the requirement that the sender of an electronic notice must obtain electronic confirmation that the notice was received. The amendment provides that notice is complete upon transmission. When the rule was first promulgated, confirmation of receipt of electronic notices was commonplace. In the current electronic environment, very few internet service providers offer the confirmation of receipt service. Consequently, compliance with the rule may be impossible, and the rule could discourage the use of electronic noticing.

Confidence in the delivery of email text messages now rivals or exceeds confidence in the delivery of printed materials. Therefore, there is no need for confirmation of receipt of electronic messages just as there is no such requirement for paper notices.