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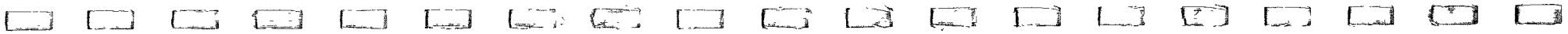
ADVISORY COMMITTEE ON BANKRUPTCY RULES

Charleston, South Carolina
March 13-14, 1997



ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 13 - 14, 1997
Charleston, South Carolina

Agenda

Introductory Matters

1. Approval of minutes of September 1996 meeting.

2. Selection of dates and places for Spring 1998 and Fall 1998 meetings.

3. Designation of circuit liaisons to fill vacancies and explanation of duties by chairman.

4. Report on January 1997 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Oral report by Chairman and Reporter.]

Action Items

5. Consideration of public comments on preliminary draft of proposed amendments to Official Bankruptcy Forms 1, 3, 6, 8, 9, 10, 14, 17, 18, and new Forms 20A and 20B and the recommendations of the Forms Subcommittee concerning these comments. [Materials: "Request for Comment" pamphlet enclosed; further materials to be distributed after the Forms Subcommittee meeting on 2/28/97.]

6. Consideration of effective date for amendments to Official Bankruptcy Forms. [Materials: to be distributed after the Forms Subcommittee meeting on 2/28/97.]

7. Consideration of proposals designed to provide better notice to governmental units. [Materials: to be distributed later.]

8. Consideration of amendments to Rule 2004 proposed by the Rule 2004 Subcommittee to require "notice and a hearing" before the court acts on a motion for an examination. [Materials: Reporter's memorandum dated 2/12/97 containing proposed draft.]

9. Consideration of proposed amendments to Rule 2014. Employment of Professionals. [Materials: Reporter's memorandum dated 2/11/97, containing draft of proposed amendments; G. Smith letter dated 1/29/97; Reporter's memorandum dated 2/7/97 on the background of the proposed amendments.]

10. Consideration of whether adjustment is needed to the dollar amounts stated in the rules. [Materials: Reporter's memorandum dated 2/7/97; H. Sommer letter dated 12/19/96.]

Reports of Subcommittees and Liaison to Civil Advisory Committee

11. Style Subcommittee's revisions to amendments to 14 rules previously approved by the Advisory Committee. [Materials: Reporter's memorandum dated 2/1/97; drafts of amendments to Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7062, 9006, and 9014.]

12. Report of the Litigation Subcommittee. [Materials; Reporter's memorandum dated 2/10/97, containing drafts of proposed amendments to Rules 9013, 9014, 1006, 1007(c), and 7001.]

13. Subcommittee on Alternative Dispute Resolution. [Oral report.]

14. Subcommittee on Technology. [Oral report.] [Informational Materials: Proposed Interim Technical Standards; to be distributed later: Executive Summary of Interim Report of Electronic Case Files Project.]

15. Subcommittee on Forms. [Oral report.]

16. Subcommittee on Local Rules. [Oral report.]

17. Liaison to Advisory Committee on Civil Rules. [Oral report.]

Organizational Matters

18. New subcommittee appointments.

Information Items

19. Status list; status chart.

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Agenda Item 1

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 26 - 27, 1996

San Francisco, California

Minutes

The following members were present at the meeting:

Bankruptcy Judge Paul Mannes, Chairman
Circuit Judge Alice M. Batchelder
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge A. Jay Cristol
Professor Charles J. Tabb
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Alan N. Resnick, Reporter

District Judge Alicemarie M. Stotler, Chair of the Committee on Rules of Practice and Procedure ("Standing Committee"), and District Judge Thomas S. Ellis, III, liaison to the Committee from the Standing Committee, also attended. Circuit Judge Edward Leavy, former Chairman of the Committee, attended part of the meeting. District Judge Paul A. Magnuson, Chairman of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), and District Judge Donald E. Walter, a member of the Bankruptcy Administration Committee, also attended part of the meeting. In addition, Bankruptcy Judge A. Thomas Small, who recently had been appointed to the Committee for a term beginning October 1, 1996, attended.

The following additional persons attended the meeting: Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee; Joseph G. Patchan, Director, Executive Office for United States Trustees; Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of California; Patricia S. Channon, Bankruptcy Judges Division, and Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins and Robert Fagan, Federal Judicial Center ("FJC").

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**.

Introductory Items

The Chairman introduced the guests in attendance and the newly-appointed member and welcomed them to the meeting.

The Committee approved the minutes of the March 1996 meeting.

Professor Resnick reported on the June 1996 meeting of the Standing Committee. The Standing Committee had approved the rules amendments forwarded by the Advisory Committee from its March 1996 meeting, he said, and these were considered by the Judicial Conference on September 17, 1996. Mr. McCabe reported that the Judicial Conference had approved the amendments to the bankruptcy rules, but that the proposed amendments to Rule 48 of the civil rules, which would have required a court to empanel 12 jurors in a civil case, had not been approved. Professor Resnick stated that the Standing Committee also had approved for publication and comment the proposed amendments to the official forms.

The Reporter reminded the Committee that Form 1, the Voluntary Petition, had undergone further change after the March 1996 meeting, at the request of the Bankruptcy Administration Committee. The Bankruptcy Administration Committee, at its June 1996 meeting, had requested the Committee to consider two changes designed to improve the statistical information about large chapter 11 cases and to include them in the form when it was published for comment. One change was to add an additional statistical category to the part of the form on which a debtor reports its total assets and total liabilities and the other was to add a question to the form asking the debtor to state whether the assets and liabilities

being reported were for an aggregate of affiliated debtors or for only the debtor listed in the particular petition. By mail ballot, he said, the Committee had approved the inclusion of the additional statistical category. The question concerning whether assets and liabilities for more than one debtor were being aggregated, he reported, had drawn a tie vote. The Chairman had broken the tie by voting against the proposal, and the Standing Committee then had approved the forms for publication with the additional statistical category, he said.

The Reporter noted that several members had included with their votes against the aggregation question comments about their reasons for voting against it and their reservations about whether a question would be effective in obtaining the information being sought. The comments indicated doubts about requiring all debtors to answer a question that is applicable only to a few and worries about whether such a question would give the impression that it is acceptable to aggregate assets and liabilities of more than one debtor. In addition, the members noted that the form is simply being published for comment and that the question could be added later if the Committee's concerns were resolved. Other alternatives suggested were converting the question to a statement and directing debtors to provide information for "the above-named debtor only."

Ms. Wiggins noted that both requests had originated with an FJC study of "mega" cases in the Southern District of New York. Ms. Wiggins said she had discussed the Committee's questions and comments with the clerk of the court. The clerk had observed that many debtors who aggregate assets and liabilities do so because they don't know what the assets and liabilities are for each debtor separately. The clerk agreed that requiring all debtors to respond to the question might cause more confusion than the information is worth, and said the court could continue to handle large cases involving numerous affiliates on an ad hoc basis. The clerk also had said she would rather know the aggregate amount than nothing and she feared attorneys would leave the statistical boxes blank if they lacked information for the debtors separately but were directed to answer for a particular debtor only.

Professor Resnick reported that the Standing Committee's style subcommittee had undergone a turnover of membership. He said the new subcommittee will review draft amendments early, usually before final approval by the Committee, and that the Committee recently had received a style markup of the proposals in the agenda book for the instant meeting. The Reporter suggested that the Committee focus on the substance of the proposed amendments, which might be voted down. If amendments are approved, the Committee should look at the style markup. He said the Standing Committee's policy of respecting the Advisory Committee's style decisions remains unchanged. Judge Duplantier warned that the Committee could bog down in style discussions and suggested delegating style issues to the Committee's own style subcommittee if matters should become protracted.

Mr. Smith reported on the second session of the Special Study Conference on Federal Rules Governing Attorney Conduct held in June 1996 and organized by Professor Daniel R. Coquillette, reporter to the Standing Committee. Mr. Smith praised the written materials which detailed the great diversity of ethical standards that exists today among the various states. He said this diversity is further complicated by the fact that some federal courts also have adopted the underlying American Bar Association ("ABA") Code or, in some cases, the old ABA Canons of Professional Responsibility. He said the ideal would be to have one rule, but that would appear to be impossible. Mr. Smith said it is possible that bankruptcy practice presents a sufficiently special situation that a national rule may be needed. At the end, the symposium authorized Professor Coquillette to draft a model interim rule for future consideration, but all decision-making was postponed.

Professor Resnick reported that he and Judge Mannes also had attended a session of a working group of the National Bankruptcy Review Commission. He was informed that the Commission had discussed the absence of a supersession clause for bankruptcy rules in the Rules Enabling Act, but that the Commission does not seem to support change in that area. He said he believes it likely that any suggestions for rules changes ultimately recommended by the Commission would be addressed to the Committee (rather than to Congress). Judge Mannes added that Bankruptcy Judge Robert Ginsberg, a member of the Commission, has

expressed a desire to brief the Committee about the Commission's work at the spring 1997 meeting.

Judge Stotler noted that the pamphlet in which the proposed amendments to the Official Bankruptcy Forms have been published is eight-and-a-half by eleven inches, full page size. She said she believes the large size to be a major improvement, particularly for attracting comment on the proposed amendments. Judge Stotler said she would like the pamphlets containing rules amendments also to be full page size, but that the Rules Committee Support Office had informed her the cost would be too high. Professor Resnick added that the number of forms pamphlets mailed had been reduced to offset the additional cost of their larger size.

Judge Stotler said the Standing Committee is aware that the Committee has its own style subcommittee and is the only advisory committee that does. The Committee's approach to style is good, she said. She added that, with respect to full-scale restyling, the Standing Committee is following the advice of the Chief Justice, using the draft of the appellate rules as a bellwether, to see what the reaction is, and exempting the evidence rules from the restyling effort, because of their substantive nature.

Action Items

Rule 2004. At its September 1995 meeting, the Committee had approved amendments to Rule 2004 to make it clear that the court in which a case is pending can order an examination that will take place outside the district in which that court is located and that an attorney admitted to practice in the district where the case is pending can issue the subpoena for an examination to be held in a "distant" district. These proposed amendments, however, had given rise to a discussion of whether the request for an examination could or should be considered by the court ex parte. The Committee had requested the FJC to conduct a study to determine the existing practices under Rule 2004, which requires a motion to be filed. The Committee Note states that the motion may be heard either ex parte or on notice. The

Committee had asked the FJC also to survey the courts concerning the dispositions of the motions and whether it would be advisable to adopt a procedure similar to that for taking depositions under the civil rules. The FJC study showed that the bankruptcy bench is about equally divided between judges who consider the motions ex parte and those who consider them on notice, with few objections being filed (or granted) under either practice. The Reporter had prepared a memorandum presenting several alternatives for the Committee's consideration.

After a discussion of the various alternative approaches and the findings of the FJC study, there was **a motion for the appointment of a subcommittee to study further the materials prepared by the Reporter and the FJC and make recommendations to the Committee, which motion carried with none opposed. Chairman Mannes appointed Judge Cordova to chair the subcommittee and Judge Robreno, Judge Kressel, Professor Tabb, Mr. Batson, and Mr. Kohn to serve as members.**

Rule 9031 and Special Masters. The Reporter briefly stated the history of the proposal and referred the Committee to several alternative amendments, starting at page 17 of his memorandum. Judge Walter said the Bankruptcy Administration Committee had offered the idea of authorizing a bankruptcy judge to appoint a special master as simply another tool that could be used in appropriate cases, adding that any such authorization should be tailored to the bankruptcy situation. Judge Magnuson added that the Bankruptcy Administration Committee had its own long range planning subcommittee which had recommended bringing the proposal to the Advisory Committee as a form of help to the judge.

Judge Robreno, noting that the Reporter's memorandum seemed to indicate that the special master concept might be at odds with several provisions of the Bankruptcy Code, asked whether it is appropriate for the Committee to decide these underlying policy issues. Mr. Klee noted that, prior to the enactment of the 1978 Code, there had been a history of patronage in bankruptcy and that receivers (which are prohibited in the Code) and special masters were part of that patronage. Even today, he said, bankruptcy judges are appointing

mediators in cases. Judge Ellis suggested that the Committee should hear from Judges Merhige and Shelley in Richmond, who had managed the "Dalkon Shield" case with the help of an examiner (an officer specifically authorized by the Code). Mr. Rosen said he thought the idea of special masters might be workable if limited to appointment by a district judge when the reference has been withdrawn. Professor Tabb said he thought Alternative No. 6, which contains the fewest restrictions on an appointment, was acceptable. He said he has confidence in both bankruptcy judges and district judges and added that judges already make such appointments under the name "examiner." Judge Kressel said he thinks the Bankruptcy Administration Committee's proposal seems acceptable and that he would like to have the tool, even though in 14 years he could think of only one case in which he might have considered using it.

Mr. Batson, however, said he is not convinced the authority is needed. He said the mass tort situation, such as the "Dalkon Shield" case, calls for estimation of the claims under § 502 of the Code, a core matter that is not delegable. He said he could not think of a case over the prior 15 years where a court would have used a special master. Judge Magnuson noted that the "Dalkon Shield" case was filed in Virginia and that Judge Merhige also was the multi-district litigation judge who had been appointed to hear the civil tort actions involving the Dalkon Shield device. He said he thinks the Dow Corning case is different because the multi-district litigation and the bankruptcy case are in different jurisdictions. Mr. Batson said he is participating in the Dow Corning case and that he expects the bankruptcy court to estimate the claims, after which the plan will establish a trust from which to pay them. He said he is not convinced there is a role a special master could play.

Judge Cordova said he has never needed a special master, but favors removal of the prohibition. Judge Cristol said he had experienced coordinating with a special master who was appointed in a criminal case. Judge Small said he sees no harm in adding suitably limited authority for special masters. Mr. Rosen said he sees appointments of examiners or fee experts because judges are frustrated when a case does not move; then, he said, the parties are frustrated at having a person in the case that they don't want.

Mr. Sommer said he was concerned about conflict with the Bankruptcy Code if the estate were to pay a special master. Judge Restani said she believes the issue was thought out during the drafting of the 1978 Code and that she disfavors special masters generally, even in district court, and particularly in jurisdictional matters.

Mr. Klee pointed out that the Bankruptcy Code currently contains checks and balances, one of them being that any examiner is appointed by the United States trustee, not the judge, although Rule 706 of the Federal Rules of Evidence permits a judge to appoint an expert. He asked what differentiates a special master from an examiner or an expert. Judge Walter said the difference is that a special master's findings must be accepted unless clearly erroneous. **Judge Batchelder made a motion, seconded by Judge Restani, that the rules not be amended to permit special masters, which motion carried by a vote of 8 to 5.**

Rules 1019(6) and 9006. The Reporter referred the Committee to his memorandum. Rule 1019, he said, currently provides for the filing of claims for debts incurred postpetition but before conversion in a case that is converted to chapter 7. The rule invokes Rules 3001(a) - (d) and 3002, which govern the filing of proofs of claim. Most postpetition claims, however, are for administrative expenses, for which § 503(a) of the Code directs the filing of a "request for payment" rather than a proof of claim. Several courts have ruled, however, that an administrative expense claimant must file a proof of claim in a converted case in order to obtain payment. One recent decision, In re Pro Set, Inc., states affirmatively that no provision of the Code or the rules imposes such a requirement. Accordingly, the Reporter said, he had drafted amendments to clear up the growing confusion over the proper procedure.

The proposed amendments would expressly require an administrative expense claimant to file a request for payment and would set the same 90-day deadline that already is in place for a creditor to file a proof of claim. Professor Tabb noted that the Committee might have to change the § 341 Notice forms to include mention of a request for payment of an administrative expense. Mr. Kohn requested that the government be given 180 days to file. **A motion directing the Reporter to redraft the amendments to provide for a 180-day**

filing period for a government entity carried with none opposed. A motion to approve the Reporter's draft amendment to Rule 9006 to protect against shortening of the time also carried unopposed. Upon considering the recommendations of the Standing Committee's style subcommittee, **the Committee approved adding on line 15 after the word "entities" the phrase "listed on the schedule of unpaid debts" and referred the amendments to both Rule 1019(6) and Rule 9006 to the Committee's own style subcommittee for further review.**

Rules 4004(a) and 4007(c). The Reporter said that several recent decisions described in his memorandum had ruled that the 60-day deadlines for filing a complaint objecting to the debtor's discharge or to determine the dischargeability of a debt under § 523(c) of the Code are to be counted from the date the meeting of creditors is held rather than from the first date set for the meeting, as stated in the rule. The Reporter said the language of these rules includes the word "held," which apparently was used to support the recent decisions. Accordingly, he had drafted amendments deleting the word "held" from both rules. Professor Resnick added that the Committee already had voted at a prior meeting to delete the word "held" from Rule 4007(c) for style reasons at the time it approved the substantive change to "filed" from "made." The text of the previously-approved amendments to Rule 4007(c) appears at Tab 22 of the agenda book. The Reporter suggested expanding the previously approved Committee Note to Rule 4007(c) to explain the substantive effect of the amendment. **A motion to approve the Reporter's draft carried unopposed.**

Rule 2003(d). In September 1995 the Committee approved amendments to conform Rule 2003(d) to amendments being proposed to Rule 2007.1, in furtherance of the amendments to the Bankruptcy Code made by the Bankruptcy Reform Act of 1994. Both rules concern the election of a trustee in a bankruptcy case. In March 1996, the Committee approved changes to the published draft of Rule 2007.1, in response to comments from the Executive Office for United States Trustees. The Reporter explained that the proposed changes to Rule 2003(b) would conform the rule to the revisions made to Rule 2007.1. **By consensus, the words "Report of" were deleted from the title of subdivision (2) of the proposed rule.** The

Committee then reviewed the markup forwarded by the Standing Committee's style subcommittee. **The Committee approved changing the introductory phrase in subdivision (1) to "In a chapter 7 case, if . . . " and to add a reference to chapter 7 in subdivision (2), but rejected the other style suggestions. A motion to approve the amendments and refer further consideration of style to the Committee's style subcommittee carried with none opposed.**

Presentation

Mr. Fagan of the FJC demonstrated for the Committee an interactive tutorial program he had developed on the bankruptcy rules. The program is intended as a training tool for deputy clerks, he said, and numerous clerks, judges, and Administrative Office attorneys served as advisers during its development. He said the program was about to undergo review by court and Administrative Office personnel prior to distribution to the courts as a CD-ROM. The Committee made suggestions about the program content, and several members offered to review the program material for accuracy and assist the FJC in revising the program material.

Subcommittee Reports

Litigation Subcommittee. Mr. Klee reminded the Committee that the subcommittee's work had originated with the former long range planning subcommittee and the FJC survey of the level of satisfaction with the existing rules requested in 1995 by that subcommittee. The FJC study had disclosed general satisfaction with the rules except in the area of litigation and, especially, motion practice. The long range planning subcommittee subsequently had been restructured into two subcommittees, one charged with addressing motion practice (litigation subcommittee) and the other with professional responsibility issues (Rule 2014 subcommittee). A year of work, he said, had produced a consensus on approach and two draft rules for the Committee's consideration, one on "administrative motions" and the other on "general motions." He added that Judge Robreno had expressed concern about the drafts, particularly whether it is appropriate for a national rule to delineate procedures with so much specificity.

Judge Robreno said the question is how broadly a national rule should mandate specific procedures each judge should use in all types of cases and in all courts, some urban and some not. He cautioned that changes on the scale proposed may invite the law of unintended consequences. He said he is not sure the Committee should sweep aside local practices on such matters as the number of days to answer and mandated status conferences. He said he thinks the draft [general motions] rule is an excellent local rule; he questioned only whether it should be imposed on everyone. Mr. Klee responded that there is a tension in the system between natural preferences for local practices and the fact that the Bankruptcy Code is a national law under which there is a national practice.

Judge Robreno noted that there is an ongoing study by the Rand Corporation of Civil Rule 26 and mandatory disclosures, under which the current rule provides for an opt-out. He said it might be wise to await the results of that study. Judge Restani said she favored proceeding with the subcommittee's work. She said there are problems over local rules in district court also, and the Committee should not await the results of the Rand study, which she believes will show no beneficial effect resulting from the opt-out.

Judge Mannes said he thinks there should be no objection to the proposed draft of Rule 9013 on administrative motions, most of which are pro forma. Professor Tabb questioned whether it is appropriate to include item (5), dismissal of a chapter 12 or chapter 13 case at the request of the debtor. Judge Mannes said that the fact that a court has done something a certain way in the past does not make that court's way the right one. He said he thought the items listed in the draft Rule 9013 should be standardized. [A motion the next day to move (5) to the negative notice category resulted in a 5-5 tie vote.]

Mr. Smith said the lack of a basic, national structure for motion practice has caused local rules (all different) to proliferate. He noted that contested matters can be more complex than adversary proceedings, yet nobody thinks adversary proceedings should be conducted under local rules instead of using the Federal Rules of Civil Procedure. He said the Committee should not leave contested matters with only [the current] Rule 9014.

Mr. Sommer said the Committee has received much feedback that people experience problems litigating motions under Rule 9014. For example, he said, the discovery deadlines of Rule 26 don't work in the short time frames of motion practice and it is unclear whether an answer must be specifically ordered. He said he thinks there will be resistance to the idea of detailed national rules, but that the Committee should proceed.

Judge Restani said that a contested matter in bankruptcy, although initiated by motion, is really like a complaint and the subcommittee's draft Rule 9014 is really more like "complaint practice." Professor Resnick said that a contested matter really is a separate litigation or lawsuit, which may be why there are so many local rules on the subject and why there is a perceived need for a national rule such as the subcommittee's draft Rule 9014. Draft Rule 9013, he said, would replace the current expedited application process. The concept is not revolutionary, he said, as the applications and motions filed currently under Rule 9013 generally are those that are listed as "administrative motions" in the subcommittee's draft Rule 9013. Rule 9014 now is titled "contested matters," a confusing term of uncertain meaning and in need of being replaced.

Mr. Kohn suggested circulating the subcommittee's drafts to obtain more feedback, possibly as an attachment to an FJC questionnaire. Professor Resnick explained that, if the material is to be circulated to the bar, it needs to go through the Standing Committee, which means it has to be a finished product rather than a work in progress. He also noted a lot of other rules would have to be changed because they would be affected, meaning that much work would be required. Judge Ellis said he doubted a survey would reveal more than the reaction in the meeting room.

Judge Duplantier said that he would like the Committee to use the adversary proceeding rules wherever possible. Mr. Sommer said the subcommittee's draft Rule 9014 has moved the bankruptcy rules in the direction of the civil rules to the extent that perhaps contested motions should be conducted under the adversary proceeding rules. The motion with attachments, he noted, closely resembles a motion for summary judgment. Judge Restani

said she formerly agreed with Judge Duplantier's view, but changed her mind because she realized it isn't possible, often due to provisions in the Bankruptcy Code.

Judge Robreno asked whether the negative notice procedure prescribed in the local bankruptcy rules for the Southern District of Florida would be inconsistent with the subcommittee's draft Rule 9014. [Judge Cristol had circulated copies of these local rules to the Committee.] Mr. Klee said he believes the draft Rule 9013 is consistent with the negative notice concept and directed the Committee's attention to page 9, line 108, of the draft as an example of a negative notice procedure in the draft itself. Judge Robreno asked whether attorneys generally would have to change their procedures under the subcommittee's draft rules. Mr. Klee said he does not see the subcommittee's proposals as disrupting existing practices. Judge Cristol said he considers his district's local rules 913 and 914 to be a sign that the district's local practice is ahead of the national rules and that national attention is needed on the subject of motion practice.

Judge Restani raised as an issue the provision in the subcommittee's draft Rule 9014 for a mandatory status conference, which, she said, appeared to trouble several members. Judge Kressel said lawyers need to know whether they must bring their witnesses or not. [A matter that is unclear under, for example, § 362(e) of the Code and Rule 4001(a).] Mr. Klee directed the Committee to page 11 of the drafts and said that, generally, the participants would not have to bring witnesses and supply exhibits, except with respect to matters listed there.

Judge Mannes suggested thinking about how a motion to assume and assign an executory contract would be handled under the subcommittee's draft Rule 9014. Since the matter is not on the administrative motions list, he said, it would be a general motion. The subcommittee's draft Rule 9014 would direct the movant to file the motion, stating the relief sought, and to attach an affidavit supporting the motion. The draft rule also would advise the movant of the requirement to file proofs of service indicating that the movant had served the person or persons against whom relief is sought, the attorney for the debtor, and the creditors

committee, and had transmitted a copy of the motion to the United States trustee. Opposers of the motion would be required to respond. If there were no response, the judge would dispose of the motion. If one or more responses were filed, the judge would hold a status conference to set discovery and schedule the "trial" [hearing]. Under the current Rule 6006, there is not much guidance, and an attorney must obtain a district's local rule to know how to proceed.

Mr. Klee compared the process under proposed Rule 9014 to an adversary proceeding in which the plaintiff serves the defendant with a summons. Under the rules applicable in an adversary proceeding, any compulsory counterclaim the defendant may have must be asserted or waived. Thus, a "counterclaimant" must submit to bankruptcy court jurisdiction or waive its counterclaim, a procedural requirement that effectively expands the bankruptcy court's jurisdiction, he said. Judge Restani added that any rule that applies the adversary proceeding rules to contested motions would have to eliminate the requirement to file a compulsory counterclaim and provide a separate rule for service. Mr. Smith said the subcommittee tried to follow the civil rules, but ended up adopting the substance of the draft proposed by the subcommittee. Mr. Batson said he thinks the existing Rule 9014 also evolved from an attempt to apply the civil rules and that today's Rule 9014 was the best they could do. He said the bankruptcy community still needs the subcommittee's draft Rule 9013 (administrative motions), however.

Judge Duplantier asked whether the Committee could define the phrase "contested matter." The Reporter stated that he had written a memorandum on the subject during which he had come to realize that some matters that frequently are contested are not governed by Rule 9014, while other matters that never actually are contested are nevertheless handled under Rule 9014. He added the Committee should be prepared for the prospect that attempting to change the parties' long-held habits and customs will provoke a major "political" battle similar to the struggle over the local rules project.

Judge Robreno said the subcommittee had educated the Committee by means of the discussion and suggested that the drafts be sent back to the subcommittee for further work in light of the feedback presented during the discussion. Mr. Rosen suggested that the subcommittee 1) think about economically using the civil rules to develop a procedure for general motions, 2) borrow the language of the civil rules to the extent possible, 3) treat the subject of motions within motions, and 4) continue also to refine its draft of Rule 9013 (administrative motions). Mr. Klee requested a non-binding "view" of the Committee concerning the direction the subcommittee's work should take before the subcommittee invests more time in the project.

A proposal that motion practice should continue to be governed by local rule and the subcommittee should limit its work to fine-tuning the draft of Rule 9013 did not attract any votes. **A motion that the subcommittee continue its work carried with one opposed.**

Mr. Klee asked Mr. Sommer to draft his proposal to use the adversary proceeding rules, so that it could be compared to the subcommittee's revised draft at the March 1997 meeting. Mr. Sommer agreed to the request.

Judge Duplantier said that during the time remaining to the Committee at the meeting he would like to debate some of the points raised during the discussion. Chairman Mannes accepted this proposal and said the Committee would discuss how to help the subcommittee proceed at the next day's session.

On the second day of the meeting, Mr. Klee resumed the discussion by suggesting that the subcommittee continue its deliberations and return in March 1997 with new drafts that would include a breakdown into more categories of motions than the two presented in the drafts submitted to the meeting. Mr. Klee identified six categories: 1) administrative motions (limited to routine matters), 2) administrative proceedings (major litigation but not an adversary proceeding), 3) expedited motions (as set forth in subdivision (i) of the draft of Rule 9014), 4) motions within motions, 5) motions in adversary proceedings, and 6) an

intermediate category that would be handled on a "negative notice" basis "after notice and a hearing." He inquired whether the Committee agreed about the number and types of the categories.

Judge Duplantier said he would call administrative motions simply "motions" and the same for motions in adversary proceedings. He said he would have multiple laundry lists within these categories, and would use a different word, perhaps "petition," for the matters dealt with in the subcommittee's draft of Rule 9014 (the "general" motions). Mr. Rosen suggested leaving Rule 9014 as a hybrid between an adversary proceeding and a motion, calling the matters addressed therein "administrative proceedings," and listing them in the rules. He said this approach would avoid encroaching on normal motion practice while affording appropriate attention to important bankruptcy administration matters. He said he would not favor putting any "real" motions into draft Rule 9013.

Mr. Heltzel expressed concerns about the notice provisions of the subcommittee's draft Rule 9013. He said that a motion (now an application) to pay the filing fee in installments is a matter about which there does not need to be any notice or any hearing, because there is no natural opposition to the request. He also questioned the need for notice of the filing as well as of the granting of requests for action on several of the other matters listed in draft Rule 9013. Mr. Klee explained that draft Rule 9013 does not contemplate that there would be two notices but rather only the notice after the court rules, as already required under the current rules for most of the actions listed. Mr. Heltzel said, however, that the second sentence of subdivision (e) of the draft [the "after" notice] should not apply to an installment order and that subdivision (c) [the "before" notice] also should not apply to some items, such as motions to pay filing fees in installments.

The Reporter suggested moving the notice and service requirements for installment payments to Rule 1006, which contains provisions concerning the number and timing of installment payments. Ms. Wiggins said the survey that prompted the creation of the litigation subcommittee had shown strong preference by practitioners for having all the

directions in one place and suggested that the Committee refrain from sprinkling around to other rules too many of the items in draft Rule 9013. Judge Restani also cautioned against too much proliferation, but the consensus was that placement in Rule 1006 would work for a motion to pay the filing fee in installments.

Professor Tabb said, as a general matter, he thought the "after" notice provisions of subdivision (e) of the draft Rule 9013 were the more important and that the "before" notice that would be required under subdivision (c) of the draft could be deleted. Professor Resnick disagreed; he said he thought the "before" notice of subdivision (c) was the more important one. Mr. Klee said that some items in the draft Rule 9013 might be better handled under a negative notice procedure. The consensus, however, was that for a truly ex parte matter the "after" notice of subdivision (e) would be sufficient.

With respect to the subcommittee's draft Rule 9013, the Committee agreed specifically to --

- move notice/service requirements on installment payments to Rule 1006;
- bracket [] item (5) on dismissal under §§ 1208(b) and 1307(b), to reflect the 5-5 tie vote by the Committee on moving this item to the negative notice category;
- move a motion/order to enlarge the time for filing schedules and statements to Rule 1007, and add that matter to the list of those excepted from Rule 9013 treatment in item (9);
- combine item (10), waiver of a filing fee, with item (1), installment payments, and add it to Rule 1006 and possibly other rules;
- carve out chapter 9 and chapter 11 cases from item (11), (form of, manner of sending, or publication of a notice), and require negative notice for this motion in those cases.

Mr. Heltzel and Mr. Sommer both stressed that it is important, throughout, to focus on what is appropriate and functional in the large number of cases and not to be distracted by the rare or exceptional circumstances in which a generally applicable rule would not work as intended. Exceptional cases, they emphasized, can be dealt with by the parties and the court as necessary.

Subcommittee on Rule 2014 Disclosure Requirements. Mr. Smith referred the Committee to the subcommittee's proposed draft and to his letter of exception to the draft in the agenda book. Mr. Rosen said the original draft amendments considered by the subcommittee had tried to clarify the information to be supplied to the court, but that the subcommittee thought the draft did not accomplish its purpose. Moreover, Mr. Klee said, the subcommittee determined that no rule could accomplish the purpose in light of the Bankruptcy Code's definition of "disinterested person" in § 101(14) and the inclusion in the statute of the requirement to disclose any "connection." Mr. Klee pointed out a number of improvements over the current rule in the subcommittee's draft, including the change from an application to a motion, the addition of a notice requirement to replace the existing ex parte procedure, and the addition of an express statement of the ongoing duty to disclose changes in circumstances.

Mr. Smith said the original draft tried to give more guidance on what must be disclosed, even though the statute also provides some direction. He added that he would prefer to avoid an ex parte order, perhaps by utilizing a negative notice procedure, but would want a means of allowing counsel to go forward during the notice period. He said he also thinks the subcommittee draft improves on the existing rule by directing the disclosure of anything that might be an adverse interest.

Mr. Smith asked the Committee members' views on whether the courts currently are obtaining the disclosure they should. Mr. Rosen said attorneys tend to use general language, because it is impossible to list every connection, but there is more specificity than a mere statement that "we have some connections with others in the case, but we don't think they're significant." He said a bright line test, however, such as that an attorney would not have to disclose a connection with a creditor who represents less than ten percent of the firm's business, would violate the Bankruptcy Code.

Mr. Smith summarized the differences between the subcommittee's draft Rule 2014 and the current rule. He began by noting that the draft states who files the motion and who is to be served, that the draft requires the movant to aver concerning the professional's eligibility

and uses some specifics (*e.g.*, "duty to another client") taken from the Restatement of the Law Governing Lawyers, although without any intent to lessen the movant's obligation to employ only someone eligible. The draft authorizes an immediate order, he said, but allows for a hearing on ten days' notice at the court's discretion, a timing that might need to be reconciled with the 20-day notice period provided in the subcommittee's companion draft amendment to Rule 2002. In addition, the draft would require a verified statement by the professional to be employed that discloses any relationship which might cause a "reasonable person" to conclude there is an adverse interest, in language borrowed from both the Restatement and § 101(14), and which is, therefore, more expansive than the current rule. He noted also the addition of a requirement for a supplemental statement and the addition of language covering changes in membership of a partnership during the course of the representation.

It was noted that the Bankruptcy Code addresses the issues of conflict and potential conflict in several places and that the standards differ from section to section. For example, § 101(14) describes when a person is not disinterested and includes in that description the having of "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 an investment banker . . . or for any other reason"; § 327(a) requires a professional employed by a "trustee" to be disinterested with no adverse interest; § 328(c) authorizes a court to deny compensation to anyone who is found not to have lived up to the "disinterested with no adverse interest" standard required for employment; but § 327(c) permits employment by the "trustee" of a professional who also represents a creditor, subject to disapproval of the employment if an actual conflict is shown. It also was noted that the National Bankruptcy Review Commission is examining these issues.

Judge Cordova moved to adopt the subcommittee's draft amendments to Rules 2014 and 2002. Mr. Rosen questioned the expansion in draft Rule 2014, subdivision (b), clause (3), to include "connections" to any party in interest. Mr. Klee said the Committee should adhere to the statute by limiting disclosure of connections to those with the debtor and investment bankers and should use adverse interest as the standard for creditors. Judge

Kressel said he would prefer to have a hearing before authorizing employment, but was concerned about the resulting delay in signing an order and how to approve payment for prior work. Professor Resnick suggested that "negative notice" could work for authorizing employment, but Judge Kressel said there would still be a problem of waiting for the objection period to run. Mr. Sommer suggested using an interim order that would ripen into a final order if no objection were filed. Professor Resnick suggested instead that a regular order followed by notice, with no stated period for objecting, would still allow a party in interest to object. Mr. Sommer also said he thinks that subdivision (b) clause (2) (the reasonable person test) creates a new standard with new uncertainties. Judge Robreno observed that the drafts lack Committee Notes and that there seem to be both technical and conceptual problems with the proposed amendments. Mr. Klee offered **an amendment to the motion to adopt the subcommittee's draft Rule 2014 that would revise subdivision (b) by striking clause (2) and requiring instead the disclosure of any adverse interest and representation of any adverse interest, and by striking the language after the third comma in clause (3) and inserting "the debtor or an investment banker" as set forth in § 101(14). The motion as amended carried with none opposed.** Professor Tabb offered a further **amendment to prescribe an interim employment order, followed by notice, with the order to ripen into a final order if no objection is filed. The amendment carried with none opposed.** The Reporter asked **whether the Committee wanted him to conform lines 15 through 19 of subdivision (a) to the changes approved in subdivision (b), to which the response was, by consensus, affirmative. A motion to table further consideration until the March 1997 meeting and request the Reporter to prepare new drafts and Committee Notes carried without opposition.** Judge Robreno requested that the Reporter also prepare **a memorandum providing the Committee with information and background, discussing the meaning of "disinterested," and the present condition of the law.**

Subcommittee on Rule 7062. Judge Kressel reviewed for the Committee the history of the proposed amendments. The project began, he said, with the Committee's instructions to delete from Rule 7062 the list of "additional exceptions" to the ten-day stay of enforcement of a judgment. The reasons were that the exceptions are contested matters and not adversary

proceedings and that the list kept growing. The first task for the subcommittee was to identify those matters in which there should be time to appeal before the parties take action based on a court order. The choices are to 1) stay none, 2) stay all except those specified, or 3) stay none except those specified. The subcommittee chose the third option. This option would have the effect of changing the "default" mode for the selected items from immediate implementation to delayed implementation, unless the court orders otherwise in a particular matter.

Next, the subcommittee considered which items should be stayed and where to put the stay provision, whether in one rule or sprinkled around in the rules that govern the substantive issues. The subcommittee did not resolve the placement issue, and the drafts present the amendments both ways. Taking up the specific matters that currently are listed in Rule 7062 as "additional exceptions" and are, therefore, immediately enforceable, the subcommittee chose to "stay" some of these matters and added confirmation of a chapter 11 plan to the group. Rather than retain the word "stay," however, the subcommittee decided to use separate language to indicate what really is meant in each of the specific contested matters, that is, the postponement of implementation.

A motion signifying the Committee's general agreement to change the default as recommended by the subcommittee carried unopposed. A motion to place the amendment provisions in the various rules governing the substantive issues, rather than in Rule 9014, carried by a vote of 7 - 2.

A motion to adopt the proposed amendment to Rule 7062, deleting all but the first sentence of the existing rule, carried with none opposed. In considering the subcommittee's draft Rule 9014, members questioned the carving out of the trustee and the debtor in possession from the ten-day stay. After discussion, **a motion to adopt only the subcommittee's proposed amendment deleting Rule 7062 from the list of rules applicable in contested matters (line 11) and not adopt the proposed new sentence at the end of the draft carried unopposed.**

Turning to the subcommittee's proposed amendment to Rule 1017, which would add a new subdivision (f) to provide for delaying the effect of an order converting or dismissing a case, Judge Small said an order of dismissal should not be stayed, because assets will disappear during the ten-day period. **A motion to revise the subcommittee's draft to provide for the immediate implementation of an order dismissing a case carried by a vote of 9 to 2. A motion to make an order converting a case effective immediately also carried by a vote of 9 to 3.**

The subcommittee's proposed amendment to Rule 4001(a) would stay the effect of an order granting relief from the automatic stay for ten days. **A motion to adopt the subcommittee's draft carried by a vote of 8 to 2.** The subcommittee's proposed amendment to Rule 6004 would stay for ten days the effect of an order authorizing the use, sale, or lease of property other than cash collateral. **A motion to adopt the subcommittee's draft carried by a vote of 10 to 2.** Both amendments give the court discretion to order immediate effectiveness in a particular matter. Judge Kressel noted that the amendment to Rule 6004 also refers to § 363(m) of the Code, which provides protection for a bona fide purchaser of estate property if the sale is overturned on appeal. Concerning the subcommittee's proposed amendment to Rule 6006, Judge Kressel pointed out that the provision for a ten-day stay would apply only to the assignment of an executory contract or unexpired lease and not to either assumption or rejection. **A motion to adopt the subcommittee's draft carried on a voice vote.** The subcommittee also had submitted draft amendments to Rules 3020 and 3021 to delay for ten days the implementation of a confirmed chapter 11 plan and any distribution under a confirmed plan. **A motion to adopt the subcommittee's draft amendments to these rules also carried on a voice vote.**

Mr. Klee said that in all of these amendments the phrase "if an order is entered" or similar language should be used instead of the wording in the drafts which uses "if the court enters." Judge Duplantier suggested revising all the amendments uniformly to characterize the court's action as "entry" of the order concerned.

Subcommittee on Forms. Mr. Sommer reported that the proposed amendments to the official forms have been published, and the subcommittee is awaiting comments on the proposals. The deadline for comments is February 15, 1997.

Subcommittee on Local Rules. Judge Duplantier reported that courts are in the process of converting the local rule numbers to conform to the Judicial Conference directive, a process due to be completed by April 15, 1997. Ms. Channon reported that she receives four to five calls a month from courts having questions about the renumbering.

Subcommittee on Alternative Dispute Resolution (ADR). Professor Tabb said the subcommittee has been monitoring local ADR programs and that 18 bankruptcy courts currently operate mediation programs. He said he expects the American Bar Association's work on a proposed model local rule on ADR to be completed soon and that he will report to the Committee in March 1997 about whether the model rule will make it advisable to amend any bankruptcy rules. In response to a question about how bankruptcy judges select mediators, Professor Tabb said there are various methods and that the more recent local rules contain more provisions covering the selection process. Professor Tabb referred the Committee to a law review article by former Committee member Ralph R. Mabey and himself that appeared in the South Carolina Law Review. Mr. McCabe said the Rand Corporation is due to submit a subreport on ADR by November 30 to the Committee on Court Administration and Case Management, and that the report should be available to other committees by the March 1997 meeting.

Subcommittee on Technology. Mr. Heltzel reported that the amendments authorizing electronic filing are to become effective December 1, 1996, and that some experiments with the process have already begun. The bankruptcy court for the Western District of Oklahoma has been imaging all documents filed for several months, and the Prince Georges County, Maryland, state court is accepting electronic filings in several types of cases, as described in the material at tab 16 in the agenda book. He said that he is accepting filings on disk at the

bankruptcy court for the Eastern District of California and is engaged in limited electronic data interchange (EDI) transactions with the case trustees in the district.

Liaison with Advisory Committee on Civil Rules. Judge Restani, after noting that much of her subject had already been covered in connection with the report on the meeting of the Standing Committee, stated that draft amendments to Rule 23 had been published for comment. The next rule on which the civil committee will focus, she said, is Rule 26(b) concerning the scope of discovery. She added that the draft amendments to Rule 26(c) on protective orders, even though complete, probably will be held until the civil committee completes its draft of Rule 26(b). Mr. McCabe said that the outgoing chair of the civil committee has conducted a series of focus meetings around the country and that the work on class actions and discovery arose from bar comments at those meetings.

Respectfully submitted,

Patricia S. Channon

Agenda Item II

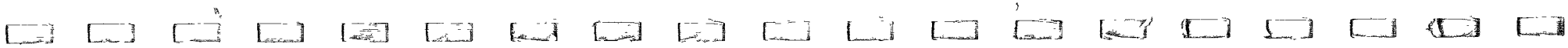
The Committee will select meeting dates and locations for the 1998 spring and fall meetings. Members should bring their personal calendars to the meeting.

Agenda Item 3

The Chairman will make an oral presentation.

Agenda Item 4

The Chairman and Reporter will report on the January 1997 meeting of the Committee on Rules of Practice and Procedure.



Agenda Item 5-6

The "Request for Comment" on the preliminary draft of amendments to the Official Bankruptcy Forms is enclosed with this agenda book.

The recommendations of the Forms Subcommittee concerning the public comments on the preliminary draft of amendments to the Official Bankruptcy Forms will be mailed prior to the Committee meeting.

A recommendation concerning the effective date for amendments to the Official Bankruptcy Forms will be mailed prior to the Committee meeting.

Agenda Item 7

Proposals for improving notice to governmental units in bankruptcy cases and proceedings will be distributed later.

Agenda Item 8

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: REPORT OF SUBCOMMITTEE ON RULE 2004

DATE: FEBRUARY 12, 1997

Rule 2004 has been the subject of discussion at Advisory Committee meetings since September 1995, when the Committee approved proposed amendments to Rule 2004(c) regarding examinations held outside the district in which the case is pending. Since then, the Committee has considered a number of alternatives regarding procedures for Rule 2004 examinations.

In particular, the Committee has been discussing the ambiguity as to whether a Rule 2014(a) motion may be *ex parte*, and how to best improve the rule to eliminate this ambiguity. (The rule seems to contemplate notice, but the committee note indicates it may be *ex parte*). These discussions have focused on the fundamental question of whether it is best to permit these motions *ex parte*, or whether principles of fairness require notice.

The Federal Judicial Center, at the Advisory Committee's request, performed an extensive study regarding local practices and procedures for granting motions for Rule 2004 examinations. The FJC found that the bankruptcy bench was divided between judges who hear Rule 2004(a) motions *ex parte*, and those who hear such motions on notice. The Reporter has submitted to the Advisory Committee alternative proposals for amending Rule 2004 to provide for (1) *ex parte* motions, (2) motions on notice, or

(3) issuance of subpoenas by attorneys without court order.

The Subcommittee on Rule 2004 was formed at the Advisory Committee's meeting in San Francisco in September, 1996, to consider the materials prepared by the Reporter and the FJC and to make recommendations to the Committee at the March 1997 meeting. Judge Cordova was appointed Chair, and Judge Robreno, Judge Kressel, Professor Tabb, Chris Kohn, and Neal Batson were appointed as members of the subcommittee.

The subcommittee met by telephone conference on February 10th, and voted unanimously (Judge Cordova wants me to report that he would have dissented, but as Chair he did not have a vote) to recommend that Rule 2004(a) be amended to provide that a Rule 2014(a) motion must be on notice, rather than *ex parte*. This recommendation is based on fundamental fairness to the person to be examined.

In view of the subcommittee's vote, I was asked to draft proposed amendments to Rule 2004 to provide for Rule 2004(a) motions on notice. The following draft of Rule 2004(a) is consistent with the recommendation of the subcommittee. I also included the proposed amendments to Rule 2004(c) that were approved by the Committee in 1995 (so that I don't forget them).

Rule 2004. Examination

(a) EXAMINATION ON MOTION. On motion of any party in interest, and after notice and a hearing, the court may order the examination of any entity. Notice of the motion shall be served on the entity to be examined and on any other entity the court directs.

****

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE. The attendance of an entity for examination and the production of documentary evidence, whether it is to be held within or without the district in which the case is pending, may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial. An attorney as officer of the court 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.

****

COMMITTEE NOTE

Subdivision (a) is amended to prohibit the issuance of an order under this rule *ex parte*. Any motion for an order under Rule 2004(a) must be on notice to the entity to be examined and any other entity the court directs. This amendment, which is based on principles of fairness, will afford an entity an opportunity to be heard before an order of examination is issued.

The opportunity to be heard before the order is issued under Rule 2004(a) does not prevent an entity served with a subpoena from subsequently seeking a protective order under Rule 45(c) F.R.Civ.P., which is made applicable by Rule 9016.

Subdivision (c) is amended to clarify that an examination ordered under 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. The amendment also clarifies that 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, which is to ease the burdens of interdistrict law practice.

Agenda Item 9

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: BANKRUPTCY RULE 2014

DATE: FEBRUARY 11, 1997

A draft of proposed amendments to Rule 2014 was discussed at the Advisory Committee meeting in September (see pp. 18-20 of the minutes of the meeting, which are at the beginning of the agenda book). As a result of the discussion, I was asked to prepare a new draft and committee notes for consideration at the March 1997 meeting. I also was asked to prepare a separate memorandum (which is included in the agenda materials) on employment of professionals in bankruptcy cases.

I enclose a revised draft of proposed amendments to Rule 2014. This draft will be the focus of discussion at the March meeting. For your convenience, I enclose both a clean copy (without showing changes from the existing rule), and a marked draft that shows the changes. Consistent with the views of the Committee expressed at the last meeting, the enclosed draft has the following features:

(1) A Rule 2014 motion must be on notice and an opportunity for a hearing must be provided before an order authorizing employment is issued (except with respect to an interim order);

(2) If there is no objection or request for a hearing, the court may authorize employment without a hearing;

(3) The disclosure requirements more closely track the definition of "disinterested" in § 101 of the Code.

(4) I added a provision that allows *ex parte* interim orders pending resolution of the motion. If no objection or request for a hearing is filed after the interim employment, the court may approve employment without a hearing.

In addition to substantive changes, I completely restyled the rule (I had help from Bryan Garner, who is the style consultant to the Standing Committee, and from Joe Spaniol, who is a member of the Standing Committee Style Subcommittee, who submitted style comments regarding the draft that the Advisory Committee considered in September). I think that it is much easier to read as restyled. In any event, the Advisory Committee's Style Subcommittee will review any draft approved by the Advisory Committee.

I also suggest that the Committee consider two other possible changes to the enclosed draft:

(1) Should the words "to the extent practicable", or a similar phrase, be added after the word "disclosing" in Rule 2014(b)(3) (line 26 on the clean draft)? These words may protect professionals who, in good faith, take "reasonable" steps to ascertain whether there are any "connections" with the debtor.

(2) Should Rule 2014(b) require disclosure of relationships with the U.S. trustee? I raise this question because of Rule 5003, which was amended in 1991 to govern conflicts that may exist because of a professional's relationship to the United States trustee.

2/9/97 Draft (clean copy)

Rule 2014. Employment of Professional 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:

(1) stating that the person is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion;

(2) disclosing any interest that the person holds or represents that is adverse to the estate;

(3) disclosing any direct or indirect relationship to, connection with, or interest in, the debtor or any investment banker for any security of the debtor; and

(4) stating 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 bases, the motion, and at least [10] 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.

COMMITTEE NOTE

This rule is amended to improve the procedures for obtaining an order authorizing the employment of

professionals. The trustee, debtor in possession, or 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.

This rule is amended so that a professional's disclosures required to be made more closely follow the statutory requirements for eligibility. 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 2014. Employment of Professional ~~Persons~~ Person

~~(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.~~

(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 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.~~ The motion shall be accompanied by a verified statement of the person to be employed:

(1) stating that the person is eligible under the Bankruptcy Code for employment for the purposes set forth in the motion;

(2) disclosing any interest that the person holds or represents that is adverse to the estate;

(3) disclosing any direct or indirect relationship to, connection with, or interest in, the debtor or any investment banker for any security of the debtor;

and

(4) stating 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 bases, the motion, and at least [10] 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.

~~(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.~~

(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.

COMMITTEE NOTE

This rule is amended to improve the procedures for obtaining an order authorizing the employment of professionals. The trustee, debtor in possession, or 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.

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Our File Number

January 29, 1997

Prof. Alan N. Resnick
Hofstra University
School of Law
Hempstead, NY 11550

Re: Subcommittee on Rule 2014 -- Advisory Committee on Bankruptcy Rules

Dear Alan:

I apologize for the delay in responding to your December 10 letter concerning the revised Rule 2014. I continue to have several concerns. Briefly stated, they are as follows:

1. The Rule fails to give much guidance to lawyers, those employing professionals or the professionals to be employed.

2. Even if a safe harbor cannot be firmly entrenched, at the very least we can provide in the Rule that the judge should consider the good faith of the person employed on an interim basis in determining whether to grant compensation.

3. I would consider including the disclosures required by Rule 2016(b), in an application to employ counsel for the debtor-in-possession. Such information is also important in assessing whether counsel for the debtor-in-possession holds or represents adverse interests or is subject to other influences or direction.

I remain concerned that the Rules and Commentary do not adequately inform counsel and others involved in the bankruptcy process. We should do the best we can to promote understanding and compliance with not only the Rules but the ethical standards. In my experience, there is a lack of understanding even among those who are skilled practitioners.

Sincerely,

Gerald K. Smith

GKS:pg
cc: Hon. Adrian G. Duplantier

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

DATE: FEBRUARY 7, 1997

RE: EMPLOYMENT OF PROFESSIONALS -- RULE 2014

In connection with the Advisory Committee's consideration of suggested amendments to Rule 2014 (Employment of Professional Persons), I was asked at the last meeting to prepare a memorandum explaining the provisions of the Code and Rules, as well as any relevant case law, relating to the employment of professionals. This memorandum is in response to that request. It is not my intention to comment in this memorandum on any specific proposals to amend Rule 2014. Rather, as requested, I will summarize briefly the applicable law regarding the employment of professionals. I also will mention briefly some concerns relating to Rule 2014 that have been brought to the attention of the Committee and that have caused the appointment of the Subcommittee on Rule 2014 two years ago. Hopefully, this background information will assist you in your deliberations on specific proposals relating to the employment of professionals.

Code Eligibility Requirements Relating to Professionals

Eligibility requirements for employment as a professional in a bankruptcy case depend on the particular role of the professional:

(1) Employment by a trustee or debtor in possession.

If a professional -- including an attorney, accountant, appraiser, auctioneer, or other professional -- is to be employed

by a trustee, § 327(a) requires (with certain exceptions discussed below) that the court approve the employment, and that the person:

(a) not hold or represent an interest adverse to the estate, and

(b) be "disinterested" (defined below).

Section 327(f) adds a further requirement regarding eligibility for employment as a professional: the person is ineligible if he or she was an examiner in the case.

Section 327(c) clarifies that a professional is not disqualified from employment by a trustee solely because of the person's representation of a creditor, unless another creditor or the U.S. trustee objects and the court finds that there is an actual conflict of interest.

Section 1107 of the Code gives a debtor in possession the rights and powers of a trustee, which includes the right, with court approval, to retain professionals. Therefore, courts apply § 327 (including the "disinterested" requirement, etc.) to the employment of professionals by a debtor in possession. There is one provision in § 1107(b), however, that applies only to debtors in possession, and not to trustees. That section provides that "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."

There are a few exceptions to these eligibility requirements

applicable to professionals employed by a trustee or debtor in possession:

(a) Regularly employed professionals. Section 327(b) permits a trustee or debtor in possession who is operating a business that has "regularly employed" professionals on salary to retain or replace such professionals if necessary in the operation of the business. No court approval is needed and the professional need not be "disinterested."

(b) Special Purpose Attorneys. Section 327(e) allows a trustee or debtor in possession, with court approval, to employ an attorney for a "specified special purpose" if the attorney has represented the debtor and if the 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." For example, if the debtor is a plaintiff in a pending antitrust lawsuit when the bankruptcy petition is filed, the debtor in possession may seek to employ its antitrust counsel under § 327(e). Attorneys employed for a special purpose do not have to be "disinterested."

The word "disinterested" is defined in § 101(14) to mean a person that:

> (A) is not a creditor, an equity security holder, or an insider;

(B) is not and was not an investment banker for any outstanding security of the debtor;

(C) has not been, within three years before the date of the filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;

(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 or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and

(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 an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason.

You will notice the similarity or overlap of the first prong of § 327(a)'s eligibility requirement (i.e., "not hold or represent an interest adverse to the estate") and the last prong of the "disinterested" definition (i.e., "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"). One court of appeals has commented that "the twin requirements of disinterestedness and lack of adversity telescope into a single hallmark." *In re Martin*, 817 F.2d 175, 180 (1st Cir. 1987).

The application of the "adverse interest" requirement found in § 327(a) and in the definition of "disinterested" has been the subject of litigation. One issue on which courts have disagreed is whether a mere potential conflict of interest, rather than an actual conflict, is sufficient to cause an attorney to have an

interest adverse to the estate. A few courts have held or implied that only "actual" conflicts will disqualify the attorney. See, e.g., *In re Stamford Color Photo, Inc.*, 98 B.R. 135, 137-38 (Bankr. D. Conn. 1989). But the majority view has been that "potential" conflicts also disqualify a professional. See, e.g., *In re Codesco, Inc.*, 18 B.R. 997, 999 (Bankr. S.D.N.Y. 1982) ("There should be no opportunity for the exercise of conflicting interests..."). Other courts, such as the bankruptcy court in *In re Kendavis Indus., Inc.*, 91 B.R. 742, 755-56 (Bankr. N.D. Tex. 1988), have criticized the distinction between actual and potential conflicts. The district court in *TWI International, Inc. v. Vanguard Oil & Service Co.*, 162 B.R. 672, 675 (S.D.N.Y. 1994), concluded that an attorney is disqualified when an actual conflict is present, but not a mere hypothetical or theoretical conflict. The court also indicated that a potential conflict could result in disqualification, and that the appropriate test is whether there is a "potential actual conflict." *Id.*

Courts that have rejected the "potential v. actual" conflict analysis, as well as any other bright line test, have focused on the particular facts of each case to determine whether the professional has any incentive to act contrary to the best interest of the estate. "In other words, if it is plausible that the representation of another interest may cause the debtor's attorneys to act any differently than they would without that other representation, then they have a conflict and an interest

adverse to the estate." *In re Leslie Fay Companies, Inc.*, 175 B.R. 525, 533 (Bankr. S.D.N.Y. 1994). In any event, bankruptcy courts have broad discretion with respect to "adverse interest" issues. See, e.g., *In re Interwest Business Equipment, Ltd.*, 23 F.3d 311, 315 (10th Cir. 1994).

Courts also have been divided on how strictly to apply the other aspects of the "disinterested" definition. For example, if an attorney is a "creditor" of the debtor, he or she is not disinterested and, therefore, may not be employed by the trustee. Nonetheless, several courts have not applied this definition literally. In *In re Martin*, 817 F.2d 175 (1st Cir. 1987), the court of appeals construed "disinterested" to permit lawyers who were creditors due to the rendering of prepetition services to be retained as counsel to a debtor in possession.

> "At first blush, this statute [Section 327(a)] would seem to foreclose the employment of an attorney who is in any respect a 'creditor.' But, such a literalistic reading defies common sense and must be discarded as grossly overbroad. 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. It stands to reason that the statutory mosaic must, at the least, be read to exclude as a 'creditor' a lawyer, not previously owed back fees or other indebtedness, who is authorized by the court to represent a debtor in connection with reorganization proceedings--notwithstanding that the lawyer will almost instantaneously become a creditor of the estate with regard to the charges endemic to current and future representation."

817 F.2d at 180. See also, e.g., *In re Carter*, 116 B.R. 123 (ED Wis. 1990) (despite the Code, mere fact that attorney is a

creditor does not render attorney "interested" so as to preclude representation of debtor; lists twelve factors to be considered; attorney was "disinterested" despite taking security interest five hours prior to filing petition); *In re Viking Ranches, Inc.*, 89 B.R. 113, 115 (CD Cal. 1988) (accounting firm was not disqualified for employment as professional even though debtor owed the firm $21,000 in prepetition fees).

In contrast, most other courts addressing this issue have held that the requirement that a professional be "disinterested" is unambiguous, that it must be applied literally, and that a bankruptcy court has no discretion to ignore that requirement based on equitable principles. See, e.g., *In re Federated Dept. Stores, Inc.*, 44 F.3d 1310, 1318 (6th Cir. 1995); *U.S. Trustee v. Price Waterhouse*, 19 F.3d 138, 141 (3rd Cir. 1994); *In re Eagle-Picher Indus., Inc.*, 999 F.2d 969, 972 (6th Cir. 1993); *In re Middleton Arms Ltd. Partnership*, 934 F.2d 723, 725 (6th Cir. 1991). I believe that these controversial cases -- which render a professional ineligible for employment by a debtor in possession merely because of an outstanding bill for prepetition services -- have caused the National Bankruptcy Review Commission to consider recommending that the Code be amended to delete the disinterestedness requirement for professionals employed by a debtor in possession.

(3) Employment by a Chapter 11 Committee.

Section 1103 of the Code permits a chapter 11 committee of creditors or equity security holders, with court approval, to

employ professionals to perform services for the committee. There are two provisions in § 1103(b) regarding eligibility: (a) the professional, while employed by the committee, may not represent any other entity having an adverse interest in connection with the case; and (b) representation of one or more creditors of the same class as represented by the committee does not per se constitute the representation of an adverse interest. There is no requirement that the professional be "disinterested."

Section 1114, added to the Code in 1988, provides for the appointment of committees of retired employees in chapter 11 cases. Section 1114(b)(2) gives such committees the powers of a committee of creditors, including the power to employ professionals with court approval. Therefore, the provisions of § 1103 relating to professionals apply with respect to committees of retired employees.

(4) Compensation of Professionals.

It is beyond the scope of this memorandum to discuss the Code's provisions regarding compensation of professionals. However, one provision relating to fees is related to eligibility for employment. Section 328(c) provides that

> (c) Except as provided in section 327(c), 327(e), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."

Section 328(c) has been applied retrospectively to deny or

reduce compensation to attorneys who were employed with court approval and who had rendered services to the estate, but who were later found to have had a conflict of interest. See, e.g., *In re Rusty Jones, Inc.*, 134 B.R. 321 (Bankr. N.D. Ill. 1991).

Applicable Bankruptcy Rules

(1) Rule 2014. Employment of Professional Persons.

Bankruptcy Rule 2014 is a "one-size-fits-all" rule that governs all applications for court approval of the employment of professionals -- regardless of whether the professional will be a debtor in possession's bankruptcy attorney, appraiser or accountant (which requires disinterestedness), or its products liability trial counsel employed for a "special purpose" (which does not require disinterestedness). Rule 2014 applies to professionals retained by a trustee, debtor in possession, or committee.

Rule 2014(a) provides, in part and with emphasis added, as follows:

> "An order approving the employment of attorneys, . . . or other professionals . . . shall be made only on application . . . . 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."

The purpose of the rule is to provide the court, and the United States trustee, with the information necessary to determine whether the professional is eligible for employment under the Code, and "whether the professional's employment meets the broad test of being in the best interest of the estate." 9 COLLIER ON BANKRUPTCY ¶ 2014.03 (15th ed. rev. 1996).

Rule 2014 has been construed broadly so as to put the burden on the attorney being retained to reveal all facts ("connections" with the debtor and others listed in the rule) that may indicate an actual or potential conflict of interest, even if the attorney believes that the facts do not disqualify him or her from being employed. One district court had expressed its interpretation of the rule as follows:

> "All facts that may be relevant to a determination of whether an attorney is disinterested or holds or represents an interest adverse to the debtor's estate must be disclosed to the court. [citations omitted]. The duty to disclose is so broad because the court rather than the attorney must decide whether the facts constitute an impermissible conflict of interest."

Diamond Lumber v. Unsecured Creditors' Committee, 88 B.R. 773, 777 (N.D. Tex. 1988). Accord, *In re Rusty Jones, Inc.*, 134 B.R. 321, 345 (Bankr. N.D.Ill. 1991).

In *In re Leslie Fay Companies, Inc.*, 175 B.R. 525, 536 (Bankr. S.D.N.Y. 1994), the court emphasized the broad nature of the disclosure requirement:

> "As I have explained, the requirements of [Rule 2014] are more-encompassing than those governing the disinterestedness inquiry under section 327. For while retention under section 327 is only limited by interests that are 'materially adverse,' under Rule 2014, 'all connections' that are not so remote as to be *de minimis* must be disclosed. Consequently,

> there is 'no merit to the ... argument that [a party] did not have to disclose its connections ... because its attorneys did not feel that a conflict existed.' [citation omitted]. [Attorneys in this case] had no right to 'make a unilateral determination regarding the relevance of a connection.' [citation omitted]

Most recently, the Ninth Circuit BAP wrote in *In re Mehdipour*, 202 B.R. 474, 480 (9th Cir. BAP 1996), that:

> "Professionals must disclose all connections with the debtor, creditors and parties in interest, no matter how irrelevant or trivial those connections may seem.... The disclosure rules are not discretionary.... The duty to disclose is not vitiated by negligence or inadvertent omissions.... A court may sanction a professional for disclosure violations regardless of actual harm to the estate."

Rule 2014 has been criticized for being too broad and ambiguous regarding the obligation to disclose. What is a "connection?" It has been suggested that the rule should give more definite guidance to professionals who, in good faith, attempt to comply with disclosure requirements. Rule 2014 also has been criticized for being virtually impossible to satisfy, especially in large cases and for large firms. It has been suggested that it is not realistic to expect even a medium size firm to learn about, and to disclose, every "connection" with every creditor (no matter how small the amount owed), every shareholder (regardless of the number of shares owned), every "party in interest," their respective attorneys and accountants (how does the professional know who the attorneys and accountants are?), the U.S. trustee, and even persons that work in the U.S. trustee's office (including secretaries?). These types of concerns have been the subject of discussion by the National

Bankruptcy Review Commission, and caused the American Bar Association to adopt a resolution in 1991 calling for more specificity in Rule 2014 (an ABA report commented that "[n]o guidance is given as to the nature of the required disclosures or the test to be applied"). These concerns were heightened and more widely discussed after the *Leslie Fay* decision in 1994. In March of 1995, the Subcommittee on Rule 2014 was formed, chaired by Gerry Smith, to consider possible revisions to the rule.

Other Rule Provisions Relating to Eligibility to Act as a Professional

There are several other provisions contained in the Rules that relate to the employment of professionals.

(a) Rule 2014(b) and Related Definitions Relating to Firms.

Rule 2014(b) provides:

> (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.

Rule 9001(9) defines "regular associate" to mean "any attorney regularly employed by, associated with, or counsel to an individual or firm." Rule 9001(6) provides that the word "firm" includes a "partnership or professional corporation of attorneys or accountants."

(b) Rule 5002. Restrictions on Approval of Appointments.

This rule contains restrictions relating to the approval of certain appointments and of the employment of professionals based

on relationships with the bankruptcy judge or the United States trustee. In particular, Rule 5002(a) provides, in part, that:

> "The employment of an individual as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 shall not be approved by the court if the individual is a relative of the bankruptcy judge approving the employment. The employment of an individual as attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 may be approved by the court if the individual is a relative of the United States trustee in the region in which the case is pending, unless the court finds that the relationship with the United States trustee renders the employment improper under the circumstances of the case. Whenever under this subdivision an individual may not be approved for appointment or employment, the individual's firm, partnership, corporation, or any other form of business association or relationship, and all members, associates and professional employees thereof also may not be approved for appointment or employment."

In addition, Rule 5002(b) provides, in part, that:

> "A bankruptcy judge may not approve ... the employment of a person as an attorney, accountant, appraiser, auctioneer, or other professional person pursuant to §§ 327, 1103, or 1114 of the Code if that person is or has been so connected with such judge or the United States trustee as to render the appointment or employment improper."

(c) Rule 6005. Appraisers and Auctioneers.

Finally, Rule 6005 contains the following provision, which is applicable only to the employment of appraisers and auctioneers: "No officer or employee of the Judicial Branch of the United States or the United States Department of Justice shall be eligible to act as appraiser or auctioneer. No residence or licensing requirement shall disqualify an appraiser or auctioneer from employment."

Agenda Item 10

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

DATE: FEBRUARY 7, 1997

RE: ADJUSTMENT OF DOLLAR AMOUNTS IN THE RULES

In his letter of December 19, 1996, Henry Sommer suggested that the Advisory Committee consider increasing dollar amounts contained in the Rules. In particular, Henry suggests that Rule 2002(a)(6), which requires notice to all creditors of every hearing on a fee application or request for reimbursement of expenses for more than $500. As Henry pointed out, this $500 amount has not been changed since 1987 (when it was increased from $100). Henry suggests that the Committee start the process of reviewing all dollar amounts to determine whether others should be increased as well. Henry also suggests that the Committee consider putting in "automatic dollar adjustments" in the Rules, similar to those place in § 104 of the Code in 1994. A copy of Henry's letter is attached.

To assist the Committee in discussing Henry's suggestions, I searched the Rules to detect every specific dollar amount and discovered that there are only eight. The following is a list of each rule number that contains a dollar amount, a summary of the applicable provision, and the history regarding the amount.

(1) Rule 2002(a)(6) - Requires 20 days' notice to the debtor, the trustee, all creditors and indenture trustees of hearings on all applications for compensation or reimbursement of expenses totaling in excess of $500. This amount was changed from $100 to $500 in 1987.

(2) Rule 2002(f)(8) - Requires that a summary of the trustee's final report in a chapter 7 case be mailed to the debtor and to all creditors and indenture trustees if the net proceeds realized exceed $1,500. The amount was last changed from $250 to $1,500 in 1991.

(3) Rule 2003(g) - If the U.S. trustee calls a final meeting of creditors in a case in which the net proceeds realized exceed $1,500, the clerk shall mail a summary of the trustee's final account to the creditors with a notice of the meeting, together with a statement of the amount of the claims allowed. The amount was last changed from $250 to $1,500 in 1991 to conform to the amendment to Rule 2002(f)(8).

(4) Rule 2006(c)(1)(C)(iii) - In a chapter 7 liquidation case, a proxy may be solicited for voting purposes only by certain entities, including a committee of creditors selected by a majority in number and amount of claims of creditors who were present or represented at a meeting of which all creditors having claims of over $500 or the 100 creditors having the largest claims had at least 5 days notice (and certain other requirements are met). This $500 amount has been in the Rule since it was promulgated in 1983, and also was in the former Bankruptcy Rule promulgated in 1973 (Rule 208) from which this provision derives.

(5) Rule 2007(b)(1) - The court may find that a committee of unsecured creditors organized prepetition was "fairly chosen" if, among other requirements, it was selected at a

meeting of which all creditors having unsecured claims of over $1,000 or the 100 largest unsecured creditors had at least five days' notice. The $1,000 amount has not changed since the original promulgation of the rule in 1983; there was no similar provision in the former Rules.

(6) Rule 3010(a) - In chapter 7 cases, no dividend in an amount of less than $5 shall be distributed unless authorized by local rule or court order; these funds shall be treated in the same manner as unclaimed funds. This $5 amount has not changed since the rule's original promulgation in 1983, but its predecessor (former Rule 309) set the amount at $1.

(7) Rule 3010(b) - In a chapter 12 or chapter 13 case, distributions of less than $15 shall not be made unless authorized by local rule or court order; these funds shall accumulate and be distributed when the aggregate reaches $15, remaining funds to be distributed with the final payment. This $15 amount has been in the Rule since it was promulgated in 1983, and also was in the former Bankruptcy Rule promulgated in 1975 (Rule 13-309(b)(2)) from which this provision derives.

(8) Rule 6004(d) - When the nonexempt property of the estate has a gross value of less than $2,500, it is sufficient to give all creditors, committees, the U.S. trustee, and others as the court may direct, only a "general" notice of intent to sell such property out of the ordinary course of business (more detailed notice specifying the time and place of each

sale is not required). The $2,500 amount has not changed since the rule was promulgated in 1983; there was no similar provision in the former Rules.

Automatic Adjustment of Dollar Amounts in the Code

As Henry points out, the Code was amended in 1994 to add a provision that will result in automatic inflation adjustments to a number of statutory dollar amounts every three years. In particular, the new § 104(b) provides as follows:

> (b)(1) On April 1, 1998, and at each 3-year interval ending on April 1 thereafter, each dollar amount in effect under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) immediately before such April 1 shall be adjusted--
>
> (A) to reflect the change in the Consumer Price Index for All Urban Consumers, published by the Department of Labor, for the most recent 3-year period ending immediately before January 1 preceding such April 1, and
>
> (B) to round to the nearest $25 the dollar amount that represents such change.
>
> (2) Not later than March 1, 1998, and at each 3-year interval ending on March 1 thereafter, the Judicial Conference of the United States shall publish in the Federal Register the dollar amounts that will become effective on such April 1 under sections 109(e), 303(b), 507(a), 522(d), and 523(a)(2)(C) of this title.
>
> (3) Adjustments made in accordance with paragraph (1) shall not apply with respect to cases commenced before the date of such adjustments.

It is interesting to note that there are dollar amounts in the Code that are not subject to this automatic inflation adjustment. For example, the monetary limits in the § 101 definitions of "small business" ($2 million) and "single asset real estate" ($ 4 million), as well as the monetary amount in §

1104(c) relating to the appointment of an examiner ($5 million), are not subject to § 104(b)'s automatic adjustments.

Although I agree with Henry that the Advisory Committee should periodically (including now) review the eight dollar amounts in the rules, I do not favor the type of automatic adjustments found in § 104. I prefer the periodic review by the Advisory Committee focusing on the policy of the particular rule. For example, if the policy behind the $5 and $15 amounts found in Rule 3010 is to avoid undue expense in making very small distributions, it is possible that technological advancements may make such small distributions easier and less expensive. Inflation adjusted numbers also may be more confusing. I personally do not look forward to the inflation adjustments (rounded to the nearest $25) in the Code every three years. Rounded numbers ($500, $1000, $2,500, etc.) are easier for lawyers and judges to remember than inflation adjusted numbers changed every three years and rounded to the nearest $25 ($675, $1,125, and $2,650).

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December 19, 1996

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

Re: Suggested rules amendments

Dear Alan:

You may recall that at a few months ago I raised the question with you about whether there had been amendments to the dollar amounts in the rules, suggesting that they might be appropriate since Congress has recently raised dollar amounts in the Code. I was particularly interested in Rule 2002(a)(6), which requires notice to all creditors of every hearing on an application for compensation or expenses in excess of $500. The rule has been interpreted in some places as requiring notice to all creditors of every application in excess of $500, adding a considerable burden in routine consumer cases where approval of a larger fee as a "base fee" for a consumer case is never contested.

It appears that this amount was last changed in 1987 and, if we started immediately, could not be changed under our processes until about the year 2000. I would like to discuss at our next meeting whether we should start the process, not only for this dollar amount but also for others in the rules. I would also like to discuss whether Rule 2002(a)(6) should be clarified about whether notice of every application is intended to be required, and whether we might be able to put in automatic inflation adjustments similar to those now in Code section 104.

I hope you and your family are enjoying the holidays, and look forward to seeing you in Tucson.

Very truly yours,

Henry J. Sommer

cc: Hon. Adrian G. Duplantier

Agenda Item 11

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: STYLE REVISIONS TO PROPOSED AMENDMENTS PREVIOUSLY APPROVED BY THE ADVISORY COMMITTEE

DATE: FEBRUARY 1, 1997

At meetings held in September 1995, March 1996, and September 1996, the Advisory Committee approved (subject to review by its Style Subcommittee) proposed amendments to 14 Bankruptcy Rules. The Standing Committee's Style Subcommittee, including its style consultant, Bryan Garner, reviewed drafts of these proposed amendments and sent the Advisory Committee suggestions for stylistic improvements. The Advisory Committee's Style Subcommittee ("Style Subcommittee") then reviewed the proposed amendments and the suggestions received from the Standing Committee's Style Subcommittee, and met for nearly three hours by telephone conference on January 16, 1997, to finalize the proposed amendments. It is expected that these proposed amendments, as revised by the Style Subcommittee, will be presented to the Standing Committee at its June 1997 meeting with a request for publication for public comment.

There are several "global changes" that the Style Subcommittee made to this package of proposed amendments:

(1) The word "under" is used instead of "pursuant to" when referring to a Code section or another rule. This change is consistent with Bryan Garner's "Guidelines for Drafting and Editing Court Rules" ("Guidelines") and the stylistic changes being made in other bodies of federal rules.

(2) The phrase "no later than" is used instead of "not later than." This change is consistent with the Guidelines and changes in other bodies of federal rules.

(3) The word "following" when used in connection with a time period (for example, "30 days following the meeting of creditors..."), is changed to "after" ("30 days after the meeting of creditors). Similarly, the words "prior to" have been changed to "before." These changes are consistent with the Guidelines and changes in other bodies of federal rules.

(4) Consistent with a style policy adopted by the Advisory Committee in the 1980's, the phrase "of the Code" after a Code section is used only the first time that a Code section appears in a rule. It is deleted in all other places.

(5) Rules 3020, 4001, 6004, and 6006 are being amended to impose a 10-day stay with respect to certain court orders. These new 10-day stay provisions are related to the amendments to Rule 7062 and 9014 which, in essence, make Civil Rule 62 inapplicable to orders in contested matters. To achieve uniformity among these provisions and to make them easier to read, the Style Subcommittee revised them so that they all stay the relevant court order, rather than particular conduct of a party (i.e., assigning an executory contract).

The Style Subcommittee did not make any stylistic changes to Rule 9014. The only substantive change is the deletion of "7062." Since Rule 9014 is likely to be totally revised when the work of the Litigation Subcommittee is completed, the Style Subcommittee thinks that any style changes should be made in connection with the complete revision.

The following text of the proposed amendments and committee notes includes the stylistic changes made by the Advisory Committee's Style Subcommittee.

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 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 under § 707(a)(2) or § 1307(c)(2).

(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 motion to dismiss a voluntary chapter 7 case or a chapter 13 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) or § 1307(c)(9) 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 is for the purpose of avoiding the expense of sending notices of the motion to all creditors.

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 a contested matter 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(e) 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;

* * * * *

(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), or § 1307(c)(9) ~~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) or §1307(c)(9), 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 suspension of proceedings in a case under § 305 of the Code.

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

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(e) STAY OF CONFIRMATION ORDER. An order confirming a plan shall be 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 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 the implementation of a confirmed 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

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(3) STAY OF ORDER. An order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1) shall be 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 enforcement and implementation 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.

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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.

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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

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(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 shall be 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 ~~and~~ Unexpired ~~Leases~~ Lease

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(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. An order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) shall be 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 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.

Agenda Item 12

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: REPORT OF THE LITIGATION SUBCOMMITTEE: RULES 9013, 9014, 1006, 1007, AND 7001

DATE: FEBRUARY 10, 1997

At the Advisory Committee meeting in September, the Litigation Subcommittee presented preliminary drafts of proposed amendments to Rules 9013 and 9014 that would substantially change litigation practice in bankruptcy courts. After a lengthy discussion, the Advisory Committee asked the Litigation Subcommittee to continue its work in this area.

Based on the Advisory Committee's discussion in September, and an informal lunch meeting attended by most of the members of the Litigation Subcommittee in Washington in October, I revised the preliminary drafts of Rules 9013 and 9014 and circulated them to the Litigation Subcommittee in November. Since then, the Subcommittee met in Tucson, Arizona on January 8th, and again by telephone conference on February 5th. As a result of these meetings, further revisions were made to Rules 9013 and 9014, and related proposed amendments to Rules 1006, 1007, and 7001 were approved for consideration by the full Advisory Committee at the March meeting.

The Litigation Subcommittee's revised drafts of proposed amendments to Rules 9013, 9014, 1006, 1007, and 7001 are enclosed. Since the drafts of Rules 9013 and 9014 are intended to replace the existing rules entirely, I did not underline the text of the new language and show deletions with strikeouts (as I

usually do when presenting proposed amendments to existing rules). However, because the proposed amendments to Rules 1006, 1007, and 7001 do not affect most of the existing language, I do show new language by underlining and deleted language by strikeouts so that you can see the changes proposed.

The enclosed drafts differ significantly from those presented to you in September. Almost every subdivision of Rule 9013 and Rule 9014 -- as well as some basic concepts (such as the purpose of the hearing in Rule 9014 proceedings) -- have been changed.

You will notice that certain language is in brackets. These brackets are intended to highlight issues on which the Subcommittee is divided, or for some other reason. In particular, brackets were placed in the following areas:

Rule 9013:

* Line 29 (procedures relating to Rule 2004 examinations are being considered by a different subcommittee and it is premature to decide whether Rule 9013 should govern requests for these examinations)

* Line 32 (should Rule 9013 govern orders to close a case?)

Rule 9014:

* Lines 39 and 111 (should a memorandum of law be required?)

* Lines 82-83 (language will be included if the new official form for a notice of hearing is approved)

* Lines 222-227 (should the rule require appearance at the status conference?)

* Lines 237 and 239 (should relief from stay be included in this category?)

* Line 244 (should it be mandatory that the trial be held at the time scheduled for the hearing in these matters?)

* Lines 252-255 (should Rule 9014 remind parties to send copies to the U.S. trustee, or is Rule 9034 sufficient?)

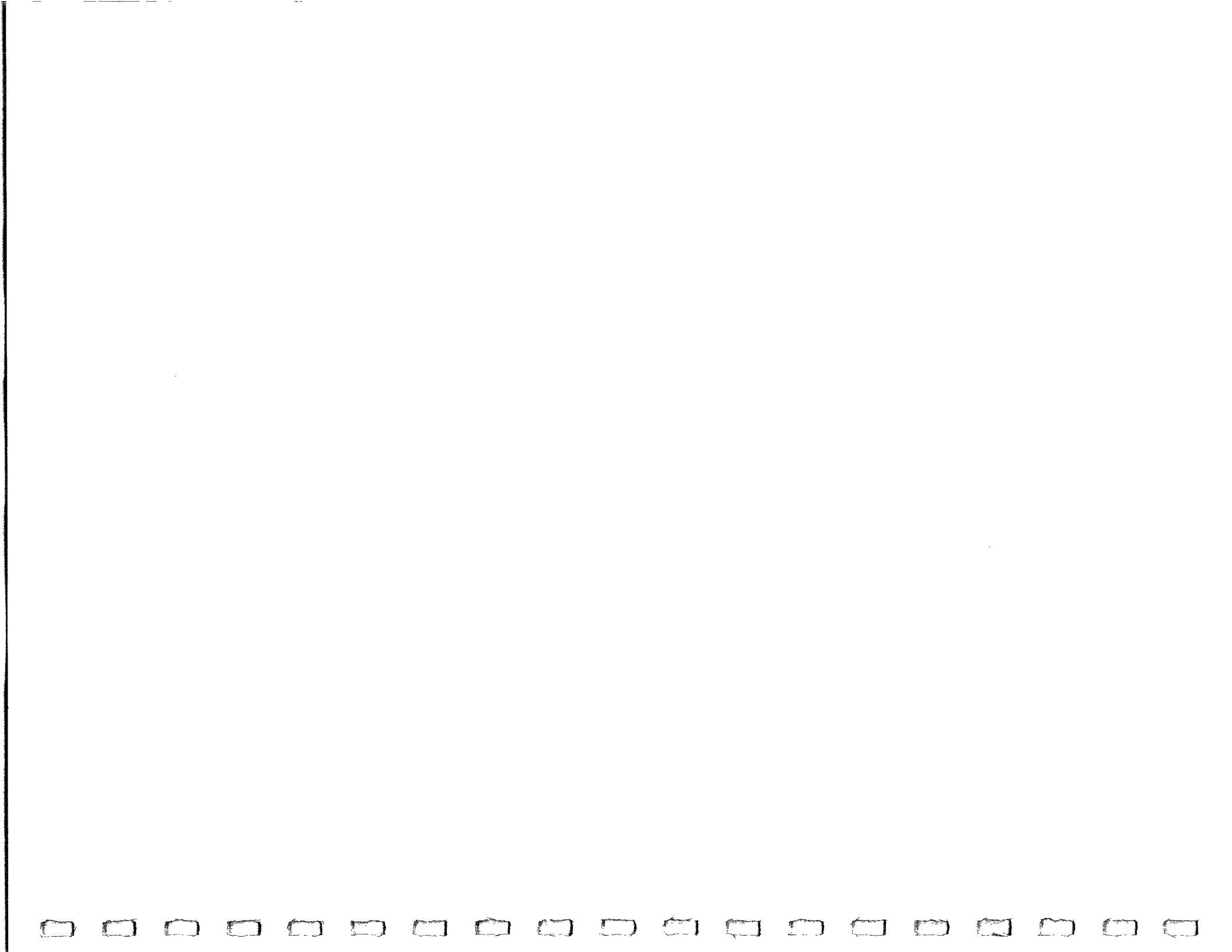
* Lines 263-267 (should this safety-valve be included to assure flexibility? Does the court have this power anyway? Is this an invitation for local variation?)

Rule 1006:

* Lines 20-21 (this is not within the scope of the subcommittee's work, but it suggests that the Advisory Committee consider adding reference to "bankruptcy petition preparer" as a substantive change. This change would require further amendment to the Official Form 3. If this is deleted, the last paragraph of the comment must be deleted also).

Rule 7001:

* Line 23 (should an injunction be in a confirmation order if it is not in the plan?)



Rule 9013. Application for an Order

(a) SCOPE OF THIS RULE. This rule applies to a request for an order relating to any of the following matters:

(1) payment of income to the trustee under § 1225(c) or 1325(c);

(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 employment of a professional person under § 327, 1103, or 1114, and in accordance with Rule 2014;

(6) service of process by first-class mail on an insured depository institution under Rule 7004(h)(2);

(7) approval of the appointment of an examiner or trustee in a chapter 11 case under § 1104 and in accordance with Rule 2007.1;

(8) enlargement of time under Rule 9006(b) made before the expiration of the period originally prescribed or as extended by a previous order, other than the enlargement of time for taking action under Rules 1007(c), 1017(e), 3015(a), 4003(b), 4004(a), 4007(c), 8002, or 9033;

(9) the form of, manner of sending, or publication of a notice in a chapter 7, chapter 12, or chapter 13 case;

(10) notice under Rule 9020(b);

[(11) the examination of an entity under Rule 2004;]

(12) deferral of the entry of an order granting a discharge under Rule 4004(c);

[(13) closing a case under § 350(a);] and

(14) reopening a case under § 350(b);

(b) REQUEST FOR RELIEF. A request for an order under this rule shall be by application. The application shall be in writing, unless made orally at a status conference under § 105(d), or at a hearing, at which all parties entitled to notice of the application are present. The application shall:

(1) state with particularity the relief or order sought and the grounds for that relief or order; and

(2) if the application is in writing, be accompanied by proof of compliance with subdivision (c) of this rule, and by a proposed order for the relief requested.

(c) NOTICE. Not 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. Notice shall be served 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 if consistent with technical standards, if any, established by the Judicial Conference of the United States.

(d) NO RESPONSE; RELIEF WITHOUT A HEARING. No response to the application is required, and relief may be granted without a hearing.

(e) ORDER. A copy of any order entered shall be served in accordance with Rule 9022 on the applicant, the entities listed in Rule 9013(c), and any other entity as 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.

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 for the enlargement of a time period under these rules is noncontroversial and may be made under Rule 9013. But the enlargement of time for taking 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 for filing 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

(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 of the Code;

(2) a proceeding or request for relief of the type described in Rule 1006(b), 1006(c), 1007(c), 1010, 1011, 1013, 1018, 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 the resolution of, a pending administrative proceeding, except as provided in Rule 9014(f) relating to the reduction of time and Rule 9014(i) relating to discovery;

(5) a motion relating to an appeal to the district court or bankruptcy appellate panel.

(b) REQUEST FOR RELIEF. A request for an order governed by this rule shall be made by motion designated "administrative motion." The administrative motion shall:

(1) be in writing, unless the request is made orally

at a status conference held under § 105(d), or at a hearing, at which all parties entitled to notice of the administrative motion are present;

(2) state with particularity the relief or order sought and the grounds for that relief or order;

(3) be accompanied by proof of service, unless the administrative motion is made orally;

(4) be accompanied by a proposed order for the relief requested, unless the administrative motion is made orally;

(5) unless the administrative motion is made orally or the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits;

[(B) a memorandum of law;]

(C) a statement of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the movant at any trial on the administrative motion, and a summary of the testimony that the person is likely to give; and

(D) if the value of property is at issue, a valuation report has been prepared, and the movant intends to introduce the valuation report as evidence, a copy of the valuation

report, and the name, address, and telephone number of the person who prepared the report.

(c) SERVICE OF AN ADMINISTRATIVE MOTION AND NOTICE OF HEARING.

(1) Unless the application is made orally, and except as provided in Rule 9014(f), at least 25 days before the hearing date, the movant shall serve a copy of the administrative motion, a copy of any paper filed with the administrative motion, and notice of the hearing on the following:

(A) any entity against whom relief is sought;

(B) any entity that has a lien or other interest in property that is the subject of the administrative motion;

(C) the debtor;

(D) the debtor's attorney;

(E) the trustee; and

(F) 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).

(2) Service shall comply with the provisions of Rule 7004 for the service of a summons, except that the court by local rule may permit service by electronic means if consistent with technical standards, if any, established by the Judicial Conference of the United States.

(3) The notice of the hearing shall [conform to the appropriate Official Form and] include:

(a) the date, time, and place of the hearing;

(b) the time for filing a response; and

(c) a statement that unless a response opposing the administrative motion is timely filed, the court may grant the administrative motion without a hearing.

(d) RESPONSE.

(1) A response to an administrative motion may be filed not later than 10 days before the hearing date.

(2) Not 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).

(3) Service of the response shall comply with Rule 7004, except that the court by local rule may permit service by electronic means, provided such means are consistent with technical standards, if

any, established by the Judicial Conference of the United States.

(4) Every 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) if there is a factual dispute, one or more supporting affidavits;

[(C) a memorandum of law;]

(D) a statement of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the respondent at any trial on the administrative motion, and a summary of the testimony that the person is likely to give; and

(E) if the value of property is at issue, a valuation report has been prepared, and the respondent intends to introduce the valuation report as evidence, a copy of the valuation report and the name, address, and telephone number of the person who prepared the valuation report.

(e) AFFIDAVITS. An affidavit filed in an administrative proceeding shall be made on personal knowledge, shall

set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

(f) REDUCTION OF NOTICE PERIOD. The court, for cause, may reduce any time period provided in Rule 9014(c)(1) or (d)(1). A motion to reduce time may not be heard unless the movant has attempted to confer with opposing parties to agree on the reduced time period. Rule 9014(b)-(f), (h), and [(k)-(n)] [(k)-(o)] applies to a motion to reduce time, except that the movant shall serve and give notice of the motion in accordance with Rule 9014(c)(1) at least 2 days before a hearing on the motion to reduce time, and a response may be filed at any time before a hearing on the motion to reduce time. The motion to reduce time shall be a separate motion, but it shall be served together with a copy of the related administrative motion. The movant shall take all reasonable steps to provide all parties with the most expeditious service and notice feasible and shall file an affidavit specifying the efforts made. If a response is filed, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice feasible. The court may reduce the

time as is reasonable under the circumstances or may issue any other appropriate order, with or without a hearing, except as provided in Rule 4001(b)(2) and (c)(2).

(g) 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 obtained under Rule 4001(b)(2) or Rule 4001(c)(2) to the extent and under the conditions stated in those rules.

(h) DECISION WITHOUT A HEARING. If no response is timely filed, the court shall resolve the administrative proceeding without a hearing, unless the court gives notice to the movant, and to any other entity as the court determines, that a hearing will be held. The court may order relief without a hearing to the extent provided in § 102(1) of the Code.

(i) DISCOVERY.

(1) Unless the court directs otherwise, Rules 26 and 28-37 F.R.Civ.P. apply, except that:

(A) 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.;

(B) the parties are not required to meet in accordance with Rule 26(f) F.R.Civ.P.;

(C) the 30-day 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 in a pretrial order; and

(D) the movant may begin discovery only after a response is filed or after a respondent begins discovery. A respondent may begin discovery at any time.

(2) A motion relating to contested discovery may not be heard unless the entity requesting judicial resolution of the discovery dispute has attempted to confer with each party to the discovery dispute to resolve their differences, and has filed a statement setting forth the matters that they have

not yet resolved.

(j) HEARING; STATUS CONFERENCE; TRIAL.

(1) HEARING. Except as provided in Rule 9014(j)(3), if a timely response is filed, a hearing shall be held 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 shall be taken at the hearing, unless the movant and all respondents consent otherwise. If the court finds that there is no genuine issue as to any material fact, the court shall order appropriate relief. If the court finds that there is a genuine issue of material fact, the court shall conduct a status conference.

(2) STATUS CONFERENCE. A status conference under Rule 9014(j)(1) may be held at the time fixed for the hearing or immediately after the hearing, and without further notice to the parties. [The attorneys for the movant and any party against whom relief is sought that filed a timely response, or, if unrepresented by an attorney, any such party, 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 disclosure of information of the type described in Rule 26(a)(1)-(3) F.R.Civ.P., fixing a schedule for pretrial discovery, fixing the time for a trial on factual issues, and including any other provisions to facilitate 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 the administrative motion [requests relief under § 362(d) or] includes a request for a preliminary hearing as provided in Rule 4001(b)(2) or (c)(2), and a trial is required to resolve genuine issues of material fact, a trial at which witnesses may testify [may] [shall] be held at the time fixed for the hearing.

(k) TESTIMONY OF WITNESSES. Rule 43(e) F.R.Civ.P. shall not apply in administrative proceedings.

(l) SERVICE OF ORDER. A copy of any order entered 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.

[(m) 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.]

(n) APPLICATION OF PART VII RULES. Unless the court orders otherwise, the following rules apply in an administrative proceeding: Rules 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 shall apply.

[(o) RELIEF FROM PROCEDURAL REQUIREMENTS. The court for cause may, with or without notice, order that any procedural requirement provided in this rule shall not apply or shall be amended in a particular proceeding based on the necessity for expeditious relief.]

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 proceedings that are not applications (governed by Rule 9013), adversary proceedings (governed by Part VII), requests to pay the filing fee in installments (governed by Rule 1006(b)), or requests for extensions of time to file schedules and statements (governed by Rule 1007(c)). A motion

made in either a pending adversary proceeding or in a pending administrative proceeding -- such as a motion for summary judgment or a motion for a protective order relating to discovery -- are not administrative proceedings governed by this rule. Any motion made in connection with an appeal to the district court or bankruptcy appellate panel (governed by Part VIII of these rules) is excluded from the scope of Rule 9014. Subdivision (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 1014(a) provides that a case filed in a proper district may be transferred to another district in the interest of justice or for the convenience of the parties "on timely motion of a party in interest." A motion requesting transfer of the case under Rule 1014(a) 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 25 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 9014(f). 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.

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 (h) 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, unless the proceeding is for relief from the automatic stay or is for preliminary authority to use cash collateral or to obtain credit, attorneys and unrepresented parties do not have to bring witnesses to the hearing. Rather, if a response is filed, the court will hold a hearing only for purposes of determining whether a trial is necessary to resolve questions of fact and, if a trial is not necessary, to resolve the proceeding. If a trial is needed, the court will hold a status conference under Rule 9014(j)(2) to facilitate settlement discussions, set a discovery schedule, schedule a trial, 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 (j) 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 a trial 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(k), 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. 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.

Rule 1006 Filing Fee

(a) GENERAL REQUIREMENT. Every petition shall be accompanied by the filing fee except as provided in subdivision (b) or (c) of this rule. For the purpose 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.

(b) PAYMENT OF FILING FEE IN INSTALLMENTS.

(1) *Request* ~~*Application*~~ *for Permission to Pay Filing Fee in Installments*. 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 [or bankruptcy petition preparer] for services in connection with the case.

(2) *Action on* ~~*Application*~~ *Request*. Prior to the meeting of creditors, the court, with or

without notice or a hearing, may order the filing fee paid to the clerk or grant leave to pay 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 later than 120 days after filing the petition. For cause shown, the court may extend the time of any installment, provided the last installment is paid not later than 180 days after filing the petition.

(3) *Postponement of Attorney's Fees.* The filing fee must be paid in full before the debtor or chapter 13 trustee may pay an attorney 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, with or without notice or a hearing, may waive the fee.

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. As amended, this subdivision requires a similar statement regarding the payment of money or transfer of property to a bankruptcy petition preparer.]

Rule 1007. Lists, Schedules and Statements; Time Limits

* * * * *

(c) TIME LIMITS. 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 thereafter, except as otherwise provided in subdivisions (d), (e), and (h) of this rule. In an involuntary case 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. Schedules and statements filed prior to the conversion of a case to another chapter shall be deemed filed in the converted case unless the court directs otherwise. Any request 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 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.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding:

(1) to recover money or property, except 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) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d)~~,~~;

(3) to obtain approval under § 363(h) for the sale of both the interest of the estate and

of a co-owner in property~~,~~;

(4) to object to or revoke a discharge~~,~~;

(5) to revoke an order of confirmation of a chapter 11, chapter 12, or chapter 13 plan~~,~~;

(6) to determine the dischargeability of a debt~~,~~;

(7) to obtain an injunction or other equitable relief, except when the relief is provided in a plan [or an order confirming a plan] in a case under chapter 9, 11, 12, or 13;

(8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan~~,~~;

(9) to obtain a declaratory judgment relating to any of the foregoing~~,~~; or

(10) to determine a claim or cause of action removed 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 if the relief is included in a plan [or an order confirming a plan]. Other amendments are stylistic.

Agenda Item 13

Item 13 will be an oral report.

Agenda Item 14

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

December 30, 1996

MEMORANDUM TO PERSONS INTERESTED IN ELECTRONIC FILING

SUBJECT: Proposed Technical Standards for Electronic Filing in the Federal Courts

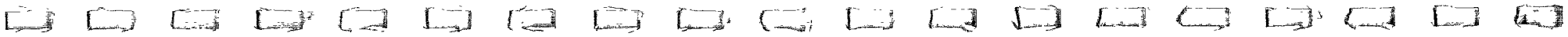
Effective December 1, 1996, the Federal Rules of Procedure (Fed. R. App. P. 25, Fed. R. Civ. P. 5, and Fed. R. Bankr. P. 5005) were amended to permit electronic filing in appellate, district, and bankruptcy courts under certain circumstances. The amendments permit federal courts to establish local rules to allow documents to be filed, signed, or verified by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States.

Attached are proposed technical standards for electronic filing in the federal courts. Comments and suggestions regarding these proposed standards are sought from the courts and from potential filers. It is anticipated that a final set of proposed technical standards will be presented for consideration by the Judicial Conference's Committee on Automation and Technology at its June 1997 meeting, and subsequently forwarded for consideration by the Judicial Conference at its September 1997 meeting. Courts choosing to implement electronic filing in advance of action by the Judicial Conference are asked to use these proposed technical standards as guidance to their efforts.

Any comments or suggestions you may have regarding the proposed technical standards may be mailed to: Electronic Filing Standards, Administrative Office of the U.S. Courts, OIT-TEO, Washington, DC 20544 (or via facsimile to 202/273-2459). We would appreciate receiving your comments on or before **February 14, 1997.**

Leonidas Ralph Mecham

Attachment



PROPOSED TECHNICAL STANDARDS FOR ELECTRONIC FILING IN THE UNITED STATES COURTS

Comments requested by February 14, 1997, to:

Electronic Filing Standards
Administrative Office of the U.S. Courts
OIT-TEO
Washington, DC 20544

Introduction

Effective December 1, 1996, the Federal Rules of Procedure (Fed. R. App. P. 25, Fed. R. Civ. P. 5, and Fed. R. Bankr. P. 5005) have been amended to permit electronic filing in appellate, district, and bankruptcy courts under certain circumstances. The amendments permit federal courts to establish local rules to allow documents to be filed, signed, or verified by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. The Committee Note on amended Civil Rule 5(e) indicates that national technical standards for electronic filing "can provide nationwide uniformity, enabling ready use of electronic filing without pausing to adjust for otherwise inevitable variations among local rules. ... Perhaps more important, standards must be established to assure proper maintenance and integrity of the record and to provide appropriate access and retrieval mechanisms."

This document contains proposed technical standards for electronic filing. Comments and suggestions regarding these proposed standards are being sought from the judiciary and potential filers, prior to submission for consideration and adoption by the Judicial Conference, probably at its September 1997 session.

Defining Technical Standards

Since 1988, the federal judiciary has been experimenting on a limited basis with electronic filing, and much has been learned regarding the feasibility and usability of a variety of electronic filing technologies and processes. While much progress has been made in the course of this experimentation, the technologies necessary to support electronic filing continue to evolve as the public and private sectors move to adopt and promote the use of electronic commerce. Similarly, a variety of procedural and operational issues which require further exploration have been

identified. As a result, any technical standards specified for electronic filing should be adopted with an expectation that technological change is inevitable and that the standards will necessarily have to evolve to reflect improvements in computer systems, software, telecommunications, and business processes and policies.

To accommodate the evolving nature of the technologies currently available to support electronic filing, the approach taken here is two-fold. Both technical *standards* and technical *guidelines* are provided:

- The proposed technical *standards* are intended as mandatory requirements which courts choosing to permit electronic filing must implement in order to comply with the amended rules. The technical standards proposed herein focus primarily on ensuring the "integrity of the record" and providing a capability for filing which is at least as good as existing paper systems.
- The proposed technical *guidelines*, on the other hand, are not intended to be mandatory requirements, but rather recommendations for experimental use subject to further evaluation. The guidelines may become candidates for future standards, if they are proven fully capable of meeting judiciary requirements. The technical guidelines proposed herein focus on promoting "nationwide uniformity" of electronic filing across the courts.

To provide a context within which decisions about the choice of electronic filing technical standards may be discussed, a Background Discussion appendix contains an overview of the electronic filing process and a description of the various technology alternatives that should be considered in supporting that filing process.

The Transition to Electronic Filing

Electronic filing is a major new initiative which will require new software and new telecommunications capabilities in the federal courts. There are currently several different approaches being tested through experimental electronic filing systems, using both judiciary-developed systems and systems developed commercially by information systems vendors, and additional approaches are being considered. The technical standards and guidelines presented herein assume that new capabilities will have to be acquired, not that these capabilities necessarily exist today. This effort will take some time to evolve and to define the best choices by balancing costs, benefits, and improvements in service. These standards will necessarily have to evolve to accommodate changes in technology and changes in the judiciary's business processes.

The Judicial Conference Advisory Committees on Rules have acknowledged the importance of technical standards in their notes for the amendments to the rules. It should be mentioned, however, that the adoption of standards can have both positive and negative consequences. For example, one of the areas of consideration in defining technical standards is the trade-off between courts and filers regarding the level of effort required by each in conforming to any

given standard. The committee notes suggest that providing a uniform view of the courts for filers is important; however, achievement of this goal may entail more work for the courts. Moreover, it appears that the technology required to implement a uniform public filing interface is not yet fully proven, and the associated procedural issues are not fully understood. Such considerations are important in determining equitable and useful technical standards, and they indicate the need for flexibility in an evolving environment.

Pending adoption by the Judicial Conference, the proposed technical standards contained herein are offered as guidance to those courts that may choose to implement electronic filing in advance of action by the Conference. The Administrative Office of the U.S. Courts, Office of Information Technology, is also available, upon request, to offer technical advice to courts considering the use of electronic filing.

Some courts have already begun experimenting with electronic filing using approaches which pre-date these proposed standards. Courts that accept electronic filings prior to the establishment by the Judicial Conference of national technical standards will be permitted a *two-year transition period* to come into compliance with the established national standards.

Proposed Technical Standards

The following proposed technical *standards* are intended as mandatory requirements which courts choosing to permit electronic filing must implement in order to comply with the amended rules. These standards are phrased as functional requirements that any electronic filing system must meet; there may be a variety of technical implementations by which each functional standard may be met. These standards focus primarily on ensuring the integrity of the court record.

Document and File Format Standards

S1. All documents filed electronically must be capable of being printed as paper documents without loss of content or appearance.

Commentary

It is important to be able to preserve and reproduce faithfully both the content and the appearance of electronically submitted documents. Printed documents will continue to be used regularly in the conduct of court business, so it must be possible to provide an accurate printed reproduction of any electronic document. Furthermore, it may be necessary to convert electronic documents to paper (or film equivalent) for purposes of archiving (see Standard S2). To ensure the ability to create a faithful reproduction of the original, care must be taken to preserve document appearance (formatting) during the electronic submission process. Color documents may present special concerns, as it is currently expensive to print color documents and difficult to maintain color fidelity in the printing process.

S2. Electronic documents must be stored in, or convertible to (without loss of content or appearance), a format that can be archived in accordance with specifications set by the National Archives and Records Administration.

Commentary

The National Archives currently accepts paper documents, images as microfiche or microfilm, and ASCII text on magnetic tape. The National Archives is currently considering how to archive electronic documents in other formats (such as Portable Document Format, described in Guideline G1 below). See section III.D in the Background Discussion appendix for further discussion on archival requirements.

S3. Electronic documents must be retained in the electronic format in which they are submitted. However, documents submitted to the court in paper form may subsequently be imaged to facilitate the creation of an electronic case file.

Commentary

It is important to be able to preserve and reproduce faithfully both the content and the appearance of electronically submitted documents. Post-submission conversion of electronic documents to different formats (e.g., from one word processing internal format to another, or to an "interchange format") should be avoided because it can change the content and appearance of the electronic document. Even changing printers for a WordPerfect document changes its appearance. A proposed document format guideline for electronic submissions is the Portable Document Format (see Guideline G1); documents filed in this format will retain their content and appearance without requiring conversion.

While direct electronic submission is the preferred way to capture documents in electronic form, courts will still need to accommodate paper submissions as a component of a comprehensive electronic case files system. To facilitate the creation of a single electronic case file, it will be necessary to convert paper submissions to electronic form. While document imaging is relatively expensive and does not provide the advantages of direct electronic submission (see Guideline G5), limited use of imaging for the storage of documents originally filed as paper may be beneficial, when combined with other electronic filings, to maintain a single electronic case file. A paper document can generally be imaged in a way which avoids loss of content or appearance. It should be noted, however, that conversion of an imaged document to text (such as through optical character recognition, or OCR) introduces errors, and is acceptable only as a means to create searchable text from document images, not for retaining archivable records; in such a use, the corresponding image (or the paper original) must be retained for archival purposes.

S4. Every implementation of electronic filing must accommodate submission of non-electronic documents or exhibits (although such non-electronic filings may require court permission).

Document and System Security Standards

S5. A mechanism must be provided to ensure the authenticity of the electronically filed document. This requires the ability to verify the identity of the filer, and the ability to verify that a document has not been altered since it was filed.

Commentary

The simplest approach to ensure filer identity and document integrity is to store electronic filings in a restricted-access file system (e.g., NetWare or Unix) requiring login and password. These systems will record file creation and modification (if any) times. For implementations permitting submissions via electronic mail, it should be noted that an e-mail address can be forged, so additional mechanisms, such as a PIN password, are required to authenticate the identity of the filer. A more comprehensive solution would be to base the electronic filing system on a digital signature technology (such as public-private key encryption), which can be used both to authenticate filer identity and to ensure the integrity of a document's content. Note, however, that the use of a digital signature technology may make the archiving process significantly more complex (see Guideline G7).

S6. If a court implements an interactive electronic filing process, the court must control interactive access to the electronic filing system via a user authentication process. When an electronic communication channel is used, the login process must be secured via use of a telephone connection directly to the court, a secure communications channel, or other secure means.

S7. Media capable of carrying viruses into court computers (e.g., floppy disks and electronic mail) must be scanned for computer viruses prior to processing.

S8. It is necessary to isolate access to computers used for electronic filing from access to other court networks and applications.

Commentary

The public should not be permitted direct access to internal court networks or computers upon which court operations are performed. One way to isolate Internet web sites that may be used for electronic filing is to use a commercial Internet firewall product. Similar security precautions should be taken for other electronic filing implementations.

S9. Computer systems used for electronic filings must protect electronic filings against system and security failures during periods of system availability. In addition, they must provide normal backup and disaster recovery mechanisms.

Commentary

Several methods are available to protect against loss of electronic filings during periods of system availability: (1) electronic filings can be written to isolated media (e.g., magnetic tape) frequently during the day; (2) electronic filings can be copied to another computer

system frequently during the day; or (3) a continuous register of information can be printed identifying the submission and submitter of each filing. The latter method would allow a court to request re-submission by the filer in the event of a system failure. Note that, for courts wishing to maximize the availability of electronic filing services, the period of system availability (i.e., the "work day") may be nearly 24 hours.

Electronic Filing Process Standards

S10. All electronic document submissions must generate a positive acknowledgment that is given to the filer to indicate that the document has been received by the court. The positive acknowledgment must include the date and time of the document receipt (which is the court's official receipt date/time), and a court-assigned document reference number (e.g., docket transaction number).

Commentary

In addition to providing a document receipt to the filer (which merely acknowledges the receipt of the submitted document), the court may also wish to provide a document validation (e.g., document checksum) by which the filer may be assured that the submitted document was received correctly by the court. Provision of a document validation is optional, but is recommended if digital signature methods are being used, since document validation is a common feature of digital signature technologies.

S11. Electronic filing systems must provide mechanisms for quality assurance and quality control of the submitted documents and case management data by both the court and the filer.

Commentary

The court may want to review the submission and validate the accuracy of the case management data before accepting and docketing an electronic filing. The filer may need to indicate that a particular document was submitted in error, and offer an additional (new) filing to rectify the error.

S12. Adequate public access to electronically filed documents must be provided.

Commentary

The records and dockets of the federal courts are public records. Regardless of the electronic filing process that is adopted, adequate public access must be provided to the records so filed. Electronic public access outside the courthouse is recommended using methods such as PACER systems. If a complete electronic case file is maintained (as when a court images any paper submissions and combines them with electronically filed documents to form a single electronic case file), then the public should have access electronically to all documents in the case file, whether or not they were originally submitted in electronic form.

Proposed Technical Guidelines

The following proposed technical *guidelines* are presented as recommendations for experimental use subject to further evaluation. While their use is not required, these guidelines may become candidates for future standards, if they are proven fully capable of meeting judiciary requirements. The guidelines proposed below focus on promoting electronic filing uniformity across the federal courts. Additional technical guidelines may be proposed in the course of testing and evaluating alternative approaches to electronic filing.

Document and File Format Guidelines

G1. The preferred document format for electronic filings is text in a Portable Document Format (PDF) file (except see Guideline G2 below). Electronic exhibits and images not available in text form should be embedded within the PDF document.

Commentary

The Portable Document Format (PDF) is a widely accepted document exchange standard which provides a rich environment for representation of formatted text documents, including pictorial information, such as images. PDF files can also carry audio and video information. The PDF standard is specified in "The Portable Document Format Reference Manual" by Adobe Systems, Inc., Addison-Wesley Publishing Co., 1993, ISBN 0-201-62628-4, and more recent extensions to the technical specification published electronically via the Internet site www.adobe.com. An inter-agency group within the federal government has recommended that the National Institute of Standards and Technology (NIST) develop a Federal Information Processing Standard (FIPS) for PDF; efforts are also under way to develop national (American National Standards Institute, ANSI) and international (International Standards Organization, ISO) standards for PDF based on this published specification. A variety of companies and universities have created PDF products. A federal government PDF user group is exploring with the National Archives the possibility of accepting PDF-formatted electronic documents as an archival standard. Acceptance of PDF as an archival standard will require long-term stability of the basic PDF specification.

G2. The preferred document format for the batch submission of bankruptcy petitions, schedules, and claims is the Electronic Data Interchange (EDI) format defined in standard transaction 176 (Court Submission). EDI transactions should comply with approved American National Standard X.12 EDI, and with appropriate Implementation Conventions developed by the Administrative Office of the U.S. Courts.

Commentary

The use of industry-standard electronic data interchange (EDI) formats for data exchange are particularly well suited for automated processing of batch (non-interactive) submissions, as may be filed by computer-to-computer interaction from large creditors filing many bankruptcy claims or sole practitioners filing a bankruptcy petition generated

via commercial bankruptcy forms software. Substantial work has been done in creating EDI electronic commerce standards for the specific high-volume bankruptcy transactions noted above. Other common court transactions may also be candidates for future use of EDI standards. For more information on EDI standards and implementation conventions, contact the Administrative Office's Technology Enhancement Office.

G3. Electronic documents should carry sufficient case management data to enable the automation of the court's docketing process. The structured description of court events as defined in the EDI standard transaction 176 (Court Submission) offers a well-defined reference model for how docket event data might be transmitted, particularly with a batch submission.

Commentary

To provide maximum benefit to the court's document submission process, electronic submissions should carry sufficient case management data to permit the automatic docketing of the filing. If the courts adopt a common, well-defined standard for the submission of case management data, filers will also benefit, since such standards will facilitate the development of value-added products for law offices by commercial software vendors.

The EDI reference model contained in standard transaction 176 can serve as the basis for a common format for the submission of case management data. It contains a syntax of "event-action-qualifier", and a constrained vocabulary for each of these three objects. For example, a particular motion might be categorized as "Pleading - Filed - Motion for Extension of Time". The "words" in this constrained vocabulary are defined for specific applications in draft EDI Implementation Conventions developed by the Administrative Office of the U.S. Courts.

G4. Hyperlinks embedded within an electronic filing should refer only to information within the same document, or to external documents or information sources which are known to be stable over a long period of time. Hyperlinks should not be used to refer to external documents or information sources which are likely to change.

Commentary

The basic concern here is to preserve the integrity of the record. To preserve the integrity of a document's content, the integrity of external information referenced by hyperlinks must also be ensured. Information sources referred to outside the filed document may change significantly (or even disappear) between the time the document is created, and the time it is reviewed by the court, or archived as a permanent record, or retrieved for historical review some long time later. For example, many Internet web sites change daily, and the long-term stability or availability of document references to such web pages cannot be guaranteed. When the external information changes or disappears prior to review, the intended message of the filer may be invalidated, and the integrity of the record is not preserved. On the other hand, one example of a stable external information source is a database of court opinions, which grows by accumulating new records, but

without changing the content of historical records. It is thus reasonable to permit citations to such databases to be embedded as hyperlinks within electronic submissions. Use of such citation hyperlinks would require that the court's electronic case files application include a CALR component which can read and interpret the citation link, and then take appropriate action to retrieve and display the cited material. There are very few other external data sources which offer the same kind of guarantee of long-term stability of content, so hyperlinks to other kinds of external information sources should generally be avoided.

G5. The use of document images (including facsimile) as the document format for electronic submission is strongly discouraged. Every effort should be made to obtain original documents in a standard electronic format which retains document content and appearance in a compact, text-searchable form.

Commentary

The preferred format for most electronic filings is PDF (see Guideline G1). Images typically require 20 times the storage space of the equivalent text document, which increases submission time, hardware storage costs, and the difficulty of document database backup and recovery. Because of the large file sizes, images are more difficult for court staff and the public to access from remote sites over dial-up telephone lines. Scanning large numbers of documents takes a substantial staff effort. Perhaps most significantly, images are not text searchable, and the conversion to text using optical character recognition (OCR) software introduces significant errors.

If a court uses document imaging in a limited role (as envisioned in Standard S3, to facilitate the creation of a single electronic case file by imaging only those documents submitted to the court in paper form), the following standards are recommended: CCITT (now ITU) Group 4 is the compression method of choice for documents containing largely text and simple graphics; JPEG is the compression method best suited to photographs. Both of these image compression methods can be supported on many commercial software packages with the addition of a TIFF file header; both Group 4 and JPEG are also supported by PDF. A scanning resolution of at least 200 dpi (dots per inch) is recommended.

Communications Guidelines

G6. An electronic filing system should offer several means of delivery of the electronic documents to the court, for example: via network (Internet or commercial Value-Added Network), dial-up telephone access, floppy disks, magnetic tape, and/or electronic mail.

Document and System Security Guidelines

G7. Digital signature standards based on public-private key encryption technology may be used both to authenticate filer identity and to ensure the integrity of a document's content

Commentary

Several competing methods for digital signature are currently being evaluated, but there is as yet no universally accepted standard, nor a clear market-leading product or approach. Furthermore, while digital signature technologies offer excellent mechanisms for authenticating filer identity and validating document integrity, the use of a digital signature technology may make the archiving process significantly more complex. To ensure the long-term ability to read and validate a document, it will be necessary not only to archive the document itself, but also to archive the mechanism for applying and reading the digital signature (or to otherwise ensure the long-term availability of the digital signature mechanism). These issues will, no doubt, be resolved by the marketplace over time, but the answer is not yet evident.

Electronic Filing Process Guidelines

G8. Electronic filing systems should support both an interactive filing process and the capability to receive a complete filing submitted using a (non-interactive) batch process.

Commentary

See section I.C in the Background Discussion appendix for an overview of interactive and batch electronic filing processes.

G9. The court should provide a facility for *pro se* filers to file electronically.

Commentary

To reduce the burden on the court in creating and maintaining a fully electronic case file, it will be necessary to make it easier to get electronic documents from all case participants. This might mean providing a computer at the courthouse and/or in a prison with appropriate software. Private sector services for converting source documents into an appropriate electronic format may be another means by which to enable all filers to participate in electronic filing.

Appendix: Background Discussion

This appendix contains an overview of the electronic filing process and a description of the various technological and procedural considerations that affect the selection of solutions to support that filing process. It is intended to provide a context for discussions about the choice of electronic filing technical standards.

I. Introduction

A. Scope of Electronic Filing Technical Standards

For the purposes of these technical standards and guidelines, electronic filing is defined as including the submission of case file documents and the submission of related docketing information.

1. Submission of case file documents. Electronic filing is the process by which information required by the court is delivered by electronic means rather than in the conventional paper form. Typically this includes any documents which normally become part of the case file, whether submitted by the court or the litigants.

2. Submission of docketing information. One of the important benefits which courts may be able to realize through electronic filings is minimizing the data entry associated with filings. Achieving this benefit requires that the document filed in electronic form be accompanied by case management information in an electronic format that is easily interpreted by court computers. Several alternative approaches that may be used to accomplish this goal are described below in section I.C.

3. Exclusions. For purposes of these technical standards and guidelines, electronic filing does not include noticing from the court or between counsel. The technical standards assume that the federal rule amendments intended to facilitate electronic filing do not govern the noticing process. Rather, for example, Fed. R. Bank. P. 9036 governs electronic bankruptcy noticing, and it specifically permits electronic notices to replace printed and mailed notices. However, provision for electronic noticing as a substitute for mailed notices between counsel, or in other kinds of cases, has not yet been explicitly permitted.

   Electronic filing, as the term is used here, also does not include the process of disseminating orders from the court. Some courts have begun the process of experimenting with methods for electronic dissemination of orders, but this process is not governed by the amended rules intended to facilitate electronic filing.

Should it become necessary or desirable to define technical standards for electronic dissemination of notices and court orders, techniques similar to those recommended here will likely be applicable, although further study is still needed. There are currently experiments under way using facsimile to send copies of orders, and using Electronic Data Interchange (EDI) for bankruptcy noticing, which may include some kinds of orders. The inclusion of structured data in electronic notices or orders (such as through the use of EDI) offers the ability to use such transmissions to provide case management data in computer-processable form to law offices. This may facilitate automation of law office business processes.

B. Benefits of Electronic Filing

Courts, the bar, and the public potentially can achieve many benefits from electronic filing. One of the underlying assumptions is that most of the documents in the case file were originally created in electronic form by either the law office or the court. Following are some of the long-term advantages which motivate the replacement of paper case files with electronic case files:

1. Filer Savings. Filers benefit by reducing the costs of printing, copying, mailing, and courier service associated with filing paper documents. They also benefit from the various forms of enhanced access described below.

2. Space Savings. The storage space required to file documents could be substantially reduced by using electronic case files. To store one million pages of paper documents takes about 500 linear feet of shelf storage, or about 50 four-drawer file cabinets. Those million pages can be stored as electronic images in about 50 gigabytes, or the space of about a half a file drawer using magnetic disk technology (using six commercially available nine-gigabyte hard disks), and the commonly used CCITT Group 4 image compression format. Furthermore, if all documents were submitted in electronic text form instead of image form, the same million pages would require only 2.5 gigabytes, using less than half the space of a shoe box. Of course, not all documents submitted to a court consist of text alone; some contain pictures or drawings. Therefore, some combination of text and images will be required to support the need for pictures and diagrams as evidence and attachments to submissions.

3. Staff Time Savings. Paper handling accounts for a significant portion of the staff time spent processing documents, typically much more than data entry time. This paper handling includes opening mail, removing staples, sorting documents by case number, punching holes, fetching paper case files, inserting documents in the case file, and returning the files to the shelf. In addition, significant resources are required serving front counter and chambers case file requests that require retrieving, sometimes copying, and returning case files to and from shelf storage. The most costly staff effort, consuming hours of time, occurs when a document or case file is misfiled, or misplaced. The considerable staff effort involved in handling paper documents can be largely avoided when documents are submitted electronically.

Data entry costs may also be reduced. Electronically submitted documents can include all the information necessary for docketing, thereby permitting the possibility of automating much of the docketing process, except for the final quality assurance step necessary to ensure the accuracy of submitted information. Well-defined standards for case management and document management data can describe how to present the case number, case type, court type, and court identification within the document. The document can include a court event description which specifies the kind of motion being filed or hearing requested. Other kinds of information which might be carried as data with the document include the names and roles of parties in the case, and references to related cases, both in the same court and in other courts. Related financial information (such as monetary claims) might also be described in detail in a data format (and transferred easily to a spreadsheet).

4. Enhanced Access. Electronically stored case files can provide simultaneous access to many users, as compared to the current situation of a single paper case file assigned sequentially on a first-come, first-served basis. Problems of missing files or documents can be reduced substantially, although perhaps not completely eliminated. Text-search tools allow access by content, so it becomes easy to revisit that one memorable phrase in a large document. Public access can also be enhanced. If the documents are mostly image and not text, remote access becomes more difficult or expensive because of the large file sizes, but it is possible using enhanced, high-speed communications services.

   Citations to statutes or opinions can be carried as data within an "intelligent" document. If computer-aided legal research tools capable of interpreting legal citations embedded within an electronic document are integrated into electronic case files systems, readers could "click" on a citation embedded in a document and have the statute or case appear beside the original text. However, note that (by design) legal citations are a particularly stable document reference link; references to other external information sources may not be as stable (e.g., the referenced source may be later altered or even disappear) and such linkages should be avoided unless the long-term integrity of the referenced information can be ensured.

5. Enhanced Security and Integrity. Security for electronic documents can be substantially better than the current paper system. Several active authentication methods are available to ensure the identification of the filer, including login and password, and digital document signatures which mate the identity of a document and its content with its filer using encryption techniques. Electronic records can easily be duplicated for off-site storage, improved disaster recovery, and greater records security.

6. Document Management. A document management system (DMS) can track all data accesses and modifications. A DMS can keep prior versions of records and maintain an audit trail of the changes and who made them. It can roll back changes to show what the data looked like before it was changed. Audit trail and roll-back capability, combined with appropriate controls for data access and physical access to equipment, can provide a much higher level of security and integrity than what can be provided currently for paper case files.

C. An Overview of the Electronic Filing Process

Figure 1 on the following page illustrates the process of electronic filing. It shows the basic steps of creating a document, adding case management data, filing it electronically, and receiving an electronic acknowledgment.

The process of electronic filing begins with the creation of the document, typically in the law office. Currently, the content of most documents is largely text that is produced using commercial word processing software. Some documents are produced using commercial forms software that displays a facsimile of an official form on a computer screen into which the filer enters the required information.

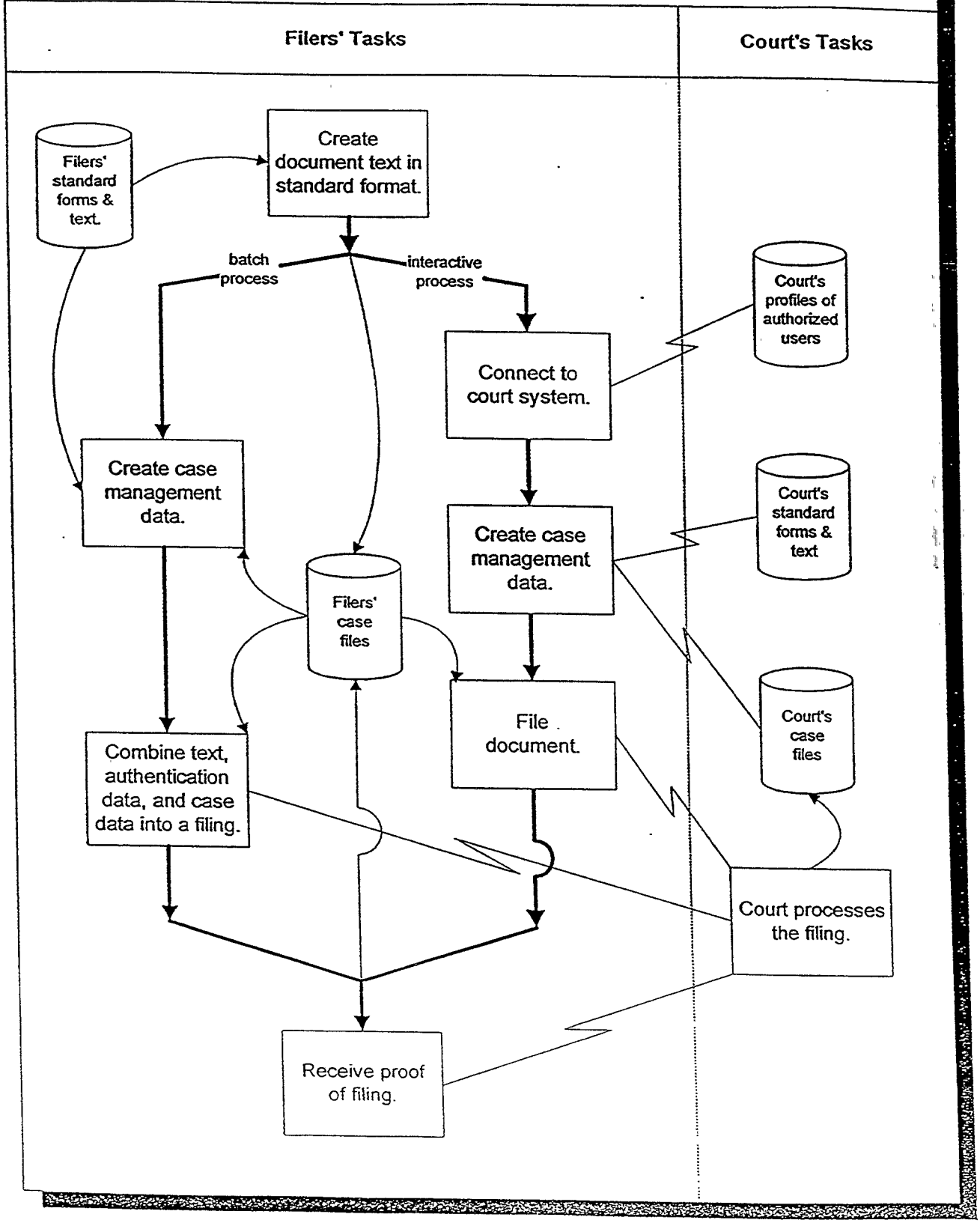
The next step in the electronic filing process is the conversion of the document from its local proprietary format into a standard electronic format accepted by the court. Standard formats are necessary because it is not possible for the court to support all the potential proprietary products which are in use, and because of the need for long-term retention of electronic records. It is important that the filer retain control over the appearance and content of the actual electronic document submitted to the court. The proposed standards and proposed guidelines were written with the intent of minimizing the impact of this process on both the documents, and the resources of the attorneys and courts. However, a certain minimum level of technical capability is required by all participants in this process.

There are two generic approaches to the process of electronic filing, interactive processing and batch processing. These two approaches differ primarily in how the case management data which accompanies the submission is prepared, and in how the receiving computer applications in the court operate. The "interactive" process involves live interaction between the filer and the court's computer system. The "batch" process assumes that the filer has all the necessary information (in a law office database, or on existing paper documents) to complete the filing without interaction with the court's computer.

The interactive process requires that the filer contact the court computer either directly through a court dial-up modem, via a private network, or via a public network (e.g., Internet). The filer proves his identity through a login and password process. The court computer prompts the filer to fill out forms on the screen. The filer selects appropriate items from predefined lists, and might enter a small amount of text. The document the attorney created on the local law office computer is then transmitted to the court in a standard format.

The batch process requires that the attorney use a computer program that runs locally on the law office computer. The program creates the case management data in a standard format which the court will accept. There are some documents (e.g., common bankruptcy forms such as petitions, schedules, and claims) which require little or no case management information outside the context provided by the document itself. Most documents, such as motions, require a modest amount of added case management data (e.g., case number, document type, and party names and

Figure 1. Electronic Filing Process Between Filers And A Court (Showing Batch and Interactive Filing Options)



roles) in order to maximize the benefits of electronic filing. Precise descriptions for formatting this kind of data are necessary if the computer programs necessary both to generate it and to receive it are to be built, whether by commercial software providers, by the technology staff of law firms, or by the courts. The documents submitted must also contain information which authenticates the filer. The complete document can then be delivered to the court on a floppy disk, by electronic mail, or by other electronic means.

Assuming the document complies with the standards and is readable, the court might choose to review the filing for accuracy (e.g., to check whether the document content matches the case number and docket event described for it). The filing is then docketed to the court's case management computer. In response, the court computer generates an acknowledgment of receipt of the filing. The acknowledgment should show the date and docket number of the filing, and be returned to the filer as proof that the court received the submission. The manner in which acknowledgments are returned depends on the process used to submit the document.

II. The Filer's Perspective

Attorneys who participate in electronic filing will need to change the process they use to deliver documents to the court, but not the process they use to create documents in their office. The technology which underlies the electronic filing process should be easy to use for an attorney. Those who develop software for attorneys, or manage the process of submitting documents, will be most affected by the technical standards adopted.

A. Generating Documents

The process of creating text documents should be largely unaffected. Documents submitted to courts are typically produced in electronic form using word processing software. Bankruptcy forms can be created on a personal computer using one of many products designed to automate this process. Sometimes document management systems or databases are used to generate filings. None of these processes should change significantly from a filer's perspective.

The methods used to submit attachments, either as exhibits or evidence, may have to change. Often these attachments are not original documents created in the law office. Typically, a photocopy of the attachment document accompanies the paper filing. With electronic filing, the attachments will have to be converted to electronic form, by the use of a document scanner or other means.

B. Formats for Documents

There are three broad categories of information for which formats are required in order to support electronic filings: text, pictorial information, and structured data. Text is simply words on a page, with minimal structure. More complex text documents require enhanced capabilities such as page layout and formatting requirements (e.g., margins, footnotes at the bottom of a page),

fonts (Courier, Times Roman, etc.), and type styles (**bold**, *italics*, etc.). Pictorial information includes scanned images of an original document, graphical representations of data, drawings, charts, and photographs. Structured data is the content of a database field or data used by computer programs. Some examples of structured data include names, addresses, dates and numbers, and the contents of forms where each box may correspond to a particular database field and the responses are constrained to a well-defined type of data. Compound documents may contain any or all of these kinds of information. An examples of a compound document is a pleading which includes the text of a motion, an imaged document as an exhibit, and case management data in structured form. The technical guidelines which are proposed for electronic filing support the following kinds of compound, multi-media documents:

1. ASCII. ASCII text is suitable for simple documents only, where the filer is unconcerned about the appearance of the document. Depending on the choice of font style and size, line breaks and page breaks may not appear where the filer expects them to. Footnotes cannot be placed at the bottom of a particular page with confidence. Exhibits which contain graphics or images cannot be supported at all.

2. Portable Document Format. The Portable Document Format (PDF) is a widely accepted document exchange standard which provides a rich environment for representation of formatted text documents, including pictorial information, such as images. PDF files can also carry audio and video (Quicktime format) information. It is easy to create a PDF representation of *any* file which can be printed under Microsoft Windows or Macintosh operating systems, by printing to a file through a PDF printer driver instead of printing to a physical printer. It is also possible to create PDF files on DOS and UNIX systems by converting PostScript output into a PDF file. PDF files can be viewed on any of these platforms (without loss of content or appearance), and free viewing programs are available.

3. Electronic Data Interchange. Electronic Data Interchange (EDI) standards are well suited to carrying structured data, such as bankruptcy forms and notices, case disposition information, and criminal history data. In the bankruptcy area, several companies that produce automated forms packages for debtor attorneys have already produced experimental software which creates bankruptcy petitions in EDI format, and several courts are experimenting with software to automate the opening of a bankruptcy case based on these EDI petitions. In these experiments, the petitions are delivered to the court on floppy diskettes along with a signed paper copy of the form.

   An EDI transaction can also be used like an envelope, where the EDI transaction consists of the case management data in structured form, and it carries within it a PDF file of an arbitrarily complex document. This may be useful when a batch process is appropriate, to combine a text or compound document with associated case management data.

   The EDI standards contain a framework for a structured description of court (docket) events. This offers a precisely defined standard "notation" for docket events that has the power and

flexibility of a natural language description, but offers information management capabilities which derive from a simple syntax and a constrained vocabulary. Structured docket events have the potential of becoming a powerful tool for business process reengineering in both courts and law firms, since new information-based tools can be developed to automate business processes and work flow management based on the well-defined content of the docket events. Achieving these benefits depends on maintaining a *compatible structure and vocabulary* for electronic docket information, whether it is collected through an interactive terminal session or is submitted as an EDI transaction or an electronic mail file transfer. The process of providing this data can be made simple for filers by providing familiar presentation tools, such as forms data entry screens and menu-driven data entry choices.

C. Submitting Documents

Two generic processes are envisioned for electronic filing: an *interactive* and a *batch* approach. From a filer's perspective, the user interfaces may not differ between these approaches as much as the sequence of steps involved. The interactive approach requires that the filer establish a communications link with the court in order to enter case management data on the court's computer. The current electronic filing experiments in the Northern District of Ohio and the Southern District of New York (Bankruptcy) using the Internet and PDF provide examples of how this process might be implemented. World-wide web technology can provide easy access to the court using standard web browser software (e.g., Netscape or Mosaic) and any telecommunications provider that offers Internet access. The filer logs in, and is prompted to enter case number(s), parties represented, and parties the document is filed against. Then the PDF document is selected and uploaded to the court. This process makes use of standard commercial software in the law office, and court-designed forms for the capture of case management data. When the document is received, the court creates an acknowledgment which appears on the filer's screen and may be saved and/or printed to serve as a proof of filing.

The batch approach, on the other hand, requires the filer to enter the case management data prior to establishing a communications link with the court's computer. One of the important benefits of this approach is similar to the benefits the court receives from electronic filings, which is that it can provide new opportunities to automate law office business process. The user interface might look similar to that developed by courts and other commercial electronic filing products currently being tested. However, some kinds of data which are typically found on the court's computer, like a list of parties to file against, may also be needed on the law office computer. Electronic noticing capabilities, either from the court or counsel, might be one method to provide the necessary data. This model of exchanging data in both directions (both to and from the court) is similar to the widely implemented model of electronic commerce in industry. After the filer creates the case management data, the filing is assembled into a single submission containing data and document, and transmitted to the court. The complete filing can be transmitted using any of several different mechanisms, such as electronic mail through private or public networks, or via delivery of physical media, such as a diskette. When electronic mail is used for delivery, the acknowledgment can be returned to the submitting address. It is not clear what the best

method is to deliver an acknowledgment when physical media are delivered to the court, but a printed acknowledgment might be mailed to the sender.

D. Filing Security

Login and password are the most common authentication methods in use in government and commercial activity today, and are well suited to an interactive process. Courts can easily assign a login and password for attorneys, since they have a formal relationship with the court. However, this approach addresses neither the requirements for security in a batch process nor the need for signatures by parties such as litigants and debtors in bankruptcy, who do not have formal relationships with the court and who may be prosecuted for fraud. There are both technical and procedural solutions which can be effective in addressing these latter issues.

Facsimile signatures offer one possible solution. One way to carry a facsimile signature is with a scanned image of a signature accompanying a text document. Another way is to capture a combination of an image, and a recording of the forces and motion of an actual signature and transmit it with an electronic filing. The latter method uses signature capture pads such as those used by United Parcel Service drivers. Facsimile signatures can provide an interim solution for authentication of individuals unknown to the court, such as debtors in bankruptcy, and for batch filings submitted via either e-mail or delivery of media. A procedural alternative to facsimile signatures is that the attorney or non-attorney petition preparer must retain an original signature for the signing parties of all electronic filings. A Personal Identification Number (PIN) might be used as a simple authentication procedure for batch submissions from attorneys.

Current digital signature technology provides the possibility for significant enhancement of document security over paper systems currently in use, password protected systems, and the simple authentication methods described above. There are several methods currently used to implement digital signature services. They differ in detail, but are conceptually similar in their use of encryption technology and the public-private key approach for document authentication. Two examples are the Fortezza suite developed by the National Security Agency which uses the Skipjack algorithm and Clipper chip, and the approach recommended by the American Bar Association which relies on the RSA encryption algorithm and commercially available software. In another proposal, the U.S. Postal Service might act as a key management service, and authenticate and time stamp each transaction.

It is premature to define mandatory digital signature standards at this time. This technology is changing rapidly, and most government agencies have not yet defined policies for its use. Also, there is no clear market-leading product or approach. There are also many practical issues related to archiving, key management, and the role of trusted third-parties which pose significant technical challenges.

Users of electronic filing may be more concerned about document integrity than strong technical methods for authentication. There is a clear requirement to ensure that documents are not

altered. Verifying document integrity is a two-step process. When the document is created, a "hash" is calculated using a mathematical process that produces a single large number which is different for each document. Techniques for creating a hash are widely available and inexpensive. This process of creating the hash produces a different result if even minor alterations to the document are made. The hash value accompanies the document during all phases of document management. The recipient can recalculate the hash for the document *using the same method*, and if the values match, the document has not been altered. Although it is not essential, greater security is provided if the hash is encrypted in a manner that the filer's public key can decrypt. This establishes both document integrity and authenticity with one piece of data. It ensures that the filer is the one who created the hash and not someone attempting to alter or substitute the document.

Documents and case management data can also be encrypted to preserve confidentiality. This is usually not an issue in most court case files, since most documents are a matter of public record. However, in an interactive terminal session, it may be useful to encrypt a communications link to keep passwords private. This method is used in securing connections to the Internet electronic filing experiments in the Northern District of Ohio and the Southern District of New York (Bankruptcy).

III. The Court's Perspective

A. Formats Accepted

Document format issues have been the subject of extensive analysis, discussion, and experimentation in the process of exploring solutions for electronic filing. It is simply not possible for courts to support all proprietary word processing formats that are in use today. Conversions between word processing formats can often create significant differences in document appearance, and sometimes in content. Court documents have a long retention requirement. New software may not be able to read old file formats. There are trade-offs between the need to use commercial products, and the need to choose widely accepted and easy-to-use standards.

ASCII text provides a lowest common denominator for document exchange. ASCII text can capture the basic text content of a document, but it lacks many of the capabilities which attorneys and judges have come to require for document formatting and appearance. It cannot carry attachments that include images or drawings.

PDF provides a *de facto* standard (and may soon become an International Standards Organization approved standard) for preserving both the content and the appearance of complex documents across different kinds of computer platforms. The PDF specification was published in book form and has been implemented by a number of vendors. It supports both searchable text and images. Free viewing software is available on the Internet for several different platforms.

EDI standards offer a well-defined way to carry structured data. This is particularly important in the forms-intensive bankruptcy process. EDI is widely used in government and industry, especially by large institutions such as taxing authorities, banks, and utility companies, which are major creditors in bankruptcy. EDI also provides a clear way to specify how to carry case management data in a standard way which can be applied to other kinds of documents. Further, EDI can be combined with PDF to bring data and documents together in a single file. EDI has broad potential application in other areas as well, including criminal and civil case opening, case disposition reporting, and noticing. There are a large number of companies that offer tools which facilitate the use of EDI. These range from turnkey products in specific application areas, to generic forms front-ends, and powerful data mapping systems which move data from EDI standard formats into local databases, and vice versa.

B. Electronic Public Interface

The success of electronic filing depends on providing access in ways that make it easy for attorneys to participate. Courts should provide the same kinds of electronic access that businesses do, and tools are readily available in the commercial marketplace to support the user community. There are two distinct technology issues in defining the public interface: *telecommunications method* and *user interface*.

Telecommunications methods are categorized by how they relate to the overall electronic filing process. Interactive sessions might be initiated via several different possible communications methods: the public Internet, private networks, or by directly dialing the court's computer through telephone lines and modems. Batch submissions might also be initiated through similar communications methods.

Electronic mail can be sent using either public (Internet) or private networks. Value-Added Network (VAN) services are the most commonly used method to transport EDI messages; they provide highly reliable service, a detailed audit trail, and acknowledgments which are critical to providing an electronic equivalent of the current paper process for noticing. Physical media, such as diskettes and magnetic tapes containing submissions in electronic form, can also be delivered to the court.

Most of the telecommunications methods require an infrastructure for supporting electronic filing which is not currently in place in the courts. For example, most courts do not have Internet access to provide web sites to the public or to receive electronic mail through the Internet. Many courts currently may not have sufficient telephone lines and modems available to support electronic filing through direct access.

The court must not only provide the telecommunications connectivity, but it also must provide (build or buy) the user interface for systems that use the interactive approach to accept filings. Once the user is connected, the court presents a series of forms which are used to gather required data prior to accepting the document. One way forms can be presented is using Internet web

technology. This requires building Internet web sites and forms templates for each individual court. The completed electronic forms are then linked interactively to a court database. It is also possible to present forms and data to the user in a manner that does not require web browsing software in the law office, such as by interactive menus as used in the PACER systems.

Courts also must build or buy applications that will receive batch filings. Experimental software is currently being tested in several courts for automatically opening new bankruptcy cases based on receiving EDI format petitions on floppy diskettes.

C. Court Systems Security

Information security technology is needed to guarantee document integrity and to protect court computer systems from unauthorized access. The use of public key encryption techniques for ensuring document authenticity and integrity were discussed above with the filer's perspective. In many situations, requiring technology-intensive solutions for ensuring document authenticity may not be as important an issue as document integrity. The courts, together with the Administrative Office of the U.S. Courts, need to define the requirements and priority for this technology. Further experimentation is needed, and market forces need to shape commercial practice and products, prior to selecting mandatory technology standards for security.

There is another step in protecting electronic filings which is also important. This is to make sure that soon after documents are filed they are stored on long-term media isolated from the receiving computer system so that they are protected against systems failures or penetrations of security, and so that they are easily recoverable in the event of system failure. One way this might be accomplished is by logging filings to tape. Another important consideration is that electronic filings should be scanned for computer viruses, especially those submitted by a batch process on floppy disks. Other kinds of electronic filings may have similar security risks associated with them.

The protection of court computer systems is clearly a priority requirement. Currently, courts which establish Internet connections are required to use commercial Internet firewall software to prevent access to court networks and computers. Better methods for isolating Internet connections may become available as commercial tools evolve. The use of login and password restricts access to court computers and limits privileges.

D. Long-Term Retention of Electronic Records

Long-term retention of electronic records, and ensuring permanent access to them, is important. Currently, the courts depend on the National Archives and Records Administration (NARA) to store and preserve the judiciary's permanent paper records. However, NARA does not currently accept records in any electronic format other than ASCII text.

The lack of support for archiving more complex electronic formats is a common problem faced by many government agencies that are beginning to rely on electronic records. Proposed Guideline G1 recommends the use of PDF format for electronic filings. The Department of Defense has already established a policy that many documents requiring permanent retention will be stored in PDF format, and other government agencies are exploring this possibility. Several agencies have approached NARA about archiving electronic documents in PDF form, and it is expected that NARA will seriously consider this possibility, in addition to other alternatives.

If NARA decides not to accept PDF files for archiving, there are several alternatives. The courts might choose to maintain electronic records themselves, without relying on Federal Record Centers. This approach may be more reasonable for electronic records than it would be for paper. Alternatively, the courts could choose to convert their records to some other electronic format that NARA decides to accept. Or courts could "print" their records to paper, microfiche, or microfilm to put them into a NARA-acceptable format.

The courts should also consider the possibility that new technology will provide better methods for interchange of electronic documents at some point in the future. A long-term plan for records management needs to provide for the possibility of migration of electronic formats.

Records management policy also requires that if courts use digital signatures, they must archive them. In order to interpret these digital signatures in the future, there may be a need to preserve the system used to create the digital signature: that is, the method used for encryption of the signature, the method used to calculate the hash, and the public key associated with the person making the digital signature. Without this kind of information, the digital signature becomes useless in all future attempts to verify the document. However, instead of doing its own key management, the court may rely instead on a trusted third-party certificate authority to provide the information used to verify digital signatures. Of course, this alternative has its own set of technical and policy issues. From the perspective of preserving the long-term integrity of court records, these certificate authorities must preserve their records on a permanent basis. This requirement is not yet widely recognized. The patchwork of state regulations related to digital signatures generally creates very few requirements on who may establish a certificate authority, and what such an organization must provide. The courts may want to limit which certificate authorities they will support to those that will guarantee long-term records retention. Some further regulation of certificate authorities may be necessary to ensure the viability of digital signature technology for use in document archiving.

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Agenda Item 15-17

Items 15 through 17 will be oral reports.

Agenda Item 18

A list of subcommittees and their members will be distributed at the meeting.

Agenda Item 19

STATUS LIST OF BANKRUPTCY RULES AMENDMENTS

March 1997

1. "Class of '97." Approved by Judicial Conference and transmitted to Supreme Court 10/96. If prescribed by Supreme Court, will be transmitted to Congress before May 1, 1997. Projected effective date 12/1/97.

1019(3), (5)
1020 [new rule]
2002(a), (n)
2007.1
3014
3017
3017.1 [new rule]
3018(a)
3021
8001(a), (b), (e)
8002(c)
8020 [new rule]
9011
9015
9035

2. Official Bankruptcy Forms. Published for comment 8/15/96; public comment period concluded 2/15/97. If approved by Advisory Committee, will be transmitted to Standing Committee for consideration at June 1997 meeting. If approved, will be transmitted to Judicial Conference for consideration at September 1997 session. Advisory Committee to consider effective date and make recommendation.

Amended Forms No. 1, 3, 6 (Schedule F only), 8, 9 (A - I), 10, 14, 17, 18, and new Forms No. 20A and 20B.

3. "Class of '99" Amendments approved by Advisory Committee September 1995, March 1996, and September 1996 and referred to Style Subcommittee. If approved as to style by Advisory Committee, will be transmitted to Standing Committee for consideration at the June 1997 meeting of the Advisory Committee's that they be published for comment.

1017
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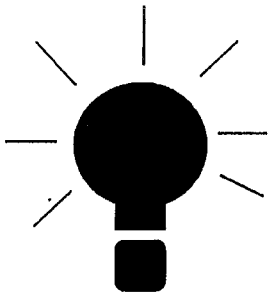
9014

THE GESTATION OF AN AMENDMENT



1. Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.
2. This period is of indeterminate length.
3. Proposals come from Committee members, the Reporter, judges clerks, or the public, or result from statutory changes, case law developments, or experience.

Proposed amendments may be at different stages of the process, at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

YEAR 1

Advisory Committee approves draft of proposed amendments. (January -May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited. (October)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). (January-April)

Public comment period closes. (mid-April)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate). (April-May)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress. (March or April) (must be by May 1)

Congress can alter or reject during the next 90 days. If Congress does not act, amendments take effect December 1.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

THE GESTATION OF AN AMENDMENT