Feb Rules

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of February 18 -19, 1993

Innisbrook Resort
Tarpon Springs, Florida

Agenda

Introductory Items

1. Approval of draft minutes of September 1992 meeting.

2. Approval of draft minutes of March 1989 meeting.

3. Report on meeting of Standing Committee.

Rules

4. Discusson of recommendation to amend Rule 3016(a). See Reporter's memorandum dated 1/10/93.

5. Proposal by Judge Mannes to amend Rule 4004 to delay issuance of discharge if the debtor has not paid all installments of the filing fee or did not attend § 341 meeting. See Reporter's memorandum dated 1/12/93.

6. Review of proposals requested by Standing Committee regarding uniform local rule numbering, technical amendments, and standing orders. See Reporter's memorandum dated 1/13/93.

7. Proposal for an Advisory Committee resolution recommending amendments to Rule 52(b), Rule 59(b), and Rule 59(e), Fed.R.Civ.P. regarding time limits for post judgment motions. See Reporter's letter dated 1/13/93.

8. Proposal to amend Rule 2015 to clarfy obligation to file inventory in chapter 12 and chapter 13 cases. See Reporter's memorandum dated 1/14/93.

9. Proposal to amend Rule 4008 regarding the filing of reaffirmation agreements. See Reporter's memorandum dated 1/14/93.

10. Discussion of Henry Sommer's proposal regarding waiver of $30 administrative fee in lieu of noticing fees. See Reporter's letter dated 1/6/93.

11. Discussion of proposals to reduce certain costs of the bankruptcy process by amending Rules 2002, 4004(g), and 6007(a), referred by the Committee on Administration of the

1/19/93

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of September 17 - 18, 1992

Santa Fe, New Mexico

The Advisory Committee on Bankruptcy Rules met at 9:00 a.m. on September 17, 1992, in a conference room of the Hilton Hotel in Santa Fe, New Mexico. The following members were present:

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

One committee member was unable to attend: District Judge Harold L. Murphy.

The following persons also attended all or a part of the meeting:

Circuit Judge Paul J. Kelly, Jr., of the Tenth Circuit
District Judge Thomas S. Ellis, III, member, Committee on Rules of Practice and Procedure, and liaison with this Committee
Bankruptcy Judge Stewart Rose of the District of New Mexico
John E. Logan, Director, Executive Office for United States Trustees, U.S. Department of Justice
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The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure. References to the Standing Committee are to the Committee on Rules of Practice and Procedure. References to the Bankruptcy Rules are to the Federal Rules of Bankruptcy Procedure. References to the Civil Rules are to the Federal Rules of Civil Procedure. References to the Appellate Rules are to the Federal Rules of Appellate Procedure. References to the Criminal Rules are to the Federal Rules of Criminal Procedure. References to the Evidence Rules are to the Federal Rules of Evidence.

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

Minutes

Professor King moved that the proposed minutes of the meetings of March 26, 1992, February 28, 1992, June 20 - 21, 1991, and March 15 - 16, 1990, be approved, subject to the correction of any typographical errors and subject to the revision of page 18 of the March 26, 1992, minutes to reflect the unanimous approval of Judge Jones' motion referred to in the final paragraph on that page. **The motion carried.**

Standing Committee

The Reporter stated that the Standing Committee had approved the proposed amendments submitted with the Chairman's memorandum of May 8, 1992. The only change made by the Standing Committee was to delete the reference to Civil Rule 16(b) in the Committee Note to the proposed amendment to Rule 9002. As revised, the Committee Note refers to "amendments to the Federal Rules of Civil Procedure."

The Reporter stated that it was unclear whether this Committee intended for the amendments to the Official Forms approved at the March 26, 1992, meeting to be published for comment by the bench and bar. After discussions with the Chairman and several members of the Committee, the Reporter had proposed splitting the amendments into two packages: a package of technical amendments which would not be published and a package of substantive amendments which would be published for comment. Some committee members expressed an interest in reconsidering some of the substantive changes.

The Standing Committee approved the package of technical amendments and submitted them for consideration by the Judicial

Conference at its meeting in September, 1992. The Reporter said he had been informed that publication of the substantive amendments would be difficult until after the Administrative Office move scheduled for October 2 - 5, 1992. As a result of the concerns expressed about some of the substantive changes and the delay in publication, those amendments have been placed on the agenda for reconsideration at this meeting.

The Reporter stated that Judge George C. Pratt is the chair of a new subcommittee of the Standing Committee. The new subcommittee is called the Subcommittee on Substantive and Numerical Integration of the Federal Rules.

During this Committee's discussion of a proposed amendment to Appellate Rule 4(a)(4) at its last meeting, it had been suggested that a similar change be made to Appellate Rule 6(a)(2)(i), which governs bankruptcy appeals from the district court or the bankruptcy appellate panel. The Reporter stated that the Advisory Committee on Appellate Rules accepted the suggestion and the Standing Committee approved the proposed amendment.

The Reporter indicated that the proposed amendment to Civil Rule 83(b) had been revised after publication to include experimental local rules inconsistent with the Bankruptcy Rules as well as ones inconsistent with the Civil Rules. Experimental local district rules would require the approval of the Judicial Conference. Mr. Shapiro asked how the experimental rules would be considered. The Reporter stated that he anticipated that the request would go from the district court to the Standing Committee, which would refer it to this Committee for its recommendation. Judge Ellis stated that the proposal comes from the Biden Bill. The approval process, he stated, has been designed to prevent misusing experimental local rules to create local fiefdoms.

Judge Mannes asked Judge Ellis about the Standing Committee's recommendation that the Chief Justice reactivate the Advisory Committee on the Federal Rules of Evidence with some overlapping membership with the advisory committees on civil and criminal procedure. Judge Ellis stated that the Standing Committee voted for a systematic revision of the evidence rules by a separate committee which has liaison members from the advisory committees. He indicated that the lack of a reference to this Committee was an oversight. Mr. McCabe stated that the Standing Committee's recommendation is on the Judicial Conference's discussion calendar.

The Reporter recalled that this Committee had proposed amendments to Rules 8018 and 9029 in response to a request by the Standing Committee that each of the advisory committees propose amendments to provide for uniform numbering systems for local

rules and to prohibit local rules which merely repeat national rules. According to the Reporter, the Standing Committee has received the proposed amendments and has asked that the reporters for the four advisory committees attempt to develop uniform language before the Standing Committee's December meeting.

Style Committee

Judge Barta reported that the Style Subcommittee of this Committee met on March 27, 1992, to consider, on behalf of the Committee, suggested changes in the proposed amendments to the Bankruptcy Rules published in August, 1991. The changes were suggested by the Style Subcommittee of the Standing Committee. Judge Barta's subcommittee reviewed the changes line by line, agreed to several, and suggested that the others appeared to be substantive. The subcommittee also reviewed and responded to a second set of suggested stylistic changes.

Judge Barta stated that most of these changes also were substantive. The Reporter stated that Standing Committee accepted the recommendations of Judge Barta's subcommittee. Judge Barta thanked the Style Subcommittee for its thought-provoking suggestions and Professor King, Professor Resnick, Mr. Minkel, Ms. Channon, and Joseph F. Spaniol for their work in reviewing the suggested changes.

Filing Secured Claims

The Reporter recalled the Committee's consideration of proposed amendments to Rule 3002 at several recent meetings, beginning with the amendments proposed by the Chapter 13 Subcommittee. The Committee voted at its March, 1992, meeting to withdraw the proposed amendments to Rules 3002(a) and 3002(c) for further study. The Reporter reviewed his memoranda dated August 25, 1992, and June 10, 1991, in which he discussed whether the present rule, which does not require secured claims to be filed, is inconsistent with sections 501, 502, and 506(d) of the Code. Although the Reporter concluded that such a requirement would not be inconsistent with the Code, requiring secured claims to be filed could cause other problems. The imposition of a filing requirement and a bar date could result in a windfall for the debtor, who can redeem under section 722 for the allowed amount of the claim. (If a bar date were prescribed and no proof of claim were filed, the claim could not be allowed in any amount.) Furthermore, the Reporter stated that section 726 of the Code, unlike Rule 3002, does not equate the timeliness of a claim with its allowance.

The chairman asked why a secured creditor should not be deemed to have filed a claim for the amount of the scheduled

debt. The Reporter responded that, although the Code deems scheduled claims to be filed in chapter 11 cases, there are doubts about whether it would be consistent with the Code, especially section 502, to extend the concept to chapter 12 or chapter 13 cases. Judge Mannes and Mr. Sommer stated that, based on Rule 3021, most chapter 13 trustees only pay those creditors who have filed claims. Deeming secured claims to be filed would give secured creditors more of an incentive to come into the case. Mr. Minkel stated that forcing a creditor to file a proof of claim would also force the creditor to subject itself to the court's jurisdiction under the Granfinanciera decision.

Professor King suggested amending Rule 3021 rather than Rule 3002. He stated that the problem with Rule 3002 really is the use of the word "allowed" in sections 506(b) and 722, and that changing Rule 3002 could lead some courts to rule that the lien of a non-filing secured creditor would not ride through the bankruptcy case, despite the provisions of section 506(d). Mr. Mabey and the Reporter stated that the addition of section 506(d) to the Code in 1984 should make it clear that the lien survives.

The Reporter suggested that the Committee had three alternatives (1) doing nothing, (2) amending Rule 3021 to permit the trustee to make distributions to secured creditors who don't file claims or amending Rule 3004 to delete the bar date for the trustee or debtor to file a claim on behalf of a secured creditor, or (3) amending Rule 3002 to delete the word "unsecured" and make it consistent with the Code and the case law. Mr. Mabey stated that there are two problems: (1) the practical problem that chapter 13 trustees can not pay secured creditors who do not file and (2) the legal problem that the present Rule 3002 does not appear to be consistent with the Code.

Professor King moved not to make any amendment to Rules 3002 and 3004 and to direct the Reporter to consider a change to Rule 3021 to take care of distributions to secured creditors in chapter 13 if that can be done consistent with the Code. Mr. Shapiro seconded the motion. Mr. Dixon said the problems with amending Rule 3002 arise when the change is applied to cases under chapters 7 and 11. He suggested amending the rule, but limiting it to chapter 13 cases. Mr. Mabey stated that amending Rule 3021 to solve the problem with chapter 13 distributions would conceptually offend the Code in the minds of judges who believe that the Code requires secured claims to be filed in order to be allowed. Judge Mannes stated that removing the bar date from Rule 3004 could cause a problem if a secured claim is filed close to the end of payments under a chapter 13 plan.

The motion carried with four dissenting votes.

Excusable Neglect

When the proposed amendment to Rule 3002(c)(6) was withdrawn at the Committee's meeting in March, 1992, the Reporter was directed to study the matter further. The Reporter stated that the amendment, which would authorize the court to extend the filing period for a chapter 13 creditor who has not filed a timely claim due to excusable neglect, was not needed in light of the provisions of section 726(a)(2), (a)(3), and, possibly, (a)(4) and (a)(5). He indicated that both the proposed rule and present rule 3002(c)(6) conflicted with a creditor's right to file a tardy claim under certain circumstances by giving the court discretion to approve the late filing.

As a point of order, Judge Howard questioned why the Committee was continuing to discuss Rule 3002 when Professor King's motion, which passed, provided that the Committee would not amend Rule 3002. The Chair stated that the motion was proposed and passed in the context of the discussion of subsection 3002(a). Professor King moved that Rule 3002 not be changed. Judge Howard stated that the motion was out of order and unnecessary in light of the identical, earlier motion. Professor King withdrew the motion.

Citing the conflict described by the Reporter between Rule 3002(c) and section 726, Mr. Mabey dissented from concluding the discussion. The Reporter stated that the mischief with the rule is the misconception that once the bar date has passed, unsecured creditors can not file claims in chapter 7 and chapter 13 cases. There being no motion, the Chair moved to the next agenda item.

Bankruptcy Notices

In continuing the discussion of adequate notice which he began at the March meeting, Mr. Sommer stated that many chapter 13 debtors are effectively pro se after confirmation of their plans. He added that an even larger group of creditors are pro se. These pro se parties may lose valuable property rights because they do not have adequate information and do not understand what is happening in a case.

Mr. Sommer stated that he is preparing a list of matters which are particularly important to pro se debtors and creditors, including motions to dismiss or convert a case, objections to claims, relief from stay motions, motions to modify a chapter 13 plan, motions for a chapter 13 hardship discharge, and dischargeability complaints. He described the "plain language" notices used in some state courts and indicated that the new bankruptcy notices could be either generic notice of the need to respond or refer to the specific type of relief sought. Notices

that are easier to understand also would reduce the number of calls to the clerk's office.

Mr. Heltzel stated that the present notices contain the bare minimum of information. More informative notices would be a major improvement, he stated, but many of the additional statements would require multiple pages, creating practical difficulties with mailing. The new Notice Print Center would go a long way to resolving the problem. Judge Meyers suggested that the Committee consider reviewing the Director's Forms with an eye to the adequacy of the notices.

Judge Jones stated that the content of many forms of notice should be prescribed by local rules. Judge Meyers stated that it would be much easier to revise the Director's Forms, or create new ones, than it would be for each district to review its local rules. Mr. Shapiro stated that new national forms might be useful for objections to discharge and similar situations. Professor King indicated that Rule 9013 might need to be strengthened. **The Chair asked Mr. Sommer to make a list of situations in which more adequate notice could be provided by rule or form.** He agreed to do so with the Reporter's assistance.

Rule 4004(c)

The Reporter stated that it has been suggested that Rule 4004(c) be amended to delay granting the discharge if the debtor fails to appear at the meeting of creditors or has not paid the filing fee in full. Professor King stated that there is an existing remedy built into the rules -- extending the time for objecting to the discharge -- but that this puts the onus on the trustee or some other party to move for an extension. Judge Barta stated that he hears a docket of discharge motions each month for debtors who have failed to appear for their meetings of creditors on two separate occasions.

Judge Jones stated that the question should be deferred until the Committee has a memo to consider. Mr. Shapiro moved to defer the matter for the time being and to ask the Reporter to prepare a memo for a future meeting. **The motion carried unanimously.**

Rule 8002

The Reporter discussed the proposed changes in Appellate Rules 4(a)(4) and 6(b)(2)(i) which would provide that a notice of appeal filed before the disposition of a motion for a new trial or rehearing will be held in abeyance pending disposition of the motion. This will avoid the necessity of having to file a second notice of appeal, which the Committee Note to the proposed

amendment to Rule 4(a)(4) describes as a "trap for unsuspecting litigants." The Reporter recommended that a similar amendment be made to Bankruptcy Rule 8002(b).

The Reporter stated that this Committee generally does not consider amendments to conform the Bankruptcy Rules to changes in other bodies of federal rules until those changes have been adopted by the Supreme Court. This amendment merits expedited consideration, however, because the changes to the Appellate Rules are almost certain to be approved and the resulting difference between the two sets of rules would create a procedural trap.

Professor King noted that the proposed amendments to the Appellate Rules would be effective in December, 1993, and that, with publication, the earliest the amendment to Rule 8002(b) could be effective is August, 1994. He stated that the Committee had time to reverse itself if the appellate amendments are not adopted.

Professor King moved the adoption of the Reporter's proposed amendment to conform Rule 8002 to the amendments to Appellate Rules 4(a)(4) and 6(b)(2)(i). Professor Resnick distributed copies of a memorandum by Judge Robert E. Keeton, the chair of the Standing Committee, suggesting that the revision of Rule 8002 more closely track the drafting style of Rule 4. The Reporter suggested that this be left to the Style Subcommittee. Judge Mannes criticized the last two sentences of the proposed amendment to Rule 8002. The Reporter stated that they tracked the language of the proposed amendment to Rule 4(a)(4).

Mr. Sommer asked why the proposed amendment to Rule 8002 did not include the proposed amendment to Rule 4(a)(2). The Reporter stated that the amendment to Rule 4(a)(2) tracks the existing language of Rule 8002(a). Mr. Sommer asked why the proposed amendment to Rule 8002 did not include a provision for a motion for attorney's fees under Civil Rule 54. The Reporter stated that Bankruptcy Rule 7054 did not incorporate that provision of Civil Rule 54. Mr. Sommer stated that the provision for attorney's fees should be incorporated in the Bankruptcy Rules.

Judge Jones stated that the amendment to Rule 8002 should more closely track Rule 4(a)(4) to avoid differences between the two rules and confusion. Judge Jones seconded Professor King's motion and proposed an amendment to the motion to provide that the proposed amendment to Rule 8002(b) be conformed to Rule 4(a)(4). **The amended motion carried unanimously.** The Reporter stated that he would prepare a revised draft, submit it to the Style Subcommittee for review, and then transmit it to the Standing Committee. The Reporter indicated that his new draft would follow Rule 4 as much as possible and the reasons for any

differences would be set out in the Committee Note. **The Committee agreed by consensus.**

The Reporter recommended asking the Standing Committee at its December meeting to approve the proposed amendment to Rule 8002 for expedited publication. If the request is granted, this Committee could consider the comments by mail or at a meeting in the spring. **There was no objection to the recommendation.**

Local Rules Subcommittee

Mr. Shapiro reported on the meeting of the Local Rules Subcommittee held on September 16, 1992. He discussed Judge Keeton's letter on the uniform numbering of local rules and predicted that there will be increasing pressure to adopt uniform numbering. Mr. Shapiro mentioned several numbering systems, including ones where the bankruptcy local rules are numbered to correspond with the local district rules or to correspond to the national Bankruptcy Rules. He stated that the Bankruptcy Division had reviewed all of the local bankruptcy rules in the country and produced an alphabetical index of the topics of those rules.

Mr. Shapiro distributed copies of a proposed uniform national numbering system for local district rules which was based on the Civil Rules. He stated that the Bankruptcy Division had agreed to prepare a similar numbering system based on the Bankruptcy Rules for use with local bankruptcy rules. Mr. Shapiro stated that the courts could continue to use local numbers as long as uniform national numbers and an index also are available. Judge Leavy predicted that if someone in Washington reviewed all of the local bankruptcy rules, assigned them to uniform national numbers, and published an index of those rules and numbers, within five years, most of the citations and references by counsel would be to those uniform numbers.

Technology Subcommittee

Presenting the report from the Subcommittee on Technology, Judge Barta stated that several questions have arisen recently about facsimile filing. He stated that the proposed amendment to Rule 5005, which is scheduled to take effect on August 1, 1993, is not intended to require the clerk to accept facsimile filings and that the Committee Note states so.

Mr. McCabe stated that the Court Administration Committee is scheduled to consider guidelines on facsimile filing at its December meeting. The guidelines, which cover technical matters such as the quality of paper and types of machines to be used, will supersede the existing guidelines adopted by the Judicial

Conference. Judge Barta stated that facsimile filing would not work well in the bankruptcy courts due to the nature of bankruptcy filings. Mr. Minkel stated that facsimile filing would be a boon for attorneys whose offices are a long way from the bankruptcy court as well as in isolated areas of the country. Mr. Heltzel stated that facsimile filing is an interim step to fully electronic filing. Judge Barta indicated that he believed that there is no need at this time to make a further change in Rule 5005 for the purpose of encouraging facsimile filing.

Judge Barta stated that the subcommittee had attempted to draft an universal agreement form and protocol for use with creditor applications to receive notices electronically. Because it proved to be difficult to devise a form which could be used by any creditor in any district, the subcommittee proposed, as an alternative, to draft guidelines for testing in several pilot districts prior to August 1, 1993, the effective date of new Rule 9036. Judge Barta asked if there were any opposition to the proposed pilot program. None was expressed. The Chair asked whether there was opposition to the new rule among the clerks. Mr. Heltzel stated that there was some opposition in courts where the automation equipment is limited. He predicted that the new form of noticing would save money for both the courts and the creditors who receive notices electronically.

Judge Barta discussed the use of bar coding in processing proofs of claim and the possibility of scanning claims and supporting documents when they are filed. In the future, when the court receives filings by electronic transfer from the attorneys, he indicated that there may not be a need for the clerk to keep paper copies of the filings as well as the electronic documents.

The subcommittee recommended that the chair of the subcommittee be directed to confer with the Reporter to consider drafting a new rule or amendment that would (1) authorize clerks to accept documents filed by electronic means, (2) allow clerks to destroy pieces of paper after the papers are imaged and made part of the clerk's database, and (3) suggest that digitalized information stored in the computer carry the same legal effect as a piece of paper filed and stored somewhere. Judge Barta stated that Rule 3001(f), which deals with the evidentiary effect of an executed and filed proof of claim, is a precedent for the proposed rule. Judge Barta moved that the chair of the Technology Subcommittee meet with the Reporter with a view toward drafting a new rule to be considered by the full committee to authorize filing by electronic means, to allow the clerk to destroy a piece of paper if the image is stored electronically, and to make the electronically stored record the official record. **Judge Mannes seconded the motion, which carried unanimously.**

The Chair stated that he feels strongly that the Committee ought to pursue the matter. He described a demonstration in which a piece of paper was imaged as quickly as you could check out a can of beans at the grocery store. The Chair stated that until the courts make the electronic record the official record the courts just will be spinning their wheels. **At 3 p.m., the meeting was adjourned until 8:30 a.m. Friday.**

United States Trustee Report

Mr. Logan discussed the United States Trustee Program's efforts to assume responsibility for reviewing case trustees' final reports and accounts, and proposed distributions in chapter 7 cases, as set out in the amendment to Rule 5009 and the Memorandum of Understanding.

He stated that United States trustees are devoting greater scrutiny to chapter 7 cases because of their wariness about a number of things. These concerns include the pendency of 34,000 chapter 7 cases filed in 1988 or before, the significant group of trustees who don't move their cases and file periodic reports in a timely fashion, and the trustees who can not account for all of their estate funds. Mr. Logan stated that 32 such potential embezzlements are being investigated.

According to Mr. Logan, the United States trustees have instituted a program to evaluate panel trustees annually in order to determine whether they should continue receiving cases. Mr. Logan stated that the new program, which includes enumerating the standards for the evaluations, has caused a significant amount of tension with the trustees. As part of the program, legislation was introduced in July to permit the United States trustee to remove trustees.

Official Forms

Ms. Channon stated that when the Reporter was preparing the package of amendments to the Official Forms approved at the March meeting for submission to the Standing Committee, he realized that this Committee had specified that publication for comment was unnecessary with respect only to one of the forms to be amended. He had consulted with several committee members by telephone and, with Ms. Channon's assistance, prepared one set of technical amendments, which he submitted to the Standing Committee for consideration without publication. He brought the rest of the amendments back to this Committee for further consideration, including whether they should be published. Ms. Channon presented the proposed amendments for reconsideration.

Table of Contents. There is a mismatch between the Table of Contents and actual titles of the forms which comprise Official Form 9. Ms. Channon recommended substituting the phrase "Commencement of Case" for the word "Filing" in the Table of Contents and the cover sheet for Official Form 9.

Form 1. Ms. Channon proposed adopting a request from a bankruptcy judge that debtors not represented by counsel be required to disclose their telephone numbers on the voluntary petition, Official Form No. 1. The reporter opposed making the change, saying that it could prompt harassing calls to debtors, especially those embroiled in domestic relations disputes.

Judge Mannes stated that the phone number would be especially useful when a debtor makes a groundless filing on the eve of foreclosure. The secured creditor could seek ex parte relief from the stay but would have to give telephonic notice, which it could not do without the phone number. Mr. Sommer suggested that the clerk maintain a confidential list of phone numbers. Mr. Heltzel indicated that this would be burdensome and stated that court papers are public records absent a court order.

Judge Howard moved to adopt the proposed amendment. Judge Barta moved to amend the motion. He proposed substituting the phrase "Telephone Number at which Debtor Can Be Reached if not Represented by Attorney" for the proposed amendment. **Judge Barta's amendment failed by a vote of 4-6. The main motion carried with three dissenting votes.**

Schedule E. Ms. Channon stated that the Crime Control Act of 1990, Pub. L. No. 101-647, had added an eighth priority to section 507 of the Code. She recommended adding the following language to Schedule E:

> [ ] Commitments to Maintain the Capitol of an Insured Depository Institution
>
> Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Treasury, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507(a)(8).

The Reporter stated that a member of the Standing Committee had suggested spelling out the names of the FDIC and RTC. Mr. Shapiro and Ms. Channon stated that the two institutions are well known by their initials. Judge Mannes moved to adopt the

proposed amendment with the initials. **The motion carried with one dissenting vote.**

Form 7. Ms. Channon stated that some attorneys are not sure whether all debtors must answer all questions in Form 7 or just debtors that are or have been in business. She recommended either transposing the sentences in the second paragraph as indicated or striking the second sentence. Judge Mannes moved to strike the sentence "Each question must be answered." and to leave the rest of the second paragraph as it is. **The motion carried by a vote of 8-0.**

In January, 1990, the Committee approved a change in question 4.a to include administrative proceedings. Ms. Channon stated that the amendment was held in abeyance for submission to the Standing Committee as part of a package of changes in the Official Forms. Several committee members indicated that the question is so broad that it may cover parole revocations, drivers license suspensions, food stamp applications, and the like. Ms. Channon stated that the question was intended to cover equal employment opportunity (EEO) proceedings and similar administrative proceedings which may have a significant impact on the estate. Mr. Minkel indicated that the amended question would impose a considerable additional burden on business debtors, who may have numerous pending EEO claims. Judge Jones moved to approve the proposed amendment as it was presented. It was suggested that the column heading "Court and Location" be amended to read "Court or Agency and Location." Judge Jones agreed to the amendment. **The amended motion carried with two dissenting votes.**

The Reporter proposed revising the proposed Committee Note by deleting the words "sentences have been transposed" and substituting the phrase "the third sentence has been deleted". Mr. Mabey moved the adoption of the Reporter's revision of the Committee Note. **The motion carried with one dissenting vote.**

Alternative Forms 9E and 9F. Ms. Channon presented the proposed alternative versions of Official Forms 9E and 9F, which were designed for use in the courts which routinely set bar dates for filing claims in chapter 11 cases. She indicated that the space provided for the inclusion of the last day to file claims also could be used to state that the court will set a deadline later. Mr. Sommer and Judge Barta indicated that, rather than simply "Filing Claims", the space should be labeled "Deadline for Filing Claims". Ms. Channon stated that the purpose of the space could be explained in the Committee Note. Judge Howard moved to accept the form as presented. **The motion carried with two dissenting votes.**

On a motion by Judge McGlynn, the committee unanimously approved rewriting the proposed Committee Note so that the final two sentences will read as follows:

> When a creditor receives this alternate form in a case, the box labeled "Filing Claims" will contain information about the bar date as follows "Deadline for Filing a Claim: _____ (Date)". If no deadline is set in a particular case, either the court will use Form 9E or Form 9F, as appropriate, or the alternate form will be used with the following sentence appearing in the box labeled "Filing Claims": "When the court sets a deadline for filing claims, creditors will be notified."

Ms. Channon presented a revised cover sheet for Form 9 which included the conforming change in the title referring to "Commencement of Case" and the inclusion of the two new alternative forms. Mr. Shapiro moved to adopt the revised cover sheet. **The motion carried unanimously.**

Form 10. Ms. Channon presented several proposed changes in Form 10. She proposed revising the final line of the section on priority claims to read as follows: "[ ] Other - 11 U.S.C. § 507(a)(2),(a)(5),(a)(8) (Circle applicable §)". In order to avoid revising the form every time Congress adds a priority, Mr. Sommer suggested substituting "[ ] Other - Specify section number". Ms. Channon stated that this might encourage creditors to claim priority status even though there is no basis for it in the law. Professor King suggested the phrase "[ ] Other - Specify applicable paragraph of section 507(a) _____".

The second proposed change requests the creditor to state "Chapter of Bankruptcy Code under which Case is Proceeding: Chapter _____". Ms. Channon stated that the information would speed claims processing in clerks' offices which are organized by chapter, unless the court already incorporates the chapter in the case number. Mr. Mabey indicated that it seems unreasonable to require a creditor to tell the clerk under what chapter the case is pending. Several committee members suggested that, if the chapter number is important to the court, the court should include it in the case number. Ms. Channon stated that the use of bar codes for proofs of claim may make the necessity for the information obsolete in a short time. Professor King moved to make no change. Judge Meyers suggested that the Committee Note state that a court could require the information at its option. **The motion carried on a vote of 6-1.**

Ms. Channon presented several changes in questions 4 and 5 intended to make it clear that creditors are to include only the prepetition amounts of their claims. She recommended inserting the phrase "at time case filed" at two points and striking the

word "prepetition" in question 5. Judge Mannes moved the adoption of all of the proposed changes in Form 10, including Professor King's suggested language for other priorities under § 507(a), except for requiring creditors to specify the chapter under which the case is proceeding. Professor King suggested correcting the spelling of "acknowledgement" in question 8. The Reporter indicated that this could be done by the Style Subcommittee. **The motion carried unanimously.**

The Reporter proposed the following revised Committee Note:

> This form has been amended to include the priority afforded in § 507(a)(8) of the Code that was added by Pub. L. No. 101-647 (the Crime Control Act of 1990) and to avoid the necessity for further amendments in the event that other priorities are added to § 507 in the future. In addition, sections 4 and 5 of the form have been amended to clarify that only prepetition arrearages and charges are to be included in the amount of the claim.

Judge Howard moved to approve the revised Committee Note. **The motion carried with one dissenting vote.**

Form 14. Ms. Channon proposed adding the phrase ", which classifies this claim or interest under class _____" to the last two sentences on the form. Mr. Shapiro suggested changing "under" to "in" and Ms. Channon agreed. He asked if the plan proponent would complete this blank. Ms. Channon stated that she hoped the proponent would do so. Mr. Mabey moved to adopt the proposed changes, including the use of the word "in".

The Reporter indicated that the proposed revision implies that the creditor is to complete the blank, which could be difficult and burdensome for creditors not represented by counsel. Because it is an Official Form, he stated, many attorneys may send out the form without completing the blank. The Reporter asked what would be the effect of a creditor's misclassifying its claim. Professor King stated that the classification is only a matter of information and would not affect the validity of the vote. **The motion to adopt failed by a vote of 3-7.**

Judge Jones suggested putting the burden on the proponents to propose special ballot forms in those cases which have competing plans. She moved to delete the reference to competing plans. Professor King stated that the provision had been in the form for a long time. He opposed deleting it on the spur of the moment without having a memorandum prepared by the Reporter. The Reporter recommended retaining the provision for creditors to express their preference between competing plans in light of Code

§ 1129(c). Judge Jones withdrew her motion. **The chair asked the Reporter to look into the matter.**

Form 4. The Reporter stated that recent amendments to 11 U.S.C. § 101 required revision of the reference to the definition of "insider" in Official Form 4. He recommended striking "§ 101(30)" and substituting "§ 101" to avoid the need for revising the form every time § 101 is amended. Professor King moved to make the change. **The motion was approved unanimously.**

Publication. Judge Howard moved that none of the amendments to the Official Forms be published for comment by the bench and bar. **The motion carried on a vote of 8-3.**

Miscellaneous Letters

Responding to the letter of February 14, 1992, from the American Express Company, Judge Jones suggested that the Committee consider in the future requiring debtors to disclose their account numbers. Mr. Sommer stated that schedules already include the account number. Ms. Channon indicated that the request for the number to be included in the § 341 notice but not be including in the mailing label or exposed to public view may be impracticable. Ms. Channon suggested that the matter be referred to the Technology Subcommittee for followup. **The Chair did so.**

Bankruptcy Judge Geraldine Mund wrote to the Committee concerning the time and methodology by which a party must request a jury trial in a proceeding removed to the bankruptcy court. In response, Judge Howard inquired whether the Supreme Court is likely to revisit the issue of jury trials in the bankruptcy courts. Professor King stated that the Court had declined to hear two bankruptcy jury trial cases. The Reporter indicated that the Committee should defer considering the matter until the Supreme Court provides more guidance on whether jury trials can be held in the bankruptcy court. Professor King stated that the Committee Note to the abrogation of Rule 9015 expressed the same policy.

Joseph Spaniol, secretary of the Standing Committee, informed this Committee that Rule 2005 continues to make a distinction between arrest in a nearby district and arrest in a distant district although the distinction has been removed from Criminal Rule 40. Mr. Spaniol suggested that this Committee consider whether Rule 2005 should be amended. The Reporter indicated that the current bankruptcy rule need not be amended because it is working fine and because the former criminal rule embodied a different concept. It was moved to thank Mr. Spaniol

for the letter but to make no change in the rule. **The motion carried unanimously.**

Tributes

The Chair recognized the following members of the Committee whose terms expire this year and thanked them for their service:

Judge Jones
Judge Howard
Professor King
Mr. Shapiro
Mr. Dixon

Judge Ellis complimented the Committee for what he described as the unique rigor with which it approaches the issues which it considers and the good work it does.

Date and Place of Next Meeting

The Chair suggested that the next meeting be held at Point Clear, Alabama, or some other place in the Southeast on February 18 - 19, 1993. The Summer meeting would be held in Jackson Hole, Wyoming, in September, 1993. **There was no objection.**

There being no further business, the meeting was adjourned at 10:44 a.m. on September 18, 1992.

Respectfully submitted,

James H. Wannamaker, III
Attorney
Division of Bankruptcy

DRAFT

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Minutes of the Meeting of March 16 - 17, 1989

The Advisory Committee on Bankruptcy Rules met in Phoenix, Arizona, in the Pointe at Squaw Peak hotel. The following members were present:

District Judge Lloyd D. George, Chairman
Circuit Judge Edith Hollan Jones
Circuit Judge Edward Leavy
District Judge Thomas A. Wiseman, Jr.
Bankruptcy Judge James J. Barta
Bankruptcy Judge Paul Mannes
Ralph R. Mabey, Esquire
Joseph G. Patchan, Esquire
Herbert P. Minkel, Jr., Esquire
Bernard Shapiro, Esquire
Professor Lawrence P. King
Professor Alan N. Resnick, Reporter

The following additional persons also attended the meeting:
W. Reece Bader, Esquire, Committee on Rules of Practice and Procedure
Peter G. McCabe, Assistant Director, Administrative Office
Patricia S. Channon, Attorney, Bankruptcy Division, Administrative Office
Richard G. Heltzel, Clerk, U.S. Bankruptcy Court, Eastern District of California
Gordon Bermant, Research Division, Federal Judicial Center

The Chairman announced that no representative of the Executive Office for United States Trustees would be present at the meeting. The Executive Office had scheduled a national program for the United States trustees, he said, an activity which had pre-empted Mr. Stanton's calendar. Barbara O'Connor had planned to attend the meeting, but had become ill. Ms. O'Connor had informed the Chairman, however, that she had reviewed the materials for the meeting and approved of everything which had been sent to her.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

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

Approval of Minutes of January 1989 Meeting

The Advisory Committee approved the minutes of the January 1989 meeting. Herbert Minkel requested an amendment on page 19 to clarify the statement made by Judge Leavy concerning the action taken by the Committee on class proofs of claim. With Judge Leavy's consent the minutes were amended as requested by Mr. Minkel.

Consideration of Further Comments Received from the Public

The Committee continues to receive detailed comments on the rules from bankruptcy judges and practitioners. One recent letter contained 27 recommendations, and another contained 18. All recommendations will continue to be circulated to the entire Committee as they are received, but the Reporter requested the Committee's consent to his suspension of writing responsive comments in order to concentrate on preparation of the complete preliminary draft. If any member thinks a particular recommendation is significant, the member can contact the Reporter and request that it be addressed by the full Committee. With only one further meeting remaining before the preliminary draft must be ready for publication, however, **the consensus of the Committee was that all further comments will be treated as if they had come in during the period of public comment on the published draft.**

Transmittal Letters, Publication of Draft

The Committee discussed whether to publish only the rules to which changes are being proposed or all of the rules. The consensus was that with changes being proposed to approximately one third of the rules, publication of all would assist the public to review the Committee's proposals in context. **A motion to publish all of the rules passed unanimously.**

The Committee will consider draft transmittal letters for the publication package at the Seattle meeting.

Amendment to Bankruptcy Rule 9006(a)

Professor Resnick reported that the proposed amendment which will reduce from eleven days to eight days the period from which intervening weekends and holidays may be excluded in computing the time was approved by the Judicial Conference on March 14. He said that James E. Macklin, Jr., Secretary to the Committee on Rules of Practice and Procedure, had indicated that the transmittal letters to the Supreme Court and Congress would provide for an effective date of December 1, 1989, for all the rules changes being submitted.

The December 1, 1989, date was being used pursuant to the new Rules Enabling Act, Pub. L. No. 100-702. Several members pointed out that the change to a December 1 effective date in the Rules Enabling Act did not apply to Bankruptcy Rules, because Congress had retained 28 U.S.C. § 2075 for bankruptcy rules. Section 2075 states that bankruptcy rules become effective 90 days after transmittal to Congress.

The Committee approved a resolution noting the statutory provision prescribing an effective date for bankruptcy rules of 90 days following submission of rules to Congress, (August 1), and requesting that Mr. Macklin be directed to revise the transmittal letter for the amendment to Rule 9006(a) to reflect the effective date provided by § 2075. The consensus for the long term, however, was that the effective dates for all rules should be uniform. Accordingly, the Committee approved a resolution authorizing the Chairman to consult with Judge Weis on this matter and to seek the necessary legislative changes to achieve uniformity with the procedures prescribed for the other bodies of federal rules.

Next Meeting

The next meeting will be a three day meeting, May 17 through May 19, in Seattle, Washington. The meeting will take place in the Stouffer Madison Hotel, 515 Madison Street.

The Chairman said he expects the Committee will need to work full days throughout the scheduled meeting in order to complete the preliminary draft of the rules for transmittal to the Standing Committee in time for consideration at its summer meeting on July 17. He cautioned the members against making return air travel reservations for Friday, May 19, and said that members should plan on travelling home on Saturday.

On Wednesday evening (May 17), the Committee will take a packet steamer excursion boat to an island in Puget Sound for a salmon dinner prepared by local Indians. On Thursday (May 18), the Committee will visit the bankruptcy court, where the clerk's office will demonstrate the BANCAP automated docketing and case control system and also the experimental automated telephone case inquiry system being tested under the auspices of the Federal Judicial Center.

Official Forms

Petitions, Schedules, and Statements. Joseph Patchan introduced the proposals for revising the forms of the petitions, schedules, and statements. The present proposals are based on those made in 1988 by a task force of judges and clerks. The forms subcommittee has reviewed all of this earlier work and made substantial revisions as well as many changes that are more in the nature of refinements of the original proposals. Mr. Patchan noted that some aspects of the revised forms initially may appear radical, especially the departure from the traditional format of a pleading in the petition, but directed the Committee to the memorandum and notes prepared by Patricia Channon which provide the subcommittee's reasons for the recommended changes. He requested the Committee to pay particular attention to the policy statement beginning on page 1 of the memorandum. This statement, drafted primarily by Judge Mannes, who is a subcommittee member and also was a member of the task force, expresses the philosophy which guided the revision process.

The Committee gave preliminary approval to the draft forms of the petitions, schedules, and statement of affairs with several changes. Revised forms, which also will include the addition of penalty language as described below, will be considered at the next meeting.

Official Forms No. 16 and No. 19. Patricia Channon reviewed the history of the proposed revisions to these forms. Form No. 16, the notice of the meeting of creditors, has been reformatted with a separate notice prescribed for each of the relief chapters, and for no-asset and asset cases and various types of debtors within each chapter. Prescribing the form of the notice for each type of case separately in a block or box design serves two purposes. It establishes the elements of notice required in each type of case for purposes of programming the courts' computers, enabling notices to be produced electronically. Further, the prescribing of all authorized variations combined with centralized programming of computers curtails the ability of any court to utilize a local form which conflicts with the Bankruptcy Code and national Bankruptcy Rules.

The Advisory Committee gave preliminary approval to the revised Form No. 16 in 1987. Although there is no requirement that forms be published for public comment, the Advisory Committee determined that some form of public exposure would be both appropriate and helpful before the revisions were officially prescribed. In lieu of publication, the Advisory Committee authorized testing of these forms together with the revised proof of claim form. Eleven courts agreed to participate and used the revised forms during July - December, 1988. Some adjustments were made during the test, the most significant being the addi-

tion of two lines that can be used for local information at the option of the court.

Bernard Shapiro noted that the Northern District of Texas routinely imposes a claims filing deadline in chapter 11 cases and inquired whether the proposed forms of notice would make it impossible for a court to continue such a practice. Ms. Channon said that if notices are generated electronically, a court could impose a claims deadline in a chapter 11 case only by using the two optional lines at the bottom.

The response to the revised forms was extremely favorable, overall, and the test courts have requested permission to continue using the revised forms. The test courts also have forwarded several suggestions for changes based on their experience in using the forms. These suggestions, and the recommendations of the subcommittee concerning them, were considered by the committee and the following **changes approved:**

*** the form will require the telephone numbers of both the trustee and the debtor's attorney;**

*** if the case has been converted from another chapter, information concerning the original chapter and filing date will be disclosed, and the information highlighted to enhance its visibility;**

*** the first sentence of the paragraph labelled "LIQUIDATION OF THE DEBTOR'S PROPERTY" will be amended to state that the trustee "will collect the debtor's property and turn *any that is not exempt* into money," (new wording shown in italics); the words "has been appointed" also will be deleted from this sentence.**

The Committee also voted not to add the word "interim" to the title of the box "Name and Address of Trustee" on the chapter 7 notices, accepting the recommendation of the subcommittee that technical correctness on this point probably would confuse the public unnecessarily in view of the small number cases in which creditors elect a trustee at the meeting of creditors. **Potential contradiction with the paragraph entitled "MEETING OF CREDITORS" will be resolved by inserting the word "different" before "trustee" in the third sentence, which states that creditors may elect a trustee.**

One comment on the proposed form asserted that the information section gives "too much legal advice." This information is not materially different from that provided in the current form, however. Richard Heltzel observed that if the form does not provide any information, recipients simply will call the clerk's office, which is prohibited from giving legal advice. Chairman

George said the issue is one of balance in achieving the appropriate amount of information to be provided.

Herbert Minkel observed that the statements concerning the effect of the discharge omit two "material" exceptions: 1) the discharge may be revoked, a event which would revive the creditor's right to collect a debt; and 2) a secured creditor may not collect any deficiency from a discharged debtor but may foreclose on the lien (and thus collect the secured portion). Ralph Mabey said he was not troubled by the failure to mention a right to foreclose as the sentence says only that the creditor "may never take action to collect the discharged debts." (Emphasis added.) **The consensus was that this paragraph should be left as it is.**

Herbert Minkel also raised several matters concerning the accuracy of the information provided in the chapter 11 notices. He observed that in the notice for a chapter 11 case filed by individual or joint debtors, the paragraph titled "Purpose of a Chapter 11 Filing" states that the chapter allows a debtor to "reorganize a business or liquidate assets." Mr. Minkel said this language amounts to taking the position that chapter 11 relief is restricted to business debtors. Although the courts are split on this issue, the Bankruptcy Code does not expressly require a chapter 11 debtor to have a business. Mr. Minkel suggested substituting the phrase "restructure the debtor's obligations," but Peter McCabe said the meaning might not be clear to lay people. The Committee also considered substituting "reorganize financial affairs," but **voted simply to delete the words "a business." By consensus, this change also will be made in the notice concerning a corporation or partnership.** Although corporations and partnerships filing chapter 11 cases probably are businesses, no "mischief" results from making the deletion.

In the final sentence of the same paragraph, the Committee voted to the delete the word "all" and to add at the end the phrase "or the court orders otherwise."

By consensus, the Committee agreed to Mr. Minkel's request to substitute "may seek a discharge" for the "is seeking a discharge" in the chapter 11 individual/joint, and the chapter 12 notices.

Mr. Minkel's motion to delete the final sentence of the form, ["YOU WILL BE NOTIFIED OF THE DEADLINE FOR FILING PROOF OF CLAIM"], on the ground that in some cases no deadline ever is set, was not seconded.

The Committee approved a number of changes in Form No. 19, the Proof of Claim:

* The request for the "number by which creditor identifies debtor will be clarified by inserting the words "account or other" before the word "number";

* Taxes will be added as a category of claim;

* A box will be added for claims based on post-petition judgments;

* Retiree benefits as defined in § 1114(a) will be added as a category of claim;

* The words "compensation for" will be inserted in the category labelled "unpaid services performed" to eliminate any ambiguity concerning whether the creditor intended to provide services without compensation;

* "(Describe briefly)" will be used throughout the form to request descriptions by the claimant;

* The plus [+] and equals [=] signs will be deleted from block no. 4;

* The check box for alerting the trustee that a claim includes interest or other charges will be placed in block 4;

* Item no. 6 will be revised as follows: "This form should not be used to make a claim for an administrative expense incurred after the filing of the bankruptcy petition. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503." See discussion of Rule 2016, infra;

* Item no. 8 will be revised as follows: "To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of your claim."

Several courts had requested that wage claimants be required to disclose any vacation, severance, or sick leave pay which is included in their claims. The Committee, however, believes adding this would require claimants to swear to something that in most cases is beyond their ability to determine correctly. Accordingly, the consensus was that it should not be added.

Judge Leavy questioned the inclusion of the warning concerning criminal penalties at the bottom of this form, which is filed by creditors, when no similar notice appears on the forms completed by debtors. Bernard Shapiro said that at one time there was a perceived problem of debtors and creditors acting in

collusion to file false claims. **A motion to delete the warning, however, failed. A motion to amend the language to make the warning more general by omitting the specifics of the maximum sentence, also failed. A motion to add the warning to the schedules and statements carried, with four opposed. Patricia Channon will verify the correct amount of the maximum fines and the statutory citations.**

Official Form No. 2. Bankruptcy Rule 1006(b) requires an application to pay the filing fee installments to include a **statement that the debtor is unable to pay the fee except in installments. The Committee approved an amendment to the form inserting this statement.**

* * * *

The Committee will give a final review to Official Form No. 16 (§ 341 notices) and Official Form No. 19 (proof of claim) at the May 1989 meeting. **The Committee approved immediate transmittal of amended Official Form No. 2 (installment fees) to the standing Committee for recommendation to the September 1989 meeting of the Judicial Conference.**

Revisions to the Bankruptcy Rules

All Rules - Use of Word "File." **The Committee adopted the Reporter's recommendation made in a memorandum dated 2/21/89 that the rules adhere to a uniform style with respect to the use of the word "file." Accordingly, the word "file" will be used to indicate that a document is to be delivered to the clerk for inclusion in the official court record of the case.** Variants, such as "file with the clerk" or "file with the court" will be changed to simply "file." If a document or copy is destined for the United States trustee or a party, other words such as "transmit" and "serve" will be used.

Rule 2011. The Code was amended in 1986 to replace the court with the United States trustee as the appointing authority for trustees. As a result there no longer is any appointing order which the trustee can display as proof of appointment. The United States trustee issues a notice of appointment only. Moreover, in order to qualify, a trustee also must post a bond within five days of being appointed. The bond must be filed with the court. (11 U.S.C. § 322(a).) A panel trustee who is covered by a blanket bond qualifies automatically, but a trustee appointed specially, as in a the case of an elected trustee, must post a separate bond. **A motion to amend the rules to require the clerk to notify the court and the United States trustee when a trustee fails to qualify within the time prescribed by § 322(a) passed with two opposed. The Committee agreed that legislative action**

should be sought to have the trustee's bond filed with the United States trustee rather than the court.

Rule 2016. The Committee considered whether to amend the rule to provide specific direction on the filing of a request for payment of an administrative expense as authorized by § 503(a) of the Code. **A motion to leave the rule alone, as recommended by the Reporter, carried.**

Rule 3001(e). Mr. Minkel stated that the present rule, which requires the judge to approve every transfer of a claim other than one based on a bond or debenture, if the transfer occurs after a proof of claim has been filed, has led to inconsistent treatment of transferred claims. He said some judges look only to ascertain that the transfer is a bona fide one while others examine the transaction for the level of disclosure (concerning value) to the transferor, fairness of the price, etc., regardless of whether the transferor is satisfied with the terms of the transfer. Mr. Minkel said that the inconsistent treatment was a problem itself but that an even greater potential problem is that the postpetition market in claims could be stifled, and creditors who need to liquidate their claims will be unable to do so. Judge Wiseman said amending the rule so that the judge would be involved only if there were a dispute would be acceptable as long as there would be no preclusion from raising issues of fraud. Mr. Patchan expressed concern about transfers to an insider and wanted the transfer documents to disclose what inducements had been offered to the transferor. **A motion to amend the rule to delete court approval of a transfer of a claim in the absence of objection passed with one opposed.**

Rule 3018. **A motion to adopt the Reporter's draft amendments carried.**

Rule 5009. **A motion carried to amend the Committee Note to state that the United States trustee should not certify that the case trustee is entitled to be paid the fee provided in § 330(b) of the Code until after the time for filing a complaint objecting to discharge under Rule 4004 has expired and, in the case of an individual, the disposition of any complaint.**

Rule 5011(b). The Committee concurred with the recommendation of the Reporter that this rule, which limits a bankruptcy judge to submitting a report and recommendation to the district court on an issue of abstention from a proceeding, should remain as is. **A motion to make no change carried.**

Rule 6006. **Upon motion, the Committee voted to delete from the rule all references to "time share" interests.** Time share interests are simply one of the many forms of executory contracts. The rule applies to all executory contracts and unexpired leases, and the Committee believes that mentioning only one type may be

misleading. The Committee Note will state that the reference to time share interests is deleted as unnecessary.

Rule 7062. **Upon motion, the Committee voted (with two opposed) to add to the rule language that would include among the matters that are exceptions to the 10-day stay of execution on a judgment provided by Fed.R.Civ.P. 62(a) the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code.** As these actions arise by motion rather than by adversary proceeding, the Committee directed that the amendment should mention that these are contested matters. Professor King agreed to research the definition of the word "judgment" and advise the Committee at the next meeting.

Rule 8002(a). **Upon motion, the Committee voted to adopt the Reporter's recommendation to amend the rule by adding, after the second sentence: "A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof."** This amendment will conform the rule to Rule 4(a)(2) of the Federal Rules of Appellate Procedure.

Rule 8006. **The Committee approved amending the rule to require any party filing a designation of record to provide the clerk with a copy of the items designated and, if a party fails to do so, authorizing the clerk to provide a copy at the party's expense.**

Rule 8007. **The Committee approved related amendments that would direct the clerk to forward to the appellate court a copy of the record.** These amendments include deleting existing subdivision (c) of the rule, which permits the parties to stipulate parts of the record to be retained in the bankruptcy court with copies to be forwarded. This subdivision would be unnecessary under the amendments proposed.

Rule 9027(a). The Committee discussed amending the rule to conform it to recent amendments to the statute governing removal of civil actions, (28 U.S.C. § 1446). These amendments changed the procedure from one requiring a "petition" on which the district court would rule to a simple notice procedure. **A motion to replace the word "application" with the word "notice" in subdivision (a) and wherever else in the rule "application" appears carried with one opposed.** The Committee also approved the Reporter's recommendation that the rule be amended to require the removing party to include in the notice of removal a statement concerning whether the action, upon its removal, is core or non-core and, if non-core, whether the removing party consents to final determination by the bankruptcy judge. The Committee considered whether to retain the requirement that the notice of removal be filed in the same division of the district in which the action originally was brought. It was noted that in some

districts the bankruptcy court may have a division at a location where there is no district court division, while in others the district court may have a division located where there is no bankruptcy court division. **A motion to leave the rule unchanged in this respect passed with several members abstaining. The Committee also approved adding a requirement that the notice of removal contain a statement concerning the core or non-core nature of the proceeding and whether the removing party consents to final determination by the bankruptcy judge.**

Rule 9027(b). **A motion to abrogate Rule 9027(b), in keeping with the spirit of the repeal by Congress of 28 U.S.C. § 1446(d), to which the rule is similar, passed unanimously.** The Committee Note will say that abrogation, which has the effect of deleting any requirement for a removal bond, is consistent with the repeal of 28 U.S.C. § 1446(d).

Rule 9027(e). The Committee concurred in the recommendation of the Reporter that this rule, which limits a bankruptcy judge to submitting a report and recommendation to the district court concerning any motion to remand a removed proceeding, should remain as is. **A motion to make no change in the rule carried.**

Rule 9027(g). This subdivision would be redesignated as subdivision (f) as a result of the abrogation of subdivision (b). A new subpart (3) would require any party to the proceeding other than the removing party to file within 10 days after the filing of the notice of removal a statement admitting or denying the removing party's allegations concerning whether the proceeding is core or non-core and stating whether the party filing the statement consents to final determination by the bankruptcy judge. **The Committee approved the addition of a new subdivision (3) of the rule that would require other parties to the removed action to file a statement responding to the removing party's allegations concerning the core or non-core nature of the proceeding and whether the party consents to final determination by the bankruptcy judge.**

Committees of Retired Employees Appointed under § 1114 of the Code. **The Committee approved with minor changes amendments proposed by the Reporter to Rules 1007(a)(4), 2002(i), 2019(a), 3006, and 6007(a) to provide for treatment of § 1114 committees and to specify which committee or committees are to receive notices or copies** of documents when not all need to receive the notice or copy in question. **The Committee also reviewed and approved a list prepared by the Reporter of rules that make general reference to committees and need not be amended.**

* * * *

Mr. Minkel raised the problem that is created when the list of 20 largest unsecured creditors filed with the petition under

Rule 1007(d) has been amended or when the creditors listed therein have subsequently assigned their claims to others. An outdated listed is a problem, he said, because other rules require notice to be given to the creditors on the "list filed pursuant to Rule 1007(d)." Mr. Minkel said he had no solution concerning how to make sure notice goes to those who actually are the 20 largest unsecured creditors at the time any specific notice may be sent, but he wanted the Committee to be aware of the problem.

* * * *

The Reporter's memorandum on the proposals of the American Bankruptcy Institute ["ABI"] and Bankruptcy Judge Paskay [Docket No. 43-B] and the Reporter's memorandum on miscellaneous suggestions from the public concerning Parts V through IX [Docket No. 34-E] were discussed under the Committee's procedure of considering suggestions not recommended by the Reporter only when raised by a member. The Committee took the following action concerning matters brought up under this procedure:

1. Ralph Mabey raised the suggestion of the ABI that **Rule 3002** provide that an undersecured creditor that recovers its collateral be required to file an amended proof of claim (to notify the trustee of the value of the collateral). **The consensus of the Committee, however, was that no change in the rule is needed.**

2. Ralph Mabey also noted the ABI's suggestion that Rule 4007(c) be amended to extend the deadline for filing a § 523(c) complaint in chapter 11 cases. He said this suggestion had put him in mind of earlier Committee discussions about running this time period from the date the § 341 meeting actually occurs, rather than from the date the meeting is scheduled as the present rule provides. The Reporter said the subject of this deadline is still active and work on it only has been deferred. Judge Jones indicated that she also continues to have an interest in the subject. **The issue will be placed on the agenda for the May 1989 meeting.**

3. Harry Dixon raised the suggestion of the ABI that the Committee consider amending **Rule 6004** or adopting a rule establishing uniform title standards or other approaches to eliminate requests by title companies for "comfort orders" approving sales of estate property. **The Committee, however, declined to take any action.**

* * * *

The Committee deferred to the next meeting consideration of the Reporter's memorandum concerning documents to be filed in a chapter 12 case and deletion of the chapter 13 statement from the Official Forms. This subject affects Rules 1007 and 1008 and

several others in which the existing chapter 13 statement is mentioned. (Agenda Item 9.)

Automation Study Group

The American Bankruptcy Institute has suggested that the Committee establish a study group on computerization and the need for rules relating thereto. Chairman George said this appeared to be an area in which better results might be obtained from a joint study group composed of members of the Advisory Committee and the Committee on Administration of the Bankruptcy System. The consensus supported Judge George's recommendation, with a proviso that nothing should be undertaken until after the presentation of the preliminary draft to the standing Committee on July 17, 1989.

Respectfully submitted,

Patricia S. Channon
Deputy Assistant Chief
Division of Bankruptcy

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 3016(a)

DATE: JANUARY 10, 1993

Background

Pursuant to section 1121(b) of the Bankruptcy Code, only the debtor may file a chapter 11 plan within the first 120-days of the case. This period is commonly known as the "exclusivity period." Under § 1121(c), "exclusivity" ends if either (1) a trustee is appointed, (2) the debtor does not file a plan during the 120-day period, or (3) the debtor files a plan within the 120-day period, but fails to obtain acceptance of the plan by all impaired classes within 180 days after the order for relief. These 120-day and 180-day periods may be reduced or increased by the court for cause. If exclusivity ends, § 1121(c) permits any party in interest to file a plan.

The Code does not contain any time limits for parties in interest to file a plan after exclusivity terminates. Rule 3016(a), as originally promulgated in 1983 and prior to 1991, provided that:

> "(a) Time for Filing Plan. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code, may file a plan at any time before the conclusion of the hearing on the disclosure statement or thereafter with leave of court."

The Advisory Committee Note to the original version of Rule 3016(a) explained that:

"Subdivision (a). Section 1121(c), while permitting parties in interest a limited right to file plans, does not provide any time limitation. This subdivision sets as the deadline the conclusion of the hearing on the disclosure statement. The court may, however, grant additional time, It is derived from former Chapter X Rule 10-301(c)(2) which used, as the cut-off time, the conclusion of the hearing on approval of a plan. As indicated supra, § 1121(a) permits a debtor to file a plan at any time during the chapter 11 case. Under § 1121(c), parties other than the debtor may file a plan only after a trustee is appointed or the debtor's exclusive time expires."

In 1988, the Committee received a letter from a member of the bar who commented that Rule 3016(a) was ambiguous in that it was not clear which disclosure statement the rule referred to, and also commented that the rule assumed that the filed chapter 11 plan eventually will be confirmed by the court. If the plan is not confirmed, the rule would not make sense. In response, the Advisory Committee amended Rule 3016(a) in 1991 to clarify its meaning and to enlarge slightly the time for filing a competing plan by using the entry of the order approving the disclosure statement (instead of the conclusion of the hearing on the disclosure statement) as the cut-off time for filing the competing plan.

In 1991, Rule 3016(a) was amended to read as follows:

"(a) Time for Filing Plan. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court orders otherwise."

Although the rule was amended in 1991, the purpose of the rule had not changed since its promulgation in 1983. The purpose is to control the plan and disclosure statement process or, to

use the words of Barney Shapiro at the meeting of the Committee on January 19-20, 1989, "to monitor the traffic in plans." Suppose that the debtor or another party in interest files Plan A together with a disclosure statement. Suppose further that the disclosure statement to Plan A is approved and is sent out with ballots to the creditors and interest holders. If another party is able to file Plan B with a disclosure statement during the voting period regarding Plan A, it is unclear how the case would proceed in the absence of Rule 3016(a). Would the court hold a hearing on the disclosure statement to Plan B while creditors are voting on Plan A? Should the voting on Plan A be halted pending approval of the disclosure statement relating to Plan B, so that the creditors could choose among the plans? For these reasons, it may make sense to prevent a new plan and disclosure statement from being "processed" during the voting period on a previously filed plan. Of course, the current rule permits the court to order otherwise in a particular case.

The Problem

The National Bankruptcy Conference (NBC) has recently voted on a preliminary draft of a report that includes a recommendation that Rule 3016(a) be amended so that the rule does not result in the extension of exclusivity past the time periods prescribed in the Code. It is the view of the NBC that the rule "is problematic because a literal reading could extend exclusivity past the time provided for in the Bankruptcy Code. If a debtor has obtained approval of its disclosure statement prior to the

lapse of its exclusivity period, but has failed to obtain requisite confirmation of the plan, the Rule could prohibit the filing of competing plans until confirmation of the debtor's plan has been denied." The NBC believes that the rule can be read to "modify the substantive rights of parties in interest in bankruptcy proceedings" in violation of the Rules Enabling Act (28 USC § 2075), which provides that the rules may not "abridge, enlarge, or modify any substantive right" created under the Code. Although the NBC report is preliminary at this time, I nonetheless think that this is an issue that should be considered by the Advisory Committee.

A scenario that emphasizes the concern of the NBC -- and which appears to me to be the strongest argument for amending Rule 3016(a) -- is the following: Suppose that the debtor files a plan and disclosure statement on the 119th day after the case is commenced. On the 170th day after the case is commenced, the disclosure statement is approved, and the ballots and disclosure statement are mailed to creditors. Suppose further that the confirmation hearing is scheduled for the 200th day after the case is commenced. Under § 1121(c), exclusivity has terminated on the 181st day, giving any party in interest the right to file a plan under § 1121(c). However, Rule 3016(a) would prohibit a party in interest from filing a plan on the 181st day because the debtor's disclosure statement has been approved on the 170th day and the confirmation hearing has not been held yet. The effect of Rule 3016(a) in this situation would be an extension of the

exclusivity period without any court order. It could be argued that it is inappropriate for a rule to automatically extend exclusivity. Under § 1121(d), exclusivity may be extended, but only by the court and only for cause.

I was unable to locate any published court decisions that have focused on the validity or propriety of Rule 3016(a). However, I am persuaded that the Rule may be improper in that it could have the effect of extending exclusivity without a court order.

Should the Rule be Left Alone?

Although I personally believe that it is weak, it could be argued that the present rule may remain as is without violating the Code. The justification for Rule 3016(a) has been that the Rules may set time limits for the filing of documents to best control the process. Rule 3016(a) does nothing more than set a time limit for a party in interest to file a plan. It may be worth noting that § 1121(a) provides that the debtor may file a plan "at any time", whereas § 1121(c) applicable to other parties does not use the phrase "at any time," thereby supporting the position that it is appropriate for the rules to provide reasonable time limits for parties in interest to file plans under § 1121(c). If a disclosure statement has been approved relating to a different plan, the rule merely says that it is too late for someone else to file another plan until confirmation of the first plan has been denied.

In addition, since the rule contains the phrase "or the court otherwise directs," the court may allow a party in interest to file a plan where the effect would be to extend exclusivity and the court finds that such extension of exclusivity is not warranted under the circumstances. One could view Rule 3016(a) as a rebuttable presumption that exclusivity should be extended if the debtor's disclosure statement has been approved and the confirmation hearing has not concluded.

Amending Rule 3016(a).

One way to fix the problem raised by the NBC is to amend the rule as follows:

Rule 3016. Filing a Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) Time for Filing Plan. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied, the order approving the disclosure statement was entered during the period when only the debtor had the right to file a plan under § 1121, or the court orders otherwise.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to permit a party in interest to file a plan pursuant to § 1121(c) notwithstanding prior approval of a disclosure statement filed by the debtor if the disclosure statement was approved during the exclusivity period under § 1121. This amendment is designed to limit application of subdivision (a) of this rule so that it will not have the effect of extending without court order the period in which only the debtor may file a plan. However, if an order approving a disclosure statement is entered after termination of the debtor's

exclusive period for filing a plan, the right of a party in interest to file a plan under § 1121(c) will be suspended until confirmation of the plan relating to the approved disclosure statement has been denied.

This amendment does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed. If the debtor's disclosure statement is approved during the debtor's exclusive period for filing a plan, the court may in its discretion schedule the hearing on a disclosure statement regarding a competing plan filed by a party in interest under § 1121(c) so that it is held after the confirmation hearing relating to the debtor's plan.

This amendment would have the effect of always providing a window of time immediately following termination of the exclusivity period for a party in interest to file a competing plan. A few hypotheticals may be helpful:

(a) Debtor files a petition on Day 1 and files a plan and disclosure statement on Day 119; the disclosure statement is approved on Day 170, ballots are due by Day 195, and the confirmation hearing is scheduled for Day 200. Under the above amendment, a party in interest may file a competing plan on Day 181 (when the exclusivity period expires), unless exclusivity is extended by court order. The court would then decide how to schedule the disclosure statement hearing regarding the second plan (before or after the confirmation hearing on the first plan).

(b) Debtor files a petition on Day 1 and files a plan and disclosure statement on Day 119; the disclosure statement is approved on Day 190, and the confirmation hearing is scheduled for Day 215. Under Rule 3016(a), with the above amendment, a

party in interest may file a competing plan at any time between Day 181 (when the exclusivity period expires) and Day 190, unless exclusivity is extended by court order. However, if a party in interest fails to file a competing plan within that time period, the Rule as amended would prohibit the filing of a competing plan by a party in interest until confirmation is denied. Although the rule still would prohibit the filing of a plan by a party in interest once a disclosure statement has been approved, the party in interest had the opportunity to file a plan (but failed to take advantage of it) immediately after termination of exclusivity and prior to approval of the disclosure statement.

This amendment is a modest change and would not alter the effect of the rule other than to avoid the effect of extending exclusivity by rulemaking.

Other Alternatives.

The Advisory Committee may want to consider alternatives that go beyond amending Rule 3016(a) as provided above. It could be argued that the rule, even after the above amendment, will be in conflict with § 1121(c) of the Code. Although the above amendment will make it clear that the rule does not extend exclusivity, the rule will continue to have the effect of reinstating exclusivity as soon as a disclosure statement (filed by anyone) is approved. Could the validity of the rule be questioned because it prohibits the filing of a plan when the Code does not so prohibit it?

If the Committee is concerned that Rule 3016(a) may continue

to be an inappropriate limitation of the right to file a plan under § 1121(c), the following three alternatives should be considered:

(1) Abrogate Rule 3016(a). Abrogation of Rule 3016(a) would cure the problem raised by the NBC and may remove any other doubt regarding the validity of a rule that prohibits the filing of a plan when the Code does not so prohibit it.

The Committee Note could explain that the rule is abrogated so that parties who have a right to file a plan under § 1121 may do so. It could also point out that courts may exercise their discretion in scheduling hearings on disclosure statements so that, after one has been approved, no other disclosure statements will be approved until denial of confirmation. For example, the following Committee Note could be used:

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d).

The abrogation of subdivision (a) does not affect the court's discretion with respect to the scheduling of hearings on the approval of disclosure statements when more than one plan has been filed. If a disclosure statement has been approved and the confirmation hearing has not been held, the court may in its discretion schedule the hearing on a different disclosure statement regarding a competing plan filed by a party in interest under § 1121(c) so that it is held after the confirmation hearing relating to the first plan. Ordinarily, the court should delay the hearing on another disclosure statement if a previously approved

disclosure statement has been approved and ballots have been mailed.

I do not think that the abrogation of Rule 3016(a) would be such a significant change. Courts have the power to control their dockets and to schedule hearings in a way that makes the most sense. If a debtor's disclosure statement has been approved and the parties are awaiting the confirmation hearing, and a competing plan is filed, the debtor may ask the court to exercise its discretion to delay scheduling the disclosure statement hearing until after the confirmation hearing regarding the debtor's plan -- whether or not Rule 3016(a) is abrogated.

(2) Abrogate Rule 3016(a) and amend Rule 3016(c) to prohibit the filing of a disclosure statement if another disclosure statement has been approved. Rule 3016(c) could be amended as follows:

Rule 3016. Filing a Plan and Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

* * * *

(c) Disclosure Statement. In a chapter 9 or 11 case, a disclosure statement pursuant to § 1125 or evidence showing compliance with § 1126(b) of the Code shall be filed with the plan or within a time fixed by the court. Notwithstanding the foregoing, a disclosure statement may not be filed [by a party in interest, other than the debtor,] after entry of an order approving another disclosure statement unless confirmation of the plan relating to the other disclosure statement has been denied or the court otherwise directs.

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when

only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d).

The amendment to subdivision (c) relates to the abrogation of Rule 3016(a). The purpose of this amendment is to prohibit a party in interest, [including the debtor] [other than the debtor], who files a plan from also filing a disclosure statement if a disclosure statement relating to a different plan has been approved and confirmation has not yet been denied, unless the court otherwise directs. This amendment has the effect of requiring a party in interest who wants to solicit votes on a plan, after a disclosure statement has been approved regarding a different plan, to request that the court expressly permit it to file a disclosure statement. The result is that the court will decide whether, under the particular circumstances of the case, it is in the best interest of the estate and the parties in interest for the confirmation hearing on the first plan to be completed before the process toward confirmation begins regarding the second plan.

The result of the abrogation of subdivision (a), together with the amendment of subdivision (c), is that instead of limiting the right of a party in interest, other than the debtor, to file a plan during the vote solicitation period regarding another plan, the rule as amended will limit the right of a party in interest [including the debtor] [including the debtor] to file a disclosure statement during that time period.

It is important to note that the Code gives a party in interest the right to file a plan after termination of exclusivity, but does not expressly give the party in interest the right to file a disclosure statement at any time. Although this amendment would be technically consistent with § 1121, the rule would have the same effect as the current rule -- i.e., after a disclosure statement has been approved regarding one plan, the process toward voting on a different plan would be

temporarily halted until confirmation of the earlier plan is denied.

You will notice that I put the words "by a party in interest, other than the debtor," in brackets to show two different versions of this alternative. If the Committee wants to keep the effect of the amendment the same as the effect of current Rule 3016(a) (i.e., to halt the process towards voting on a second plan filed by a party in interest, other than the debtor, after approval of a disclosure statement regarding an earlier plan), the bracketed language should be included. However, the reason for the phrase "other than the debtor" in current Rule 3016(a) is to make the rule consistent with § 1121(a) (the debtor may file a plan "at any time"). Again, the Code does not give the debtor the right to file a disclosure statement at any time. If Rule 3016(a) is abrogated and Rule 3017(c) is amended to limit the right to file a disclosure statement, the Committee has the option of making the limitation applicable to debtors as well as to other parties in interest. Why should a debtor be treated differently than any other party in interest regarding the ability to file a disclosure statement after exclusivity has been terminated and another disclosure statement has been approved relating to a creditor's plan?

(3) Abrogate Rule 3016(a) and amend Rule 3017 relating to the scheduling of the disclosure statement hearing. This alternative is a close variation of the preceding one. Rule 3017(a) could be amended as follows:

Rule 3017. Court Consideration of Disclosure Statement in Chapter 9 Municipality and Chapter 11 Reorganization Cases

(a) Hearing on Disclosure Statement and Objections Thereto. Following the filing of a disclosure statement as provided in Rule 3016(c), the court shall hold a hearing on not less than 25 days notice to the debtor, creditors, equity security holders and other parties in interest as provided in Rule 2002 to consider such statement and any objections or modifications thereto. A hearing to consider a disclosure statement [filed by a party in interest other than the debtor] shall not be held after entry of an order approving another disclosure statement unless confirmation of the plan relating to the other disclosure statement has been denied or the court otherwise directs. The plan and the disclosure statement shall be mailed with the notice of the hearing only to the debtor, any trustee or committee appointed under the Code, the Securities and Exchange Commission and any party in interest who requests in writing a copy of the statement or plan. Objections to the disclosure statement shall be filed and served on the debtor, the trustee, any committee appointed under the Code and such other entity as may be designated by the court, at any time prior to approval of the disclosure statement or by such earlier date as the court may fix. In a chapter 11 reorganization case, every notice, plan, disclosure statement, and objection required to be served or mailed pursuant to this subdivision shall be transmitted to the United States trustee within the time provided in this subdivision.

* * * *

COMMITTEE NOTE

The amendment to subdivision (a) relates to the abrogation of Rule 3016(a). If a disclosure statement has been approved but the confirmation hearing has not been concluded, and a party in interest ,[other than the debtor] [including the debtor], subsequently files another plan and disclosure statement, this amendment will delay the hearing on approval of the latter disclosure statement until confirmation of the earlier plan has been denied or unless the court otherwise directs. This amendment has the effect of requiring a party in interest, [other than the debtor] [including the debtor], who wants to solicit votes on a competing plan before the confirmation hearing is concluded regarding the earlier plan, to request that the court order that the hearing on the latter disclosure statement be held. The result is that the court will decide whether, under the particular circumstances of the case, it is in the best

interest of the estate and the parties in interest for the confirmation hearing on the earlier plan to be completed before the process toward confirmation begins regarding the other plan.

The result of the abrogation of subdivision (a), together with the amendment of subdivision (c), is that instead of limiting the right of a party in interest, other than the debtor, to file a plan during the vote solicitation period regarding another plan, the rule as amended will delay the hearing on a disclosure statement relating to another plan filed by a party in interest, [other than the debtor] [including the debtor], during that time period unless the court orders otherwise.

If this alternative is used, the Committee Note to the abrogation of Rule 3016(a) could read as follows:

COMMITTEE NOTE

Section 1121(c) gives a party in interest the right to file a chapter 11 plan after expiration of the period when only the debtor may file a plan. Under § 1121(d), the exclusive period in which only the debtor may file a plan may be extended, but only if a party in interest so requests and the court, after notice and a hearing, finds cause for an extension. Subdivision (a) is abrogated because it could have the effect of extending the debtor's exclusive period for filing a plan without satisfying the requirements of § 1121(d). However, see the amendment to Rule 3017(a) with respect to scheduling the hearing on approval of the disclosure statement.

This alternative would permit the party in interest to file a plan and disclosure statement at any time after exclusivity terminates, but would delay the scheduling of the disclosure statement hearing after another disclosure statement had been approved, unless the court otherwise directs. This may appear awkward in that the rule is telling the court that it may not schedule the second disclosure statement hearing "unless the court otherwise directs." Perhaps the phrase "unless the court

otherwise directs" should be changed to "unless the court for cause otherwise directs."

You will notice that I put certain words in brackets which would have the effect of making the proposed amendment inapplicable to debtors. I did so for the same reason that I bracketed certain phrases in the preceding alternative.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 4004

DATE: JANUARY 12, 1993

Judge Paul Mannes has suggested that Rule 4004 be amended to provide for delay of entry of the discharge order in a chapter 7 case in the event that (1) the debtor has not completed payment of the filing fee in installments, or (2) the debtor has not appeared to testify at the § 341 meeting of creditors.

Judge Mannes has indicated that his suggestion

> "was energized by the realization that it was possible for a debtor to receive a discharge without attending a § 341 meeting or paying the filing fee in full. This anomaly results by virtue of Rule 4004(c), that mandates that the court grant the discharge on the expiration of the time for the filing of a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case pursuant to Rule 1017(e).
>
> When a debtor is granted permission to pay the filing fee in installments, installments may be paid over a period extending beyond the mandatory discharge date. Similarly, for any number of reasons, the debtor may receive a discharge order before the debtor's examination at a § 341 meeting. . . . [E]liminating these abuses by rule saves time and effort for the clerk and the judge. This is because the alternative requires numerous insubstantial motions, orders and docket entries."

Failure to Complete Payment of Filing Fee in Installments

Rule 1006 provides that an individual debtor may apply to pay the filing fee in installments. Rule 1006(b)(2) allows for the final installment to be payable 120 days after the filing of the petition or, if the court for cause extends the time, the final installment may be payable up to 180 days after the filing

of the petition. Section 707(a)(2) of the Code provides that the court may dismiss a chapter 7 case for nonpayment of the filing fee. Accordingly, the remedy for the debtor's failure to pay an installment of the filing fee is a motion to dismiss the case.

Rule 4004(a) provides that the bar date for filing a complaint objecting to the debtor's discharge in a chapter 7 case is 60 days after the first date set for the § 341 meeting. Under Rule 4004(b), the time for objecting to discharge may be extended by the court for cause, but only if the motion to extend is made prior the expiration of the 60-day time period. When the time for objecting to discharge has expired without any complaint being filed and certain other conditions have been met, Rule 4004(c) requires the court to "forthwith" grant the discharge.

When Rules 1006 and 4004 are read together, the result is that a discharge is often entered before the date on which one or more of the filing fee installments are payable. If the discharge order is entered and the debtor subsequently fails to pay the remaining installments of the filing fee, the case may be dismissed pursuant to § 707(a)(2), but the debtor has the discharge nonetheless. Section 349 deals with the effect of dismissal of the case, but is silent on the effect of dismissal with respect to a previously entered discharge order. In addition, § 727(d), which lists the specific grounds for revoking a discharge, does not include nonpayment of the filing fee. Therefore, the debtor may effectively obtain the benefit of a

discharge of debts without ever completing payment of the filing fee.

One possible response to this problem is that there really is no problem at all because, in those cases in which the debtor still owes a portion of the filing fee, the court on its own or on motion of the trustee may extend the time for filing a complaint objecting to discharge. If the time to object to a discharge is extended, the court is not required to enter the discharge order under Rule 4004(c).

However, I agree with Judge Mannes' view that this solution is unsatisfactory in that it exposes the debtor to possible objections to discharge for a longer period of time merely because the debtor is unable to pay the filing fee without the installment method. In addition, it causes needless docketing and administrative burdens.

Judge Mannes has suggested that this problem be solved by amending Rule 4004(c) to provide for a delay in the entry of the discharge order until the filing fee is paid in full. The attached draft of Rule 4004(c) includes proposed amendments that would achieve this result.

It is important to note that the delay in the entry of the discharge order under Rule 4004(c) does not, and should not, extend or otherwise affect the time for filing a complaint objecting to discharge.

Failure to Attend the § 341 Meeting

Judge Mannes also suggests that Rule 4004 be amended to delay entry of the discharge order until the debtor has attended the § 341 meeting of creditors or until the § 341 meeting has been concluded. Although Rule 2003(a) requires that the meeting of creditors be held between 20 and 40 days after the order for relief, there are a number of reasons why the § 341 meeting may not take place when originally scheduled. For example, the debtor or counsel may be ill, or debtor's counsel may have conflicting engagements. One lawyer representing consumer debtors in Judge Mannes' district was involved in a 10-week narcotics trial.

Under Rule 4004(c), a discharge order will be entered upon expiration of the time for filing objections to discharge, which is 60-days after the first date set for the § 341 meeting. In the vast majority of cases, the § 341 meeting is concluded before that time. However, in the unusual case in which the § 341 meeting is not held prior to the bar date, it is possible for the discharge to be entered prior to the § 341 meeting. This defeats one of the purposes for requiring the debtor to appear at the § 341 meeting, which is for the trustee and creditors to determine whether there is a basis for objecting to discharge.

In the unusual case in which the § 341 meeting will be delayed for more than 60 days, the trustee or any other party in interest may file a motion under Rule 4004(b) for an extension of the time for filing a complaint objecting to discharge. Such an

extension of time would solve the problem discussed above. However, Judge Mannes suggests that this solution produces more paperwork than is necessary and that it would be better to amend the rule to delay entry of the discharge order automatically until the debtor has attended the § 341 meeting.

I am not certain as to whether I agree that an amendment to Rule 4004 is a good idea, given the fact that it is the unusual case in which the § 341 meeting is delayed for such a long period of time, and that a party may move for an extension of time under Rule 4004(b). I also am concerned that there may be reasons for delaying the § 341 meeting that are not caused by the debtor or debtor's counsel. Will a new automatic extension of the deadline for objecting to discharge cause busy United States trustees (who preside at § 341 meetings) to adjourn § 341 meetings more freely, or encourage busy trustees to seek more adjournments?

In any event, if a change is made, I think that the rule should use the conclusion of the meeting of creditors as the significant time, and not the debtor's attendance. Although they are rare, there have been cases in which courts have excused the debtor's appearance at the § 341 meeting due to extraordinary circumstances. See In re Stewart, 14 BR 959 (Bankr. N.D. Ohio 1981)(debtor excused for serious illness). If the debtor's failure to appear delays the entry of the discharge order indefinitely, what would happen if the debtor is excused from attending due to extreme hardship?

If the Committee agrees that Rule 4004 should be amended to

delay entry of the discharge order until the conclusion of the § 341 meeting, I think that the best way to accomplish that is to amend subdivision (a) of Rule 4004, not subdivision (c). If only subdivision (c) is amended, that could result in a situation in which the debtor's discharge is delayed beyond the deadline for filing an objection to discharge. Once the debtor does appear at the delayed § 341 meeting, the discharge would be entered automatically even if the debtor reveals at the meeting of creditors that there is a basis for objecting to discharge.

Therefore, if an amendment is made, it would make sense to delay entry of the discharge order until the conclusion of the § 341 meeting only if the time to object to discharge is also extended. One way to accomplish this is to amend Rule 4004(a) which governs the time to object to discharge. The attached draft includes proposed amendments to Rule 4004(a) that would accomplish this result.

If the Committee agrees that the attached amendments should be made to Rule 4004(a), it should also decide whether the time to object to discharge should be extended to the actual conclusion of the meeting of creditors, or whether there should be a period of time (10 days?) after the conclusion of the meeting in which to file an objection. In the attached draft, I include such a 10-day period in brackets.

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. Not less than 25 days notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney. Notwithstanding the foregoing, the time for filing a complaint objecting to discharge shall not expire before [ten days after] the conclusion of the meeting of creditors.

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be made before such time has expired.

(c) GRANT OF DISCHARGE. In a chapter 7 case, on expiration of the time ~~fixed~~ for filing a

(5) a motion to extend the time for filing a complaint objecting to discharge is pending,

complaint objecting to discharge and the time ~~fixed~~ for filing a motion to dismiss the case pursuant to Rule 1017(e), the court shall forthwith grant the discharge unless (1) the debtor is not an individual, (2) a complaint objecting to the discharge has been filed, (3) the debtor has filed a waiver under § 727(a)(10), ~~or~~ (4) ~~a motion to~~ dismiss the case under Rule 1017(e) is pending, or (5) the filing fee has not been paid in full. Notwithstanding the foregoing, on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within such period, the court may defer entry of the order to a date certain.

* * * *

COMMITTEE NOTE

Subdivision (a) is amended to provide that the time for filing a complaint objecting to discharge may not expire before [ten days after] the conclusion of the meeting of creditors. This amendment will alleviate the necessity for a motion to be filed by the trustee or another party in interest under Rule 4004(b) to extend the time for filing a complaint objecting to discharge in a case in which the meeting is adjourned for a significant period of time. As a result of this amendment, entry of the order of discharge under Rule 4004(c) may not occur before [ten days after] the conclusion of the meeting of creditors.

This amendment does not create any new notice requirements. If the time for filing a complaint objecting to discharge does not expire at the time fixed pursuant to the first two sentences of

subdivision (a) because the meeting of creditors had not been concluded, a new notice would not be required. Subdivision (a) of this rule and Rule 2002(f) requires notice only of the time fixed under the first two sentences of this rule.

Subsection (c) is amended to delay entry of the order of discharge if the debtor has not paid the filing fee in full. If the debtor is authorized to pay the filing fee in installments in accordance with Rule 1006, the discharge order will not be entered until the final installment has been paid.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: UNIFORM AMENDMENTS REGARDING UNIFORM LOCAL RULE NUMBERING, TECHNICAL AMENDMENTS AND STANDING ORDERS

DATE: JANUARY 13, 1993

At its meeting last month, the Standing Committee preliminarily approved uniform language to be used in amendments to be made to the Civil Rules, Criminal Rules, Bankruptcy Rules, and Appellate Rules regarding (1) uniform numbering of local rules, (2) technical amendments, and (3) standing orders.

The Chairmen and Reporters of the various Advisory Committees met to resolve differences in language among drafts previously offered by the Advisory Committees on these subjects. The Standing Committee then approved the uniform language, asked each Advisory Committee to review it, and requested that each Advisory Committee propose rule amendments based thereon prior to the June 1993 meeting of the Standing Committee. If such amendments are approved at the Standing Committee meeting in June, I anticipate that they will be published for comment by the bench and bar at that time.

Uniform Language Approved by the Standing Committee

The specific language approved by the Standing Committee is as follows:

(1) Uniform Local Rule Numbering:

"Local Rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States."

(2) Orders Regulating Practice Before a Court

"A judge may regulate practice in any manner consistent with Acts of Congress, with these rules, with Official Forms, and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement, not in a local rule, of which the alleged violator did not have actual notice."

(3) Technical and Conforming Amendments

"The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes essential to conforming these rules with statutory amendments."

I attach for your consideration proposed amendments to Bankruptcy Rule 8018 (Rules by Circuit Councils and District Courts), Rule 9029 (Local Bankruptcy Rules), and a proposed new Rule 9037 (Technical and Conforming Amendments). In drafting these amendments, I included the uniform language preliminarily approved by the Standing Committee (with minor variations that I thought necessary to conform to the Bankruptcy Rules). I also made minor stylistic changes in Rules 8018 and 9029 to conform to similar stylistic changes being made to analogous provisions in other bodies of rules.

Dean Daniel R. Coquilette, Reporter to the Standing Committee, is in the process of drafting uniform Committee Notes to accompany these rule amendments. As soon as I receive them, I will circulate them to you.

Rule 9029. Local Bankruptcy Rules; ~~Orders Regulating Practice~~ Procedure When There is No Controlling Law

(a) Local Bankruptcy Rules. Each district court by action of a majority of the judges thereof may make and amend rules governing practice and procedure in all cases and proceedings within the district court's bankruptcy jurisdiction which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Rule 83 F.R.Civ.P. governs the procedure for making local rules. A district court may authorize the bankruptcy judges of the district, subject to any limitation or condition it may prescribe and the requirements of 83 F.R.Civ.P., to make and amend rules of practice and procedure which are ~~not inconsistent~~ consistent with, but not duplicative of, these rules and which do not prohibit or limit the use of the Official Forms. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. ~~In all cases not provided for by rule, the court may regulate its practice in any manner not inconsistent with the Official Forms or with these~~

~~rules or those of the district in which the court acts.~~ Procedure When there is no Controlling Law

(b) ~~Orders Regulating Practice Before a~~ Court. A judge may regulate practice in any manner consistent with ~~Acts of Congress, with~~ federal statutes ~~these~~ rules, ~~with~~ Official Forms, and with local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in ~~a local rule, of which the alleged violator did not have actual notice.~~ federal statutes, rules, Official Forms, or the local district rules unless the alleged violator has actual ~~knowledge~~ notice of the requirement.

Rule 8018. Rules by Circuit Councils and District Courts; Orders Regulating Practice

(a) Local Rules by Circuit Councils and District Courts. Circuit councils which have authorized bankruptcy appellate panels pursuant to 28 U.S.C. § 158(b) and the district courts may by action of a majority of the judges of the council or district court make and amend rules governing practice and procedure for appeals from orders or judgments of bankruptcy judges to the respective bankruptcy appellate panel or district court~~, not inconsistent~~ consistent with, but not duplicative of, the rules of this Part VIII. Local rules must conform to any uniform numbering system prescribed by the Judicial Conference of the United States. Rule 83 F.R.Civ.P. governs the procedure for making and amending rules to govern appeals. ~~In all cases not provided for by rule, the district court or the bankruptcy appellate panel may regulate its practice in any manner not inconsistent with these rules.~~

(b) Orders Regulating Practice. A bankruptcy appellate panel or district judge may regulate practice in any manner consistent with Acts of Congress, with these rules, with Official Forms, and with local rules of the circuit council or district court. No sanction or other disadvantage

may be imposed for noncompliance with any requirement, not in a local rule, of which the alleged violator did not have actual notice.

Rule 9037. Technical and Conforming Amendments

The Judicial Conference of the United States may amend these rules to correct errors in spelling, cross-references, or typography, or to make technical changes ~~essential~~ NEEDED to conform ~~these rules with~~ TO statutory ~~amendments~~ CHANGES.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

January 13, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

At the meeting of the Standing Committee in December 1992, Judge Leavy, on behalf of the Advisory Committee on Bankruptcy Rules, asked the Standing Committee for permission to publish for comment the proposed amendments to Bankruptcy Rules 8002 and 8006 that were adopted by the Advisory Committee in September 1992. I am pleased to report that the Standing Committee authorized the publication of the proposed amendments to these rules.

You may recall that the proposed amendments to Rule 8002 were designed to conform to similar amendments being made to Appellate Rule 4(a)(4). In part, the purpose of amending Rule 8002 is to add to the list of postjudgment motions that toll the time for filing an appeal a motion under Civil Rule 60 (made applicable by Rule 9024) if the Rule 60 motion is "filed" within 10 days after entry of the judgment. This differs from a pending amendment to Appellate Rule 4(a)(4) in that the Appellate Rule requires that the Rule 60 motion be "served" within 10 days after judgment.

This difference ("filed" vs. "served") was discussed at the Standing Committee meeting last month. We explained to the Standing Committee that, in the opinion of the Advisory Committee, the need for certainty in bankruptcy cases regarding the finality of orders justifies requiring that the Rule 60 motion be filed, not just served, within 10 days. The Standing Committee apparently agreed in that it approved publication of the proposed amendments to Rule 8002.

A more general discussion followed after we pointed out that the Civil Rules on postjudgment motions are inconsistent regarding relevant 10-day time limits. Civil Rule 52(b) allows the court to amend or add to its findings, and to amend a judgment accordingly, "upon motion of a party made not later than 10 days after entry of judgment." Civil Rule 59 allows a motion for a new trial or a motion to alter or amend a judgment if it is "served not later than 10 days after the entry of the judgment."

Civil Rule 50(b) requires both "service and filing not later than 10 days after entry of a judgment" for the renewal of a motion for judgment as a matter of law.

As a result of this discussion, the Standing Committee has asked the Advisory Committee on Civil Rules to consider whether these 10-day time limits regarding postjudgment motions should be changed to require that all such motions be "filed" within 10 days. Professor Edward Cooper, the new Reporter to the Advisory Committee on Civil Rules, has indicated to me that it may be helpful to the Civil Committee to have input on this issue from the Bankruptcy Committee. He also indicated that the next meeting of the Civil Committee will be in May 1993.

It is my opinion that the Rules would be improved if all of these time provisions applicable to postjudgment motions were amended to require the filing of such motions within 10 days after the entry of the judgment. This would enable any party, by looking at the docket on the morning of the 11th day following entry of a judgment, to know with certainty whether such a motion has been made. This is important in bankruptcy cases because Civil Rules 52(b), 59(b), and 59(e) are made applicable by Bankruptcy Rules 7052 and 9023, and also because such motions have the effect of extending the time to appeal under Rule 8002. Under the current rules, it is impossible to know by looking at the docket on the 11th day after judgment whether the time to appeal has expired because, for example, a motion to amend the judgment under Civil Rule 59(e) may have been dropped in a mailbox late on the 10th day.

At our meeting in February, I will suggest that the Advisory Committee on Bankruptcy Rules vote on a resolution to urge the Advisory Committee on Civil Rules to amend Civil Rules 52(b), 59(b), and 59(e)(made applicable to Bankruptcy cases by Bankruptcy Rules 7052 and 9023) so that such postjudgment motions must be filed not later than 10 days after the entry of the judgment. These amendments will result in more uniformity among analogous rules, and will facilitate greater certainty regarding the finality of judgments in bankruptcy cases.

I enclose for your convenience copies of F.R.Civ.P. 50, 52, and 59.

Sincerely,

Alan N. Resnick
Reporter
Advisory Committee on
Bankruptcy Rules

Not incorporated in BR

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings

(a) JUDGMENT AS A MATTER OF LAW.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) RENEWAL OF MOTION FOR JUDGMENT AFTER TRIAL; ALTERNATIVE MOTION FOR NEW TRIAL. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION FOR JUDGMENT AS A MATTER OF LAW.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party against whom judgment as a matter of law has been rendered may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment.

(d) SAME: DENIAL OF MOTION FOR JUDGMENT AS A MATTER OF LAW. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

BR 7052

Rule 52. Findings by the Court; Judgment on Partial Findings

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) AMENDMENT. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

(c) JUDGMENT ON PARTIAL FINDINGS. If during a trial without a jury a party has been fully heard with respect to an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party on any claim, counterclaim, cross-claim or third-party claim that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Rule 59. New Trials; Amendment of Judgments

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2015

DATE: JANUARY 14, 1993

Henry Sommer has informed me that Rule 2015(b) and (c) are ambiguous because it is unclear whether a chapter 12 debtor in possession or trustee, or a chapter 13 debtor in a case involving a debtor engaged in business, is required to file an inventory under Rule 2015(a)(1) in the absence of a court order.

In particular, Henry has written as follows:

> "Bankruptcy Rule 2015(c) provides that the debtor in a chapter 13 business case shall comply with Bankruptcy Rule 2015(a)(1)-(4). However, Bankruptcy Rule 2015(a)(1) contains two alternative requirements depending upon whether the debtor is in chapter 7 or chapter 11, and there is no indication in the rules as to which alternative should be applicable in chapter 13 cases. (Probably, such cases should be treated like chapter 11 cases with respect to transmitting an inventory since, as in chapter 11, the debtor remains in possession of all property of the estate.) The same problem pertains to Rule 2015(b) in chapter 12 cases. The rule should be clarified regarding exactly what the requirements for chapter 12 and chapter 13 debtors are."

I agree with Henry that the rule should be clarified. I do not have a strong opinion as to whether a complete inventory should be required in all chapter 12 cases and all chapter 13 cases involving debtors engaged in business (as is required in all chapter 7 cases), or whether an inventory should be required only if the court so directs (as in chapter 11 cases). I have a slight preference, however, for treating chapter 12 and chapter

13 business cases the same as chapter 11 cases with respect to the duty to file an inventory. This question should be discussed at the next Advisory Committee meeting.

I attach a draft of amendments to Rule 2015 designed to clarify that a complete inventory is required in chapter 12 and chapter 13 business cases only if the court so directs.

Rule 2015. Duty to Keep Records, Make Reports, and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall (1) in a chapter 7 liquidation case and, if the court directs, in a chapter 11 reorganization case file and transmit to the United States trustee a complete inventory of the property of the debtor within 30 days after qualifying as a trustee or debtor in possession, unless such an inventory has already been filed; (2) keep a record of receipts and the disposition of money and property received; (3) file the reports and summaries required by § 704(8) of the Code which shall include a statement, if payments are made to employees, of the amounts of deductions for all taxes required to be withheld or paid for and in behalf of employees and the place where these amounts are deposited; (4) as soon as possible after the commencement of the case, give notice of the case to every entity known to be holding money or property subject to withdrawal or order of the debtor, including every bank, savings or building and loan association, public utility company, and landlord with whom the debtor has a deposit, and to every insurance company which has issued a policy having a cash surrender value payable to the debtor, except that notice need not be given to any entity who has knowledge or has previously been notified of the case; (5) in a chapter 11 reorganization case, on or before the last

day of the month after each calendar quarter until a plan is confirmed or the case is converted or dismissed, file and transmit to the United States trustee a statement of disbursements made during such calendar quarter and a statement of the amount of the fee required pursuant to 28 U.S.C. § 1930 (a)(6) that has been paid for such calendar quarter.

(b) CHAPTER 12 TRUSTEE AND DEBTOR IN POSSESSION. In a chapter 12 family farmer's debt adjustment case, the debtor in possession shall perform the duties prescribed in clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor in accordance with clause (1) of subdivision (a) of this rule. If the debtor is removed as debtor in possession, the trustee shall perform the duties of the debtor in possession prescribed in this paragraph.

(c) CHAPTER 13 TRUSTEE AND DEBTOR.

(1) Business Cases. In a chapter 13 individual's debt adjustment case, when the debtor is engaged in business, the debtor shall perform the duties prescribed by clauses ~~(1)-(4)~~ (2)-(4) of subdivision (a) of this rule and, if the court directs, shall file and transmit to the United States trustee a complete inventory of the property of the debtor in accordance with clause (1) of subdivision (a) of this rule.

(2) Nonbusiness Cases. In a chapter 13 individual's debt adjustment case, when the debtor is not engaged in business, the trustee shall perform the duties prescribed by clause (2) of subdivision (a) of this rule.

* * * *

COMMITTEE NOTE

Subdivisions (b) and (c) are amended to clarify that a debtor in possession and trustee in a chapter 12 case, and a debtor in a chapter 13 case where the debtor is engaged in business, is not required to file and transmit to the United States trustee a complete inventory of the property of the debtor unless the court so directs.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 4008

DATE: JANUARY 14, 1993

Bankruptcy Rule 4008 governs discharge and reaffirmation hearings. It provides as follows:

Rule 4008. Discharge and Reaffirmation Hearing

> Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as prescribed in § 524(d) of the Code. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

Henry Sommer has suggested that Rule 4008 be amended to add a deadline for filing reaffirmation agreements. In particular, Henry has written the following:

> "Under current rule 4008, any discharge hearing must be held within 30 days following the entry of an order granting or denying a discharge, and on not less than 10 days notice to the debtor and the trustee. Section 524(d) requires the court to have a discharge hearing in any case where the debtor intends to reaffirm a debt. However, there is no way for the court to know whether the debtor intends to reaffirm a debt until the reaffirmation agreement is filed with the court, and there is no requirement that the reaffirmation agreement be filed with the court prior to the discharge. Therefore, situations could arise where the reaffirmation agreement was filed more than 20 days after the discharge order and there would be no way for the court to comply with the rule about scheduling a discharge hearing. To remedy this problem, there should be a deadline for filing any reaffirmation agreement with the court and sufficient time so that the court can send notice of and hold the discharge hearing within the time required by the rules."

I agree with Henry that Rule 4008 should be amended to provide a time limit for filing reaffirmation agreements so that the court will know to schedule a hearing within the 30-day time period provided in the existing rule.

In looking at this problem, it occurred to me that the current rule also may give the erroneous impression that discharge hearings are always discretionary. I therefore think that the Advisory Committee should consider further amendments to make it clear that (1) hearings under § 524(d) are not required unless the debtor desires to reaffirm a debt, (2) if the debtor enters into a reaffirmation agreement (whether or not court approval of the agreement is required under § 524(c)(6)), a hearing is required, and (3) if court approval is needed under § 524(c)(6), the debtor must file a motion at or before the hearing.

The following amendments should be considered by the Committee.

Rule 4008. Discharge and Reaffirmation Hearing

(a) Discharge Hearing. Not more than 30 days following the entry of an order granting or denying a discharge, or confirming a plan in a chapter 11 reorganization case concerning an individual debtor, and on not less than 10 days notice to the debtor and the trustee, the court may hold a hearing as prescribed in § 524(d) of the Code. ~~A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.~~

(b) Reaffirmation Agreement. Any reaffirmation agreement made in accordance with § 524(c) shall be filed not more than 10 days after the entry of an order granting a discharge or, in a chapter 11 reorganization case involving an individual debtor, confirming a plan. If a reaffirmation agreement is timely filed, the court shall hold a hearing as prescribed in § 524(d) and subdivision (a) of this rule. A motion by the debtor for approval of a reaffirmation agreement shall be filed before or at the hearing.

COMMITTEE NOTE

This rule is amended to clarify that, although of a hearing under § 524(d) of the Code usually is discretionary, a hearing is required if a discharge has been granted and the debtor desires to make a reaffirmation agreement in accordance with § 524(c).

This amendment also establishes a time limit for filing a reaffirmation agreement so that the court will

have sufficient time to schedule and hold a hearing within the 30-day period provided in subdivision (a) of this rule. If court approval of the reaffirmation agreement is required under § 524(c)(6), a motion for such approval shall be filed by the debtor before or at the hearing.

The addition of the comma in the first sentence is stylistic.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
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CHAIRMEN OF ADVISORY COMMITTEES
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APPELLATE RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY
BANKRUPTCY RULES

January 6, 1993

TO THE ADVISORY COMMITTEE ON BANKRUPTCY RULES:

I enclose a copy of a letter from Henry Sommer dated December 21, 1992, regarding the new $30 administrative fee imposed by the Judicial Conference that must be paid by every debtor who files a chapter 7 or chapter 13 petition. I also enclose a copy of a notice of this fee published by the Bankruptcy Court in the Southern District of New York providing that the fee may not be paid in installments. The subject of Henry's letter will be on the agenda for the next meeting of the Advisory Committee. The purpose of this letter is to provide additional information that may be helpful to the Committee.

Fees in bankruptcy cases are governed by 28 USC § 1930, a copy of which is enclosed. You will notice that § 1930(a) sets the "filing fees," while § 1930(b) gives the Judicial Conference authority to prescribe "additional fees." Although 28 USC § 1915 provides for proceedings in forma pauperis, § 1930(a) provides that filing fees must be paid "notwithstanding section 1915," so that the filing fees may not be waived by the court based on the debtor's inability to pay. Section 1930(a) provides, however, that filing fees may be paid in installments and, accordingly, Bankruptcy Rule 1006 sets forth the procedures for an application to pay the fees in installments. In sum, the statute does not permit the waiver of "filing fees" but permits the payment of such fees in installments.

In contrast, the "additional fees" that may be imposed by the Judicial Conference are governed by § 1930(b), which does not contain the phrase "notwithstanding section 1915" and does not mention the payment of such fees in installments. It appears to me, therefore, that the new $30 "additional fee" prescribed under § 1930(b) may be waived under § 1915 at the present time. I do not think that any amendment to the statute, rules, or Judicial Conference regulations is necessary to provide that the new $ 30 fee may be waived by the court based on the debtor's inability to pay.

Unfortunately, the presence of § 1915 does not provide a complete answer to Henry's concern expressed in his letter. Section 1915 provides that a "court of the United States" may authorize a proceeding without the payment of fees and there is some authority that supports the view that a bankruptcy court is not a "court of the United States" as that phrase is used in § 1915. Section 451 of title 28 provides that "court of the United States" in that title includes the Supreme Court, courts of appeals, district courts constituted by chapter 5 of title 28, the Court of International Trade, "and any court created by Act of Congress the judges of which are entitled to hold office during good behavior." In In re Perroton, 958 F2d 889 (9th Cir. 1992), the Court of Appeals for the Ninth Circuit held that bankruptcy judges are not "courts of the United States" because they do not enjoy life tenure and, accordingly, do not hold office "during good behavior." Therefore, an indigent debtor too poor to pay the $30 fee may have to ask a district judge -- not a bankruptcy judge -- to waive the fee, which may be impractical and complex when time is of the essence to prevent a foreclosure sale or other creditor activity.

Henry suggests that the Advisory Committee adopt a resolution urging the Judicial Conference, which prescribed the $30 fee, to insert in its schedule of fees an express provision providing that the fee may be waived based on inability to pay. If the Advisory Committee agrees with that suggestion, I would add that such Judicial Conference action might not change the current state of the law unless it specifically provides that a bankruptcy judge may waive the fee. The Advisory Committee also may wish to consider whether it should recommend to the Judicial Conference that this fee may be payable in installments if not waived. Another question for the Advisory Committee is whether its recommendation on this issue, if any, should be directed to the Judicial Conference through the Standing Committee on Rules of Practice and Procedure, or whether it should be directed to the Judicial Conference Committee on Bankruptcy Administration.

Sincerely,

Alan N. Resnick
Reporter, Advisory Committee
on Bankruptcy Rules

COMMUNITY LEGAL SERVICES, INC.

LAW CENTER NORTHEAST
3207 KENSINGTON AVENUE
PHILADELPHIA, PA 19134-1917
215-427-4850
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December 21, 1992

Professor Alan Resnick
Hofstra University
School of Law
Hempstead, NY 11550

Re: Suggestion for Agenda Item
at Next Rules Committee Meeting

Dear Alan:

As I discussed with you briefly on the phone the other day, a new $30 noticing fee, payable upon the filing of chapter 7 and chapter 13 cases, is causing substantial problems for some of our clients. In quite a few of our cases, our clients desperately need to file an immediate bankruptcy in order to restore or preserve heat, electricity, or water service or to forestall a foreclosure or repossession. It is not uncommon for these clients, who live from check-to-check, have no cash at the time the bankruptcy must be filed.

Up until now, we have been able to file such bankruptcies with an application to pay the filing fee in installments and no cash at the time of filing. However, the new $30 noticing fee threatens to effectively deny the benefits of bankruptcy to those who do not have cash at the time they need bankruptcy relief.

Because the noticing fee was adopted by the Judicial Conference and is not a statutory creation, I believe there is no doubt that the Judicial Conference may provide for its waiver in appropriate cases. In fact, one of the other fees prescribed by the Judicial Conference, the $20 fee for amending schedules to add a creditor, is expressly made waivable by the court in the schedule of fees.

Therefore, I suggest that our Committee adopt a resolution urging the Judicial Conference to insert in its schedule of fees an express provision permitting the waiver of the noticing fee for individuals who are unable to pay, at the discretion of the court.

Absent such a provision, it is possible that some of the people who need bankruptcy relief the most will be denied its benefits. Currently, the Administrative Office has taken the

position that the noticing fee cannot be paid in installments because it is not a "filing fee" and the rules permit only filing fees to be paid in installments.

I would appreciate it if you could circulate this letter to members of the Committee prior to our next meeting.

Very truly yours,

Henry J. Sommer

HJS:jmp

NOTICE

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

NOTICE IMPOSING A MISCELLANEOUS ADMINISTRATIVE FEE OF $30 ON ALL CHAPTER 7 AND 13 CASES

Effective December 1, 1992

Effective December 1, 1992, the Judicial Conference has authorized the collection of a miscellaneous administrative fee of $30 in all Chapter 7 and Chapter 13 cases. This is to be collected in lieu of the noticing fees currently charged by the clerks of court under the Fee Schedule issued in accordance with 28 U.S.C. § 1930(b). However, the $.50 fee for all notices generated will continue to be billed for all pending Chapter 7 and Chapter 13 cases.

This fee is due in its entirety at the time of filing and cannot be paid in installments. It is not subject to Federal Rule of Bankruptcy Procedure 1006(b), which applies to filing fees.

The approval of this new fee by the Judicial Conference does not preclude trustees from seeking reimbursement for noticing they perform.

Cecelia G. Morris, Clerk

NOTICE: Court rules and related materials supplied by the courts are included. Since all rules and amendments may not have been supplied, the clerk of the appropriate court should be consulted to determine the current rules.

FILING FEES (CHAPTER 123)

28 U.S.C. § 1930. Bankruptcy fees.

(a) Notwithstanding section 1915 of this title, the parties commencing a case under title 11 shall pay to the clerk of the district court or the clerk of the bankruptcy court, if one has been certified pursuant to section 156(b) of this title, the following filing fees:

(1) For a case commenced under chapter 7 or 13 of title 11, $120.

(2) For a case commenced under chapter 9 of title 11, $300.

(3) For a case commenced under chapter 11 of title 11 that does not concern a railroad, as defined in section 101 of title 11, $500.

(4) For a case commenced under chapter 11 of title 11 concerning a railroad, as so defined, $1,000.

(5) For a case commenced under chapter 12 of title 11, $200.

(6) In addition to the filing fee paid to the clerk, a quarterly fee shall be paid to the United States trustee, for deposit in the Treasury, in each case under chapter 11 of title 11 for each quarter (including any fraction thereof) until a plan is confirmed or the case is converted or dismissed, whichever occurs first. The fee shall be $150 for each quarter in which disbursements total less than $15,000; $300 for each quarter in which disbursements total $15,000 or more but less than $150,000; $750 for each quarter in which disbursements total $150,000 or more but less than $300,000; $2250 for each quarter in which disbursements total $300,000 or more but less than $3,000,000; $3,000 for each quarter in which disbursements total $3,000,000 or more. The fee shall be payable on the last day of the calendar month following the calendar quarter for which the fee is owed.

An individual commencing a voluntary case or a joint case under title 11 may pay such fee in installments. For converting, on request of the debtor, a case under chapter 7, or 13 of title 11, to a case under chapter 11 of title 11, the debtor shall pay to the clerk of the court a fee of $400.

(b) The Judicial Conference of the United States may prescribe additional fees in cases under title 11 of the same kind as the Judicial Conference prescribes under section 1914(b) of this title.

(c) Upon the filing of any separate or joint notice of appeal or application for appeal or upon the receipt of any order allowing, or notice of the allowance of, an appeal or a writ of certiorari $5 shall be paid to the clerk of the court, by the appellant or petitioner.

(d) Whenever any case or proceeding is dismissed in any court for want of jurisdiction, such court may order the payment of just costs.

(e) The clerk of the court may collect only the fees prescribed under this section.

THE BANKRUPTCY DIVISION MEMORANDUM

Administrative Office of the United States Courts
Washington, D.C. 20544

DATE: January 15, 1993

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: Francis F. Szczebak, Chief

RE: Referral by Committee on the Administration of the Bankruptcy System

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The Judicial Conference Committee on the Administration of the Bankruptcy System at its meeting on January 7, 1993, voted to refer the matters raised in the attached materials to the Advisory Committee on Bankruptcy Rules. The attached agenda item from the Bankruptcy Committee's meeting describes and analyzes several suggestions for amending the bankruptcy rules to reduce the costs incurred by the courts in fulfilling their responsibilities in the bankruptcy process.

Bankruptcy Committee
Meeting of
January 7-8, 1993
Agenda Item B.8
Action Item

MEMORANDUM TO THE CHAIRMAN AND MEMBERS OF THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

SUBJECT: Proposals to Reduce Certain Costs of the Bankruptcy Process

A. BACKGROUND

On October 6, the President signed Public Law 102-395, which appropriates $2.47 billion for the Judiciary for Fiscal Year 1993, which began on October 1, 1992. While the funding level is slightly greater than the amount contained in the separate bills passed by the House and Senate, it is $370 million less than the amount requested and represents funding at 92 percent of the Judiciary's current service levels. If all reductions are applied equally, the Judiciary is threatened with a severe curtailment of services during the fiscal year.

In order to address the anticipated hardships, Chief Judge John F. Gerry, Chairman of the Judicial Conference Executive Committee, sent an urgent memo to every judge soliciting ideas for saving money or enhancing revenues during the fiscal year. Judge Gerry advises that although requests for more funds will be made, even if Congress is responsive to these requests the Judiciary will still need to make substantial cuts in its FY 1993 spending plan. Consequently, the Judicial Conference is looking at such possibilities as reducing support personnel; curtailing civil jury trials; turning back courthouse space and deferring alterations projects; restricting supervision of offenders; discontinuing panel attorney payments as early as next spring and

deferring creation of new defender offices; reducing expenditures for travel, supplies, telephones, postage and printing; and postponing installation of automated systems. (Judge Gerry's memorandum to all judges appears as Attachment A.) The Executive Committee met on December 14, 1992 to review the input it received from the courts and from other Conference committees in order to adopt a spending plan. The Committee made a number of reductions in the various categories of spending for this fiscal year.

Numerous communications have been received in response to Judge Gerry's request for creative suggestions in dealing with the current fiscal crisis. Among the communications received was a letter from Chief Judge Richard S. Arnold to Raymond A. Karam, Assistant Director for Finance, Budget and Program Analysis, which attaches a list of cost savings proposals suggested several years ago by Kevin O'Brien, Clerk of the U.S. Bankruptcy Court for the District of Arizona. (A copy of Judge Arnold's letter appears as Attachment B.) According to Kevin O'Brien, the specific changes that he has proposed to the Federal Rules of Bankruptcy Procedure would save both postage and clerical labor. He estimated that adoption of his list of amendments to the Bankruptcy Rules could potentially save the Federal Judiciary more than $32 million in postage and labor costs.

There are, undoubtedly, numerous ways in which the Judiciary could take steps to save money and enhance available revenues. This agenda item is limited, however, to consideration of the measures suggested by the Clerk of the U.S. Bankruptcy Court for the District of Arizona. Although many of these changes are addressed to the Federal Rules of Bankruptcy Procedure, the suggestions have more wide-ranging ramifications for the bankruptcy system.

B. SPECIFIC PROPOSALS

1. Rule 4004(g)

This rule requires the clerk to mail to all creditors, the United States trustee, the trustee, and the trustee's attorney, a copy of the final order of discharge. The rule is drafted in a manner indicating this to be a nondelegable noticing function of the clerk. It is suggested that Rule 4004(g) be amended so that the courts could determine whether the clerk or some other person should mail the discharge notice to creditors. Alternatively, it is suggested that Rule 4004(g) be amended to require the clerk to provide notice routinely only to the debtor, the debtor's attorney, and the trustee, or to allow the clerk to provide notice of the discharge by publication rather than by mail. It was estimated that during the 1987 fiscal year, approximately $17 million was spent on postage to notice discharges to creditors, plus an additional $3 million in labor costs associated with this type of noticing.

Although there would be cost savings associated with delegating this function to parties other than the clerk, there are important reasons why this function should not be delegated. Perhaps the most significant reason for leaving this function with the clerk is the importance of the discharge notice. The individual debtor's fresh start is one of the most important policies underlying the bankruptcy laws. The order of discharge serves the purpose of informing creditors that the automatic stay has been lifted and that certain creditors are now authorized to commence collection action to recover nondischarged prepetition debts. The order of discharge also serves to advise other creditors that their claims have been discharged and can no longer be collected from the debtor. The delegation of this function to a party other than the clerk runs the risk that creditors may not receive notice of the discharge or that the notice given may

improperly characterize the scope and effect of the discharge. Leaving this function with the clerk ensures that this important function will be performed properly, on a timely basis, and with some degree of uniformity. The alternative proposals to limit notice (to the debtor, the debtor's attorney and the trustee) or to permit notice by publication merit further consideration. It is unclear whether these proposals would result in significant cost savings.

There is an additional reason for continuing to have the clerk give notice of the discharge order. Some of the costs of noticing the discharge order are already being recovered through the administrative fee recently promulgated by the Judicial Conference pursuant to 28 U.S.C. § 1930(b). Prior to December 1, 1992, the clerks were collecting 50 cents for all notices generated in bankruptcy cases, but only to the extent there is an estate. Commencing on December 1, 1992, in all cases filed under chapter 7 or chapter 13, the clerk is to collect from the debtor a miscellaneous administrative fee of $30, in lieu of noticing fees previously charged by clerks of court. This new fee is designed to recoup some of the court's costs of noticing in chapter 7 and chapter 13 cases. Delegating the burden of noticing the discharge order to the parties would lessen the burden on the clerk and would arguably undercut the rationale for collecting the $30 miscellaneous administrative fee.

It should be noted that this same proposal to amend Rule 4004(g) was formally considered at the January 8, 1988 meeting of the Advisory Committee on Bankruptcy Rules. Discussion of this proposal by the Rules Committee raised the issue of the injunction which issues with the discharge and which is narrower in scope than the automatic stay in effect prior to discharge. See 11 U.S.C. § 524. Members of the Rules Committee expressed concern that contempt of discharge actions might increase if creditors are not reminded of the injunctive provisions and,

conversely, that creditors need to be informed concerning the time at which collection of non-dischargeable debts safely may be resumed. Upon consideration of the proposal, the Rules Committee took no action to amend Rule 4004(g) at that meeting or any time thereafter.

2. Rule 2002

Another suggestion for cost savings is that bankruptcy courts could delegate a substantial share of the noticing requirements in chapter 11 cases to other parties. The recommendation is made that Rule 2002 be amended to provide that it will be the responsibility of the moving party to notice any hearing or bar date set as a result of the movant's motion to all creditors in chapter 11 cases. Rather than the clerk doing the noticing, it should be the responsibility of the debtor to give notice of the filing of the petition to all equity security holders, and notice of the first meeting of creditors to all creditors when the list of creditors and equity security holders combined exceeds 500 in chapter 11 cases. It is also proposed that the Rules be amended to provide that it shall be the responsibility of the party filing an application for interim fees to notice all creditors of the hearing set on the application for fees.

It is estimated by Mr. O'Brien that the typical chapter 11 case has about 125 creditors. In addition to mailing the § 341 meeting notice, the clerk's office mails the notice of the hearing on the chapter 11 disclosure statement, as well as an average of ten miscellaneous notices during the life of a typical chapter 11 case. He estimates that the savings from delegation of all chapter 11 noticing to the moving party would save over $10 million in postage costs.

Although these suggestions have merit, to a large extent they have already been implemented via rules changes or Judicial Conference guidelines. Bankruptcy Rule 2002(a), for example, provides that the clerk, or some other person as the court may direct, shall give notice by mail of the meeting of creditors pursuant to § 341 of the Code; a proposed use, sale or lease of property of the estate; the hearing on approval of the compromise or settlement of a controversy; the date fixed for filing of claims against a surplus in an estate; the time fixed to accept or reject a proposed plan modification; and hearings on all applications for compensation or reimbursement of expenses in excess of $500. Similarly, in a chapter 11 case, the Bankruptcy Rules already provide that the clerk, or some other person as the court may direct, shall give notice to all equity security holders of the order for relief; any meeting of equity security holders; as well as other types of hearings and deadlines. Fed. R. Bankr. P. 2002(d). Consequently, the Bankruptcy Rules already permit the delegation of these types of noticing in chapter 11 cases to parties other than the clerk. It would appear that courts make decisions on a case-by-case basis as to whether or not to delegate.

The Judiciary has already taken steps to encourage the preparation and mailing of notices by persons other than bankruptcy clerks and to permit the courts to use other than court facilities or services to provide notices and other administrative information to parties in bankruptcy cases. Beginning in fiscal year 1986, the annual appropriations legislation for the Judiciary has contained a provision directing the Administrative Office and the courts to permit and encourage the preparation and mailing of notices in bankruptcy cases by persons other than bankruptcy clerks. In March 1986, the Judicial Conference approved guidelines implementing this statutory directive. The Judicial Conference Noticing Guidelines appears as Attachment C.

In addition to the noticing guidelines, 28 U.S.C. § 156(c) authorizes bankruptcy courts to use other than court facilities or services to provide notices, dockets, calendars, and other administrative information to parties in bankruptcy cases. The need for such outside services is most prevalent in so-called "mega cases" and other large chapter 11 cases. Section 156(c) was enacted in recognition that the day-to-day activities and administrative requirements in some large cases are too onerous to be performed efficiently by the bankruptcy clerk's office. Services such as noticing and processing proofs of claims can sometimes be performed more efficiently outside the clerk's office. This statute authorizes the bankruptcy court to permit third parties to perform these services at the estate's expense. The statute further provides that the use of such facilities or services shall be subject to any conditions and limitations which the pertinent judicial council of the circuit may prescribe. The Judicial Conference, at its March 1989 session, approved guidelines for the use of outside facilities or services. The Guidelines Implementing 28 U.S.C. § 156(c) appears as Attachment D.

In view of the steps already taken by the Judiciary to permit the preparation and mailing of notices by third parties in chapter 11 cases, it would appear that this issue has already been addressed adequately by the Judiciary.

3. Chapter 13 Notices

A third suggestion for saving money is to delegate chapter 13 noticing to chapter 13 standing trustees. In the typical chapter 13 case, notice must be given of the meeting of creditors pursuant to § 341 as well as the chapter 13 discharge. According to this proposal, the clerk typically mails an average of two other chapter 13 notices, usually orders to show cause for dismissal and for failure to make installment payments of the

filing fee. It is suggested that the Rules could be amended to provide that this burden be absorbed by the chapter 13 trustees and that since the chapter 13 debtor must pay for noticing whenever the plan is confirmed, these fees could be added into the plan at the front end of the case.

Although this proposal has merit, it has already been incorporated into the Bankruptcy Rules and Fee Schedule. First, the Rules already permit the court to shift the burden of noticing to the chapter 13 trustee. Fed.R.Bankr.P. 2002. Moreover, the courts are now imposing a flat fee in all chapter 13 cases to offset the costs of administrative services performed by the clerk's office, such as noticing. At its September 22, 1992 session, the Judicial Conference approved the collection of a miscellaneous administrative fee of $30 in all chapter 7 and chapter 13 cases, in lieu of noticing fees currently charged by the clerks of court under the Fee Schedule issued in accordance with 28 U.S.C. § 1930(b). The approval of the new miscellaneous administrative fee does not preclude trustees from seeking reimbursement for noticing they perform. The miscellaneous administrative fee is due at the time of filing, however, and cannot be paid in installments. The new miscellaneous administrative fee became effective on December 1, 1992. This proposal to shift the burden of chapter 13 noticing to the chapter 13 trustee has arguably been sufficiently addressed by the language of Rule 2002 and the recent fee change approved by the Judicial Conference.

4. Rule 6007(a)

Rule 6007(b) provides that a party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property of the estate. If such a motion is made, the court must set a hearing on notice to the United States trustee and to other entities as the court may direct. Fed.R.Bankr.P.

6007(c). According to this proposal, secured creditors regularly petition the courts for abandonments prior to utilizing state foreclosure remedies. Given the large percentage of no-asset cases, in many courts it is impractical to require trustees to notice these abandonments. It is suggested, therefore, that Rule 6007(b) be amended to require the moving parties to notice proposed abandonments thereby reducing court costs associated with noticing.

This proposed change is unnecessary. Rule 6007(b) provides only that a party in interest may file and serve a motion for abandonment. The rule does not specify who is to do any necessary noticing. Although Rule 6007 could be amended to require the moving party to do all such noticing, the court already has the authority to direct that the moving party notice any hearing on the abandonment motion. Many courts do so by local rule or general order.

C. CONCLUSION AND RECOMMENDATION

In view of the current fiscal crisis, the Judiciary is examining alternative ways in which to curtail spending and enhance revenues. Although the above proposals may not merit implementation, there are possibly other provisions of the Bankruptcy Rules which could be amended for cost savings. Indeed, Rule 1001 requires that the rules be construed to secure the just, speedy, and inexpensive determination of every case and proceeding. Therefore, it is recommended as follows:

RECOMMENDATION

That Judge Arnold's letter be referred to the Advisory Committee on Bankruptcy Rules for appropriate consideration.

Attachments

ATTACHMENT A

IMPORTANT AND URGENT

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

CHIEF JUDGE JOHN F. GERRY
Chairman, Executive Committee

September 10, 1992

TELEPHONE:
COM: (609) 757-5454
FTS: 488-5454

MEMORANDUM TO ALL JUDGES, UNITED STATES COURTS

I have tried not to bother you or add to the flow of paper in which you are so often engulfed, but we need your help in dealing with what promises to be a sobering fiscal situation in 1993.

As the lead article in the most recent edition (August 1992) of The Third Branch made clear, both the House and Senate made unprecedented cuts in the funding levels requested by the Judiciary for FY 1993. Those totals represent only 92 percent of the Judiciary's current services levels: they are $200 million short of current services and $400 million short of our true needs. We are vigorously pursuing appeals for more funds.

However, even if Congress is responsive to our appeals, the Judiciary will still need to make substantial cuts in our FY 1993 spending plan. Unless we can come up with other alternatives, we are looking at such possibilities as reducing supporting personnel; curtailing civil jury trials; turning back courthouse space and deferring alterations projects; restricting supervision of offenders; discontinuing panel attorney payments as early as next spring and deferring creation of new defender offices; reducing expenditures for travel, supplies, telephones, postage and printing; and postponing installation of automated systems.

The Judicial Conference of the United States, and its Executive Committee, will need to deal with this extraordinary situation. Accordingly, Director L. Ralph Mecham has asked the committees of the Judicial Conference and various court administrators to recommend ways to cut expenditures.

I want to make a similar appeal to you. If any judge has an idea how to save money or enhance revenues, please let us know by writing to Director Mecham as soon as possible. As a fellow laborer in the trenches, I know you are the real experts in how the courts operate, so will you please take the time and come up with creative suggestions to assist us in dealing with this difficult fiscal crisis?

We're circling the wagons, and we want to hear from you.

Jack Gerry

Jack Gerry
Chairman, Executive Committee

ATTACHMENT B

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

RAYMOND A. KARAM
ASSISTANT DIRECTOR FOR
FINANCE, BUDGET AND
PROGRAM ANALYSIS

November 10, 1992

MEMORANDUM TO FRANCIS SZCZEBAK

SUBJECT: BUDGET REDUCTIONS -- Referral of Options Presented by Judges

To help address the funding shortage the Judiciary faces for FY 1993, Executive Committee Chairman Chief Judge John Gerry sent a letter to all judges asking for ideas to reduce spending. Numerous letters were received, which include suggestions affecting many Judiciary programs.

Many of the proposals would offer immediate, identifiable savings if implemented, while several others would generate either longer term or an indefinite level of savings. Proposals in the former category are currently being examined as potential savings for this year; those in the latter are being referred to the appropriate individuals for future consideration.

The attached letter from Judge Richard Arnold includes several proposals which you may wish to raise with the Administration of the Bankruptcy System Committee.

Raymond A. Karam

Attachment

cc: Honorable Lloyd D. George
Honorable Richard S. Arnold

UNITED STATES COURT OF APPEALS

CHAMBERS OF
RICHARD S. ARNOLD
CHIEF JUDGE
P.O. BOX 429
LITTLE ROCK, ARKANSAS 72203

EIGHTH CIRCUIT

October 5, 1992

Mr. Raymond A. Karam, Assistant Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Ray:

Enclosed is a copy of a letter from Kevin E. O'Brien, Clerk of the United States Bankruptcy Court for the District of Arizona, to Ann B. Manley, Clerk of the United States Bankruptcy Court for the Western District of Wisconsin.

The letter, together with its attachments, makes several suggestions about cost savings. I believe they are worth careful consideration. The suggestion about notices in Chapter 13 cases, perhaps, has already been sufficiently addressed by the recent fee change approved by the Judicial Conference.

Would you please see that these ideas are cranked into the process for preparation of the draft financial plan for 1993? Many thanks.

Sincerely yours,

RSA

Richard S. Arnold

RSA/bf
Encls.

cc: Mr. Kevin E. O'Brien, Clerk
United States Bankruptcy Court
for the District of Arizona
230 North First Avenue, Room 5000
Phoenix, Arizona 95025

Members of the Budget Committee
Messrs. Mecham, Macklin, Heising, Feidler,
and Bobek, and Ms. Potok

OCT - 2 1992

United States Bankruptcy Court

District of Arizona
230 N. First Avenue Rm. 5000
Phoenix, Arizona 85025

Kevin E. O'Brien
Clerk of Court
FTS 261-6965
Commercial 602-379-6965
Fax 261-3328

Michael R. Temple
Chief Deputy
FTS 261-6965
Commercial 602-379-6965
Fax 261-3328

September 28, 1992

Ms. Ann B. Manley
Clerk of Court
U.S. Bankruptcy Court
Western District of Wisconsin
P.O. Box 548
Madison, WI 53701

Dear Ann:

Enclosed for your review is the letter which I wrote to Mr. Robert E. Feidler, Legislative and Public Affairs Officer for the Administrative Office, in 1987. I proposed a number of changes in the Bankruptcy Rules to save both postage and clerical labor. None of these proposals resulted in changes to the Bankruptcy Rules.

When I wrote the letter, I estimated that these amendments to the Bankruptcy Rules could potentially save the federal judiciary $32 million in postage and labor costs. With a much higher bankruptcy caseload today, the savings would be proportionately greater. Adoption of individual changes, such as shifting the burden of mailing the Chapter 7 discharge to the debtors and debtors' attorneys, would result in significant cost savings even if the whole package did not get approval by the Advisory Committee on Bankruptcy Rules.

In this time of financial crisis for the federal courts, I hope that these suggestions for amendment of the Bankruptcy Rules are considered before drastic actions in the personnel area are implemented. The Administrative Office might receive a number of good ideas on ways to achieve budget savings by surveying the Circuit, District and Bankruptcy clerks. It is in our interest to come up with cost savings ideas if we wish to protect our staffs from furloughs and reductions in force.

Please contact me if you need additional information.

Sincerely,

Kevin E. O'Brien
Clerk of Court

KEO/kyr
Enclosure

cc: Honorable Richard S. Arnold, Chief U.S. Circuit Judge,
Chairman, Budget Committee
Honorable Edward Leavy, U.S. Circuit Judge,
Chairman, Advisory Committee on Bankruptcy Rules
Honorable Robert G. Mooreman, Chief Judge, U.S. Bankruptcy
Court, District of Arizona
Ms. Patricia Channon, Assistant Chief, Bankruptcy Division,
Administrative Office of the U.S. Courts

District of Arizona
United States Courthouse
Phoenix, Arizona 85025

Kevin T. O'Brien
Clerk

November 16, 1987

Mr. Robert E. Feidler
Legislative and Public Affairs Officer
Administrative Office, U.S. Courts
Washington, D.C. 20544

Dear Bob:

You had asked me to suggest potential changes in the Bankruptcy Code and Rules which would result in cost savings to the judiciary. I discussed the topic with several other bankruptcy clerks over the telephone. The suggestions which follow, however, reflect only my own opinion.

I could not think of any major changes in the Code which would result in immediate cost savings to the judiciary. Several changes in the Bankruptcy Rules, however, could result in major savings for the bankruptcy courts.

1. Discharge Notices

Rule 4004(g) requires the clerk's office to mail a copy of the debtor's discharge to creditors. Prior to the amendment of the Bankruptcy Rules on August 1, 1987, this noticing could be delegated to the debtor or debtor's attorney by operation of language in Rule 2002(f). The permissive language was eliminated in the August 1 amendments.

Before passage of the amendments, our court had shifted the burden of noticing discharges to the debtor's attorney. We have now reassumed responsibility for noticing the discharge. This function is extremely expensive both in postage and clerical labor.

The average Chapter 7 case in our district has about 30 creditors. Chapter 7 cases constitute roughly 82% of our overall filings. Based on 16,000 projected filings for fiscal year 1988, we shall expend $86,592 in postage to notice discharges. This cost represents one-fourth of our postage budget. Add to this sum two deputy clerk salaries for the year (reproduction and noticing), and the overall cost to the bankruptcy court is even higher. Using an average deputy clerk salary of $20,000 per year, our court shall expend $126,592 to send copies of the discharge to creditors during this fiscal year. Using Arizona's averages and Administrative Office projected filings of 700,000 cases for this fiscal year, $16,988,400 will be spent in postage to notice discharges to creditors. I would conservatively add $3,000,000 in labor costs to this figure.

What are the alternatives? I suggest that Rule 4004(g) be amended to provide notice routinely only to the debtor, debtor's attorney, and trustee. The Section 341 notice should instead provide the following language in bold letters: "The last day for filing objections to discharge is (Dec. 6, 1987). Unless you are further contacted by the court or some other person as the court may direct, the debtor will be discharged forthwith after expiration of this date." The clerk's office could then only notice orders denying or revoking the discharge, which represent a tiny percentage of all cases.

A second alternative would be to allow the courts individual discretion in choosing who should mail the discharge to creditors. Under the old Rules, our debtors' attorneys were adding the cost of postage and clerical processing to their initial fee. The debtor thus bore the cost of notifying creditors of the discharge.

A third alternative would be to provide notice of the discharge by publication. This alternative is the least satisfying, due to the increase in interstate financing and banking. I believe that the existing Bankruptcy Rules place an unnecessary fiscal burden on the courts in the area of discharges.

2. Chapter 11 Notices and Fee Applications

Our court recently adopted a general order delegating a substantial share of noticing requirements in Chapter 11 cases. We further require by this order that interim fee applications for all Chapters be noticed by the moving party. I have enclosed a copy of this order for your review.

We estimate that our typical Chapter 11 case has about 125 creditors. In addition to mailing the 341 meeting notice, we always mail the notice of the hearing on the disclosure statement. We also mail an average of ten miscellaneous notices during the life of the case.

Based on our projected filings and the new general order, we expect to save $232,320 in postage over the life of Chapter 11 cases filed during the 1988 fiscal year. This savings in postage would be spread over several years during case administration. Using the national forecast and Arizona averages, national savings by adoption of a similar rule would amount to $10,164,000 in postage.

Between January and June 1987, our clerk's office noticed 337 applications for interim fees, mostly by attorneys in Chapter 11 cases. Under our new general order, these requests for interim fees will be noticed by the moving party. The cost of notice postage and clerical processing can be properly charged to the estate as an expense under Rule 2016.

I would suggest that Bankruptcy Rule 2002 be amended to provide that it will be the responsibility and duty of the moving party, whether it be a creditor, the debtor, or other interested party, to notice any hearing or bar date set as a result of the movant's motion to all creditors in Chapter 11 cases. I would further suggest that it be the responsibility of the debtor to give notice of the filing of the petition to all equity security holders and notice of the first meeting of creditors to all creditors where the list of creditors and equity security holders combined exceeds 500 in Chapter 11 cases. Finally, I suggest that the Rules be amended to provide that it shall be the responsibility of the party filing an application for interim fees to notice all creditors of the hearing set on the application for all Chapters.

3. Chapter 13 Notices

Chapter 13 noticing practices vary among districts. In some districts, the Chapter 13 standing trustees are required to do all noticing for the court. Many other districts, including the District of Arizona, continue to do nearly all Chapter 13 noticing through the clerk's office. I believe that a nationwide rule delegating noticing to standing Chapter 13 trustees would result in substantial savings for the judiciary.

We estimate that our typical Chapter 13 case has about 30 creditors. We always provide notice of the first meeting of creditors and the discharge. We additionally mail an average of two other notices, usually orders to show cause for dismissal for failure to make installment payments.

If we delegated this noticing function to our Chapter 13 standing trustees, we would save $47,308 in postage during the life of Chapter 13 cases filed this fiscal year. Using the Arizona averages and the national forecast, national savings by adoption of such a rule would total $2,069,760 in postage for 1988 fiscal year cases. Once again, labor costs could be added to this sum.

The Rules could be amended to provide that this burden be absorbed by standing Chapter 13 Trustees. I would suggest that a new Rule be drafted to require that postage and handling be included in every confirmed plan. Under the New Judicial Conference Schedule of Fees collected pursuant to 28 U.S.C. 1930(b), the clerk's office is required to collect $.50 per notice whenever there is an estate. For Chapter 13 cases, we collect these fees at closing from the Chapter 13 trustee. Since the Chapter 13 debtor must pay for noticing whenever the plan is confirmed, why not add these fees into the plan at the front end of the case? The Chapter 13 standing trustees might even be able to charge the debtors less than $.50 per notice because of volume processing, thus even benefiting them.

now $30/case collected in front.

4. Abandonments

Bankruptcy Rule 6007(a) provides that the trustee or debtor in possession shall give notice of a proposed abandonment to all creditors, unless the court directs otherwise. Under 11 U.S.C. Sec. 554(b) and Bankruptcy Rule 6007(b), a party in interest may file and serve a motion requiring the trustee or debtor in possession to abandon property. Notice and an opportunity for a hearing are required for any abandonment.

Secured creditors regularly petition our court for abandonments prior to utilizing state foreclosure remedies. With our large number of no-asset cases, it is impractical to require trustees to notice these abandonments under Rule 6007(a). Before I became clerk, it was our practice to require the clerk's office to process and mail these abandonment notices.

In June through July, 1985, our Phoenix office processed 237 abandonment notices. A total of 8,164 notices were mailed to creditors. Based on this data, our court shifted the burden of noticing abandonments to the moving party. Our secured creditors were pleased with this change, since it eliminated delay in foreclosure procedures.

I suggest that Bankruptcy Rule 6001(b) be amended to require moving parties to notice proposed abandonments. The change would benefit both the judiciary and creditors. Practice on abandonment varies among courts, so it is difficult to make a dollar estimate on cost savings. I believe that savings would be substantial.

5. Conclusion

I believe that all of these recommendations comply with the intent of the Director's Bankruptcy Noticing Guidelines - shifting the burden and expense of noticing to parties profiting from the bankruptcy system. Implementation of these suggestions would save the judiciary at least $32 million. Please contact me if you need further information on these suggestions.

Sincerely,

Kevin E. O'Brien
Clerk of Court
U.S. Bankruptcy

cc: Honorable Robert G. Mooreman, Chief Judge
Honorable George B. Nielsen, Judge
Honorable Lawrence Ollason, Judge
Honorable Sarah Sharer Curley, Judge

Honorable Morey L. Sear, Chairman,
Bankruptcy Committee of the Judicial Conference
Honorable Lloyd D. George, Chairman, Advisory Committee
on Bankruptcy Rules
Mr. Peter G. McCabe, Assistant Director
Administrative Office, U.S. Courts
Mr. Frank Szczebak, Chief, Bankruptcy Div.
Administrative Office, U.S. Courts

KEO:jfn

ATTACHMENT C

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 19, 1990

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES BANKRUPTCY COURTS
CIRCUIT EXECUTIVES
DISTRICT COURT EXECUTIVES
CLERKS, UNITED STATES BANKRUPTCY COURTS

Subject: Bankruptcy Noticing Guidelines

At its March 1990 meeting, the Judicial Conference of the United States approved the following amendment to the bankruptcy noticing guidelines:

~~5. Excess-Notice-Fee.--For-any-petition-under-the Bankruptcy-Code-where-the-clerks-provide-any-notice-the Judicial-Conference-has-imposed-an-excess-notice-fee-of $.25-for-each-notice-in-excess-of-fifty-notices-per set.--The-fee-may-be-charged-only-against-an-estate-and only-to-the-extent-there-is-an-estate.~~

5. Fee for Noticing by Clerks. For all notices generated in cases filed under title 11 of the United States Code, 50 cents each. Notices dated prior to January 1, 1987, should be charged at the rate of 25 cents for each notice in excess of fifty notices per set. Notice fees are payable only from the estate and only to the extent there is an estate.

The amendment is technical and conforms the guidelines to an amendment to the notice fee provisions of the Judicial Conference Schedule of Additional Fees for Bankruptcy Courts.

Since the beginning of fiscal year 1986, the Congress has encouraged the bankruptcy courts to place the burden and expense of noticing on the litigants rather than the taxpayers, whenever feasible. The Judicial Conference noticing guidelines provide

advice to the courts concerning the assignment to parties in a bankruptcy case the responsibility of providing notices.

A copy of the guidelines, as amended, is attached for your convenience.

L. Ralph Mecham
Director

Attachment

GUIDELINES ON NOTICING

1. Purpose. The Bankruptcy Code and Rules afford bankruptcy judges considerable discretion in the allocation of responsibility for providing notice of events in the course of bankruptcy proceedings. Moreover, only limited appropriations and personnel are available to process bankruptcy petitions. The Judiciary's current Appropriation Act encourages the courts to place the burden and expense of noticing on the litigants rather than the taxpayers, and 28 U.S.C. § 156 encourages the courts to explore alternative procedures for furnishing information on the courts' dockets. These guidelines are designed to provide advice for the exercise of the courts' discretion under the Bankruptcy Code and Rules.

2. Generally. Litigants involved in bankruptcy petitions and proceedings should be on a financial footing similar to that of other litigants in the district courts. Parties are generally expected to bear their own costs of litigation, including the costs associated with serving other parties with summonses and copies of pleadings and motions. Conversely, the clerk's office is generally responsible for ensuring that notices have been provided and for providing notice of court-initiated events, such as hearing and trial

dates and entry of orders and judgments. The courts should provide for review of the particular circumstances involved in individual situations.

3. Combining Notices. Bankruptcy proceedings generally have more individuals involved as parties who must be notified of hearings and motions than many other civil actions in the district courts. Accordingly, every effort should be made to reduce the clerical work and mailing expenses involved in providing notice by combining notices of different events into a single notice whenever feasible. In addition, many parties routinely receive notices in many cases; and every effort should be made to include notices of several different cases in the same mailing to such parties.

4. "No Asset" Cases. A litigant is not generally denied access to federal courts where indigency precludes payment of certain expenses of litigation. In bankruptcy proceedings a debtor with insufficient assets to pay any of the costs of administration - or only enough assets to pay part of such costs - may well not be able to bear the burden of noticing and should be given appropriate consideration.

5. Fee for Noticing by Clerks. For all notices generated in cases filed under title 11 of the United States Code, 50

cents each. Notices dated prior to January 1, 1987, should be charged at the rate of 25 cents for each notice in excess of fifty notices per set. Notice fees are payable only from the estate and only to the extent there is an estate.

6. Statutory Limitations. Certain provisions of the Bankruptcy Code and Rules limit the judge's discretion to determine who will provide notice by specifying that particular notices will be provided by particular individuals.

a. Clerk. Under 11 U.S.C. §§ 743 and 762 the clerk must give notice to the Securities and Exchange Commission and the Security Investor Protection Corporation of stockbroker liquidation petitions and to the Commodity Futures Trading Commission of commodity broker liquidation petitions. Where a claim has been transferred and either the transferor or transferee files a proof of claim, the clerk must immediately notify the other of the right to join in the claim under Bankruptcy Rule 3001(e)(3).

b. Trustee. Under Bankruptcy Rule 2015, a trustee (or debtor in possession) shall give notice of the petition

to every person holding money or property of the debtor who has not already been notified of the petition. Under Bankruptcy Rule 6007, a trustee (or debtor in possession) must furnish whatever notice is given of a proposed abandonment or disposition of property, unless otherwise directed by the court.

c. Debtor. The debtor is required to give notice of any amendment to a voluntary petition, list, schedule, or statement to the trustee and to any person affected by the amendment, under Bankruptcy Rule 1009.

7. Specific Factors. In a particular case the court should consider the following specific factors in allocating the burden for providing notices:

a. The financial ability of the moving party (estate or creditor) to bear the burden.

b. The convenience of including notices with other mailings (such as distribution checks), thus reducing total costs.

c. Pick-up boxes should be established for persons, such as trustees, U.S. attorneys, etc., who can conveniently pick up notices at the clerk's office on a regular basis rather than mailing notices to such persons.

d. The relative technical and administrative capabilities for providing notices on a timely basis - particularly when unusually large numbers of creditors are involved - including the availability of automated data-processing in the clerk's office.

e. The availability of reliable commercial services to assist in providing notices. [Note that the court must exercise care in avoiding even the appearance of favoritism and should not direct litigants to one service to the exclusion or detriment of other available services.]

f. Any particular circumstances or management concerns in the proceeding that indicate a need to have notices provided by the clerk's office directly.

g. The chapter of the Bankruptcy Code and the anticipated number of separate notices to be provided.

8. Certificate. The court or clerk should approve the form and content of any notice not provided by the clerk's office and should receive from the person providing notice a certificate of service that includes a copy of the notice and a list of persons to whom it was mailed.

9. Postage. Ordinarily postage expenses will be borne by the person providing notice which may be reimbursed as a court approved cost of administration. However, in a particular case it may be appropriate to impose on the estate or a litigant only the physical burden of preparing notices while actually mailing the notices through the Clerk's office using official (penalty-mail) envelopes. Clerks, however, may not provide parties or litigants with penalty-mail envelopes for their use. In those limited instances where the court directs that noticing be performed by someone other than the clerk in no asset cases, reimbursement for postage may be claimed in accordance with provisions established by the Administrative Office of the United States Courts.

10. Assistance. The Administrative Office should be consulted for assistance in unusual circumstances, such as the filing of an exceptionally large petition with massive noticing

requirements where insufficient assets are available to bear the cost of providing notices. Where the court itself is interested in using commercial services for providing notices, the Administrative Office should be consulted as to applicable procurement and contracting considerations and procedures.

ATTACHMENT D

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 24, 1989

MEMORANDUM TO ALL CHIEF JUDGES, UNITED STATES COURTS

SUBJECT: Guidelines to Implement 28 U.S.C. § 156(c)

At its March 1989 meeting, the Judicial Conference promulgated guidelines to implement section 156(c) of title 28, United States Code, which authorizes bankruptcy courts to use other than court facilities or services to provide notices, dockets, calendars and other administrative information to parties in bankruptcy cases when the costs of such facilities or services are paid for from assets of the estate.

The statute further provides that the use of such facilities or services shall be subject to such conditions and limitations as the pertinent judicial council of the circuit may prescribe. The Conference has promulgated the attached guidelines for consideration of the judicial councils.

L. Ralph Mecham

Attachment

cc: Judges, United States Bankruptcy Courts
Circuit Executives
Bankruptcy Administrators
Clerks, United States Bankruptcy Courts

GUIDELINES ON USE OF OUTSIDE FACILITIES AND SERVICES

GENERALLY

1. Authority. Section 156(c) of title 28 authorizes bankruptcy courts to use outside facilities or services to provide notices, dockets, calendars, and other administrative information to parties in bankruptcy cases where the cost of such facilities or services are paid for out of the assets of the estate and are not charged to the United States. The statute provides that the use of such facilities and services is subject to any conditions and limitations imposed by the pertinent circuit council.

Comments: Section 156(c) was enacted in recognition that the day-to-day activities and administrative requirements in some large bankruptcy cases are too onerous to be performed efficiently by the bankruptcy clerk's office. Services such as noticing, providing copies of case papers, and processing proofs of claims and interest can sometimes be performed more efficiently outside the bankruptcy clerk's office. The statute authorizes the bankruptcy court to permit third parties to perform these services at the estate's expense.

The need for such outside services is most prevalent in so-called "mega cases," which are extremely large bankruptcy cases with hundreds or thousands of creditors. The staffing levels of bankruptcy clerks' offices sometimes cannot absorb such dramatic increases in workloads.

2. Custodian. Pursuant to 28 U.S.C. § 156(e), the bankruptcy clerk of court is the official custodian of the records and dockets of the bankruptcy court. As custodian of the records and dockets of the bankruptcy court, the bankruptcy clerk is responsible for the security and integrity of all the bankruptcy court's records and dockets, including those maintained by the debtor or a third party.

Comments: The bankruptcy clerk is responsible for the security and integrity of all the bankruptcy court's records and dockets, including dockets, claims registers, mailing matrices, and other case papers maintained by the debtor or a third party.

How the bankruptcy clerk assures the security and integrity of the records and dockets depends on the procedures utilized in a particular case.

If the estate has hired personnel to work in the bankruptcy clerk's office, the bankruptcy clerk should supervise their work. If the debtor or a third party maintains claims registers, mailing matrices, or other case papers outside the bankruptcy clerk's office, the bankruptcy clerk should institute a system to monitor and check their work.

The bankruptcy clerk should institute safeguards to be included in the procedures used by others.

For example, if the debtor or a third party is to process proofs of claims and produce the claims register, they may be required to issue an acknowledgment when a

proof of claim is filed. The notice of the meeting of creditors could state that acknowledgments are to be issued for proofs of claims and that if a creditor does not receive one within a week after filing a proof of claim, the creditor should contact the bankruptcy clerk.

Another example of a safeguard would be to require that the third party submit updated copies of the claims register or mailing matrix to the bankruptcy court on a weekly basis.

3. **Filing. Proofs of claim or interest, complaints, motions, applications, objections, and other case papers shall be filed with the bankruptcy clerk's office which, after noting receipt, upon order of the court, may transmit case papers to an outside entity for maintenance.**

Comments: Bankruptcy Rules 3002(b) and 5005(a) require that proofs of claim or interest, complaints, motions, applications, objections, and other case papers be filed with the bankruptcy clerk of court in the district where the case is pending, except as specified by section 1409 of title 28 and except as a judge permits papers to be filed with the judge.

The bankruptcy court should assure itself of the integrity of the procedures before directing that proofs of claim or interest, or other case papers be transmitted to a third party.

If all case papers are filed in the bankruptcy clerk's office and stamped with the date received, the papers can be picked up by the debtor or a third party for

processing at another location. The bankruptcy clerk can copy some papers to make spot checks of their processing by the debtor or a third party.

The bankruptcy clerk can obtain a special post office box for the receipt of proofs of claim in "mega cases." This separates the proofs of claims from other mail and speeds processing.

4. **Disposition. The bankruptcy clerk remains responsible for the disposition of case papers after the conclusion of a case in which the bankruptcy court has directed the debtor or a third party to maintain the records.**

Comments: Although the order which directs the debtor or a third party to maintain records does not necessarily have to provide for their disposition, the bankruptcy clerk should begin planning for records disposition early in the case.

5. **Claims. If debtors or third parties are directed to process proofs of claim and maintain the claims register, they should be directed to perform related functions such as recording transfers of claims and giving notices of transfer.**

Comments: Bankruptcy Rule 3001(e)(2),(3),(4) requires notices of certain transfers of claims. The party which processes proofs of claim and maintains the claims register is best able to give the notices. Bankruptcy Rule 3001 requires that the court enter an order on many transfers. The original notices and orders should be placed in the case files.

Bankruptcy Rule 3004 requires notice to the creditor when the debtor or trustee files a claim in the name of the creditor. The party that processes proofs of claim and maintains the claims register is best able to provide the notice.

6. Public records. **Section 107 of the Bankruptcy Code provides that the papers filed in bankruptcy cases and the bankruptcy court's dockets are public records unless the bankruptcy court orders otherwise. Case papers such as proofs of claim remain public records even if the debtor or a third party is directed to process and maintain those records. The bankruptcy clerk should ensure that those records are open to examination at reasonable times without charge.**

Comments: Case papers processed and maintained by the debtor or a third party at a location outside the bankruptcy clerk's office should be available for review at that location during normal business hours.

Because it may often be impractical for parties to review case papers where the papers are processed and maintained, the bankruptcy clerk should attempt to make as much information available as is possible.

As an example, if a third party or the debtor processes proofs of claim and interest and generates the claims register, the third party or the debtor should furnish copies of the updated claims register to the bankruptcy court at least weekly.

7. **Waivers.** **Personnel employed by the estate to assist the bankruptcy clerk's office are not government employees. They should not be administered oaths of office although they may be asked to sign a waiver of any right to compensation by the government. Because such personnel are not government employees, the bankruptcy clerk may not fire them.**

Comments: There is no need to administer an oath of office to personnel paid by the estate to assist the bankruptcy clerk's office in processing a case. Administering an oath to such personnel fosters the false impression that they are government employees.

Administering an oath to a new government employee impresses the employee with the obligations of office and triggers certain restrictions on the employee's activities. A written waiver including a statement of the obligations of personnel employed by the estate to assist the bankruptcy clerk's office is less suggestive of government employment.

The bankruptcy clerk should request that special employees sign a written waiver of any right to receive compensation from the government, civil service retirement credit, or other benefits of government employment. The waiver should also include an acknowledgment that the special employee is to be paid by the estate, is directly accountable to the bankruptcy clerk, and will not receive instructions, directions, or orders from the debtor or the trustee.

The waiver should also specify that the special employees will refrain from discussing pending or

impending cases, will not disclose confidential information received during the course of their employment, and will not profit from such confidential information. These obligations are included in the code of conduct for clerks, which requires that the clerks impose these specific obligations on their staffs.

8. Supervision. **The bankruptcy clerk is responsible for supervising the work of personnel employed by the estate to assist the bankruptcy clerk's office.**

Comments: The bankruptcy clerk of court may select personnel to be employed by the estate to work in the bankruptcy clerk's office pursuant to section 156(c). If authorized by the order directing the estate to employ the personnel, the bankruptcy clerk may specify the terms of their employment. Due to the nature of such special employees' work, the bankruptcy clerk or a designated deputy clerk should supervise their work.

For the ease of supervision, it is desirable that the special employees work in the bankruptcy clerk's office if sufficient space is available. This also makes it easier to maintain security for the case papers processed by the special employees.

9. Favoritism. **Personnel employed by the estate to assist the bankruptcy clerk's office may not provide special services for the debtor or the trustee. The bankruptcy clerk should strive to avoid any appearance that these personnel favor the debtor or any other party while performing official duties.**

Comments: While they are assisting the bankruptcy clerk's office, special employees should not be in contact with the debtor, except on official business or to receive their paychecks. They should not receive instructions, directions, or orders from the debtor or the trustee.

The bankruptcy clerk should strive to avoid any impression that the special employees favor the debtor or any other party in their work for the bankruptcy clerk's office. For this reason, the special employees should not work in the debtor's business and assist the bankruptcy clerk's office at the same time. It is desirable that the special employees not be former employees of the debtor.

FACILITIES

10. Equipment. Any equipment, furniture, or other facilities leased or purchased at the estate's expense for the court's use in a bankruptcy case is property of the estate and will be returned to the estate after its use by the bankruptcy court.

Comments: Because section 156(c) prohibits charging the cost of such equipment, furniture, or other facilities to the United States, the bankruptcy clerk should explain to the seller or lessor that the estate -- not the bankruptcy court -- is responsible for payment.

SERVICES

11. Copies. If the bankruptcy clerk selects a commercial copy service to provide copies of papers in one or more cases, the bankruptcy clerk must exercise care to avoid

the appearance of favoritism in the selection. The bankruptcy clerk should request written proposals for the work as part of the clerk's determination of which commercial copy service is best qualified to provide such a service. If the cost of the copies is expected to total more than $25,000, the bankruptcy clerk should make a formal solicitation of written proposals for the work. If a very large case is filed without advance notice, the bankruptcy clerk may not have time to solicit formal written proposals for the copy services. In such an instance, the clerk may solicit proposals orally and document the solicitation and responses.

Comments: The bankruptcy clerk's office may not be able to efficiently handle the volume of copy requests in a "mega case." With planning and the bankruptcy clerk's assistance, a private copy service may be able to provide copies of case papers at a lower price than the bankruptcy clerk's office. This saves time for the bankruptcy clerk's office and saves money for the parties. The time savings is particularly important in "mega cases," in which copy requests could otherwise require much of the bankruptcy clerk's office's time.

The bankruptcy clerk must exercise care to avoid the appearance of favoritism in the selection of a copy service to provide copies in a "mega case." The bankruptcy clerk should make at least an informal survey to determine which copy service is best qualified to provide copies on the basis of reliability, price per copy, and additional services to be provided such as maintaining a duplicate file for review by the public.

Advertising is required for most government purchases of more than $25,000 by 41 U.S.C. § 5. Although the bankruptcy court's designation of a copy service is not

a government purchase of services, it does convey a valuable business opportunity.

Basic fairness requires that all qualified copy centers be allowed to submit proposals if the bankruptcy clerk anticipates that more than $25,000 worth of copies will be requested in a year. If time permits, the bankruptcy clerk should send written requests for proposals to each of the local copy services which are capable of performing the work in a timely manner. If time permits and the bankruptcy clerk anticipates that more than $25,000 worth of copies will be requested in a year, copies of all of the written proposals should be sent for review to the Contracts Branch of the Contracts and Services Division of the Administrative Office before a particular proposal is selected.

Proposals for making copies should be solicited on a contingent basis before a "mega case" is filed. If it has not been done, the request for proposals can be conveyed orally or hand-delivered with instructions that they be returned within 48-hours.

The order designating the copy service can also require that the parties file an extra copy of all case papers except proofs of claim. The intake and docket clerks can process the copies along with the originals and the copy service can pick up the copies and an updated docket sheet once a day. The parties can then order copies by docket numbers or can place standing orders for copies.

The request for proposals should require the copy center to maintain a duplicate case file from which copies will be made. The request may also require that

the copy center make the duplicate file available for review without charge during normal business hours.

NOTICES

12. **Mailing lists. A debtor in a voluntary case must file a list containing the names and addresses of its creditors, even if the debtor or a third party is ordered to mail all notices in the case. If the debtor or a third party is directed to maintain the mailing matrix in a case, it shall make copies of the matrix available as requested by other parties or the bankruptcy court.**

Comments: Bankruptcy Rule 1007(a) requires that debtors in voluntary cases file mailing lists with their petitions unless the petitions are accompanied by schedules of liabilities or chapter 13 statements. Other parties may need to review the list. Another party or the bankruptcy clerk's office may need the list in order to provide a notice.

In certain circumstances the bankruptcy court may permit the debtor to file the mailing list in the form of a computer tape. The bankruptcy clerk shall take steps to insure that the mailing list is maintained properly and that it is protected against loss or damage.

13. **Certificates of service. The bankruptcy court or the bankruptcy clerk should approve the form and content of any notice not provided by the bankruptcy clerk's office and should receive from the person providing notice a certificate of service which includes a copy of the notice and a list of persons to whom it was mailed.**

Comments: Pursuant to the Bankruptcy Noticing Guidelines adopted by the Judicial Conference in March 1986, the parties shall file certificates of service for the notices which they provide. If counsel for the party signs a certificate of service, the certificate may generally state that notice was given to certain parties (such as the parties on the mailing matrix as of a certain date). If someone else signs the certificate, the certificate shall be accompanied by a list of the names and addresses of the parties served.

To ease the burden of reviewing the form and content of notices not prepared by the bankruptcy clerk's office, the bankruptcy clerk and the bankruptcy court can develop form notices for various circumstances. The bankruptcy court can specify the required contents for certain notices in its local rules.

MISCELLANEOUS

14. **Assistance. The Bankruptcy Division of the Administrative Office should be consulted when unusual questions or problems arise concerning outside facilities or services.**

Comments: "Mega cases" often present unusual questions or problems such as the need to hire additional personnel on an expedited basis or to address unique circumstances in the meeting of creditors notice. The Bankruptcy Division can either answer the questions or refer them to the appropriate office.

United States Bankruptcy Court
Middle District of Florida
4921 Memorial Highway, Suite 260
Tampa, Florida 33634

Alexander L. Paskay
Chief Bankruptcy Judge

Phone: (813) 228-2261

December 7, 1992

Mr. James E. Macklin, Jr.
Deputy Director
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Deputy Director Macklin:

It was brought to my attention by the Clerk, Mr. Carl Stewart, that the Jacksonville Division now has over 30,000 adversary proceedings filed in the Olympia Holding (P.I.E) Chapter 11 case. He also informed me that there are approximately 100 Motions to Withdraw the Reference and indicated that there are a lot more to follow.

Initially, the District Court in its Order granting the Motion to Withdraw Reference required the Plaintiff to file in the District Court copies of all pleadings which previously have been filed in the Bankruptcy Court. Our current Local Rule 1.05(f) requires the Clerk's Office to furnish copies to the District Court whenever reference is withdrawn. It is my understanding that the District Court now modified its Order and deleted the requirement that the copies must be furnished by the Plaintiff, consequently it is the Clerk's responsibility to accept for filing and prepare the same for transmittal to the District Court. The enormous number of adversary proceedings has placed a tremendous burden on the Clerk's Office by requiring it to prepare the copies necessary where Motions to Withdraw have been filed and granted by the District Court.

It is my understanding that when Mr. Stewart sought advice from the AO, he was told that under the current rules, specifically F.R.B.P. 9002, it is the Clerk's responsibility to prepare and transmit the copies.

While I do not agree with the interpretation of F.R.B.P. 9002, I suggest that the Advisory Committee of Bankruptcy Rules at its next session give serious consideration to amend the Rules to spell out clearly that after the District Court withdraws the reference all submissions thereafter shall be filed directly with the District Court and not with the Bankruptcy Court and the

staff of the Bankruptcy Clerk will no longer be responsible for the record of a proceeding which has been withdrawn by the District Court.

Thank you for your consideration of this matter and your assistance to transmit this suggestion to the Advisory Committee on the Rules at its next meeting.

Very truly yours,

ALEXANDER L. PASKAY

ALP:mm

REQUEST OF JUDGE JONES REGARDING BALLOT FORM.

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REPORT OF SUBCOMMITTEE ON TECHNOLOGY.

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REPORT OF SUBCOMMITTEE ON LOCAL RULES.

ORAL PRESENTATION

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ROBERT E. KEETON
CHAIRMAN

PETER G. McCABE
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

December 24, 1992

Honorable James J. Barta
United States Bankruptcy Judge
1114 Market Street
St. Louis, MO 63101

Honorable James W. Meyers
Chief Judge, United States
Bankruptcy Court
940 Front Street
San Diego, CA 92189

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
451 Hungerford Drive
Rockville, MD 20850

Gentlemen:

At the September 1992 meeting of the Advisory Committee on Bankruptcy Rules, we discussed making some changes to Rule 3002. I am enclosing a copy of an opinion of the Bankruptcy Court for the District of Minnesota which says some rather nasty things about the drafters of Rule 3002.

It is my request that the three of you, with Judge Mannes as Chairman, serve as an ad hoc committee to determine whether we should include in our agenda at our next meeting a revisit to Rule 3002.

If you decide that the matter should be taken up at the meeting, I request that you let me know and prepare some materials for circulation to our members so we can all be prepared to discuss the question.

Sincerely,

Edward Leavy

Edward Leavy

EL/jg
Enclosure
cc: Professor Alan N. Resnick
Mr. Peter G. McCabe
Mr. John K. Rabiej
Ms. Patricia S. Channon

In re Gary HAUSLADEN and Kristi Hausladen, Debtors.
Jeffrey TIEDENS and Amy Tiedens Debtors.
Virgil M. FLYNN, Debtor.
Robert M. BEAUTO, Debtor.
Harold M. MICHAUD and Jacqueline M. Michaud, Debtors.
Nos. 4-91-6571, 4-91-6398, 3-91-6802, 3-90-4460, 3-91-1964.
United States Bankruptcy Court, D. Minnesota.
Sept. 24, 1992.

Before KRESSEL, C.J., and O'BRIEN, KISHEL and DREHER, Bankruptcy Judges.

KRESSEL

*1 At Minneapolis and St. Paul, September 24, 1992.

These Chapter 13 cases came on for hearing on objections by the trustee to several claims. Stephen J. Creasey appeared for the trustee. Richard L. Kelso appeared for debtors Jeffrey Tiedens and Amy Tiedens, Thomas E. Hoffman appeared for Norwest Bank, Linda Jeanne Jungers appeared for Minneapolis Collection Bureau and Reliance Recoveries, and John P. Gustaphson appeared for John's Hillcrest Pharmacy. Because the trustee's objections raise the identical issue [FN1] in each case and because of the importance of the issue, the court is deciding the objections en banc. See Local Rule 109. This court has jurisdiction under 28 U.S.C. ss 1334 and 157(a) and Local Rule 201. These are core proceedings under 28 U.S.C. s 157(b)(2)(B).

FACTS

The debtors all filed petitions under Chapter 13. Meetings of creditors were scheduled pursuant to 11 U.S.C. s 341 and Rule 2003 of the Federal Rules of Bankruptcy Procedure. Pursuant to Rule 3002 of the Federal Rules of Bankruptcy Procedure, timely filed claims were to be filed by creditors within 90 days after the meeting of creditors. Pursuant to Rule 3004 of the Federal Rules of Bankruptcy Procedure, the debtors have an additional 30 days to file a proof of claim on behalf of a creditor who fails to do so. After the 90-day period had run, Norwest Bank Minnesota, N.A., Minneapolis Collection, Reliance Recoveries and John's Hillcrest Pharmacy filed proofs of claim. After both the 90-day period and the additional 30-day period had run, proofs of claim were filed on behalf of North Memorial Medical Center and Student Loan Servicing Center by the Tiedens. The trustee objected to allowance of all claims on the basis of their late filing.

ISSUE

The issue before us is whether a claim filed in a Chapter 13 case after the 90-day deadline set by Rule 3002(c) of the Federal Rules of Bankruptcy Procedure should be disallowed?

DISCUSSION

The resolution of this question requires an examination of several provisions of the Bankruptcy Code and Rules. Although "canons of construction are no more than rules of thumb that help courts determine the meaning of legislation," Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149 (1992), the examination commences with the language of the statutes itself. Pennsylvania Dept. of Public Welfare v. Davenport, 110 S.Ct. 2126, 2130 (1990) ("the fundamental canon [of] statutory interpretation begins with the language of the statute itself."); U.S. v. Ron Pair Enter., Inc., 109 S.Ct. 1026, 1030 (1989). "The sole function of the court is to enforce [the statute] according to its terms. Id. at 1030 (citing Caminetti v. U.S., 242 U.S. 470, 485 (1917)). Defining the terms of the statute, we must "presume that a legislature says in a statute what it means and means in a statute what it says there." Germain, 112 S.Ct. at 1149. When the language before the court expresses Congress' intent with precision, as it does here, reference to legislative history and to pre-Code practice is not necessary. Ron Pair Enter., Inc., 109 S.Ct. at 1030. [FN2]

*2 Section 501 is our starting point. Simply, section 501 tells us who can file a claim; it

does not set out the time limits for filing. Legislative history tells us that "[t]he Rules of Bankruptcy Procedure will set the time limits, the form, and the procedure for filing, which will determine whether claims are timely or tardily filed. H.R. Rep. No. 595, 95th Cong., 1st Sess., 351 (1977); S.Rep. No. 989, 95th Cong., 2d Sess. 61 (1978) (emphasis added). Rule 3002 of the Federal Rules of Bankruptcy Procedure addresses these issues: (a) Necessity for Filing. An unsecured creditor or an equity security holder must file a proof of claim or interest in accordance with this rule f or the claim or interest to be allowed, (C) [FN3] Time for Filing. In a chapter 7 liquidation or chapter 13 individuals debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to s 341(a) of the Code.... Fed. R. Bankr.P. 3002. Read together, Rules 3002(a) and 3002(c) do not explicitly say but imply that filing with in the prescribed period is a prerequisite to allowance. This erroneous reading arose when the drafters of the new Rule 3002 hastefully copied the substance of old Rule 302 without paying any attention to the major change in the underlying statute. Under the Bankruptcy Act, late claims were explicitly disallowed. Section 57(n) of the Act provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed ... " 11 U.S.C. s 939(n) (repealed Oct. 1, 1919) (emphasis added). The old Bankruptcy Rule implemented this time bar. [FN4] However, a time bar does not expressly exist under the Code or Rules.

All of this has been compounded by attorneys, judges and commentators who have carried forward the old Act habit of referring to the date set for filing claims as the "bar date." Under Section 57(n) of the Act it was a bar date; however under Section 502 of the Code it is not. Continued mischaracterization of the time period has led to reliance on the words themselves without actually understanding them or what the statute actually says.

The language of the official bankruptcy forms further aggravates the problem and confusion. These forms provide that: claims which are not filed within ninety days following the above date set for the meeting of creditors will not be allowed, except as otherwise Provided by law. Again, reading this clause without actually understanding its significance leads one to believe that tardily filed claims are not allowed. However, the law does in fact "otherwise provide" that tardily filed claims are allowed.

Focusing on the operative language, we find that allowance of claims is specifically governed by Section 502 of the Code. Section 502, in relevant part, provides: Allowance of claims or interests. ***3** (a) A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects. (b) ... if such objection to a claim is made, the court, after notice and a hearing ... shall allow such claim ... except to the extent that-- 11 U.S.C. s 502 (emphasis added). Section 502 then sets out eight specific grounds for disallowing claims. Tardy or late filing is not one of them. The statute says what the statute means: "the court ... shall allow ... claim [s] ... except...." 11 U.S.C. s 502(b) (emphasis added). The words are clear; "lateness is not a ground for disallowance under section 502 of the Code." In re Horner, 1991 WL 353297 (Bankr.N.D. Ill. Sept. 21, 1991) (dicta); J. Keith M. Lundin, Chapter 13 Bankruptcy, s 7.24 at 7-59 (Sept.1992 galley proof). In fact, in the face of an objection based on lateness, the statute explicitly requires us to allow the claim.

When Congress speaks as clearly as it has done here, the plain meaning of the legislation is conclusive, except in those "rare cases" in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters. Ron Pair Enter., Inc., 109 S.Ct at 1031 (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). Here, however, the exception does not apply. Allowance of tardily filed claims clearly does not contravene the intent of the framers of the Code. Indeed,

allowing tardily filed claims does not conflict with any other section of the Code, the legislative history of section 502 or for that matter with any important state or federal interest. [FN5] The trustee has failed to articulate any argument or policy reason why Congress would have intended to disallow late filed claims. The language being clear and in conformity with the intent of Congress, the plain meaning is conclusive; tardily filed claims are allowed.

In fact, while not directly applicable in a Chapter 13 case, s 726 supports our conclusion that tardily filed claims should be allowed. Among the priorities of distribution in section 726(a) are allowed unsecured claims which are "timely filed" and those which are "tardily filed." Thus, absent some other basis of disallowance, tardily filed claims are allowed and entitled to distribution if there is enough money. while we recognize that section 726 applies only to Chapter 7 cases, it is a clear illustration of the principal: while treatment of a claim may be dependent on its timeliness, allowance is not.

Given the clarity of the statutory text, the trustee's burden of persuading us that Congress intended tardily filed claims to be disallowed is exceptionally heavy. Union Bank, 112 S.Ct. at 530 (citing U.S. v. Ron Pair Enter., Inc., 489 U.S. 235, 241-42 (1989)). The trustee, reading section 502 and Rule 3002 together, argues that tardily filed claims should not be allowed. Essentially, the trustee asserts that Rule 3002 complements section 502 by not allowing late filed claims. However, the trustee's reading ignores the obvious; section 502 and Rule 3002 are not complementary but independent. considering the independent functions of each provision, the trustee's reading is simply incorrect.

*4 Fundamentally, treatment of classification of claims is different from allowance. A creditor who files a claim is seeking payment under the debtor's plan. Section 502 identifies what claims are entitled to treatment under the plan. once claims are allowed under section 502 they may then be classified by the plan for treatment under the plan. To this end, Rule 3002 plays an important role. Rule 3002 expressly provides the criteria for determining whether a claim is timely or tardy, a distinction which is explicitly significant in a chapter 7 case and which provides a basis for differing treatment in a chapter 13 plan.

The rights of tardily filing claim holders in Chapter 13 cases are not defined by the Code but rather are controlled by the Chapter 13 plan. See 11 U.S.C. s 1322(b)(10). The plan may treat these claims in several different ways. The plan may provide that tardily filed claims be paid after timely filed claims are paid in full or for no payment at all. The plan may provide identical treatment for all allowed unsecured claims, regardless of timeliness or for payment at a different percentage than timely filed claims.

What is to be gleaned from this exercise is that treatment or classification of a claim is distinct from allowance under the Code. We need not choose between giving effect on the one hand to s 502 and on the other to Rule 3002. Independent application gives effect to the express language of both Code section 502 and Rule 3002 avoiding any unnecessary conflict or contradiction between the two. See U.S. v. cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir.1990)(discussing the conflict between s 726 and Rule 9006 the court stated: "We cannot have a statute that specifically allows payment of tardily filed claims and rules that prohibit their filing. Accordingly, to the extent that Rule 9006 contradicts the statute, it cannot stand.") See also In re Klein, 110 B.R. 862, 870 (Bankr.N.D. Ill.1990); In re Grabill Corp., 113 B.R. 966, 974 (Bankr.N.D. Ill.1990). See 28 U.S.C. s 2075 (Congress intended Code supremacy when it stated: "[Bankruptcy] rules shall not abridge, enlarge, or modify any substantive right.").

The trustee, going beyond the language of the statutes, asserts that operation of section 502 and Rule 3002 is governed by pre-Code practice. As support, the trustee cites a series of cases that, to some, is the "weight of

authority." [FN6] Specifically, the trustee cites In re Glow, 111 B.R. 209 (Bankr.N.D. Ind.1990) for the proposition that a claim, tardily filed, in a Chapter 13 case, is not allowable. Id. at 217. The Glow court primarily rests on Wilkens v. Simon Bros., Inc. (In re Wilkens), 731 F.2d 462 (7th Cir.1984). Reliance on Wilkens, however, is misplaced. [FN7]

The Wilkens court found that Rule 13-302(e)(2) of the Rules of Bankruptcy Procedure under the Bankruptcy Act of 1898 controlled its decision. [FN8] The Advisory Committee Note to Rule 13-302(e)(2) explains that the language "of subdivision (e) is adopted from s 57(n) of the Act and retains the time limits on the filing of claims established by the statutory provisions." Section 57(n) of the Act provided that ... " [c]laims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed ... " U.S.C. s 939(n) (repealed Oct. 1, 1979) (emphasis added). Section 502 of the Code, on the other hand, does not, by its express terms, exclude late claims. Indeed, the drafters, aware of Section 57(n) and Rule 13- 302(e)(2) of Bankruptcy Act of 1898, chose not to include late filed claims as grounds for disallowing claims. Pre-Code practice is hardly relevant where, as here, the Code specifically changes the practice. See, e.g., U.S. v. Ron Pair Enter., Inc., 109 S.Ct. at 1030.

***5** The Glow court also places heavy reliance on In re Chirillo, 84 B.R. 120 (Bankr.N.D. Ill.1988). The Chirillo court held that a creditor's claim, filed late, in a Chapter 13 case, is not allowed. The Chirillo court found that [c]ase law supports this construction [of the Rules and Code). Former Bankruptcy Rule 302(e) contained the same type of bar date as present Rule 3002(6); the only difference is that the former rule allowed six months from the first meeting of creditors instead of 90 days. In re Glow, 111 B.R at 216 (quoting In re Chirillo, 74 B.R at 429-30). We do not agree that timing is the only difference. Code section 502 is anything but analogous to section 57(n) under the Act. Again, section 57(n) specifically provided that ... "[c]laims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed ... " 11 U.S.C. s 939(n) (repealed Oct. 1, 1979) (emphasis added). Section 502, on the other hand does not exclude late claims. once again, reliance on the Bankruptcy Act and its Rules is misplaced. Therefore, we respectfully disagree with both the Chirillo and Glow courts and all courts that follow them.

THEREFORE, IT IS ORDERED: The trustee's objections to the claims are overruled and: 1. claim number 7, filed in case number 4-91-6398 by North Memorial Medical Center, is allowed in the amount of $410.21; 2. claim number 8, filed in case number 4-91-6398 by Student Loan Servicing Center, is allowed in the amount of $1,800.00; 3. claim number 18, filed in case number 4-91-6571 by Norwest Bank Minnesota, N.A., is allowed in the amount of $5,164.40; 4. claim number 14, filed in case number 3-91-6802 by Minneapolis Collection Bureau, is allowed in the amount of $767.67; 5. claim number 7, filed in case number 3-90-4460 by Reliance Recoveries, is allowed in the amount of $442.68; and 6. claim number 14, filed in case number 3-91-1964 by John's Hillcrest Pharmacy, is allowed in the amount of $1,755.28.

FN1. While the dispositive issue is the same, three cases contain factual differences. In Beauto and Flynn the late filing creditors did not receive notice of the Chapter 13 case or the deadline for filing timely claims. In Tiedens, the late filed claim was filed by the debtor. This late filing raises the issue of whether an extension could have been granted under Rule 9006 of the Federal Rules of Bankruptcy Procedure for excusable neglect. The debtors have not yet made such a motion. Because we are allowing all claims, these issues are moot and need not be addressed.

FN2. Our method of statutory interpretation, the "plain language" doctrine, is widely accepted and applied by a majority of the current Supreme

Court. See, e.g., Patterson v. Shumate, 112 S.Ct. 2242, 2248- 51 (1992) Connecticut Nat'l Bank v. Germain, 112 S.Ct. 1146, 1149-50 (1992) U.S. v. Nordic Village, Inc., 112 S.Ct. 1011, 1015 (1992); Union Bank v. Wolas, 112 S.Ct. 527, 530 (1991); Board of Governors v. Mcorp Financial, Inc., 112 S.Ct. 459, 465-66 (1991). Although the "plain meaning" doctrine is not always followed, [it is] regrettable that we have a legal culture in which [legislative history and policy] arguments have to be addressed ... with respect to a statute utterly devoid of [ambiguity]. Union Bank, 112 S.Ct. at 534 (Scalia, J., concurring). ... [T]he phenomenon [of looking outside the "Plain meaning" of words in the statute) calls into question whether our legal culture has so far departed from attention to text, or is so lacking in agreed-upon methodology for creating and interpreting text, that it any longer makes sense to talk of "a government of laws, not of men." Patterson, 112 S.Ct. at 2250-51 (Scalia, J., concurring).

FN3. Consistent with the statute, Local Rule 502 provides: [t]he last day to timely file a proof of claim is fixed at 90 days after the date set for the meeting of creditors. Local Rule 502 does not address the allowance, disallowance or treatment of claims.

FN4. The Advisory Committee Note to Rule 13-302(e)(2) explains that the language "of subdivision (e) is adopted from s 57(n) of the Act and retains the time limits on the filing of claims established by the statutory provisions."

FN5. As we discussed above, allowing late filed claims under Code section 502 may arguably conflict with Rule 3002 of the Federal Rules of Bankruptcy Procedure. However, we interpret the rule is such a way as the to eliminate the inconsistency. Even if they were inconsistent, it is the rule that must fall, not the statute. See U.S. v. Cardinal Mine Supply, Inc., 916 F.2d 1087, 1089 (6th Cir.1990). See Also In re Klein, 110 B.R. 862, 870 (Bankr.N.D. Ill.1990); In re Grabill Corp., 113 B.R. 966, 974 (Bankr.N.D. Ill.1990). See 28 U.S.C. s 2075.

FN6. Included in the "weight of authority" is In re Davis, 936 F.2d 771 (4th Cir.1991); Wilkens v. Simon Bros., Inc., 731 F.2d 462 (1984); In re Pigott, 684 F.2d 239 (3d Cir.1982); In re Street, 55 B.R. 763 (Bankr.9th Cir.1985); In re Smart Const. Co., 138 B.R. 269 (D. Colo.1992); Richards v. U.S. (In re Richards), 50 B.R. 339 (E.D. Wash.1989); In re Tomlan, 102 B.R. 790 (E.D. Wash.1989); In re Richards, 50 B.R. 339 (E.D. Tenn.1985); In re Weissman, 126 B.R. 889 (Bankr.N.D. Ill.1991); In re Wells, 125 B.R. 297 (Bankr.D. Colo.1991); In re Harper, 138 B.R. 229 (Bankr.N.D. Ill.1991); In re Scott, 119 B.R. 818 (Bankr.M.D. Ala.1990) In re Glow, 111 B.R. 209 (Bankr.N.D. Ind.1990); in re Woodhouse 119 B.R. 819 (Bankr.M.D. Ala.1990); In re Chirillo, 84 B.R. 126 (Bankr.N.D. Ill.1988); In re Int'l Resorts, Inc., 74 B.R. 428 (Bankr.N.D.Ala.1981); In re Stern, 70 B.R. 472 (Bankr.E.D.Pa.1987); In re Mathews, 75 B.R. 379 (Bankr.E.D. Mo.1987); In re Goodwin, 58 S.R. 75 (Bankr.D. Me.1986); In re Kennedy, 40 B.R. 558 (Bankr.N.D. Ill.1984).

FN7. Beyond misapplying Wilkens, the Glow decision is without reason. After quoting the Wilkens decision at great length, the Glow court, in summary fashion, states: [a]lthough the Wilkens case was decided under Rule 13-302(e)(2), the predecessor to the present Bankr.R., this Court concludes that the holding in Wilkens is still applicable under the present Bankruptcy Rules. Conclusory statements of law, to us, are less than persuasive. We are similarly unimpressed with lack of specificity other courts have used in discussing this issue.

FN8. The debtor's Chapter 13 case was filed in early 1981, long before the

promulgation of the new Rules which took effect on August 1, 1983. Therefore, the old Rules were applicable.

Bkrtcy.D.Minn.,1992.

In re Gary HAUSLADEN and Kristi Hausladen, Debtors.Jeffrey TIEDENS and Amy Tiedens Debtors.Virgil M. FLYNN, Debtor.Robert M. BEAUTO, Debtor.Harold M. MICHAUD and Jacqueline M. Michaud, Debtors.
--- B.R. ----, 1992 WL 246584 (Bankr.D.Minn.)
END OF DOCUMENT

ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Little Rock, Arkansas
March 26-27, 1998

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 26-27,1998
Winrock International Conference Center
Morrilton, Arkansas

Introductory Items

1. Welcome and introduction of guests. (Oral)

2. Approval of minutes of September 1997 meeting.

3. Report on the January 1998 meeting of the Committee on Rules of Practice and Procedure. (This will be an oral report.)

4. Report on the January 1998 meeting of the Committee on the Administration of the Bankruptcy System. (This will be an oral report.)

5. Report on recent meetings of the Advisory Committee on Civil Rules. (This will be an oral report.)

Action Items

6. Preliminary Draft of Proposed Amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 published in August 1997. (Materials: Reporter's memorandum dated 2/22/98; the proposed amendments; summary of public comments received; letters received from commentators.)

7. The "Litigation Package" — proposed amendments to Rules 9013 and 9014, and related proposed amendments to 25 other rules. (Materials: Reporter's memorandum dated 2/18/98; the proposed amendments; letter from the Hon. Donald E. Cordova dated 2/12/98; § 111(d) of Pub. L. No. 103-121.)

8. Proposed Draft of Introduction to the "Litigation Package." (Materials: Reporter's memorandum dated 2/15/98; revised draft of Introduction; revised draft showing changes from previous draft.)

9. Rules of Attorney Conduct. (Materials: memorandum dated 2/11/98 from Prof. Daniel R. Coquillette, Reporter to the Standing Committee, to the Hon. Alicemarie H. Stotler, Chair of the Standing Committee, on Federal Rules of Attorney Conduct; memorandum dated 12/1/97 from Prof. Coquillette to the Standing Committee; draft of suggested revisions to Fed. R. App. P. 46; draft of suggested revisions to Fed. R. Civ. P. 83; draft of suggested

Federal Rules of Attorney Conduct; Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct.)

10. Notice to Governmental Units. (Materials: Reporter's memorandum dated 2/16/98; proposed amendments to Rule 2002(j); proposed amendments to Rules 1007 and 5003; memorandum dated 2/2/98 from J. Christopher Kohn; Recommendation 4.2.1 of the National Bankruptcy Review Commission; § 503 of H.R. 3150; § 405 of H.R. 3150.

11. Report of the Forms Subcommittee: Proposed Revisions to Official Forms 1 and 7 Relating to Notice to Governmental Units. (Materials: proposed Official Form 1, Voluntary Petition; proposed Exhibit "C" to the Voluntary Petition; proposed Official Form 7, Statement of Financial Affairs.)

12. Bankruptcy Rule 9020, Contempt Proceedings. (Materials: Reporter's memorandum dated 2/24/98; letter from the Hon. A. Thomas Small dated 2/14/97; 1983 version of Rule 9020; decision in Matter of Terrebonne Fuel and Lube, Inc.; memorandum of J. Christopher Kohn dated 2/11/98; excerpt from the Report of the Proceedings of the Judicial Conference of the United States, March 1996, and materials on expanding contempt authority of federal magistrate judges.)

13. Report of the National Bankruptcy Review Commission. (Materials: Reporter's memorandum dated 2/15/98.)

14. Bankruptcy Rules 4003(b) and 1017(e)(1) and Motions to Extend Time. (Materials: Reporter's memorandum dated 8/6/97; decision in In re Laurain; letter from the Hon. Steven W. Rhodes to the Hon. Paul Mannes dated 6/4/97.)

15. Rule 9022, Notice of Judgment or Order. (Materials: letter from Richard G. Heltzel dated 7/14/97.)

16. Consideration of Whether Proposed Amendments to Rules 2002(a)(6), 2002(g), and 2002(j), (previously approved by the Advisory Committee), should be published for comment. (Materials: drafts of Rules 2002(a)(6), 2002(g), and 2002(j).)

17. Rule 9009, Forms. (Materials: memorandum dated 2/18/98 to bankruptcy clerks of court concerning delay in implementing new official forms; examples of § 341 notices containing local variations.)

Information Items

18. Report on Revisions to Official Form 6, Schedule E, Creditors Holding Claims Entitled to Priority, and Official Form 10, Proof of Claim, Resulting from the Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code. (Materials:

announcement published in the Federal Register on 2/12/98; revised Official Forms 6E and 10, effective 4/1/98.)

19. Reports on the Status of the Electronic Case Files Initiative, the Electronic Courtroom Project, and other Technology Issues. (Materials: These will be oral reports.)

20. Report on the Federal Judicial Center Study of Alternative Dispute Resolution Programs in Bankruptcy Courts. (Materials: to be distributed separately.)

21. Additional Subcommittee Reports [if any]. (Oral)

Administrative Matters

22. Status of All Subcommittees. (Materials: list of existing subcommittees and their members.)

23. Discussion of dates and locations for March 1999 and September/October 1999 meetings. (Oral)

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Item 1 will be oral.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 11 - 12, 1997

Williamsburg, Virginia

Draft Minutes

The following members were present at the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Eduardo C. Robreno
District Judge Bernice B. Donald
District Judge Robert W. Gettleman
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge A. Thomas Small
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Charles J. Tabb
Professor Kenneth N. Klee
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Professor Alan N. Resnick, Reporter

District Judge Alicemarie H. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and Alan W. Perry, Esquire, liaison to this Committee from the Standing Committee, were unable to attend. Peter G. McCabe, Secretary to the Standing Committee and Assistant Director of the Administrative Office of the United States Courts ("Administrative Office"), attended the meeting. Bankruptcy Judge George R. Hodges, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Committee"), attended part of the meeting as a representative of that committee. Brady C. Williamson, Esquire, the chairman of the National Bankruptcy Review Commission ("NBRC"), and James I. Shepard, a member of the NBRC, also attended part of the meeting.

The following additional persons attended the meeting: Joseph G. Patchan, Director, Executive Office for United States Trustees (EOUST); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Cecelia B. Morris, Clerk, United States Bankruptcy Court for the Southern District of New York; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office,

Administrative Office; and Elizabeth C. Wiggins and Robert Niemic, Research Division, Federal Judicial Center ("FJC").

In addition, David B. Foltz, Jr., Esquire, from Houston, Texas, and Alan S.Tenenbaum, Esquire, of the Environment and Natural Resources Division, United States Department of Justice, 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 Advisory Committee and assignments by the Chairman appear in **bold.**

Introductory Items

The Chairman introduced the guests and welcomed them to the meeting.

The Committee approved the draft minutes of the March 1997 meeting subject to minor editorial changes on pages 4, 15, and 19.

Judge Duplantier and Professor Resnick reported on the June 1997 meeting of the Standing Committee. Judge Duplantier said the Standing Committee had approved the amendments to the Official Forms, as proposed by the Committee, including the changes made to proposed Official Form 10, the Proof of Claim, after the March 1997 meeting and circulated by mail and facsimile transmission to the members. At the Standing Committee meeting, Alan W. Perry, Esquire, had inquired about inconsistencies in the dates and abbreviated designations of the forms in the top left corner of each form. In response to these questions, these dates and designations were edited uniformly to the month and year of anticipated Judicial Conference action and variations in the abbreviated designations were reduced, the Chairman said. The Standing Committee also had approved the Advisory Committee's recommendation that a transition or phase-in period for the new forms be authorized, with March 1, 1998, as the date on which the new forms would become mandatory.

The Chairman said the Standing Committee also had approved the publication for comment of the package of rules forwarded by the Advisory Committee. He noted that the preliminary draft pamphlets had just been printed and had been distributed to the members at the meeting as well as by mail.

Professor Resnick said the Standing Committee has been examining over the past several years a few areas of practice in federal courts in which issues of attorney conduct have arisen, with a view toward ascertaining whether any uniform federal rules might be either appropriate or helpful in a field that traditionally has been regulated by the states and local federal district

courts. The various state rules and the American Bar Association's model code are often inconsistent, especially with respect to defining and addressing conflicts of interest, a situation that can leave practitioners subject to contradictory rules. Professor Resnick said he had spoken with Professor Daniel R. Coquillette, Reporter to the Standing Committee, who stated that he planned to draft an amendment to Federal Rule of Civil Procedure 83 that would prohibit courts from making local rules that would conflict with "Appendix A." Professor Coquillette told Professor Resnick that he also planned to draft an "Appendix A" to the civil rules that would contain five to eight "core" federal rules of attorney conduct.

Professor Resnick noted that the Standing Committee has held two seminars on the subject, which were attended by Gerald K. Smith of the Advisory Committee, and that there appears to be recognition that bankruptcy practice may have to be carved out of at least some aspects of the kinds of rules the Standing Committee appears to be contemplating. Professor Resnick also noted, however, that most bankruptcy court local rules on the subject refer to district court or state rules and, therefor, if the Federal Rules of Civil Procedure are amended, those amendments may be binding on the bankruptcy courts. Accordingly, he said, the Advisory Committee needs to monitor this attorney conduct rules project very attentively. Ultimately, the Advisory Committee may have to draft its own "core" rules or, at minimum, consider and comment on any proposed civil rules amendments. Professor Resnick also said that the FJC last year had completed a study of attorney conduct issues in district courts and that Professor Coquillette has suggested that a similar study be done in the bankruptcy courts. This proposed study, he said, will require input from the Advisory Committee. **The Chairman said that he, Mr. Smith, and the Reporter would consult with Ms. Wiggins concerning any proposed study.**

The Reporter noted that on April 1, 1998, adjustments to certain dollar amounts in the Bankruptcy Code are scheduled to take effect. Some of the affected dollar amounts also appear on some of the official forms. He reminded the Committee that in 1996 the Standing Committee and the Judicial Conference had acted to permit these adjustments to be made automatically without further Committee or Conference involvement. Amendments to the Bankruptcy Code enacted in 1994 specify the procedure and formula to be used to adjust the dollar amounts and require that the adjustments be published in the Federal Register no later than March 1. The Administrative Office will take care of making the computations needed and arranging and paying for the publication. Conforming amendments to the affected forms -- the Proof of Claim and Schedule E -- will be distributed in the normal way.

Judge Duplantier said that the Advisory Committee on Civil Rules had sponsored a two-day conference on discovery the week before at Boston College Law School. Professor Resnick said he had attended the conference and that it appeared to him that the only consensus reached during the two days is that local opt-outs from an otherwise national rule should not be permitted. There was a divided vote on what the national rule should provide with respect to

mandatory disclosures, with the majority opposed. The minority, however, was sizable, he said. Judge Robreno said he had attended a meeting of the Civil Rules Committee and would be attending another in October. He said he had been studying the Rand Corporation report issued in connection with the experiments conducted under the Civil Justice Reform Act. The Rand researchers had studied 12,000 cases and their findings are quite controversial, he said. The report indicates that the various pilot programs undertaken under the Civil Justice Reform Act had little effect on costs of litigation or parties' satisfaction with the process, and that alternative dispute resolution (ADR) programs also made little difference. The only factor that made a difference, according to the report, was the setting of an early trial date. The report also indicated that differentiating cases for appropriate management according to size and complexity is a useful exercise, he said. Judge Robreno also said the Advisory Committee should be aware of the June 1997 decision of the Supreme Court in the "Georgine" case, Amchem Products, Inc. v. Windsor, ____ U.S. ____, 117 S.Ct. 2231 (1997), which held that settlement classes are not permissible unless they meet all the requirements for a regular class under Federal Rule of Civil Procedure 23.

Judge Duplantier also said he had attended the June 1997 meeting of the Bankruptcy Committee. Judge Hodges, who attended the Advisory Committee meeting as a representative of the Bankruptcy Committee, observed that the two committees overlap very little in their responsibilities but have many common interests. One area of interest to both groups is fees and he noted that the Bankruptcy Committee had made recommendations concerning bankruptcy fees at the June meeting. Other issues the Bankruptcy Committee is working on actively, he said, are additional judgeships, consolidation of bankruptcy and district court clerks' offices, the *in forma pauperis* study which is due to Congress on March 31,1998, and methods to improve the operations of United States trustees and bankruptcy administrators.

Mr. McCabe added that the Bankruptcy Committee also had taken up Recommendation 73 of the Long Range Plan for the Judiciary, which states that the judiciary does not have enough information about its bankruptcy cases to support program decisions, and assigned to its Long Range Planning Subcommittee the task of recommending ways to make more and better bankruptcy information available to those who need it. The subcommittee had met September 9 and divided into two subgroups, one of which will focus on court data and the other of which will work on financial and demographic information. Mr. McCabe said he believes the best way to standardize information coming in to the courts may be through the official forms. Mr. Sommer, after noting that amendments to the official forms would be considered by the Judicial Conference the following week, said the Committee should be mindful about timing future amendments to the forms, because lawyers must purchase new or upgraded software each time the forms are amended.

Ms. Wiggins said the FJC presently transfers district and appellate court data to the Interuniversity Consortium for Political Research, which makes the data available to other

researchers, and is working with the Statistics Division of the Administrative Office to make bankruptcy data available also. Professor Resnick reported that he had attended a conference held in April 1997 under the sponsorship of the Rand Corporation and the EOUST which had included social scientists, academics, and a National Bankruptcy Review Commissioner, John A. Gose. Professor Resnick said he was concerned about privacy issues that arise with widespread distribution of information disclosed by debtors in bankruptcy cases. For example, he said, there is a 10-year limit on including bankruptcy information in a credit report, but information placed on the Internet cannot be erased. Ms. Wiggins said the FJC is sensitive to the privacy issues and is working to purge certain items from the bankruptcy data. She said the FJC intends to work with the General Counsel of the Administrative Office and with the Bankruptcy Committee on the matter. Judge Duplantier asked if the Committee ever had been asked to add social science questions to the official forms. The Reporter said requests had been made in the past, such as a request to add the question whether the debtor is male or female.

Notice to the Government

Judge Small introduced the discussion by noting that proposals by the Reporter, Mr. Kohn, and Mr. David B. Foltz, Jr., had been considered at the Committee's last meeting and been referred to a new subcommittee chaired by him. He recalled that one proposal would have required the clerk to establish and maintain a register for addresses of governmental units. The March 1997 discussion had highlighted problems with the proposal: 1) on the part of clerks concerning the frequency of updates and the number of addresses permitted per government agency, and 2) on the part of debtors over the effect, under § 523(a)(3), of a debtor's failure to provide a correct address. Over the summer, Judge Small said, the subcommittee had met by telephone and, after further discussion, had directed the Reporter to draft amendments incorporating many of the proposals presented at the March 1997 meeting. The Reporter added that the effort to amend the rules to provide for better notice to governmental units actually had begun at the March 1995 meeting, when the Committee had considered the issues and requested new proposals that would reflect the concerns raised at that time.

Professor Resnick summarized the elements of the various proposals that the Committee had considered at the March 1997 meeting; 1) amending Rule 1007 to require that wherever a debt to a governmental unit is listed a debtor state the name of the agency through which the debt was incurred; 2) amending Rule 5003 to require the clerk to keep a register of mailing addresses for government agencies; 3)requiring the debtor to use the register address if the entity listed is a unit of the federal government or of the government of a state; 4) providing a "safe harbor" for the debtor who uses the address in the register but providing also that use of a different address does not bar the discharge if the governmental unit involved receives actual notice of the

bankruptcy case;[1] 5) amending Rule 2002 to provide that when notice to the United States attorney also is required, that the name of the agency through which the debt was incurred be included in the notice to the United States attorney; 6) requiring disclosure in the Statement of Financial Affairs of additional information about the debtor's personal and business relationships that would enable taxing authorities to investigate the status of the debtor's tax obligations and about environmental claims, both actual and potential; and 7) requiring a debtor to mail a copy of the environmental part of its Statement of Financial Affairs to the relevant government agencies.

Mr. Klee said the Committee needs a policy basis for approving the proposals, which he viewed as having conflicting objectives. On the one hand, he said, a false oath can jeopardize the discharge and on the other, the proposed tax and environmental disclosures could result in self-incrimination. With respect to the notice proposals, he said, due process requires notice, but with these proposals, if notice is not given correctly, the discharge may be jeopardized. What is different about a bankruptcy, he asked, that these disclosures should be required? He said the clerk, rather than the debtor, should give notice, and that the only practical approach is for the clerk to give notice to the entire register, which should be national and not limited to the state where the court is located. Professor Resnick responded that the use of the register would occur only when a governmental unit is a creditor and that its purpose is to help government agencies overcome the problems that arise from the massiveness of their programs. He said the environmental disclosures proposed for the Statement of Financial Affairs are a different matter and are much more controversial.

Notice to the Government — Rules 2002 and 5003

The Committee began its consideration of the draft amendments with the proposed amendments to Rule 5003(e) (establishment of a register) and proposed new Rule 2002(g)(2) (filing by governmental unit of preferred address information). Mr. Shepard said the NBRC had heard much about the importance of notice, especially when the time to act is short. The opportunity clearly exists to delay notice, he said, and a remedy is needed. The NBRC view is that the Bankruptcy Code should provide sanctions for deficient noticing, and the rules should specify the mechanics of proper noticing. Mr. Shepard said he thinks the register should go beyond the immediate state in the which the court is located. Mr. Klee added that Indian reservations, foreign states, municipalities, and other, smaller, government units also should be included. Mr. Heltzel pointed out that the number of government entities in the State of California alone is over 7,000, and including further jurisdictions is simply impractical. Professor Resnick suggested that it probably would be better to start with a manageable amount

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[1]Although the Reporter characterized this as a "safe harbor" provision for the debtor who uses the address in the register, Mr. Kohn emphasized that it makes use of the register address voluntary.

of material and see how it goes. He said the Committee also had been asked why the register should be limited to governmental units, with a suggestion to include private creditors such as Citibank as well. A relatively small register will help, he said, and probably be sufficient for most cases.

Judge Cristol expressed concern about the debtor using a register list that is more than five months old. He said he thinks there should be a distinction in treatment depending on whether a creditor is a voluntary one (private lending institution) or an involuntary one (such as a taxing authority). For a voluntary creditor, he said, a debtor should have records and the debt should not be discharged if notice is not provided. Mr. Kohn said the "outside" states may need to be listed in a register more than the immediate one. He also said a register would benefit debtors, because using the address listed there is *per se* effective notice and creditors also benefit because timelier notice helps them to avoid violating the automatic stay. Mr. Sommer said he favors good notice, but that if a registry is too large it is not really useful. Judge Kressel suggested turning the thrust of the amendment around to say "do the best you can in providing an address, but you can do even better if you use the register." He said he also would want the rule to make clear that notice will still go to the address listed by the debtor on the mailing matrix and not require the clerk to override the matrix with any different address from the register.

Mr. Klee said he still would like the word "state" in line 7 of Rule 5003(e) changed to "state or territory" and to have conforming changes made throughout the drafts. Mr. Rosen asked whether the government could search for information using a debtor's social security number. Mr. Kohn said this is impractical, because the federal government has no central database and each state would have to go through all one million annual filings to find the cases in which that state is a creditor.

Judge Duplantier asked whether anyone on the Committee opposed the general idea of "a register." Mr. Heltzel said he opposed the amount of work it would require of the clerk. Mr. Batson said he doubted the idea would work in practice. **When the matter was put to a vote, the result was 9 - 4 in favor. On the question of expanding the scope of the register** beyond the proposal, as amended, Mr. Heltzel said clerk opposition would be massive, and **only one member voted in favor.**

Continuing with the various provisions of the draft of Rule 5003, the Chairman asked if the Committee thought the dates on which the register is updated should be uniform. The consensus was that they should.

Mr. Kohn said he does not like limiting an agency to one address and would prefer to give the clerk discretion in the matter. Judge Duplantier asked how the debtor would know which one to choose if several addresses were listed. Kohn suggested that the addresses could be distributed by counties, but Mr. Heltzel said the government agencies are not all organized the

same way, that their boundaries seldom match those of the court districts. His district, for example, comprises parts of three IRS districts, he said. Professor Tabb asked if there should be a safe harbor provided for a debtor who has only a one-in-three chance of choosing the right address. Mr. Heltzel questioned what will happen when people move. He also said he had been sampling matrices filed in his district to determine how well debtors are complying with the addresses posted in the local roster of government agency addresses that he has maintained for many years; he found compliance is only about 50 percent.

Judge Kressel suggested changing the word "district" on line 7 of Rule 5003(e) to "court" and making conforming changes throughout the drafts. Judge Gettleman made a motion to change the frequency of register updates to once per year (from twice per year), which carried with one opposed.

Mr. Sommer said that in the draft of Rule 2002(g)(2), at lines 13 through 15, he found the language confusing and asked the Reporter why he did not simply say "the agency"? Professor Resnick responded that it is not the agency that has the claim, but the United States or the state. If agency were to be added, he said, it might appear that municipalities could be included. In the same way, he said, the reference to Rule 5003 is intended to show that the United States or a state can file an address for one or another of its agencies, but the creditor is still the United States or the state. Judge Kressel concurred and observed that the cases on notice say that notice to the Small Business Administration, for example, is not notice to the Internal Revenue Service. There was general agreement that drafting on these points presents difficult issues and that the definition of "governmental unit" in §101 of the Code increases the difficulties. The Reporter invited help from the Committee in resolving this drafting point.

Mr. Rosen said the heading of Rule 2002(g)(2) should be changed to use the phrase "the United States, states, and territories" to reflect the discussion at the meeting. Judge Cordova said the would "separate" on line 21 of the rule should be deleted.

Mr. Sommer asked how Rule 2002(g)(2) would work with Rule 2002(g)(1), which provides for using the address on a filed proof of claim if that address differs from the one provided by the debtor. Professor Resnick suggested that he could either insert in (g)(1) a carve-out such as "except as provided in (g)(2)" or he could add a proof of claim option to subdivision (g)(2).

A motion by Mr. Rosen that in the draft of Rule 2002(g)(1), lines 10 - 11, a provision be inserted that a creditor that wants a different address used in subsequent notices must file a request and serve copies on the debtor and trustee carried by a vote of 9 - 3. The Committee then reconsidered the matter, based on the amount of paper that would be generated. Professor Resnick suggested amending proposed subdivision (g)(2) at lines 17 - 19 to carve out subdivision (g)(1), but Mr. Sommer said it would be a mistake to carve out of subdivision (g)(1)

the requirement to use the address on the matrix or any later-filed schedule unless a request is filed to use a different address. Mr. Heltzel said the real process of sending notices is highly computerized, with the actual printing and mailing performed by a contractor at a remote site. As a practical matter, he said, the clerk can't make corrections, but simply adds any new addresses received and sends notices to all.

After this discussion, a new suggestion was made: **delete subdivision (g)(2), (refrain from amending Rule 2002 at all), and rely instead on draft Rule 1007(m)(2) (debtor's duty to use register address). Although there was no vote taken, no member expressed any objection** to this approach. The Reporter said he would redraft Rule 5003(e) to delete the reference to (g)(2) and to provide simply for setting up the register.

The Committee discussed again Rule 5003 and the issue of whether to limit a government agency to one address or permit multiple addresses to be used. Mr. Batson spoke passionately against requiring citizens to help the government by providing information that may be damaging to their interests. Mr. Smith said he is ready to reconsider the creditor's option to provide a new address by doing so on the Proof of Claim. Mr. Kohn said that multiple addresses seem to be working without causing problems in those districts that have established registers by local rules and that the various addresses conform to geographic divisions within the particular district. **A motion to limit each agency to one register address carried by a vote of 5 - 4.**

With respect to the draft of Rule 2002(j), the Reporter said the proposed changes all were stylistic with the exception of lines 61 - 64, which contain the provision requiring that when notice must be mailed also to the United States attorney, the notice shall identify in the address the name of the department, agency, or instrumentality through which the debt was incurred. **The Chairman stated that, seeing no objection, the amendment would be adopted, subject to review by the Style Subcommittee.**

National Bankruptcy Review Commission

Brady C. Williamson, chairman of the NBRC, reported that the Commission expected to issue its report on time, on October 20, 1997, and that it would be published electronically as well as in paper form. He said the report would be available on several websites, including the Government Printing Office (GPO) and the site maintained by the judiciary. Commissioner James I. Shepard spoke of the importance of notice to the bankruptcy system. If the public's right and interest is not protected in bankruptcy proceedings, he said, the system is not working properly.

Notice to the Government — Rule 1007

The Committee, returning to its consideration of government noticing, discussed the draft

of proposed Rule 1007(m), in particular the "safe harbor" provisions that safeguard the discharge if the debtor incorrectly names a government agency or uses an address that is different from the address in the clerk's register, but the creditor agency timely receives actual notice of the case. Mr. Klee said the language should track that of § 523(a)(3). Mr. Sommer and Judge Kressel said the provision should be rewritten more explicitly as a "safe harbor." Judge Duplantier asked how many members thought there should be no "safe harbor." Only Mr. Kohn raised his hand. Judge Duplantier asked how many members would favor language such as "the debtor may use" the register address rather than "the debtor shall" use it. The show of hands was clearly in favor. Mr. Klee observed that some circuits have ruled that if a requirement is in the rules and not followed, the debtor is not discharged. Mr. Rosen said that whether an agency is correctly named should not control whether a debtor receives a discharge in an actual notice situation. **The draft of Rule 1007 was recommitted to the subcommittee.**

Notice to the Government — Official Form 7
(Tax and Environmental Questions)

The Reporter introduced the discussion of the proposed addition of several tax questions to Official Form 7, the debtor's Statement of Financial Affairs, and stated that the four questions shown in the agenda book represent the Government Noticing Subcommittee's winnowing of the submissions received from the Department of Justice. It was the subcommittee's judgment, he said, that if any tax questions are added, the addition should be limited to the questions shown. Mr. Sommer said that in the proposed new question 16, on line 3, the phrase "had been married" should be changed to "was married." He also said some of the proposed questions overlap existing ones, and the Committee should try to avoid duplication of information. He suggested referring the proposed questions either to the Forms Subcommittee or the Style Subcommittee.

Mr. Smith said that proposed question 17 should clarify whether the word "owned" means only 100 percent ownership or is intended also to cover partial ownership. He referred the Committee to the current question 16, which is quite similar, and suggested that it could be broadened to include proposed question 17. Mr. Smith also asked why the information on former spouses is needed. Mr. Kohn said that is for community property purposes. Mr. Sommer suggested substituting "if you listed community debts, name any former spouse." Mr. Klee said trustees also would find the information useful for contribution purposes. Other suggestions by members were to generally refine question 22 and add "If the debtor is a corporation . . . ," and in question 23 to limit applicability to the debtor as an employer and possibly to corporations only. **The consensus was that these questions should not be added specially, but only when there is a general review of forms.**

Judge Small introduced the discussion of the proposed environmental questions by noting that they pertain to identified claims only and do not include the disclosure of "imminent danger" on property of the debtor, which Mr. Kohn advocates. Mr. Klee said he would want question

24.a. limited to disclosure of notices actually received by the debtor and would want the clerk, rather than the debtor, to mail the part of the statement containing the disclosures. The Reporter said any requirement to mail part of the statement to creditors should be in the rules and that Rule 1007 could provide for it. Mr. Batson asked whether affording environmental protection agencies with extra information could open the door to requests for similar service by other agencies. **There was consensus that merely adding an instructional note to the form would not be sufficient to require a debtor to mail a portion of its statement to certain creditors and that, if the Committee approves such a requirement, it must be stated in the rules.**

Mr. Smith said he thinks the "imminent danger" information should be disclosed. Mr. Klee said that goes beyond the debtor-creditor relationship and had Fifth Amendment implications. Judge Robreno suggested that such information would be appropriate to inquire about at a § 341 meeting. Judge Gettleman asked whether such disclosures would go beyond what the environmental laws would require. Judge Cristol said environmental issues generally arise in a chapter 7 case where there is a fight between the bank, the trustee, and the other creditors over who will bear the expense of cleanup, and the sooner the existence of an environmental problem is known the better it is for all. Mr. Sommer asked whether it is so important that the participants in the case need the information sooner than the § 341 meeting. Mr. Patchan said it should be known to the U.S. trustee, who appoints the case trustee, before the appointment is made and suggested that there should be a requirement in the rules for separate notice. Mr. Foltz stated that question 24, as drafted, would not have disclosed the problems he has encountered, which included representing a debtor that had hazardous biomedical material on its premises. Mr. Foltz said he would like the substance creating an "imminent danger" to be identified and thinks it should be disclosed immediately. Mr. Klee said there should be a distinction between different types of debtors and what is required of them. He said he supports requiring disclosure by a business and thinks the standard should be that the substance does, rather than may, pose a hazard. Mr. Batson suggested that the standard should be "imminent threat to public health and safety," including environmental safety.

Concerning the general principle of requiring disclosure, the vote was in favor, with one opposed. Turning to the mechanism for establishing the requirement, Professor Resnick suggested that the disclosures in question may go beyond what already is required under § 521 and need a statutory change, especially if separate notice is to be given. Mr. Patchan again supported special notice to the U. S. trustee as the person most likely to respond immediately. Professor Resnick suggested there could be a checkbox on the petition, and checking the box would signal the clerk to notify the U. S. attorney immediately. Judge Cordova said the U.S. trustee should receive the notice, not the U. S. attorney. Judge Robreno said he favors using the statement of affairs rather than adding to the filing requirements set out by Congress. He said he also was concerned about how the word "imminent" would be interpreted. Mr. Rosen said that in a bankruptcy, the property is transferred to a new person, the trustee, who should know the risk being undertaken.

The Reporter suggested that a two-step disclosure might be possible, with items that create an imminent danger and need urgent attention to be disclosed on Day 1, and other items that are not urgent disclosed in the statement of affairs. A show of hands indicated that the Committee generally favored a two-stage approach, with one opposing vote and two abstentions. A second vote showed nine members favoring broad disclosure at the outset, including both urgent and non-urgent items. Professor Resnick said he thought disclosure might be more effective if limited to matters that require urgent attention. He said this could be done with a box labeled "Check here and give a brief description." Mr. Sommer said he favored a combination of a rule and form to go out for comment with the rule amendment. Judge Donald said the requirement should be only for disclosure of hazards known to the debtor, with a duty to amend based on later information.

The Committee determined to recommit to the Forms Subcommittee the issue of environmental disclosures, both those that present an "imminent danger" and those for which disclosure is less urgent.

Litigation Subcommittee — Rules 9013 and 9014

The Reporter introduced the discussion by reviewing the Committee's action at the March 1997 meeting approving in principle the subcommittee's proposed amendments, subject to further refinement, review by the Style Subcommittee, and deferral of certain issues. He said he had submitted the drafts to the Style Subcommittee of the Standing Committee for its recommendations, and that the Advisory Committee's own Style Subcommittee had gone over those recommendations in a telephone conference in which the Litigation Subcommittee chairman, Mr. Klee, also had participated. Professor Resnick said that during the summer he also had reviewed the rules generally to identify those that would require conforming amendments. He said that as a result of this review he also wanted to bring back to the Committee the matter of amending Rule 9034, which governs notice to the United States trustee. A proposal to amend that rule had been defeated at the March 1997 meeting, but deleting notice to the U.S. trustee as part of the conforming of rules to the proposed Rules 9013 and 9014 might cause the Committee to take a different view of amending Rule 9034, he said. Professor Resnick described the various agenda materials: Exhibit A contains the style revision, with portions related to deferred issues shown in brackets; Exhibit B is identical to Exhibit A, but marked to show some additional proposals from the Reporter that resulted from his review of other rules; Exhibit C lists proposed amendments to 20 rules to conform to the proposed amendments to Rules 9013 and 9014; Exhibit D contains proposed amendments to Rule 1006, deferred at the March 1997 meeting; and Exhibit E shows proposed amendments to Rule 1007 that were approved in principle at the March 1997, subject to further refinement.

Judge Duplantier said that, although the Committee had approved in principle the proposed amendments to Rules 9013 and 9014, the proposals were open to reconsideration and

he noted that Judge Robreno had written a letter describing a different approach. Judge Robreno's letter, which was distributed to the Committee separately from the agenda book, would be discussed at the appropriate moment, he said. Speaking for himself, Judge Duplantier said his objective in managing litigation is to identify the big case early on, so it can be singled out for special attention and management. The routine matters, however, should not be unduly burdened with requirements that are needed only in a big case. He suggested as targets for deletion from proposed Rule 9014 two items that he thinks will burden routine matters and can be specially provided for when needed: the list of witnesses, and the 25-day response time. He said that motion practice is similar to discovery; the problems are in the big cases.

Mr. Smith said the attorney for the movant usually knows when a matter is complex and should trigger the extraordinary procedures, but Judge Duplantier said it may sometimes be the responder who creates the complexity. Judge Robreno spoke generally against the proposed Rule 9014(m), which gives the court discretion to depart from the prescribed procedures. He said it seemed to him to be like the opt-out provided in Federal Rule of Civil Procedure 26(a) and is really like adopting no rule. He also said the draft seems to be legislating for the extraordinary, while he prefers an approach that states basic principles for all, leaving the court to give directions in major matters. Judge Duplantier said he did not think proposed subdivision (m) would create a general opt-out.

Mr. Klee reviewed the status of the litigation project. Like Gaul, he said, it is divided into three parts. Adversary proceedings comprise one part, and are not affected by the proposals. Proposed Rule 9013 is another part, addressing matters that usually proceed unopposed, and the proposals concerning these appear to enjoy broad support within the Committee. Proposed Rule 9014 is the third part, and there are three approaches within the Committee: Judge Robreno's, Judge Duplantier's, and the subcommittee's draft. The Committee then turned to the materials and considered the proposals in order.

The Reporter noted that the first bracketed material in the draft of Rule 9013 is subdivision (a)(5), concerning an application for approval of employment of a professional. Professor Resnick said that deleting the brackets would create a conflict with what is proposed for Rule 2014 and that perhaps the best course would be to delete (a)(5) from Rule 9013 altogether and leave Rule 2014 as a stand-alone rule. **There was no opposition to deleting subdivision (a)(5).**

The next bracketed subdivision is (a)(11), which addresses a request for examination under Rule 2004, and the Reporter noted that the Rule 2004 Subcommittee had decided to table the proposals to require notice of a Rule 2004 examination. Deleting subdivision (a)(11), he said, would leave the question of notice to local rule. **Mr. Klee made a motion to retain subdivision (a)(11) (and delete the brackets), which carried by a vote of 7 to 6.**

Turning to Exhibit B, which includes additions made to the draft after the Reporter's review of other rules, **there was consensus to retain subdivision (a)(14),** concerning conditional approval of a disclosure statement under Rule 3017.1. With respect to subdivision (a)(15), concerning protection of secret, confidential, scandalous, or defamatory materials, Judge Robreno raised the issue of public interest. **A motion to include subdivision (a)(15) drew a tie vote of 6 to 6, which the Chairman resolved by voting to include (a)(15).**

Judge Kressel expressed concern about the provision in subdivision (e) that the applicant is to serve the order, once it has been signed by the judge. Judge Kressel said the rule needs to ensure that the order is served, because the clerk will docket it and the appeal time will begin to run. He said he thinks the rule should require that, if the court issues an order, the clerk must serve a copy on the applicant, any entity listed in Rule 9013(c), and any other entity the court directs. **A motion to amend the draft to require the clerk to serve any order carried by a vote of 9 to 2.**

A motion to approve proposed Rule 9013 as amended at the meeting carried on a voice vote.

Turning to the subcommittee's draft of Rule 9014, the Chairman said the draft is nearing completion. He said he would like to shorten the response time, put the burden on the respondent to say the matter is complex and needs more time.

Judge Robreno made a motion to substitute his draft. He said the essence of his proposed rule is its subdivision (c). Under his draft rule, he said, the rule would state the principles, and the details would be left to local rule. Judge Robreno said the proposed substitution would provide a mandate to bankruptcy courts to refrain from awarding relief unless a court found that the party against whom relief was sought had been afforded, in the circumstances, 1) adequate notice of the hearing, 2) an opportunity to respond to the administrative motion, 3) an opportunity to offer evidence on any contested issues, 4) an opportunity to cross examine adverse witnesses, and 5) an opportunity for discovery in the circumstances.

Mr. Sommer said he supports the principle of uniformity and would publish the subcommittee's draft. Judge Kressel agreed and said the sole finding of the FJC study was a desire for uniformity. He said the Committee should publish the draft and see what the comments are. Professor Tabb said the draft seems to him to be micromanagement. Professor Resnick said he did not agree and noted that the draft had been streamlined since two meetings prior. He also observed that the policy of the Standing Committee is uniformity in rule and against local rules. Judge Cordova said the draft appears to be unduly complicating motion practice, and the only items needed are notice to the opposing party, and opportunity to respond (which should be ten days), and reasonable time to be heard. Judge Donald said the procedures look more complicated on paper than they would be in practice, and Judge Duplantier and Mr.

Sommer agreed. The Reporter said the trend in the civil rules with respect to discovery is toward limiting the number of depositions and interrogatories. This is a technique for identifying the big case, he said, because studies show that in most cases discovery takes less than three hours, and a need for more than the rule permits forces the parties to go to the judge. If the draft of Rule 9014 is amended to make the response time ten days, he said, that would have a similar result of sending the parties in a complex matter to the judge with a request for more time. **The motion to substitute Judge Robreno's draft for the subcommittee's draft of Rule 9014 failed by a vote of 3 to 9.**

The Committee then turned to the subcommittee's draft of Rule 9014. The Chairman said the rule should be drafted so that in a non-routine matter, the respondent can request more time. Mr. Smith said the extension should be automatic if there is a response. The Reporter said this extension already is built-in, because, if there is a response, the first hearing is a status conference (unless there is no genuine triable issue of fact). Judge Small said he thinks the shortest response time possible would be 15 days. Others suggested ten days, with 24 hours for further response from the movant, or with three days for further response. Mr. Sommer said shortening the time is workable so long as the rule retains the "at least" language, so the time can be extended. **A suggestion to establish 15 days as the time for response, with five days for further response, drew 9 votes in favor. A subsequent motion to change the 15 days to 20 days carried by a vote of 8 to 2.**

A motion to strike the requirement that the movant (lines 31-35) and the respondent (lines 95-101) provide witness lists with their initial pleadings carried, 7 to 3.

The Committee then began a subdivision-by-subdivision review of the subcommittee's draft. In response to a question about the inclusion in subdivision (a)(2) of the approval of a disclosure statement and the confirmation of a plan as matters to which Rule 9014 would not apply, the Reporter said no motion or status conference is required for these matters now, that the Code requires the court to hold a confirmation hearing, and that Rule 9014 would allow the court to skip the confirmation hearing if no objection were filed. **A motion to apply Rule 9014 procedures to Rules 3017, 3019, and 3020(b) carried by a vote of 6 to 5.** Judge Kressel said it is the objection to a disclosure statement or to confirmation of a plan that triggers Rule 9014 now, and that should continue. The Reporter said any motion involving valuation needs an attached appraisal under the subcommittee's draft, which may not be appropriate for a disclosure statement or a plan. **A motion that Rule 9014 apply to these matters but that the objection be the initiating "motion" failed by a vote of 3 to 6.** Mr. Klee reiterated that the survey showed people think there are too many different procedures in the rules. The Reporter noted that there also is a conflict with existing Rule 2002(b), which requires a 25-day notice of a hearing on approval of a disclosure statement or confirmation of a plan. **A motion to reconsider and carve out Rules 3017 and 3020(b) from Rule 9014 carried by a vote of 10 to 1. A motion to retain the reference to Rule 3015(g), modification of a chapter 13 plan, in subdivision (a)(2)**

carried 8 to 2. [Subsequently, the Committee determined that Rule 3015(g) is to be governed by Rule 9014.] The Committee then agreed to amend Rule 3019 to provide that a request for a determination that a class be deemed unaffected by a plan is governed by Rule 9014. The Committee decided to delete as redundant, however, the reference to Rule 3017.1, because it is included in Rule 9013(a) which is carved out generally.

In subdivision (a)(5), the Committee also determined to delete the word "other" in line 18 and to insert the word "the" after the word "or" in line 19. The Committee voted 7 to 2 to retain subdivision (b)(3)(C), requiring the movant to provide a copy of any valuation report when valuation is "an" (rather than "at") issue.

Concerning subdivision (c), Mr. Sommer said there is an ambiguity surrounding the phrase "at least" when applied to the time limit that could permit a party to file a motion and wait to serve it. The Reporter asked whether the court can change time periods other than under Rule 9014, which permits such changes in a particular case only. **The Committee voted 7 to 4 in favor of allowing the court to circumvent the "at least" and allow a local rule to provide for a longer initial time period.** Judge Duplantier said this action would destroy uniformity, and **in a second vote, the Committee reversed and voted 8 to 3 against a local rule opt-out.**

In subdivision (c)(1)(F), the Committee determined to insert the word "on" after "lien" in line 60 and to delete the word "adversely" in line 62. In subdivision (c)(1)(G), the Committee inserted the words "to service" after "entitled" in line 64.

Concerning subdivision (h)(1)(C), a member questioned whether the shortened time period provided in the subcommittee's draft would be workable with the shortened answer time voted earlier. **The Committee voted 4 to 3 against shortening these periods and then voted to delete the subdivision entirely. Upon a motion to reconsider, subdivision (h)(1)(C) was restored with the phrase "30 days" in line 141 deleted and the brackets surrounding "10 days" deleted in line 143. The Committee voted to delete subdivision (h)(2),** which Judge Gettleman had pointed out as redundant of Federal Rule of Civil Procedure 37.

In subdivision (i)(1)(B), line 171, the Committee discussed how much notice the court should be required to give when it decides that the first hearing in a matter will be an evidentiary hearing. Five members favored three days, but Mr. Batson wanted a longer time. Mr. Klee said a longer time would not work when the response does not come in until five days before the originally scheduled hearing date. Both Rule 9006 and subdivision (n) of the (Exhibit B) draft allow for alteration of time periods, he said, and the Reporter suggested that line 171 could simply require "reasonable" notice. **The Committee voted 7 to 3 in favor of requiring reasonable notice. In subdivision (i)(2), line 181, the Committee changed "unrepresented" to "not represented."**

In subdivision (l), line 211, the Committee agreed to delete the brackets around "7009" in the list of adversary proceeding rules that will apply. In lines 216-17, and in subdivision (n), line 229, the Committee determined to delete the phrase "within the time necessary." In subdivision (n), line 225, the Committee also determined to delete the phrase "with or without prior notice."

The Chairman requested that, for the publication of the draft for comment, the Reporter and Mr. Klee write an introduction to the litigation package that would tell members of the bench and bar what to focus on, such as the issues just debated by the Committee. Ms. Wiggins suggested as a model the "Call for Comment" that accompanied the preliminary draft of Rule 11 of the Federal Rules of Civil Procedure. Judge Robreno asked if any report or other document accompanying the package would contain a disclaimer that it is not approved by the Committee. The Reporter said he envisioned a report to the Standing Committee that the Committee would ask to have published with the preliminary draft. **At the Chairman's request, the Reporter and Mr. Klee agreed to have the report ready in time to include in the agenda book for the March 1998 meeting.**

A motion to adopt the subcommittee's draft of Rule 9014 as amended at the meeting carried by a vote of 8 to 3.

Litigation "Package" — Conforming Amendments to Other Rules

The Committee then turned to Exhibit C, which contains proposed conforming amendments to other rules that would be required if proposed Rules 9013 and 9014 become national rules. The Reporter noted that he had included style changes also, and that, if approved by the Committee, these amendments still would have to be reviewed by the style subcommittees of the Standing Committee and the Advisory Committee.

Rule 1014. **The Committee approved the Reporter's draft with one change, inserting in line 17, before the word "transfer," the phrase beginning on line 18 "if the court determines . . . ."**

Rule 1017. The Reporter noted that Rule 1017(c), which is shown as deleted because it would conflict with proposed Rule 9014, had been published for comment. He said the subdivision would simply remain in effect if Rule 9014 does not become effective. **The Committee changed the word "motion" to "application" in subdivision (f)(2), line 40, and approved the Reporter's draft.**

Rule 2001. **The Committee approved the Reporter's draft.**

Rule 2004(a). (Not in materials.) **The Committee determined to change the word**

"motion" to "application."

Rule 2007. The Reporter noted that the changes shown are all stylistic except for the addition of a provision that the matter is governed by Rule 9014. **The Committee approved the Reporter's draft.**

Rule 2016. The Reporter said he had restyled the rule, making substantive changes only to change "application" to "motion" and provide that Rule 9014 governs. **The Committee changed the word "request" on line 28 to "motion," changed "applies" to "apply" in line 56, and changed "application" to "motion" in line 57. The Committee approved the Reporter's draft with the changes noted.**

Rule 3001. It was noted that the response time in the current rule would be shortened as a consequence of bring the matter under Rule 9014. **The Committee approved the Reporter's draft.**

Rule 3006. The Committee discussed whether the rule should say "claim" or " proof of claim," and Judge Cordova noted that usage is inconsistent throughout the rules. **The Committee approved the Reporter's draft.**

Rule 3007. The Reporter noted that conforming the procedure for objecting to a claim would shorten the response time from 30 days to 15 and change the procedures generally, by requiring that the matter be set for hearing and a status conference be held. Judge Kressel said he thinks the existing rule contemplates that some basis for the objection will be stated in the papers filed. Several members thought the response time should be longer, wanted to retain the 30 days, and change the response time in Rule 9014 to 30 days also (subdivision (c)(1), line 43). Mr. Patchan said the Rule 9014 procedures would burden the pro se party and generate unnecessary paper to get the matter before the court. **The Committee approved the Reporter's draft with the following changes. In line 2, insert "except that the motion shall be served and filed at least 30 days before the hearing" after "Rule 9014"; in line 6, change "If" to "But", and delete the word "is" before the word "joined"; and, line 7, delete the comma and substitute "is" for "it becomes."**

Rule 3012. **The Committee deleted the phrase "of a party in interest" and approved the Reporter's draft.**

Rule 3013. **The Committee approved the Reporter's draft.**

Rule 3015. Subdivision (f), objection to confirmation, the Reporter said, would be a stand alone procedure, and the changes from the current rule would be to provide for service as in Rule 9014 and to make discovery available. A member raised the issue of whether there

should be a deadline for filing an objection, and **the Committee decided to delete the word "timely" from line 14. The Committee also struck the text of subdivision (g), subject to review by the Reporter. Subdivision (g) is to remain, but simply say that modification of a plan after confirmation is governed by Rule 9014. The Committee approved the Reporter's draft with the changes specified.**

Rule 3020(b)(1). After discussion, **the Committee decided to change the first sentence back to the passive voice, and approved the Reporter's draft, with that change.**

Rule 4001. Professor Resnick explained that most of the changes he was recommending are to eliminate redundancies, state that Rule 9014 applies, or make style improvements. **The Committee approved the Reporter's draft.**

Rule 6004. The consensus was that the redrafting effort had become overzealous with respect to the rearranging of the paragraphs. **The Committee directed that the paragraphs be restored to the order in which they appear in the existing rule and that lines 11 - 13 and 38 - 42 be restored to the passive voice. The Committee also changed the reference to "(d)" in line 11 to "(e)" and decided to move the clause on lines 35 - 38 beginning "to all creditors" to form an insert at line 33, after the word "give."** When redrafted, Judge Duplantier said, the **rule should make it clear that a sale may be accomplished by notice, but, if an objection is filed, Rule 9014 applies and the objection is treated as a response. The objector should be required to obtain a hearing date if none has been set in the notice. In addition, the Committee decided to delete the bracketed language at lines 49 - 51. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 6006. **The Committee approved the Reporter's draft.**

Rule 6007. **The Committee restored the phrase "or debtor in possession" on lines 3 and 4,** which had been marked for deletion by the Reporter, **and inserted in line 15 after the word "is" the phrase "treated as a motion." The Committee also directed that Rule 6007(b) also be amended to provide that Rule 9014 applies. The Committee approved the Reporter's draft, subject to the changes stated.**

Rule 9006. **The Committee approved the abrogation of subdivision (d),** and noted a typographical error in identifying the subdivision in the Committee Note.

Rule 9017. **The Committee approved the Reporter's draft.**

Rule 9021. **The Committee approved the Reporter's draft.**

Rule 9034. **The Committee deleted lines 27 and 28 and approved the Reporter's**

draft.

Rule 1006. Turning to Exhibit D, the Reporter explained that Rule 1006 would be a stand alone rule. The change to the existing rule is to substitute the word "request" for the word "application," as that is now a specific procedure governed by Rule 9013. The Reporter said he also had made substantive clarifications about pre- and post-petition payments to bankruptcy petition preparers. **The Committee approved the Reporter's draft.**

Rule 1007. (Exhibit E.) The Reporter noted that this also is a stand alone rule which the Committee had previously approved and is back for review after redrafting. **After changing the word "is" in line 16 to "are," the Committee approved the Reporter's draft.**

The Reporter said these 23 rules will be submitted to the two style subcommittees and then reviewed by the Committee at the March 1998 meeting.

Rule 2002(a)(6)

After discussion of the Reporter's draft of amendments to raise from $500 to $1000 the amount of a fee request that would trigger notice to all creditors, **the Committee inserted in line 9 of the draft the phrase "of an entity," deleted line 11, and substituted the word "request" for the word "hearing" in line 12. The Committee approved the Reporter's draft with the changes noted.**

Rule 2002(g)

This rule requires the clerk to use the address provided by a creditor in a filed proof of claim, if that address differs from the one listed on the schedules filed by the debtor. The rule allows the clerk to ignore any new address on a proof of claim, however, if a notice of no dividend has been given. The Reporter noted that Bankruptcy Judge Paul Mannes, the former chairman of the Committee, had suggested that, in a case in which assets later appear and a further notice of possible distribution must be sent, any address provided by a creditor on a proof of claim should be used. **A motion to adopt the Reporter's draft, except the portion that requires the use of an address provided in a proof of claim, failed by a vote of 3 to 9. A motion to adopt the Reporter's draft carried by a vote of 9 to 0.** A member requested that the Style Subcommittee give particular attention to this amendment, especially to clarifying the purpose and use of the word "subsequent" in line 10.

Alternative Dispute Resolution Subcommittee

Professor Tabb stated that the subcommittee is in a watching mode. The FJC has completed a survey aimed at discovering whether problems exist, he said. A second survey to

explore any problems found in the initial one remains a possibility, he said. Mr. Niemic reported on the preliminary results of the survey. He said a very small number of problems had been reported, leaving the Committee to consider whether any problems in the areas of mediator confidentiality and ex parte communication between the mediator and the judge should be tolerated. Mr. Klee indicated he would be interested in whether the results of the survey differed depending on whether the mediator was paid or was a volunteer. He said he also is interested in how frequently the ex parte contact between the judge and the mediator was with the consent of the parties.

Field Trip to Courtroom 21

The Committee visited Courtroom 21, which is located at the Marshall-Wythe School of Law of the College of William and Mary. Professor Frederic I. Lederer of the law school faculty demonstrated some of the special features of the courtroom, which include video-conference participation by judges at remote locations, video presentation of evidence, and real time court reporting. Ms. Morris used the facilities to explain and demonstrate for the Committee the electronic filing system now being used in the Manhattan office of the bankruptcy court for the Southern District of New York. The Committee could view actual documents filed in cases, and Ms. Morris demonstrated the procedures an attorney would use to file a new document in one of the cases on the system. A private vendor of an electronic filing system also made a presentation.

Miscellaneous Matters

The Committee discussed dates and locations for the autumn 1998 meeting. Members appeared to favor New York, Boston, New England, Sun Valley, or the north rim of the Grand Canyon as possible locations. Staff will explore availability of space at these locations for October 8 - 9, 1998.

All other matters on the Committee's agenda were put over to the March 1998 meeting.

Respectfully submitted,

Patricia S. Channon

Items 3 through 5 will be oral reports.

6

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: PRELIMINARY DRAFT OF PROPOSED AMENDMENTS PUBLISHED IN 1997

DATE: FEBRUARY 22, 1998

In August 1997, a preliminary draft of proposed amendments to the Bankruptcy Rules was published for comment by the bench and bar. The published draft, which is enclosed as Exhibit A, includes proposed amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006 and 9014.

The public comment period ended on February 15, 1998. The Advisory Committee received 14 letters commenting on the proposed amendments. A public hearing scheduled for January 30, 1998, was canceled for lack of witnesses.

For your convenience, I have summarized the public comments and have divided the summaries into several categories. These summaries are in Exhibit B. The summaries are only brief descriptions and are not intended to serve as substitutes for the letters. Copies of the letters, appearing in the order in which they were received and identified by number, are enclosed as Exhibit C.

Need for a Conforming Amendment to Rule 9006(b)(2)

Rule 1017(b)(3) provides that notice of an order dismissing a case for failure to pay the filing fee must be sent to all creditors within 30 days after dismissal. The preliminary draft of proposed amendments to the Bankruptcy Rules published in August

would delete Rule 1017(b)(3) as unnecessary (Rule 2002(f) requires the clerk to send creditors notice of dismissal of a case regardless of the grounds for dismissal).

In again reviewing the proposed amendments, I discovered that a technical amendment must be made to Rule 9006(b)(2) to conform to the deletion of Rule 1017(b)(3). I suggest that the following amendment to Rule 9006(b) be adopted:

> (2) *Enlargement Not Permitted.* The court may not enlarge the time for taking action under Rules 1007(d), ~~1017(b)(3),~~ 2003(a) and (d), 7052, 9023, and 9024.

Committee Note

Rule 9006(b)(2) is amended to conform to the abrogation of Rule 1017(b)(3).

This change is technical and would not require publication for comment. I recommend that this amendment be added to the package of proposed amendments.

At the March meeting in Little Rock, after considering the public comments and my suggested amendment to Rule 9006(b)(2), the Advisory Committee will be asked to vote on the proposed amendments and, if approved, they will be presented to the Standing Committee at its June meeting.

EXHIBIT A

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure

Request for Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 15, 1998

AMENDMENTS ARE BEING PROPOSED TO:

Bankruptcy Rules	1017,1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014
Criminal Rules	6, 11, 24, 30, 54, and new Rule 32.2

PUBLIC HEARINGS WILL BE HELD ON THE AMENDMENTS TO:

- Bankruptcy Rules in Washington, D.C. on January 30, 1998; and
- Criminal Rules in New Orleans, Louisiana on December 12, 1997

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

August 1997

Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy and Criminal Procedure

Request for Comment

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Address all communications on rules to
Secretary of the Committee of Rules of Practice and Procedure
Administrative Office of U.S. Courts
Washington, D.C. 20544

August 1997

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

August 1997

TO THE BENCH, BAR, AND PUBLIC:

The Judicial Conference Advisory Committees on the Bankruptcy and Criminal Rules have proposed amendments to the federal rules and requested that the proposals be circulated to the bench, bar, and public for comment. The advisory committee notes explain the proposals.

We request that all suggestions and comments, whether favorable, adverse, or otherwise, be placed in the hands of the Secretary as soon as convenient and, in any event, **no later than February 15, 1998.** All communications on rules should be addressed to the Secretary of the Committee on Rules of Practice and Procedure, Administrative Office of the United States Courts, Washington, D.C. 20544.

To provide persons and organizations wishing an opportunity to comment orally on the proposed amendments, a hearing is scheduled to be held on the amendments to the Bankruptcy Rules in Washington, D.C. on January 30, 1998; and to the Criminal Rules in New Orleans, on December 12, 1997.

Those wishing to testify should contact the Secretary of the Committee at the above address **at least 30 days before the hearing.** The advisory committees will review all timely received comments and will take a fresh look at the proposals in light of the comments. If an advisory committee approves a proposal, it and any revisions as well as a summary of all comments received from the public will then be considered by the Standing Committee. All comments are made part of the official record and are available for public inspection.

The Judicial Conference Standing Committee on Rules of Practice and Procedure **has not approved these proposals**, except to authorize their publication for comment. The proposed amendments have not been submitted to or considered by the Judicial Conference of the United States or the Supreme Court.

Alicemarie H. Stotler
Chair

Peter G. McCabe
Secretary

TABLE OF CONTENTS

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS

TO THE

FEDERAL RULES OF BANKRUPTCY PROCEDURE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

TO: Honorable Alicemarie H. Stotler, Chair
Standing Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 12, 1997

RE: Report of the Advisory Committee on Bankruptcy Rules

Introduction

The Advisory Committee on Bankruptcy Rules met on March 13-14, 1997, in Charleston, South Carolina.

* * * * *

I. Action Items

* * * * *

B. Preliminary Draft of Proposed Amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 Submitted for Approval to Publish.

1. *Synopsis of Proposed Amendments:*

(a) Rule 1017 is amended to specify the parties entitled to notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. Currently, all creditors are entitled to notice of a hearing on the motion if it is a chapter 7 case. To avoid the expense of sending notice to all creditors, the proposed amendments provide that the debtor, the trustee, and any other entities specified by the court, are the only parties entitled to notice. The rule is amended further to provide that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 is governed by Rule 9014. Other amendments are stylistic or designed to

delete redundant provisions that are covered by other rules.

(b) Rule 1019 is amended (1) to clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires; (2) to provide that the holder of a postpetition, preconversion administrative expense claim is required to file a request for payment under § 503(a) of the Code, rather than a proof of claim; and (3) to conform the rule to the 1994 amendment to § 502(b)(9) and to the 1996 amendment to Rule 3002(c)(1) regarding the 180-day period for filing a claim of a governmental unit. Other amendments are stylistic.

(c) Rule 2002(a)(4) is amended to delete the requirement that notice of a hearing on dismissal of a chapter 7 case based on the debtor's failure to file required lists, schedules, and statements, must be sent to all creditors. This amendment conforms to the proposed amendments to Rule 1017 which requires that the notice be sent only to certain parties. This subdivision is amended further to delete the requirement that notice of a hearing on dismissal of the case based on the debtor's failure to pay the filing fee must be sent to all creditors. Rule 2002(f) is amended to provided for notice of the suspension of proceedings under § 305 of the Code.

(d) Rule 2003(d) is amended to require the United States trustee to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. Also, the amended gives a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute. These amendments and other stylistic revisions are designed to conform to proposed amendments to Rule 2007.1(b)(3) on the election of a trustee in a chapter 11 case.

(e) Rule 3020(e) is added to automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

(f) Rule 3021 is amended to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

(g) Rule 4001(a)(3) is added to automatically stay for ten days an order granting relief from an automatic

stay so that parties will have sufficient time to request a stay pending appeal.

(h) Rule 4004(a) is amended to clarify that the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for filing a complaint objecting to discharge must be filed before the time has expired. Other amendments are stylistic.

(i) Rule 4007 is amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. This rule is amended further to clarify that a motion for an extension of time for filing a complaint must be filed before the time has expired. Other amendments are stylistic.

(j) Rule 6004(g) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

(k) Rule 6006(d) is added to automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) so that parties will have sufficient time to request a stay pending appeal.

(l) Rule 7001 is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan. Other amendments are stylistic.

(m) Rule 7004(e) is amended to provide that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

(n) Rule 7062 is amended to delete the additional exceptions to Rule 62(a) F.R. Civ. P. The deletion of these exceptions—which are orders issued in contested matters rather than adversary proceedings—is consistent with the amendment to Rule 9014 that renders Rule 7062 inapplicable to contested matters. For proposed amendments that provide a new automatic ten-day stay of certain orders, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

(o) Rule 9006(c)(2) is amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case to chapter 7.

(p) Rule 9014 is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter. Rule 7062, which provides that Rule 62 F.R.Civ.P. is applicable in adversary proceedings, is not appropriate for most orders granting or denying motions governed by Rule 9014. For proposed amendments that provide a new automatic ten-day stay of certain orders to that parties will have sufficient time to obtain a stay pending appeal, see the amendments to Rules 3020, 3021, 4001, 6004, and 6006.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1017. Dismissal or Conversion of Case; Suspension

(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner, ~~or~~ for want of prosecution or other cause, or by consent of the parties, before ~~prior to~~ a hearing on notice as provided in Rule 2002. For ~~such~~ the purpose of the notice, the debtor shall file a list of ~~all~~ creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the debtor or another entity to prepare and file it ~~the preparing and filing by the~~

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

~~debtor or other entity~~.

(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.

(1) ~~For failure to pay any installment of the filing fee,~~ If any installment of the filing fee has not been paid, the court may, after a hearing on notice to the debtor and the trustee, dismiss the case.

(2) If the case is dismissed or ~~the case~~ closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

~~(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner~~

~~provided in Rule 2002.~~

(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.

~~(c)~~ (d) SUSPENSION. The court shall not dismiss a case or suspend proceedings under § 305 before ~~A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to~~ a hearing on notice as provided in Rule 2002(a).

~~(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a~~

~~case to another chapter, except pursuant to §§706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.~~

(e) DISMISSAL OF INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. An individual debtor's case may be dismissed for substantial abuse ~~pursuant to~~ under § 707(b) only on motion by the

United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) A motion by the United States trustee shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held~~ ~~pursuant to~~ under § 341(a), unless, before such time has expired, the court for cause extends the time for filing the motion. The motion shall ~~advise the debtor of~~ set forth all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is on the court's own motion, notice ~~thereof~~ of the hearing shall be served on the debtor ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~pursuant~~

to under § 341(a). The notice shall ~~advise the debtor~~ of set forth all matters to be considered by the court at the hearing.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) A proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b), is governed by Rule 9014.

(2) Conversion or dismissal under §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§1208(a) or 1307(a). The filing date of the notice shall be deemed the date

of the conversion order for the purposes of applying §348(c) and Rule 1019. The clerk shall forthwith transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently require notice to all creditors of a hearing on dismissal of a voluntary chapter 7 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment, and the amendment to Rule 2002, will have the effect of avoiding the expense of sending notices of the motion to all creditors in a chapter 7 case.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 under § 707(b) is governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Rule 1019. Conversion of a Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to a Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) FILING OF LISTS, INVENTORIES, SCHEDULES, STATEMENTS.

* * * * *

(B) If a statement of intention is required, it ~~The statement of intention, if required,~~ shall be filed within 30 days ~~following~~ after entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. The court may grant an ~~An~~ extension of time ~~may be granted~~ for cause only on written motion

filed, or oral request made during a hearing, ~~motion made~~ before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

(6) ~~FILING OF~~ POSTPETITION CLAIMS; PRECONVERSION ADMINISTRATIVE EXPENSES; NOTICE. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) of the Code if it is filed before conversion or within 90 days after the first date set for the meeting of creditors under § 341 called after conversion of the case. If the request is filed by a governmental unit, it is timely if it is filed before conversion or within 180 days after the date of

the conversion. A claim of a kind specified in § 348(d) may be filed in accordance with Rules 3001(a)-(d) and 3002. ~~On~~ Upon the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give notice to those entities listed on the schedule of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d), ~~notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix~~

~~the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code.~~

* * * * *

COMMITTEE NOTE

Paragraph (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Subdivision (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within the specified time, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The 180-day period applicable to governmental units is intended to conform to § 502(b)(9) of the Code and Rule 3002(c)(1). The time for filing a request for payment of an administrative expense may be enlarged as provided in Rule 9006(b), but may not be reduced. *See* Rule 9006(c)(2). If an administrative expense claimant fails to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request

for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase "including the United States, any state, or any subdivision thereof" is deleted as unnecessary. Other amendments to this rule are stylistic.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee**

(a) TWENTY–DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of:

(1) the meeting of creditors under § 341 or § 1104(b) of the Code;

** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

* * * * *

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, or ~~and~~ a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is under § 707(a)(3) or § 707(b) ~~of the Code~~ or is on dismissal of the case for failure to pay the filing fee~~, or the conversion of the case to another chapter~~;

* * * * *

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of:

* * * * *

(2) the dismissal or the conversion of the case to another chapter, or the suspension of proceedings under § 305;

* * * * *

COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b), which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of the suspension of proceedings under § 305.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN A CHAPTER 7 CASE ~~TO THE COURT~~.

(1) *Report of Undisputed Election.* In a chapter 7 case, if the election of a trustee or a member of a creditors' committee is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.

(2) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. No later than the date on which the report is filed, the United States

trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. ~~The presiding officer shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed no later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to the style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

* * * * *

(e) STAY OF CONFIRMATION ORDER. An order confirming a plan is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. Unless the court orders otherwise, any transfer of assets, issuance of securities, and cash distributions provided for in the plan may not be made before the expiration of the 10-day period. The stay of the confirmation order under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period less than 10 days.

Rule 3021. Distribution Under Plan***

Except as provided in Rule 3020(e), ~~After confirmation of a plan~~ after a plan is confirmed, distribution shall be made to creditors whose claims have been allowed, to interest holders whose interests have not been disallowed, and to indenture trustees who have filed

*** Includes amendments prescribed by the Supreme Court on April 11, 1997, which take effect on December 1, 1997, unless Congress acts otherwise.

claims ~~pursuant to~~ under Rule 3003(c)(5) that have been allowed. For ~~the purpose~~ purposes of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution, unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3020 regarding the ten-day stay of an order confirming a plan in a chapter 9 or chapter 11 case. The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

* * * * *

(3) STAY OF ORDER. An order granting a motion for relief from an automatic stay made in accordance

with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

* * * * *

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor, and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay. Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period less than 10 days.

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT

OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). In a chapter 11 reorganization case, ~~such~~ the complaint shall be filed ~~not~~ no later than the first date set for the hearing on confirmation. ~~Not less than 25 days~~ At least 25 days' notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k), and to the trustee and the trustee's attorney.

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may ~~extend~~ for cause extend the time to file ~~for filing~~ a complaint objecting to discharge. The motion shall be ~~made~~ filed before ~~such~~ the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Other amendments to this rule are stylistic.

Rule 4007. Determination of Dischargeability of a Debt

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(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN A CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, OR ~~AND~~ CHAPTER 12 FAMILY

FARMER'S DEBT ADJUSTMENT ~~CASES~~ CASE; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of ~~any~~ a debt ~~pursuant to~~ under § 523(c) ~~of the Code~~ shall be filed ~~not~~ no later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors ~~not~~ no less than 30 ~~days~~ days' notice of the time so fixed in the manner provided in Rule 2002. On motion of ~~any~~ a party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing ~~a time for the filing of~~ the time to

file a complaint to determine the dischargeability of any debt pursuant to under § 523(c) and shall give not no less than 30 days days' notice of the time fixed to all creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made filed before the time has expired.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. *See*, e.g., *In re Coggin*, 30 F.3d 1443 (11th Cir.

1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

The other amendments to this rule are stylistic.

Rule 6004. Use, Sale, or Lease of Property

* * * * *

(g) STAY OF ORDER AUTHORIZING USE, SALE, OR LEASE OF PROPERTY. An order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363(b) of the Code before the order is implemented. It does not affect the time for filing a notice of appeal in accordance with Rule 8002.

Rule 6004(g) does not apply to orders regarding the use of cash collateral and does not affect the trustee's right to use, sell, or lease property without a court order to the extent permitted under § 363 of the Code.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period less than 10 days.

Rule 6006. Assumption, Rejection ~~and~~ or Assignment of an Executory ~~Contracts and~~ Contract or Unexpired ~~Leases~~ Lease

* * * * *

(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period less than 10 days.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. ~~It is a proceeding~~ Any of the following is an adversary proceeding:

(1) a proceeding to recover money or property, ~~except~~ other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

(3) a proceeding to obtain approval ~~pursuant to~~ under § 363(h) for the sale of both the interest of the estate and of a co-owner in property~~;~~;

(4) a proceeding to object to or revoke a discharge~~;~~;

(5) a proceeding to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan~~;~~;

(6) a proceeding to determine the dischargeability of a debt~~;~~;

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for the relief;

(8) a proceeding to subordinate any allowed claim or interest, except when a chapter 9,

chapter 11, chapter 12, or chapter 13 plan provides for subordination ~~is provided in a chapter 9, 11, 12, or 13 plan;~~;

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing;; or

(10) a proceeding to determine a claim or cause of action removed ~~pursuant to~~ under 28 U.S.C. § 1452.

COMMITTEE NOTE

This rule is amended to recognize that an adversary proceeding is not necessary to obtain injunctive or other equitable relief that is provided for in a plan under circumstances in which substantive law permits the relief. Other amendments are stylistic.

Rule 7004. Process, Service of Summons, Complaint

* * * * *

(e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED STATES. ~~If service is made pursuant to Rule 4(c)-(j)~~ Service made under Rule 4(e), (g),

(h)(1), (i), or (j)(2) F.R.Civ.P. ~~it~~ shall be ~~made~~ by delivery of the summons and complaint within 10 days after the summons is issued ~~following issuance of the summons~~. If service is ~~made~~ by any authorized form of mail, the summons and complaint shall be deposited in the mail within 10 days after the summons is issued ~~following issuance of the summons~~. If a summons is not timely delivered or mailed, another summons shall be issued and served. This subdivision does not apply to service in a foreign country.

* * * * *

COMMITTEE NOTE

Subdivision (e) is amended so that the ten-day time limit for service of a summons does not apply if the summons is served in a foreign country.

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by~~

~~§ 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court orders otherwise. *See also* the amendments to Rules 3020, 3021, 4001, 6004, and 6006 that delay the implementation of certain types of orders for a period of ten days unless the court otherwise directs.

Rule 9006. Time

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(c) REDUCTION.

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(2) REDUCTION NOT PERMITTED. The court may not reduce the time for taking action ~~pursuant to~~ under Rules 1019(6), 2002(a)(7), 2003(a), 3002(c), 3014, 3015, 4001(b)(2), (c)(2), 4003(a), 4004(a), 4007(c), 8002, and 9033(b).

* * * * *

COMMITTEE NOTE

Subdivision (c)(2) is amended to add a reference to Rule 1019(6), which fixes the time for filing a request for payment of an administrative expense incurred after the commencement of the case but before conversion of the case to chapter 7.

Rule 9014. Contested Matters

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the

manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062,~~ 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, amendments to Rules 3020, 4001, 6004, and 6006 automatically stay certain types of orders for a period of ten days, unless the court orders otherwise.

EXHIBIT B

SUMMARY OF PUBLIC COMMENTS ON THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

The Advisory Committee received a total of 14 letters from commentators. The following summary contains brief descriptions of the comments received. Copies of the letters are included as Exhibit C.

(1) General Comment Applicable to All Proposed Amendments.

The Committee received a letter from **Jack E. Horsley, Esq.** (Letter #003) commenting with general approval of the entire package ("I look with favor upon everything in the pamphlet....").

(2) Comments Relating to the Rule 7062 Package.

Seven of the 16 Rules that would be changed by the proposed amendments relate to the application of a ten-day automatic stay of certain orders. Under the current Rules, Rule 7062 and Rule 9014 make applicable to contested matters the automatic 10-day stay of judgments under Civil Rule 62. The Advisory Committee voted to delete the reference to Rule 7062 found in Rule 9014, delete the exceptions to the 10-day stay listed in Rule 7062, and amend other rules to impose a new automatic 10-day stay for (1) an order granting relief from the automatic stay (Rule 4001); (2) an order authorizing the use, sale, or lease of property (Rule 6004); (3) an order authorizing the assignment of an executory contract or lease (Rule 6006); and (4) an order confirming a chapter 9 or chapter 11 plan (Rule 3021).

Eleven of the 14 letters received commented specifically on all or part of this "Rule 7062 package" of amendments:

(a) **George C. Webster II, Esq.** (Letter #009) wrote in support of the Rule 7062 package. His 6-page letter explains the uncertainty that exists under the current Rules regarding the application of Civil Rule 62(a). He also discusses problems caused by uncertainty as to when certain orders will become moot and the "false emergencies" that result. The proposed amendments that will add 10-day stays to Rules 3020, 4001, 6004, and 6006 will have the effect of "leveling the playing field by reducing the prospect of mooting by ambush..."

(b) **William E. Shmidheiser, III, Esq.** (Letter #004) wrote that the addition of the 10-day stay to Rules 3020, 4001, 6004, or 6006 would represent a fundamental shift in the way business is conducted in bankruptcy cases. These amendments would slow down even more the already glacial pace of business, probably killing many otherwise barely-viable deals. "The net result will be to make doing business with bankruptcy estates even more less attractive than it already is. A bad idea."

(c) **Hon. Poly S. Higdon, Chief Bankruptcy Judge (D. Ore.)** (Letter #006) wrote in opposition to the addition of the 10-day stay in Rules 3020, 4001(a)(3), 6004, or 6006. Judge Higdon is concerned that the areas which will have the 10-day stay "are exactly those areas which often are quite time sensitive... Wouldn't it be logical, given that fact, that, as under the present rule, the 10 day stay specifically <u>not</u> be applicable to such time sensitive areas." Judge Higdon recognizes that the court could order that the 10-day stay not apply, but notes that the court or the parties may forget to put that in the order (the court and the parties "being human and often harried, will likely forget that the order must specifically except application of the stay"). Acknowledging that Rule 7062 is ambiguous with respect to its application to orders in contested matters, Judge Higdon suggests that this problem can be cured simply by amending Rule 7062 and 9014 to delete the application of Rule 7062 in contested matters.

(d) **Hon. David N. Naugle, Bankruptcy Judge (C.D. Cal.)** (Letter #002) wrote that the proposed 10-day stay of orders granting relief from the automatic stay in foreclosure and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay. The letter does not address the other 10-day stay provisions in the proposed amendments to Rules 3021, 6004, or 6006.

(e) **Hon. Leslie Tchaikovsky, Bankruptcy Judge (N.D. Cal.)** (Letter #005) wrote that only one of the proposed amendments - - Rule 4001(a)(3) -- is "a very bad idea ... It would prejudice many to benefit only a few." In most cases, "each day of delay represents a quantifiable dollar loss to the creditor." Debtors do not often appeal such orders; "more often, they file a new bankruptcy case, thereby invoking a new automatic stay". When a debtor wishes to appeal, he or she may request a stay pending appeal.

(f) **Wade H. Logan, Esq.** (Letter #008) opposes the addition of the 10-day stay in Rules 3020, 4001, 6004, and 6006 to permit an opportunity to appeal. "This issue has not proven a problem in our district... [T]his requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified."

(g) **Arthur Rolston, Esq.** (Letter #010) suggests that the new 10-day stays that will be added to Rules 4001(a), 6004, and 6006 should apply only to matters that are actually contested, but not to uncontested matters. If the matter is uncontested, the order should be effective immediately unless the court orders otherwise. "There appears little reason why secured lenders, proposed assignees of leases and other parties impacted by such orders should be subjected to an automatic delay when the proceedings before the Bankruptcy Court issuing the order were unopposed."

(h) **Eugene E. Derryberry, Esq.** (Letter #007) opposes the proposed amendments to Rule 4001(a)(3). As a lawyer for creditors (in most cases secured creditors), he claims that creditors file relief from stay motions only when the debtor is in serious default, and usually a consent order is entered without a hearing. In many cases in which an agreed order cannot be obtained, "the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments...." The proposed amendment "grants an unreasonable delay to debtors who do not need or deserve such protection." He lists factors that the Committee should consider: (1) competent counsel for the debtor could obtain a stay pending appeal when appropriate; (2) the proposed rule is "in effect *ex parte*" with none of the showings usually made in considering stays; (3) the proposed rule "unfairly tilts the playing field against secured creditors" in favor of "bad faith filers;" (4) the imposition of sanctions for frivolous appeals "is an illusory deterrent seldom obtainable;" and (5) "the stay of a consent or agreed order is manifestly inappropriate."

(i) **Prof. Anthony Michael Sabino** (Letter #011) opposes the proposed amendments to Rules 4001(a)(3), 6004(g), and 6006(d). Pointing out that most relief from stay motions are granted, he comments that a mandatory stay would "work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions." He has the same general comments regarding orders under Rule 6004 and 6006. He comments that these new 10-day stays will be a burden overly harmful to the bankruptcy system. He does not address the 10-day stay in the proposed amendments to Rule 3020.

(j) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that the proposed amendments to Rule 9014 and 7062 (rendering Rule 7062 inapplicable to most contested matters) "are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay" and "many of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period..." With respect to the new 10-day stays added to certain rules, these matters "involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal." Finally, "since the court would have discretion to impose or modify the stay, "parties should not be prejudiced under the amended Rules."

(k) **New Jersey Bar Association, Bankruptcy Law Section** (Letter #012) suggests that the new 10-day stay in Rules 4001(a)(3) (automatic stay), Rule 3020(e) (confirmation order), and Rule 6004(g) (use, sale, or lease of property) be modified to 3 days. Although they agree with the concept embodied in these amendments, severe economic or other prejudice could result from a 10-day stay of these types of orders. "In our experience, district court judges are routinely able to consider emergent applications for a stay from the entry of the order." The competing interests addressed in these proposed amendments can best be served by reducing 10 days to 3 days, which will be "sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced."

(3) Proposed Rule 1017(c) and Rule 2002(a)(4).

The proposed amendments to Rule 1017 and Rule 2002(a)(4) would eliminate the

need to send notice to all creditors when the U.S. trustee moves to dismiss a case because of the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. The motion would have to be served only on the debtor, the trustee, and on any other entities as the court directs. In addition, the provision that requires the clerk to give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal would be deleted and the clerk's duty to give notice of the dismissal would be governed by the same general provision in Rule 2002(f) that applies to dismissal orders based on other grounds. The Committee received four letters that comment on these proposed amendments:

(a) **Prof. Michael Anthony Sabino** (Letter #011) opposes the proposed new Rule 1017(c) and the amendment to Rule 2002(a)(4). He believes that it is important for creditors to receive notice of the motion to dismiss for failure to file lists, schedules or statements. He claims that creditors can give the court vital information as to the debtor's true intentions, the debtor's good or bad faith, and the reasons why the debtor failed to file the required documents. He claims that creditors "usually possess knowledge superior to that of the case trustee or the U.S. trustee" and the proposed amendment would "harm the system by foreclosing the vital contribution of knowledgeable creditors."

(b) **New Jersey Bar Association, Bankruptcy Law Section** (Letter# 012) is not in favor of eliminating notice to all creditors of dismissal of a case for failure to pay the filing fee [Reporter's note: under Rule 2002(f), creditors would receive notice of the dismissal], and notice of a hearing on dismissal for failure to file schedules, etc. Creditors and their lawyers often spend time preparing applications for various types of relief, such as relief from the stay, and should receive prompt notice of dismissal or a hearing on dismissal so that they do not waste efforts on matters that will become moot. Because there are few creditors in most chapter 7 cases, the cost of providing notice is "relatively insignificant."

(c) **Wade H. Logan, III, Esq.** (Letter # 008), commenting as a member of

the American College of Trial Lawyers, is in favor of "the greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss" for failing to file the list of creditors, schedules, or statement of financial affairs. But he suggests that notice also be given to any party that files a notice of appearance in the case pursuant to Rules 2002 and 9010.

(d) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that the amendment that eliminates the need to give all creditors notice of a motion to dismiss for failure to file schedules is appropriate. "It is costly and unnecessary to give all creditors notice of a hearing on dismissal of a case based on the failure to file a list of creditors, schedules and statement of financial affairs or substantial abuse or failure to pay the filing fee." But the Litigation Committee disagrees with the deletion of Rule 1017(b)(3), which requires the clerk to give creditors notice of an order dismissing the case on this ground within 30 days after the dismissal. Rule 2002(f), which requires that notice of dismissal be sent to creditors regardless of the basis for dismissal, does not have a time limit. "Therefore, the 30 day requirement now contained in Rule 1017(b)(3) should be retained or an appropriate time period be added to Rule 2002(f)."

(4) Rules 4004 and 4007.

The proposed amendments to Rules 4004 and 4007 are intended to clarify that (1) the 60-day deadline for filing a complaint objecting to discharge or for determining dischargeability of a particular debt runs from the first date scheduled for the meeting of creditors, rather than the date when the meeting is actually held, and (2) that a motion for an extension of this deadline must be *filed* (rather than *made*) before the deadline expires. The Committee received two letters that comment on these amendments.

(a) **William E. Shmidheiser, III, Esq.** (Letter #004) opposes the proposed amendment providing that the 60-day deadline runs from the first date scheduled for the meeting of creditors. He urges the adoption of a rule that starts the 60-day period from the date on which the meeting is actually held. He commented that

creditors often use the meeting of creditors to weigh whether or not they want to file a complaint under Rule 4004 or 4007 "based in large part on the debtor's demeanor and responses to three or four questions" posed at the meeting. "Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor" at the meeting, persuading the creditor not to pursue the matter further. The proposed amendment might lead to more complaints for exception to discharge being filed. He commented that it is not unusual for the meeting to be continued because of the debtor's failure to appear due to illness, bad weather, car trouble, etc. "On the other hand, I am hard pressed to think of a good reason for a change in those Rules. I therefore urge that it remain as it is presently stated."

(b) **Wade H. Logan, III** (Letter #008) commented that amendments to require a motion for an extension of time to be *filed* before the time expires are "well reasoned," but that they present an excellent opportunity to set forth further guidance on the effect of the expiration of the time before the hearing on the extension motion. That is, what happens when a timely motion for an extension is filed before the deadline, but the court does not rule on the motion until after the deadline expires? He claims that there is a split of authority on this question. In some courts the motion is deemed moot after the time expires, in some courts a tolling period is assumed until the court rules on the motion, and in some courts the judge routinely enters a "bridge order" to cover the period between the expiration of the period and the hearing date. "Practice in this area should be made consistent among all jurisdictions." This comment also applies to the proposed amendments to Rule 1019(1)(b), which contains a similar provision requiring the filing of a motion for an extension of time to file a statement of intention in a converted case.

(c) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) wrote that these changes are appropriate and that they "address confusion under the current rules, especially where the initial meeting is not held on the scheduled date."

(5) Rule 1019(6).

The proposed amendments to Rule 1019(6) provide, among other things, that the holder of an administrative expense claim incurred before a case is converted to chapter 7

must file a request for payment under section 503(a) of the Code, rather than a proof of claim. The Committee received four letters commenting on Rule 1019(6):

(a) **James Gadsden, Esq.** (Letter #001) opposes the proposed amendment and suggests that the "present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses." He comments that requiring a claimant to file a request for payment places a substantial additional burden on the claimant. "The claimant must prepare a more elaborate pleading and must serve and file a motion and request a hearing on the request" and the motion must be made shortly after conversion when parties are unlikely to be able to determine the likelihood of a distribution with respect to preconversion administrative expense claims (which are subordinated to postconversion administrative expenses). Mr. Gadsden relates his experiences in representing a landlord that has had preconversion administrative expense claims for postpetition rent in cases involving tenants, but received little or no distribution because of subordination to chapter 7 administrative expenses.

(b) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) believes that this amendment is problematic for two reasons. First, holders of small administrative claims will not hire lawyers to file motions. Second, court dockets will be burdened by large numbers of motions seeking allowance of claims. Both of these comments assume that a motion under § 503(a) would be necessary; one member of the Committee does not construe this rule amendment as requiring claimants to file motions for allowance of administrative claims. They mention one actual converted case in which landlords on 500 leases would have been required to file motions to establish priority with respect to postpetition rent claims. The trustee in that case simply requested an order setting a bar date for the filing of chapter 11 administrative claims, "clearly a more efficient and cost effective procedure." Forcing claimants to file motions to establish priority is contrary to current practice, and is an "inefficient, burdensome and costly procedure upon both the Court and the creditors." The Litigation Committee agrees, however, with the proposed change to Rule 9006 so that the time period for filing postconversion administrative claims may not be extended.

(c) **Karen Cordry, Esq.** (Letter #013), writing on her own behalf and not on behalf of National Association of Attorneys General (to which she is Bankruptcy Counsel), offers the following comments: (1) the commentary should

alert practitioners that the deadline for filing preconversion administrative expense claims is new and did not exist before; (2) the amendment will require administrative expense claimants to file requests for payment even in no-asset cases - this will be confusing because prepetition claimants will be told they need not file anything, but administrative expense claimants will have to in order to protect their priority positions; (3) why is there a need to have a bar date for preconversion administrative expense claims separate from a bar date for other administrative expenses set at the end of the case (she suggests that the bar date be the same for both). "That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. In most cases, the most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances." Ms. Cordry also suggests that Rule 1019(5) be clarified. Finally, she notes that "the present rules are largely geared to dealing with prepetition claims, administrative expense claimants often fall through the cracks."

(d) **New Jersey Bar Association, Bankruptcy Law Section** (Letter #012) suggests that the proposed amendment to Rule 1019(6) be modified to provide that the 90-day deadline for filing administrative expense claims after conversion of the case shall apply only if the administrative expense claimant received prior notice of the date set for the meeting of creditors. In many cases the debtor does not update the list of creditors after conversion and it is possible that administrative claimants will not receive notice of the conversion and date set for the meeting of creditors. These claimants should not be bound by the 90-day deadline.

(6) Rule 2003(d) - Chapter 11 Trustee Elections.

Rule 2003(d) would be amended to change the deadline to file a motion to resolve a disputed chapter 11 trustee election. The deadline will be 10 days after the time when the U.S. trustee files a report of the disputed election, rather than 10 days from the time of the creditors' meeting. **The Litigation Committee, Association of the Bar of the District of Columbia** (Letter #014) notes that the deadline in the present rule is unrealistic and that "the proposed changes provide a more functional procedure to resolve

disputed elections."

(7) Rule 7001(7).

Rule 7001(7) is amended to recognize that an adversary proceeding is not necessary to obtain an injunction or other equitable relief if a plan provides for such relief. The Committee received three comments relating to this rule.

(a) **Wade H. Logan, III, Esq.** (Letter #008) commented that the proposed amendment to Rule 7001(7) is "well advised."

(b) **Prof. Michael Anthony Sabino** (Letter #011) commented on the stylistic change at the beginning of Rule 7001 (the language: "Any of the following is an adversary proceeding."). He finds this language confusing and thinks that it can be interpreted to mean that the list of proceedings in Rule 7001 is a nonexclusive list. He suggests using "adversary proceedings are:" or "only the following matters are deemed to be adversary proceedings:" He also thinks that the proposed language at the end of Rule 7001(7) will cause confusion and suggests that the language ("plan provides for the relief") be changed to "plan provides for such injunctive or other equitable relief."

(c) **Litigation Committee, Bar Association of the District of Columbia** (Letter #014) commented that this change would streamline the confirmation process and avoid time consuming ancillary litigation. "However, imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors. However, certain types of injunctive relief are included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard."

(8) *Rule 7004(e).*

Rule 7004(e) would be amended to provide that the ten day limit on service of a summons after issuance does not apply to service in a foreign country. **The Litigation Committee, Bar Association of the District of Columbia** (Letter #014), commented

that this amendment "is a practical change in recognition of the difficulty in international service."

(9) Rule 1019(1)(B).

Rule 1019(1)(B) would be amended to clarify that an extension of time to file a statement of intention regarding collateral may be granted only if a motion for the extension is made either by written motion or orally at a hearing before the time has expired. **The Litigation Committee of the Association of the Bar of the District of Columbia** (Letter #014) commented that the revision is appropriate in that the present rule is unclear regarding the ability to make an oral request.

EXHIBIT C

LETTERS RECEIVED FROM COMMENTATORS RELATING TO THE PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE BANKRUPTCY RULES PUBLISHED IN AUGUST 1997

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November 12, 1997

Secretary of the Committee on Rules
of Practice and Procedure
Judicial Conference of the United States
Administrative Office of United States Courts
Washington, D.C. 20544

Re: Proposed Amendment to Rule 1019(6) of the Federal Rules of Bankruptcy Procedure

Dear Sirs:

I am writing to urge that the Committee reconsider the proposed amendment to Rule 1019(6) which would require the filing of a request for payment rather than a proof of claim for debts accrued prior to conversion of a case under chapter 11 to a case under chapter 7. The present procedure of permitting the filing of a proof of claim should be continued, at least for entities making claims for ordinary course of business expenses.

This firm represents a landlord which has suffered numerous bankruptcies among its tenants over the past several years. A substantial number of those cases have involved companies which initially filed for relief under chapter 11 where the cases were converted to cases under chapter 7 when the attempt to reorganize failed. Frequently, the landlord had a claim for unpaid rent for the period between the filing and conversion of the case. In many of those cases the landlord ultimately received little or no distribution on the claim for the rent during the chapter 11 phase of the case because of the subordination of the chapter 11 administrative claims to the chapter 7 administrative claims under Bankruptcy Code §726(b).

Under the present rule, the landlord need only file a proof of claim to assert its claim for unpaid post-petition rent. A proof of claim supplies sufficient detail for the trustee to evaluate the claim without placing an undue burden on the claimant. In the event that a distribution will be made, the claim can be and is addressed in informal communications with the trustee and, if necessary, in the claims objection process.

Requiring the claimant to file a request for payment places a substantial additional burden on the claimant. The claimant must prepare a more elaborate pleading and must serve and file a motion and request a hearing on the request in order to have the claim allowed. The proposed amended rule requires that the motion be made shortly after conversion at a time when the parties are unlikely to be able to determine the likelihood of a distribution on the chapter 11 administrative claims and at time when the trustee is newly appointed and concentrating his efforts on liquidating the assets of the estate. Claims for chapter 11 administrative expenses need not be addressed before the trustee is in a position to make a distribution at the conclusion of the liquidation case when trustees commonly address the allowance of pre-petition claims.

In short, the present proof of claims process for business expenses accrued prior to conversion meets the need of the parties and should not be modified.

I would be happy to supply any further information which may assist the committee in its evaluation of my comment.

Very truly yours,

James Gadsden

JG:mc

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
3420 TWELFTH STREET
RIVERSIDE, CALIFORNIA 92501-3819

DAVID N. NAUGLE
Bankruptcy Judge

TELEPHONE
(909) 774-1021

September 19, 1997

97-BK-
002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Bankruptcy Procedure (Rule 4001(a)(3))

Dear Mr. McCabe:

The proposed 10-day stay of relief from stay orders in foreclosure (legitimate and scam cases) and unlawful detainers will vastly increase the number of cases filed and the misuse of the automatic stay.

Very truly yours,

DAVID N. NAUGLE
Bankruptcy Judge

DN/lp

cf: Hon. Geraldine Mund,
Chief Bankruptcy Judge

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RICHARD F RECORD JR
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September 23, 1997

97-BK-003

97-CR-003

Mr. Peter G. McCabe
Secretary
Rules Committee Support Office
Administrative Office of the
US Courts
Thurgood Marshall Federal Judiciary
Building
Columbus Circle NE
Washington, DC 20544

Dear Mr. McCabe:

Thank you for your letter of September 9th. A heavy workload here has delayed my expressing my appreciation. A Judicial Conference and its request for public comment on the Preliminary Draft comprise a well supported approach.

I read with interest the full text of the proposed amendments referred to in the second paragraph of your letter. I look with favor upon everything in the pamphlet and I am grateful to you for keeping me advised and giving me an opportunity to take part in this important project.

Respectfully yours,

Jack E. Horsley

Jack E. Horsley

JEH:pr

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Donald E. Showalter
Glenn M. Hodge
M. Bruce Wallinger
Ronald D. Hodges
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October 13, 1997

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D. C. 20544

Re: Comment on proposed Bankruptcy Rule Amendments

Dear Mr. McCabe:

I am in receipt of a "Preliminary Draft of Proposed Amendments to the Federal Rules of Practice & Procedure" and am responding to the request for written comments.

I write from the perspective of a bankruptcy practitioner with 18 years of experience at all different levels of bankruptcy work, from small-scale Chapter 7 and Chapter 13 cases to fairly sizeable Chapter 11 cases involving as much as $5 million to $8 million. I must confess I have little experience with the mega-cases that we hear so much about. My experience is more with the humdrum bread-and-butter cases which make up 95% of the actual world of bankruptcy.

Proposed Rules 4004 and 4007 -- The proposed amendment to "clarify that the deadline for filing a complaint objecting to discharge is 60 days after the first date set for the meeting of creditors, regardless of the actual meeting date," is a bad, bad, bad idea. I say this as an attorney who has represented both debtors and creditors. Most creditors who are considering filing a complaint for exception to discharge use the First Meeting of Creditors as an opportunity to weigh whether or not they want to file such a complaint, based in large part on the debtor's demeanor and responses to three or four questions which the creditor might pose at the First Meeting of Creditors. Often what appear to be suspicious circumstances turn out to be easily explained or clarified by the debtor at the First Meeting of Creditors, persuading the creditor not to pursue the matter further.

On the other hand, a debtor whose answers are evasive or incriminatory may persuade a creditor that the case has a solid foundation. In the consumer creditor cases,

Bankruptcy Code § 523(d) mandates, as we say, that "If you go to kill the king, you must kill the king." In other words, you don't bring a consumer debt nondischargeability action unless you are 95% sure you will prevail, because if you lose you must pay the consumer debtor's attorney's fees, in addition to paying your own attorney's fees. The First Meeting of Creditors thus gives the consumer creditor and its counsel a chance to size up the debtor prior to instituting its suit, and helps weed out those cases.

Bringing a complaint for nondischargeability is an expensive process for all concerned, including the debtor, even in a non-consumer debt situation, and any change in the Rule which might lead to more complaints for exception to discharge being filed rather than fewer is to be avoided. Yet that is what the proposed amendment would do.

The practical reason for that is as follows. It is not at all unusual for First Meetings of Creditors to be continued. Often the debtor forgets to show up, or is sick, or has car trouble. In the wintertime, we have First Meetings which are cancelled because of snow, and sometimes the Chapter 7 Trustee is sick or has car trouble. If the last date for filing a complaint objecting to discharge is 60 days after the first scheduled date, regardless of the actual meeting date, that would mean in many cases that the creditor would have to elect to file a complaint for exception to discharge before the actual First Meeting of Creditors was ever held, or just a few days after, without sufficient time to evaluate the debtor's under-oath responses to some pretty basic questions, which is, after all, one of the intended functions of the First Meeting of Creditors.

On the other hand, I am hard pressed to think of a good reason for a change in those Rules. I therefore urge that it remain as it is presently stated.

Rules 302(e), 3021, 4001(a)(3), 6004(g), and 6006(d) --- As I understand it, all of these rules are to be amended to provide that there would be an "automatic stay" for 10 days after the entry of an Order confirming a Chapter 11 Plan, granting relief from the stay, or authorizing use, sale or lease of property.

This would represent a fundamental shift in the way business is conducted in Bankruptcy Court. At the present time, routinely transactions close immediately on entry of the Order approving the sale, or Plan, or loan. These Rule changes would slow down even more the already glacial pace of business, probably killing many otherwise

barely-viable deals. The net result will be to make doing business with bankruptcy estates even less attractive than it already is. A bad idea.

Very truly yours,

William E. Shmidheiser, III

WES/mh/107909

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
1300 CLAY STREET
P.O. BOX 2070
OAKLAND, CALIFORNIA 94612

LESLIE TCHAIKOVSKY
BANKRUPTCY JUDGE

TELEPHONE (510) 879-3540
Leslie_Tchaikovsky@ce9.uscourts.gov

97-BK-005

October 23, 1997

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Offices of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Secretary:

I have reviewed the proposed amendments to the Federal Rules of Bankruptcy Procedure and have a problem with only one proposed change. It is proposed that there be a ten day stay of all orders granting relief from the automatic stay to give the aggrieved party time to file a notice of appeal. I think the proposed amendment is a very bad idea. It would prejudice many to benefit only a few. Moreover, the benefit does not appear necessary.

In the case of most orders, ten days delay is inconsequential. However, in the case of orders for relief from stay, in the majority of cases, each day of delay represents a quantifiable dollar loss to the creditor. Debtors do not often appeal orders of this nature. (More often, they file a new bankruptcy case, thereby invoking a new automatic stay.) When they do wish to file a notice of appeal, they may request a stay at the hearing. In a case in which it is credible that an appeal may be taken, the judge will certainly stay the order at least long enough for a stay to be requested from the appellate court.

In California, by state law, unless otherwise ordered by the bankruptcy court, a nonjudicial foreclosure sale may not be held any sooner than seven days after an order granting relief from the automatic stay. If this amendment is enacted, in these instances, the debtor will receive an additional seventeen days delay, in most instances, unwarranted, at the expense of the secured creditor, instead of only seven.

Sincerely,

Leslie Tchaikovsky

Leslie Tchaikovsky

United States Bankruptcy Court
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Bankruptcy Judge

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97-BK-006

November 3, 1997

Mr. Peter McCabe
Secretary to the Rules Committee
Administrative Office of the US Courts
One Columbus Circle, N.E.
Washington, D.C. 20544-0001

Re: Certain Proposed Amendments to the Bankruptcy Rules

Dear Peter:

The Oregon bankruptcy judges have reviewed the Bankruptcy Rules Committee's proposed changes to Bankruptcy Rules 3020(e), 4001(a), 6004, 6006, 7062, and 9014. As we read these changes they would, acting together, first, eliminate application of BR 7062 to contested matters. Second, however, the 10 day stay applicable under 7062 would then be restored as applicable to selected matters, namely, orders for relief from stay, orders confirming Chapter 9 and 11 plans, orders authorizing the use, sale or lease of property, and orders authorizing assignment under Section 365 absent court order directing otherwise.

We are concerned that the areas which have been specifically identified for application of the 10 day stay are exactly those areas which often are quite time sensitive; that is, areas where the court and parties are addressing a matter which urgently needs to be resolved. Wouldn't it be logical, given that fact, that, as under the present rule, the 10 day stay specifically not be applicable to such time sensitive areas?

We recognize that the rule allows the judge to except the order from application of the stay in a particular case. However, the reality is that given the urgency of the matter more often than not the order should not be affected by the stay but the court and the parties, being human and often harried, will likely forget that the order must specifically except application of the stay.

We also recognize that the present Rules create an ambiguity with regard to the application of the Rule 62 stay as to those contested matters apart from the ones now specifically excepted from the stay. However, wouldn't that ambiguity be addressed simply by the first proposed change, i.e., eliminating the application of BR 7062 to contested matters?

Can you provide us with any information about the analysis the Rules Committee applied which led to these proposed rule changes? We are confused and concerned but we may be missing some important piece of the puzzle.

Sincerely,

Polly S. Higdon
Chief Bankruptcy Judge

PSH:mo
cc: All Oregon Bankruptcy Judges

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97-BK-007

November 14, 1997

Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Proposed Amendments to Federal Rules of Bankruptcy Procedure

Dear Sir/Madam:

We have reviewed with interest the proposed changes to the bankruptcy rules as reported in our bankruptcy service.

We are particularly concerned about proposed Rule 4001(a)(3), which would automatically stay for 10 days any order granting relief from the automatic stay. The stated purpose of this rule is to give the debtor sufficient time to request a stay pending appeal.

Our practice consists primarily of representing creditors, and in most cases secured creditors. In our experience, secured creditors have not been overly aggressive in bringing motions for relief, in view of the expense involved. Thus in practically every case, the motion is brought on for hearing only when the debtor is seriously in default. In the majority of cases, a consent order is endorsed and entered without a hearing. In many of the cases in which an agreed order cannot be entered, the debtor has been engaged in delaying tactics such as serial filings without ever proposing a Chapter 13 plan or making any payments, a practice which we consider an abuse of the bankruptcy process.

Based on the foregoing experience, we believe the proposed change grants an unreasonable delay to debtors who do not need or deserve such protection. For example, if a bankruptcy is filed shortly before a foreclosure sale, often in a second or third bankruptcy filing by the same debtor, we are able to obtain immediate relief from the bankruptcy stay in many cases by a telephone hearing under "emergency" conditions, so that the sale can continue. This avoids the substantial expense (seldom recovered from the debtor) of a rescheduled foreclosure. The proposed rule would preclude a secured creditor from avoiding bad faith or abusive filings in this way, and would create a 10-day window during which a bad faith filer could act with impunity.

HM\HM\389010.1

For that matter, we have found that appeals from orders granting relief from the automatic stay are rare.

We note in passing that orders of the United States district courts are not automatically stayed, and that some cause need be shown and some protection afforded the prevailing party, such as by the posting of a bond.

Accordingly, we respectfully request that the committee consider the following:

1. If the debtor has competent bankruptcy counsel (a circumstance which we believe should be encouraged), such counsel can obtain a stay of an order if appropriate.

2. The rule as proposed is in effect ex parte, with none of the showings (such as likelihood of success, and lack of harm to the prevailing party) made in considering stays.

3. The granting of an automatic 10-day stay of every order granting relief from the stay unfairly tilts the playing field against secured creditors acting in good faith after a serious default, in favor of bad faith filers. This is especially so when the debtor has no intention of appealing or when any appeal would be utterly lacking in merit.

4. The imposition of sanctions for frivolous appeals is an illusory deterrent seldom obtainable.

5. The stay of a consent or agreed order is manifestly inappropriate.

We appreciate your consideration of these views.

Very truly yours,

Eugene E. Derryberry

EED/abs
cc: Hon. Robert W. Goodlatte

HM\HM\389010.1

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Please Reply to the Charleston Office

November 19, 1997

97-BK-008

Peter G. McCabe, Esquire
Secretary
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Our File No. 2054-13

Dear Mr. McCabe:

Thank you for providing me the opportunity, as a member of the American College of Trial Lawyers, to comment upon the proposed amendments to the Federal Rules of Bankruptcy Procedure. In formalizing these comments, I have discussed their merit with the bankruptcy practitioners in my firm, upon whose judgments my comments are largely based.

A. Rule 1017. We applaud the greater specificity in setting forth the identity of the parties entitled to notice of a motion to dismiss a Chapter 7 or Chapter 13 Case on motion of the U.S. Trustee, based upon the debtor's failure to file a list of creditors, schedules, and statement of financial affairs. It would be our suggestion, however, that any party filing a Notice of Appearance in the case, pursuant to Rules 2002 and 9010, FRBP be included in the notification. To that end, we would join in the proposed amendment of Rule 2002(a)(4).

B. There are various proposed changes which require a motion for extension to be filed prior to the statutory expiration date. While such proposals are well reasoned, this amendment may provide an excellent opportunity to set forth further guidance as to whether such extension is deemed granted prior to a hearing on the subject motion. Currently, there is a split of authority or custom as to the effect of

the expiration of an extension deadline. In some jurisdictions, disposition of such motions must be heard prior to the expiration date or the motion is deemed moot. In other jurisdictions, a tolling period is assumed until the Court may consider the merits of the motion for extension. Other jurisdictions routinely execute "Bridge Orders" to cover the period between the motion deadline and the hearing date. Practice in this area should be made consistent among all jurisdictions.

These comments would relate to the proposed changes for Rules 1019, 2002(a)(4), 4004, and 4007.

C. There are a number of proposed changes that would implement an automatic ten day stay between the date on which the Court enters a ruling, in order to allow the losing party to institute appropriate appellate measures. This issue has not proven a problem in our district. It is our view that this requirement would simply add to what can often be a very time-consuming process inherent in the Bankruptcy system and is not justified. These comments apply to the proposed changes for Rules 3020(e), 3021, 4001(a)(3), 6004(g), and 6006(d).

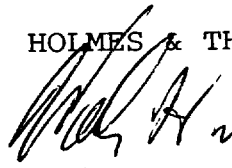
D. The proposed change for Rule 7001(7) is well advised.

Again, thank you for allowing me the opportunity to provide comments on the proposed Rules. If I, or any member of my firm, may be of additional assistance in this matter, please do not hesitate to contact me.

With kind regards, I am

Very truly yours,

HOLMES & THOMSON, L.L.P.



Wade H. Logan, III

WHLIII/sec

cc: The Honorable Strom Thurmond
The Honorable Ernest F. Hollings
The Honorable Mark Sanford

HERMAN L GLATT
RICHARD M NEITER
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January 15, 1998

97-BK-009

Peter G. McCabe
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the
United States Courts
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

I write this letter on behalf of the Bankruptcy Committee of the Commercial Law and Bankruptcy Section of the Los Angeles County Bar Association in support of the amendments to Rules 3020, 4001, 6004, 6006, 7062, and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") proposed by the Advisory Committee on Bankruptcy Rules and published for comment in August 1997.

The proposed amendment to Bankruptcy Rule 9014 would delete the reference therein to Bankruptcy Rule 7062, thus limiting to adversary proceedings the applicability of Bankruptcy 7062 and the ten-day stay of Federal Rule of Civil Procedure 62(a) ("Rule 62(a)") incorporated by Bankruptcy Rule 7062. As a result, there could be no reliance upon the automatic ten-day stay of Rule 62(a) except with respect to orders entered in adversary proceedings. As a counterpart, the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 provide for an automatic ten-day stay of the effectiveness of orders confirming plans (Bankruptcy Rule 3020), orders granting relief from the stay (Bankruptcy Rule 4001), orders authorizing the use, sale, or lease of property other than cash collateral (Rule 6004), and orders authorizing the assignment of executory contracts and unexpired leases (Bankruptcy Rule 6006).

The proposed amendments remedy what is probably the most significant problem caused by current Bankruptcy Rules 9014 and 7062 – uncertainty regarding the applicability of the ten-day automatic stay of Rule 62(a) to an order of the Bankruptcy Court. This uncertainty has caused parties to rely upon stays which, it turns

out, were not in effect,[1] and to violate stays that the party mistakenly did not recognize to be in effect.[2]

The uncertainty stems from two principal causes. The first is the perception that the language of Rule 62(a) might stay the effectiveness of an order, rather than only staying execution upon or enforcement of the order, and confusion regarding what constitutes "enforcement."[3] Second, confusion exists with respect to whether Bankruptcy Rule 7062 applies in certain contexts (i.e., whether an order is entered in a contested matter to which Bankruptcy Rule 9014 applies).[4]

The problems caused by this confusion have, as a practical matter, been limited by the 1983 and 1991 amendments to Bankruptcy Rule 7062, which made Rule 62(a) expressly inapplicable to orders granting relief from the automatic stay, orders regarding the use of cash collateral, orders regarding the use, sale, or lease of property, orders authorizing borrowings, and orders authorizing the assumption or assignment of

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1 See, e.g., In re Barnes, 119 B.R. 552, 555 (Bankr. S.D. Ohio 1989) (execution on judgment against debtor within ten days after order dismissing case valid; order dismissing case not subject to Rule 62(a)); In re Pero Bros. Farms, Inc., 91 B.R. 1000, 1001 (Bankr. S.D. Fla. 1988) (motion to convert filed too late; order confirming plan not subject to Rule 62(a)).

2 See, e.g., Chrysler Credit Corp. v. Cooper (In re Cooper), 16 B.R. 19, 22 (Bankr. W.D. Mo. 1981) (repossession of car within ten days after entry of order dismissing case violated stay of Rule 62(a)).

3 See Fish Market Nominee Corp. v. Pelofsky, 72 F.3d 4, 6 (1st Cir. 1995) ("Contrary to Fish Market's position, Rule 62(a) does not purport to make a judgment ineffective for 10 days after entry; on the contrary, the judgment retains full force and effect for other purposes. . . . Instead, Rule 62(a) merely stays proceedings to enforce the judgment. . . .").

4 See Lugo v. Saez (In re Saez), 721 F.2d 848, 852 (1st Cir. 1983) (Bankruptcy Rule 7062 does not apply to an order dismissing a case because it was not entered in a contested matter); In re Barnes, 119 B.R. at 555 (same). Underlying this aspect of the problem is the lack of a precise definition for "contested matter". See, e.g., Iles v. LTV Aerospace Defense Co. (In re Chateaugay Corp.), 104 B.R. 626, 634 (S.D.N.Y. 1989) ("'Contested matter' is not defined in the Code or the rules."), appeal dismissed, 930 F.2d 245 (2d Cir. 1991); In re RFD, Inc., 211 B.R. 403, 407-08 (Bankr. D. Kan. 1997) ("Except to say that relief in contested matters should be requested by motion, the quoted statement [from Bankruptcy Rule 9014] does not define 'contested matter.'").

executory contracts and unexpired leases.[5] However, uncertainty regarding the application and effect of Rule 62(a) remains with respect to other types of orders.

In the case law, this appears to be most often reflected in confusion by practitioners regarding the applicability of Rule 62(a) to orders dismissing cases. However, the potential exists for problems to arise relating to the uncertain application of Rule 62(a) with respect to virtually every order of the Bankruptcy Court not specifically excluded by Bankruptcy Rule 7062 or entered in an adversary proceeding, ranging from orders confirming plans, to orders allowing or disallowing claims, to orders approving the retention of professionals, to orders authorizing the payment of administrative expenses.[6]

The proposed amendment to delete the reference to Bankruptcy Rule 7062 in Bankruptcy Rule 9014 will eliminate the current state of uncertainty. As a result

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[5] One result of the prior amendments to Bankruptcy Rule 7062 is the implication that Rule 62(a) would otherwise apply to the orders explicitly excluded by the prior amendments to Bankruptcy Rule 7062 and does apply to certain orders which were considered for exclusion but were not excluded. Compare 9 Norton Bankruptcy Law & Practice 2d (1997) at 489-90 ("From a practical standpoint, it is essential that a discretionary stay be obtained as to those situations which are excepted from the scope of the 10-day automatic stay. . . . Other exceptions were considered for the 1991 Amendments. The Advisory Committee rejected the idea of making an order authorizing the sale of property pursuant to a plan and the confirmation of a plan additional exceptions. This was rejected because an order authorizing a sale of property pursuant to a plan should wait until the plan becomes 'final'. . . . It was felt that a plan should not be consummated until after the confirmation order becomes final by the expiration of the ten-day period.") and In re Tempo Tech. Corp., 202 B.R. 363, 374 (D. Del. 1996) ("This amendment excepted orders authorizing section 363(b)(1) sales from the general ten day stay of all federal court orders under Fed. R. Civ. P. 62(a).") with Ewell v. Diebert (In re Ewell), 958 F.2d 276, 280 (9th Cir. 1992) ("Our cases strongly suggest that, even if Bankruptcy Rule 7062 had not been amended, Rule 62(a) would have no application to judicially authorized sales of estate property in bankruptcy proceedings.") and In re Whatley, 155 B.R. 775, 781 (Bankr. D. Colo. 1993) (confirmation order not subject to Rule 62(a)).

[6] Compare Arnold & Baker Farms v. United States (In re Arnold & Baker Farms), 85 F.3d 1415, 1419 (9th Cir. 1996) ("The Bankruptcy Court confirmed the plan on May 5, 1993, and FmHA filed its timely notice of appeal on May 14, one day before the expiration of the automatic stay provided in Bankruptcy Rule 7062."), cert. denied, ___ U.S. ___, 117 S. Ct. 681 (1997) with In re Pero Bros. Farms, Inc., 91 B.R. at 1001 (order confirming plan not subject to Rule 62(a)) and In re Whatley, 155 B.R. at 781 (order confirming plan, order disallowing claim, and order allowing claim not subject to Rule 62(a)).

of the proposed amendment, those parties who want an immediate stay not specifically provided by the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 will know that they must seek a stay under Bankruptcy Rule 8005 rather than courting the risk of mistakenly relying upon the applicability of Rule 62(a).

The proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 also provide clarity by explicitly providing that the effectiveness of orders covered by those rules is stayed. Since the closing of transactions subject to orders under those rules will generally moot an appeal,[7] the amendments appropriately place the burden to acquire a modification of the ten-day stay on the party who would seek to moot an appeal by closing the transaction immediately.

Under the current rules which permit appeals from orders subject to Bankruptcy Rules 3020, 4001, 6004, and 6006 to be mooted by an event that could occur at any time after the entry of an order, the parties and courts are subject to "emergency" stay motions in situations where the mooting event would and need not occur until a stay could be sought on a less urgent timetable; the opposing parties and the court simply do not know when the mooting event will take place.[8] Thus, the parties and courts are engaged in expedited proceedings when there is no need for this disruption; the existing rules create the sort of pointless emergencies that have been decried in the case law.[9]

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[7] See, e.g., Manges v. Seattle - First Nat'l Bank (In re Manges), 29 F.3d 1034 (5th Cir. 1994) (appeal from confirmation order moot), cert. denied, ___ U.S. ___, 115 S. Ct. 1105 (1995); Van Iperen v. Production Credit Ass'n (In re Van Iperen), 819 F.2d 189 (8th Cir. 1987) (appeal from order granting relief from stay moot); Pittsburgh Food & Beverage, Inc. v. Ranallo, 112 F.3d 645 (3d Cir. 1997) (appeal from order approving sale moot); Sulmeyer v. Karbach Enter. (In re Exennium, Inc.), 715 F.2d 1401 (9th Cir. 1983) (appeal from order authorizing assumption and assignment of leases moot).

[8] Even in situations where the plan, sale agreement, loan document or assignment contract provide for an effective date or closing ten days or more after the entry of the order, such documents frequently allow an earlier effective date or closing without further court order with the consent of certain parties; the party which would seek a stay is usually not among the parties who must consent to an early closing or effective date.

[9] See generally Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 491-92 (C.D. Cal. 1995) ("When an ex parte motion is filed, it is hand-delivered immediately from the clerk's office to the judge. The judge drops everything except other urgent matters to study the papers. It is assumed that the tomatoes are about to spoil or the yacht is about to leave the jurisdiction and that all will be lost unless immediate action is taken. Other litigants are relegated to a secondary priority. The

The proposed amendments should reduce considerably the unnecessary "emergencies" caused by uncertainty regarding when the mooting event will occur.

In those instances where a transaction must close or a plan must go effective within ten days after entry of the order, the proposed amendments to Bankruptcy Rules 3020, 4001, 6004, and 6006 would permit the court to modify the stay so that the transaction may close or the plan may go effective. The only "cost" of the proposed amendments would be to reduce the ability of a party to surprise opponents by an immediate closing so as to moot an appeal; leveling the playing field by reducing the prospect of mooting by ambush is a small "price" to pay for decreasing the number of motions based upon false emergencies.[10]

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judge stops processing other motions. . . . Lawyers must understand that filing an ex parte motion, whether of the pure or hybrid type, is the forensic equivalent of standing in a crowded theater and shouting, 'Fire!'. There had better be a fire."); Gumport v. China Int'l Trust & Inv. Corp. (In re Intermagnetics Am., Inc.), 101 B.R. 191, 193 (C.D. Cal. 1989) ("Ex parte applications throw the system out of whack. They impose an unnecessary administrative burden on the court and an unnecessary adversarial burden on opposing counsel who are required to make a hurried response under pressure, usually for no good reason. They demand priority consideration, where such consideration is seldom deserved.").

[10] See generally In re T&H Diner, Inc., 108 B.R. 448, 452 (D.N.J. 1989) (lessor relets premises during adjournment it requested of hearing on appeal from orders denying debtor's motion to assume lease and lifting the automatic stay, "It should also be noted that a dismissal of this matter on mootness grounds will be manifestly inequitable. . . . Under these circumstances, the court finds it unfair, perhaps even manipulative, for the landlords to seek the court's indulgence for an adjournment and then argue that the action has been rendered moot."); In re Halladay Ent., Inc., 5 B.R. 83, 87 (Bankr. S.D. Tex. 1980) ("To hold that a sale made within ten (10) days of the order approving sale is irreversible under any circumstances would deprive a party from attaining the status quo during an appeal or a motion under Rule 62 and, such a result, in my opinion, is clearly contrary to the intent of Rule 805 and Rule 62. Rule 805 contemplates that an order approving sale may be stayed and unless it is stayed, the sale to a good faith purchaser is final. Such a stay and appeal could easily be circumvented if the parties are allowed to consummate a sale immediately upon entry of an order.").

Thank you for your consideration of these comments.

Sincerely,

George C. Webster II

GCW:sd

cc: Susan B. Hall, Esq.
Chair, Bankruptcy Committee of
the Commercial Law and Bankruptcy Section

#4245

RECEIVED 2/9/98

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97-BK-010

February 3, 1998

OUR FILE NO

101:ADMIN\L\COMMITTE.001

Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Comments to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure (August, 1997)

Gentlepersons:

The undersigned practices extensively in bankruptcy matters, and I have had an opportunity to review the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure.

My comment is directed to the proposed amendments to Rules 4001(a)(3), 6004(g) and 6006(d). Each of these rules provides that unless the Court determines otherwise, certain orders are automatically stayed for a period of 10 days after entry of the order. I would propose that the aforesaid rules apply only as to ***contested*** matters, but if the application is uncontested, the general rule should be that the order is effective immediately unless the Court orders otherwise.

There appears little reason why secured lenders, proposed assignees of leases and other parties impacted by such orders should be subjected to an automatic delay when the proceedings before the Bankruptcy Court issuing the order were unopposed.

Thank you for your kind attention.

Sincerely,

Arthur L. Rolston

ALR:djs

ST. JOHN'S UNIVERSITY

FOUNDED 1870

COLLEGE OF BUSINESS ADMINISTRATION
DEPARTMENT OF LAW

97-BK-011

#4251

12 February 1998

Peter G. McCabe, Esq.
Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re:Proposed Draft/Proposed Amendments/Bankruptcy Rules
Release Date: August 1997

Dear Mr. McCabe:

Reference is made to the abovecaptioned. As provided therein, I wish to submit my written comments, as set forth below, prior to the 15 February 1998 deadline. I would be most appreciative if you would place them before the Committee for considertion.

By way of introduction, as to my credentials, the undersigned formerly served as Judicial Law Clerk to the late Hon. D. Joseph DeVito, U.S. Bankruptcy Court, is a nationally known expert in bankruptcy law, is a Professor of Law, is the author of the treatise *Practical Guide to Bankruptcy*, and has commented on prior Proposed Amendments to the Federal Rules of Bankruptcy Procedure.

GENERAL COMMENT

Overall, the current Proposed Amendments to the Federal Rules of Bankruptcy Procedure (the "Rules") are most satisfactory, and should be enacted. These proposals represent various changes, both substantive and stylistic, which would improve the admininstration of our nation's bankruptcy laws, primarily by clarifying their purposes and intentions.

Therefore, on the whole, the Proposed Amendments should be adopted.

Nonetheless, it is the opinion of this commentator that certain of these proposals should not be enacted in their present form. These limited items, as outlined below, would

foment negative changes to the administration of bankruptcy law; in effect, they would create more problems than they would solve. Therefore, the following opposition and/or proposals for further change are made below.

RULE 1017

It is now proposed that Rule 1017 be amended to eliminate notice to creditors of a motion to dismiss a debtor's Chapter 7 or 13 case for reason of the debtor's failure to file a list of creditors, schedules, or a statement of affairs. The avowed purpose of said change is to avoid the expense of notification beyond the minimal parties of the debtor, the trustee, the U.S. Trustee, and parties specified by the Court.

This amendment should not be made. It would be highly detrimental to the bankruptcy system, for the following reasons. Oftentimes, creditors have useful information regarding the debtor. The mere failure of the debtor to properly file its schedules and so forth is merely the tip of the iceberg in a great many of these cases. Creditors, who usually possess knowlege superior to that of the case trustee or the U.S. Trustee, can contribute vital information as to debtor's true intentions, its good or bad faith, and so on. In sum, creditors play an important role in fully informing the Bankruptcy Court as to why a debtor is deficient in the filing of its necessary documents.

If creditors are denied notice of such dismissal motions, then they are foreclosed from contributing to the process. The exclusion of creditors by this lack of notice would leave all responsibility to the case trustee or the U.S. Trustee, already strained by limited resources, to apply what would essentially be a mechanical test. Finally, permitting the court to designate certain creditors be notified at its discretion is not a solution. At such a typically early stage, the court also lacks familiarity with the debtor.

In sum, notice to creditors, as provided in the present Rule, must be maintained. The proposed amendment would harm the system by foreclosing the vital contribution of knowledgeable creditors.

RULE 2002(a)(4)

Same comment as for Rule 1017.

RULE 4001(a)(3)

The proposed amendment would provide that an order granting relief from the automatic stay would itself be automatically stayed for a period of no less than ten (10) days. The purpose is to allow affected parties time to file an appeal and likewise seek a stay pending appeal.

This amendment should not be made. It would work a severe injustice upon creditors and others, and provide little or nothing in the way of new, meaningful help for debtors.

Since the advent of the modern Bankruptcy Code in 1978, vast experience has demonstrated that the bulk of motions for relief from the automatic stay (hereinafter "stay relief motions") are routinely granted, for they are of the "garden variety" type. In brief, the secured creditor bringing the motion is indisputably entitled to the relief, the debtor has no defense, and there is no ground for an appeal thereof, much less grounds for a stay pending appeal.

Indeed, immediate enforcement of the stay relief motion is imperative to the petitioning creditor. The cases are legion where the creditor has been deprived of its property for a very long time (i.e., the huge number of instances where the debtor has dragged out a state court foreclosure for years, then finally files bankruptcy as yet another delaying tactic), has finally put an end to the debtor's judicial delays, and now sets in motion the events necessary to realize upon its rights (i.e., the scheduling of a foreclosure sale, and all the notice, publication, and other strenuous and expensive requirements thereof).

By contrast, the debtor has typically capitalized on every procedural delay tactic available, has absolutely no basis in fact or law for an appeal, and in fact will not file an appeal. For those rare exceptions where the debtor has actual grounds for an appeal and does indeed pursue one, moving to stay the decision is merely part of its legitimate burden, and so, like any other, that rare debtor must move with alacrity and convince the court of its right to a stay pending appeal.

In sum, the imposition as proposed of a mandatory ten day automatic stay of orders granting stay relief would work exclusively to the significant harm of innocent creditors, would be of no value to the vast majority of debtors who do not appeal, and would be of inconsequential benefit to debtors who do appeal stay relief motions. The greater good demands this proposed amendment be rejected.

RULE 6004(g)

An amendment has been proposed to modify this rule to provide an automatic stay of an order authorizing the use, sale or lease of property (other than cash collateral), so as to allow affected parties time to seek a stay pending appeal.

First, the proposed amendment is much like the "ten day stay" proposed for Rule 4001(a)(3). For that reason, the same general objections set forth hereinabove are repeated as to this proposal as well.

More precisely, this specific amendment is ill-advised, since it would be debilitating to the proper functioning of the bankruptcy process. Whether in a Chapter 7 liquidation or a Chapter 11 reorganization, the disposition of a debtor's assets by use, sale or lease is usually undertaken under the most strained of circumstances, where time is of the essence. Therefore, a ten day stay would no doubt unduly burden such vital activities.

Certainly, many of these orders are in fact appealed, and it would be of great help to the objecting party to have additional time in which to move to stay the judgment pending appeal. Nonetheless, the present burden placed upon those seeking a stay is not unjust, and there is simply no good reason to lighten their load when to do so would be much more harmful to the expeditious handling of the debtor's assets.

To be sure, the undersigned's personal experience has usually been on the losing side of a use, sale or lease motion, thereby compelling a massive effort to draft, file, and obtain a stay of judgment. Many times in the past I have most heartily wished for a ten day stay, so I might seek a stay pending appeal! But the truth of the matter is the realization that such a new rule will do much more harm than good to the overall administration of bankruptcy cases.

In sum, an automatic stay of ten days of use, sale or lease orders would be a burden overly harmful to the system, with little or no offsetting benefits. The proposed rule change should therefore be rejected.

RULE 6006(d)

Same comment as Rule 6004(g). Given that orders regarding executory contracts and unexpired leases are the functional equivalent of use, sale or lease orders, the same criticisms apply.

The proposed amendment should therefore be rejected.

RULE 7001

It has been proposed that the opening paragraph of Rule 7001 be amended to state "[a]ny of the following is an adversary proceeding."

While the intent is understandable, the language does not do it justice and is confusing. To state "any of the following" can be interpreted to mean that the denomination of certain actions in Rule 7001 is a nonexclusive list. Traditionally, Rule 7001 defines a narrow list of actions that must be brought as adversary proceedings; all else in the universe of cases and controversies are subject to motion practice pursuant to Rule 9014 as "contested matters." It is presumed the intent is still to have Rule 7001 recite an exclusive list of adversary proceedings, leaving all else as contested matters.

Therefore, the proposed language should be rejected. Instead, any amended language should say "adversary proceedings are:" or "only the following matters are deemed to be adversary proceedings:" or some such language in that vein. This will eliminate confusion at some future time.

Further, it is proposed that Paragraph 7 of Rule 7001 be modified to make clear that an action to obtain injunctive relief is not an adversary proceeding, if undertaken pursuant to a Chapter 9, 11 or 13 plan. The amended paragraph would end with the words "the relief".

That is not explicit enough, and will cause confusion. The ending of Paragraph 7 should be the "plan provides for such injunctive or other equitable relief." This makes clear what type of relief this exclusion is limited to, thereby eliminating any possible misunderstanding.

RULE 7062

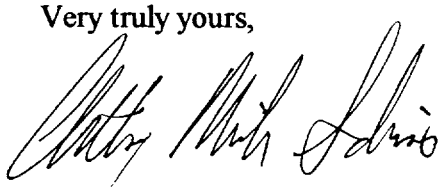
Rule 7062 is to be amended to reflect the other proposed amendments to Rules 4001(a)(3), 6004(g), and 6006(d) regarding the imposition of ten day stays.

As aforstated, the undersigned opposes such changes to the aforementioned Rules. Therefore, logically, opposition is stated to this reflexive change to Rule 7062. In sum, Rule 7062 should remain unchanged.

CONCLUSION

The instant Proposed Amendments to the Bankruptcy Rules generally mark beneficial and necessary change. Notwithstanding, the undersigned respectfully requests the Committee seriously consider the foregoing criticisms and comments regarding certain proposals, which in a very practical sense would be highly detrimental to the adminstration of our nation's bankruptcy laws if enacted in their present versions. In any event, I trust the Committee will find my statements to be helpful, and I am available for further consultation. With thanks, I remain,

Very truly yours,



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February 13, 1998

97-BK-012

VIA FEDERAL EXPRESS

Mr. Peter G. McCabe
Secretary of the Committee of
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle NE
Room 4-170
Washington, DC 20544

Re: New Jersey Bar Association, Bankruptcy Law Section
Comments as to Proposed Amendments to Official
Bankruptcy Forms and New Official Bankruptcy Forms

Dear Mr. McCabe:

The Bankruptcy Law Section of the New Jersey State Bar Association has appointed a committee to review and comment on the Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure. The committee offers the following comments.

Rule 1017

The committee is not in favor of the proposed amendments to Rule 1017 which would eliminate notice to creditors of the dismissal of a Chapter 7 case for failure to pay the filing fees and of notice of a hearing on dismissal for failure to timely file a list of creditors, schedules and statement of financial affairs. Creditors and their counsel often begin preparing applications to the court for various types of relief, including relief from automatic stay, immediately after receiving a notice of commencement of a Chapter 7 case. Creditors are entitled to receive prompt notice that a case has been dismissed for failure to pay filing fees, or that a motion has been filed to dismiss a case for failure to file schedules, to avoid incurring time and expense with respect to matters that have been, or may be, rendered moot. Because in the vast majority of Chapter 7 cases,

the number of creditors is small, the cost of providing such notice is relatively insignificant.

Rule 1019(6)

Proposed Rule 1019(6), as currently drafted, requires administrative expense creditors to file a request for payment within 90 days after the first date set for the meeting of creditors called after conversion of a case. In many cases, the debtor may not update its list of creditors following conversion to include all administrative expenses incurred prior to the conversion. If an administrative expense creditor does not receive notice of the conversion and the date fixed for the meeting of creditors, such creditor should not be bound by the 90 day deadline. We therefore recommend that proposed Rule 1019(6) be modified to a provide that a request for payment of an administrative expense must be filed within 90 days after the first date set for the meeting of creditors called after conversion of a case, if the administrative expense claimant received prior notice of the date set for the meeting of creditors.

Rules 3020(e), 4001(a)(3) and 6004(g)

We agree with the concept embodied in these proposed amendments that the right to appeal should not be rendered a nullity merely because action is taken to moot an appeal before an application for a stay can be filed and heard by the appellate tribunal. However, in the context of the use, sale or lease of property, confirmation of a plan and/or relief from the stay, severe economic or other prejudice may result if the effectiveness of a bankruptcy court order is automatically stayed for ten days. Moreover, in our experience, district court judges are routinely able to consider emergent applications for a stay pending appeal of bankruptcy court orders well prior to 10 days from the entry of the order. We believe that the competing interests addressed in these proposed amendments can be best served by reducing the proposed ten day stay to three days. A three day stay will be sufficient in the vast majority of cases to afford an aggrieved party the opportunity to apply for a stay pending appeal and will insure that the other parties to the order are not unduly prejudiced.

We appreciate the opportunity to comment on the proposed rule amendments. If the Committee of Rules of Practice and Procedure has questions or requires further information, please do not hesitate to contact me.

Very truly yours,

JACK M. ZACKIN

JMZ/kc

#4266
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2/19/98

97-BK-013

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CHRISTINE T. MILLIKEN
Executive Director
General Counsel

February 13, 1998

Secretary of the Committee of Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Proposed Changes to Bankruptcy Rules

I would like to comment briefly on the proposed changes to Rule 1019(6) and suggest that some clarifying language in Section 1019(5) would also be helpful. (Please note these are my own comments and do not reflect an official position of the Attorneys General.) I think the changes to Rule 1019(6) appropriately reflect that there are two separate kinds of postpetition debts: administrative expenses, and other unpaid debts that do not rise to the level of an administrative expense and which, therefore, must be treated as a claim. That distinction is not clearly recognized in the current provisions. In particular, Rule 1019(5)(A)(i) and (B)(i) provide that the debtor is to provide a schedule of all unpaid postpetition "debts" (which could include both postpetition claims and administrative expenses), but then states that his list should include the names and addresses of "each holder of a claim." I would suggest that those provisions would be better worded in the same way as in the new Rule 1019(6) -- i.e., the debtor should file a schedule of unpaid debts and include the names and addresses "of those entities listed on the schedule." This would then eliminate the question of whether a person with an administrative expense is or is not the holder of a "claim."

Turning then to the proposed changes in Rule 1019(6), the rule, as noted, does appropriately distinguish between administrative expenses and claims. I do have some concerns and questions, though, about the decision to impose a new time limit, not heretofore in existence, on the filing of the request for administrative expenses. First, the commentary on the rule does not make plain that this is, indeed, a new requirement and that practitioners must be alert to a new deadline that they were not hitherto subject to. This is an important fact and one that should be clearly disclosed.

Second, the proposal would make it mandatory to file a request for administrative expenses within the established deadline even if the trustee has determined that the matter is a "no asset" case. However, it makes no more sense to require expense requests to be filed in such an instance than it would to require proofs of claim to be filed. Imposing such a requirement will cause confusion because the "no asset" notice would have to say that "claimants" need not file claims but those with

administrative expenses must do so. This will be confusing in and of itself; moreover, it will require those who are owed money by the debtor to determine, at their peril, whether or not they hold an administrative expense claim. If they do not, they may simply sit back and wait to see whether the case will later change to an asset case. If, on the other hand, they do have an administrative expense but do not file (even though there is no money to pay that expense), they will be denied payment if the case later does have assets. The result is that most persons will feel obligated to file an expense request, "just in case." This places an undue and unnecessary burden on both the expense holder and the other parties in the system.

For much the same reasons, I question why there is any need to set a deadline for these preconversion administrative expenses separate and apart from whatever deadline the court will set in the end for other administrative expenses. They will not be paid any earlier than if they were submitted at the end, nor will they receive any higher priority. And, if the estate in the end turns out to be administratively insolvent with respect to even postconversion expenses, the preconversion expense claimants and other parties in the case will simply have been put to an unnecessary burden and expense. In short, I would suggest that it make better sense to simply provide that the deadline for these expense requests would be the same as that imposed for any other types of administrative expenses. That said, I agree that it would be appropriate to provide a minimum period for filing of any expense request that should not be shorter than the time periods allotted deadline for filing a claim. In most cases, the most appropriate deadline for such claims would be calculated from the confirmation date; however, it could be left up to the court to set an earlier date in special circumstances.

I appreciate the chance to comment on these proposals and hope that these statements will be of assistance. My concern here is primarily with ensuring fair treatment of these claimants while imposing the least burden on the system. Because the present rules are largely geared to dealing with prepetition claims, administrative expense claimants often fall through the cracks. I welcome the effort to ensure that they are taken into account, while I urge that the solution not cause new problems.

Very truly yours,

Karen Cordry

Karen Cordry, NAAG Bankruptcy Counsel

The BAR ASSOCIATION of the DISTRICT of COLUMBIA

Established 1871 Chartered 1874

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#4267

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February 14, 1998

97-BK-014

Peter G. McCabe, Secretary
Committee on Rules of Practice
and Procedure
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
Washington, D.C. 20544

Re: Proposed Amendments to the Federal Rules of Bankruptcy Procedure

Dear Mr. McCabe:

The Judicial Conference Standing Committee on Rules of Practice and Procedure has requested comment on various proposed amendments to the federal rules, including the Federal Rules of Bankruptcy Procedure. The Litigation Committee of the Bar Association of the District of Columbia, and its Subcommittee on Court Rules, submit these comments concerning the proposed amendments.

The Bar Association of the District of Columbia is a voluntary bar association. The responsibilities of its Litigation Committee include serving as a commentator on proposed changes to court rules. Comments submitted by the Litigation Committee represent only its views, and not necessarily those of the Bar Association.

1. Stay of Orders.

The most significant change to the Rules governs the application of Federal Rule of Civil Procedure 62 to Bankruptcy Court orders entered in contested matters and adversary proceedings. Currently, the ten day automatic stay of the effectiveness of orders applies to all orders entered in contested matters and adversary proceedings with the exceptions provided in Federal Rule 62 and the following additional exceptions provided in Bankruptcy Rule 7062:

a. Orders granting relief from the automatic stay

b. Orders authorizing or prohibiting the use of cash collateral Orders authorizing or prohibiting the use, sale or lease of property under § 363

c. Orders authorizing the trustee to obtain credit pursuant to § 364

d. Orders authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365.

The amendments propose to delete the reference to Rule 7062 contained in Rule 9014 which governs procedures in contested matters and to delete the additional exceptions provided by Rule 7062 listed above. The result is twofold. One, the ten day automatic stay of orders entered in contested matters does not apply unless specifically imposed by the Court. Two, the ten day stay only applies in adversary proceedings as limited by Federal Rule 62.

However, the ten day stay is imposed in certain contested matters by amendment to the following Rules:

a. 3020(e) (orders confirming a plan in Chapter 9 or 11 cases)

b. 3021 (time for commencement of distributions under a confirmed plan)

c. 4001(a)(3) (orders granting relief from the stay)

d. 6004(g) (orders authorizing the use, sale or lease of property other than cash collateral)

e. 6006(d) (orders authorizing the assignment of executory contracts and unexpired leases)

Each of these rules as amended gives the Court discretion to waive the ten day stay entirely or shorten the period as circumstances may require.

Comment. These changes are appropriate because most orders entered in contested matters are either interlocutory, ministerial or simply too insignificant to the outcome of the case to require the ten day stay. Furthermore, many of these orders should be immediately effective to avoid additional costs to the estate which accrue during the ten day period, such as orders rejecting executory contracts or unexpired leases. Each of the matters in which the stay is imposed involve a significant effect on the estate and its creditors which should be automatically stayed to provide time to perfect an appeal and obtain a stay pending appeal. Since the Court has discretion to impose or modify the stay, parties should not be prejudiced under the amended Rules.

2. Injunctive Relief.

Rule 7001 is amended to clarify that an adversary proceeding is not necessary to obtain injunctive or other equitable relief where such relief is provided in a Chapter 9, 11, 12 or 13 plan of reorganization. The official comment states that substantive law must support such relief.

Comment. This change would certainly streamline the confirmation process and avoid time consuming ancillary litigation. However, imposition of injunctions without the requisite evidence propounded by the debtor would be highly prejudicial to the affected creditors. However, certain types of injunctive relief are included as plan terms on a routine basis. Therefore, the amendment would be sanctioning current practice in this regard.

3. Discharge.

Rule 4004(a) which pertains to objections to general discharge under Section 727(a) and Rule 4007(c) which pertains to objections to discharge of specific debts under Section 523(c) are each amended to provide that complaints must be filed within 60 days of the first date set for the meeting of creditors regardless of whether the meeting is actually held. Each Rule is also amended to clarify that requests for extension of the time periods must be "filed" before the expiration of the time.

Comment. These changes address confusion under the current rules, especially where the initial meeting is not held on the scheduled date, and are appropriate.

4. Service and Notice.

a. **Rule 1017(b)(3).** This subpart has been eliminated by the commission. Rule 1017(b)(3) provided a 30 day notice of dismissal to all listed creditors and to those creditors filing claims. The committee note says that Rule 1017(b)(3) is deleted as unnecessary, because 2002(f) provides notice to creditors upon dismissal.

Comment. Rule 2002(f) does provide a notice requirement, but unlike the 2002(a) twenty-day notices, and the 2002(b) twenty-five-day notices, 2002(f) does not specify a time period for notices. Therefore, the 30 day requirement now contained in 1017(b)(3) should be retained or an appropriate time period be added to 2002(f).

b. **Rule 7004(e).** The Rule is amended to provide that the ten day limit on service of a summons after issuance does not apply to service in a foreign country.

Comment. This is a practical change in recognition of the difficulty in international service.

c. **Rule 2002.** The Rule is amended to conform to Rule 1017.

Comment. The revisions are appropriate. It is costly and unnecessary to give all creditors notice of a hearing on dismissal of a case based on the failure to file a list of creditors, schedules and statement of financial affairs or substantial abuse or failure to pay the filing fee.

5. Election of Trustee.

Rule 2003(d) is amended to require the United States Trustee to mail a copy of a report of a disputed election on or before the date that the report is filed to any interested party which has requested it. The party has ten days from filing the report to file a motion to resolve the dispute.

Comment. The Rule currently requires such motion to be filed ten days after the meeting of creditors. This is an unrealistic deadline because the report may not be available within that time period. Therefore, the proposed changes provide a more functional procedure to resolve disputed elections.

6. Conversion of a Reorganization Case to a Liquidation Case.

a. **Statement of Intent.** Rule 1019(1)(B) is amended to clarify that extensions of the time to file a statement of intent regarding retention of collateral must be made before the time has expired, either by written motion filed with the court or by oral request made during a hearing.

Comment. The current Rule is unclear regarding the ability to make an oral request. Therefore, the revision is appropriate.

b. **Administrative Claims.** Rule 1019(6) currently requires holders of claims incurred in the reorganization case to file proofs of claim after a case is converted to a liquidation case. A number of members of our Committee interpret the Committee Note to the proposed amendment, by referring to Section 503(a), as apparently requiring such claimants to file motions for allowance of such administrative claims pursuant to Section 503(a) within ninety days of the meeting of creditors.

Comment. The proposed amendment is problematic for two reasons. One, holders of small administrative claims are not going to incur the cost of hiring an attorney to prepare and file a motion. Such creditors will simply forego the opportunity to obtain the priority status for their claim. Second, the court's docket would be burdened by large numbers of motions seeking allowance of such priority. For example, in the Merry-Go-Round Enterprises case currently pending in Baltimore, Maryland, which converted from a Chapter 11 reorganization to a Chapter 7 liquidation, landlords of the remaining 500 leases would have been required to file pleadings with the Court to establish priority for their unpaid post petition rent claims. The Trustee in this case simply requested the Court to establish a bar date for the filing of Chapter 11 administrative claims, clearly a more efficient and cost effective procedure. While the revisions are proposed to conform the Rule with the requirements of 11 U.S.C. § 348(d), it is contrary to current practice to require holders of claims incurred postpetition to file motions to establish the priority accorded to administrative creditors pursuant to 11 U.S.C. § 726(b). It is an inefficient, burdensome and costly procedure upon both the Court and the creditors.

Alternate Comment. One of our Committee's members, Mr. Pearlstein, does not interpret the proposed amendments to Rule 1019(6) as requiring claimants to file motions for allowance of administrative claims, and therefore supports the proposed amendments to the Rule.

7. Time.

Rule 9006 is modified to provide that the new time periods provided in Rule 1019(6) to file a motion for allowance of an administrative postpetition claim may not be reduced by the Court.

Comment. This revision is appropriate and conforms to the same restriction for claims filed pursuant to Rule 3002(c).

Very truly yours,

Michael J. Mueller 2/9/98

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7

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: THE LITIGATION PACKAGE
RULES 9013, 9014, AND MORE

DATE: FEBRUARY 18, 1998

At the September 1997 meeting in Williamsburg, the Advisory Committee approved proposed amendments to Rules 9013 and 9014, and to 25 other rules, subject to stylistic revisions by the Style Subcommittee. These amendments would substantially change litigation practice in bankruptcy courts. A draft of the proposed amendments is attached as Exhibit A.

I also enclose for your information a letter that I received from Judge Cordova in which he expressed opposition to the proposed amendments. The letter is attached as Exhibit B.

You will notice that I placed the rules included in Exhibit A in numerical order, which is how they will appear when presented to the Standing Committee. The amendments to Rules 9013 and 9014, which are the most important, are on pages 55-72.

The Standing Committee's Style Subcommittee, including Bryan Garner, reviewed and commented on these drafts. The Advisory Committee's Style Subcommittee, together with Ken Klee, chair of the Litigation Subcommittee, held a two-hour telephone conference for the purpose of reviewing the comments of the Standing Committee's Style Subcommittee and making stylistic improvements. These improvements are reflected in Exhibit A.

Despite the considerable amount of time spent on these proposed amendments, and the numerous discussions during the past

two years, I would like to raise a few more matters for your consideration before this package is presented to the Standing Committee with a request for publication:

(1) *Rule 9006(d)*. At the September meeting, I recommended that Rule 9006(d) be abrogated. Rule 9006(d) provides as follows:

> (d) FOR MOTIONS - - AFFIDAVITS. A written motion, other than one which may be heard ex parte, and notice of any hearing shall be served not later than five days before the time specified for such hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 9023, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

In reviewing all the Rules to determine which ones need to be revised to conform to the extensive revisions to Rules 9013 and 9014, I first concluded, and recommended to the Committee, that Rule 9006(d) should be deleted because it would not be consistent with Rule 9013 applications or Rule 9014 motions. However, I since reconsidered and now believe that it should be retained, but with amendments to limit its scope to (a) motions within adversary proceedings, and (b) procedural or dispositive motions within a Rule 9014 administrative proceeding.

The 5-day and 1-day time periods in Rule 9006(d) are the same as those provided in Civil Rule 6(d), which are applicable to motions in civil actions in district court. There is no reason why they should not be applicable to motions relating to adversary proceedings. I also think that Rule 9006(d) should

apply to procedural or dispositive motions made within administrative proceedings under Rule 9014. For your consideration, I restored to the draft (see page 53 of Exhibit A) Rule 9006(d) with amendments to limit its scope.

Consistent with the restoration of Rule 9006(d), I also added a new subdivision to the draft of Rule 9014 (see Rule 9014(m) on page 67 of Exhibit A) and a conforming amendment to Rule 9014(a)(4) on page 59, to clarify that Rule 9006(d) applies to procedural and dispositive motions related to pending administrative motions.

(2) Application of Civil Rule 7(b)(1) to Procedural and Dispositive Motions Within a Pending Rule 9014 Administrative Proceeding.

For similar reasons, I reconsidered the effect of deleting the current Rule 9013 (you will recall that the Committee voted to completely revise Rule 9013, which means that the current text will disappear). I now believe that the substance of Rule 9013, which contains basic requirements regarding motions in general (i.e., a motion shall state grounds with particularity, etc.) should be restored somewhere, and that it should be applicable to procedural or dispositive motions made within a Rule 9014 administrative proceeding.

In reviewing Part VII and the Civil Rules, I realized that Civil Rule 7(b)(1) is similar to current Rule 9013 and is applicable to motions made in adversary proceedings (see Rule

7007). Rule 7(b)(1) provides as follows:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

In a new subdivision added to the draft of Rule 9014 (see Rule 9014(m) on page 67), I added a provision that says that Civil Rule 7(b)(1) applies to a procedural or dispositive motion in a Rule 9014 administrative proceeding.

By adding the reference to Civil Rule 7(b)(1) in Rule 9014(m), the Committee would actually be keeping the *status quo* because procedural and dispositive motions in contested matters are now governed by Rule 9013, which contains similar language.

(3) *Rule 2014*. The Advisory Committee and its Subcommittee on Rule 2014 has been considering proposals to amend Rule 2014 for several years. The Advisory Committee approved amendments that would provide new procedures for requests for court approval of the employment of professional persons. But the Committee has not been able to agree on new language to define the information that must be disclosed by the professional. Please see the proposed amendments to Rule 2014 on pages 18-21 of Exhibit A.

The Advisory Committee approved the complete revision of Rule 2014 as shown on pages 18-21, except for Rule 2014(b)(3). Since Rule 2014 is not governed by Rule 9014 (see Rule 9014(a)(2)), which makes it a free-standing rule procedurally, it

would be unfortunate for this rule to remain as is without the procedural improvements already adopted by the Committee. Therefore, I included the proposed amendments to Rule 2014 in the package of rules set forth in Exhibit A, but I drafted Rule 2014(b)(3) in a manner that does not change the current standard for disclosure. That is, the draft incorporates the procedural improvements while keeping the current disclosure standard.

(4) *Rule 3012.* The Style Subcommittee, in performing its work, noticed that Rule 3012 is in need of substantial stylistic improvement and asked me to redraft it. In particular, we noticed that the rule refers to the valuation of a *claim,* rather than valuation of *property.* The title of the rule also is in need of improvement, according to the Style Subcommittee. Please consider the amendments to Rule 3012 on page 33.

(5) *Rule 3015(g).* The draft of Rule 9014 that I prepared and presented to the Advisory Committee in September listed Rule 3015(g) proceedings (modification of a chapter 12 or chapter 13 plan after confirmation) as one of those that are excluded from the scope of Rule 9014. But the Committee rejected that approach and asked me to draft amendments to Rule 3015(g) that provide that a request to modify the plan is governed by Rule 9014. Please see pages 34-36 of Exhibit A. You will notice that I placed in brackets language indicating that a response to a motion to modify a plan does not have to be served on creditors.

(6) *Rule 1006(c).* The Committee voted to add Rule 1006(c)

(see page 2 of Exhibit A) so that a court may rule on a request to waive the filing fee without notice or a hearing, but only if it may be waived under applicable law.

When the Committee approved this provision, there was in effect a three-year *in forma pauperis* program under which, in six pilot districts, the filing fee could be waived for individuals unable to pay the fee in installments. The pilot program was established by statute to enable the Judicial Conference to carry out its duty to report to the House and Senate Judiciary Committees by March 31, 1998, on the costs and benefits of an *in forma pauperis* system. Section 111(d), Pub. L. No. 103-121, 107 Stat. 1165 (Dept. Of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act of 1994). The pilot program began on October 1, 1994, and terminated on September 30, 1997. A copy of section 111(d) of the Appropriations Act is enclosed as Exhibit C.

At this time, there is no authority for bankruptcy courts to waive the filing fee. My question for the Committee is whether the proposed amendment to Rule 1006 at this time would be misleading (even though the Committee Note states that this provision is not intended to create any right to a waiver of fees). Will Rule 1006(c) invite requests for fee waivers when no such right exists in any bankruptcy court? Should the Committee wait to see if an *in forma pauperis* system is established by Congress before recommending this amendment?

EXHIBIT A

PROPOSED AMENDMENTS

Rule 1006. Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in ~~subdivision (b) of this rule~~ Rule 1006(b) or (c). For ~~the purpose~~ purposes of this rule, "filing fee" means the ~~filing~~ fee prescribed by 28 U.S.C. § 1930(a)(1)-(a)(5) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk ~~upon the commencement of a case under the Code~~ when the case is commenced.

(b) PAYING ~~PAYMENT OF FILING FEE~~ IN INSTALLMENTS.

(1) *Request* ~~*Application*~~ *for Permission to Pay* ~~*Filing Fee*~~ *in Installments*. The clerk shall accept for filing an individual's voluntary petition if it is ~~A voluntary petition by an individual shall be accepted for filing if~~ accompanied by the debtor's signed ~~application~~ request stating that the debtor is unable to pay the filing fee except in installments. The ~~application~~ request shall state the proposed terms of the installment payments and that the ~~applicant~~ debtor has neither paid any money nor transferred any property to an attorney for services in connection with the case.

(2) *Action on ~~Application~~ the Request*. Before ~~Prior to~~ the meeting of creditors, with or without notice or a hearing, the court may order the filing fee paid to the clerk or grant leave to pay it in installments and fix the number, amount, and dates of payment. The number of installments shall not exceed four, and the final installment shall be payable ~~not~~ no later than 120 days after ~~filing~~ the petition is filed. For cause ~~shown~~, the court may extend the time of any installment to a time that is~~, provided the last installment is paid not~~ no later than 180 days after ~~filing~~ the petition is filed.

(3) ~~*Postponement*~~ *Postponing Payment of ~~Attorney's~~ Other Fees*. After a petition is filed, ~~The~~ the filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney, bankruptcy petition preparer, or any other person who renders services to the debtor in connection with the case.

(c) *Waiver of Filing Fee.* If a filing fee may be waived under applicable law, and a request for waiver of the filing fee is filed, the court may waive the fee, with or without notice or a hearing.

COMMITTEE NOTE

This rule is amended to provide that a request to pay the filing fee in installments or a request for a waiver of the filing fee may be granted by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to these requests. This rule is not intended to expand or create any right to a waiver of fees.

Under subdivision (b)(1), the debtor is required to state in the request for permission to pay the filing fee in installments that the debtor has neither paid money nor transferred property to an attorney for services rendered in connection with the case. A similar statement is not required with respect to bankruptcy petition preparers. A debtor who pays a bankruptcy petition preparer should not be disqualified from paying the filing fee in installments. But after the petition is filed, the debtor is prohibited by Rule 1006(b)(3) from paying fees to an attorney, bankruptcy petition preparer, or any other person for services in connection with the case until the filing fee, including every installment, is paid in full.

Rule 1007. Lists, Schedules and Statements; Time Limits

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(c) TIME LIMITS. Except as provided in Rule 1007(d), (e) and (h), in a voluntary case, the debtor shall file the ~~The~~ schedules and statements, other than the statement of intention, ~~shall be filed~~ with the petition ~~in a voluntary case,~~ or, if the petition is accompanied by a list of all the debtor's creditors and their addresses, within 15 days after the petition is filed~~, within 15 days thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule~~. In an involuntary case, the debtor shall file the schedules and statements, other than the statement of intention, ~~shall be filed by the debtor~~ within 15 days after ~~entry of~~ the order for relief is entered. Unless the court directs otherwise, schedules ~~Schedules~~ and statements filed ~~prior to~~ before a case is converted ~~the conversion of a case~~ to another chapter ~~shall be~~ are deemed filed in the converted case ~~unless the court directs otherwise.~~ ~~Any~~ A request to extend the ~~for an extension of~~ time for ~~the~~ filing ~~of~~ the schedules and statements may be granted with or without notice or a hearing ~~only on motion for cause shown and on notice to the~~

~~United States trustee and to any committee elected under § 705 or appointed under § 1102 of the Code, trustee, examiner, or other party as the court may direct~~. Notice of an extension of time shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

This rule is amended to provide that a request for an extension of time to file schedules and statements under subdivision (c) may be resolved by the court without notice or a hearing. The procedural requirements for an application under Rule 9013 or an administrative motion under Rule 9014 are not applicable to the request. The other amendments are stylistic.

Rule 1014. Dismissal and Change of Venue

(a) DISMISSAL AND TRANSFER OF CASES.

(1) *Cases Filed in Proper District.* If a petition is filed in a proper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be transferred~~ the court may transfer the case to any other district if ~~the court~~ it determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) *Cases Filed in Improper District.* If a petition is filed in an improper district and a party in interest makes a~~, on~~ timely motion~~, of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, the case may be dismissed or transferred to any other district if the court determines that transfer is in the interest of justice or for the convenience of the parties~~ the

court may dismiss the case or, if it determines that transfer is in the interest of justice or for the convenience of the parties, transfer the case to another district.

(b) ~~PROCEDURE WHEN~~ PETITIONS INVOLVING THE SAME DEBTOR OR RELATED DEBTORS ~~ARE~~ FILED IN DIFFERENT DISTRICTS ~~COURTS~~. If petitions ~~commencing cases under the Code~~ are filed in different districts by or against (1) the same debtor, ~~or~~ (2) a partnership and one or more of its general partners, ~~or~~ (3) two or more general partners, or (4) a debtor and an affiliate, on motion filed in the district in which the petition filed first is pending ~~and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court~~, the court ~~may~~ shall determine, in the interest of justice or for the convenience of the parties, the district or districts in which the ~~case or~~ cases should proceed. ~~Except as otherwise ordered by the court in the district in which the petition filed first is pending, the proceedings on the other petitions shall be stayed by the courts in which they have been filed until the determination is made.~~ Until that determination is made, any other court where another petition is pending shall stay its proceedings unless the court in which the motion is

pending orders otherwise.

(c) PROCEDURE GOVERNING MOTION. Rule 9014 governs a motion made under this rule. Every entity filing a petition against the debtor under § 303 of the Code shall be treated as an entity listed in Rule 9014(c)(1).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. The list of entities entitled to notice of a hearing on transfer or dismissal of a case under this rule is deleted as unnecessary because Rule 9014, which governs a motion under this rule, sets forth the list of entities entitled to service of the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the transfer or dismissal of a case in the list of matters with respect to which the United States trustee is entitled to receive papers.

Rule 1017. Dismissal or Conversion of Case; Suspension

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~~(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may dismiss a voluntary chapter 7 or chapter 13 case under § 707(a)(3) or § 1307(c)(9) after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs.~~

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(e) DISMISSAL OF AN INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. The court may dismiss an ~~An~~ individual debtor's case ~~may be dismissed~~ for substantial abuse under § 707(b) only on motion by the United States trustee or on the court's own motion ~~and after a hearing on notice to the debtor, the trustee, the United States trustee, and any other entities as the court directs~~.

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within ~~A motion by the United States trustee shall be filed no later than~~ 60 days after the first date set for the meeting of creditors under § 341(a), unless, before ~~such~~ the time has expired,

the court for cause extends the time for filing the motion. The United States trustee shall set forth in the motion ~~The motion shall set forth~~ all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor, the debtor's attorney, and the trustee no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing. The clerk shall transmit a copy of the notice to the United States trustee.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) Rule 9014 governs a ~~A~~ proceeding to dismiss or suspend a case, or to convert a case to another chapter, except under §§706(a), 1112(a), 1208(a) or (b), ~~or~~ 1307(a) or (b), or Rule 1017(e)(2)~~, is governed by Rule 9014~~.

(2) Conversion or dismissal under §§ 706(a), 1112(a), 1208(b), or 1307(b) shall be on

~~motion~~ application filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order when the debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of the notice becomes ~~shall be deemed~~ the date of the conversion order for the purposes of applying § 348(c) and Rule 1019. The clerk shall promptly ~~forthwith~~ transmit a copy of the notice to the United States trustee.

COMMITTEE NOTE

Subdivision (e) is amended to delete the list of the entities entitled to service of the motion except when the motion is on the court's own initiative. When the United States trustee files the motion for dismissal under § 707(b), the list of the entities to be served is in Rule 9014(c)(1).

Subdivision (f) is amended to provided that a proceeding to dismiss a case under § 707(b) is not governed by Rule 9014 if it is initiated on the court's own motion.

The other amendments are stylistic.

Rule 2001. Appointment of Interim Trustee Before Order for Relief in a Chapter 7 Liquidation Case

(a) APPOINTMENT. At any time after ~~following the commencement of~~ an involuntary ~~liquidation~~ case is commenced under chapter 7 and before an order for relief, the court on ~~written~~ motion of a party in interest may order the appointment of an interim trustee under § 303(g) of the Code. ~~The motion shall set forth the necessity for the appointment and may be granted only after hearing on notice to the debtor, the petitioning creditors, the United States trustee, and other parties in interest as the court may designate.~~ Rule 9014 governs the motion. Every entity filing a petition against the debtor under § 303 shall be treated as an entity listed in Rule 9014(c)(1).

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COMMITTEE NOTE

This rule is amended to provide that a motion for the appointment of an interim trustee is governed by Rule 9014. The petitioners, as well as the entities listed in Rule 9014(c)(1), are entitled to be served with the motion papers. Reference to the United States trustee is unnecessary because Rule 9034 includes the appointment of an interim trustee on the list of matters as to which the United States trustee is entitled to receive papers.

Rule 2004. Examination

(a) EXAMINATION ON ~~MOTION~~ APPLICATION. On ~~motion~~ application of any party in interest, the court may order the examination of any entity. Rule 9013 governs the application.

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(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS ~~DOCUMENTARY EVIDENCE~~. The attendance of an entity for examination and for the production of ~~documentary evidence~~ documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled ~~in the manner~~ as provided in Rule 9016 for the attendance of a witness ~~witnesses~~ at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is authorized to practice in that court or in the court in which the case is pending.

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COMMITTEE NOTE

Subdivision (a) is amended to conform to the amendments to Rule 9013, which governs an application for an order under this rule.

Subdivision (c) is amended to clarify that an examination ordered pursuant to Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in

the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

Rule 2007. Review of Appointment of Creditors' Committee Organized Before Commencement of ~~the~~ a Chapter 9 or Chapter 11 Case

(a) MOTION TO REVIEW APPOINTMENT. If a committee appointed by the United States trustee ~~pursuant to~~ under § 1102(a) of the Code consists of the members of a committee organized by creditors before ~~the commencement of~~ a chapter 9 or chapter 11 case was commenced, on motion of a party in interest ~~and after a hearing on notice to the United States trustee and other entities as the court may direct~~, the court may determine whether the appointment ~~of the committee~~ satisfies the requirements of § 1102(b)(1) ~~of the Code~~. Rule 9014 governs the motion. If the court finds that the appointment failed to satisfy the requirements of § 1102(b)(1), the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate relief.

(b) SELECTION OF COMMITTEE MEMBERS ~~OF COMMITTEE~~. The court may find that a committee organized by unsecured creditors before the commencement of a chapter 9 or chapter 11 case was fairly chosen if:

(1) it was selected by a majority in number and amount of claims of unsecured creditors who may vote under § 702(a) ~~of the Code~~ and who attended ~~were present~~ in person or were represented at a meeting for ~~of~~ which all

creditors having unsecured claims of over $1,000, or the 100 unsecured creditors having the largest claims, had been given at least five ~~days~~ days' notice in writing, and ~~of~~ at which ~~meeting~~ written minutes reporting the names of the creditor witnesses present or represented and voting and the amounts of their claims were kept and are available for inspection;

(2) all proxies voted at the meeting for the elected committee were solicited ~~pursuant to~~ in accordance with Rule 2006 and the lists and statements required by Rule 2006(e) ~~subdivision (e) thereof~~ have been transmitted to the United States trustee; and

(3) the organization of the committee was in all other respects fair and proper.

~~(c) FAILURE TO COMPLY WITH REQUIREMENTS FOR APPOINTMENT. After a hearing on notice pursuant to subdivision (a) of this rule, the court shall direct the United States trustee to vacate the appointment of the committee and may order other appropriate action if the court finds that such appointment failed to satisfy the requirements of § 1102(b)(1) of the Code.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014 and to make stylistic improvements.

Rule 2014. Employment of Professional ~~Persons~~ Person

(a) MOTION FOR AN ORDER AUTHORIZING EMPLOYMENT. A request for an order authorizing employment under § 327, § 1103, or § 1114 of the Code may be made only by written motion of the trustee or committee. The motion shall:

(1) state specific facts showing why the employment is necessary;

(2) state the name of the person to be employed and the reasons for the selection;

(3) state the professional services to be rendered;

(4) disclose any proposed arrangement for compensation;

(5) state that, to the best of the movant's knowledge, the person to be employed is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion; and

(6) disclose any interest that the person to be employed holds or represents that is adverse to the estate.

(b) STATEMENT OF PROFESSIONAL. The motion shall be accompanied by a verified statement of the person to be employed. The statement shall:

(1) state that the person is eligible under the

Bankruptcy Code for employment for the purposes set forth in the motion;

(2) disclose any interest that the person holds or represents that is adverse to the estate;

(3) disclose the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee;

(4) if the professional is an attorney, state the information required to be disclosed under § 329(a); and

(5) state whether the person shared or has agreed to share any compensation with any person and, if so, the particulars of any sharing or agreement to share other than the details of any agreement for the sharing of compensation with a partner, employee, or regular associate of the partnership, corporation, or person to be employed.

(c) SERVICE. The motion and at least 10 days' notice of the hearing shall be transmitted to the United States trustee, unless the case is a chapter 9

case, and shall be served on:

(1) the trustee;

(2) any committee elected under § 705 or appointed under § 1102 of the Code, or the committee's authorized agent;

(3) the creditors included on the list filed under Rule 1007(d); and

(4) any other entity as the court may direct.

(d) HEARING. The court may resolve the motion without a hearing if no objection or request for a hearing is filed at least 2 days before the scheduled hearing date.

(e) INTERIM EMPLOYMENT ORDER. If the motion so requests, the court may authorize employment on an interim basis without notice and a hearing pending resolution of the motion. A copy of the order authorizing employment on an interim basis, the motion, and at least 5 days' notice of the hearing shall be served forthwith on the entities listed in Rule 2014(c). The hearing shall be scheduled for a time that is not more than 14 days after service of the order authorizing interim employment, unless the court orders otherwise.

(f) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 days after discovering any matter that is required to be disclosed under Rule 2014(b), but that has not

yet been disclosed, a person employed under this rule shall file a supplemental verified statement, serve copies on the entities listed in Rule 2014(c) and, unless the case is a chapter 9 municipality case, transmit a copy to the United States trustee.

(g) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF EMPLOYED PROFESSIONAL. If, under the Code and this rule, a court authorizes the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or withdrawal of a partner.

~~(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the~~

~~employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.~~

~~(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.~~

COMMITTEE NOTE

This rule is amended to improve the procedures for obtaining an order authorizing the employment of professionals. The trustee -- which is defined in Rule 9001(10) to include a debtor in possession in a chapter 11 case -- or a committee seeking authorization is required to file a motion, rather than an application, and copies of the motion must be served on the parties in interest specified in the rule. If the motion requests, the court may authorize employment on an interim basis without a hearing so as to avoid delays in obtaining professional assistance immediately.

The moving party is required to state that, to the best of the person's knowledge, the professional to be employed is eligible to serve. The rule also requires that the professional state in a verified statement that the professional is eligible to serve. Eligibility is governed by the Bankruptcy Code and may depend on the purposes for which the professional is to be employed. For example, an attorney may be employed to represent the trustee or debtor in possession under § 327(a) only if the person is disinterested. See 11 U.S.C. § 101 for the definition of "disinterested." If an attorney is retained solely as special counsel under § 327(e), the professional need not be disinterested so long as other requirements are met. Nonetheless, regardless of the purpose for which the professional is to be employed, the moving party must disclose any interest that the person to be employed holds or represents that is adverse to the estate.

Arrangements for sharing compensation have been added to the matters that must be disclosed. Subdivision (f) is added to require timely supplemental disclosures.

Subdivision (g) is expanded to cover firms when the professional is not an attorney or accountant, and is amended to clarify that, if a partnership is employed, a further order authorizing employment is not required solely because the partnership has dissolved due to the addition or withdrawal of a partner.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses

~~(a) APPLICATION FOR COMPENSATION OR REIMBURSEMENT.~~ ~~An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement of (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have theretofore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation so paid or promised, whether any compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by~~

~~an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.~~

(a) MOTION FOR COMPENSATION OR REIMBURSEMENT. Rule 9014 governs a motion for interim or final payment from the estate for compensation for services rendered or the reimbursement of expenses.

(1) The motion shall state the amount requested, the services rendered, the time expended, and the expenses incurred. If compensation is requested, the motion shall also state:

(A) the source and the amount of any payments that have been made or promised for services rendered or to be rendered in any capacity in connection with the case;

(B) whether any compensation previously received has been shared and whether an agreement or understanding exists between the movant and any other entity to share compensation received or to be received for services rendered in or in connection with the

case; and

(c) the particulars of any sharing of compensation or any agreement or understanding with respect to sharing compensation, but the details of any agreement by the movant to share compensation as a member or regular associate of a firm of lawyers or accountants is not required.

(2) This Rule 2016(a) applies to a motion for compensation for services rendered by an attorney or accountant even if the motion is filed by a creditor or other entity.

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COMMITTEE NOTE

This rule is amended to provide that a proceeding for compensation or reimbursement of expenses from the estate is governed by Rule 9014. The provision requiring transmittal of papers to the United States trustee is deleted as unnecessary. See Rule 9034. The other amendments are stylistic.

Rule 3001. Proof of Claim

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(e) TRANSFERRED CLAIM.

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~~(5) *Service of Objection or Motion; Notice of Hearing.* A copy of an objection filed pursuant to paragraph (2) or (4) or a motion filed pursuant to paragraph (3) or (4) of this subdivision together with a notice of a hearing shall be mailed or otherwise delivered to the transferor or transferee, whichever is appropriate, at least 30 days prior to the hearing.~~

(5) *Procedures.* An objection under Rule 3001(e)(2) or (4), or a motion under Rule 3001(e)(3) or (4), is governed by Rule 9014. The transferor or transferee, whichever is appropriate, shall be treated as an entity listed in Rule 9014(c)(1).

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COMMITTEE NOTE

Paragraph (e)(5) is amended to provide that an objection or motion under Rule 3001(e) is governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014. Since the objection or motion is governed by Rule 9014, service must be made 20 days before the hearing

date, rather than 30 days as is provided under the current Rule 3001(e)(5).

The other amendments are stylistic.

Rule 3006. Withdrawal of Claim; Effect on Acceptance or Rejection of Plan

(a) WITHDRAWAL OF CLAIM. Except as provided in this rule, a ~~A~~ creditor may withdraw a claim as of right by filing a notice of withdrawal~~, except as provided in this rule~~. Unless the court orders otherwise, a creditor may not withdraw a claim if, after the creditor files a proof of claim, ~~If after a creditor has filed a proof of claim~~ an objection to the claim is filed, ~~thereto~~ ~~or~~ a complaint is filed against ~~that~~ the creditor in an adversary proceeding, ~~or~~ the creditor has accepted or rejected ~~the~~ a plan, or the creditor has otherwise ~~or otherwise has~~ participated significantly in the case~~, the creditor may not withdraw the claim except on order of the court after a hearing on notice to the trustee or debtor in possession, and any creditors' committee elected pursuant to § 705(a) or appointed pursuant to § 1102 of the Code~~. Rule 9014 governs a motion to withdraw a claim. The order may include ~~order of the court shall contain such~~ terms and conditions ~~as~~ which the court ~~deems~~ considers proper.

(b) EFFECT ON ACCEPTANCE OR REJECTION OF A PLAN. Unless the court orders otherwise, an authorized withdrawal of a claim ~~shall constitute~~ constitutes withdrawal of any related acceptance or rejection of a

plan.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice of the hearing on a creditor's withdrawal of a claim is deleted as unnecessary. See Rule 9014(c). The other amendments are stylistic.

Rule 3007. Objections to Claims

An objection to the allowance of a claim is treated as a motion governed by Rule 9014, except that (a) the motion shall be served at least 30 days before the hearing, and (b) an objection joined with a demand for relief of the kind specified in Rule 7001 is an adversary proceeding ~~shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding~~.

COMMITTEE NOTE

This rule is amended to clarify that an objection to the allowance of a claim is an administrative proceeding governed by Rule 9014. An objection is made by filing a motion in accordance with Rule 9014(b). But service of the motion must be made at least 30 days before the hearing date, rather than 20 days as is required for administrative motions under Rule 9014(c). The claimant may file a response under Rule 9014(d).

If an objection to a claim is joined with relief of the kind specified in Rule 7001, the objecting party must file and serve a complaint commencing an adversary proceeding under Part VII of these Rules.

The other amendments are stylistic.

Rule 3012. Valuation of Property Securing Lien ~~Security~~

On motion, the court may determine the value of a secured creditor's interest in the estate's interest in property ~~a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct~~. The motion is governed by Rule 9014, and the holder of the secured claim shall be treated as an entity listed in Rule 9014(c).

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Other amendments are stylistic.

Rule 3013. Classification of Claims and Interests

~~For the purposes of the plan and its acceptance, the court may, on motion after hearing on notice as the court may direct,~~ On motion, the court may determine classes of creditors and equity security holders ~~pursuant to §§~~ under § 1122, § 1222(b)(1), ~~and~~ or § 1322(b)(1) of the Code for purposes of the plan and its acceptance. The motion is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended to provide that the motion to determine classification of claims and interests is governed by Rule 9014. The other amendments are stylistic.

Rule 3015. Filing, Objection to Confirmation, and Modification of a Plan in a Chapter 12 Family Farmer's Debt Adjustment Case or a Chapter 13 Individual's Debt Adjustment Case

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(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. A party in interest may object to confirmation of a plan by filing an objection before the plan is confirmed. The objecting party shall serve a copy of the objection ~~An objection to confirmation of a plan shall be filed and served~~ on the debtor, the debtor's attorney, and the trustee~~, and any other entity designated by the court~~ in the manner provided in Rule 9014(c)(2), and shall ~~be transmitted~~ transmit a copy to the United States trustee, before the plan is confirmed ~~confirmation of the plan~~. ~~An objection to confirmation is governed by Rule 9014.~~ Discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C). If no objection is ~~timely~~ filed, the court may determine, without receiving evidence, that the plan has been proposed in good faith and not by any means forbidden by law ~~without receiving evidence on such issues~~.

(g) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan under ~~pursuant to~~ § 1229 or § 1329 ~~of the Code~~ is made by motion governed by Rule 9014. Every creditor that would be affected by the

proposed modification shall be treated as an entity listed in Rule 9014(c)(1) **[, but a respondent is not required to serve the response on any creditor unless the court directs otherwise]**. The motion shall include a copy or summary of the proposed modification **[and a list of the names and addresses of the creditors affected by the modification]**. ~~shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity~~

~~designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.~~

COMMITTEE NOTE

Subdivision (f) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection under Rule 3015(f) is not an administrative proceeding under Rule 9014, service of the objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C).

Deletion of the phrase "any other entity designated by the court" from the entities entitled to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving the objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on another entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

Subdivision (g) is amended to provide that a request to modify a chapter 12 or chapter 13 plan after confirmation is an administrative proceeding governed by Rule 9014. The movant is required to serve all creditors that would be affected by the proposed modification.

The other amendments are stylistic.

Rule 3019. Modification of Accepted Plan Before Confirmation in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If on motion the court finds ~~after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court~~ that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted the modification in writing ~~the modification~~, the plan as modified ~~it~~ shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan. Rule 9014 governs the motion.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of entities entitled to notice is deleted as unnecessary because Rule 9014, which governs motions under this rule, includes a list of entities to be served. See the amendments to Rule 9014(c)(1).

Rule 3020. Deposit; Confirmation of a Plan in a Chapter 9 Municipality Case or a Chapter 11 Reorganization Case

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(b) ~~OBJECTION TO AND HEARING ON CONFIRMATION~~ CONFIRMATION OF A PLAN IN A CHAPTER 9 OR CHAPTER 11 CASE.

(1) *Objection to Confirmation*. Within the time fixed by the court, any ~~An~~ objection to confirmation of ~~the~~ a plan shall be filed and served in the manner provided in Rule 9014(c)(2) on the debtor, the debtor's attorney, the trustee, the proponent of the plan, and any committee appointed under the Code~~, and any other entity designated by the court, within a time fixed by the court~~. In a chapter 11 reorganization case, ~~Unless the case is a chapter 9 municipality case,~~ the objecting party shall transmit a copy of the ~~every~~ objection ~~to confirmation shall be transmitted by the objecting party~~ to the United States trustee within the time fixed for filing objections. Discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C). ~~An objection to confirmation is governed by Rule 9014.~~

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COMMITTEE NOTE

Subdivision (b)(1) is amended to conform to Rule 9014(a) which, as amended, will provide that an objection to confirmation of a plan under this rule is not governed by Rule 9014. Although an objection to confirmation under Rule 3020(b) is not an administrative proceeding under Rule 9014, service of an objection must be made in the manner provided in Rule 9014(c)(2) and discovery may be obtained in the manner provided in Rule 9014(h)(1)(A)-(C).

Deletion of the phrase that provided that the court may designate other entities to receive copies of an objection is intended to avoid the appearance that an objecting party, before serving an objection, must inquire as to the proper parties to be served. This amendment is not intended to deprive the court of the power to require, in a particular case, that a copy of an objection be served on any other entity.

Consistent with the amendments to Rule 9014, a copy of an objection must be served on the debtor's attorney.

The other amendments are stylistic.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY.

(1) *Procedures Governing Motion*. Rule 9014 governs a ~~A~~ motion for relief from an automatic stay provided by the Code or a motion to prohibit or condition the use, sale, or lease of property under ~~pursuant to~~ § 363(e) ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

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(b) USE OF CASH COLLATERAL.

(1) *Procedures Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for ~~authorization~~ authority to use cash collateral ~~shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the~~

~~cash collateral, on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.~~ Every entity having an interest in the cash collateral shall be treated as an entity listed in Rule 9014(c)(1).

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~~(3) *Notice.* Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(c) OBTAINING CREDIT.

(1) *Procedure Governing Motion* ~~*Motion; Service*~~. Rule 9014 governs a ~~A~~ motion for authority to obtain credit ~~shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured~~

~~creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.~~ The motion shall include ~~be accompanied by~~ a copy of the agreement relating to the credit to be obtained.

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~~(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.~~

(d) AGREEMENT RELATING TO RELIEF FROM THE AUTOMATIC STAY, PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY, PROVIDING ADEQUATE PROTECTION, USE OF CASH COLLATERAL, ~~AND~~ OR OBTAINING CREDIT.

(1) *Administrative Proceeding*. ~~*Motion; Service.*~~ Except as provided in Rule 4001(d)(3), Rule 9014 governs a ~~A~~ motion for approval of an agreement:

(A) ~~to provide~~ providing adequate protection~~,~~;

(B) ~~to prohibit or condition~~ prohibiting or conditioning the use, sale, or lease of property~~,~~;

(C) ~~to modify or terminate~~ modifying or terminating the stay provided for in

§ 362~~,~~;

(D) ~~to use~~ using cash collateral~~,~~; or

(E) consenting to the creation of a lien senior or equal to an existing lien or interest in property of the estate ~~between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality case or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct~~.

(2) Copy of the Agreement. The motion shall ~~be accompanied by~~ include a copy of the agreement.

~~(2) *Objection.* Notice of the motion and the~~

~~time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.~~

~~(3) *Disposition; Hearing*. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.~~

~~(4)~~ (3) *Procedure For Approval of Agreement to Settle a Motion* ~~*Agreement in Settlement of Motion*~~. The court may direct that the procedures prescribed in Rule 4001(d)(1) and (2) do ~~paragraphs (1), (2), and (3) of this subdivision shall~~ not apply, and that an ~~the~~ agreement of the kind listed in Rule 4001(d)(1) may be approved without further notice, if the court determines that a motion made under

Rule 4001(a), (b) or (c) ~~pursuant to subdivisions (a), (b), or © of this rule~~ was sufficient to afford reasonable notice of the material provisions of the agreement and an opportunity to be heard for a hearing.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. The list of parties entitled to service of the motion and notice of the hearing is deleted from Rule 4001(a), (b), and (c), because Rule 9014(c)(1) lists the entities that must be served. Other amendments are stylistic.

Rule 6004. Use, Sale, or Lease of Property

(a) NOTICE OF PROPOSED USE, SALE, OR LEASE OF PROPERTY. Notice of a proposed use, sale, or lease of property, other than cash collateral, not in the ordinary course of business shall be given in accordance with ~~pursuant to~~ Rule 2002(a)(2), (c)(1), (i), and (k) and, if applicable, in accordance with § 363(b)(2) of the Code. The notice may include a date for a hearing to be held if a timely objection is filed.

(b) OBJECTION TO PROPOSAL. Except as provided in Rule 6004(c) or (d) ~~subdivisions (c) and (d) of this rule~~, an objection to a proposed use, sale, or lease of property ~~shall~~ may be filed and served ~~not~~ no less than five days before the date set for the proposed action or within the time fixed by the court. The objection shall be served on the entities listed in Rule 9014(c)(2). If a timely objection is filed and served, the notice sent under Rule 6004(a) is treated as a motion for authority to use, sell, or lease the property, the objection is treated as a response, and Rule 9014 governs the proceeding. If the notice does not include a hearing date, a hearing date shall be included in the objection. ~~An objection to the proposed use, sale, or lease of property is governed by Rule 9014.~~

(c) SALE FREE AND CLEAR OF LIENS AND OTHER INTERESTS. Rule 9014 governs a ~~A~~ motion for authority to sell property free and clear of liens or other interests ~~shall be made in accordance with Rule 9014 and shall be served on the parties who have liens or other interests in the property to be sold~~. The notice required by Rule 6004(a) ~~subdivision (a)~~ of this rule shall include the date of the hearing on the motion and the time within which objections may be filed and served ~~on the debtor in possession or trustee~~. An objection is treated as a response to a motion under Rule 9014(d)

(d) SALE OF PROPERTY VALUED UNDER $2,500. ~~Notwithstanding subdivision (a) of this rule, when~~ If all of the nonexempt property of the estate has an aggregate gross value less than $2,500, it shall be sufficient to give to all creditors, indenture trustees, committees appointed or elected under the Code, the United States trustee and other persons as the court may direct a general notice of intent to sell ~~such~~ the property other than in the ordinary course of business ~~to all creditors, indenture trustees, committees appointed or elected pursuant to the Code, the United States trustee and other persons as the court may direct~~. A party may object to the proposed sale ~~An objection to any such sale may be filed and~~

~~served by a party in interest~~ within 15 days after ~~of the mailing of~~ the notice is mailed~~,~~ or within the time fixed by the court. An objection is governed by Rule 9014.

~~(e) HEARING. If a timely objection is made pursuant to subdivision (b) or (d) of this rule, the date of the hearing thereon may be set in the notice given pursuant to subdivision (a) of this rule.~~

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COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014. Although the trustee or debtor in possession who sends a notice of proposed use, sale, or lease of property under § 363(b) does not need to obtain a court order and is not required to file a motion, if a timely objection is filed the notice is treated as a motion and the objection is treated as a response in a proceeding governed by Rule 9014.

The procedure is different if the property is to be sold free and clear of liens and other interests. The trustee or debtor in possession that wants to sell the property must file and serve a motion for authorization to sell it free and clear of liens and other interests. Notice of the proposed sale must be sent to all creditors and others under Rule 2002(a) and (c)(1), and the motion must be served in accordance with Rule 9014(c). An objection to the proposed sale is treated as a response to the motion, which is governed by Rule 9014.

Other amendments, including the rearranging of subdivisions, are stylistic.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

(a) PROCEEDING TO ASSUME, REJECT, OR ASSIGN. A proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

(b) PROCEEDING TO REQUIRE TRUSTEE TO ACT. A proceeding by a party to an executory contract or unexpired lease in a chapter 9 municipality case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual's debt adjustment case, to require the trustee, debtor in possession, or debtor to determine whether to assume or reject the contract or lease is governed by Rule 9014. The other party to the contract or lease shall be treated as an entity listed in Rule 9014(c)(1).

~~(c) NOTICE. Notice of a motion made pursuant to subdivision (a) or (b) of this rule shall be given to the other party to the contract or lease, to other parties in interest as the court may direct, and, except in a chapter 9 municipality case, to the United States trustee.~~

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rules 9014 and 9034. Subdivision (c) is deleted as unnecessary. Rule 9014(c)(1) lists the entities entitled to receive the motion papers and Rule 9034 requires transmittal of the motion papers to the United States trustee.

Rule 6007. Abandoning or Disposing ~~Abandonment or Disposition~~ of Property

(a) NOTICE OF PROPOSED ABANDONMENT OR DISPOSITION; OBJECTION ~~OBJECTIONS; HEARING~~. Unless the court directs otherwise ~~otherwise directed by the court~~, the trustee or debtor in possession shall give notice of a proposed abandonment or disposition of property to the United States trustee, all creditors, indenture trustees, and committees elected ~~pursuant to~~ under § 705 or appointed ~~pursuant to~~ under § 1102 of the Code. A party in interest may file an objection to the proposed abandonment or disposition no later than 15 days after the notice is mailed ~~and serve an objection within 15 days of the mailing of the notice,~~ or within the time fixed by the court. ~~If a timely objection is made, the court shall set a hearing on notice to the United States trustee and to other entities as the court may direct.~~ The objection is treated as a motion governed by Rule 9014.

(b) MOTION BY PARTY IN INTEREST. A party in interest may file and serve a motion to require ~~requiring~~ the trustee or debtor in possession to abandon property of the estate. Rule 9014 governs the motion.

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COMMITTEE NOTE

This rule is amended to provide that an objection to a proposed abandonment or disposition of property is governed by Rule 9014. The objection is made by filing and serving a motion in accordance with Rule 9014 before the time for objecting expires. Other amendments are stylistic.

Rule 9006. Time

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(d) FOR MOTIONS RELATING TO A PENDING ADVERSARY PROCEEDING OR ADMINISTRATIVE PROCEEDING ~~-- AFFIDAVITS~~. A written motion of the type described in Rule 9014 (a)(3) or (a)(4), other than one which may be heard ex parte, and notice of any hearing shall be served ~~not~~ no later than five days before the time specified for the ~~such~~ hearing, unless a different period is fixed by these rules or by ~~order of~~ the court. ~~Such an order may for cause shown be made on ex parte application~~. For cause shown, the order fixing a different period may be made on ex parte application. When ~~a~~ the motion is supported by affidavit, the movant shall serve the affidavit ~~shall be served~~ with the motion. ~~, and, except as otherwise~~ Except as provided in Rule 9023, opposing affidavits may be served ~~not~~ no later than one day before the hearing, unless the court permits them to be served at some other time.

****

COMMITTEE NOTE

Subdivision (d) is amended to limit it to motions made within adversary proceedings under Part VII of these rules, and to procedural or dispositive motions relating to pending

administrative proceedings under Rule 9014. The time limits set forth in Rule 9014(d) do not apply if the motion is governed by another rule that fixes different time periods. For example, a motion for summary judgment under Rule 7056, which applies in an administrative proceeding under Rule 9014(l), is governed by the time periods fixed by Rule 56 F.R.Civ.P., rather than by Rule 9014(d).

Rule 9013. Application for an Order ~~Motions: Form and Service~~

(a) SCOPE OF THIS RULE. This rule governs a request for an order relating to any of the following:

(1) payment of income to a trustee under § 1225(c) or 1325(c) of the Code;

(2) joint administration under Rule 1015;

(3) conversion of a case under § 706(a) or § 1112(a);

(4) dismissal of a case under § 1208(b) or § 1307(b);

(5) approval of the appointment of an examiner or trustee in a chapter 11 case under § 1104 and in accordance with Rule 2007.1;

(6) enlargement of time under Rule 9006(b) if the request is made before the original or enlarged period has expired other than an order enlarging the time to take action under Rule 1007(c), 1017(e), 3015(a), 4003(b), 4004(a), 4007(c), 8002, or 9033;

(7) form of, manner of sending, or publication of a notice in a chapter 7, chapter 12, or chapter 13 case;

(8) notice to a committee under Rule 2002(i);

(9) notice under Rule 9020(b);

(10) examination of an entity under Rule 2004;

(11) deferral of the entry of an order granting

a discharge under Rule 4004(c);

(12) reopening a case under § 350(b);

(13) conditional approval of a disclosure statement under Rule 3017.1; and

(14) protection of a secret, confidential, scandalous, or defamatory matter under Rule 9018.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by application. The application shall be in writing, unless it is made orally at a status conference or hearing at which all parties entitled to notice of the application are present. The application shall:

(1) state with particularity the relief sought and the grounds for that relief; and

(2) if in writing, be accompanied by proof of service under Rule 9013(c) and by a proposed order for the relief requested.

(c) SERVICE OF APPLICATION. No later than the time when a written application is filed, the applicant shall serve a copy of the application, any paper filed with the application, and the proposed order on the debtor, the debtor's attorney, the trustee, any committee elected under § 705 or appointed under § 1102, and any other entity required by federal law or these rules, and shall transmit a copy to the United

States trustee. Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes.

(d) NO RESPONSE REQUIRED; ORDER WITHOUT A HEARING. A response to the application is not required, and the court may order relief without a hearing.

(e) SERVICE OF ORDER. If the court issues an order, the clerk shall serve a copy on the applicant, the entities listed in Rule 9013(c), and any other entity as the court directs.

~~A request for an order, except when an application is authorized by these rules, shall be by written motion, unless made during a hearing. The motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Every written motion other than one which may be considered ex parte shall be served by the moving party on the trustee or debtor in possession and on those entities specified by these rules or, if service is not required or the entities to be served are not specified by these rules, the moving party shall serve the entities the court directs.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9013 is amended to govern a category of procedures, called "applications," that relate to certain enumerated matters which, in most instances, are nonsubstantive and noncontroversial. This rule, as amended, is designed to enable parties to obtain court orders relating to these matters in a relatively short period of time. This rule does not preclude any party from requesting appropriate relief after an application is granted and an order is entered. See, e.g., Rule 9024.

These amendments provide greater detail relating to procedures for obtaining the enumerated types of orders. They are intended to increase uniformity in litigation practice among districts and to reduce the necessity for local rules governing these matters.

In most situations, a request to enlarge a time period under these rules is noncontroversial and may be made under Rule 9013. But the enlargement of time to take certain action under these rules may be controversial and, therefore, warrant the procedural safeguards afforded in an administrative proceeding under Rule 9014. In particular, a request for an order enlarging the time to file a motion to dismiss a chapter 7 case under § 707(b) and Rule 1017(e), to file a chapter 12 plan in accordance with Rule 3015(a), to file an objection to the list of property claimed as exempt in accordance with Rule 4003(b), to file a complaint objecting to discharge under Rule 4004(a), to file a complaint to determine the dischargeability of a debt under § 523(c) and Rule 4007(c), to file a notice of appeal under Rule 8002, or to file an objection to proposed findings of fact and conclusions of law under Rule 9033, is an administrative proceeding governed by Rule 9014. In contrast, a request for an order enlarging the time to file schedules and statements is governed by Rule 1007(c), rather than 9013 or Rule 9014, so that the order may be issued without any notice.

Rule 9014. Administrative Proceeding ~~Contested Matters~~

(a) SCOPE OF THIS RULE. This rule governs any request for an order other than the following:

(1) a petition commencing a case under § 301, 302, or 303 of the Code, or a petition commencing a case ancillary to a foreign proceeding under § 304;

(2) a proceeding or request for relief of the type described in Rule 1006(b), 1006(c), 1007(c), 1010, 1011, 1013, 1017(e)(2), 1018, 2014, 3015(f), 3017, 3020(b), 4001(a)(2), 7001, or 9013(a);

(3) a motion made in an adversary proceeding under Part VII of these rules;

(4) a motion that addresses only a procedural matter relating to, or a dispositive motion within, a pending administrative proceeding, except as provided in Rule 9014(h)(2) or Rule 9014(m);

(5) a motion under Part VIII of these rules or any motion relating to an appeal to the district court or the bankruptcy appellate panel.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by written motion entitled "administrative motion." The motion shall:

(1) state with particularity the relief sought and the grounds for that relief;

(2) be accompanied by proof of service and by a proposed order for the relief requested; and

(3) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits; and

(B) if the value of property is an issue, a valuation report has been prepared, and the movant intends to introduce the valuation report as evidence, a copy of that report, with the name, address, and telephone number of the person who prepared it.

(c) SERVICE OF MOTION AND NOTICE OF HEARING.

(1) Except as provided in Rule 3007 or 9014(f), at least 20 days before the hearing date, the movant shall serve a copy of the administrative motion, a copy of any paper filed with it, and notice of the hearing on the following:

(A) any entity against whom relief is sought;

(B) the debtor;

(C) the debtor's attorney;

(D) the trustee;

(E) any committee elected under § 705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of unsecured creditors has been appointed, on the creditors included in the list filed under Rule 1007(d);

(F) any entity that has a lien on or other interest in property if the lien or interest may be affected by the requested relief; and

(G) any other entity entitled to service by federal law or these rules.

(2) Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit service by electronic means that are consistent with technical standards, if any, that the Judicial Conference establishes.

(3) The notice of the hearing shall conform to any appropriate Official Form and shall include:

(A) the date, time, and place of the hearing;

(B) the time to file a response; and

(C) a statement that if a response is not timely filed, the court may grant the motion without a hearing.

(d) RESPONSE.

(1) A response to an administrative motion may be filed no later than 5 days before the hearing date.

(2) No later than the time when a response is filed, the responding party shall serve a copy of the response on the movant and the entities listed in Rule 9014(c)(1) in the manner prescribed by Rule 9014(c)(2).

(3) A response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits if there is a factual dispute;

(C) if the value of property is an issue, a valuation report has been prepared, and the respondent intends to

introduce the valuation report as evidence, a copy of that report with the name, address, and telephone number of the person who prepared it.

(e) AFFIDAVITS. An affidavit filed in an administrative proceeding shall comply with Rule 56(e) F.R.Civ.P.

(f) INTERIM RELIEF. If a request for interim relief is included in an administrative motion, the movant shall take reasonable steps to provide all parties with the most expeditious service and notice of a preliminary hearing feasible and shall file an affidavit specifying the efforts made. If a response is filed before the preliminary hearing, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice feasible before the preliminary hearing. At the preliminary hearing, the court shall determine the adequacy of the notice under the circumstances. Interim relief may be granted under Rule 4001(b)(2) or Rule 4001(c)(2), to the extent and under the conditions stated in those rules.

(g) ORDER WITHOUT A HEARING. If no response is timely filed, the court may order relief without a hearing to the extent provided in § 102(1), or may notify the movant, and any other entity the court considers appropriate, that a hearing will be held.

(h) DISCOVERY. Unless the court directs otherwise, Rules 26 and 28-37 F.R.Civ.P. apply, except that:

(1) the parties are not required to make the disclosures mandated by Rule 26(a)(1)-(3), F.R.Civ.P., other than as provided in Rule 9014(b) and (d), but the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by discovery methods prescribed by Rule 26(a)(5) F.R.Civ.P.;

(2) the parties are not required to meet in accordance with Rule 26(f) F.R.Civ.P.;

(3) the time periods provided in Rules 30(e), 33(b)(3), 34(b), and 36(a) F.R.Civ.P. are reduced to 10 days or as directed by the court; and

(4) the movant may begin discovery only after a response is filed or a respondent begins discovery. A respondent may begin discovery at any time.

(i) HEARING; STATUS CONFERENCE.

(1) HEARING.

(A) Except as provided in Rule 9014(i)(1)(B) or (3), if a timely response to an administrative motion is filed, the court shall hold a hearing to determine whether there is

a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. No testimony may be taken at the hearing, unless the movant and all respondents consent. If the court finds that there is no genuine issue as to any material fact, it shall order appropriate relief. If the court finds that there is a genuine issue of material fact, it shall conduct a status conference.

(B) On request or on its own initiative and on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify shall be held on the scheduled hearing date.

(2) STATUS CONFERENCE. A status conference under Rule 9014(i)(1)(A) may be held at the time fixed for the hearing, or immediately afterward without further notice to the parties. The attorneys for the movant and for every party against whom relief is sought that filed a timely response, and every party not represented by an attorney,

shall appear and participate at the status conference. The purpose of the status conference is to expedite the disposition of the administrative proceeding. The court may enter a pretrial order requiring the disclosure of information of the type described in Rule 26(a)(1)-(3) F.R.Civ.P., scheduling pretrial discovery, fixing the time for a hearing on factual issues, and otherwise providing for the just, speedy, and economical disposition of the proceeding.

(3) RELIEF FROM AUTOMATIC STAY; PRELIMINARY HEARING ON USE OF CASH COLLATERAL OR OBTAINING CREDIT. If an administrative motion requests relief from an automatic stay of any act against property of the estate under § 362(d), or includes a request for a preliminary hearing as provided in Rule 4001(b)(2) or (c)(2), a hearing at which witnesses may testify may be held at the time fixed for the hearing.

(j) TESTIMONY OF WITNESSES. Rule 43(e) F.R.Civ.P. does not apply at an evidentiary hearing on an administrative motion.

(k) SERVICE OF NOTICE THAT ORDER HAS BEEN ENTERED.

Notice of the entry of any order shall be served in accordance with Rule 9022 on the movant, the entities listed in Rule 9014(c)(1), and any other entity as the court directs.

(l) APPLICATION OF PART VII RULES. Unless the court orders otherwise, the following rules apply in an administrative proceeding: Rules 7009, 7017, 7019-7021, 7025, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. The court may at any stage in a particular matter order that one or more of the other rules in Part VII apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures made applicable by the order.

(m) PROCEDURAL OR DISPOSITIVE MOTION RELATING TO PENDING ADMINISTRATIVE PROCEEDING. Rule 7(b)(1) F.R.Civ.P. and Rule 9006(d) apply to a motion that addresses only a procedural matter relating to, or a dispositive motion made within, a pending administrative proceeding.

(n) TRANSMISSION TO UNITED STATES TRUSTEE. A copy of every paper filed and every order entered in connection with an administrative proceeding shall be transmitted to the United States trustee if required by Rule 9034.

(o) RELIEF FROM PROCEDURAL REQUIREMENTS. The court for cause may order that any procedural requirement

provided in this rule shall not apply or shall be amended in a particular proceeding. The court shall give the parties notice of the order to afford them a reasonable opportunity to comply with any amended procedural requirements.

~~In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such~~

~~time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9014 had been limited to the category of disputes called "contested matters." Confusion as to whether a particular motion was a contested matter, rather than a different type of proceeding, and uncertainty as to the procedural requirements relating to a contested matter, have led to the amendment of this rule.

These amendments provide more detailed procedural guidance than provided in the past. This change is intended to increase uniformity in litigation practice among districts and to reduce the number of local rules.

This rule, as amended, governs a proceeding that is not an application (governed by Rule 9013), an adversary proceeding (governed by Part VII), a request to pay the filing fee in installments or to waive the filing fee (governed by Rule 1006), a request for an extension of time to file schedules and statements (governed by Rule 1007(c)), a proceeding commenced on the court's own initiative to dismiss a case for substantial abuse of chapter 7 (governed by Rule 1017(e)(2)), a motion for an order approving the employment of a professional person (governed by Rule 2014), or a request for an order approving a disclosure statement or confirming a plan (governed by Rule 3015(f), 3017, or 3020(b)).

A motion made in either a pending adversary proceeding or in a pending administrative proceeding -- such as a motion for summary judgment, a motion to dismiss, or a motion for a protective order relating to discovery -- is not an administrative proceeding governed by this rule. However, a procedural or dispositive motion relating to a pending administrative proceeding is governed by Rule 9014(m) and a motion relating to discovery is

governed by Rule 9014(h). Any motion made in connection with an appeal to the district court or bankruptcy appellate panel (including a motion for a stay pending appeal, a motion for leave to appeal, or any motion under a rule in Part VIII) is excluded from the scope of Rule 9014.

Rule 9014(a) also clarifies that this rule does not apply to a petition commencing a case under the Code (governed by §§ 301-303 of the Code and Rules 1002-1005, 1010, 1011, 1013, and 1018), or a petition commencing a case ancillary to a foreign proceeding (governed by § 304 of the Code and Rules 1002, 1005, 1010, 1011, and 1018).

Numerous rules require or refer to the filing of a motion for certain relief. Unless the motion to which the rule refers is of the type listed in Rule 9014(a) as being outside the scope of this rule, the motion would commence an administrative proceeding and would be governed by Rule 9014. For example, Rule 3008 provides that a party in interest "may move for reconsideration of an order allowing or disallowing a claim against the estate." A motion requesting reconsideration under Rule 3008 commences an administrative proceeding and is governed by Rule 9014.

The amendments also increase certain time periods relating to these types of proceedings. For example, current Rule 9006(d) -- which formerly applied in contested matters -- provides that a motion and notice of hearing must be served at least 5 days before the scheduled hearing date. In contrast, amended Rule 9014 provides for service at least 20 days before the date scheduled for the hearing. This time period may be enlarged in accordance with Rules 9006(b) and 9013, or reduced in accordance with Rule 9006(c) or Rule 9014(o). The three-day "mail rule" under Rule 9006(f) does not apply with respect to these time periods because the time for acting in accordance with this rule is not triggered by service of any notice or other paper.

The amendments provide that a response may be filed no later than 5 days before the scheduled hearing date. See Rule 9014(d). It is important for practitioners to be aware of Rule 9006(a), which provides that time periods in the rules that are less than 8 days are determined without including in the computation intervening Saturdays, Sundays, and

legal holidays.

Rule 9014(c) requires service of both the administrative motion and notice of the hearing, but there is no requirement that the motion and notice of hearing be in separate documents.

The court may order appropriate relief without a hearing if a timely response is not filed. If the judge wants to hold a hearing nonetheless, subdivision (g) requires that the court notify the movant that a hearing will be held. The court may hold the hearing at the originally scheduled time or on a subsequent date.

A hearing must be held if a response is filed. But, attorneys and unrepresented parties do not have to bring witnesses to the hearing unless (1) the proceeding is for relief from the automatic stay of acts against property of the estate, (2) the proceeding is for preliminary authority to use cash collateral or to obtain credit, or (3) the court gives reasonable notice to the parties that an evidentiary hearing may be held on the date when the hearing is schedule. Otherwise, if a response is filed, the court will hold a hearing only for purposes of determining whether an evidentiary hearing is necessary to resolve questions of fact and, if an evidentiary hearing is not necessary, to resolve the proceeding. If an evidentiary hearing is needed, the court will hold a status conference under Rule 9014(i)(2) to facilitate settlement discussions, set a discovery schedule, schedule an evidentiary hearing, or formulate any other pretrial order designed to expedite the proceeding. It is anticipated that the status conference will be held immediately following the court's determination that there is a genuine issue of material fact and, therefore, attorneys and unrepresented parties should attend the hearing prepared for an immediate status conference. Subdivision (i) does not preclude the court from ordering a status conference under Rule 105(d).

If the court determines based on affidavits that there are genuine issues of material fact, and an evidentiary hearing is held to resolve the issues, witnesses must testify orally in open court in accordance with Rule 9017 and Civil Rule 43(a). Under Rule 9014(j), the court may not resolve these factual issues based on affidavits.

The amendments also require automatic disclosure regarding valuation reports when the value of property is at issue, the report has been prepared, and the party intends to introduce it as evidence. As used in this rule, the term "valuation report" includes a formal appraisal of the property, as well as any less formal written report on the value of the property.

Any party that files a paper in connection with an administrative proceeding is required to transmit a copy to the United States trustee, if the proceeding relates to any of the matters listed in Rule 9034.

Subdivision (o) gives the court discretion to order, for cause and in a particular proceeding, that any procedural requirement under this rule does not apply or is amended. The court for cause shown may enlarge or reduce any time periods prescribed by this rule in accordance with Rule 9006.

Rule 9017. Evidence

Except as provided in Rule 9014(j), the ~~The~~ Federal Rules of Evidence and Rules 43, 44 and 44.1 F.R. Civ. P. apply in cases under the Code.

COMMITTEE NOTE

This rule is amended to conform to Rule 9014(j), which provides that Rule 43(e) F.R. Civ. P. does not apply at an evidentiary hearing in an administrative proceeding. The effect of Rule 9014(j) is that a witness must testify in open court, rather than by affidavit, at an evidentiary hearing in an administrative proceeding governed by Rule 9014.

Rule 9021. Entry of Judgment

Except as otherwise provided ~~herein~~ in this rule, Rule 58 F.R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or ~~contested matter~~ in an administrative proceeding shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) ~~F.R. Civ. P.~~ shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

This rule is amended to conform to the amendments to Rule 9014.

Rule 9034. Transmittal of Pleadings, Motion Papers, Objections, and Other Papers to the United States Trustee

Unless the United States trustee requests otherwise or the case is a chapter 9 municipality case, an ~~any~~ entity that files a pleading, motion, objection, or similar paper relating to any of the following matters shall transmit a copy ~~thereof~~ to the United States trustee within the time required by these rules for service of the paper:

(a) a proposed use, sale, or lease of property of the estate other than in the ordinary course of business;

(b) a rejection, assumption, or assignment of an executory contract or unexpired lease;

~~(b)~~ (c) the approval of a compromise or settlement of a controversy;

~~(c)~~ (d) the dismissal of a case, transfer of a case to another district, or conversion of a case to another chapter;

~~(d)~~ (e) the employment of a professional person ~~persons~~;

~~(e)~~ (f) an application for compensation or reimbursement of expenses;

~~(f)~~ (g) a motion for, or approval of an agreement relating to, the use of cash collateral or authority to obtain credit;

(h) the appointment of an interim trustee before an order for relief in an involuntary case;

~~(g)~~(i) the election of a trustee or the appointment of a trustee or examiner in a chapter 11 reorganization case;

(j) a review of the appointment of a creditors' committee ;

~~(h)~~(k) the approval of a disclosure statement;

~~(i)~~(l) the confirmation of a plan;

~~(j)~~(m) an objection to, or the waiver or revocation of, the debtor's discharge;

~~(k)~~(n) any other matter ~~in which~~ when the United States trustee requests ~~copies~~ a copy of filed papers or the court orders ~~copies~~ a copy transmitted to the United States trustee.

COMMITTEE NOTE

Several rules have contained provisions requiring that notice of a hearing on a particular matter be transmitted to the United States trustee. See, e.g., Rules 1014, 2001(a), 2007(a), 4001, and 6007. Those provisions have been deleted and replaced with the additional matters added to the list in Rule 9034. In addition, the election of a chapter 11 trustee under § 1104 is added to the list in this rule so that the United States trustee will receive all papers relating to the election. Other amendments are stylistic.

EXHIBIT B

United States Bankruptcy Court
District of Colorado
U.S. Custom House
721 19th Street
Denver, CO 80202-2508

Chambers of:
Donald E. Cordova

(303) 844-2525

February 12, 1998

Professor Alan N. Resnick
Hofstra University School of Law
Hempstead , New York 11550-1090

Re:Introduction letter re Rules 9013 and 9014

Dear Alan:

I write to comment on your proposed letter. I have some difficulty with the notion that a motion filed in a bankruptcy case "commences a new litigation that is unrelated to any pending lawsuit", or that a "motion commences a separate litigation". These motions of which you speak are in fact related to the underlying bankruptcy case which is the litigation, although not in the traditional sense. I view a motion as a request for relief, which is not separate litigation even though the motion may be contested. In traditional litigation the motion is part of the process, but it does not commence new litigation, unless you view contested motions as seperate litigation. In the bankruptcy case, motions also are part of the process.

I don't believe it is necessary to draw the distinction you have made in order to treat "motions" as "administrative proceedings", especially since we have substituted "applications" for "motions" in rule 9013. I would recommend that you merely state that most, if not all, contested motions will be renamed and dealt with as "administrative proceedings" in order to promote uniformity and insure due process. Furthermore the use of the phrase "unrelated to pending litigation" may create ambiguity where none is intended. The intended distinction is between "applications" and "motions" which now are to be treated as "administrative proceedings" in the bankruptcy case. Rule 9014 is not intended to be applicable to motion practice in adversary proceedings.

Finally, I want it to be clear that I am not in favor of the proposed changes. I say this knowing fully well that a great deal of time and effort has gone into making these changes. It

is my belief that uniformity and due process can be achieved more simply and without a wholesale revision of the motion practice. Attorneys have a great deal of difficulty understanding and complying with the present rules. We are, in my opinion, complicating what should be a relatively simple procedure. All that is required is "notice and a meaningful opportunity to be heard". This can be accomplished by inserting a time to respond in the present Rule 9014. I will withhold further comments since the majority of the committee has indicated a willingess to proceed with the changes. Also, I ask that you advise the standing committee that our committee is not unanimous in making the recommended changes.

In closing, I hesitate to send this sour note to you, knowing how hard you and the committee has worked on this project. I do so out my knowledge that we have made it very difficult for attorneys to practice in the bankruptcy courts, unless they specialize. I am mindful of the admonition in Rule 1001- that the rules be construed to secure the "just, speedy, and inexpensive determination of every case and proceeding". I don't believe these proposals will accomplish that.

Respectfully,

EXHIBIT C

collected under 28 U.S.C. section 1930(a)(3)" immediately after "28 U.S.C. section 1930(a)(1)".

(c) No funds provided by this Act shall be expended to fill any bankruptcy judgeship unless such appointee was on a merit selection list or report submitted to the court of appeals by either the judicial council or a subcommittee of the members of the council, in accordance with section 120 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98–353; 98 Stat. 344), section 152 of title 28 of the United States Code, and the Judicial Conference of the United States' Procedures for the Selection and Appointment of Bankruptcy Judges.

(d) REPORT ON BANKRUPTCY FEES.— 28 USC 1930 note.

(1) REPORT REQUIRED.—Not later than March 31, 1998, the Judicial Conference of the United States shall submit to the Committees on the Judiciary of the House of Representatives and the Senate, a report relating to the bankruptcy fee system and the impact of such system on various participants in bankruptcy cases.

(2) CONTENTS OF REPORT.—Such report shall include—

(A)(i) an estimate of the costs and benefits that would result from waiving bankruptcy fees payable by debtors who are individuals, and

(ii) recommendations regarding various revenue sources to offset the net cost of waiving such fees; and

(B)(i) an evaluation of the effects that would result in cases under chapters 11 and 13 of title 11, United States Code, from using a graduated bankruptcy fee system based on assets, liabilities, or both of the debtor, and

(ii) recommendations regarding various methods to implement such a graduated bankruptcy fee system.

(3) WAIVER OF FEES IN SELECTED DISTRICTS.—For purposes of carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall carry out in not more than six judicial districts, throughout the 3-year period beginning on October 1, 1994, a program under which fees payable under section 1930 of title 28, United States Code, may be waived in cases under chapter 7 of title 11, United States Code, for debtors who are individuals unable to pay such fees in installments.

(4) STUDY OF GRADUATED FEE SYSTEM.—For purposes of carrying out paragraphs (1) and (2), the Judicial Conference of the United States shall carry out, in not fewer than six judicial districts, a study to estimate the results that would occur in cases under chapters 11 and 13 of title 11, United States Code, if filing fees payable under section 1930 of title 28, United States Code, were paid on a graduated scale based on assets, liabilities, or both of the debtor.

SEC. 112. For fiscal year 1994 only, grants awarded to State and local governments for the purpose of participating in gang task forces and for programs or projects to abate drug activity in residential and commercial buildings through community participation, shall be exempt from the provisions of section 504(f) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. 42 USC 3754 note.

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: INTRODUCTION TO PACKAGE OF PROPOSED AMENDMENTS GOVERNING LITIGATION (RULES 9013, 9014, AND OTHERS)

DATE: FEBRUARY 15, 1998

At the meeting in September, the Advisory Committee requested that I, with Ken Klee's assistance, prepare an introduction to the "litigation package" of proposed amendments that includes complete revisions to Rules 9013 and 9014, as well as proposed amendments to more than 20 other rules. The purpose of the introduction is to summarize and highlight the most significant changes in this lengthy package.

If approved by the Advisory Committee at its March meeting in Little Rock, the introduction will be presented to the Standing Committee with the litigation package in June. If approved by the Standing Committee, it will be published as an introduction to the litigation package for the benefit of the bench and bar.

You will recall that, early in February, I circulated a draft of the introduction that I prepared with Ken's assistance, and I asked for your comments or suggestions by February 12th. I revised the draft to reflect many of the comments that I received. The revised draft is attached to this memorandum as Exhibit A, and a copy showing the changes (with strikeouts and underlining) to the original draft is enclosed as Exhibit B.

EXHIBIT A

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

At the request of the Advisory Committee on Bankruptcy Rules, in 1995 the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system to determine their satisfaction or dissatisfaction with the Federal Rules of Bankruptcy Procedure. The Advisory Committee requested the survey in connection with the work of its Long-Range Planning Subcommittee and for the purpose of identifying areas that are in need of improvement. The survey results indicated general satisfaction with the Rules, but identified motion practice and litigation as areas of significant dissatisfaction.

Part VII of the Rules govern adversary proceedings, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action in district court. For example, an adversary proceeding is commenced by the service of a summons and complaint. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the F.J.C. survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary proceeding. There has been some confusion and criticism regarding procedures that govern these matters, and these are the

troublesome areas identified in the F.J.C. survey results.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important substantive disputes. Motions relating to a pending adversary proceeding -- such as a motion relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor -- may be subject to minor local variation consistent with the flexibility present in district court motion practice.

The local variations in procedure addressed by these proposed amendments are of much greater consequence.

Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current Rules provide little specificity or uniformity as to the procedure governing them. Present Rule 9014 provides that relief is obtained by motion served in the manner provided for service of a summons, that reasonable notice and opportunity to be heard must be afforded, and that a response is not required unless the court orders otherwise. In the absence of a contrary order, certain listed Part VII rules applicable to adversary proceedings -- most relating to discovery or summary judgment -- apply to the motion, and the court may order that other Part VII rules shall apply. Rule 9006(d), which applies to motions generally, provides that, unless the court orders otherwise, at least five days' notice of a hearing must be given and, if the motion is supported by affidavit, the affidavit must be served at least one day before the hearing. These general provisions are often varied or supplemented with greater detail by local rule or court order. The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the present procedures, are desirable for such motions that are unrelated to any pending litigation.

Another criticism addressed by the Advisory Committee is confusion resulting from terminology used in the Bankruptcy

Rules. For example, Rule 9014 governs "contested matters," such as a motion to reject an executory contract or a motion to obtain court approval of a sale of assets. In many instances, "contested matters" are, in fact, uncontested. Other proceedings, such as an "application" for approval of professional fees, are not "contested matters" under the Rules, despite the fact that they are often contested by parties in interest.

The Advisory Committee has spent more than two years studying the Rules relating to litigation in bankruptcy courts and formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. As mentioned above, the Advisory Committee is satisfied that the rules governing adversary proceedings under Part VII are working well. But the Advisory Committee is proposing amendments that would substantially revise other procedures for obtaining court orders unrelated to pending litigation, both for routine administrative matters and for more complex disputes that require greater procedural safeguards.

The most important and fundamental changes would be made to Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), although more than 20 Rules will have to be revised to conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce

substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

(1) Rule 9013 would be replaced with a new rule on "applications." This rule would govern specific types of relief in areas that are routine, nonsubstantive, and rarely contested. For example, Rule 9013 would govern the procedure for obtaining a court order to jointly administer two or more cases, or for an order reopening a closed case. The procedures would be streamlined so as to avoid unnecessary costs or delay.

* The application and a proposed order would be served on specified entities at any time before, or even at, the time when the application is filed with the court; advance notice is not required.
* Although service by first class mail is available, the court by local rule may permit the application and accompanying papers to be served by electronic means.
* A response to the application would not be required and the court may order relief without a hearing.

(2) Rule 9014 would govern motions that are related to the administration of the bankruptcy case or the estate, but are unrelated to any other pending litigation. These motions are often contested and may affect

significant substantive rights of the parties. For example, a motion asking the court to order the appointment of a trustee in a chapter 11 case, requesting relief from the automatic stay, requesting authorization for a debtor in possession to obtain credit, or seeking an order terminating the exclusive period in which the debtor may file a plan of reorganization, would be an administrative proceeding governed by Rule 9014. Certain types of proceedings, such as a chapter 11 confirmation hearing governed by Rule 3020, would be expressly excluded from the scope of the rule so that more appropriate tailor-made procedures could govern. The title of Rule 9014 would be changed from "Contested Matters" to "Administrative Proceedings."

The significant features of an administrative proceeding under the preliminary draft of the proposed amendments to Rule 9014 include the following:

* The proceeding would be commenced by filing and serving a motion.
* The rule would specify the papers that must accompany the motion. A proposed order and, unless the movant is a consumer debtor, one or more supporting affidavits must be included. In certain situations, a copy of a valuation report must be included with the motion papers.

* The motion papers, including notice of the hearing, must be served on specified entities at least 20 days before the hearing date. The court by local rule may permit the papers to be served by electronic means.

* Interim relief, if appropriate, may be ordered on an expedited basis.

* A response to the motion may be served and filed, but no later than five days before the scheduled hearing date. If no timely response is filed, the court may rule on the matter without a hearing or may give notice to the movant that a hearing will be held notwithstanding the absence of a response.

* Discovery methods applicable in adversary proceedings would be available, except that mandatory disclosures required under Civil Rule 26(a)(1)-(3) and the discovery meeting required under Rule 26(f) would not apply. Certain 30-day time periods in the Civil Rules relating to discovery would be reduced to ten days consistent with the expedited nature of administrative proceedings.

* If a timely response is filed, the court would hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a

matter of law. Except for certain types of motions or if the parties otherwise consent, no testimony would be taken at the hearing. Therefore, attorneys and unrepresented parties would not have to bring witnesses to the hearing in most situations. If there is no genuine issue as to any material fact, the court may grant the appropriate relief. If the court finds that there is a genuine issue of material fact, the court would conduct a status conference for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing. Alternatively, on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify will be held on the originally scheduled hearing date.

* Rule 43(e) of the Federal Rules of Civil Procedure provides that where a motion is based on facts not appearing of record the court may hear the motion on affidavits presented by the parties. The Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does

not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of material fact, this provision would require that witnesses appear and testify, rather than give testimony by affidavit.

* To provide flexibility where needed, the court for cause may order that any procedural requirement under Rule 9014 will not apply or will be amended in a particular proceeding. In accordance with Rule 9006, the court also may extend or reduce any time period set forth in Rule 9014.

It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014 would provide greater guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in

bankruptcy court -- which are similar to typical motions made in a civil action in the district court -- would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

This preliminary draft of these proposed amendments has not been approved except for the limited purpose of publication for comment. The Advisory Committee is seeking comments and suggestions from the bench and bar regarding all aspects of these proposed amendments, and is especially interested in receiving comments regarding the highlighted provisions mentioned above. All comments, whether favorable, adverse, or otherwise, will be considered by the Advisory Committee, and further revisions to the preliminary draft may be made before the Advisory Committee finally recommends the adoption of amendments to the Bankruptcy Rules relating to litigation and motion practice.

EXHIBIT B

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

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Part VII of the Rules govern adversary proceedings, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action ~~lawsuit~~ in district court. For example, an adversary proceeding is commenced by the service of a summons and complaint. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the F.J.C. survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary

proceeding. There has been some confusion and criticism regarding procedures that govern these matters, and these are the troublesome areas identified in the F.J.C. survey results.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences ~~a~~ new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences ~~a separate~~ litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, ~~a~~ litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious ~~One~~ criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important substantive disputes. ~~Although traditional motions~~ Motions relating to a pending adversary proceeding -- such as a motion

relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor -- may be subject to minor local variation consistent with the flexibility present in district court motion practice~~,~~. The local variations in procedure addressed by these proposed amendments are of much greater consequence.

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conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments ~~This change~~ should reduce substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

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Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of material fact, this ~~This~~ provision would require that witnesses appear and testify, rather than give testimony by affidavit.

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It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014

would provide greater guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in bankruptcy court -- which are similar to typical motions made in a civil action in the district court -- would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

This ~~The~~ preliminary draft of these proposed amendments has ~~have~~ not been approved except for the limited purpose of publication for comment. The Advisory Committee is seeking comments and suggestions from the bench and bar regarding all aspects of ~~the preliminary draft of~~ these proposed amendments, and is especially interested in receiving comments regarding the highlighted provisions mentioned above. All comments, whether favorable, adverse, or otherwise, will be considered by the Advisory Committee, and further revisions to the preliminary draft may be made~~,~~ before the Advisory Committee finally recommends the adoption of amendments to the Bankruptcy Rules relating to litigation and motion practice.

TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

TO: Standing Committee

FROM: Daniel R. Coquillette, Reporter

DATE: December 1, 1997

RE: Federal Rules of Attorney Conduct

1. Charge

At our last meeting, I was asked by the Committee to draft uniform federal rules that would supersede the complex thicket of local rules now governing attorney conduct in the federal courts. This follows two invitational conferences of experts, on January 9-10, 1996 in Los Angeles and on June 18-19, 1996 in Washington, which focused on this problem. There were also seven special reports, five by this reporter and two by Marie Leary of the Federal Judicial Center. These are now available printed together as Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), hereafter "Working Papers." (I strongly recommend that you keep this useful volume at hand in reviewing what follows. If you need an extra copy, please call.)

In drafting the attached rules, I had important assistance from Bryan A. Garner, John K. Rabiej, and Alan N. Resnick, Reporter to the Bankruptcy Advisory Committee. I am most grateful. Errors are my own.

These rules are now being reviewed by the Style Sub-Committee, under the regular procedures. If the Standing Committee approves of a version of this draft, the rules will be sent next to the relevant advisory committees for review at their spring meetings. The final draft would then come back to this Committee at its June meeting for a vote on publication.

2. Basic Structure

I have attached just one "rule system," but it does, in fact, offer the Committee four options:

1. To accept the complete package, which establishes a narrow core of uniform federal rules, the ten "The Federal Rules of Attorney Conduct." All other matters would be governed by current state standards, the so-called "dynamic conformity" model;

2. To adopt only some of the ten proposed uniform Federal Rules of Attorney Conduct, i.e. only the conflict of interest rules;

3. To accept only the new uniform rule that establishes a state standard, with no core of uniform federal standards at all. (This would mean adopting only Rule 1 of the Federal Rules of Attorney Conduct);

4. To adopt none of the above, and leave the matter to the present system of local rules.

There is one option I have not included. Based on my extensive studies and discussions with the Advisory Committees on Appellate Rules and Bankruptcy Rules, I would strongly recommend that district courts and appeals courts be treated alike, and that bankruptcy courts, and other special courts, be treated separately. See Working Papers, supra, 235-292 (appeals courts); 293-334 (bankruptcy courts). Thus, these proposed new rules cover just district courts and appeals courts.

3. New Fed. R. Civ. P. 83 (c)

At the moment, attorney conduct in the district courts is governed by local rules promulgated pursuant to Fed. R. Civ. P. 83. It is thus logical to start there. I have drafted a new subdivision (c) which would provide that the standards of attorney conduct in the district courts are established by the ten Federal Rules of Attorney Conduct, together with other uniform rules. (Such as Fed. R. Civ. P. 11.) This supersedes the existing local rules. The ten Federal Rules of Attorney Conduct are incorporated by Rule 83 (c) as Fed. R. Civ. P. Appendix 1, just as the Appendix of Forms is incorporated by Rule 84. Like the Appendix of Forms, the Federal Rules of Attorney Conduct would go through the full Rules Enabling Act process established by 28 U.S.C. § 2072 (b).

There is also a practical advantage with this structure. On being admitted to the bar of a federal district court or appeals court, a lawyer would be handed a small pamphlet containing the ten Federal Rules of Attorney Conduct. These rules would always govern where relevant. Otherwise, Rule 1 of the Federal Rules of Attorney Conduct directs the attorney to the current standards for the state where the district court is located or, as in the case of a court of appeals, to a choice of law rule selecting the appropriate state standard.

It has been suggested by the Reporter to the Criminal Rules Advisory Committee, Professor David Schlueter, that a parallel change should be made to the Federal Rules of Criminal Procedure. This would assure that identical rules should govern civil and criminal proceedings-- a fundamental assumption of the ABA Model Rules. (There are certain exceptions. See ABA Model Rule 3.8: "Special Responsibilities of a Prosecutor") Professor Schlueter suggests that:

> "A possible candidate for that new provision might be existing Rule 57, Rules by District Courts, which in some respects already parallels Civil Rule 83. I would recommend that the new language already proposed for

Civil Rule 83 simply be added to what would become a new subdivision (d) in Criminal Rule 57, as follows:

Rule 57. Rules by District Courts

* * * * *

(d) ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. §§ 2072 and 2075."

As Professor Schlueter correctly observes, this would be a matter for the Advisory Committee on Criminal Rules.

4. New Fed. R. App. P. 46

Of course, the courts of appeals already have a uniform rule governing attorney conduct, Fed. R. App. P. 46. This rule establishes the notoriously vague "conduct unbecoming a member of the bar" standard. After In re Snyder, 472 U.S. 634 (1985), courts of appeals have adopted many different local rules to give Rule 46 some specificity of content. See Working Papers 239-240, and cases cited. (In re Snyder is set out in full at Working Papers 265-271.) Thus the advantages of uniformity have been lost.

The new Fed. R. App. P. 46 would adopt the Federal Rules of Attorney Conduct, except for matters arising before other courts. There the standards of the other court will be applied. (Of course, under the new Fed. R. Civ. P. 83 (c) district courts will also follow the Federal Rules of Attorney Conduct, but not necessarily bankruptcy courts.) Under Rule 1 of the Federal Rules of Attorney Conduct, the appeals court will have a choice of law rule selecting an appropriate state standard, unless the conduct falls within the ambit of the other Federal Rules of Attorney Conduct. See Fed. R. Attny. Conduct 1 (a) (2).

There are in fact very few cases involving attorney conduct in the courts of appeals, and most of those involve matters arising in the district courts. There is every reason to amend Fed. R. App. P. 46 to track the district court rule. See Working Papers, supra, 237-247.

5. The Federal Rules of Attorney Conduct (Fed. R. Attny. Conduct)

Eight of the ten Federal Rules of Attorney Conduct closely follow the substance of the ABA Model Rules, which have already been adopted in the majority of state and federal courts. (Some stylistic changes have been made by Bryan Garner to conform these rules with the Guidelines for Drafting and Editing Court Rules (1996). See Working Papers, supra, 45-77. The exceptions are Rule 1 and Rule 10. Rule 1 sets up

the "dynamic conformity" with state standards, and is closely modeled on Model Local Rule 4 of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. It also contains a choice of law rule, which closely follows ABA Model Rule 8.5.

Rule 10 is based on the most recent negotiations between the Department of Justice and the Conference of Chief Justices relating to "Communication with Persons Represented By Counsel," Tentative Working Draft, July 1, 1997. It is different from ABA Model Rule 4.2. Nearly 12% of all controversies between 1990 and 1996 in federal court relating to attorney conduct concerned communications with represented parties. See Working Papers, supra, 201-205.

Four of the other rules relate solely to conflict of interest standards. See Rules 3, 4, 5 and 6, tracking ABA Model Rules 1.7, 1.8, 1.9 and 1.10. These rules together account for 44% of all attorney conduct controversies in the federal courts. See Working Papers, supra, 100-102, 107-116, 189-210. They are also closely cross-referenced to each other. The Committee may wish to add provisions to Rule 6 permitting some "screening." Otherwise state standards will apply, which usually limit any screening to former public officers or employees. See ABA Model Rule 1.11.

Three of the remaining rules concern the related subjects of confidentiality, candor toward the tribunal, and truthfulness in statements to others. See Rules 2, 7, and 9, tracking ABA Model Rules 1.6, 3.3, and 4.1. These rules are also cross-referenced to each other. While there rules together account for only 6% of all attorney conduct controversies in federal courts, they all relate to issues that are central to the judicial process. See Roger C. Cramton, Memorandum to Participants of the Special Conference, 2 (Jan. 8, 1996).

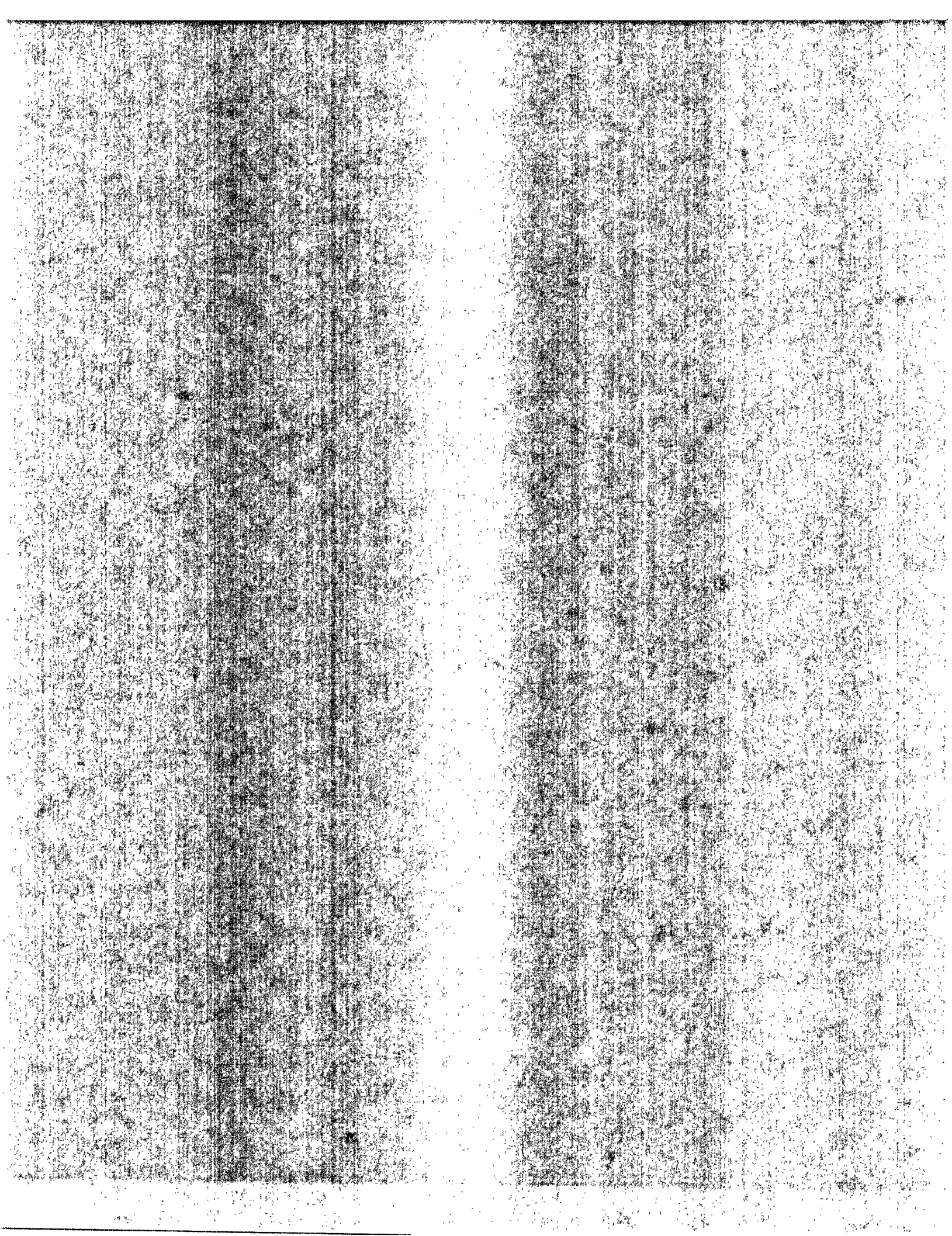
The last rule, Rule 8, is the "Lawyer as Witness" rule. It tracks ABA Rule 3.7, and cross-references Rules 3 and 5. This rule accounts for a surprising share of federal court attorney controversies between 1990 and 1996-- over 9.5%. See Working Papers, 203. It is also an issue which directly confronts the tribunal.

Altogether, Rules 2-10 account for nearly 72% of the attorney conduct issues raised in federal courts from 1990-1996. See Working Papers, supra, 201-205. This leaves only 28% of the issues previously governed by local rules for determination by reference to state standards under Rule 1. Of course, since many of the state standards are also based on the ABA Model Rules, the actual uniformity would be even greater.

6. Conclusion

The Standing Committee is mandated by Congress to "maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073 (b). These rule changes replace nearly one hundred differing local rules with a single set of ten rules. These follow the standards already adopted in a majority of state and federal courts. The new rules are also limited to matters particularly concerning the federal courts and, indeed,

account for nearly 72% of all federal attorney controversies from 1990-1996. For all the rest, Rule 1 refers the court to dynamic conformity with appropriate state standards. If you have any questions, do not hesitate to call me at 617-552-8650 or FAX 617-576-1933.



FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) **Eligibility.** An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) **Application.** An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) **Admission Procedures.** On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an attorney connected with proceedings before that court; and

(2) *Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072, govern any other act or omission by an attorney.*

NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § 2072.*

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie,* in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics,* 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See D.R. Coquillette, *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct,* Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created,* 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 3 (Jan. 8, 1996). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) **Standards for Attorney Conduct.** Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) **Conduct in Proceedings Before District Court.** For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the state authority responsible for adopting rules of attorney conduct of the state in which the district court sits; and

(2) **All Other Conduct.** For any other act or omission by an attorney admitted to practice before a district court or court of appeals, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; but if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) **Sanctions.** For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) **Applicability.** Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement), republished in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no

application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, for disclosures required by law or court order, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to another's financial interests or property; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 almost in its entirety. There is one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. (The ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal rule comports with or avoids conflict with forty-one jurisdictions, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference, 2* (Jan. 8, 1996). In addition, an exception for disclosures "required by law or court order" has been added. See ABA Code of Professional Responsibility DR-4-101 (C) (2). Finally, the rule

provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer must not represent a client if that representation may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation; when representation of multiple clients in a single matter is undertaken, the consultation must include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety, with small stylistic changes. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116, 189-210.

This Rule, and Rules 5, 6 and 8, do not prevent a trial judge from disqualifying an attorney when necessary to protect the integrity of a judicial proceeding, despite client consent to the representation. See Wheat v. United States, 486 U.S. 153 (1988).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Until the representation of a client ends, a lawyer must not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer must not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on the client's behalf.

(f) A lawyer must not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer must not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement. Nor may a lawyer settle a claim for such liability with an unrepresented person or former client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for small stylistic changes and cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). See Working Papers, supra, 100-102, 107-116. DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter must not later:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts the substance of ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of

Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c), or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from later representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for small stylistic changes and cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the client's position and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer must take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and a cross reference to these rules. To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference,* 2-3 (Jan. 8, 1996). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of

the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) the lawyer's disqualification would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for small stylistic changes and a cross reference to these rules. Between 1990-1995, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) **General Rule.** A lawyer who is representing a client in a matter must not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by:

(1) constitutional law, statute, or an agency regulation having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:

(1) the communication occurs prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

(A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or

(B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or

(C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not seperately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding

the organization with respect to proof of the matter.

(2) The term "control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d) **Limitations on Communications.** When communicating with a represented person pursuant to this Rule, a lawyer must not:

(1) inquire about information regarding litigation strategy or legal arguments for counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b) (2) (D).

NOTE

This rule is based on the tentative outcome of negotiations between the Department of Justice and the Conference of Chief Justices, "Discussion Draft, December 19, 1997," with the addition of some technical stylistic changes. As such, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "Comment." See "Discussion Draft, December 19, 1997," "Comment," pp. 1-6.

The Conference of Chief Justices considered this "Discussion Draft" at its regular Midwinter Meeting on January 25-29, 1998. At the request of officials of the American Bar Association and others, the Conference postponed the matter to its next meeting, scheduled for August 2-6, 1998. See Memorandum of February 6, 1998 from Chief Justice Thomas R. Phillips, President, Conference of Chief Justices. Obviously, if the Conference of Chief Justices, the Department of Justice, and the American Bar Association can agree on a draft rule, it will be the presumptive candidate for the final version of Rule 10.

From 1990-1995, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases* (1990-95) *Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104. See id., 115-116, 199-200, 209-210.

STUDY OF RECENT BANKRUPTCY CASES (1990-1996) INVOLVING RULES OF ATTORNEY CONDUCT

TO: Committee on Rules of Practice and Procedure, Judicial Conference of the United States

FROM: Daniel R. Coquillette, Reporter

DATE: May 11, 1997

CONTENTS

APPENDICES

I. INTRODUCTION

This Committee is currently considering two options for changing local rules governing attorney conduct in the federal district courts. "Option one" would be the adoption of a model local rule similar to Model Local Rule IV of the Federal Rules of Disciplinary Enforcement, first proposed by the Committee on Court Administration and Case Management in 1978. (This would be recommended by the Judicial Conference to the federal courts for adoption by each court individually pursuant to 28 U.S.C. § 2071.) "Option two" is the adoption of nationwide uniform rules of attorney conduct pursuant to the Rules Enabling Act, 28 U.S.C. § 2072-2074. These uniform rules would apply to specific "core" areas where problems frequently arise in federal district courts, leaving all other areas to be governed by state standards. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995; Study of Recent Federal Cases Involving Rules of Attorney Conduct, January 9, 1996; and Supplement to Study of Recent Federal Cases Involving Rules of Attorney Conduct (1990-1995), May 14, 1996.

This memorandum examines how such changes in the federal district courts would effect the bankruptcy courts and what, if anything, should be done to improve rules of attorney conduct in the bankruptcy courts. At the request of the Committee, I have conducted three separate bankruptcy studies. The first study determined the number of reported bankruptcy cases focusing on local rules of attorney conduct and categorized each case by the specific rule involved. The second study traced the sources of local rules currently governing attorney conduct in each district of the bankruptcy court system. The final study researched reported cases and law reviews discussing the application of these rules in conjunction with applicable provisions of the Bankruptcy Code, especially § 327.[1]

[1] Some districts have already made efforts to improve the administration of attorney discipline in bankruptcy court. For example, the Central District of California, by a general order, has established procedures by which bankruptcy judges can refer disciplinary problems to the Clerk of Court. See General Order 96-05, U.S. Bankruptcy Court C.D. Ca.

I am, once again, most deeply indebted to my talented and industrious research assistants, James J.G. Dimas and Thomas J. Murphy. Their hard work and intelligence has been vital to this entire series of reports, and they can take great pride in them on the eve of their graduation and entry to the "real world." In addition, I have benefited greatly from conversations with members of the Advisory Committee on Bankruptcy Rules. Of particular help has been the Chairman, the Honorable Adrian G. Duplantier, and Gerald K. Smith. Gerald Smith has attended every one of our task force meetings, and is a leading expert on attorney conduct rules in bankruptcy proceedings. The Committee's Reporter, Professor Alan N. Resnick, and Patricia S. Channon, Senior Attorney, Bankruptcy Judges Division, Administrative Office of the U.S. Courts, have also been of invaluable assistance. Particularly important was Patricia Channon's prior study of local rules in the bankruptcy courts, on which I have relied heavily. Any recommendations are, however, my own. In addition, any revisions to the Bankruptcy Rules, or any model local rules designed for bankruptcy proceedings, should be considered by the Bankruptcy Advisory Committee before action is taken.

II. METHODOLOGY AND FINDINGS:

A. "Study I": Reported Bankruptcy Cases Involving Rules of Attorney Conduct (1990-1996). See Appendices I, II.

The first study ("Bankruptcy Case Study") researched reported cases concerning local rules of attorney conduct, and categorized each case by the specific rule involved. The purpose of this study was to determine which kinds of attorney conduct are most important to the bankruptcy courts. This study was modeled after previous studies done for this Committee on local rules of attorney conduct in the federal district courts and federal courts of appeals. See Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, December 1, 1995; Supplement to Study of Recent Federal Cases (1990-1995)

Involving Rules of Attorney Conduct, May 14, 1996. (Collectively, the "Federal Case Studies")

As in the prior studies, an extensive computer search was designed, using the Descriptive Word Index of the Federal Practice Digest and the Westlaw data base. The search employed thirty five West Digest key numbers that closely tracked attorney conduct rules, as well as key words, phrases and numbers relating to these rules. A date restriction of January 1, 1990 to March 23, 1996 was used to allow for adequate comparison with the previous Federal Case Studies. The resulting search produced ninety-three reported bankruptcy cases involving local rules of attorney conduct.

Devoted research assistants then read each of the ninety-three cases. They prepared a painstaking written analysis of each case, including a summary of the underlying facts, the attorney conduct in question, the relevant standards of attorney conduct cited, the relevant key numbers assigned by West Publishing and the court's eventual decision. See Illustration I, Appendix I. At this point, a decision was to be made as to which "category" of rule was chiefly involved in each dispute. When the local standards were not based on the ABA Model Rules of Professional Conduct ("Model Rules"), the standards were "translated" into the applicable ABA Model Rule categories of Chart I, Appendix II using a system similar to the comparative table on page 128 of West's Selected Statutes, Rules and Standards of the Legal Profession (1995 ed.). Of course, this was a "rough fit," but it permits comparing "apples with apples" -- and a review of individual cases showed that the "rough fit" was more than adequate for the purposes of this study.

The results of the Bankruptcy Study show that ABA Model Rules 1.7, 1.8, 1.9, 1.10 and 1.11 or standards analogous to those rules were central to 53% of reported bankruptcy cases involving issues of attorney conduct (49 cases of the 93). The next largest category involved safekeeping of client property (ABA Model Rule 1.15 or its equivalents) accounting for 13%, or 12 cases. The third largest category involved attorney's fees (equivalent to ABA Model Rule 1.5) containing 9%, or 8 cases. Combined,

these three categories account for 75% of all reported bankruptcy cases. The next highest category involved "Lawyer as a Witness" (ABA Model Rule 3.7) with 4%, or only 4 cases.

These results were compared with the prior studies of federal district courts and courts of appeals (the "Federal Case Studies"). The frequency of "Conflict of Interest" rules was consistent with the results of the prior studies, with 53% of the reported bankruptcy cases involving such conflicts, as opposed to 46% of the other reported federal cases. But the "Communications with Represented Parties" Rule (ABA Model Rule 4.2) and the "Lawyer as Witness" Rule (ABA Model Rule 3.7) were significantly less prevalent in the Bankruptcy Study than in the prior Federal Case Studies: 4% and 1% respectively in the Bankruptcy Study, as opposed to 10% each in the Federal Case Studies. Conversely, cases involving "Attorney's Fees" (ABA Model Rule 1.5) constituted 9% of the bankruptcy cases, as opposed to 5% of the federal cases, and cases involving "Safekeeping of Client Property" (ABA Model Rule 1.15)[2] involved 13% of the bankruptcy cases, as opposed to 1% of the federal cases. Not surprisingly, in light of the Federal Case Studies, most ABA Model Rules, or their equivalents, never feature in reported bankruptcy decisions. Almost all bankruptcy cases involving attorney conduct involve the small "core" group of rules

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[2] ABA Model Rule 1.15, "Safekeeping Property," is far more important in bankruptcy courts than it is in other federal courts. The text is as follows:

> "(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.
>
> (b) Upon receiving funds or other property in which the client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.
>
> (c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interest. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved."

mentioned above. See Chart I, Appendix II; see also Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, December 1, 1995; Supplement to Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct, May 14, 1996.

B. "Study II": Sources of Local Rules Governing Attorney Conduct in Bankruptcy Courts. See Appendix III.

The second study ("Bankruptcy Rule Study") traced the sources of the local standards governing attorney conduct in each bankruptcy court. The purpose was to determine how closely the bankruptcy courts follow the local rules of attorney conduct used by their corresponding district courts, which in turn would reveal how widespread the impact of changes in the federal district courts would be in the bankruptcy court system. This study was built upon the excellent research of Patricia S. Channon, "Professional Responsibility Rules in the Local Rules of Bankruptcy Courts," and a previous report done for this Committee on local rules regulating attorney conduct in the federal district courts and courts of appeals. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995.

The results of this study reveal that most bankruptcy courts do not have their own independently developed set of local rules governing attorney conduct. See Chart II, Appendix III, Infra. Over seventy-three (73) percent of the ninety-four bankruptcy courts have either explicitly or implicitly adopted the local rules of attorney conduct of their respective federal district courts. Thirty-two (32) of the ninety-four (94) bankruptcy courts have no local rule at all governing attorney conduct. (These courts still require that the attorney be admitted to the local federal district court, which presumably implies that the attorney is governed by the federal district court's rules of attorney conduct, if any.[3])

[3] Where the local rules of a bankruptcy court are silent on attorney conduct, we have assumed that the rules of the federal district court apply. See e.g. In re Glenn Elec. Sales Corp., 99 B.R. 596, 598 (D. N.J. 1988)

Nineteen (19) of the bankruptcy courts explicitly adopt the standards of attorney conduct employed by the local federal district court. Eighteen (18) others adopt all the rules of the local federal district court generally. Thus, sixty -nine (69) of the bankruptcy courts explicitly or implicitly adopt district court standards. Additionally, three (3) bankruptcy courts use district court rules in combination with other standards, meaning that over seventy-seven (77) percent of the bankruptcy courts could automatically import changes made to district court attorney conduct rules.

The remaining bankruptcy courts use other standards. Four (4) courts have local rules authorizing disciplinary enforcement, but fail to state the standard to be applied. Eight (8) bankruptcy courts refer to the rules of attorney conduct as promulgated by the state's highest court. Three (3) courts refer to a combination of state and ABA standards. Two (2) courts, the Bankruptcy Courts for the Eastern and Western Districts of Arkansas, adopt the Uniform Rules of Disciplinary Enforcement, first promulgated by the Committee on Court Administration and Case Management in 1978. One court (1), the Bankruptcy Court for the Southern District of Georgia, refers to the "current canons of professional ethics of the American Bar Association."

As discussed in the prior reports, there is a growing "balkanization" of rules governing attorney conduct in the federal district courts. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995. It appears that the bankruptcy court system has, for the most part, "imported" this problem by adopting the differing rules of attorney conduct of their respective federal district courts. See Chart II, Appendix III. See also Knopfler v. Schraiber, 103 B.R. 1001, 1003 (Bankr. N.D. Ill 1989) (holding that a federal court may consider both the Model Code and the Model Rules as standards governing attorney conduct); In re Consupak, Inc., 87 B.R. 529, 550 (Bankr. N.D. Ill. 1988) (holding that a federal court may consider both the Model Code and the Model Rules as

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(holding that when local rules of bankruptcy court are silent on issue of attorney conduct, federal district court's local rules apply).

standards governing attorney conduct); In re Glenn Elec. Sales Corp., 99 B.R. 596, 598 (D.N.J. 1988) (disqualified law firm argues Model Code improperly invoked by District Court in Model Rules jurisdiction).

C. "Study III": Application of Rules for Attorney Conduct in Conjunction with the Bankruptcy Code. See Appendices IV, V.

The third and final study examined the application of local rules of attorney conduct in conjunction with the applicable provisions of the Bankruptcy Code, especially, § 327. See 11 U.S.C. § 327(a). The purpose was to consider what effects, if any, the options considered by this Committee would have on the application of Bankruptcy Code.

The bankruptcy system is unique in American jurisprudence and presents unique ethical issues. This is particularly true in the area of conflict of interest regulation. As revealed by our prior studies, conflict of interest issues frequently arise in federal district courts, even in ordinary civil litigation where there are only two parties. See Study of Recent Federal Cases Involving Rules of Attorney Conduct, January 9, 1996, and the other studies cited at Section I, supra. The bankruptcy arena is far more complicated. There are rarely just two diametrically opposed adversaries, and frequently dozens, or even hundreds of parties with shifting alignments and differing interests that can change over time. See Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process," 97 Commercial L.J. 149, 150 (1992), set out in Appendix V, infra. "[T]here are ordinarily a number of parties whose interests and alliances are constantly in a state of flux during the case." Id., 150. According to Professor Meltzer:

> "Bankruptcy involves shifting relationships: Today's enemy is tomorrow's friend and vice versa. Thus bankruptcy is rich in the potential for conflict, but it is also rich in the potential for cooperation. The parties need to work together even when they are at sword's points. This fact makes it extra difficult to identify just when a conflict exists."

Id. at 151, quoting, Ayer, "How to Think About Bankruptcy Ethics," 60 Am. Bankr. L.J. 355, 386-87 (1986).[4]

§ 327 of the Bankruptcy Code is a statutory prescribed ethical rule governing conflict of interests for attorneys and other professional persons in the bankruptcy context. The statute permits the Bankruptcy Trustee to only employ professional persons (including attorneys) "that do not hold or represent an interest adverse to the estate" and are "disinterested persons." 11 U.S.C. § 327(a). The Bankruptcy Code does not define the words "hold or represent an interest adverse to the estate," but caselaw has defined this provision to include : 1. "the possessing or asserting of any economic interest that would tend to lessen the value of the bankruptcy estate" or 2. "possessing a predisposition under circumstances that render such a bias against the estate." See In re Roberts, 46 B.R. 815, 827-29 (Bankr. D. Utah 1985), *aff'd in part, rev'd in part,* 75 B.R. 402 (D. Utah 1987) (en banc).

The Bankruptcy Code does define "disinterested person." See 11 U.S.C. § 101(14). The definition lists five categories of individuals who are not "disinterested." Examples of such individuals includes creditors, equity security holders, insiders and investment bankers for any outstanding security of the debtor. 11 U.S.C. § 101(14). The definition section also possesses a "catch-all" provision which some courts have interpreted to require an attorney to be free from "the slightest personal interest which might be

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[4] For example, conflict of interest is inherent in the representation of a debtor in possession (DIP) during a chapter 11 reorganization. Unless a trustee has been appointed (not the usual situation), the DIP is the debtor itself. 11 U.S.C. § 1101. Section 1107 of the Bankruptcy Code imposes on the DIP most of the duties of a trustee. Nowhere is there any reference to duties to the owner of the debtor. See Jay Lawrence Westbrook, "Fees and Inherent Conflicts of Interest," 1 Am. Bankr. Inst. L. Rev. 287, 290 (1993). Nor is the Bankruptcy Code clear on whether any duty is owed to creditors. Id. Three cases from the Northern District of Texas, however, provide that the DIP owes a duty of loyalty to creditors. See Diamond Lumber, Inc. v. Unsecured Creditors' Comm. of Diamond Lumber, Inc., 88 B.R. 773 (N.D. Tex. 1988); In re Kendavis Indus. Int'l, Inc., 91 B.R. 742 (Bankr. N.D. Tex. 1988); In re Chapel Gate Apartments, Ltd., 64 B.R. 569 (Bankr. N.D. Tex. 1986). This can create conflict of interest. While the DIP is not charged with a duty to the owners of the debtor, the DIP is very often the owner or managers employed by the owner. Charging the DIP with a duty that conflicts with its own interest passes this conflict along to the attorneys that represent the DIP.

reflected in their decisions." See In re Tinley Plaza Assocs. L.P., 142 B.R. 272, 277-78 (Bankr. N.D. Ill. 1992)[5].

Among the bankruptcy courts, application of § 327 is far from uniform. See the extensive discussion in Marcia L. Goldstein et al., "Ethical Considerations for Bankruptcy Professionals: Disinterestedness, Conflicts of Interest, and Retainers," C995 ALI-ABA 397 (May 4, 1995); William Kohn, "Deciphering Conflicts of Interests in Bankruptcy Representation," 98 Commercial L. J. 127 (1993). For example, there is a split of authority regarding the application of § 327 for "potential" conflicts of interest. Some courts have held that a "potential conflict" is a contradiction in terms, finding that all conflicts are actual. See In re Kendavis, 91 B.R. at 753-54 ("The concept of potential conflicts of interest is based on a mistaken interpretation of the Bankruptcy Code."); In re BH & P, Inc., 103 B.R. 556, 563-64 (Bankr. N.D. Texas 1989) (holding that "[t]he terms 'actual' and 'potential' conflict merely describe different stages in the same relationship" because the prospect of future conflict could "exert a subtle influence" leading to a more active conflict.) On the other hand, the Court of Appeals for the First Circuit has rejected a literal reading of § 327(a) and held that there is no per se rule against employment of counsel where there is only a "potential" conflict. See In re Martin, 817 F.2d 175, 180 (1st Cir. 1987). The First Circuit pointed out a practical reason for this conclusion. "[T]o interpret the law in such an inelastic way would virtually eliminate any possibility of legal assistance for the debtor in possession, except under a cash-and-carry arrangement or on a pro bono basis." Id., at 180. See the extensive discussion in Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in

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[5] The "catch-all" provision defines a "disinterested person" as one who:

> "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph."

11 U.S.C. § 101(14)(E).

the Bankruptcy Process," 97 Commercial L. J. 149 (1992), 154-158, set out as Appendix V, infra.

To make matters more complex, cases applying § 327 also frequently involve the conflict of interest rules of the ABA Code of Professional Responsibility ("Model Code") and the ABA Model Rules of Professional Conduct. See e.g., SLC Ltd. v. Bradford Group West, Inc., 999 F.2d 464, 467 (10th Cir. 1993) (Attorney who had represented debtor's general partner disqualified under the Utah version of the Rules of Professional Conduct.); In re F & C Intern., Inc., 159 B.R. 220, 222-23 (Bankr. S.D. Ohio 1993) (Court denied motion of expanded employment for special counsel of DIP under § 327 of Bankruptcy Code and Canon 5 of the ABA Code).

Courts have also applied these rules in a variety of ways, contributing to a wide ranging set of interpretations of § 327. For example, some courts have imported the consent exceptions of the ABA Code or ABA Model Rules into the Bankruptcy Code, and others have not. See e.g. In re Dynamark, Ltd, 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991) (after holding that attorneys did not hold or represent an adverse interest and were disinterested under § 327, the court stated that "although consent to representation by the parties is not necessarily sufficient by itself to overcome a lack of disinterestedness, this court takes judicial notice that [the client creditor] has submitted a written waiver of any conflict that exists or may exist"). But see In re Envirodyne Indus., Inc. 150 B.R. 1008, 1016 (Bankr. N.D. Ill. 1993) (holding § 327 does not allow waiver of conflicts of interest); In re Diamond Mortg. Corp. of Illinois, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990) ("certain conflicts that a client could waive after full disclosure outside of the bankruptcy context, such as simultaneous representation of the client and the client's creditors, are prohibited by the Bankruptcy Code itself from being waived.").[6] Other courts have

[6] At least one author has argued that the adoption of the consent provisions of the ABA Model Rules and the ABA Code into § 327 may be beneficial. See Karen J. Brothers, "Disagreement among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help," 138 U. Pa. L. Rev. 1733, 1751 (1990). For example, conflicts often arise when the debtor's pre-bankruptcy attorney is retained by the trustee or DIP. It

imported the vague "appearance of impropriety" aspirations of Canon 9 of the ABA Code in construing the requirements of § 327. See e.g. In re 419 Co., 133 B.R. 867, 869 (Bankr. N.D. Ohio 1991) (holding that § 327 covers "both actual and potential conflicts of interest in order to avoid even the appearance of impropriety."). This despite the intent of the drafters of the ABA Code that only the mandatory "Disciplinary Rules," not the Canons, should be enforced by sanction. See ABA Code, "Preamble and Preliminary Statement," 1. (1969).

At least one law review article has suggested that the conflict of interest standards of the ABA Model Rules are consistent with § 327, while the standards employed by the ABA Code are not. See William Kohn, "Deciphering Conflicts of Interest in Bankruptcy Representation," 98 Commercial L. J. 127, 139-140, set out as Appendix VI, infra. According to Kohn, Congress rejected a per se rule against "potential" conflicts of interest when it amended § 327 to require an "actual conflict of interest." Id. at 140. He also argues that the ABA Code contains Canon 9 which bars even "the appearance of professional impropriety," while the ABA Model Rules do not contain such a per se prohibition and therefore are more consistent with Congressional intent. See id, at 139-40. Kohn would apparently favor a uniform rule covering conflict of interest in the bankruptcy courts based on the ABA Model Rules, and would regard that as consistent with the Bankruptcy Code.

Professor Jay Lawrence Westbrook also sees practical problems in a "per se" bar against "potential" conflicts of interest in bankruptcy cases. See Jay Lawrence Westbrook, "Paying the Piper: Rethinking Professional Compensation In Bankruptcy," 1 Am. Bankr. Inst. L. Rev. 287 (1993), 288-304. He argues that a "per se" rule against "potential"

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has been suggested that disqualifying the debtor's pre bankruptcy attorney is disadvantageous because of such counsel's likely knowledge of the situation and the debtor's confidence in such counsel. Id. at 1751. One possible remedy would be to employ a standard similar to Rule 1.7, allowing the pre-bankruptcy attorney to continue representation upon disclosure and consent, with the additional requirement that parties in interest would also need to consent because the attorney would actually be representing the bankruptcy estate. Id. at 1756.

conflicts will leave debtors unrepresented or represented by inferior lawyers who are willing to face the risk of disqualification because they cannot find other work. Id. at 289. Professor Westbrook would most likely support a uniform rule for bankruptcy conflict of interest based on the ABA Model Rules because those model rules lack a "per se" prohibition against "potential" conflicts of interest.

There are many other disagreements and policy disputes concerning the proper relationship between the Bankruptcy Code provisions, particularly § 327, and local rules governing attorney conduct in the bankruptcy courts. This is true whether the bankruptcy rules are based on the ABA Code, the ABA Model Rules, or on entirely different standards. See the full discussion in Peter E. Meltzer, "Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process," 97 Commercial L. J. 149 (1992), set out in full at Appendix V, supra. Whatever position is taken on the individual disputes, one thing is certain. The conditions in bankruptcy practice are sufficiently different from that in other federal courts as to require separate analysis and, quite possibly, special rules of attorney conduct.

III. CONCLUSIONS

The first study ("Bankruptcy Cases") establishes that the rules of attorney conduct commonly litigated in the federal district courts are also among those most frequently invoked in the bankruptcy courts. Thus, rule reform for the federal district courts could also benefit the bankruptcy system. On the other hand, bankruptcy courts have a unique professional "culture" and a strong statutory environment. Rules appropriate for district courts cannot be automatically "carried over" with assured success. Whether the ultimate decision is to proceed with a model local rule, or with uniform rule making pursuant to the Rules Enabling Act, 28 U.S.C. § 2072-2074, the Committee should carefully consider which rules should be applied to the bankruptcy court system. For example, ABA Model

Rule 1.15 "Safekeeping of Client Property" is far more important in bankruptcy courts than in district courts[7].

The second study ("Bankruptcy Rules") indicates that seventy-seven percent of the bankruptcy courts have, explicitly or implicitly, adopted the local rules of attorney conduct used by their respective district courts. Thus, unless special care is taken, proposed changes in federal district court rules could technically carry over to most of the bankruptcy courts, even if there is no direct action on bankruptcy rules. To do this in an unreflective way would be a bad mistake. If new district court rules are inappropriate for the conditions of bankruptcy practice, they will be ignored in the bankruptcy courts. This would be of no real assistance to the bankruptcy bar. Specific, and different model local rules of attorney conduct may be required for bankruptcy courts.

Finally, the third study ("Bankruptcy Code") demonstrates that simply changing the rules of attorney conduct in the bankruptcy courts will not automatically produce consistent standards, particularly as to conduct also governed by the Bankruptcy Code. Bankruptcy courts are highly "balkanized" in their interpretation of § 327 of the Bankruptcy Code. Adopting carefully drafted uniform federal rules, however, could lead to more consistent application of statutory standards by curbing the casual use of the old ABA Canon 9 and the unpredictable disqualification of lawyers with "potential" conflicts of interest under § 327 and under the vague "catch-all" provision of 11 U.S.C. § 101(14). See Section II (C), supra. A well crafted model local rule, specially designed for bankruptcy courts, could do the same.

Initially, the Standing Committee set out to review local rules governing attorney conduct in the district courts. After the three extensive "Federal Cases" studies cited in Section I, supra, it became clear that standards for attorney conduct in district courts had become extremely "balkanized." But any attempt to restore uniform standards in the district

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[7] For text of Rule 1.15, see footnote 2, supra.

courts is bound to effect bankruptcy practice, due to the numerous "carry over" local rules described at Section II (B), supra. Unlike courts of appeals, where there are relatively few cases and no apparent barriers to adopting the same kind of rules as district courts, the bankruptcy courts are subjected to a complex statutory system, which includes conflict of interest criteria, and other standards directly governing attorney conduct. See Section II (C), supra. See also Study of Recent Cases (1990-1997) Involving Federal Rule for Appellate Procedure 46 (May 10, 1997).

Discussion with members of the Bankruptcy Advisory Committee, particularly the Honorable Adrian G. Duplantier and Gerald K. Smith, and the Reporter, Alan N. Resnick, suggest that the Standing Committee should specifically request the Bankruptcy Advisory Committee for recommendations. In addition, the Federal Judicial Center should undertake an empirical study of bankruptcy courts similar to the very helpful "Study of Standards of Attorney Conduct and Disciplinary Procedures in Federal District Courts" that the Center is now completing at the Standing Committee's request. Final recommendations could take the form of a different model local rule for bankruptcy courts, or of a uniform federal rule that made special allowance for the conditions of bankruptcy practice.

One practical first step would be for this Standing Committee to decide how to proceed with the district courts: whether to proceed with a model local rule ("option one"), or to proceed with some limited uniform rulemaking under the Enabling Act ("option two). That decision would give the Bankruptcy Advisory Committee the context necessary to make its own recommendations. No final action on new district court rules should be taken until specific provisions for bankruptcy practice are also ready.

APPENDIX I

Illustration I - Standard Form for Located Cases (1990-1996)

NAME OF CASE: _____

CITATION: _____

RELEVANT KEY NUMBERS: _____

FACTS/ATTORNEY CONDUCT AT ISSUE: _____

HOLDING: _____

RULES CITED: _____

APPENDIX II

Chart I - Break Down of Recent Bankruptcy Cases (1990-1996) by ABA Model Rules of Professional Conduct

TOTAL NUMBER OF CASES CLASSIFIED BASED ON MODEL RULES: BANKRUPTCY COURTS FROM JAN. 1, 1990 THROUGH MAR 23 1996

Rule	Subject matter	Total	
1.1	Competence	3	
1.2	Scope of Representation	3	
1.3	Diligence	0	
1.4	Communication	0	
1.5	Fees	8	
1.6	Confidentiality of Information	1	
1.7	Conflict of Interest: General	20	
1.8	Conflict of Int. Prohib. Trans.	8	
1.9	Conflict of Interest: Fmr. Client	13	
1.10	Imputed disqualification (Firm)	7	
1.11	Govt. to private employment	1	
TOTALS IN ABOVE FIVE CATEGORIES (CONFLICT OF INTEREST)		⇨	49
1.12	Former Judge or Arbitrator	1	
1.13	Organization as Client	1	
1.14	Client Under a Disability	0	
1.15	Safekeeping Property	12	
1.16	Declining / Terminating Repr.	2	
1.17	Sale of Law Practice	0	
2.1	Advisor	0	
2.2	Intermediary	0	
2.3	Eval. for use by 3rd Persons	0	
3.1	Meritorious Claims/Contentions	1	

Model rule	Subject matter	Total
3.2	Expediting Litigation	0
3.3	Candor Toward the Tribunal	2
3.4	Fairness to opposing party	1
3.5	Impart. & Decorum of Tribunal	0
3.6	Trial Publicity	0
3.7	Lawyer as Witness	4
3.8	Special respons. of Prosecutor	1
3.9	Advocate / Non adjudicative	0
4.1	Truth in Statements to Others	0
4.2	Comm. w. Pers. Rep. Couns.	1
4.3	Dealing w/ Unrep. Person	0
4.4	Respect for Rts. of 3rd Persons	0
5.1	Resp. of Partner or Supervisor	0
5.2	Resp. of Subordinate Lawyer	0
5.3	Resp. Nonlawyer Assist.	2
5.4	Professional Independence	0
5.5	Unauthorized Practice of Law	1
5.6	Restr. on Rt. to Practice	0
5.7	Resp. Reg. Law Rel. Practice	0
6.1	Voluntary Pro Bono Publico	0
6.2	Accepting Appointments	0
6.3	Member in Legal Svces. Org.	0
6.4	Law reform / Client Interests	0
7.1	Comm. Conc. Lawyer's Svces.	0
7.2	Advertising	0

Model rule	Subject matter	Total
7.3	Dir. Contact w/ Prospective Cl.	0
7.4	Comm. of Fields of Practice	0
7.5	Firm Names & Letterheads	0
8.1	Bar Admission & Disc. Matters	0
8.2	Judicial & Legal Officials	0
8.3	Reporting Prof. Misconduct	1
8.4	Misconduct	0
8.5	Disc. Auth.: Choice of Law	0
Totals		93

APPENDIX III

Chart II - Sources of Federal District Court and Bankruptcy Court Local Rules of Professional Conduct

SOURCES OF FEDERAL DISTRICT COURT & BANKRUPTCY COURT LOCAL RULES ON PROFESSIONAL CONDUCT[1]

DISTRICT	DISTRICT COURT[2]	BANKRUPTCY COURT[3]
M.D.AL.	ABA Rules and State rules (r)	Adopted District Court rules generally[4]
N.D.AL.	ABA Rules and State rules (r)	Adopted District Court rules generally
S.D.AL.	ABA Rules and State rules (r)	ABA Rules and State rules (r)
D.AK.	State Rule Based on ABA Model Rules	Adopted District Court rules generally
D.AZ.	State Rule Based on ABA Model Rules	No local rule[5]
E.D.AR.	Uniform Federal rules of Disciplinary Enforcement	Uniform Federal Rules of Disciplinary Enforcement
W.D.AR.	Uniform Federal rules of Disciplinary Enforcement	Uniform Federal Rules of Disciplinary Enforcement

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[1]The text of these local rules may be located in Federal Local Court Rules, Lawyers Cooperative Publishing, 1995 and Bankruptcy Local Court Rules Service, Callaghan & Company 1989.

[2]Sources of district court rules drawn from memorandum from Daniel R. Coquillette to the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, dated Jan. 2, 1995, concerning Local Rules Regulating Attorney Conduct (attached).

[3]Sources of bankruptcy court rules drawn from memorandum from Patricia S. Channon to Gerald K. Smith, dated Mar. 27, 1996, concerning Professional Responsibility Rules in the Local Rules of Bankruptcy Courts, and Bankruptcy Local Rules Service, Callaghan & Co., 1989.

[4]Where a Bankruptcy Court is listed as having "Adopted District Court Rules Generally," it is not possible to determine from the local bankruptcy rules whether the district court rules contain provisions concerning attorney conduct and professional responsibility. See Channon Memo.

[5]Where Bankruptcy Court is listed as having "no local rule," the court still requires that an attorney must be admitted to the District Court. This usually means being a member in good standing of the state bar. Presumably, state rules apply. See Channon memo, p. 1.

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
C.D.CA.	CA. Rules of Prof. Conduct	Adopted District Court Rules[6]
E.D.CA.	Refers to ABA Code and CA Rules	Adopted District Court Rules
N.D.CA.	CA. Rules of Prof. Conduct	Incorporated into District Court Rules
S.D.CA.	Refers to ABA Code and CA. Rules	Adopted District Court Rules generally
D.CO.	State Rule Based on ABA Model Rules	No Local Rule
D.CT.	State Rule Based on ABA Model Rules	No Local Rule
D.DE.	Model Federal Rules of Disciplinary Enforcement	Adopted District Court Rules generally
D.D.C.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally.
M.D.FL.	State Rule Based on ABA Model Rules	ABA Rules and State Rules
N.D.FL.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.FL.	State Rule Based on ABA Model Rules	Atty. must read and remain familiar w/ Fla. Bar's Rules of Prof. Conduct. No explicit statement on whether these rules apply or govern.
M.D.GA.	ABA rules and GA. Rules (c)	No Local Rule
N.D.GA.	State Rule Based on ABA Code	Adopted District Court Rules
S.D.GA.	Old ABA Canons	LBR 505(d), "Current canons of prof. ethics of the ABA"
D. Guam	Refers to ABA Model Code and Model Rules	Adopted District Court Rules Generally
D.HI.	State Rule Based on ABA Model Rules	No Local Rule

[6]Bankruptcy Courts listed as having "Adopted District Court rules" state they have adopted the district court's rules on attorney conduct, attorney discipline, professional responsibility, or a similar phrase. See Channon memo.

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
D.ID.	State Rule Based on ABA Model Rules	LBR 9010(g), Rules of Prof. Conduct adopted by S.Ct. of ID.
C.D.IL.	State Rule Based on ABA Model Rules	No Local rule
N.D.IL.	Unique Standing Order	Adopted District Court Rules generally
S.D.IL.	State Rule Based on ABA Model Rules	Adopted District Court Rules
N.D.IN.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.IN.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
N.D.IA.	No Local Rule	Modified standards
S.D.IA.	No Local Rule	Adopted District Court Rules generally
D.KS.	State Rule Based on ABA Model Rules	Adopted District Court Rules
E.D.KY.	State Rule Based on ABA Model Rules	No Local Rule
W.D.KY.	State Rule Based on ABA Model Rules	LBR 3(b)(2)(E), Stds. of Prof. Conduct adopted by KY S.Ct.
E.D.LA.	State Rule Based on ABA Model Rules	No Local Rule
M.D.LA.	State Rule Based on ABA Model Rules	Rules of Professional Conduct of LA. State Bar Assoc.
W.D.LA.	State Rule Based on ABA Model Rules	Adopted District Court Rules
D.ME.	State Rule Based on ABA Code	No Local Rule
D.MD.	State Rule Based on ABA Model Rules	LBR 42(k). Counsel are "encouraged to be familiar" with the "Discovery Guidelines of the Maryland State Bar."
D.MA.	State Rule Based on ABA Code	No Local Rule
E.D.MI.	State Rule Based on ABA Model Rules	Adopted District Court Rules Generally

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
W.D.MI.	State Rule Based on ABA Model Rules	Local rule authorizing discipline of attorneys which does not state standard to be applied.
D.MN.	State Rule Based on ABA Model Rules	No Local Rule
N.D.MS.	No Local Rule	Adopted District Court Rules
S.D.MS.	No Local Rule	Adopted District Court Rules
E.D.MO.	State Rule Based on ABA Model Rules	No Local Rule
W.D.MO.	No Local Rule	Adopted District Court Rules
D.MT.	Refers to ABA Code	Adopted District Court Rules
D.NE.	State Rule Based on ABA Code	Adopted District Court Rules
D.NV.	State Rule Based on ABA Model Rules	No separate bkrtcy. court rules; only bkrtcy. specific rules in Dist. Ct. Rules.
D.N.H.	State Rule Based on ABA Model Rules	No Local Rule
D.N.J.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.N.M.	State Rule Based on ABA Model Rules	No Local Rule
E.D.N.Y.	State Rules and ABA Code	No Local Rule
N.D.N.Y.	Refers to ABA Code	No Local Rule
S.D.N.Y.	State Rules and ABA Code	No Local Rule
W.D.N.Y.	State rule based on ABA Code	Local rule which does not state standard to be applied
E.D.N.C.	State rule based on ABA Model Rules	No Local Rule
M.D.N.C.	State rule based on ABA Model Rules	No Local Rule
W.D.N.C.	State rule based on ABA Model Rules	No Local Rule

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
D.N.D.	State rule based on ABA Model Rules	Adopted District Court Rules generally
D.N.M.I.	Refers to ABA Model Rules	No Local Rule
N.D.OH.	State Rule Based on ABA Code	Adopted District Court Rules
S.D.OH	Model Federal Rules of Disciplinary Enforcement	LBR 4, Code of Prof. Resp. adopted by OH S.Ct.
E.D.OK.	State Rule Based on ABA Model Rules	No Local Rule
N.D.OK.	State rule based on ABA Model Rules	No Local Rule
W.D.OK.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.OR.	State Rule Based on ABA Code	No Local Rule
E.D.PA.	State Rule Based on ABA Model Rules	Local rule which does not state standard to be applied
M.D.PA.	State Rule Based on ABA Model Rules	Local rule which does not state standard to be applied
W.D.PA.	State Rule Based on ABA Model Rules	Adopted District Court Rules
D.P.R.	Refers to ABA Code	Adopted District Court Rules
D.R.I.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
D.S.C.	State Rule Based on ABA Model Rules	Dist. Ct. Rule 2.0,08., SC Code of Prof. Resp.
D.S.D.	No Local Rule	Adopts District Court rules generally
E.D.TN.	State Rule Based on ABA Code	LBR 2(c), Code of Prof. Conduct adopted by S.Ct. of TN.
M.D.TN.	Refers to ABA Code	Adopts Dist. Ct. Rule and has local bankruptcy rule that asserts jurisdiction to enforce standards of conduct.
W.D.TN.	State Rule Based on ABA Code	Refers to ABA Code and District Court rules as they relate to attorney conduct
E.D.TX.	State Rule Based on ABA Model Rules	No Local Rule

DISTRICT	DISTRICT COURT	BANKRUPTCY COURT
N.D.TX.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.TX.	State Rules and ABA Code	Adopted District Court Rules
W.D.TX.	State Rule Based on ABA Model Rules[7]	Adopted Dist. Ct. Rules and references "litigation standard" announced in local case and states that it applies
D.UT.	State Rule Based on ABA Model Rules	LBR 4, Code of Prof. Resp. adopted by OH S. Ct.
D.VT.	State Rule Based on ABA Code	No Local Rule
E.D.VA.	State Rule Based on ABA Code	LBR 105(I), Canons of Prof. Ethics of the ABA & the VA State Bar
W.D.VA.	State rule based on ABA Code	No Local Rule
D.V.I.	. Refers to ABA Model Rules	No Local Rule
E.D.WA.	State Rule Based on ABA Model Rules	No Local Rule
W.D.WA.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
N.D.W.V.	State Rule Based on ABA Model Rules	Adopted District Court Rules
S.D.W.V.	State Rules and ABA Code	No Local Rule
E.D.WI.	State Rule Based on ABA Model Rules	Adopted District Court Rules generally
W.D.WI.	No Local Rule	No Local Rule
D.WY.	State Rule Based on ABA Model Rules	No Local Rule

[7]ABA Code noted.

APPENDIX IV

Chart III - Break Down of Recent Federal Cases (1990-96) by ABA Model Rules of Professional Conduct

TOTAL NUMBER OF CASES CLASSIFIED BASED ON MODEL RULES: FEDERAL DISTRICT AND APPEALS COURTS FROM JAN. 1, 1990 THROUGH MAR. 23, 1996

Rule	Subject matter	Civil	Criminal	Total
1.1	Competence	2	0	2
1.2	Scope of Representation	4	3	7
1.3	Diligence	1	3	4
1.4	Communication	1	0	1
1.5	Fees	24	1	25
1.6	Confidentiality of Information	10	5	15
1.7	Conflict of Interest: General	77	26	103
1.8	Conflict of Int. Prohib. Trans.	9	1	10
1.9	Conflict of Interest: Fmr. Client	81	5	86
1.10	Imputed disqualification (Firm)	20	4	24
1.11	Govt. to private employment	3	10	13
TOTALS IN ABOVE FIVE CATEGORIES (CONFLICT OF INTEREST)		191	46	237
1.12	Former Judge or Arbitrator	0	0	0
1.13	Organization as Client	6	0	6
1.14	Client Under a Disability	0	0	0
1.15	Safekeeping Property	3	1	4
1.16	Declining / Terminating Repr.	7	1	8
1.17	Sale of Law Practice	0	0	0
2.1	Advisor	0	0	0
2.2	Intermediary	0	0	0
2.3	Eval. for use by 3rd Persons	0	0	0
3.1	Meritorious Claims/Contentions	9	3	12

Rule	Subject matter	Civil	Criminal	Total
3.2	Expediting Litigation	0	0	0
3.3	Candor Toward the Tribunal	9	4	13
3.4	Fairness to opposing party	13	0	13
3.5	Impart. & Decorum of Tribunal	4	4	8
3.6	Trial Publicity	0	3	3
3.7	Lawyer as Witness	40	9	49
3.8	Special respons. of Prosecutor	1	5	6
3.9	Advocate / Non adjudicative	0	0	0
4.1	Truth in Statements to Others	0	2	2
4.2	Comm. w. Pers. Rep. Couns.	41	19	60
4.2 Cases Involving DOJ		0	17	17
4.3	Dealing w/ Unrep. Person	4	3	7
4.4	Respect for Rts. of 3rd Persons	2	1	3
5.1	Resp. of Partner or Supervisor	0	0	0
5.2	Resp. of Subordinate Lawyer	0	0	0
5.3	Resp. Nonlawyer Assist.	0	0	0
5.4	Professional Independence	4	0	4
5.5	Unauthorized Practice of Law	6	1	7
5.6	Restr. on Rt. to Practice	1	0	1
5.7	Resp. Reg. Law Rel. Practice	0	0	0
6.1	Voluntary Pro Bono Publico	0	0	0
6.2	Accepting Appointments	0	0	0
6.3	Member in Legal Svces. Org.	0	0	0
6.4	Law reform / Client Interests	0	0	0
7.1	Comm. Conc. Lawyer's Svces.	1	0	1

Rule	Subject matter	Civil	Criminal	Total
7.2	Advertising	1	0	1
7.3	Dir. Contact w/ Prospective Cl.	2	0	2
7.4	Comm. of Fields of Practice	1	0	1
7.5	Firm Names & Letterheads	0	0	0
8.1	Bar Admission & Disc. Matters	0	0	0
8.2	Judicial & Legal Officials	2	2	4
8.3	Reporting Prof. Misconduct	1	0	1
8.4	Misconduct	4	3	7
8.5	Disc. Auth.: Choice of Law	6	1	7
Totals		400	120	520

APPENDIX V

Peter E. Meltzer, Whom do You Trust? Everything You Never Wanted to Know About Ethics, Conflicts and Privileges in the Bankruptcy Process, 97 Com. L.J. 149, (1992).

WHOM DO YOU TRUST? EVERYTHING YOU NEVER WANTED TO KNOW ABOUT ETHICS, CONFLICTS AND PRIVILEGES IN THE BANKRUPTCY PROCESS[1]

PETER E. MELTZER*

OVERVIEW

In most instances, when there is a dispute between parties in a bankruptcy proceeding, there tends to be a "winner" and a "loser." For example, one party obtains relief from the automatic stay or one party prevents it; one party confirms a plan of reorganization or one party prevents it.

In cases involving ethical issues or conflicts of interest however, this is often not the case. Instead, the world is divided into losers and loss avoiders. For example, in the case of attorneys, the best they can hope for is to be permitted to represent a debtor or a committee, or to collect fees which are due. In the case of creditors or shareholders, they hope to serve on a reorganization committee. Both debtors and creditors hope to retain counsel of their choice.

It follows, therefore, that the only time an attorney might develop an expertise in this area is in an involuntary fashion—*i.e.*, he or she is dragged into an ethics issue with nothing to gain, other than maintenance of the status quo. In these cases, the question is not what they *want* to know about ethics and conflicts, but rather, what they *have* to find out about it (hence the title of the article). Despite this, it is important that all bankruptcy practitioners be cognizant of the law in this area, so as to avoid

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The author would like to express his gratitude to Leon Forman for his thoughts and suggestions on an earlier draft of this article and for his general inspiration. The author would also like to thank Ellen McDowell and Sheila Oliver for their invaluable assistance in the development of this article.

1. With apologies to Ken Klee.

being drawn into difficult situations, where the best result is loss avoidance. This article aims to serve that purpose.

I. INTRODUCTION

Three Canons of the Code of Professional Responsibility provide as follows:

Canon 4: "A lawyer should preserve the confidences and secrets of a client."
Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."
Canon 9: "A lawyer should avoid even the appearance of professional impropriety."[2]

Rules respecting ethical issues, conflicts of interest and privileges in bankruptcy can rarely be mechanically applied without consideration of the facts and circumstances involved in each particular case. A major reason for this is that, unlike ordinary civil litigation, bankruptcy cases rarely involve only two parties with diametrically opposed interests throughout the duration of the proceedings. Instead, there are ordinarily a number of parties whose interests and alliances are constantly in a state of flux during the case. This fact explains, in some measure, why the Model Rules are not as easily applied to a party's conduct in bankruptcy proceedings as they might be in other contexts.[3]

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2. The American Bar Association Code of Professional Responsibility was originally adopted in 1969. It was amended several times, with the last amendments being adopted in 1980. In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct (hereinafter "Model Rules"). The Model Rules were amended in 1987 and again in 1989.

Although the Model Rules do not contain the equivalent of the "canons" found in the Model Code, the ideas expressed therein are repeatedly found in the Model Rules as well. For example, Model Rule 1.6(a) provides that, except in certain instances, "a lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation." Model Rule 1.7 echoes Canon 5 by providing in part that "a lawyer shall not represent a client if the representation of that client will be directly adverse to another client." Canon 9 of the Model Code does not have a specific equivalent in the Model Rules, although its theme is found throughout not only the Model Rules, but also the case law involving ethical issues in bankruptcy cases.

Moreover, it does not appear that the Model Rules have created any results which would have differed if interpreted under the Model Code. *See, e.g., In re Roberts*, 46 B.R. 815, 836-837 (Bankr. D. Utah 1985), *aff'd in part, rev'd in part*, 75 B.R. 402 (D. Utah 1987) ("it is doubtful whether the impact [of the Model Rules] will be very great. . . . The new Rules of Conduct do not greatly alter the present law on conflicts of interest as that law has developed in recent years).

3. In fact, it has been observed that the Code of Professional Responsibility focused too closely on general civil litigation, as distinct from the other activities of lawyers. *See, e.g.*, Brown and Brown, *What Counsels the Counselor? The Code of Professional Responsibility's Ethical Considerations—A Preventive Law Analysis*, 10 VALPA REP. 453 (1976); Brown and Dauer, *Professional Responsibility in Nonadversary Lawyering: A Review of the Model Rules*, 1982 AM B FOUND RESEARCH J. 519 (1982).

One commentator has aptly described this difficulty as follows:

> Bankruptcy involves shifting relationships: Today's enemy is tomorrow's friend and vice versa. Thus bankruptcy is rich in the potential for conflict, but it is also rich in the potential for cooperation. The parties need to work together even when they are at sword's points. This fact makes it extra difficult to identify just when a conflict exists.
>
> . . . The typical bankruptcy case involves the debtor with a multiplicity of creditors, with different interests at stake. Some may be secured, others unsecured; some large, others small; some may have claims that are dischargeable, others not; some may have taken preferences, others not. In the nature of things, then, bankruptcy is a multi-party, rather than a two party, event.
>
> The problem of shifting relationships is less obvious, but probably more aggravating. The difficulty is that alliances shift in the middle of the case, depending on the issue. Creditors may be allied against the debtor, in, say, trying to bring the debtor to heel. But creditors and debtor may be allied with each other in trying to maximize the return from the estate. Meanwhile, one creditor may find himself at odds with others where, for example, one has a security interest (or a preference or a nondischargeable claim and the other not). And not only may these facts split the creditor body; they may force the debtor into alliance with one or more creditors, as against the others.[4]

The Bankruptcy Code contains a number of provisions which are aimed towards defining the parameters of ethical conduct in bankruptcy practice. While the words "ethics" and "conflicts" do not appear in the Code, there are instead various sections which describe what types of professionals may be employed by a debtor or a committee. The difficulty, however, is that the relevant provisions are all subject to varying interpretations, leading to the result that there is virtually no sub-issue in the field of bankruptcy ethics upon which one cannot find at least two courts reaching diametrically opposed conclusions.[5] Uniformity of opinion is practically non-existent. Accordingly, except for the poor lawyer whose employment or fees may be at stake as a result of a possible conflict, this tends to be a fascinating area of study.[6]

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4. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM BANKR. L.J. 355, 386-87 (1986). *See also*, Stranko, *Attorney Conflicts of Interest in Bankruptcy Proceedings*, 9 J. LEGAL PROFESSION 229, 229-30 (1984).

5. *See, e.g.*, Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help*, 138 U. PA L. REV. 1733 (June 1990).

6. Despite this, it has been observed that issues of ethical conduct as they apply specifically to bankruptcy proceedings receive little attention in law schools. These issues tend to escape the focus of both the standard bankruptcy course and the standard ethics course, because in both cases, time is usually too limited to allow for any significant discussion of issues which combine the two areas of study. *See, e.g.*, Boshkoff, *As We Forgive Our Debtors in the Classroom*, 65 IND L.J. 65, 78 (Winter 1989) (an article which discusses appropriate means of teaching bankruptcy in law school, and which takes its title from a 1981 study of personal bankruptcy filings in Illinois, Texas and Pennsylvania by Elizabeth War-

Based on the foregoing, any attempt to offer guidance as to what forms of conduct will or will not be appropriate in all situations is probably inadvisable, and such an endeavor will not be undertaken here. Instead, the discussion herein is intended to provide examples of some of the types of ethical, confidentiality and conflict of interest issues which can arise in bankruptcy cases, as well as some of the considerations which courts weigh in resolving those problems.

Finally, while a number of commentators have suggested proposed revisions to the relevant statutory provisions,[7] the controversial portions of these provisions have nevertheless not been substantially changed since the enactment of the Bankruptcy Code in 1978. Therefore, this article will focus on the existing state of the law, in terms of current judicial interpretation of the relevant statutory provisions, rather than on a hypothetical idealized state of the law, based on suggested amendments to those troublesome provisions.

II. ETHICAL CONSIDERATIONS AND CONFLICTS OF INTEREST REPRESENTING DEBTORS UNDER THE BANKRUPTCY CODE

A. INTRODUCTION

An attorney's relationship with a debtor may be such as to require disqualification whenever he or she is not in a completely impartial position with respect to that debtor, even if there were no intentional misconduct by the attorney. In describing the sanction of disqualification, one commentator elaborated on this theme as follows:

> [S]ituations also arise in which Courts see disqualification as a uniquely appropriate remedy; here the emphasis tends to shift away from the culpability of the attorney's conduct. Courts frequently point out that the decision to disqualify an attorney does not require a finding of improper, or even morally blameworthy, conduct. Breach of a prophylactic rule is, at least in some cases, not wrongful conduct in and of itself. Disqualification in these cases is justified as a protection for the rights of parties before the

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ren and Jay Westbrook, entitled "As We Forgive Our Debtors"); Ayer, *The Responsibilities of the Lawyer in Bankruptcy Practice*, NORTON BANKR L. AND PRAC, Monograph No. 1 (1988).

7. McCullough, *Attorneys' Fees in Bankruptcy: Toward Further Reform*, 95 COMM L.J. 133 (1990); Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help.*, 138 U PA L. REV. 1733 (June, 1990); Williams, *Bankruptcy Code Section 327(a)—New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO. L REV. 309 (1988); Grensky, *The Problem Presented By Professionals Who Fail To Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc*, 62 AM BANKR L J. 185 (1988); Flowers, *Attorney Fees: Handling Bankruptcy Without Getting There Yourself*, 84 W VA L REV. 669 (1982).

court and not as punishment for errant attorneys.[8]

An example of a case using disqualification in this manner is *Matter of Roger J. Au and Son, Inc.*[9] There the court held that an attorney could not represent a debtor in bankruptcy since he was also an officer and director of that company. The fact that his role was "uncompensated, largely ceremonial and undertaken as a convenience to facilitate the signing of documents and the recordation of corporate minutes" was deemed to be irrelevant. In justifying its decision to disqualify the law firm involved, the court stated:

> The court has not rendered, and will not render a moral judgment on the conduct of [the disqualified attorneys]. Yet, the court cannot abdicate its role of insuring that all of the parties in this case are guaranteed fair treatment in the reorganization process.[10]

This trend is common to those courts which have addressed the issues of ethical considerations and conflict of interests regarding representation of debtors under the Bankruptcy Code. That is, the law firm's intent is often not as significant as the actual effect, whether actual or apparent, of its representation.

It should also be noted that this does not tend to be a particularly fact-intensive area of bankruptcy law. Whenever a case has involved what may loosely be termed an "ethics issue", courts have tended to look to "ethics cases" in a general way to support their reasoning. Thus, whenever one court has expressed its beliefs as to what constitutes "fair and equitable" in the bankruptcy ethics process generally, that expression will often provide support for other courts, even when the factual situations presented in the specific cases are dissimilar. For example, a case where an attorney represented both a debtor and one of its creditors might be used to support a case where an attorney represented a debtor and insider, which might in turn be used to support a case where an attorney represented affiliated debtors. In these cases, specific facts tend to give way to more general concepts of jurisprudential propriety and equity.

Despite this overlap, an effort has been made herein to preserve the significance of factual distinctions between cases. That is, cases involving, for example, representation of affiliated debtors are discussed in conjunction with cases sharing that characteristic, even if the analyses contained in those cases ignored the distinction.

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8. *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV L REV. 1244, 1473-74 (1981).

9. 65 B.R. 322 (Bankr. N.D. Ohio 1984), *aff'd* 64 B.R. 600 (N.D. Ohio 1986).

10. 65 B.R. at 336.

B. OVERVIEW OF RELEVANT CODE PROVISIONS AND THE "ACTUAL VS. POTENTIAL CONFLICT" DEBATE: MAY AN ATTORNEY HOLDING A CLAIM FOR PREPETITION SERVICES REPRESENT A DEBTOR POSTPETITION?

In many instances, an attorney will file a bankruptcy petition on behalf of one of its clients while it is still owed fees by that client for prepetition services. This situation brings into play several Bankruptcy Code provisions, which it is appropriate to consider. First, Section 327(a) of the Bankruptcy Code states that the trustee, with the court's approval, may employ one or more attorneys "that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duty under this title."[11] This section is, of course, the initial focus of numerous cases involving conflicts of interest in bankruptcy generally, and not merely those relating to the issue discussed in this section.

Section 327 has frequently been interpreted, particularly under earlier Code cases, to require court approval prior to the commencement of professional services on behalf of the estate.[12] Moreover, because the section only references a "trustee", which would include a debtor-in-possession,[13] but not a mere debtor, it has also been held to be inapplicable in Chapter 7 proceedings.[14]

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11. Although framed conjunctively, these conditions have been applied disjunctively by the courts, so that failure to meet either will result in disqualification. *See, e.g., In re Pierce*, 809 F.2d 1356, 1362 (8th Cir. 1987); *In re Michigan General Corp.*, 78 B.R. 479, 482 (Bankr. N D. Tex. 1987); *In re Leisure Dynamics, Inc.*, 32 B.R. 753, 754 (Bankr D. Minn.), *aff'd*, 33 B.R. 121 (D. Minn. 1983).

12. While there are cases which have held to the contrary, in many jurisdictions professionals who proceed to perform services for the estate without prior court approval do so at their peril. In recent years however, the trend has been away from the *per se* approach towards a more flexible case-by-case analysis that considers the circumstances of each case. The practice of automatic denial of compensation has been criticized by some commentators as being unduly harsh, particularly where there has been significant benefit to the estate. *See generally*, McCullough, *Attorneys' Fees in Bankruptcy: Toward Further Reform*, 95 COMM L J. 133, 138-39 (1990); Grensky, *The Problem Presented By Professionals Who Fail to Obtain Prior Court Approval of Their Employment or Nunc Pro Tunc Est Bunc*, 62 AM BANKR L J. 185 (1988) and the cases collected at pp. 189-90; Flowers, *Attorney Fees: Handling Bankruptcy Without Getting There Yourself*, 84 W. VA L REV. 669, 672 (1982).

13. Section 1107(a) provides in relevant part that "a debtor in possession shall have all of the rights . . . of a trustee serving in a case under this chapter."

14. *See, e g., In re Trinsey*, 115 B.R. 828, 832 (Bankr. E.D. Pa. 1990) ("The weight of authority clearly establishes that [§327] does not apply to a Chapter 7 debtor desiring to retain counsel on its own behalf"); *In re Andy Gibb Organization, Inc.*, 81 B.R. 699, 699 (Bankr. S D. Fla. 1987); *In re Graham*, 74 B.R. 963, 966-67 (S.D. Ind. 1987) ("There is nothing in the Bankruptcy Code authorizing or requiring the appointment of counsel for a debtor [in a Chapter 7 case]."); *In re Spencer*, 48 B.R. 168, 171 (Bankr. E.D.N.C. 1985); 2 *Collier on Bankruptcy*, ¶327.07 (15th ed. 1991) at 327-83 ("Under the Code, as under prior law, court approval is not necessary for the appointment of an attorney for the debtor

Section 1107(b) in turn provides as follows:

> Notwithstanding Section 327(a) of this title, a person is not disqualified for employment under section 327 of this title by a debtor in possession solely because of such person's employment by or representation of the debtor before the commencement of the case.

Accordingly, based on Section 1107(b), it is clear that the mere fact of prior representation of a debtor does not, by itself, disqualify an attorney from also representing the debtor in possession. Finally, the phrase "disinterested person" is defined in Section 101(13) as, *inter alia*, a person that "is not a creditor, an equity security holder, or an insider."[15] Therefore, under Section 327(a) an attorney holding a claim against the debtor would not, at least under the literal terms of the statute, be a disinterested person. However when a person is a shareholder of the debtor, the issue is not so clear.[16]

Based on the foregoing, many courts considering this issue have held that law firms holding claims against debtors are not, *ab initio*, disinterested, and thus may not represent those debtors.[17] These courts have es-

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in a liquidation case or an attorney for the debtor out of possession in a reorganization case").

15. Under §101(31) of the Code, "insider" includes, but is not limited to, (a) with respect to an individual debtor, (1) a relative or general partner of the debtor, (2) a partnership in which the debtor is a general partner, and (3) a corporation of which the debtor is an officer, director, or person in control, (b) with respect to a corporate debtor, (1) an officer, director or person in control of the debtor or a relative of such person, and (2) a partnership in which the debtor is a general partner, and (c) with respect to a partnership debtor, a general partner of the debtor or a relative of the general partner.

Although the section does not specifically include a shareholder of a corporation as an insider, courts have had to wrestle with this area in addressing various conflict of interest issues. Some of these issues, such as whether an insider can represent a debtor in bankruptcy or whether an insider can simultaneously represent a debtor and an insider of the debtor, are discussed below.

16. *See, e.g., In re Intech Capital Corp.*, 87 B.R. 232 (Bankr. D. Conn. 1988) (law firm disqualified for holding 4 percent of debtor's outstanding equity securities); *Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 505-06 (Bankr. S.D. Ohio 1990) (debtor was permitted to employ Shearson, Lehman Hutton as a financial advisor despite the fact that Shearson owned 20,343 shares of equity securities of the debtor); *In re O'Connor*, 52 B.R. 892 (Bankr. W.D. Okla. 1985) (withdrawal by debtor's counsel not required where partners of the firm held an "infinitesimal" .0077 percent equity interest in debtor).

17. Those cases favoring a strict interpretation of the relevant statutory provisions regarding conflicts of interest include *In re Pierce*, 809 F.2d 1356 (8th Cir. 1987); *In re Jaimalito's Cantina Assoc., L.P.*, 114 B.R. 1 (Bankr. D.C. 1990); *In re Graybill Corp.*, 113 B.R. 966, 970-71 (Bankr. N.D. Ill. 1990); *In re Watervliet Paper Co.*, 96 B.R. 768, 770 (Bankr. W.D. Mich. 1989); *In re Pulliam*, 96 B.R. 208, 213 (Bankr. W.D. Mo. 1986); *Matter of Crisp*, 92 B.R. 885, 895 (Bankr. W.D. Mo. 1986); *In re Kendavis Industries International, Inc.*, 91 B.R. 742, 753-54 (Bankr. N.D. Tex. 1988); *Matter of Boro Recycling, Inc.*, 67 B.R. 3 (Bankr. E.D.N.Y. 1986); *In re Gray*, 64 B.R. 505, 507-08 (Bankr. E.D. Mich. 1986); *In re Estes*, 57 B.R. 158, 163 (Bankr. N.D. La. 1985); *Matter of Patterson*, 53 B.R. 366, 372 (Bankr. D. Neb. 1985); *In re Anver Corp.*, 44 B.R. 615 (Bankr. D. Mass. 1984); *Matter of Cropper Co. Inc.*, 35 B.R. 625, 631-32 (Bankr. M.D. Ga. 1983); *In re B.E.T. Genetics*, 35 B.R. 269, 272-74 (Bankr. E.D. Cal. 1983).

sentially adopted a *per se* analysis which does not require inquiry into the facts of each given case. This is based in part on the notion expressed by some courts that a "potential conflict" is a contradiction in terms, and thus cannot exist.[18] Therefore a conflict of interest is necessarily actual and prevents employment, notwithstanding Section 1107(b) of the Code.[19]

The absolute prohibition on representation by attorneys who may also be creditors has by no means found universal approval among the courts, particularly in recent years. In *In re Martin*,[20] the First Circuit observed that it would be nonsensical to interpret Section 327(a) literally in every case:

> After all, any attorney who may be retained or appointed to render professional services to a debtor in possession becomes a creditor of the estate just as soon as any compensable time is spent on account. Thus, to interpret the law in such an inelastic way would virtually eliminate any possibility of legal assistance for a debtor in possession, except under a cash-and-carry arrangement or on a pro bono basis.[21]

Based on the foregoing, the First Circuit held that the inquiry must, by necessity, be "case-specific." Factors to consider, according to the court, include: (1) the reasonableness of the arrangement; (2) whether it was negotiated in good faith; (3) whether the security demanded (if any) was commensurate with the predictable magnitude and value of the foreseeable services; (4) whether the security was a needed means of ensuring the engagement of competent counsel; (5) whether there are telltale signs of overreaching; (6) the nature and extent of any conflict of interest; (7) the likelihood that the potential conflict might turn into an ac-

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Some commentators have criticized the harshness of these cases on grounds that they force attorneys with claims for pre-petition services to "choose between waiving the pre-petition fee claim or referring the Chapter 11 case to another attorney." Williams, *Bankruptcy Code Section 327(a)—New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO L. REV. 309, 317 (1988).

18. *See, e.g., In re Kendavis Industries International, Inc., supra*, n. 17, 91 B.R. at 754. *See also, In re BH & P, Inc.*, 103 B.R. 556, 563-64 (Bankr. D.N.J. 1989) (court stated that the terms "actual" and "potential" conflict "merely describe different stages in the same relationship" and thus should not be treated differently); *In re Michigan General Corp.*, 78 B.R. 479, 484 (Bankr. N.D. Tex. 1987), *aff'd in part, reversed and remanded in part on other grounds sub nom. Diamond Lumber v. Unsecured Creditors' Committee*, 88 B.R. 773 (N.D Tex. 1988) ("This Court is skeptical that there can be a mere 'potential' conflict of interest in a bankruptcy situation.").

19. By virtue of §1107(b), the courts adopting the *per se* rule have held that while counsel's pre-petition representation of a debtor does not, by itself, prevent employment of that counsel post-petition, that section is inapplicable where counsel is attempting to preserve a claim for pre-petition services during the bankruptcy. *See, e.g., In re Jaimalito's Cantina Assoc., L.P.*, 114 B.R. 1 (Bankr. D.D.C. 1990); *In re Watervliet Paper Co., Inc.*, 96 B R. 768, 771-74 (Bankr. W.D. Mich 1989); *In re Roberts*, 75 B.R. 402, 407-09 (D. Utah 1987).

20 817 F.2d 175 (1st Cir. 1987).

21. *Id.* at 179.

tual one; (8) whether or not the potential conflict may influence the attorney's subsequent decision making; (9) the appearance of the arrangement to other parties in interest; (10) whether the existence of the security interest threatens to hinder or delay effectuation of a plan; and (11) whether fundamental fairness might be unduly jeopardized.[22]

It should be noted that the *Martin* case actually dealt with the specific issue of whether attorney's fees may be secured by an asset of the estate (and thus is discussed in the following section as well). Because of this, it may be arguable that its holding is limited to that particular situation, and not the case where the attorney is a pre-petition creditor of the debtor. Despite this however, several courts have interpreted *Martin* more broadly, namely as applying to any situation where an attorney may be, by strict reading of the statute, a "disinterested person."[23] This would include all claims which an attorney may have against a debtor, whether prepetition, postpetition, secured or unsecured.

Under this broad reading, *Martin* and its progeny[24] must be consid-

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22. *Id.* at 182.

23. Query whether it should make any difference whether the "potential" conflict arises from holding a claim for pre-petition services or from taking a security interest in a debtor's assets to secure post-petition services.

24. *See, e.g., In re Vanderbilt Associates, Ltd.*, 117 B.R. 678 (D. Utah 1990); *Matter of Carter*, 116 B.R. 123, 126 (Bankr. E.D. Wis. 1990); *Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990); *In re Microwave Products of America, Inc.*, 104 B.R. 900, 904 (Bankr. W.D. Tenn. 1989); *In re Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340 (Bankr. N.D. Ga. 1989); *In re Watson*, 94 B.R. 111, 115 (Bankr. S.D. Ohio 1988) (although espousing the more flexible *Martin* standard, counsel was nevertheless disqualified. However, this appeared to be based less on the existence of a claim against the debtor for prepetition services than on the fact that counsel took a security interest in the debtor's assets to secure that pre-petition claim shortly before filing for bankruptcy); *In re Viking Ranches, Inc.*, 89 B.R. 113, 115 (Bankr. C.D. Cal. 1988) (§1107(b) should be read as authorizing employment of counsel with a pre-petition claim on grounds that the term "employment" as used in that section does not distinguish between previously compensated services and services for which the attorney remains a creditor); *In re Best Western Heritage Inn Partnership*, 79 B.R. 736, 740 (Bankr. E.D. Tenn. 1987).

One of the first Bankruptcy Code cases to address this issue, *In re Heatron*, 5 B.R. 703 (Bankr. W.D. Mo. 1980), is of particular interest. There the Court permitted the appointment of an attorney for the debtor who held a prepetition claim against the debtor. The Court acknowledged that the attorney was not disinterested under Section 327(a) of the Code, but stated that the attorney's interest "does not offset the value afforded by the attorney's experience and familiarity with the Debtor." *Id.* at 705.

For many years, *Heatron* was either ignored completely or specifically not followed, as courts were generally following the rule favoring absolute prohibition on representation of a debtor by a creditor. *See, e.g., In re Glenn Electric Sales Corp.*, 89 B.R. 410, 415 (Bankr. D.N.J. 1988) (court declines to follow *Heatron* "which is more frequently distinguished and criticized than followed"); *In re Roberts*, 75 B.R. 402, 407 (D. Utah 1987) ("better reasoned cases contradict *Heatron*"); *Matter of Patterson*, 53 B.R. 366, 372 (Bankr. D. Neb. 1985). One commentator, though seemingly approving of the flexibility favored by the Court in *Heatron*, nevertheless criticized the case as an "aberration" which "ignores the clear, unambiguous language of the Code." Williams, *Bankruptcy Code Section 327(a) — New Interpretation Forces Attorneys to Waive Fees or Wave Good-Bye to Clients*, 53 MO L REV. 309, 315-16 (1988).

ered as being in conflict with the line of cases discussed above which have espoused a *pro se* prohibition on these situations. Instead, these courts have held that a conflict which is merely potential and not actual is insufficient to disqualify an attorney.[25]

An exception to the general rule prohibiting representation of trustees or debtors in possession when the proposed attorney holds a prepetition claim against the debtor is set forth in Section 327(e) of the Bankruptcy Code. That section provides:

> The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or the estate with respect to the matter on which such attorney is to be employed.

It should be noted that there is no "disinterestedness" requirement in Section 327(e). Attorneys hired for a "specified special purpose" need not be disinterested, but need only meet the "no adverse interest" requirement as to the matter for which they are to be employed. The legislative history states that this subsection "will most likely be used when the debtor is involved in complex litigation, and changing attorneys in the middle of the case after the bankruptcy case has commenced would be detrimental to the progress of that other litigation."[26]

C. MAY A LAW FIRM'S FEE FOR POSTPETITION SERVICES TO THE DEBTOR BE SECURED BY AN ASSET OF THE ESTATE?

As we have seen, *In re Martin*[27] was one of the first appellate cases to consider conflicts on a case by case basis, and not to disqualify counsel or disallow fees merely because of a potential conflict. In *Martin* however, the law firm had not, unlike the previous cases, performed prepetition services for the debtor. However, when the debtors were unable to obtain the retainer required by the law firm to represent them in bankruptcy,

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Once the judicial pendulum began swinging towards a case-by-case approach however (instigated in large part by the *Martin* case), courts suddenly began citing *Heatron* with approval. *See, e.g., Matter of Federated Department Stores, Inc.*, 114 B.R. 501, 504 (Bankr. S.D. Ohio 1990) (*Heatron* is among the courts engaging in the "better analysis" of balancing "the risk and gravity of the potential conflict of interest with the costs that the estate and perhaps the public would incur in the event of disqualification of the professional.").

25. As stated in *Martin* itself, "horrible imaginings alone cannot be allowed to carry the day. Not every conceivable conflict must result in counsel being sent away to lick his wounds." 817 F.2d at 183.

26. H.R. No. 95-595 (95th Cong. 1st Sess. 328 (1977)).

27. 817 F.2d 175 (1st Cir. 1987).

the debtors provided the law firm with a promissory note which was secured by a second mortgage on real estate which they owned. Both the Bankruptcy Court and the District Court held that the attorneys from the law firm were not "disinterested persons" and that the Bankruptcy Court should not have approved debtor's counsel as attorney for the debtor in possession until counsel had divested themselves of their interest in the debtor's real estate.

On appeal, the First Circuit reversed. The Court held that a balance must be struck, based on the facts of each case, as to whether the law firm's activity should be prohibited:

> We realize that any attorney—other than one working purely as a volunteer—has a financial interest in the matters entrusted to his care, so in that sense, there is always some danger that the lawyer's judgment will be shaded by his own economic welfare. Yet, that risk, standing alone, seems acceptable. At the opposite pole, we find it strikingly evident that §327(a) would be drained of its meaning if bankruptcy counsel were free, willy-nilly, to set aside for themselves the most promising assets of the estate as a precondition to handling a Chapter 11 proceeding. That risk is, of course, anathema.
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> Once this tension is acknowledged, it is a small step to recognize that §327(a) will not support, either by its terms or by its objectives, a bright-line rule precluding an attorney at all times and under all circumstances from taking a security interest to safeguard the payment of his fees. It will sometimes be difficult to obtain competent counsel in anticipation of the bankruptcy proceeding unless the lawyer's financial well-being can be assured to some extent. . . . Conversely, the fundamental objectives of Chapter 11 may be thwarted if property essential to a reorganization is tied up by an attorney's lien, or if a particular security arrangement (or the perception which it naturally engenders) impairs fair treatment either of creditors or of administrative expense claimants. Reason requires that a balance be struck.[28]

Most cases which have addressed this issue have reached the same result as the *Martin* court, at least with respect to security interests intended to secure post-petition services.[29]

Not all courts have adopted the *Martin* analysis however. In *In re*

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28. *Id.* at 181.

29. *See, e.g. In re Robotics Resources R2, Inc.*, 117 B.R. 61, 63 (Bankr. D. Conn. 1990); *Matter of Carter*, 116 B.R. 123, 127 (E.D. Wis. 1990); *Matter of K and R Mining, Inc.*, 105 B.R. 394, 397 (Bankr. N.D. Ohio 1989); *In re Shah International, Inc.*, 94 B.R. 136, 138 (Bankr. E.D. Wis. 1988). It should be noted however that courts have looked far less kindly on the taking of security interests to secure pre-petition non-bankruptcy services. *See, e.g., In re Pierce*, 809 F. 2d 1356 (8th Cir. 1987); *In re Thompson*, 116 B.R. 679, 681 (Bankr. W.D. Ark. 199); *In re Watson*, 94 B.R. 111 (Bankr. S.D. Ohio 1988); *In re Automend*, 85 B.R. 173, 176 (Bankr. N.D. Ga. 1988); *In re Roberts*, 46 B.R. 815, 849 (Bankr. D. Utah 1985). As with many cases involving bankruptcy ethics, the courts in this latter group of cases appeared just as influenced by the general conduct of counsel in the bankruptcy proceeding as by the act of taking security to protect a fee.

Whitman,[30] when the debtor lacked funds to pay a retainer for legal services, he agreed to provide his law firm with a security interest in his dental equipment. This payment arrangement was never disclosed to the Bankruptcy Court. When the firm subsequently foreclosed on the equipment, it retained a portion of the auction proceeds to pay its postpetition legal fees.

In requiring the law firm to return the sale proceeds to the trustee, the Court stated:

> The firm's foreclosure on the equipment, although with the consent of the debtor, and payment to itself of a fee of over $5,000 is an example of overreaching. The foreclosure deprived the debtor of his ability to sell his major asset—his dental practice—and deprived his creditors of the hope of receiving a dividend in the Chapter 13 case. Moreover, at this point, the law firm had not yet rendered services approaching the value of $5,000. In arranging this sale, the law firm had in mind its own best interests rather than the best interest of the debtor and creditors.[31]

D. MAY A LAW FIRM WHICH IS AN "INSIDER" REPRESENT THE DEBTOR POSTPETITION?

At first glance, it would appear that representation of a debtor by an insider would be prohibited by a literal reading of the Bankruptcy Code. Recall that Section 327(a) prohibits a "disinterested person" from representing a debtor, and "disinterested person" is defined to include an insider.[32] Nevertheless, in this area some courts have looked past the Code terms and instead focused on whether the law firm's interest as an insider is sufficiently significant to color the attorney's independent and

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30. 51 B.R. 502 (Bankr. D. Mass. 1985).

31. *Id.* at 507. The tenor of the remainder of the Court's opinion indicates that it was offended by counsel's overall conduct and failure to disclose relationships. This may have been a factor in its decision. However, the same result was reached at the appellate level in *In re Pierce*, 809 F. 2d 1356, 1362 (8th Cir. 1987). In that case, although the Court was again displeased by counsel's failure to disclose a mortgage taken to secure postpetition services, the Court made it clear that the taking of the mortgage itself was an independent ground for denial of fees, even apart from the failure to disclose.

32. Section 101(13). *See also* Section II. B., *supra*. Some courts have held the disinterestedness requirement for attorneys which is contained in §327(a) should apply with less stringency to debtors-in-possession than to trustees. In *In re Covey*, 57 B.R. 665 (Bankr. D.S.D. 1986), the Court stated: "The trustee is required to be aloof from all connection with the debtor and its management. To require less of the trustee's attorney, who would be active in furthering the debtor's duties, would be illogical. The debtor-in-possession, however, is certainly not aloof from the debtor nor the management of the estate—the debtor-in-possession *is* the debtor, managing the estate." 57 B.R. at 666. *See also Indian River Homes, Inc. v. Sussex Trust Co.*, 108 B.R. 46, 51 (D. Del. 1989); *In re Best Western Heritage Inn Partnership*, 79 B.R. 736, 740 (Bankr. E.D. Tenn. 1987) ("a disinterested trustee should have a disinterested attorney. It does not follow that a debtor-in-possession should have a disinterested attorney.").

impartial judgment required to handle the case.[33] For example, in *In re Covey*,[34] the Court held that the fact that the attorney in question was a nephew of the debtor was insufficient to disqualify him from representing the estate. The Court reasoned that the attorney's familiarity with the affairs of the debtor and the debtor's confidence in, and ability to work with, an attorney of his own choosing, were more significant considerations.[35]

Similarly, in *In re PHM Credit Corp.*,[36] an attorney's partners were not only officers and directors of both the debtor and its parent, but also shareholders of the debtor. The law firm also represented the indenture trustee for the debtor's mortgage-backed bonds. Notwithstanding these potential conflicts, the bankruptcy court allowed the law firm to represent the debtor, subject to certain curative measures not authorized by the Code, including the forced resignation of the attorneys as officers of the debtor. The court noted that the firm had peculiar familiarity with the debtor's affairs, and that the trustee had taken "a hypertechnical position which ignored the case's fundamental economic realities."[37] Though seemingly reluctant to do so, the District Court affirmed, holding that the lower court had not abused its discretion.[38]

On the other hand, in *In re GHR Energy Corp.*,[39] the court disqualified a law firm when one of its attorneys was an officer of the debtor. Rather than considering whether the attorney's interest was sufficient to alter his independent judgment, the court simply relied on the Bankruptcy Code's requirement that a "disinterested person" (which excludes an insider) represent the estate.[40]

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33. *See, e.g., In re Jartran*, 78 B.R. 524, 526 (Bankr. N.D. Ill. 1987).

34. 57 B.R. 665 (Bankr. D.S.D. 1986).

35. The court in *Covey* may have been influenced by what it perceived to be the looser disinterestedness requirement which is applicable to counsel for debtors-in-possession. *See* n. 7, *supra*.

36. 110 B.R. 284 (E.D. Mich. 1990).

37. *Id.*, at 287.

38. Several cases have specifically declined to follow the *PHM Credit* case. *See In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Middleton Arms, L.P.*, 119 B.R. 131, 135 (M.D. Tenn. 1990), *aff'd*, 934 F.2d 723 (6th Cir. 1991). Further, in addressing the "economic realities" argument in an affiliated debtor context, one court stated: "what may be acceptable in a commercial setting, where all of the entities are solvent and creditors are being paid, is not acceptable when those entities are insolvent and there are concerns about intercompany transfers and the preference of one entity and its creditors at, perhaps, the expense of another." *In re Amdura Corp.*, 121 B.R. 862, 866 (Bankr. D. Colo. 1990).

The mere fact that an entity owns shares in a debtor does not, by itself, render that entity an "insider" for purposes of §101(31) of the Code. However, the definition of "insider" includes a "person in control of the debtor", which could be considered to include a significant shareholder, regardless of the degree of day-to-day control exercised over the affairs of the company. Courts have typically not used shareholder status as a means to disqualify counsel, at least where a small percentage of shares were at issue. *See* n. 10, *supra*.

39. 60 B.R. 52 (Bankr. S.D. Tex. 1985).

40. *See also, In re Petralex Stainless, Ltd.*, 78 B.R. 738, 744-45 (Bankr. E.D. Pa. 1987);

Finally, in the recent case of *In re Marquam Investment Corp.*,[41] a law firm's claim for fees for representing a debtor was disallowed on the theory that members of the firm were insiders of the debtor, and that the firm had to be construed as donating its services. In that case, debtor's counsel was also its president and major shareholder. The firm filed a plan which provided for payment of prepetition legal fees. In disallowing these fees, the Ninth Circuit noted that there was no evidence that the debtor agreed to pay for any of these legal services, and that the firm had never billed for its services prior to the bankruptcy.[42]

E. MAY AN ATTORNEY WHO FORMERLY REPRESENTED A CREDITOR OF THE DEBTOR REPRESENT THE DEBTOR IN BANKRUPTCY?

Section 327(c) of the Bankruptcy Code provides as follows:

> In a case under chapter 7, 11, or 12 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove of such employment if there is an actual conflict of interest.[43]

Thus, in *In re Flanigan's Enterprises Inc.*,[44] a law firm's former representation of one of the debtor's creditors, which had been fully disclosed,

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In re Coastal Equities, Inc., 39 B.R. 304 (Bankr. S.D. Cal 1984) (impermissible conflict of interest existed when member of law firm representing debtor had personal investments in debtor and was partner with the debtor in real estate projects); *In re Leisure Dynamics, Inc.* 33 B.R. 121 (D. Minn. 1983) (law firm could not represent debtor when certain of its members were officers, directors and shareholders of the debtor); *Matter of Roger J. Au and Sons, Inc.* 65 B.R. 322 (Bankr. N.D. Ohio 1984).

41. 942 F.2d 1462 (9th Cir. 1991).

42. One might argue that the *Marquam Investment* case does not necessarily prohibit the employment of insiders as counsel for a debtor. The Court appeared to base its decision on the specific evidence before it, which indicated that, prior to the bankruptcy, the firm had not intended to be reimbursed for its legal services. Moreover, the extent to which the firm was attempting to collect for post-petition services is not clear, although it clearly performed post-petition services for the debtor. However, the Court never even mentioned §327 of the Code in its opinion, indicating that it was not focusing on the issue of employment itself, but rather the allowability of fees.

43. Section 327(c) was amended pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984. Prior to the 1984 Amendments, this section specifically prohibited the concurrent representation of the trustee and a creditor regardless of whether or not an actual conflict existed. Representation of a creditor prior to appointment as counsel for the debtor was not prohibited however. The former section provided:

> In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent, in connection with the case, a creditor.

44. 70 B.R. 248 (Bankr. E.D. Fla. 1987).

was deemed an insufficient conflict of interest to disqualify the firm. If a creditor objects however, and the court finds that such representation involves an actual, rather than theoretical, conflict of interest, employment may be denied.

Despite Section 327(c), most courts have not permitted simultaneous representation of both the creditor and the debtor in possession. Thus, in *In re Georgetown of Kettering, Ltd.*,[45] the Sixth Circuit reversed an award of fees from the debtor's estate to an attorney representing the debtor who had also represented an unsecured creditor. The fact that the creditor's claim was subsequently disallowed did not serve to obviate the conflict.[46]

In *In re Oatka Restaurant and Lounge, Inc.*,[47] a state court action was commenced against the debtor prior to bankruptcy. The lawsuit alleged that the debtor had served alcoholic beverages to an intoxicated person who thereafter caused the death of a woman. The debtor, as defendant in the lawsuit, impleaded and named as a third party defendant the woman's husband, on the theory that his intoxication was somehow the supervening cause of the woman's death, and that if the debtor was liable to the plaintiff, then the third-party defendant should be liable to the debtor. The third party defendant was represented by the same law firm who sought to represent the debtor in bankruptcy.

The court held that this was an impermissible conflict of interest under Section 327(c). The Court noted that the law firm was seeking to earn a fee from the debtor while endeavoring (albeit indirectly) to deprive the bankruptcy estate of a valuable recovery. In view of this actual conflict, the court denied the application to employ the law firm.[48]

It should also be noted that courts have not hesitated to deny compensation for simultaneous representation of a debtor and creditors even though there has been no creditor objection and even though Section 327(c) would appear to specifically contemplate such an objection. In *In re Ochoa*,[49] the Court noted that "even absent creditor objection (assuming full disclosure of the facts), the Court is not prohibited from *sua sponte* inquiry into an apparent conflict of interest."[50]

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45. 750 F.2d 536 (6th Cir. 1984).

46. Although the Sixth Circuit was construing §327(c) prior to its amendment in 1984, the amended statute would not likely have changed the result.

47. 73 B.R. 84 (Bankr. W.D.N.Y. 1987).

48. *See also, In re AOV Industries, Inc.*, 797 F.2d 1004, 1011 (D.C. Cir. 1986) (attorneys represented creditor prior to debtor's bankruptcy case, and then represented debtor while still employed by the creditor); *In re Cody*, 122 B.R. 520, 525-26 (Bankr. N.D. Ohio 1990); *In re Chicago South Shore and South Bend R.R.*, 101 B R. 10, 14 (Bankr. N.D. Ill. 1989); *In re Lee Way Holding Co.*, 100 B.R. 950, 960 (Bankr. S.D. Ohio 1989); *In re Ochoa*, 74 B.R. 191, 195 (Bankr. N.D.N.Y. 1987) (fees denied where law firm simultaneously represented debtor and one of its major creditors); *In re Paine*, 14 B.R. 272 (Bankr. W.D. Mich. 1981).

49. 74 B.R. 191 (N.D.N.Y. 1987).

50. In areas of ethical conduct, perhaps more than in other areas of bankruptcy law, courts have *sua sponte* critically examined any ethical conduct which they consider ques-

A recent case involving a court's *sua sponte* consideration of this issue is *In re Amdura Corp.*[51] In that case, debtors' counsel also represented the debtors' major secured lender, even though counsel had not represented the bank in connection with its loans to the debtors.[52] In holding that counsel was not disinterested as required by Section 327(a) of the Code, the court rhetorically asked: "How can counsel fairly and fully advise the Debtors in negotiating with [the Bank] and in drafting a plan if they are unable, or at least unwilling, to espouse positions detrimental to the interests of the bank?"[53]

F. MAY A LAW FIRM SIMULTANEOUSLY REPRESENT THE DEBTOR AND AN INSIDER OF THE DEBTOR?

The Bankruptcy Code does not precisely resolve this issue. Although a "disinterested person" is forbidden, under Section 327(a) of the Code, from representing the estate, an attorney representing an insider is not necessarily a "disinterested person" for purposes of Section 101(13) of the Code. The most relevant subdivision of that section is Section 101(13)(E) which provides that a disinterested person "does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with or interest in, the debtor . . ."

Although the Bankruptcy Code does not explicitly address this issue, courts have been particularly stringent in preventing attorneys from simultaneously representing debtors and insiders of the debtor. In so doing, reference is often made to Canon 9 of the Code of Professional Responsibility which forbids "even the appearance of impropriety." Courts typically reason that the possibility of the debtor having a differing agenda from that of its directors, officers, or general partners—particularly where guarantees may be involved—is simply too great to allow such dual representation, even if the conflict is not yet considered actual.

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tionable. *See, e.g., In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Vanderbilt Associates, Ltd.*, 111 B.R. 347, 353 (Bankr. D. Utah 1990), *rev'd on other grounds*, 117 B.R. 678 (D. Utah) ("Even though no party in interest has objected, it is incumbent upon the court to make an independent determination if appointment is appropriate"); *In re Anver Corp.*, 44 B.R. 615, 617 (Bankr. D. Mass. 1984) (Bankruptcy Court denied compensation to law firm which was a creditor for pre-filing services and an insider of the debtor, despite the fact that neither the debtor, nor the creditors' committee had raised any objection).

51. 121 B.R. 862 (Bankr. D. Colo. 1990).

52. The problems raised by the fact that counsel was attempting to represent multiple affiliated debtors in the first place is discussed below at Section II. G.

53. *In re Amdura Corp., supra*, 121 B.R. at 867. The Court also noted that counsel's sensitivity to the Bank's interests would be particularly heightened by the fact Continental was admitted to be "the hand that feeds" Winston and Strawn. *Id.*

For example, in *In re Chou-Chen Chemical, Inc.*,[54] an attorney simultaneously represented the debtor and one of the debtor's major shareholders. The bankruptcy court held that this conflict was sufficiently significant to require denial of all attorney fees for services performed on behalf of the estate.[55]

The prohibition on such dual representation is not absolute however (as so little in this area tends to be). In *Matter of FSC Corporation*,[56] the court held that an impermissible conflict of interest did not exist when a law firm simultaneously represented a Chapter 11 corporate debtor and certain of the debtor's former officers and directors. The Court held that defense of the officers against a suit for securities fraud and misrepresentation was essential to the debtor's efforts to reorganize.[57]

When an attorney formerly represented an insider of the debtor, but had ceased to do so prior to attempting to represent the debtor, courts have been somewhat more lenient. Here, "it is not sufficient to merely

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54. 31 B.R. 842 (Bankr. W.D. Ky. 1983).

55. Similar cases in which a law firm was disqualified or denied compensation due to simultaneous representation of a debtor and one of its insiders include: *Matter of Consolidated Bancshares, Inc.*, 785 F.2d 1249 (5th Cir. 1986) (attorney represented both debtor and one of its directors); *In re Freedom Solar Center, Inc.*, 776 F. 2d. 14 (1st Cir. 1985) (attorney represented debtor and new corporation owned by shareholder of debtor which intended to purchase certain of debtor's equipment); *In re Neidig Corp.*, 113 B.R. 696 (D. Colo. 1990); *In re Watson Seafood and Poultry Co., Inc.*, 40 B.R. 436 (Bankr. E.D.N.C. 1984) (attorney represented debtor and his law firm represented stockholder of the debtor); *Matter of Baldwin-United Corporation*, 45 B.R. 378 (Bankr. S.D. Ohio. 1983) (law firm was not permitted to represent debtors for specific insurance purposes while also representing certain nonmanagement directors of the debtors); *In re Coastal Equities, Inc.*, 39 B.R. 304 (Bankr. S.D. Cal. 1984) (attorney represented both debtor and individual who was president and sole shareholder of debtor); *In re Sambos Restaurants*, 20 B.R. 295 (Bankr. C.D. Cal. 1982) (attorney represented corporate debtor in possession and law firm represented a corporation owning all issued and outstanding preferred stock of the debtor).

The general theme of the foregoing cases is also applicable to partnership debtors and their general partners. In *In re D.L. Enterprises*, 89 B.R. 107 (Bankr. C.D. Cal. 1988), in reducing requested fees, the Court stated: "An attorney is at peril when simultaneously representing a partnership and its general partner. The attorney will always be suspect in the eyes of creditors and limited partners as sometimes subordinating the interests of the partnership to benefit the general partner. An attorney who does that is just asking for trouble." 89 B.R. at 110-11. *See also In re W.F. Development Corp.*, 905 F.2d 883, 884 (5th Cir. 1990), *cert. denied sub nom. W.F. Development Corp. v. Office of U.S. Trustee*, 111 S. Ct. 1311 (1991); *In re TMA Associates, Ltd.*, 21 B.C.D. 1569 (Bankr. D. Colo. 1991); *In re Kuykendahl Place Associates, Ltd.*, 112 B.R. 847, 850 (Bankr. S.D. Tex. 1989) ("The duty and loyalty of the attorney is to the debtor and not to the partners or individuals that control the partners of the debtor.").

56. 33 B.R. 212 (W.D. Pa. 1983).

57. Similarly, in *In re Stamford Color Photo, Inc.*, 98 B.R. 135 (Bankr. D. Conn. 1989), the court permitted the simultaneous representation of a debtor-in-possession and its president and sole officer. In so doing, the Court opted for the standard set forth by the First Circuit in *In re Martin* (n. 20, *supra*) to the effect that a potential conflict is insufficient to disqualify counsel absent some showing of an actual conflict. The Court also noted that the president in this case was not involved in his own bankruptcy proceeding, as was the case in some cases which have prohibited such dual representation.

identify a conflict of interest arising from prior representation, but the moving party must demonstrate that the conflict must be materially adverse to the estate, its creditors or security holders."[58] Moreover, the party seeking to disqualify opposing counsel carries the burden of establishing that counsel's continuing representation would violate the Model Rules.[59]

Finally, on a somewhat related issue, it has been held that a debtor is not entitled to "hybrid representation" whereby he represents himself *pro se* while represented by counsel at the same time.[60]

G. MAY ONE LAW FIRM REPRESENT AFFILIATED DEBTORS?

A difficult problem arises in dealing with representation of multiple debtors in Chapter 11 reorganizations. On one hand, if cases are consolidated for administrative purposes, it may not seem logical to require a chief executive officer to have to consult with a different attorney when dealing with each one of the affiliated companies. On the other hand, if the affiliates have claims against each other, as will often be the case, many of these affiliates will be in a debtor-creditor relationship which, at least theoretically, is adversarial.

In spite of the clear possibilities for denial of multiple representation in such cases, one commentator has suggested that "employment of professionals in Chapter 11 multiple corporation cases should be interpreted to allow the widest possible latitude in order to permit flexibility in operation of the businesses. Special problems requiring special treatment should be dealt with as they are raised by parties in interest."[61]

Despite the obvious chances for the existence of a conflict of interest when one attorney represents multiple affiliated debtors, such representation is not unusual. However, courts have tended to view this situation more strictly when one debtor in bankruptcy is a creditor of another. In fact, courts have typically disqualified law firms in such situations whether the conflict is actual or merely potential.[62] For example, in *In re*

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58. *In re Quakertown Glass Co.*, 73 B.R. 468, 469 (Bankr. E.D. Pa. 1987). *Accord Cle-Ware Industries, Inc. v. Sokolsky*, 493 F.2d 863 (6th Cir. 1974); *In re Hurst Lincoln Mercury, Inc.*, 80 B.R. 894, 897 (Bankr. S.D. Ohio 1987); *In re Guy-Apple Mason Contractor, Inc.*, 45 B.R. 160, 167-68 (Bankr. D. Ariz. 1984). In permitting representation in these cases, courts often focus on the perceived wasteful expense to the estate of introducing new counsel to the case.

59. *See, e.g., Kroungold v. Triester*, 521 F.2d 763 (3rd. Cir. 1975).

60. *See, e.g., In re Trinsey*, 115 B.R. 828, 832-34 (Bankr. E.D. Pa. 1990).

61. Shapiro, *Ethics and Professional Responsibilities*, ALI-ABA Course of Business Bankruptcies: Recent Developments and Trends (1987).

62. *See, e.g., In re Al Gelato Continental Desserts, Inc.*, 99 B.R. 404 (Bankr. N.D. Ill. 1989) (disqualification and sanctions for simultaneous representation of corporate debtor and its president, who was also a debtor, and who was a substantial unsecured creditor of the corporate debtor); *In re Lee*, 94 B.R. 172 (Bankr. C.D. Cal. 1988) (individual debtor's

Michigan General Corporation,[63] in response to the argument that it would be too expensive to retain separate counsel for each debtor, the Bankruptcy Court stated:

> There is no showing that the services of [the law firm] would be economical. Whether reasonable fees would be sought is only part of the problem. When counsel lacks undivided loyalty, any fee made may be excessive. It is no economy to forego maximizing the value of an individual estate because an unrevealed or competing interests would be thereby impaired. It is false economy to burden that estate with the expense of attorney fees spent in an effort to maintain the group if there is no concomitant benefit.[64]

The Court also noted that a motion had been filed for substantive consolidation which may "vitally affect substantive rights of parties in interest." The Court feared that "the question of whether [substantive consolidation] would be in the best interests of a single estate and its creditors alone may very well have been considered secondary to other, ostensibly larger interests."[65] Based on the foregoing and on the Court's obvious annoyance with the law firm's lack of disclosure of the potential conflict of interest, the Court ordered the law firm to immediately cease its representation of the estates and it denied the firm all compensation.

A contrary (though arguably distinguishable) result was reached in *In re O.P.M. Leasing Services*.[66] In this case, a single trustee and his attorney were appointed to oversee five related Chapter 11 reorganization cases. A full disclosure of potential conflict of interests was made to the Court. The Court held that the mere fact of multiple representation was insufficient to disqualify an attorney unless an actual conflict could be

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offer to waive claim against corporate debtor was unavailing as any such claim was an asset of the estate under §541 of the Bankruptcy Code, and thus belonged to the creditors of the individual debtor); *In re Star Broadcasting, Inc.*, 81 B.R. 835 (Bankr. D.N.J. 1988); *In re Hoffman*, 53 B.R. 564 (Bankr. W.D. Ark. 1985). Of course, as discussed above, many courts have held that a conflict cannot be potential anyway, particularly when one debtor is a creditor of another.

In *In re Lee*, *supra*, the Court adopted the presumption that it is improper, in related cases, to appoint (1) a single trustee, (2) a single creditors' committee, (3) the same counsel for the trustees, committees or debtors-in-possession under any one or more of the following circumstances:

> (a) Where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in guaranties and subordination agreements);
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> (b) Where there is a substantial overlap of creditors;
>
> (c) Where the affairs of the respective debtors appear to be substantially entangled;
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> (d) Where assets have been transferred from one debtor to another in transactions that do not appear to be at arm's length;
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> (e) Where piercing of the corporate veil of one of the debtors is necessary to protect the rights of creditors of another debtor. 94 B.R. at 180.

63. 77 B.R. 97 (Bankr. N.D., Tex. 1987).
64. *Id.*, at 103.
65. *Id.*, at 104.
66. 16 B.R. 932 (Bankr. S.D.N.Y. 1982).

shown. The Court stated:

> The rule is that mere allegations of a conflict of interest on the part of a trustee and/or his counsel, constitute an insufficient basis for disqualification, particularly where there is no actual or potential injury to the estates or interests of creditors. . . . Here the conflict is decidedly more apparent than real and there is no impropriety in the same attorney representing multiple related debtors under the guidance of a single trustee.[67]

The "wait and see" approach has also been adopted in several other cases, most of which have approved the employment of one attorney for multiple debtors.[68] Often courts are influenced by considerations of economy to the estate and the familiarity with all aspects of the debtor's condition which a single attorney can bring to the case.

The *Michigan General* case appears to be in the minority to the extent that it seems to advocate an automatic prohibition upon representation of multiple related debtors by one attorney. However, that the Court was clearly displeased with the law firm's failure to disclose the potential conflict (calling it a "matter of greatest significance") and it may well have grounded its holding on this consideration.[69] For the most part however, the most commonly applied rule seems to be that one attorney can represent separate but related debtors as long as no actual conflict of interest is shown to exist.[70]

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67. *Id.*, at 941.

68. In *In re Vanderbilt Associates, Ltd.* 117 B.R. 678 (D. Utah 1990), a law firm sought approval to represent two limited partnerships in Chapter 11 bankruptcy proceedings, although they had the same general partner (who had separate representation). The Bankruptcy Court held that such dual representation was impermissible, due in part to the fact that, under §723(a) of the Code, each partnership debtor might have a claim against the common general partner. The District Court reversed however, holding that, by virtue of §103(b) of the Code, subchapters I and II of Chapter 7 (which include §723(a)) were applicable only in a case under Chapter 7, and thus would not apply to a Chapter 11 proceeding. Although the Bankruptcy Court identified several other conflicts raised by the dual representation, the District Court considered them all to be potential only, and not actual.

Other cases allowing representation of affiliated debtors include *In re International Oil Company*, 427 F.2d 186, 187 (2nd Cir. 1970); *Katz v. Kilsheimer*, 327 F.2d 633 (2nd Cir. 1964); *In re Guy Apple Mason Contractor, Inc.*, 45 B.R. 160, 166 (Bankr. D. Ariz. 1984); *In re General Coffee, Inc.*, 39 B.R. 7, 8 (Bankr. S.D. Fla. 1984); *In re Iorizzo*, 35 B.R. 465, 468 (Bankr. E.D.N.Y. 1983); *In re Concept Packaging Corp.*, 7 B.R. 606, 609 (Bankr. S.D.N.Y. 1980).

69. While not citing *Michigan General*, the court in *In re Amdura Corp.*, 121 B.R. 862 (Bankr. D. Colo. 1990), though expressing sympathy for the plight of affiliated debtors with common counsel, also appeared to advocate a *per se* prohibition on such multiple representation. The Court stated that "the realities of the commercial world where one attorney at one firm routinely provides legal representation to an entire corporate family" must give way to the mandates of the Bankruptcy Code and its requirement that each debtor be treated as a separate corporate entity with its own assets and obligations to creditors. The Court also appeared to have been influenced by the inter-corporate obligations which existed in that case.

70. As with other areas involving conflicts of interest, courts have examined the issue of

H. DO THE BANKRUPTCY CODE AND BANKRUPTCY RULES APPLY WHEN A THIRD PARTY IS FUNDING COUNSEL FEES?

In some cases, potential debtors and attorneys have arranged for payment or guarantee of counsel fees by third parties (typically, but not always, an insider of the debtor such as an officer, shareholder or general partner). This frequently occurs because the debtor may not have the funds to pay a retainer to prospective counsel. Does such an arrangement permit circumvention of the requirements of Sections 327(a) and 329 of the Code, Bankruptcy Rule 2014(a) concerning disclosure?[71]

Some courts address this issue by focusing on the preliminary issue of whether these provisions are applicable at all. Generally, they have held that, while third party payments are permissible, they do not allow avoidance of the requirements which would otherwise be applicable if the debtor itself were funding counsel fees. In *In re BOH! Ristorante, Inc.*,[72] counsel fees were paid by the debtor's ex-wife. No court approval was sought for employment as required by Section 327(a). The Court first noted that payment of all fees is initially subject to court review under Section 329(a), regardless of source.[73] The Court then held that an attorney for a debtor should be subject to all of the disinterestedness requirements of Section 327(a) as well, even if the fees were paid by a third party.

The result in *BOH! Ristorante* can be justified on several bases. First, Bankruptcy Rule 2014(a) specifically requires, in connection with a

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representation of multiple debtors on their own initiative. For example, in *In re Michigan General, supra*, the law firm attempting to represent multiple debtors was eventually disqualified after "the Court became concerned" about the multiple representation. There was no evidence of any objection to this representation by a reorganization committee or any party in interest.

71. The parameters of an attorney's disclosure requirements as set forth in Bankruptcy Rule 2014(a) are discussed in the following section.

72. 99 B.R. 971 (9th Cir. BAP 1989).

73. Section 329(a) of the Code provides as follows:

> Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

See also, In re Walters, 868 F.2d 665, 668 (4th Cir. 1989); *In re Land*, 116 B.R. 798, 805 (D. Colo. 1990); *In re Furniture Corporation of America*, 34 B.R. 46, 46 (Bankr. S.D. Fla. 1983).

Section 329(a) of the Code represents a change from Section 60(d) of the Bankruptcy Act which restricted review of attorney's fees to "any payment . . . by the bankrupt." Based on this provision, a number of courts declined to review third party funding arrangements in bankruptcy proceedings. *See, e.g., In re O'Bannon*, 484 F. 2d 864 (10th Cir. 1973); *In re D.H. Overmyer Telecasting Co.*, 77 B.R. 128, 170 (Bankr. N.D. Ohio 1987).

court order approving employment under Section 327, that an employment application set forth "any proposed arrangement for compensation." Thus, the drafters of the Code appeared to be contemplating the possibility of third party payment in connection with a Section 327(a) order. Moreover, there does not appear to be any logical reason why the dual Section 327(a) requirements of "no adverse interest" and disinterestedness should *not* apply simply because the fees are not being paid by the debtor.

One issue which can arise in third party payment situations regards the extent to which the third party funds are considered property of the estate. In *In re BOH! Ristorante, Inc., supra*, the Court found that the ex-wife's payment was intended purely as a gift to the debtor. Therefore, despite the finding as to the applicability of Section 327(a), the Court held that estate funds were not involved. Thus, counsel fees were denied under Section 329(b) only to the extent they were "excessive."[74]

By contrast, in *In re Land*,[75] even though *BOH! Ristorante* was cited with approval as to the applicability of Section 327(a) in these cases, the Bankruptcy Court made a factual finding that the third party funder did have an expectation of repayment, and that the payments made should be considered estate property. In this case, the Court considered full denial of fees to be appropriate.[76]

Other cases have implicitly assumed the applicability of Section 327(a), and jumped directly to the issue of whether counsel may be employed at all when there is a third party funder or guarantor. These cases do not focus on Section 327, but instead consider the relationship of the funder to the debtor to decide whether or not that relationship creates an impermissible conflict of interest. Some cases have advocated a *per se*

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74. 99 B.R. at 974. Section 329(b) provides:

> If such compensation exceeds the reasonable value of any such services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to—
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> (1) the estate, if the property transferred —
>
> (A) would have been property of the estate; or
>
> (B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or
>
> (2) the entity that made such payment.

In *Matter of Hargis*, 887 F.2d 77 (5th Cir. 1989), an attorney was paid for post-petition services with life insurance proceeds received by the debtor more than 180 days after the bankruptcy filing. The Fifth Circuit first noted that these proceeds were not property of the estate by virtue of 11 U.S.C. §541(a)(5)(C). Then, in reversing both the Bankruptcy Court and District Court, the Fifth Circuit held that §329(b) was essentially inapplicable to this situation, and that the lower court had no authority to order disgorgement of counsel fees pursuant to this section. *Id.*, at 79. This holding was despite the fact that the attorney was considered to have made improper disclosures. The Court did indicate, however, that the bankruptcy court could have disqualified counsel altogether if it so chose, presumably on account of non-compliance with §327. *Id.* at n. 1.

75. 116 B.R. 798 (D. Colo. 1990).

76. *See also In re Trinsey*, 115 B.R. 828, 834-36 (Bankr. E.D. Pa. 1990) (fees paid by a debtor corporation of which individual debtor was sole shareholder were disallowed).

prohibition on employment where fees were paid or guaranteed by a creditor or insider,[77] while others have advocated a more flexible case-by-case approach.[78]

An example of the latter line of cases is *In re Kelton Motors, Inc.*,[79] in which the Court engaged in a thorough examination of the propriety of third party funding generally. The Court first noted the possible tension created by this situation:

> Many small corporations facing the threshold of the Bankruptcy Court depend upon their key, and many times solvent, insiders to fund the debtor's bankruptcy attorney for the latter's undertaking of vital pre- and post-bankruptcy representation. We counterbalance this pragmatic view with an obligatory uncharitable view, such an arrangement may be leaving the proverbial fox in charge of the hen house. We must be assured the Orwellian eye, the scowling mien, and the inquiring mind of debtor's counsel is focused where it should be —on the debtor's interests.[80]

The Court then proceeded to condition third party funding on a number of conditions precedent, including (1) full disclosure, (2) consent by the debtor, and (3) independent counsel for the funder. Of course, the requirement of separate counsel can lead to anomalous results.[81]

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77. In *Matter of Global International Airways Corp.*, 82 B.R. 520 (Bankr W.D. Mo. 1988), a law firm sought compensation for services rendered to a Chapter 11 debtor. The Court found that the CEO had paid the initial retainer, a fact not disclosed in the original application. The Court concluded that the CEO's payment to the debtor's attorney created a conflict of interest:

> [T]he substance of the transactions are clear. The applicant law firm had been paid, or [was] in the process of being paid, by [the CEO] at the times in question and owed [its] primary allegiance to him, not to the bankruptcy estate from which they now have the temerity to seek recompense on the contention that they have rendered services 'in aid of administration of the estate.' 82 B.R. at 523.

Accord, In re Glenn Electric Sales Corp., 89 B.R. 410, 417-18 (Bankr. D.N.J. 1988); *In re Marine Power and Equipment Co., Inc.*, 67 B.R. 643, 651 (Bankr. W.D. Wash. 1986); *In re WPMK, Inc.*, 42 B.R. 157, 163 (Bankr. D. Ha. 1984) ("an attorney representing a debtor should not receive payment, either directly or indirectly, from any of the creditors"); *In re 765 Associates*, 14 B.R. 449, 451 (Bankr. D. Ha. 1981) ("an attorney representing a general partnership should not render advice to the general partners nor receive compensation from a corporation controlled by a general partner."). *See also In re Senior G and A Operating Co., Inc.*, 97 B.R. 307 (Bankr. W.D. La. 1989) (a case reaching the same result as the foregoing cases even though the insider had merely guaranteed the debtor's counsel fees).

78. *See, e.g., In re Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340, 345 (Bankr. N.D. Ga. 1989); *In re Tiffany Square Assoc.*, 103 B.R. 337, 339 (Bankr. N.D. Ga. 1989) (counsel fees paid by a subsidiary of the debtor which held a controlling interest in the debtor's major unsecured creditor); *In re Olson*, 36 B.R. 74, 76 (Bankr. D. Neb. 1983).

79. 109 B.R. 641 (Bankr. D. Vt. 1981).

80. 109 B.R. at 658.

81. In Section II. F. above, we discussed the difficulties which can arise when attorneys attempt to represent both a debtor and one of its insiders. If the insider then attempts to pay for the fees of debtor's counsel, the problems may only be compounded. In *A Feast For Lawyers*, Sol Stein's angry—and often enlightening — diatribe against the bankruptcy pro-

I. WHAT ARE THE PARAMETERS OF AN ATTORNEY'S DUTY TO DISCLOSE POTENTIAL CONFLICTS?

Bankruptcy Rule 2014(a) requires that any application for employment disclose "any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, [and] any other party in interest."

Not surprisingly, there have been a significant number of cases which have addressed the scope of an attorney's disclosure duty. Also not surprisingly, courts get very upset when they feel that counsel has been less than candid in disclosing potential conflicts. In fact, courts typically analyzed this issue entirely separately from the issue of whether or not a conflict of interest actually existed in the first place. As stated by one Court: "Failure to disclose the facts giving rise to a conflict of interest may be grounds for denial of compensation wholly apart from the act of representing conflicting interests."[82]

Virtually every court addressing this issue has emphasized the importance of the disclosure obligation, and the more, the better. Accordingly, the easy advice would be to have counsel disclose all affiliations with the debtor and/or its creditors and any other information which could conceivably indicate the presence of a potential conflict. Moreover, in theory, the easy advice is the right advice. In practice, however, the matter is obviously not that simple. First, attorneys who are aware of potential conflicts may have far more interest in being employed than in satisfying the judge's definition of appropriate ethical conduct. Thus, there is a natural incentive either to comply with this provision in a minimal way, or to avoid it altogether, even at the risk of sanctions.[83]

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cess generally and Chapter 11 specifically, the author recognizes the initial appeal — but ultimate inadvisability — of this tactic:

> One temptation that besets a lot of executives in closely held companies is to use their own instead of a company's money for a retainer, which is a real no-no. What's important to recognize is that it's a mighty temptation for someone who has lived life as a CEO to solve a financial problem out of its own resources. After all, he will surely get it back . . .
>
> Wrong. For one, the executive lending the money may never see it again. Two, there's a chance that that executive will have to hire another lawyer to represent his personal interests as they may differ from the company's interests (believe me, I've been there), and he will then be in the peculiar position of having paid with his own money the lawyer who may be opposing him in court. *A Feast for Lawyers*, at p.9.

82. *In re Guy Apple Masonry Contractor, Inc.*, 45 B.R. 160, 163 (Bankr. D. Ariz. 1984). *Accord, In re Pierce*, 809 F.2d 1356, 1363 (8th Cir. 1987); *In re Al Gelato Continental Desserts, Inc.*, 99 B.R. 404, 409 (Bankr. N.D. Ill. 1989); *In re BES Concrete Products, Inc.*, 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988); *In re Sixth Avenue Car Care Center*, 81 B.R. 628, 632 (Bankr. D. Colo. 1988); *In re Gray*, 64 B.R. 505, 508 (Bankr. E.D. Mich. 1986); *In re S and T Industries, Inc.*, 63 B.R. 656, 657 (Bankr. W.D. Ky. 1986); *In re Coastal Equities, Inc.*, 39 B.R. 304 (Bankr. S.D. Cal. 1984).

83. As stated by one commentator: "Because attorneys may be denied the opportunity to represent their client from the outset, many downplay their prior dealings and bury the

Second, although courts often pay lip service to the possibility of denying fees for failure to disclose, this sanction is rarely imposed in practice when the court ultimately finds that no conflict of interest or other ethical violation existed.[84] Thus, while there is evidence that non-disclosure or inappropriate disclosure may affect the severity of the sanction, it does not appear to create the sanction by itself.[85]

III. DEBTORS AND ISSUES OF CONFIDENTIALITY

A. INTRODUCTION

The attorney-client privilege applies just as fully when a corporate or individual debtor is in bankruptcy as when it is outside of bankruptcy.[86] There is nothing in the general privilege rules which would create an exception to their existence merely because an entity has filed for bankruptcy. Further, the question of whether the privilege attaches in any given case is a question of fact which cannot be decided in the abstract.[87]

The only relevant Bankruptcy Code provision regarding this issue is Section 542(e) which states:

> *Subject to any applicable privilege*, after notice and a hearing, the court may order an attorney, accountant or other person that holds recorded information, including books, documents, records, and papers relating to the debtor's property or financial affairs, to turn over or disclose such recorded information to the trustee. (emphasis added).

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information in the back pages of their application. Since sanctions are neither uniform nor absolute, these underhanded practices many times pay off." Brothers, *Disagreement Among the Districts: Why Section 327(a) of the Bankruptcy Code Needs Help*, *supra*, n. 5, at 1737. Of course, in many other cases, there is no disclosure of potential conflicts at all, frequently on the theory that, in the attorney's own opinion, no conflict existed in the first place.

84. Several courts have interpreted the *Guy Apple Masonry* case, *supra*, n. 82, as automatically requiring denial of compensation merely because of non-disclosure. These courts have then proceeded to criticize that result, instead espousing a flexible case-by-case standard dependent on the facts of each case. *See, e.g., In re Roberts*, 75 B.R. 402, 412 (D. Utah 1987); *In re Ochoa*, 74 B.R. 191, 194 (Bankr. N.D.N.Y. 1987). These cases appear to have misread *Guy Apple Masonry* however, because the court in that case did not appear to favor such automatic denial in the first place.

85. By the same measure, when there has been full disclosure in cases where a conflict does exist, courts may appreciate that disclosure, but there is little evidence to suggest that they will change their findings of fact or conclusions of law merely because of the disclosure.

86. *See, e.g., In re O.P.M. Leasing Services, Inc.*, 670 F.2d 383, 385 (2nd Cir. 1982). While outside the scope of this article, those interested in the scope of the accountant-client privilege in bankruptcy are referred to Bankruptcy Judge Guy Cole's article, *State-Created Accountant-Client Privilege in Bankruptcy Proceedings*, Bankruptcy Update 1990, 64th Annual Meeting of the National Conference of Bankruptcy Judges, at 8-3.

87. *See, e.g., Trammel v. United States*, 445 U.S. 40, 47 (1980); *Matter of Baldwin-United Corporation*, 38 B.R. 802, 804 (Bankr. S.D. Ohio 1984).

The legislative history to this section states that the duty of an attorney or the professional to turn over papers to the trustee "is subject to any applicable claim of privilege, such as the attorney-client privilege."[88]

While it is clear that the attorney-client privilege may exist in bankruptcy in the first instance, the more difficult issue involves the scope of the privilege as against a trustee in bankruptcy. The legislative history to Section 542(e) states that "the extent to which the attorney-client privilege is valid against the trustee is unclear under current law and is left to be determined by the courts on a case-by-case basis."[89]

B. WHAT EFFECT DOES THE APPOINTMENT OF A TRUSTEE IN BANKRUPTCY HAVE ON THE ATTORNEY-CLIENT PRIVILEGE?

In the Supreme Court case of *Commodity Future Trading Commission v. Weintraub*,[90] the Commodity Future Trading Commission was investigating whether the debtor, Chicago Discount Commodity Brokers ("CDCB"), had engaged in certain securities violations. As part of its investigation, the Commission sought certain testimony from Gary Weintraub, the former attorney to the debtor. Weintraub appeared for his deposition but refused to answer many questions on the grounds of CDCB's attorney-client privilege.

In response to Weintraub's assertion of the privilege, the Commission obtained a letter from the trustee for the debtor in which the trustee waived "any interest I have in the attorney/client privilege possessed by [CDCB] for any communications or information occurring or arising on or before [the date of my appointment as receiver]."[91]

The issue before the court was whether the trustee had the power to waive pre-bankruptcy communications between the debtor and its attorney. The Supreme Court held that the trustee could waive the pre-bankruptcy attorney-client privilege. The Court first noted that, outside of bankruptcy, "when control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well."[92] The Court also noted that Section 542(e) was not dispositive. After citing the legislative history to this section, the Court concluded that the "subject to any applicable privilege" clause was "merely an invitation for judicial determination of privilege questions."[93]

In analyzing the relative powers and duties of the trustee versus that of the debtor's directors, the Court concluded that the trustee has "wide-ranging management authority over the debtor" while, in contrast, "the

88. *See* H. R. No. 95-595, 95th Cong. 1st Sess. 369-70 (1977).
89. 124 Cong. Rec. H11, 097 (September 28, 1978); S17, 413 (October 6, 1978).
90. 105 S. Ct. 1986 (1985).
91. *Id.*, at 1990.
92. *Id.*, at 1991.
93. *Id.*, at 1992.

powers of the debtor's directors are severely limited."[94] The Court found that to give the debtor's directors the sole power to waive the privilege "would frustrate an important goal of the bankruptcy laws. In seeking to maximize the value of the estate, the trustee must investigate the conduct of prior management to uncover and assert causes of action against the debtor's officers and directors."[95]

Based on these considerations, the Court concluded that "vesting in the trustee control of the corporation's attorney-client privilege most closely comports with the allocation of the waiver power to management outside of bankruptcy without in any way obstructing the careful design of the Bankruptcy Code."[96]

The *Weintraub* case may well have the harmful effect of chilling communications between officers and directors of a debtor and the debtor's counsel. Since the attorney may be forced to disclose the substance of conversations with insiders of the debtor if a trustee is appointed who waives the attorney-client privilege, the insiders will be understandably reluctant to discuss anything with the attorney which could be prejudicial to them personally if disclosed at a later date.[97]

A number of interesting privilege issues have arisen as a result of the *Weintraub* case, as parties attempt to maneuver themselves inside or outside the parameters of that decision. First, some corporate officers have attempted to argue that the attorney in question represented them personally as well as the debtor, presumably on the theory that the trustee's waiver power would not extend to this situation. Obviously, whether or not such an implied relationship exists depends on the facts of each case. However, the courts confronted with this argument thus far have not found the existence of an implied relationship.[98]

Second, does the trustee's waiver power apply when an attorney is engaged specifically to give bankruptcy advice?[99] In *Gekas v. Pipin*,[100] the

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94. *Id.*, at 1993.

95. *Id.* The Court also stated that it would be "extremely difficult" for the trustee to conduct its inquiry into the prior affairs of the debtor

> if the former management were allowed to control the corporation's attorney-client privilege and therefore to control access to the corporation's legal files. To the extent that management had wrongfully diverted or appropriated corporate assets, it could use the privilege as a shield against the trustee's efforts to identify those assets. *Id.*, at 1993-94.

96. *Id.*, at 1994. A number of courts have since relied on *Weintraub* in allowing a trustee to waive the attorney-client privilege. *See, e.g., In re Blinder, Robinson and Co., Inc.*, 123 B.R. 900, 906 (Bankr. D. Colo. 1991); *In re Cumberland Investment Corp.*, 120 B.R. 627, 628 (Bankr. D.R.I. 1990).

97. For a general discussion of this issue, *see* Jacobs, *Treatment of the Corporate Attorney-Client Privilege in Bankruptcy*, 35 AM. U L. REV. 773 (Spring 1986).

98. *See, e.g., United States v. Keplinger*, 776 F. 2d 678 (7th Cir. 1985) (Court acknowledged that although the subjective belief of the individual must play some role in the analysis, there must be some "minimal reasonability" to that belief); *In re Cumberland Investment Corp.*, 120 B.R. 627 (Bankr. D.R.I. 1990).

99. Recall that *Weintraub* did not involve pre-petition communications between bankruptcy counsel and corporate management.

debtor's president argued that it did not, partly on the grounds that "shifting control of the privilege will impede the candid flow of information needed for the attorney to afford proper bankruptcy counseling."[101] The District Court rejected this argument however, opining that the *Weintraub* Court would have reached the same result even if confronted with this twist on its facts.

Third, if the trustee *wants* to assert the privilege, may it do so even if its corporate predecessor could not? In *Pryor v. Schneider*,[102] the defendants, former shareholders of the debtor corporation, sought to depose the lawyer who represented the debtor and one of the defendants. The Chapter 7 trustee asserted the attorney-client privilege on behalf of the lawyer. The Court first noted that the corporation itself could not have asserted the privilege since "the joint representation exception to the attorney-client privilege applies and neither party may assert the privilege against the other as to any communication made with respect to that transaction."[103] The Court then held that if the corporation itself could not assert the privilege, then the trustee could not do so either.

Finally, although it does not appear to have yet come before the courts, another issue which arises in light of the *Weintraub* case regards control of the privilege in a Chapter 11 case where there is no trustee. Although the debtor presumably controls the privilege, its control is in its capacity as debtor-in-possession and not in its capacity as a prepetition debtor. In theory, the debtor-in-possession has the obligation to retain or waive the privilege only as it may serve the interests of other creditors, and not its own interest.

In view of the obvious lack of incentive for a debtor-in-possession to waive the privilege when it would merely benefit other parties, but would not inure to its own benefit, one commentator has stated:

> I doubt that debtors in possession (or their counsel) can be depended upon to sacrifice their own interests to the interests of the creditors in these cases. But at the very least, it would seem that counsel for the debtor in possession is under a duty to warn her client that this 'privilege' which he may enjoy will vanish if there is ever a trustee.[104]

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100. 69 B.R. 671 (N.D. Ill. 1987).

101. *Id.*, at 673.

102. 106 B.R. 352 (E.D.N.Y. 1989).

103. *Id.* at 353.

104. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM BANKR. L.J. 355, 389 (1986).

IV. REORGANIZATION COMMITTEES AND CONFLICTS OF INTEREST

A. SERVING ON THE COMMITTEE

1. Introduction

Section 1102 of the United States Bankruptcy Code, provides for the appointment, by the United States Trustee, of a committee of creditors and/or equity security holders.[105] A creditors' committee "shall ordinarily consist of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee."[106] Section 1103(c) of the Bankruptcy Code provides that a committee appointed under Section 1102 may:

(1) consult with the trustee or debtor-in-possession concerning the administration of the case;
(2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
(3) participate in the formulation of a plan, advise those represented by such committee of such committee's determinations as to any plan formulated, and collect and file with the court acceptances or rejections

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105. Section 101(10)(A) of the Code defines a "creditor" as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." Section 101(5)(A) in turn defines "claim" as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."

By virtue of the forgoing, the mere fact that a claim may be disputed does not, by itself, prevent a creditor from sitting on a committee. *See, e.g., In re Grynberg*, 10 B.R. 256, 257 (Bankr. D. Col. 1981).

106. Section 1102(b)(1). Section 1102(b)(2) makes a similar provision for equity committees. Prior to 1984, the definition of "person" under the Code excluded governmental units: " 'Person' includes individual, partnership and corporation, but does not include governmental units." This meant that agencies such as the Federal Deposit Insurance Corporation could not sit on creditors' committees. *See, e.g., Matter of Baldwin-United Corp.*, 38 B.R. 802, 806 (Bankr. S.D. Ohio 1984). However the Bankruptcy Amendments and Federal Judgeship Act of 1984 added the following proviso to the definition of "person":

> *Provided, however*, that any governmental unit that acquires an asset from a person as a result of operation of a loan guarantee agreement, or as receiver or liquidating agent of a person, will be considered a person for purposes of section 1102 of this title. §101(41).

With the dramatic increase in bank and savings and loan failures in the late 1980's and early 1990's, this amendment has taken on added significance. Without it, agencies such as the Resolution Trust Corporation (which did not even exist as of the 1984 Amendments) and the FDIC would continue to be barred from committee participation as was the case in *Baldwin-United*. Of course, governmental units not falling within the exception have continued to be excluded from committees even after the 1984 Amendments. *See, e.g., In re VTN, Inc.*, 65 B.R. 278, 279 (Bankr. S.D. Fla. 1986).

of a plan;
(4) request the appointment of a trustee or examiner under §1104 of this title; and
(5) perform such other services as are in the interest of those represented.

The common theme running through the cases addressing the obligations of parties serving on reorganization committees is that such parties must fulfill their fiduciary obligations to the class of creditors or interest holders which they have been selected to represent. In assuring that committee members are able to fulfill these obligations, courts have been particularly wary of allowing committee members to be placed in a position whereby they might be subject to conflicting loyalties or interests. For example, in *In re Johns-Manville Corp.*,[107] the court stated:

> [I]t is well-established that a holder of a claim or an equity interest who serves on a committee undertakes to act in a fiduciary capacity on behalf of the members of the class he represents. The Supreme Court has cautioned that the 'whole body of law' imposes 'the most rigorous responsibilities for fair dealing' on fiduciaries who represent the rights of others. *Young v. Higbee Co.*, 324 U.S. 204 (1945).
>
> In the case of reorganization committees, these fiduciary duties are crucial because of the importance of committees. Reorganization committees are the primary negotiating bodies for the plan of reorganization. They represent those classes of creditors from which they are selected. They also provide supervision of the debtor and execute an oversight function in protecting their constituent's interest. Empowered by Section 1103(c) [of the United States Bankruptcy Code] committees . . . [are given] . . . a wide and important array of authority indicating the intent to create a significant and central role for committees in carrying out a reorganization.
>
> Accordingly, individuals constituting a committee should be honest, loyal, trustworthy and without conflicting interests, and with undivided loyalty and allegiance to their constituents. Conflicts of interest on the part of representative persons or committees are thus not to be tolerated. Thus, where a committee representative or agent seeks to represent or advance the interest of an individual member of a competing class of creditors or various interests or groups whose purposes and desires are dissimilar, this fiduciary is in breach of his duty of loyal and disinterested service.[108]

The cases addressing the issue of which entities are entitled to serve on reorganization committees bear out the themes discussed in the *Johns-Manville* case.

2. May One Person Serve on Separate Committees in a Single Case or Jointly Administered Proceeding?

In certain cases there may be multiple committees, such as a creditors'

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107. 26 B.R. 919 (Bankr. S.D.N.Y. 1983).
108. 26 B.R. at 924-925.

committee and an equity security holders' committee. Other times, there may be affiliated debtors, each having its own committee. These situations raise the question of the extent to which a single individual may serve on more than one committee within a single bankruptcy proceeding. The only reported case which appears to have directly addressed this issue is an early Bankruptcy Code case, *Matter of Proof of the Pudding, Inc.*[109] There, the Bankruptcy Court, in denying such dual representation, stated that "[t]hose creditors serving on more than one committee will be called on to represent ofttimes competing interests. Their attempts to reconcile these competing interests could very well be to the detriment of other creditors and the respective debtors."[110] While there were multiple debtors in *Proof of the Pudding*, it would seem that the Court's holding would be equally applicable in a case involving a single debtor having multiple committees. However, the more difficult issue—and one which tends to link many of the cases involving ethical considerations in bankruptcy—is whether a potential conflict of interest in this situation should be tantamount to a *per se* prohibition on dual membership, or whether each case should be analyzed on its own merits.[111]

3. Do Separate But Related Debtors Require Separate Committees?

The Bankruptcy Code neither mandates nor precludes multiple creditors' committees in a proceeding involving related debtors.[112] However, under Section 1102(a)(1), in addition to the unsecured creditors' committee, the bankruptcy court "may appoint additional committees of creditors or of equity security holders as the United States trustee deems appropriate."[113] Here the guideline should be to assure adequate representation of all creditor and equity groups. Although the Code suggests that committees will "ordinarily" consist of the seven largest claim or interest holders,[114] this is not a requirement.[115]

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109. 3 B.R. 645 (Bankr. S.D.N.Y. 1980).

110. *Id.*, at 649. The *Proof of the Pudding* case was cited with approval in *In re White Motor Credit Corp.*, 18 B.R. 720 (Bankr. N.D. Ohio 1980).

111. For example, in *White Motor*, the Court reached its decision only after demonstrating that actual, and not merely hypothetical, conflicts of interest existed. In *Proof of the Pudding*, on the other hand, the Court did not attempt to demonstrate the specific conflicts which may have existed. The mere potential for such a conflict was sufficient to require that there be no overlapping creditor representation on separate committees. The *per se* approach versus the case-by-case approach is further discussed above at Section II.B.

112. *See, e.g., In re Salant Corp.*, 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985).

113. Similarly, §1102(a)(2) provides that "on request of a party in interest, the court may appoint additional committees of creditors or equity security holders if necessary to assure adequate representation of creditors or of equity security holders."

114. 11 U.S.C. §1102(b).

115. Prior to the enactment of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, there was a §1102(c) which provided that the bankruptcy court could change the size or membership of a committee "if the membership of

There has been some disagreement among the cases regarding the appropriate interpretation of Section 1102 in cases involving affiliated debtors. Most have held that the court ultimately has discretion both as to the number and size of the committees, depending on the facts of each case. For example, in *In re ORFA Corp. of Philadelphia*,[116] a parent company and two subsidiaries were in Chapter 11. The Court was presented with a motion to appoint a creditors' committee for one of the subsidiaries, even though a committee already existed to serve all three entities. The Court denied the motion largely on the ground that there was insufficient evidence that the three debtors had ever been viewed as distinct entities.[117]

Similarly, in *In re Salant*,[118] the Office of the United States Trustee appointed a single creditors' committee composed of seventeen creditors of three affiliated debtors. A union group applied to have a separate Employee Creditors' Committee appointed on the grounds that the interests of the non-management employees were too diverse from the interests of the general trade and institutional creditors to be adequately represented by the creditors' committee. The Court held that the employees' claims were not large enough to warrant a separate committee. Instead, the Court exercised its option to add three employees to the existing committee.[119]

Despite the foregoing cases, some courts have held that in cases involving multiple debtors, separate committees are either required *per se*, or at least presumptively required. In *In re White Motor Credit Corp.*,[120] the Court stated that "as a matter of law," Section 1102 of the Code requires that each case have its own court-appointed creditors' committee.[121]

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such committee [was] not representative of the different kinds of claims or interests to be represented." This provision became unnecessary when authority to appoint committees was vested with the United States trustee and not the bankruptcy court.

116. 121 B.R. 294 (Bankr. E.D. Pa. 1990).

117. *Id.*, at 297.

118. 53 B.R. 158 (Bankr. S.D.N.Y. 1985).

119. *See also, In re McLean Industries, Inc.*, 70 B.R. 852, 861-62 (Bankr. S.D.N.Y. 1987). A number of cases, while not involving multiple debtors, or requests for additional committees specifically for that reason, have nevertheless emphasized the bankruptcy court's discretion in this area. Not coincidentally, requests for multiple committees have arisen in some of the largest bankruptcy cases yet filed in this country. These cases (most of which have denied requests for additional committees in single creditor cases) include *In re Sharon Steel Corp.*, 100 B.R. 767 (Bankr. W.D. Pa. 1989); *In re Public Service Company of New Hampshire*, 89 B.R. 1014 (Bankr. D.N.H. 1988); *In re Johns-Manville*, 68 B.R. 155, 163 (S.D.N.Y. 1986); *In re Baldwin-United Corp*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983); *In re Shaffer-Gordon Associates*, 40 B.R. 956, 958-59 (Bankr. E.D. Pa. 1984); *In re Daig Corp.*, 17 B.R. 41 (Bankr. D. Minn. 1981). In *In re Texaco, Inc.*, 79 B.R. 560, 562 (Bankr. S.D.N.Y. 1987), there was a single general unsecured creditors committee for three related debtors, although the Court did not specifically discuss the propriety of this procedure. The issue of the permissibility of conflicts among creditors within a committee is discussed more fully in the following section.

120. 18 B.R. 720 (Bankr. N.D. Ohio 1980).

121. *Id.*, at 722. The Court opined that "creditors of one debtor cannot be presumed to

A case finding broader support than *White Motor* is *In re Parkway Calabasas Ltd.*.[122] In that case, the Court was frustrated by the lack of opposition to the debtors' motion for substantive consolidation, which operated to the detriment of one of the debtors. Accordingly, *sua sponte*, the Court stated in dictum that there must be a presumption against the appointment of a single committee or trustee in multiple debtor cases in any of the following circumstances:

> (a) Where creditors of the debtors have dealt with such debtors as an economic unit (which may be reflected in guaranties and subordination agreements);
> (b) where the affairs of the respective debtors (as reflected in inter-debtor accounts, jointly owned assets, guarantees, subordination agreements, or shared officers, directors or owners) appear to be substantially entangled;
> (c) where assets have been transferred from one debtor to another in transactions that are not at arm's length;
> (d) where piercing of the corporate veil of one of the debtors is necessary or advisable to protect the rights of creditors of another debtor.[123]

4. May Creditors Within a Committee Have Interests Which Conflict With Those of Other Committee Members or of the Debtor?

A related, but conceptually distinct, issue from that addressed in the previous section is the extent to which a creditor or interest holder in a single-debtor proceeding may serve on a committee when such creditor has views which are either (a) opposed to other committee members regarding the debtor's fate (even if all such creditors are similarly situated) or (b) opposed to the debtor's own views regarding reorganization strategy.[124] Most courts (though not all, as will be seen) have held that opposing interests within a committee or between the debtor and the committee member are acceptable, so long as the committee members fulfill their fiduciary duty to those they represent. Thus, in *Matter of Schatz Federal Bearings Co. Inc.*,[125] in allowing the debtor's labor union to serve on the creditors' committee, the court stated:

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have a material or other qualifying interest in the assets or future of an affiliated debtor." *Id.* The only cases which have cited *White Motor* have both declined to follow its holding. *See In re ORFA Corp. of Philadelphia, supra*, n. 116; *In re McLean Industries, Inc.*, 70 B.R. 852, 861-62 (Bankr. S.D.N.Y. 1987), *supra*, n. 119.

122. 89 B.R. 232 (Bankr. C.D. Cal. 1988).

123. 89 B.R. at 835, n. 3. The *Parkway Calabasas* case has since been cited with approval in several cases, including *In re BH and P, Inc.*, 103 B.R. 556, 570-72 (Bankr. D.N.J. 1989) (Court added intra-debtor claims as a fifth circumstance where it would be presumptively inappropriate to have common fiduciaries or professionals), *aff'd*, 119 B.R. 35 (D.N.J. 1990).

124. The issue of whether a competitor of the debtor may sit on a committee is discussed in the following section.

125. 5 B.R. 543 (Bankr. S.D.N.Y. 1980).

> [I]n many instances the interests of creditors who are also members of the Official Creditors Committee are not parallel to one another, or to the debtor. Some creditors may desire to continue the debtor's business as a source of supply or as a customer, while others may wish to liquidate the debtor rather than accept anything less than a 100% distribution.[126]

Courts have also allowed creditors to serve on committees even when they have an articulated antipathy towards the debtor's reorganization efforts. For example, in *In re M.H. Corporation*,[127] an attorney representing several committee members in a Chapter 11 reorganization stated, at a meeting of creditors, that "he and his clients would object to any plan the debtor proposes, and would just as soon see the case proceed as a Chapter 7 liquidation, for they feel that the debtor would not live up to anything."[128] When the debtor objected to the presence of this attorney on the creditors' committee, the Court (after noting that a debtor does not have standing in the first place to challenge the composition of a creditors' committee) held that as long as any committee member was representative of certain creditors, its appointment to the committee would not be denied.[129]

Some courts have allowed creditors with conflicting interests to serve on a committee only so long as the conflict with the debtor was merely speculative and not actual. For example, in *Matter of Enduro Stainless, Inc.*,[130] the Court, relying on *In re Altair Airlines*,[131] held that the United Steelworkers Union was entitled to be appointed to the unsecured creditors' committee. The Court noted that to deny the Union's motion

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126. *Id.*, 5 B.R. at 548. *Accord, In re Altair Airlines Inc.*, 727 F.2d 88, 90 (3rd Cir. 1984) ("Conflicts of interest [among committee members] are not unusual in reorganizations. Materialman creditors, for example, may sometimes prefer to forego full payment for past sales in hopes of preserving a customer, while lenders may prefer liquidation and prompt payment"); *In re Sharon Steel Corp.*, 100 B.R. 767, 777 (Bankr. W.D. Pa. 1989); *In re Public Service Company of New Hampshire*, 89 B.R. 1014, 1019 (Bankr. D.N.H. 1988) ("The existence of strong and diverse views is not per se a disqualification for service on a creditors' committee in a chapter 11 proceeding."); *In re McLean Industries, Inc.*, 70 B.R. 852, 861 (Bankr. S.D.N.Y. 1987); *In re Northeast Dairy Co-Op Federation*, 59 B.R. 531, 533 (Bankr. N.D. N.Y. 1986); *Matter of Baldwin-United Corp.*, 45 B.R. 375, 376 (Bankr. S.D. Ohio 1983).

127. 30 B.R. 266 (Bankr. S.D. Ohio 1983).

128. *Id.*, at 267. In this regard, it has been held that a committee has standing to object to a plan of reorganization even when the committee's constituent members vote in favor of the plan. *See In re Central Medical Center, Inc.*, 122 B.R. 568, 570-71 (Bankr. E.D. Mo. 1990).

129. *Accord, In re Microboard Processing, Inc.*, 95 B.R. 283, 286 (Bankr. D. Conn. 1989) (debtor's inability to negotiate with certain committee members regarding formulation of a plan was insufficient grounds to justify their removal from the committee); *In re Daig Corp.*, 17 B.R. 41, 43 (Bankr. D. Minn. 1981) ("[T]he creditors' committee is not merely a conduit through whom the debtor speaks to and negotiates with creditors generally. On the contrary, it is purposely intended to represent the different interests and concerns of the creditors it represents. It must necessarily be adversarial in a sense, though its relations with the debtor may be supportive and friendly.").

130. 59 B.R. 603 (Bankr. N.D. Ohio 1986).

131. 727 F.2d 88 (3rd Cir. 1984).

based upon the mere possibility of conflicting loyalties "would result in disqualification of almost every creditor."[132]

The Court then stated however, that "the Union may not act through the committee to further only its self-interests, but until such actions are brought to the Court's attention, the Court will not deny its application based on mere assumptions."[133] Apparently the Court was not persuaded that an actual conflict of interest already existed, despite the fact that the union: (a) was unavailable for negotiations with management; (b) had met with a competitor regarding an employee buy-out of the plant; (c) had indicated that it was considering requesting the appointment of a trustee; (d) would probably oppose any rejection of the labor contract; and (e) was involved in pending NLRB litigation against the debtor. The Court stated that it "should not deny a creditor a position on a creditors' committee based upon speculation."[134]

On the other hand, some courts, albeit under unique circumstances, have found that potential conflicts with the debtor were sufficient to warrant keeping a creditor off a committee in formation. For example, in *In re Allied Delivery Systems Co.*,[135] the Court held that the obvious hostilities existing between the debtor and the union constituted sufficient grounds to deny the union's application for appointment to the creditors' committee.[136] In *In re Charter Co.*,[137] the court removed a holder of preferred shares in the debtor from the unsecured creditors' committee due to a high likelihood of a conflict of interest with the committee. However, the court expressed doubt as to whether one's status as an equity security holder, even as to preferred shares, bestowed upon such person the status of "creditor" in the first place.[138]

5. May a Competitor of the Debtor Serve on a Creditors' Committee?

Occasionally, a creditor has interests which are "adverse" to the debtor, not merely because of the indebtedness, but also because of the creditor's status as a competitor of the debtor. As with virtually all areas in the murky world of conflicts in bankruptcy, one can find different courts reaching differing conclusions here as well. In *In re Wilson Foods Corporation*,[139] FDL Foods Company, a creditor of the debtor, moved to

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132. *Id.*, at 605.

133. *Id.*

134. *Id. See also In re Richmond Tank Car Co.*, 93 B.R. 504 (Bankr. S.D. Tex. 1988 (court allowed a creditor with a disputed claim who was engaged in state court litigation with the debtor to sit on the creditors' committee, though the court implied that removal might become appropriate if an actual, as opposed to potential, conflict of interest arose).

135. 52 B.R. 85 (Bankr. N.D. Ohio 1985).

136. In *Allied Delivery*, the union had filed an unfair labor practices charge against the debtor prior to the bankruptcy filing.

137. 44 B.R. 256 (Bankr. M.D. Fla. 1984).

138. *Id.*, at 258.

139. 31 B.R. 272 (Bankr. W.D. Ok. 1983).

be placed on the creditors' committee. The debtor objected on grounds that FDL was a significant competitor of the debtor in the pork processing business and that FDL's inclusion on the committee would "impair its willingness and ability to deal candidly with the committee . . . [and] . . . would impair reorganization [since the debtor] would need to protect confidential matter provided to the committee."[140]

The Bankruptcy Court agreed with the debtor:

> Whoever FDL might select as its representative would need to serve conflicting interests between two constituencies — the Wilson creditors on one hand and the FDL shareholders on the other. Conflicting interest and divided loyalties have no place on a committee of creditors.[141]

In *In re Plant Specialties, Inc.*,[142] however, the Court allowed a competitor of the debtor to serve on the creditors' committee. The court distinguished *Wilson Foods* on the grounds that the stockholder of the competing corporation in *Plant Specialties* owned all of the stock in his company "so that he would not face the pressure from shareholders that concerned the *Wilson Foods* court."[143] The Court also stated that "in many cases it can be advantageous to the debtor to have a competitor on the creditors' committee. [The competitor], because of the familiarity with the industry, may have insight into the affairs of the debtor which will be beneficial to the reorganization efforts, and thus to both the debtor and the creditors."[144]

One other court has also permitted competitors of the debtor to sit on the creditors' committee. In *In re Map International, Inc.*,[145] the court stated that "it is well established that the mere fact of competitor status is insufficient to disqualify a creditor from serving on the creditors' committee. Rather, the party seeking to exclude a creditor bears the burden of proving that the creditor's appointment will be detrimental to the debtor's reorganization efforts."[146]

6. May a Lawyer Serve on a Reorganization Committee?

The issue of a lawyer's ability to serve on a committee can arise either

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140. *Id.*, at 272.
141. *Id.*
142. 59 B.R. 1 (Bankr. W.D. La. 1986).
143. *Id.*, at 2.
144. *Id.* Of course, it takes somewhat of a leap of faith to conclude that the competitor will use such familiarity to the debtor's advantage. Depending on the ethics of the party involved, the size of the creditor/competitor's claim may be a factor in this determination.
145. 105 B.R. 3 (Bankr. E.D. Pa. 1989).
146. *Id.*, at 4. Calling this proposition "well established" is a bit of an overstatement since so few cases have addressed this issue. Moreover, *Collier* notes that direct proof of abuse of position is not required for removal: "If there is a significant degree of competition between the debtor and the committee member in a case in which the committee would have access to confidential information, the committee member should be removed." 5 *Collier on Bankruptcy*, §1102.01[6] (15th ed. 1991) at 1102-21.

when the lawyer has its own claim for prepetition services, or when the lawyer has no independent claim of its own, but is representing a client. With respect to the former situation, it may appear, at first blush, that there should be no reason an attorney should not be as free to protect its interests as any other creditor. However, other creditors are not bound by the Code of Professional Responsibility which requires a lawyer to "preserve the confidences and secrets of a client."[147] In *In re Featherworks Corporation*,[148] the Court permitted a law firm which had represented the debtor prepetition to be on the unsecured creditors' committee, despite the court's concern that such a situation could place the firm in an inherently compromising position. The debtor's objections were on grounds other than the attorney-client privilege however, and thus the case should not be construed as holding that the attorney-client privilege is subordinate to Section 1102 of the Code. The Court did note an exception to the lawyer's privacy obligations to his client when the lawyer has not been paid for services. More specifically, under D.R. 4-101(C)(4), a lawyer may reveal confidences and secrets where it is necessary in order to establish or collect a fee.[149]

When an attorney has no claim of its own, it has generally been held that that attorney may still serve on a creditors' committee on behalf of a creditor.[150] The Courts have reasoned that any conflicting loyalties on the part of the attorney would exist to an equal degree if the creditor itself sat on the committee. Similarly, *In re M.H. Corporation*,[151] the Court stated that, although it ordinarily encouraged business persons to sit on the committee, an attorney could serve in their place if the creditors so desired.

When an attorney sits on a committee while representing a client, he must be careful not to use the committee as a conduit for advancing his client's own interests at the expense of the class he represents. A classic

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147. Canon 4, Code of Professional Responsibility. The Ethical Considerations also note that "the obligation of a lawyer to preserve the confidences and secrets of his client continues after the termination of his employment" (EC 4-6) and that "a lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client, and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes." (EC 4-5).

148. 25 B.R. 634 (Bankr. E.D.N.Y. 1982), *aff'd*, 36 B.R. 460 (E.D.N.Y. 1984)

149. *Id.*, at 644. After all, while ethics are worthy, the line must be drawn somewhere. Payment of counsel fees seems as good a place as any.

On a related note, §702(a) of the Code provides that any creditor may vote for a candidate for trustee in Chapter 7 proceeding unless the creditor is an insider. A few courts have held that an attorney is an insider for purposes of this provision (notwithstanding that an attorney would not ordinarily fit within that term as defined in §101(31) of the Code), and thus may not vote for a trustee. *See, e.g., Matter of Montagna*, 31 B.R. 10, 11 (Bankr. W.D Pa 1983); *Beale v. Snead*, 81 F.2d 970 (4th Cir. 1936), *cert. denied*, 298 U.S. 685 (1936); *In re Deena*, 114 F. Supp. 260, 268-69 (D. Me. 1953).

150. *See, e.g., Matter of J.L.N. Distributors, Inc.*, 330 F.2d 825 (2nd Cir. 1964); *Arrow Dairy Co. v Chase Superior, Inc.*, 116 F.2d 573 (2nd Cir. 1941).

151. 30 B.R. 266 (Bankr. S.D. Ohio 1983).

example of such conduct occurred in the Johns-Manville bankruptcy.[152] An attorney who sat on the Asbestos Committee sought to advance a state court action which had been instituted prepetition on behalf of his client. The Court first held that by proceeding with the state court litigation, the attorney was in violation of the automatic stay granted by Section 362 of the Bankruptcy Code. However, the Court was far more perturbed by the breach of the attorney's fiduciary responsibilities. In imposing sanctions against the attorney, the Court stated:

> Mr. Sweeney is taking actions which are designed to benefit his client Doan and/or his own private interests in particular as opposed to benefitting all members of the asbestos claimants class which he represents as a committee member and fiduciary. The interests of one asbestos litigant in one action can divert substantially from the interests of all asbestos claimants. . . . As a member of the Asbestos Committee, Mr. Sweeney has access to all sorts of confidential information regarding, *inter alia*, the details of proposed reorganization plans and the debtor-in-possession's operations, which information is not intended to be used in fostering the rights of private litigants outside the context of protecting these creditors as a group in these bankruptcy proceedings. This confidential position should not be so misused by Mr. Sweeney. Indeed, it may be viewed that, in this regard, Mr. Sweeney is using his fiduciary capacity to foster his own self-interest as a private attorney, a breach of loyalty which is to be condemned.[153]

Similarly, in the recent case of *Matter of Celotex Corp.*,[154] the court was advised that, while an asbestos personal injury creditors' committee was composed of the claimants themselves, the actual functioning members of the committee were the claimants' respective attorneys. In refusing to condone this practice, the Court stated:

> [A] creditors' committee has a fiduciary duty to its constituency. Committee counsel has a fiduciary duty to the committee and the creditors it represents. Because in this case committee participation is not by the appointed members but by their legal representatives, an anomaly arises. Each legal representative who sits on the committee has a fiduciary duty to its own client/member as well as a fiduciary duty to the committee and each of its constituents.[155]

7. May Insiders of the Debtor Serve on the Reorganization Committee?

"Insiders" of the debtor are those parties who might logically be ex-

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152. *In re Johns-Manville Corp.*, 26 B.R. 919 (Bankr. S.D.N.Y. 1983).

153. *Id.*, at 926. *See also, A.H. Robins Co. v. Piccinin*, 788 F. 2d 994, 1015 (4th Cir. 1986) ("[T]he Committee is not authorized to represent the individual interests of any claimant, as distinguished from the individual interests of all claimants.").

154. 123 B.R. 917 (Bankr. M.D. Fla. 1991).

155. *Id.*, at 921-922.

pected to be privy to certain confidential information and might have certain loyalties which conflict with those of other creditors having only an arms-length relationship with the debtor. Because of these concerns, most courts addressing this issue have precluded insiders from serving on reorganization committees.[156]

However, in *In re Vermont Real Estate Investment Trust*,[157] an unsecured creditor was held eligible for an appointment to the creditors' committee despite her status as an insider by virtue of her marriage to the former president and executive manager of the debtor. The court noted that, despite the creditor's status as an insider, she had still satisfied the necessary prerequisites for appointment to the unsecured creditor's committee, namely that she was (a) a creditor, (b) holding a claim, (c) which was unsecured.[158]

8. May a Partially Secured Creditor Serve on an Unsecured Creditors Committee?

In *In re Walat Farms, Inc.*,[159] a creditor held security for its claim, but the creditor was significantly undersecured. The debtor objected to the creditor's motion to be placed on the unsecured creditors' committee on grounds that the nature of the claim was so different from that of other unsecured creditors that it would be inappropriate to place the creditor on the committee. The Bankruptcy Court agreed with the debtor that a conflict of interest was possible, such as in a situation where the bank, wearing its secured creditor hat, moved for relief from the stay in a single-asset proceeding. This would mean that a member of the committee was making reorganization impossible.[160]

Under the facts of this case however, no actual conflict had been shown to exist. Using the "wait until the potential conflict becomes an actual conflict" approach,[161] the Court allowed the creditor to be ap-

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156. *See, e.g., In re Swolsky*, 55 B.R. 144, 146 (Bankr. N.D. Ohio 1985); *In re Glendale Apartments, Ltd.*, 25 B.R. 414, 415. (Bankr. D. Md. 1982); *In re Daig*, 17 B.R. 41 (Bankr. D. Minn. 1981); *In re Penn-Dixie Industries, Inc.*, 9 B.R. 941, 944-45 (Bankr. S.D.N.Y. 1981); *In re Realty Associates Securities Corp.*, 56 F. 1008 (E.D.N.Y 1944), *aff'd* 156 F.2d 480 (2nd Cir. 1946); *In re International Railway Co.*, 86 F. Supp. (W.D.N.Y. 1949).

157. 20 B.R. 33 (Bankr. D. Vt. 1982).

158. *See also, In re Nyack Autopartstores Holding Co., Inc.*, 98 B.R. 659, 661 (Bankr. S.D.N.Y. 1989) ("An insider is not precluded by 11 U.S.C. §1102(b)(1) from appointment to the committee if the insider holds one of the seven largest claims against a debtor."). The maxim that the three elements cited in *Vermont Real Estate* are necessary for appointment to a committee was first set forth in *In re Bennett*, 17 B.R. 819, 820 (Bankr. D.N.M. 1982), and has been restated by several courts since then. However, such a principle is peculiar since a creditor, by definition, has a claim, either against the debtor or against the estate. *See* §101(10) of the Code and n. 105, *supra*. Thus, one of the three requirements is superfluous.

159. 64 B.R. 65 (Bankr. E.D. Mich. 1986).

160. *Id.*, at 69-70.

161. *See* n. 24, *supra*.

pointed to the unsecured creditors' committee.[162] The Court noted that the Advisory Committee Note to Official Bankruptcy Form No. 9, the "list of creditors holding twenty largest unsecured claims," states that a "secured creditor should be listed among the twenty largest unsecured creditors only if that creditor's claim is sufficiently undersecured so as to fall within that category."[163]

B. REPRESENTATION OF REORGANIZATION COMMITTEES

1. Introduction

One of the prime considerations involved in representing parties in interest, including reorganization committees in bankruptcy, is that "a lawyer should avoid even the appearance of professional impropriety."[164] Therefore, even when an actual conflict of interest has not yet been shown to exist, courts may frequently disqualify an attorney from representing a reorganization committee (or, for that matter, debtors) where there is a mere appearance of a conflict.

A leading example of this situation is described in *Woods v. The City National Bank & Trust Co. of Chicago*.[165] In that case, the attorney for the bondholders' committee was also counsel to the indenture trustee. In denying counsel fees, the Supreme Court stated:

> Where a claimant, who represented members of the investing public, was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted. The principle enunciated by Chief Justice Taft in a case involving a contract to split fees in violation of the bankruptcy rules is apposite here: "What is struck at in the refusal to enforce contracts of this kind is not only actual evil [which] results but their tendency to evil in other cases." Furthermore, the incidence of a particular conflict of interests can seldom be measured with any degree of certainty. . .
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> A fiduciary who represents security holders in a reorganization may not perfect his claim to compensation by insisting that although he had conflicting interests, he served his several masters equally well or that his primary

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162. The Court indicated that if a clear conflict did arise, it could reconsider the issue of the propriety of the secured creditor's appointment to the unsecured creditors' committee.

163. *See also*, 5 *Collier on Bankruptcy* ¶1102.01[2] at p. 1102-10 ("Neither §1102(c)(1) nor §1102(b)(1) prohibits the appointment to the §1102(a)(1) committee of persons holding both unsecured claims and secured claims or ownership interests.").

Walat Farms appears to be the only Code case which has specifically addressed this issue, although its holding was cited with approval in *In re Sharon Steel Corp.*, 100 B.R. 767, 778-79 (Bankr. W.D. Pa. 1989). In a case decided under the Bankruptcy Act of 1898, *In re Ascot Textile Corp.*, B.L.R. ¶64, 427 (S.D.N.Y. 1972), the court permitted a creditor whose collateral was of trivial value to serve on the unsecured creditors' committee.

164. *See* Canon 9 of the Code of Professional Responsibility, n. 2, *supra*, and accompanying text.

165. 312 U.S. 262 (1941).

> loyalty was not weakened by the pull of his secondary one. Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries at a higher level than that trodden by the crowd.[166]

The *Woods* case presaged the prohibition of "even the appearance of professional impropriety" now found in Canon 9 of the Code of Professional Responsibility. While *Woods* did not address conflicts of interest involving representation of debtors, the pronouncements of that case are often cited in conflict of interest cases which do involve debtors.

2. May One Attorney or Law Firm Simultaneously Represent (a) More than One Committee or (b) a Committee and an Individual Creditor?

Section 1103(b) of the Code provides as follows:

> An attorney or accountant employed to represent a committee appointed under §1102 of this title, may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an adverse interest.

The second sentence of Section 1103(b) was added pursuant to the Bankruptcy Amendments and Federal Judgeship Act of 1984.[167] Prior to the 1984 Amendments, it was generally held that Section 1103(b) constituted an absolute prohibition to simultaneous representation by an attorney or law firm of either two committees or one committee and an individual creditor.[168]

The effect of the 1984 Amendments was to weaken the absolute prohibition on simultaneous representation by counsel (1) for a creditors' committee and (2) for creditors in a matter adverse to the interests of other creditors in the case. However, the Amendments did not alter the prohibition of counsel representing an individual creditor and a commit-

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166. *Id.*, at 268-269 (citations omitted). The *Woods* case has rightly been called the "seminal conflict of interest case", and is constantly cited as the benchmark conflict of interest case in bankruptcy opinions. *See In re Florida Peach Corporation of America*, 110 B.R. 589, 592 (Bankr. M.D. Fla. 1990).

167. Pub. L. 98-353, 98 Stat. 358, 384. Prior to the 1984 Amendments, §1103(b) read as follows: "A person employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity in connection with the case."

168. *See, e.g., In re Broadcast Management Corp.*, 36 B.R. 519, 520 (Bankr. S.D. Ohio 1983) (court noted that the legislative history indicates that §1103(b) was designed to avoid even potential conflicts of interest and that "the language of the section essentially states a *malum prohibitum* rule which allows for no exceptions."); *In re Saxon Industries, Inc.*, 29 B.R. 320 (Bankr. S.D.N.Y. 1983); *Matter of Combustion Equipment Associates*, 8 B.R. 566 (Bankr. S.D.N.Y. 1981); *Matter of Proof of the Pudding*, 3 B.R. 645 (Bankr. S.D.N.Y. 1980).

tee if the creditor hired counsel to litigate issues potentially adverse to other committee members.[169]

As a result of the 1984 Amendments, most courts now hold that the facts of each case must be independently examined to ascertain whether multiple representation would be appropriate. As stated by one court:

> Where the representation does not entail an actual or potential conflict of interest or present an appearance of impropriety, §1103(b) is not to be interpreted to preclude a committee from engaging counsel of its choice and one in whom it has confidence will best serve the interests of the creditors represented by the Committee.[170]

Moreover, once a law firm has formally stated that it has complied with Section 1103(b), the burden of proof thereunder is on the party alleging a conflict.[171]

The second sentence of Section 1103(b) probably has no effect on cases such as *Woods v. City National Bank and Trust Co., supra.* An indenture trustee stands in a far different position relative to a reorganization committee than do the constituents that the committee purports to represent. Moreover, the mere fact that there is no longer a *per se* prohibition on simultaneous representation of a committee and one of its members does not mean that such dual representation cannot be prohibited under the facts of any given case.

Notwithstanding the 1984 Amendments, *Collier* suggests a strict interpretation of Section 1103(b):

> In many cases, the objecting party will not be able to prove that a conflict between the committee and the creditor or creditors represented by counsel to the committee is inevitable. It should be sufficient for the objecting party to establish that it is likely a conflict will arise. In such cases, the integrity of the committee process should be protected.
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> In those cases in which a conflict is likely to arise in the future, permitting counsel for the committee to serve until the conflict is fully manifest may disable the committee at a crucial juncture in the reorganization process. It is unrealistic to expect that a committee can efficiently and effectively find

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169. *See Matter of Oliver's Stores, Inc.*, 79 B.R. 588, 594 (Bankr. D.N.J. 1987); *In re Grant Broadcasting of Philadelphia, Inc.*, 71 B.R. 655 (Bankr. E.D. Pa. 1987).

170. *In Red Lion Capital Group*, 44 B.R. 684, 689 (Bankr. S.D.N.Y. 1984). *Accord In re Rusty Jones, Inc.*, 107 B.R. 161, 163 (Bankr. N.D. Ill. 1989); *In re Heck's Inc.*, 83 B.R. 410, 417 (Bankr. S.D. W. Va. 1988); *In re Roberts*, 46 B.R. 815, 825 (Bankr. D. Utah 1985) ("Multiple representation by attorneys is acceptable unless a creditor objects on grounds that additional circumstances exist which create in those other entities or creditors an interest adverse to that of the committee."); *In re Technology for Energy Corp.*, 53 B.R. 32, 35 (Bankr. E.D. Tenn. 1985); 5 *Collier on Bankruptcy*, ¶1103.03 (15th ed. 1991) at p. 1103-8 ("With respect to attorneys and accountants, the committee may appoint such professional persons to represent the committee so long as any other party represented by such attorney or accountant in connection with the case does not have an adverse interest to the interests represented by the committee.").

171. *See, e.g., In re AOV Industries*, 798 F.2d 491 (D.C. Cir. 1986).

replacement counsel in the middle of a reorganization case. One possible approach to the problem of potential versus actual conflicts is the consent of the individual creditors to the continued representation of the committee by counsel in the event a conflict arises.[172]

3. May a Reorganization Committee Employ More than One Law Firm?

Section 1103(a) of the Bankruptcy Code provides that a committee "may select and authorize the employment by such committee of one or more attorneys, accountants, or other agents to represent or perform services for such committee." Despite this apparently broad authorization for a committee to employ more than one professional, the legislative history states that "this will be the exception, and not the rule; cause must be shown to depart from the normal standard."[173]

In *In re The Bible Speaks*,[174] the Court held that the mere fact that six creditors were evenly divided in their vote for counsel was insufficient to warrant the employment of more than one law firm. The complexity of the case and geographical considerations were also deemed insufficient. The Court did not give any examples as to when "cause" would exist.

In cases which have approved co-counsel, fee applications have often been reduced due to unnecessary duplication of work product.[175]

4. May Separate Committees Retain Separate Professionals Even if Their Work Product May Overlap?

As noted above, Section 1102(a) clearly contemplates the creation of multiple committees in appropriate cases.[176] Section 1103(a) in turn provides that such committees may employ "one or more attorneys, accountants, or other agents, to represent or perform services for such committee." As also noted above, despite this section, one committee may

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172. 5 *Collier on Bankruptcy*, ¶1103.03 at p. 1103-9, 10 (15th ed. 1991). One recent case in this area is in *Matter of XGW Excavating Co., Inc.*, 111 B.R. 469 (Bankr. D.N.J. 1990). There, the Court denied the fees of the attorneys for the unsecured creditors' committee due to its concurrent representation of an undersecured creditor. The Court did allow fees for the period before which the attorneys were notified of the potential conflict by debtor's counsel. *See also In re South Pacific Island Airways*, 68 B.R. 574 (Bankr. D. Haw. 1986) (denial of fees warranted where attorney for creditors' committee did not advise court of potential conflict of interest arising from prior representation of debtor on matters relating to bankruptcy proceeding).

173. H.R. No. 95-595, 95th Cong., 1st Sess. 402 (1977), U.S. Code Cong. and Admin. News 1978, pp. 5787, 6358.

174. 67 B.R. 426 (Bankr. D. Mass. 1986).

175. *See, e.g., In re Yankee Seafood*, 53 B.R. 285, 286 (Bankr. D.R.I. 1985); *In re Sapolin Paints*, 38 B.R. 807, 814-15 (Bankr. E.D.N.Y. 1984).

176. *See*, Section IV.A.3, *supra*.

ordinarily not hire more than one attorney or accountant.

When there are multiple committees however, Section 1103(b) becomes relevant in that it prohibits any person employed to represent a committee from representing any other entity having an adverse interest in connection with the case.[177] Because of this section, the Bankruptcy Court in *In re Saxon Industries, Inc.*,[178] permitted two committees to each employ its own accountant. The Court held that this result was required by Section 1103(b), which was intended to prevent even the possibility of a conflict of interest.[179] The Court did note, however, that the accountants should confer with one another to the extent necessary to avoid duplicative work and wasteful additional costs.

In sum, while one committee will ordinarily be limited to the employment of one attorney, one accountant, and so forth, separate committees may be able to employ their own professional persons if necessary to prevent possible conflicts.

V. REORGANIZATION COMMITTEES AND ISSUES OF CONFIDENTIALITY

A. DOES THE ATTORNEY-CLIENT PRIVILEGE EXIST AS TO COMMUNICATIONS BETWEEN A COMMITTEE AND ITS COUNSEL?

The attorney-client privilege does not attach to all communications between an attorney and his client, but only as to those communications which fall within the parameters of the rule. Thus, the privilege applies only if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate; and (b) in connection with this communication is acting as lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client; (b) without the presence of strangers; (c) for the purpose of securing primarily either (i) an opinion on law; or (ii) legal services; or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[180]

The issue of whether communications between a creditors' committee and its counsel fall within the privilege was discussed in *Matter of Bald-*

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177. *See* Section IV.B.2, *supra*.

178. 29 B.R. 320 (Bankr. S.D.N.Y. 1983).

179. *Id.*, at 321.

180. *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950). *See also Foseco International Ltd. v. Fireline, Inc.*, 546 F. Supp. 22-24 (N.D. Ohio 1982).

win-United Corp.[181] The Court held that the privilege was absolute at least as to those third parties *not* represented by the creditors' committee:

> While we are cognizant of the fiduciary responsibilities which a creditors' committee owes to those it represents, we are unconvinced that the attorney/client privilege is inherently antagonistic to those responsibilities. The purposes underlying the privilege have no less applicability to a creditors' committee than they do to any other entity at least when disclosure of privileged communications is sought by those who are not represented by the committee or who stand in an adversarial relationship with it. If the committee cannot engage in full and frank communications without fear of disclosure to such outsiders, then its work may be seriously hampered to the detriment of those it represents.[182]

When disclosure of communications is sought by those parties who *are* represented by the creditors' committee, the Court held that the privilege should be more narrowly construed. The Court cited with approval *Valente v. Pepsico, Inc.*,[183] in which the Court stated: "A fiduciary owes the obligation to his beneficiaries to go about his duties without obscuring his reasons from the legitimate inquiries of the beneficiaries." The *Baldwin-United* Court held that this situation was analogous to those where shareholders have sought disclosure of privileged information from a corporation in shareholder derivative suits. In these cases many courts have held that the privilege is available to the corporation "subject to the right of the stockholders to show cause why it should not be invoked in the particular instance."[184]

The Court in *Baldwin-United* held that the *Garner* doctrine struck the appropriate balance between the creditor's right to information and the committee's need for confidentiality but that

> because of the nature of the relationship, the creditor's dependence upon the committee for information and the underlying purpose of a creditors' committee, we believe that the committee should bear the burden of establishing good cause for not disclosing privileged information to its constituent creditors.[185]

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181. 38 B.R. 802 (Bankr. S.D. Ohio 1984).

182. *Id.*, at 804-05. *See also Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). *But see In re Christian Life Center First Assembly*, 16 B.R. 35 (Bankr. N.D. Cal. 1981) (privilege could not be asserted by counsel to the creditors' committee as against counsel for the Defense Committee in the face of charges of misconduct by the creditors' committee or its attorney).

183. 58 F.R.D. 361, 370 (D. Del. 1975).

184. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-4 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971).

185. 38 B.R. at 805.

B. WHAT DUTY OF CONFIDENTIALITY IS OWED BY A CREDITORS' COMMITTEE TO A DEBTOR WITH RESPECT TO INFORMATION PROVIDED BY THE DEBTOR TO THE COMMITTEE?

To the extent a creditors' committee faithfully fulfills its obligations to its constituents and exercises its rights under Section 1103(c) of the Bankruptcy Code, it will necessarily be privy to a steady flow of information both confidential and public, concerning the debtor's affairs. As stated in *Matter of Baldwin-United Corporation*, "such committees are established not merely to represent the creditors in negotiation of a plan, but to provide them with ready access to information regarding the debtor's affairs."[186]

Based on the committee's responsibility to learn all aspects of the debtor's business affairs, it is important that the debtor not be dissuaded from providing such information. Clearly one disincentive would be a fear of public disclosure of information.

While there may be some dispute among the courts whether a competitor of the debtor may serve on the creditors' committee,[187] it would nevertheless seem essential that a privilege be applied as to communications between the committee and the debtor.[188] If the debtor does not have full assurance that all information provided to the committee will remain confidential, it will be dissuaded from providing the free flow of information which would allow the committee to make reasoned decisions which would be of greatest benefit to the constituents represented by the committee. This would also prevent the committee from fulfilling its obligations to its constituent body from fully investigating all aspects of the debtor's affairs.

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186. 38 B.R. at 804. *See also In re Wilson Foods Corporation*, 31 B.R. 272 (Bankr. W.D. Ok. 1983) ("the duties of a committee require that it dig deep into all aspects of the debtor and its business affairs. 11 U.S.C. §1103(c)."); *In re Western Management, Inc.*, 6 B.R. 438 (Bankr. W.D. Ky. 1980) ("There is no indication in the record that the unsecured creditors committee has met, investigated, monitored or in any other manner attempted to fill its statutory responsibility.")

187. *See* Section II. A.8., *supra*.

188. Wigmore has stated that a privilege against disclosure applies generally if four conditions are met: (1) the communications must originate in a confidence that they will not be disclosed; (2) the confidentiality element must be essential to the satisfactory maintenance of the relation between the parties; (3) the relation must be one which the community believes should be sedulously fostered; and (4) the injury caused to the relationship would outweigh the benefits of disclosure. *See Wigmore on Evidence*, §2285 at p. 527 (1961).

C. TO WHAT EXTENT ARE NEGOTIATIONS BY CREDITORS' COMMITTEE MEMBERS WITH OUTSIDE THIRD PARTIES PERMISSIBLE REGARDING THE SALE OF THE COMMITTEE MEMBER'S CLAIMS TO SUCH THIRD PARTIES?

An issue related to that of the privilege between a creditors' committee and a debtor is whether a committee member can negotiate with third parties regarding the sale of claims against the debtor. Under the strictest interpretation of the fiduciary duties which a creditors' committee owes to a debtor, it is arguable that virtually any form of conversation with an outside party regarding the sale of claims represents impermissible negotiation. This is because the mere acceptance or rejection of an offer, or the type of response given to an offer, will, by itself, convey to the prospective purchaser information regarding the committee member's views about the debtor.

For example, if the purchaser knows that the committee member would not accept an offer for a particular percentage of the committee member's claim, that knowledge may set a benchmark to purchase other claims. Participation in the negotiations arms prospective purchasers with new information and more comfort on their risk and gives them the ability to make a more informed judgment about the value of claims generally. Such conduct could therefore be considered to be a breach of the committee member's duty of confidentiality towards the debtor and other creditors.

VI. ROLE OF THE UNITED STATES TRUSTEE

On October 27, 1986, Congress enacted the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554 (the "1986 Act"). Aside from adding a new Chapter 12, which concerns adjustment of debts of family farmers, the 1986 Act provides for the installment of a United States Trustee in all judicial districts in the United States. Section 586(a)(3) of Title 28, as amended by the 1986 Act, provides that each United States Trustee within the region for which such Trustee is appointed shall—

> supervise the administration of cases and trustees in cases under Chapter 7, 11 or 13 of title 11 by, whenever the United State trustee considers it to be appropriate—
>
> (A) monitoring applications for compensation and reimbursement filed under §330 of title 11 and, whenever the United States trustee deems it to be appropriate, filing with the court comments with respect to any of such applications;
>
> . . . . .
>
> (E) monitoring creditors' committees appointed under Title 11;
>
> . . . . .
>
> (H) monitoring applications filed under §327 of title 11 and, whenever

> the United States Trustee deems it to be appropriate, filing with the Court comments with respect to the approval of such application. . .

Based on the foregoing provisions, it would seem clear that the United States Trustee is empowered with the right to notify the Court of any of the potential ethical or conflict of interest problems which may arise. However, one issue which arises in light of this right of the United States Trustee is whether the Bankruptcy Court is relieved of its burden (or privilege, depending on one's perspective) of raising objections, *sua sponte*, to fee applications, unethical practices or conflicts of interest.

It appears that Congress did not intend for the powers and duties of the bankruptcy court to be altered by the provisions of the 1986 Act, at least as they relate to this issue. This is evidenced by a new sentence which was added to Section 105(a) of the Bankruptcy Code pursuant to the 1986 Act:

> No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the Court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement Court orders or rules, or to prevent an abuse of process.

The Official Comment to this portion of the 1986 Act indicates that the addition of the foregoing sentence to Section 105(a) "effectively abrogates the rule of *In re Gusam Restaurant*, 737 F.2d 274 (2nd Cir. 1974), which held that when a Code provision required a request by a party in interest (*see, e.g.*, Section 327(c) of the Bankruptcy Code) the Bankruptcy Court could not act *sua sponte*." Accordingly, it would seem that while the 1986 Act provides the United State trustees with the power to notify the court of any of the potential ethical or conflict of interest problems discussed herein, the Act does not, by its terms, prevent the Bankruptcy Court from raising these issues, or fee application issues, on its own initiative.[189]

The trustee's powers under Section 586(a)(3) are essentially limited to a monitoring role. Thus, when trustees have attempted to act beyond the specific rights granted to them under that section, the courts have stepped in to prevent such action. For example, in *In re Sasson Jeans, Inc.*,[190] a Chapter 7 trustee, appointed by the United States Trustee, prosecuted two contempt actions against the former president of the debtor. These actions led to two certifications of contempt being issued by Bankruptcy Judge Lifland. The president then challenged these certi-

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189. It should also be noted that, notwithstanding the 1986 Act, there appears to have been no abatement in the willingness of courts to raise possible ethical issues, *sua sponte*, since that time. The same is true for fee requests. *See, e.g., In re Temple Retirement Community, Inc.*, 97 B.R. 333, 337 (Bankr. W.D. Tex. 1989) (while acknowledging the trustee's authority to monitor fee applications, the court nevertheless stated that "[i]f the Court fails to review fee applications *sua sponte*, the public interest will in all likelihood go begging.").

190. 104 B.R. 600 (S.D.N.Y. 1989).

fications to the District Court for the Southern District of New York.

In setting aside the certifications, the District Court held that the Trustee was an "interested party" and thus not properly appointed to prosecute the contempts.[191] The Court stated: "[T]he United States trustee's duties consist largely of supervising and monitoring ongoing bankruptcy proceedings. Moreover, [§586(a)(3)] suggests that enforcement and prosecution are not among the trustee's duties."[192]

VII. CONCLUSION

Based on the foregoing discussion, it is clear that there can never be an ironclad rule which will determine, in all instances, whether an attorney, debtor, creditor or other party in interest in a bankruptcy proceeding is engaged in unethical conduct, is representing conflicting interests, or has violated a privilege. Moreover, even if one attempts to develop a rule of general applicability for a given situation, there can be no assurance that other courts will follow it. In summarizing his article on bankruptcy ethics at the 1986 National Conference of Bankruptcy Judges, former Bankruptcy Judge John D. Ayer asked simply:

1. Does it pass the smell test?
2. Is it fair?[193]

While such a test will not, by itself, solve any of the issues addressed herein, it does provide a general overview of the kind of analysis which courts should attempt to undertake in considering the facts and circumstances of each particular case.

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191. This was the holding of the Supreme Court in *Young v. United States ex rel. Vuitton Et Fils, S.A.*, 481 U.S. 787, 107 S. Ct. 2124 (1987).

192. 104 B.R. at 608.

193. *See, In re Flanigans Enterprises, Inc.*, 70 B.R. 248, 254, n.3 (Bankr. S.D. Fla. 1987).

APPENDIX VI

William Kohn, Deciphering Conflicts of Interests in Bankruptcy Representation, 98 Com. L. J. 127 (1993).

DECIPHERING CONFLICTS OF INTEREST IN BANKRUPTCY REPRESENTATION

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Attorney disqualification in bankruptcy is governed by two separate sources of law. The first is the Bankruptcy Code itself, the second is the ethical rules that govern the conduct of attorneys appearing before the court.[1] Any policy concerning possible conflicts of interest with regard to the representation of various parties in a bankruptcy case must therefore be analyzed with respect to the Bankruptcy Code, Bankruptcy Rules, the Code of Professional Responsibility, the Rules of Professional Conduct, and case law thereunder. The representation of each party in a bankruptcy case has its own unique conflicts of interest problems, and therefore, the representation of each party must be analyzed with respect to all other parties in the bankruptcy case. Conflicts of interest arise from taking an adverse position with respect to a former client and from the concurrent representation of clients with adverse interests.

I. GENERAL LAW REGARDING CONFLICTS OF INTEREST WITH RESPECT TO CONCURRENT AND FORMER REPRESENTATION

A. STANDARD OF CONDUCT

The Code of Professional Responsibility ("Code") has long been the established norm governing the standard of attorney conduct in federal courts.[2] To date, however, thirty-six states, the District of Columbia, and the Virgin Islands have replaced the Code with the more recently formu-

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1. *In re Vanderbilt Assocs., Ltd.*, 117 B.R. 678, 680 (D. Utah 1990).
2. *Ruff v. Ivey*, 102 B.R. 868 (Bankr. M.D. Fla. 1989).

lated Model Rules of Professional Conduct ("Model Rules").[3] The local rules of federal district courts typically adopt the standard of conduct which has been adopted by the highest court of the state in which the court sits.[4] Bankruptcy courts then follow the standard of conduct adopted by the district courts.[5]

Even with the advent of the Model Rules, the Code of Professional Responsibility has not diminished in importance. In jurisdictions which have adopted the Model Rules, courts continue to employ the canons, ethical considerations, and disciplinary rules of the Code of Professional Responsibility.[6] The primary reason for the Code's continued vitality stems from the fact that there has not been a substantial amount of case law decided under the more recent Model Rules. Judges are familiar with the Code and therefore continue to quote its provisions in addition to the applicable provisions of the Model Rules. Several decisions have explicitly stated that federal courts can consider both the Code and the Model Rules when evaluating the professional conduct of attorneys.[7] Other decisions have gone further, stating that the Code and Model Rules lack the force of law and merely provide guidelines which the court is not bound to follow.[8] Irrespective of the applicable standard of conduct and the weight accorded thereto, attorneys are well advised to consider both the Code and the Model Rules when analyzing possible conflicts of interest with regard to representation of various parties in a bankruptcy case.[9]

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3. The Model Rules were adopted by the House of Delegates of the American Bar Association on August 2, 1983, and submitted to the states for consideration thereafter. The states which have adopted the Model Rules are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. Please note that each state's version of the Model Rules may differ from the Model Rules promulgated by the American Bar Association.

4. *See, e.g.*, N.D. Ind. LR DE-IV; S.D. Ind. Dis. Enfor. R. IV.

5. *See* 28 U.S.C.A. § 151 (West Supp. 1993).

6. *See, e.g., Monon Corp. v. Wabash Nat'l Corp.*, 764 F. Supp. 1320 (N.D. Ind. 1991); *Greater Rockford Energy and Technology Corp. v. Shell Oil Co.*, 777 F. Supp. 690 (C.D. Ill. 1991).

7. *Knopfler v. Schraiber*, 103 B.R. 1001, 1003 (Bankr. N.D. Ill. 1989); *In re Consupak, Inc.*, 87 B.R. 529, 549 (Bankr. N.D. Ill. 1988); *Jones v. City of Chicago*, 610 F. Supp. 350, 355 (N.D. Ill. 1984). *But see In re Glenn Elec. Sales Corp.*, 99 B.R. 596 (D.N.J. 1988) (disqualified law firm argues Code improperly invoked by district court in Model Rules jurisdiction).

8. *See Greater Rockford Energy and Technology Corp.*, 777 F. Supp. at 693; *American Motor Club, Inc. v. Neu*, 119 B.R. 394, 398 (Bankr. E.D.N.Y. 1990) (Code of Professional Responsibility not binding on bankruptcy court in regard to disqualification).

9. Significant difference concerns fact that "appearance of professional impropriety" standard of Canon 9 under the Code was not included in the Model Rules.

B. CODE OF PROFESSIONAL RESPONSIBILITY

The majority of states have replaced the Code of Professional Responsibility with the Model Rules as the governing standard of attorney conduct. Nonetheless, an understanding of the conflicts of interest requiring disqualification of counsel under the Code is beneficial because of the lack of precedent under the Model Rules. Disciplinary Rule 4-101, *inter alia*, states:

> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
> (1) Reveal a confidence or secret of his client.
> (2) Use a confidence or secret of his client to the disadvantage of the client.
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.[10]

Canon 5 is probably the most applicable part of the Code of Professional Responsibility and deals with conflicting representation of clients which may impair an attorney's independent professional judgment. Disciplinary Rule 5-105 states:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.
> (D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner or associate, or any other lawyer affiliated with him or his firm may accept or continue such employment.[11]

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10. Model Code of Professional Responsibility DR 4-101 (1980).
11. Model Code of Professional Responsibility DR 5-105.

The Ethical Considerations of Canon 5 provide further guidelines. Ethical Consideration 5-15 states that a lawyer must always weigh carefully the possibility that his judgment may be impaired or his loyalty divided if offered representation from multiple clients having even potentially differing interests, and that "[a] lawyer should never represent in litigation multiple clients with differing interests."[12] On the other hand, Ethical Consideration 5-15 also states:

> [T]here are many instances in which a lawyer may properly serve multiple clients having potentially differing interests in matters not involving litigation. If the interests vary only slightly, it is generally likely that the lawyer will not be subjected to an adverse influence and that he can retain his independent judgment on behalf of each client . . . .[13]

Ethical Consideration 5-16 states that even in instances where a lawyer is justified in representing multiple clients, "he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent."[14] Ethical Consideration 5-17 provides examples of situations involving potentially differing interests, *i.e.*, where a lawyer is asked to represent co-defendants in a criminal case, co-plaintiffs in a personal injury case, an insured and his insurer, and multiple beneficiaries of an estate of a decedent.[15] "Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case."[16]

Probably the most controversial conflicts provision of the Code is Canon 9, which provides that "[a] lawyer should avoid even the appearance of professional impropriety."[17] Courts sometimes use this nebulous test in deciding motions to disqualify counsel for conflicts of interest. Generally, however, courts have not disqualified counsel based solely on Canon 9, holding instead that the more specific Canon 4 duty of confidentiality and Canon 5 provisions concerning interference with the lawyer's judgment are controlling.[18]

Though the "appearance of impropriety" standard has been dropped by the Model Rules, it has not been forgotten by the courts. In *Monon Corp. v. Wabash National Corp.*,[19] a district court in Indiana held that the "appearance of impropriety" standard under Canon 9 required disqualification of the attorney representing a defendant who claimed that

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12. Model Code of Professional Responsibility EC 5-15.
13. *Id.*
14. Model Code of Professional Responsibility EC 5-16.
15. Model Code of Professional Responsibility EC 5-17.
16. *Id.*
17. Model Code of Professional Responsibility Canon 9.
18. For a good description of the analysis required concerning disqualification of counsel under Canons 4, 5, and 9, *see Pennwalt Corp. v. Plough, Inc.*, 85 F.R.D. 264 (D. Del. 1980).
19. 764 F. Supp. at 1320.

an invention lacked the conditions of patentability where the same attorney had previously made initial determinations for plaintiff that the invention was patentable and had drafted claims for a patent application. The court referred to Model Rule 1.9 in its decision but relied explicitly on Canon 9 in its holding.

Another case applying the appearance of impropriety standard in a Model Rules jurisdiction is *In re Glenn Electric Sales Corp.*,[20] in which a district court in New Jersey upheld a bankruptcy court's disqualification of counsel. The district court did not resolve whether the bankruptcy court improperly applied Canon 9, but held instead that the Bankruptcy Rules in and of themselves incorporate considerations which are equivalent to Canon 9's "appearance of impropriety" standard.

C. RULES OF PROFESSIONAL CONDUCT

In the area of conflicts, the Model Rules of Professional Conduct substantially reflect the prior Code of Professional Responsibility and relevant case law. The Model Rules as adopted by the states are typically known as the Rules of Professional Conduct ("Rules").

Disciplinary Rule 4-101 concerning protection of confidences or secrets of the client has been revised as Rule 1.6, "Confidentiality of Information":

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[21]

Also, Rule 1.8(b) provides:

> A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation,

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20. 99 B.R. at 596. *But see In re Peck*, 112 B.R. 485 (Bankr. D. Conn. 1990) (bankruptcy court in Model Rules jurisdiction holding that the mere appearance of impropriety is not alone sufficient basis for granting disqualification).

21. Model Rules of Professional Conduct Rule 1.6 (1992).

except as permitted or required by Rule 1.6 or Rule 3.3.[22]

Rule 1.6 enlarges the principle of confidentiality in that it imposes confidentiality on information relating to representation even if it is acquired before or after the relationship existed. The Rule does not require the client to indicate what information is confidential as does Disciplinary Rule 4-101. However, Rule 1.6 permits a lawyer to disclose information where impliedly authorized in order to carry out the representation, whereas under the Code the lawyer could not disclose confidences unless the client first expressly consented after disclosure. Rule 1.8(b) also allows a lawyer to use confidential information to the actual disadvantage of the client if the client consents after "consultation."

Canon 5 of the Code has been reformulated as Rule 1.7, "Conflict of Interest: General Rule":

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) each client consents after consultation.
>
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.[23]

Rule 1.7 combines Sections (A), (B) and (C) of Disciplinary Rule 5-105 and expressly states their implications. Rule 1.7 requires that when the lawyer's other interests are involved, not only must the client consent after consultation but also, independent of such consent, the representation reasonably appear not to be adversely affected by the lawyer's other interests. The same constraints seem to be implicitly required by Disciplinary Rule 5-105(C). The Comment to Rule 1.7 states that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."[24] However, "simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients."[25] The Comment states that a possible conflict does not itself preclude the representation:

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22. Model Rules of Professional Conduct Rule 1.8(b).
23. Model Rules of Professional Conduct Rule 1.7.
24. Model Rules of Professional Conduct Rule 1.7 cmt.
25. *Id.*

> The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.[26]

The Comment recognizes that a client may consent to representation notwithstanding a conflict, but when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such consent from the client. The Comment to Rule 1.7 further states that when more than one client is involved, the question of conflict must be resolved as to each client and the clients must receive enough information to make an informed decision.[27] The Comment recognizes that there are circumstances in which a lawyer may act as an advocate against a client:

> For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. . . . The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.
>
> A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.[28]

The Comment further recognizes that conflicts of interest in contexts other than litigation sometimes may be difficult to assess, but relevant factors to consider are: 1) the duration and intimacy of the lawyer's relationship with the client or clients involved; 2) the functions being performed by the lawyer; 3) the likelihood that actual conflict will arise; and, 4) the likely prejudice to the client from the conflict if it does arise.[29] "The question is often one of proximity and degree."[30]

Finally, the Rules adopted existing case law concerning disqualifying conflicts of interest in former representation by codifying the "substantially related" test.[31] Rule 1.9, "Conflict of Interest: Former Client" states:

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26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Model Rules of Professional Conduct Rule 1.9. There is no counterpart to Rule 1.9 under the Code. However, case law developing the "substantially related" rule relies princi-

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.
>
> (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client
>
> (1) whose interests are materially adverse to that person; and
>
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;
>
> unless the former client consents after consultation.
>
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.[32]

The Comment to Rule 1.9 points out that disqualification from subsequent representation is for the protection of clients and can be waived by them. However, a waiver is effective only if there is disclosure of circumstances, including the lawyer's intended role on behalf of the new client.[33]

D. FORMER REPRESENTATION

Prior to the enactment of Rule 1.9, courts relied on the common law "substantially related" test when considering whether the former representation of one party disqualified counsel from representing another party.[34] Courts in Model Rules jurisdictions continue to cite case law developing the "substantially related" test because of the lack of precedent under Rule 1.9.[35] The "substantially related" test requires a three-

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pally on Canon 4 of the Code, which provides that "a lawyer should preserve the confidences and secrets of a client," and Canon 9, which provides that a lawyer should "avoid the appearance of professional impropriety." *See infra* note 33.

32. Model Rules of Professional Conduct Rule 1.9.

33. Model Rules of Professional Conduct Rule 1.9 cmt.

34. *See Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983); *Schiessle v. Stephens*, 717 F.2d 417 (7th Cir. 1983); *Novo Terapeutisk Laboratorium A/S, v. Baxter Travenol Lab., Inc.*, 607 F.2d 186 (7th Cir. 1979); *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978); *Flo-Con Systems, Inc. v. Servsteel, Inc.*, 759 F. Supp. 456 (N.D. Ind. 1990); *Knopfler*, 103 B.R. at 1001; *In re Sharpe*, 98 B.R. 337 (Bankr. N.D. Ill. 1989); *Ruff*, 102 B.R. at 868; *General Elec. Co. v. Industra Prods. Inc.*, 683 F. Supp. 1254 (N.D. Ind. 1988).

35. *See In re American Airlines, Inc.*, 972 F.2d 605 (5th Cir. 1992); *Monon Corp.*, 764 F. Supp. at 1320; *In re Peck*, 112 B.R. at 485.

part analysis:

> First, the court must factually reconstruct the scope of the prior legal representations. Second, the court must determine what confidential information may reasonably be inferred to have been provided to a lawyer representing a client in such matters. Third, the court must decide whether that information is relevant to the current litigation.[36]

Case law has established that a conclusive presumption of shared confidences exists when a law firm changes sides on a "substantially related" matter.[37] With regard to the "substantially related" test, the Seventh Circuit has stated as follows:

> [A] lawyer may not represent an adversary of his former client if the subject matter of the two representations is "substantially related," which means: if the lawyer could have obtained confidential information in the first representation that would have been relevant in the second. It is irrelevant whether he actually obtained such information and used it against his former client, or whether—if the lawyer is a firm rather than an individual practitioner—different people in the firm handled the two matters and scrupulously avoided discussing them.[38]

A law firm which changes sides on a "substantially related" matter must therefore be disqualified, whether or not it sets up screens or "Chinese walls," and regardless of whether confidential information is actually exchanged.[39]

Attorneys can engage in representation adverse to their former clients as long as the matters embraced within the pending representation are not substantially related to matters in which the attorneys represented their former clients.[40] Disqualification may only be granted "upon a showing that the relationship between issues in the prior and present cases is patently clear. Put more specifically, disqualification has been granted or approved recently only when the issues involved have been 'identical' or 'essentially the same.' "[41] Doubts as to the existence of a conflict of interest should be resolved in favor of disqualification.[42] Guidelines to determine whether two controversies are substantially re-

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36. *In re Sharpe*, 98 B.R. at 341 (*citing LaSalle Nat'l Bank v. County of Lake*, 703 F.2d 252, 256 (7th Cir. 1983)).

37. *See In re American Airlines, Inc.*, 972 F.2d at 614; *Analytica, Inc.*, 708 F.2d at 1266; *Flo-Con Systems, Inc.*, 759 F. Supp. at 460; *Ruff*, 102 B.R. at 870; *General Elec. Co.*, 683 F. Supp. at 1259.

38. *Analytica, Inc.*, 708 F.2d at 1266.

39. *Id.* at 1267-68.

40. *See supra* note 33.

41. *In re Peck*, 112 B.R. at 490 (*quoting Government of India v. Cook Indus., Inc.*, 569 F.2d 737, 740 (2nd Cir. 1978)); *see also Market Square Assocs., Ltd. v. Garfinkle*, 19 B.R. 111, 113 (S.D.N.Y. 1982).

42. *Westinghouse Elec. Corp.*, 588 F.2d at 225; *Ruff*, 102 B.R. at 870; *In re Whitney-Forbes, Inc.*, 31 B.R. 836, 838-39 (Bankr. N.D. Ill. 1983).

lated include:

> 1. the similarities between the two factual situations;
> 2. the legal questions posed;
> 3. the nature and extent of the attorney's involvement in the case including the type of work performed and the attorney's possible exposure to the formulation of policy or strategy;
> 4. the time period within which the actions in issue took place;
> 5. the existence of common defendants or plaintiffs; [and]
> 6. the possibility of a taint on the underlying trial due to the attorney's conduct.[43]

E. CONCURRENT REPRESENTATION

While the "substantially related" test is customarily applied in conflicts of interest situations presented by former employment, conflicts of interest arising out of concurrent representation "must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients."[44]

A significant case under Canon 5 of the Code bearing on the propriety of concurrent representation is *International Business Machines Corp. v. Levin* ("*IBM*").[45] The decision is relevant because Rule 1.7 largely incorporates the provisions of Canon 5. In *IBM*, the Third Circuit found a disqualifying conflict of interest where a law firm represented the plaintiff in an anti-trust suit against a defendant which that same law firm represented in unrelated labor matters. The court held that IBM was a present client of the law firm even though the law firm had no specific assignment on hand the day the complaint was filed and despite the fact that the law firm worked on a fee for services basis and was not under any retainer agreement with IBM. While the law firm had obtained consent from the plaintiff for its continued representation of defendant in labor matters, no disclosure of the dual representation was made to the defendant, nor was any consent given by defendant. The law firm argued that because the multiple representation involved two entirely unrelated areas there would be no adverse effect on the exercise of independent professional judgment on behalf of defendant and, therefore, DR 5-105(A) and (B) were not applicable. The court disagreed with this narrow view of "adversely affected" in clauses (A) and (B) of DR 5-105 and stated that clause (C) makes it clear that situations entailing the likelihood of an adverse effect include circumstances where the adverse

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43. *In re Olson*, 21 B.R. 123, 127 (Bankr. D. Neb. 1982) (*citing Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 518 F.2d 751, 754-56 (2nd Cir. 1975)); *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268-69 (S.D.N.Y. 1953).

44. *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2nd Cir. 1976); *see also Westinghouse Elec. Corp.*, 588 F.2d at 229; Model Rules of Professional Conduct Rule 1.7 cmt.

45. *International Business Machs. Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978).

effect is relatively minor. "In those cases the multiple representation may take place if the attorney believes in good faith that he can adequately represent both clients and if the consent of the clients is obtained."[46] The court stated that "it is likely that some 'adverse effect' on an attorney's exercise of his independent judgment on behalf of a client may result from the attorney's adversary posture toward that client in another legal matter,"[47] and that a serious effect on the relationship may follow if the client learns from a third party that he is being sued in a different matter by the attorney. In finding a disqualifying conflict of interest, the court stated as follows:

> Putting it as mildly as we can, we think it would be questionable conduct for an attorney to participate in any lawsuit against his own client without the knowledge and consent of all concerned.[48]

The Third Circuit concluded that the law firm was obligated under the circumstances to disclose fully to the defendant the facts of its representation of plaintiffs and obtain the defendant's consent.

At least one circuit court has expressly adopted the holding in *IBM*.[49] Additionally, the holding in *IBM* is consistent with the Rules of Professional Conduct, which have been adopted by a majority of the states. Rule 1.7 provides that representation "directly adverse" to another client is prohibited unless there is disclosure and consent. With respect to application of Rule 1.7, the Comment thereto provides as follows:

> As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client without that client's consent. Paragraph (a) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated.[50]

A recent district court decision in *SWS Financial Fund A v. Salomon Bros. Inc.*[51] seems to limit the application of *IBM* and Rule of Professional Conduct 1.7 by failing to adopt a per se rule of disqualification when counsel undertakes concurrent representation of clients with adverse interests without complying with the disclosure and consent provisions of Rule 1.7. The court in *Salomon Bros.* refused defendant's motion to disqualify plaintiff's law firm in a suit for various security law violations where the same law firm represented defendant without a retainer agreement over a thirteen month period by answering commodity law questions as they arose. Despite the fact that the law firm had not

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46. *Id.* at 280.
47. *Id.*
48. *Id.* (*quoting Cinema 5, Ltd.*, 528 F.2d at 1386).
49. *See Unified Sewerage Agency of Wash. County, Or. v. Jelco Inc.*, 646 F.2d 1339, 1345 (9th Cir. 1981).
50. Model Rules of Professional Conduct Rule 1.7 cmt.
51. *SWS Fin. Fund A v. Salomon Bros. Inc.*, 790 F. Supp. 1392 (N.D. Ill. 1992).

performed any legal work for defendant in almost five months, the court found that the defendant was a current client.[53] After determining that the law firm had failed to comply with the disclosure and consent provisions of Rule. 1.7, the court stated that it was "unaware of any Seventh Circuit authority which requires disqualification upon a showing that a law firm has violated an ethical rule governing conflicts of interest."[54] The court acknowledged that disqualification is a "drastic measure which courts should hesitate to impose except when absolutely necessary."[55] In denying disqualification, the court stated as follows:

> Were this court to rule that disqualification was mandated by [the law firm's] breach of Rule 1.7 in this case, the implications would be overwhelming. Clients of enormous size and wealth, and with a large demand for legal services, should not be encouraged to parcel their business among dozens of the best law firms as a means of purposefully creating the potential for conflicts. With simply a minor "investment" of some token business, such clients would in effect be buying an insurance policy against that law firm's adverse representation.[56]

With respect to its decision, the court recognized that failure to disqualify a law firm after finding a conflict of interest "may be viewed by some as a departure from the norm."[57] In defense of its decision, the court contends that "[t]he legal world is changing, however, and courts must be sensitive to the complexities and multiplicities of interests that come into play when enormous corporations and monster law firms interact in a dynamic legal economy."[58]

II. BANKRUPTCY CONSIDERATIONS

Application of the conflicts of interest prohibitions contained in the Code of Professional Responsibility and the Rules of Professional Conduct takes on an added dimension in bankruptcy. "Unlike other forums and battlefields, where the lines of conflict are clearly drawn, in bankruptcy court, interested parties face proceedings with multiple litigants where the parties' interests, positions and relationships may change several times from pre-filing to post-filing and even thereafter."[59] "[C]ertain conflicts that a client could waive after full disclosure outside of the bankruptcy context, such as simultaneous representation of the client and client's creditor, are prohibited by the Bankruptcy Code itself from

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52. *Id.* at 1397-98 (*citing International Business Machs. Corp.*, 579 F.2d at 271).
53. *Id.* at 1400.
54. *Id.* (*quoting Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721 (7th Cir. 1982)).
55. *Id.* at 1402.
56. *Id.* at 1403.
57. *Id.*
58. *In re Flanigan's Enters., Inc.*, 70 B.R. 248, 250 (Bankr. S.D. Fla. 1987).

being waived."[59] Other representations which have a built-in appearance of conflict, such as simultaneous representation of an individual creditor and the creditors' committee, are allowed by the Bankruptcy Code.[60]

In an attempt to maintain the integrity of the bankruptcy process and assure that counsel devotes undivided loyalty to the client, conflicts of interest rules have been "more strictly applied in the bankruptcy context than in other areas of the law, at least insofar as professionals retained by the estate are concerned."[61] "It is universally recognized that attorneys are prohibited from representing actual conflicts of interest in bankruptcy."[62] However, a split of authority exists on whether potential conflicts of interest should lead to automatic disqualification.[63] One line of cases applies a rigid, strict constructionist rule, whereby the potential for conflict or "appearance of impropriety" constitutes a disqualifying conflict of interest.[64] With regard to the trustee or debtor in possession, one court has stated as follows:

> It is the duty of counsel for the debtor in possession to survey the landscape in search of property of the estate, defenses to claims, preferential transfers, fraudulent conveyances and other causes of action that may yield a recovery to the estate. The jaundiced eye and scowling mien that counsel for the debtor is required to cast upon everyone in sight will likely not fall upon the party with whom he has a potential conflict: Any potential conflict or interest represents a potential to overlook an asset or defense of the estate.[65]

"Other courts are more flexible in their interpretation and application of the amorphous term conflict of interest, preferring to analyze potential conflicts on a case-by-case basis."[66]

"A more flexible approach appears to be supported by the statutory scheme as enunciated by Congress in the Bankruptcy Code itself."[67] The structure of the Code suggests that an actual conflict is required, see 11 U.S.C. Section 1129 (confirmation of plan); 11 U.S.C. Section 1102 (equity security holders' committees); 11 U.S.C. Section 329(b) (other en-

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59. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. 78, 90 (Bankr. N.D. Ill. 1990); *see In re Amdura Corp.*, 121 B.R. 862, 865 (Bankr. D. Colo. 1990).

60. *In re Flanigan's Enters., Inc.* 70 B.R. at 250-51.

61. *In re Rusty Jones, Inc.*, 134 B.R. 321, 346 (Bankr. N.D. Ill. 1991); *see also In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 90.

62. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 90.

63. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 91 (collecting cases); *In re H & K Developers v. Waterfall Village of Atlanta, Ltd.*, 103 B.R. 340, 343 (Bankr. N.D. Ga. 1989) (collecting cases).

64. *See In re 419 Co.*, 133 B.R. 867 (Bankr. N.D. Ohio 1991); *In re Butterfield Ltd. Partnership*, 131 B.R. 67 (Bankr. E.D. Mich. 1990).

65. *In re Butterfield Ltd. Partnership*, 131 B.R. at 69.

66. *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 91; *see also In re Dynamark, Ltd.*, 137 B.R. 380 (Bankr. S.D. Cal. 1991); *In re Peck*, 112 B.R. at 485; *In re Lee Way Holding Co.*, 102 B.R. 616 (S.D. Ohio 1988); *H & K Developers*, 103 B.R. at 344.

67. *H & K Developers*, 103 B.R. at 344; *see also In re Lee Way Holding Co.*, 102 B.R. at 621.

tity may pay debtor's attorney's fees); Section 11 U.S.C. Section 327(c) (counsel may represent creditor). "To hold otherwise would fly in the face of Congressional direction, for Congress clearly rejected the per se approach in favor of an actual-conflict-of-interest approach"[68] when it amended the language of Bankruptcy Code Section 327(c) to require an "actual conflict of interest."[69] The cases applying the rigid rule in contrast rely primarily upon Canon 9 of the Code of Professional Responsibility, as opposed to some special provisions in the Bankruptcy Code.[70]

In the Seventh Circuit, the choice between the competing strains of cases appears to have been made. Even independent of the special implications in the language of the Bankruptcy Code, the Seventh Circuit requires an actual conflict.[71] This approach is further supported by the fact that all states in the Seventh Circuit have adopted the Model Rules, which do not incorporate the "appearance of professional impropriety" language of Canon 9. The approach taken by the Seventh Circuit is explained in *General Electric Co. v. Industra Products, Inc.* as follows: "The Seventh Circuit first stresses that disqualification is a drastic measure which should not be imposed unless absolutely necessary. Moreover, motions for attorney disqualification must be reviewed with extreme caution to avoid their misuse as techniques of harassment."[72]

In applying the Seventh Circuit's standard, the court in *General Electric* asked whether "*any* attorney" representing the challenged party could act differently.[73] This standard was applied in *In re Nephi Rubber Products Corp.*[74] In *Nephi*, a law firm which represented seventeen creditors of the debtor's estate, including the largest unsecured creditor, on unrelated matters and which also represented the majority of the debtor's officers and directors on unrelated matters, was chosen to represent the debtor in a Chapter 11 case. A fifty percent shareholder of the debtor moved for disqualification pursuant to Bankruptcy Code Section 327, arguing that the law firm was not disinterested and that it represented interests adverse to the estate. Violation of Rules 1.7 and 1.9 of the Rules of Professional Conduct was also alleged, but not considered by the court in reaching its decision denying disqualification. The court held that each potential disqualification case must be considered "on its own particular facts in order to reach a fair result."[75] The court reasoned that "[i]f a party will suffer great prejudice by disqualification of its counsel and if another attorney would need to take the same steps to

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68. *In re Lee Way Holding Co.*, 102 B.R. at 621.
69. 11 U.S.C.A. §327(c) (West 1993).
70. *See In re Kendavis Ind. Int'l, Inc.*, 91 B.R. 742 (N.D. Tex. 1988).
71. *See, e.g., Freeman*, 689 F.2d at 720-22.
72. 683 F. Supp. at 1258 (citations omitted).
73. 683 F. Supp. at 1261.
74. *In re Nephi Rubber Prods. Corp.*, 120 B.R. 477 (Bankr. N.D. Ind. 1990), *aff'd, Cypher v. Nephi Rubber Prods. Corp.*, Nos. S90-432, S90-579, Slip. Op. (N.D. Ind. April 10, 1991).
75. *Id.* at 481.

represent the client, the court may find that disqualification should be denied."[76] In denying disqualification the court stated that it was "not convinced that any other attorney would have or should have acted any differently in representing [the debtor]."[77] The movant failed to show that the law firm had an actual conflict of interest.[78] The court found that the law firm had appropriately accepted appointment by a majority of the debtor's directors, limited its representation in the proceeding to the debtor, and not favored the interests of other clients through its legal advice to the debtor.[79]

A. REPRESENTATION OF TRUSTEE

1. Bankruptcy Code

Bankruptcy Code Section 327 provides the terms under which a trustee may select counsel to represent the trustee or for other specified purposes:

> (a) Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.
>
> (b) If the trustee is authorized to operate the business of the debtor under section 721, 1202 or 1108 of this title, and if the debtor has regularly employed attorneys . . . the trustee may retain or replace such professional persons if necessary in the operation of such business.
>
> (c) In a case under chapter 7, 11 or 12 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, unless there is objection by another creditor or the United States trustee, in which case the court shall disapprove such employment if there is an actual conflict of interest.
>
> . . . .
>
> (e) The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.[80]

To represent a trustee, the attorney must not hold or represent an interest adverse to the estate, and he must be disinterested.[81] A "disinter-

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76. *Id.* at 482 (*citing General Electric Co.*, 683 F. Supp. at 1261).

77. *In re Nephi Rubber Prods. Corp.*, 120 B.R. at 482, *aff'd, Cypher v. Nephi Rubber Prods. Corp.*, Nos. S90-432, S90-579, Slip. Op. (N.D. Ind. April 10, 1991).

78. *Id.* at 483.

79. *Id.*

80. 11 U.S.C.A. §327 (West 1993).

81. 11 U.S.C.A. §327(a); *In re Roberts*, 46 B.R. 815, 822 (Bankr. D. Utah 1985), *aff'd*

ested person" is defined in Bankruptcy Code § 101(14) as a person that:

> (A) is not a creditor, an equity security holder, or an insider;
> . . . .
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor . . .
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor . . . or for any other reason.[82]

While not defined in the Bankruptcy Code, "adverse interest" has been held to mean:

> (1) to possess or assert any economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant; or
> (2) to possess a predisposition under circumstances that render such a bias against the estate.[83]

The Bankruptcy Code, therefore, allows a law firm which represents a creditor in an unrelated matter to represent the trustee provided there is no actual conflict of interest.[84] The procedures for obtaining court approval of counsel in a bankruptcy case are outlined in Bankruptcy Rule 2014(a), "which requires among other things that the application for employment contain a detailed disclosure of the attorney's connections with the debtor, creditors and any other party in interest."[85] Further restrictions on appointment of counsel are provided by Bankruptcy Rule 5002, which prohibits an attorney from representing a trustee if the attorney or any member of his firm is a "relative of the bankruptcy judge approving the employment."[86] The importance of proper disclosure has been described as follows:

> Ineffective or insufficient disclosure is not a minor problem. It goes to the heart of the integrity of the bankruptcy system, of counsel, and of the courts. . . . Appearances count. Even conflicts more theoretical than real will be scrutinized. The disclosures must appear in the application and declaration required by Bankruptcy Rule 2014(a). It is not sufficient that the information might be mined from petitions, schedules, section 341 meeting testimony, or other sources. The burden is on the person to be employed to come forward and make full, candid, and complete disclosure. Negligent

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In part, modified in part, rev'd on other grounds, 75 B.R. 402 (D. Utah 1987).

82. 11 U.S.C.A. §101(14) (West 1993).

83. *In re Tinley Plaza Assocs.*, 142 B.R. 272, 277 (Bankr. N.D. Ill. 1992); *In re 419 Co.*, 133 B.R. at 869; *In re Diamond Mortgage Corp. of Ill.*, 135 B.R. at 94.

84. 11 U.S.C.A. §327(c).

85. *In re Interstate Distribution Ctr. Assocs. (A), Ltd.*, 137 B.R. 826, 831 (Bankr. D. Colo. 1992) (*quoting In re Land*, 116 B.R. 798, 803 (D. Colo. 1990)).

86. Bankruptcy Rule 5002(a).

> omissions do not vitiate the failure to disclose. . . . Regardless of whether there is an actual conflict, the existence of an arguable conflict must be fully disclosed in plain and public view, if only to be explained away.[87]

2. Concurrent and Former Representation of Unsecured and Secured Creditors

Prior to amendment in 1984, 11 U.S.C. Section 327(c) specifically prohibited the concurrent representation of a creditor and the trustee in the same bankruptcy case.[88] Bankruptcy Code Section 327(c) previously read as follows:

> (c) In a case under chapter 7 or 11 of this title, a person is not disqualified for employment under this section solely because of such person's employment by or representation of a creditor, but may not, while employed by the trustee, represent in connection with the case, a creditor.[89]

Amended § 327(c) no longer contains a per se bar to the concurrent representation of a creditor and the trustee in the same bankruptcy case; an actual conflict of interest is now required.[90] Former representation of creditors does not generally prohibit representation of the trustee.

Despite the clear language of the statute, some courts continue to hold that a potential conflict or the appearance of impropriety is enough to disqualify counsel from representing the trustee.[91] Such a holding is in accord with the Code of Professional Responsibility, but contra to the Rules of Professional Conduct, which have abandoned the appearance of impropriety standard as unworkable. Generally, however, counsel is disqualified under the Rules of Professional Conduct when concurrently representing the trustee and a creditor on related matters.[92] No case law discovered has yet determined whether the more liberal federal standard under Bankruptcy Code Section 327(c) preempts the Code of Professional Responsibility or Rules of Professional Conduct as adopted by the states.

While acknowledging that strict construction of amended Section 327(c) may allow simultaneous representation of a creditor while representing the trustee or debtor-in-possession, at least one court has held that such representation always results in a disqualifying conflict.[93] In

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87. *In re Interstate Distribution Ctr. Assocs. (A), Ltd.*, 137 B.R. at 832 (alteration in original) (citations omitted).

88. *See, e.g., In re AOV Idus., Inc.*, 797 F.2d 1004, 1011 (D.C. Cir. 1986).

89. 11 U.S.C.A. §327(c) (West 1979) (amended 1984).

90. 11 U.S.C.A. §327(c).

91. *See In re BH&P Inc.*, 949 F.2d 1300, 1313 (3rd Cir. 1991); *In re Glenn Elec. Sales Corp.*, 99 B.R. at 596. *But see In re Lee Way Holding Co.*, 102 B.R. at 622 (holding that prior representation of creditor could not per se sustain a claim of "appearance of impropriety").

92. *See* Model Rules of Professional Conduct Rule 1.7.

93. *In re Greater Pottstown Community Church*, 80 B.R. 706 (Bankr. E.D. Pa. 1987).

Pottstown, counsel for a Chapter 7 debtor who concurrently represented creditors in proceedings against the debtor was denied compensation. With regard to Section 327(c), the court held as follows:

> [E]ven as amended, Section 327(c) does *not* authorize any apparent or actual conflicts. Further, we believe that a prohibited apparent or actual conflict arises perforce when (1) counsel for the trustee represents a creditor simultaneously; and (2) counsel for a debtor or DIP, whose interests are necessarily diverse from those of a creditor, as opposed to an independent trustee, has represented a creditor in the past or, what is even more clearly objectionable, purports to represent a creditor in the same proceeding in which he represents the DIP.[94]

The court relied primarily on an Editor's Comment in Norton's *Bankruptcy Law & Practice* referring to Bankruptcy Code Section 327(c). The Comment provides that "the Code allows counsel to represent the trustee under Section 327(c), even though counsel was previously employed by a creditor, but further representation of the creditor by that attorney in connection with the Title 11 U.S.C. case is improper and forbidden."[95]

There is an alternative to disqualification. Bankruptcy Code Section 327(e) allows a trustee to appoint special counsel, even a law firm which has represented the debtor. Courts have held that a law firm representing a creditor may also serve as special counsel to the trustee.[96] The court in *Fondiller v. Robertson* allowed a law firm representing a creditor to represent the trustee as special counsel to investigate and recover assets fraudulently conveyed from other creditors with which the law firm had no connection.[97] The court noted that former Section 327(c), which would require an attorney to sever his relationship with creditor clients connected with the case if he were general counsel to the trustee, did not apply where the attorney represented the trustee in a special limited capacity that presented no conflicting interest between the trustee and the creditor clients of the attorney. Additionally, under Section 327(a), the law firm was disinterested because it was not one of the disqualified parties listed in what is now Section 101(14) and since it did not hold or represent any interest adverse to the estate with respect to its duties as special counsel.[98]

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94. *Id.* at 711 (*quoting* W. Norton, Bankruptcy Law & Practice, Bankruptcy Code 124 (1987-88)).

95. *Id.*

96. *See, e.g., Fondiller v. Robertson*, 15 B.R. 890 (Bankr. 9th Cir. 1981), *appeal dismissed*, 707 F.2d 441 (9th Cir. 1983); *Roberts v. Harris*, 101 B.R. 210 (Bankr. E.D. Cal. 1989).

97. *Fondiller*, 15 B.R. at 890; *see also Reigle v. Ogle*, 58 B.R. 516 (Bankr. E.D. Pa. 1986).

98. *Fondiller*, 15 B.R. at 891. *But see In re Roberts*, 46 B.R. 815, 829 (Bankr. D. Utah 1985), *aff'd in part, modified in part, rev'd on other grounds*, 75 B.R. 402 (D. Utah 1987) (holding list of disqualified parties in what is now Bankruptcy Code § 101(14) is not exhaustive).

3. Former Representation of Creditors' Committee

Several cases have presented the issue of whether counsel to the creditors' committee in a Chapter 11 case can subsequently be appointed to represent the trustee in the same converted Chapter 7 case.[99] The courts in *Market Response Group* and *Codesco* both held that a law firm's prior representation of a creditors' committee did not disqualify the law firm from representing the trustee in the same proceeding. Under the Bankruptcy Code, the creditors' committee possesses a plethora of power with respect to the trustee: it can petition the court to appoint an interim trustee to take possession of the property of the estate and to operate the business under Section 303(g); it may circumvent the appointment of any trustee by bringing forth evidence that the trustee is unqualified pursuant to Section 321; it may petition for removal of the trustee under Section 324; and Section 702, Section 703, Section 1104 and Section 1105 "bring the election and removal of a trustee totally within the realm of the creditors' committee's choice."[100] The creditors' committee freely consults with its attorney on strategy to secure a plan which best favors the creditors or to secure a sale which brings the greatest amount of proceeds upon liquidation.[101] The court in *Codesco* noted that there existed a valid concern that previously disclosed confidences might be misused to the detriment of the estate if counsel for the creditors' committee becomes counsel for the trustee.[102] Both courts stressed that Canons 5 and 9 also applied, making it obligatory that the respective law firm in each case exercise independent judgment in the representation of clients and avoid even the slightest appearance of professional impropriety.[103]

The court in *Codesco* found that the purpose of pre-amended Bankruptcy Code Section 327 was to prevent even the appearance of a conflict by prohibiting an attorney employed by the trustee from representing a creditor in connection with the case.[104] However, the court acknowledged that there also exists the highly regarded principle that the trustee should have wide latitude in determining who shall be employed to perform legal services for the estate and held that "[o]nly in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel . . . ."[105] The court in *Codesco* found that it cannot be stated categorically that the interests of counsel for the creditors' committee in an aborted Chapter 11 case and those of an attorney for the trustee in a

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99. *See, e.g., In re Market Response Group, Inc.*, 20 B.R. 151 (Bankr. E.D. Mich. 1982); *In re Codesco, Inc.*, 18 B.R. 997 (Bankr. S.D.N.Y. 1982).

100. *In re Market Response Group, Inc.*, 20 B.R. at 152.

101. *Id.*

102. *In re Codesco, Inc.*, 18 B.R. at 1001.

103. *In re Market Response Group, Inc.*, 20 B.R. at 152; *In re Codesco, Inc.*, 18 B.R. at 999-1000.

104. *In re Codesco, Inc.*, 18 B.R. at 999.

105. *Id.* (*quoting In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934)).

Chapter 7 case are in conflict because both fiduciary positions strive to protect the interests of unsecured creditors generally.[106] Furthermore, the potential argument that the attorney for the trustee may be required to review the administrative claims and conduct of the attorney for the creditors' committee is an argument that has been rejected because the attorney for the creditors' committee is required to account to the court, not to the trustee.[107]

The problem in *Codesco* was that the attorneys for the creditors' committee in the Chapter 11 case advised against the plan, which might imply that the attorneys hoped for appointment as trustee's counsel if the case were converted for failure to obtain approval of a plan. The court stated such an implication was pure speculation.[108] The attorneys in the case knew that if all secured claims were sustained there would not be sufficient funds for their fees, so they had a strong motive to question the status of each secured claim. However, such tension between counsel for the trustee and counsel for the secured creditors is proper and is not sufficient reason for disqualification of a trustee's chosen counsel.[109] The conclusion to be drawn from these cases is that wide latitude in the absence of a direct conflict exists for appointment by the trustee of counsel of his choice.

4. Former Representation of Debtor

The trustee may hire an attorney that has represented the debtor for specified purposes, other than to generally represent the trustee, if such attorney will not represent or hold any adverse interest to the debtor or the estate.[110] In *Hassett v. McColley*, the trustee and his attorney had been administering the Chapter 11 case of a parent corporation and its subsidiary. A motion to disqualify trustee's attorney arose over an adversary proceeding instigated by the trustee to recover certain stock from a third party wherein it was possible that a question could arise as to the ownership of the stock between the parent company and its subsidiary. The court noted that DR 5-105 (C) and Ethical Considerations 5-14, 5-15, 5-16 and 5-19 allowed for multiple representation under prescribed circumstances and found that full disclosure of potential conflicts had been made by counsel to both the parent corporation and the subsidiary as well as to the court.[111] The court found a unity of interest between the parent and subsidiary companies in the recovery of the stock from the

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106. *Id.* at 1000.

107. *Id.* (*citing In re Eloise Curtis, Inc.*, 326 F.2d 698 (2nd Cir. 1964)).

108. *Id.* at 1001.

109. *Id.*

110. 11 U.S.C.A. §327 (e); *see In re G & H Steel Service, Inc.*, 76 B.R. 508 (Bankr. E.D. Pa. 1987); *Hassett v. McColley*, 5 Collier Bankr. Cas. 2d (MB) 1503 (Bankr. S.D.N.Y. 1982).

111. *Hassett*, 5 Collier Bankr. Cas. 2d (MB) at 1514.

third party.[112] If a conflict arose as to the ownership between the two companies, the court stated that the trustee could then appoint special counsel to resolve the ownership question.[113]

Representation of the trustee may also conflict with prior representation of a debtor's officers or partners individually. In *In re Philadelphia Athletic Club, Inc.*,[114] the court disqualified attorneys chosen by the trustee who previously represented two individuals in a struggle for control over a Chapter 11 debtor. In their representation of those clients, the attorneys attacked debtor's plan, accused debtor of fraud and caused the court to remove debtor as debtor-in-possession. The trustee moved to employ these same attorneys as its general counsel and they subsequently withdrew from representing the two individuals. Debtor objected, claiming the attorneys had an interest adverse to the interests of debtor. In disqualifying the attorneys from representing the trustee, the court held that it was not sufficient that the attorneys actually were disinterested because the appearance of being interested could not be avoided.[115] (Note that this result would not be reached under the Rules of Professional Conduct, absent more than an "appearance of professional impropriety.") The court stated that a reasonable person would conclude that the attorneys' prior clients would be given preferential treatment by the attorneys as trustee's counsel, to the detriment of others, and that an attorney for the trustee should not place himself in a position where he may be required to choose between a conflicting interest or his duties.[116] The result reached by the court was unusual because a trustee typically seeks to save the estate money by employing counsel familiar with the debtor. Special counsel could have been employed by the trustee to review the claims or other liabilities of the attorneys' prior clients.

B. REPRESENTATION OF DEBTORS

1. Concurrent and Former Representation of Unsecured and Secured Creditors

"A debtor in possession stands in the shoes of a trustee in every way"[117] and can therefore exercise the rights and duties of a trustee.[118] Much of the previous discussion concerning representation of a trustee is relevant in that attorneys for the debtor-in-possession must be disinterested and hold or represent no adverse interest.[119] "Only the concurrent

112. *Id.* at 1512.
113. *Id.* at 1512-13.
114. *In re Philadelphia Athletic Club, Inc.*, 20 B.R. 328 (E.D. Pa. 1982).
115. *Id.* at 335 (*citing* Model Code of Professional Responsibility Canon 9).
116. *Id.*
117. *In re Watson*, 94 B.R. 111, 114 (Bankr. S.D. Ohio 1988).
118. 11 U.S.C.A. §1107(a) (West Supp. 1993).
119. 11 U.S.C.A. §327(a); *see, e.g. In re Michigan Gen. Corp*, 77 B.R. 97 (Bankr. N.D. Tex. 1987) (law firm disqualified from representing Chapter 11 debtor in consolidated case

representation of conflicting interests disqualifies an attorney from representing a debtor-in-possession."[120] Counsel for the debtor can therefore concurrently represent a secured or unsecured creditor in an unrelated transaction, provided no actual conflict or adverse interest exists.[121] Note, however, that some courts disregard the language of Bankruptcy Code Section 327(c), which requires an actual conflict, and disqualify counsel based solely on potential conflicts or the appearance of impropriety.[122] However, an attorney would not be disqualified from representing the debtor-in-possession solely because he represented the debtor before the commencement of the case.[123] In fact, that is the usual practice.

Therefore, representation of the debtor even if the attorney represented unsecured or secured creditors in other matters is allowable, as long as those other matters are not substantially related to the bankruptcy case. However, if the attorney prepared the security agreements between the secured creditor and the debtor, or if the attorney represented a creditor with respect to any matter which the debtor might litigate in a bankruptcy proceeding, then representation should not be considered. The same would apply if the attorney formerly represented officers or directors of the debtor, if it is likely that the debtor will be litigating against these individuals. Even in this situation, the creditors' committee or trustee rather than debtor's counsel could have responsibility for investigating and litigating issues involving the officers and directors.

2. Concurrent and Former Representation of Creditors' Committee and Trustee

Because of the obvious adverse interests in concurrent representation and the fact that prior representation of either the creditors' committee or trustee would concern substantially related matters, no subsequent or concurrent representation of the debtor would be possible.[124]

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where partner of law firm served on boards of directors of corporations controlling related Chapter 11 debtors).

120. *In re Dynamark, Ltd.*, 137 B.R. 380, 381 (Bankr. S.D. Cal. 1991) (citing *In re McKinney Ranch Assocs.*, 62 B.R. 249 (Bankr. C.D. Cal. 1986)) (law firm retained by debtor-in-possession was disinterested even though firm currently represented largest secured creditor in case on unrelated transactions); *see also In re Roberts*, 75 B.R. 402 (Bankr. D. Utah 1987) (simultaneous representation of wholly-owned corporation and its principals in separate Chapter 11 proceedings did not constitute conflict of interest).

121. *See In re Dynamark, Ltd.*, 137 B.R. 380 (Bankr. S.D. Cal. 1991); *In re Flanigan's Enters., Inc.*, 70 B.R. 248 (Bankr. S.D. Fla. 1987).

122. *See, e.g., In re Status Game Corp.*, 102 B.R. 19 (Bankr. D. Conn. 1989).

123. 11 U.S.C.A. § 1107(b) (West 1979).

124. *See, e.g.*, 11 U.S.C.A. § 1103(b) (West Supp. 1993).

C. SECURED CREDITOR REPRESENTATION

1. Concurrent and Former Representation of Debtor

Again, because of obvious adverse interests, concurrent representation of a secured creditor and debtor in the same case is generally prohibited.[126] (Since we are assuming representation of the creditor in the debtor's bankruptcy case, there exists little likelihood that there could be representation of the debtor on an "unrelated" matter.) Furthermore, representation of a secured creditor would probably be precluded if counsel formerly represented the debtor. Debtor would likely have grounds to disqualify the law firm from undertaking representation. Since all matters concerning the debtor will be under scrutiny in a bankruptcy case, the "substantially related" test is typically met.[126] Given the chance that debtor's confidences may be used against him and the overall appearance of impropriety, disqualification becomes all the more likely.[127]

2. Concurrent and Former Representation of Other Secured Creditors

Canons 4, 5 and 9 of the Code of Professional Responsibility would not require disqualification for concurrent representation of other secured creditors in the same bankruptcy case without a showing that the attorney's independent professional judgment on behalf of a client would likely be adversely affected by such multiple employment. Rule of Professional Conduct 1.7 would allow multiple representation if representation of each creditor was not limited by the attorney's representation of other creditors. Of course, full disclosure might be necessary to each client concerning the implications and possible conflicts of such multiple representation, and representation should not be undertaken until each client consents.[128] If there is a likelihood of an adversary proceeding between the creditors, the attorney should not engage in multiple representation.[129] If there is little likelihood of a dispute over collateral, the concurrent representation of secured creditors should be allowable.[130]

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125. *See* Model Code of Professional Responsibility DR 5-105; Model Rules of Professional Conduct Rule 1.7; *In re Kujawa*, 112 B.R. 968 (Bankr. E.D. Mo. 1990).

126. *See supra* part I, section D; Model Rules of Professional Conduct Rule 1.9.

127. *See* Model Code of Professional Responsibility Canon 9, DR 4-101; Model Rules of Professional Conduct Rules 1.6, 1.8(b); *Securities Investor Protection Corp. v. Blinder, Robinson & Co.*, 123 B.R. 900 (Bankr. D. Colo. 1991), *appeal dismissed, Intercontinental Enters., Inc. v. Keller*, 132 B.R. 759 (Bankr. D. Colo. 1991).

128. *See* Model Code of Professional Responsibility DR 5-105, EC 5-16; Model Rules of Professional Conduct Rule 1.7.

129. *See* Model Code of Professional Responsibility Canon 9, DR 5-105, EC 4-5, EC 5-15; Model Rules of Professional Conduct Rule 1.7; *International Business Machs. Corp.*, 579 F.2d at 271.

130. *See* Model Rules of Professional Conduct Rule 1.7 cmt.

Conflicts arise where there is a dispute with regard to the same collateral securing each claim. If an attorney prepared the relevant documentation for both secured creditors, the attorney should probably not represent either creditor because of the appearance of impropriety that would exist with respect to the confidences of the party not represented.[131] However, if the attorney was not involved in the preparation of the relevant documentation for either secured creditor, the attorney could represent one creditor without violating the Code of Professional Responsibility. There would be no multiple representation, yet the attorney could represent the chosen secured creditor without danger of the appearance of any identifiable impropriety, i.e., using the other creditor's confidences against him.[132] Note, however, that such representation may require disclosure and consent under Rule of Professional Conduct 1.7.

3. Concurrent and Former Representation of Unsecured Creditors, Creditors' Committee, and Trustee

Because the interests of unsecured creditors and secured creditors may be adverse, DR 5-105 and Model Rule 1.7 would possibly not allow general concurrent representation in the same bankruptcy case. If representation of the unsecured creditor was specifically limited to filing a proof of claim (in many cases, unsecured creditors rely on a trustee or creditors' committee to scrutinize the claims of secured creditors), representation of the secured creditor concurrently may be appropriate. The issue under DR 5-105(C) is whether or not it is "obvious" that an attorney could adequately represent both the secured and unsecured creditor. Under Rule of Professional Conduct 1.7, the issue would be whether the representation is directly adverse to, or limited by, representation of the unsecured creditor.

An attorney cannot concurrently represent both a secured creditor and the creditors' committee in the same case because of the above-described responsibility of the committee. Also, Bankruptcy Code Section 1103(b) most likely prohibits such representation. Finally, the concurrent representation of a secured creditor and the trustee in the same bankruptcy case, while possible under Bankruptcy Code Section 327(c), is generally prohibited.[133]

In considering whether representation should be undertaken, there is always the question of whether former representation of another creditor, the creditors' committee or the trustee would preclude the representation of a secured creditor. If the attorney's former representation included matters which were substantially related to the secured creditor's inter-

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131. *See* Model Code of Professional Responsibility Canon 9, DR 4-101, EC 4-5; Model Rules of Professional Conduct Rules 1.6, 1.8(b).

132. *See Fred Weber, Inc. v. Shell Oil Co.*, 566 F.2d 602 (8th Cir. 1977), *cert. denied*, 436 U.S. 905 (1978).

133. *See* Model Code of Professional Responsibility DR 5-105; Model Rules of Professional Conduct Rule 1.7.

ests in the bankruptcy case, then employment by the secured creditor should not be accepted. Otherwise no appearance of impropriety would exist and employment could be accepted.

D. UNSECURED CREDITOR REPRESENTATION

1. Concurrent and Former Representation of Secured Creditors, Debtor, and Trustee

For reasons previously discussed, general representation of an unsecured creditor would generally not be permissible if counsel was already representing a secured creditor or the debtor or the trustee in the same bankruptcy case. The concurrent representation of a secured creditor in an unrelated matter would be allowable as long as there was no potential for the commencement of an action by one party against the other. Former representation of a secured creditor or debtor or trustee would disqualify counsel from representing an unsecured creditor only if the former representation was substantially related to a matter in the bankruptcy case. Of course, this would obviously mean that former representation of the debtor would most likely disqualify counsel from representing an unsecured creditor in debtor's bankruptcy case. Former representation of the trustee or secured creditor would be disqualifying only if so indicated by the substantially related test.

2. Concurrent and Former Representation of Other Unsecured Creditors

As to the representation of other unsecured creditors in the same bankruptcy case, the conflicts involved would invoke DR 5-105 and Rule 1.7 concerning multiple employment and full disclosure. There would seem to be little likelihood of conflict in this situation. It should be noted, however, that Bankruptcy Rule 2019 requires full disclosure to the court, including a recital of pertinent facts and circumstances in connection with each employment.

E. CREDITORS' COMMITTEE REPRESENTATION

1. Concurrent Representation

Bankruptcy Code Section 1103(b) reads as follows:

> An attorney . . . employed to represent a committee appointed under section 1102 of this title may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case. Representation of one or more creditors of the same class as represented by the committee shall not per se constitute the representation of an

adverse interest.[134]

The language of Bankruptcy Code Section 1103 clearly supports the concurrent representation of individual unsecured creditors and the creditors' committee as long as there is no adverse interest involved in such concurrent representation.[135] Because of the inherent adverse interest involved in the concurrent representation of the creditors' committee and the trustee or debtor-in-possession, debtors, or a secured creditor, such concurrent representation is generally prohibited.

2. Former Representation of Secured and Unsecured Creditors, Trustee, and Debtor

Former representation of a secured creditor would disqualify counsel from representing the creditors' committee only if the matters advised on for the secured party were substantially related to the matters in dispute in the bankruptcy case. Counsel for the creditors' committee is duty bound to scrutinize the claims of secured creditors and if counsel prepared documentation relating to the extension of credit on behalf of a particular creditor, he should be disqualified from serving as creditors' committee counsel, unless the court would appoint special counsel to review that creditor's position and handle any resulting litigation.

Since the interests of unsecured creditors and the creditors' committee are the same, there would be little chance that counsel's former representation of a particular unsecured creditor would disqualify him from representing the creditors' committee.

With respect to counsel for the trustee and counsel for the creditors' committee, they would also share a common goal, i.e., to increase the size of the estate available for unsecured creditors. Therefore, former representation of the trustee would not necessarily disqualify counsel from subsequently representing the creditors' committee.[136]

Former representation of the debtor would likely disqualify counsel from representing the creditors' committee because of the substantial relationship of matters in dispute and the chance that confidences might be revealed in the bankruptcy case.[137] However, where the subject matter of the former representation is too remote from the bankruptcy action and where a sufficient showing is made to rebut the presumption that confidential information passed to the attorney during the prior representation, a request for disqualification may be denied.[138]

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134. 11 U.S.C.A. § 1103(b).

135. *See In re Whitman*, 101 B.R. 37 (Bankr. N.D. Ind. 1989).

136. *See In re Market Response Group, Inc.*, 20 B.R. at 151.

137. *See* Model Code of Professional Responsibility DR 4-101; Model Rules of Professional Conduct Rules 1.6, 1.8(b); *In re Davenport Communications Ltd. Partnership*, 109 B.R. 362 (Bankr. S.D. Iowa 1990); *In re Market Response Group, Inc.*, 20 B.R. at 151.

138. *See In re Allied Artists Pictures Corp.*, 5 Bankr. Ct. Dec. (CRR) 636, 638 (Bankr. S.D.N.Y. 1979).

III. CONCLUSION

Because of the overlay of bankruptcy considerations to traditional conflicts analysis, each potential conflict must be carefully considered in light of the information contained in this article. The appendix following this article summarizes the relevant considerations for deciphering the conflicts of interest which frequently occur in bankruptcy representation.

APPENDIX

The conflicts chart on the following pages attempt to put in shorthand form the answer, or at least the possible considerations, concerning conflicts of interest which arise in a bankruptcy case by the concurrent representation of two clients or the subsequent representation of a client concerning the same matters involved in the former representation of another client.

The chart should be read as follows: The entity corresponding to each Roman numeral is the party that is requesting representation of the law firm in a bankruptcy case. Whether or not representation may be undertaken is then answered with respect to each of the other possible entities involved in a bankruptcy case where those entities are (A) currently being represented or (B) were formerly represented. The possible conflicts are further divided according to whether the representation of entities currently or formerly represented was related or unrelated to the particular bankruptcy case in which representation is being requested. The chart indicates whether representation of the party requesting representation would not be possible ("No") or would be possible ("Yes") and other possible restrictions thereon. In shorthand form, the chart indicates the authority for the position taken as to whether representation would be possible as being the Bankruptcy Code (e.g., 327(a), 1103(b)), certain disciplinary rules of the Code of Professional Responsibility (e.g., 4-101, 5-105) or the Rules of Professional Conduct (e.g., 1.7, 1.9). Further explanation of the information contained in the chart is provided in the legend at the end of this appendix. Additional considerations are represented as follows: The indicator "SR" is used to denote case law which has developed the "substantially related" test concerning conflicts with respect to former representation and is explained more fully in the legend; the acronym "*IBM*" refers to a specific Court of Appeals decision more fully explained in the legend; the phrase "not same entity" is used in certain instances with respect to conflicts concerning the trustee to distinguish instances where an individual, who also acts as trustee, is represented or has been represented in his individual capacity and where the attorneys involved may be representing another entity in a bankruptcy case where said individual is acting as trustee.

It should be noted that Canon 9, which requires counsel to avoid even the appearance of impropriety, may also be relevant in certain situations. However, it is not included in this chart because courts generally have not disqualified counsel based solely on Canon 9, holding instead that the more specific language of Canons 4 and 5 controls.

CONFLICTS CHART

I. TRUSTEE - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	N/A	N/A	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**	N/A
2. Debtor	No, 327(a); 5-105; 1.7	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**	Yes, 327(b), (e); 4-101**; 1.6; 1.8(b)**
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 327(a); 5-105; 1.7	N/A	Yes, SR (not adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 327(c); 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; 327(c)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 327(c); 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 327(c); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART				
II. DEBTOR-IN-POSSESSION - PARTY REQUESTING REPRESENTATION				
PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor	N/A	N/A	Yes, 1107(b)	Yes, 1107(b); 327(b)
2. Trustee	N/A	N/A	Yes, (rare)	N/A
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; IBM; (may require disclosure and consent)	Yes, 327(c); 4-101**; 1.6; 1.8(b)**	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

III. DEBTOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	N/A	N/A	Yes, SR (similar interest); 1.9	N/A
2. Trustee	No, 327(a); 5-105; 1.7	Yes, 327(a); 5-105*; 1.7*; (not same entity); *IBM*; may require disclosure and consent)	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	Yes (not same entity)
3. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
4. Secured Creditor	No, 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	No, 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

IV. CREDITORS' COMMITTEE - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	N/A
2. Debtor	No, 1103(b) (adverse interest)***; 5-105; 1.7	No, 5-105; 1.7; 4-101 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b); SR (adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 1103(b) (adverse interest)***; 327(a); 5-105; 1.7	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, SR (similar interests); 1.9	Yes, (not same entity)
4. Secured Creditor	No, 1103(b) (adverse interest)***; 5-105; 1.7	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 1103(b); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
5. Unsecured Creditor	Yes, 1103(b) (no adverse interest)***; 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 1103(b); 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

V. SECURED CREDITOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 5-105; 1.7 [Possible, 327(c)]	N/A	No, 4-101; 1.6; 1.8(b)	N/A
2. Debtor	No, 5-105; 1.7	No, 5-105; 1.7; 4-101; 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, (not same entity)
4. Creditors' Committee	No, 1103(b) (adverse interest)***; 5-105; 1.7	N/A	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	N/A
5. Other Secured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
6. Unsecured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART

VI. UNSECURED CREDITOR - PARTY REQUESTING REPRESENTATION

PARTY CURRENTLY OR FORMERLY REPRESENTED	A. Concurrent Representation		B. Former Representation	
	RELATED TO CASE	UNRELATED TO CASE	RELATED TO CASE	UNRELATED TO CASE
1. Debtor-in-Possession	No, 5-105; 1.7 [Possible, 327(c)]	N/A	No, 4-101; 1.6; 1.8(b)	N/A
2. Debtor	No, 5-105; 1.7	No, 5-105; 1.7; 4-101; 1.6; 1.8(b)	No, 4-101; 1.6; 1.8(b)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
3. Trustee	No, 5-105; 1.7 [Possible, 327(c)]	Yes, 5-105*; 1.7*; (not same entity); *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, (not same entity)
4. Creditors' Committee	Yes, 1103(b) (no adverse interest)***; 5-105*; 1.7*; (may require disclosure and consent)	N/A	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	N/A
5. Secured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9
6. Other Unsecured Creditor	Yes, 5-105*; 1.7*; (may require disclosure and consent)	Yes, 5-105*; 1.7*; *IBM*; (may require disclosure and consent)	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9	Yes, 4-101**; 1.6; 1.8(b)**; SR (not adversarial); 1.9

CONFLICTS CHART LEGEND

* 5-105 If representation is likely to adversely affect the lawyer's independent professional judgment in behalf of a client, the lawyer must obtain the consent of each party after full disclosure, and it must be obvious that the lawyer may represent each party adequately.

1.7 A lawyer shall not represent a client if the representation of that client will be directly adverse to, or limited by, the representation of another client, unless the lawyer reasonably believes there will be no adverse effect and each client consents after consultation.

** 4-101 A lawyer may only reveal confidences of secrets of his client or use such confidences or secrets to his advantage or to the advantage of a third person if such client consents after full disclosure. Of course, if no confidences or secrets are to be revealed, no disclosure or consent would be necessary.

1.6; 1.8(b) A lawyer shall not reveal information relating to the representation of a client or use such information to the disadvantage of a client unless the client consents after consultation.

*** Section 1103(b) of the Bankruptcy Code allows the concurrent representation of the creditors' committee and another entity in the bankruptcy case as long as such entity does not have an adverse interest. Specifically, the concurrent representation of particular unsecured creditors is allowed unless an adverse interest exists.

SR *Substantially Related Test*: Without full disclosure and consent by the former client, a lawyer may not represent an interest adverse to a former client if the matters embraced by the present representation are substantially related to the matters embraced by the former representation. This test has been formulated as Rule 1.9 of the Rules of Professional Conduct. Rule 1.9 implicitly has application only where the proposed current representation is adversarial with respect to the former representation. It should not apply where there is no materially adverse interest.

IBM Refers to *International Business Machs. Corp. v. Levin*, 579 F.2d 271 (3rd Cir. 1978), where the court held that counsel was obligated under DR 5-105 to disclose and obtain consent from both parties for representation in situation where concurrent representation of parties with adverse interests involved two entirely unrelated areas.

The holding in *IBM* is consistent with Rule of Professional Conduct 1.7, which provides that representation "directly adverse" to another client is prohibited unless there is disclosure and consent. The Comment to Rule 1.7 provides that "a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated."

Note: Any employment of attorneys by a trustee or debtor-in-possession requires certain disclosures to the court pursuant to Bankruptcy Rule 2014, including the attorneys' connection with the debtor, creditors or any other party in interest.

If multiple representation of creditors is undertaken in a Chapter 11 proceeding, Bankruptcy Rule 2019 requires that the attorneys file a verified statement with the clerk disclosing each creditor represented, said creditors' claims and "the pertinent facts and circumstances in connection with the employment."