ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Stevenson, WA
September 18-19, 2003

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 18-19, 2003
Skamania Lodge, Stevenson, WA

Agenda

Introductory Items

1. Approval of minutes of April 2003 meeting.

2. Report on the June 2003 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). (The Chairman and the Reporter will provide an oral report.)

3. Report on the June 2003 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). (Judge Montali will provide an oral report.)

Action Items

4. Report and recommendation of the Technology Subcommittee on proposed amendments to Rule 2002(g) to authorize sending notice to a creditor in chapter 7 or chapter 13 cases at a central address specified by the creditor, if the creditor requests that method of notice.

5. Report and recommendation of the Technology Subcommittee concerning the request of the Bankruptcy Noticing Group to delete the requirement in Rule 9036 that notice sent electronically is complete only upon confirmation to the sender that the notice was received.

6. Report of the Style Subcommittee concerning the restyling of Civil Rules 1 - 15 and discussion of how the committee should proceed in light of the impact on the bankruptcy rules and the need, ultimately, to conform to bankruptcy rules to changes in the civil rules. (Professor Resnick will provide an oral report.)

7. Proposed amendment to Rule 5001(b) to permit bankruptcy judges to hold court outside their districts in an emergency (COOP amendment).

8. Judge Robert Kressel's suggestion concerning Rule 7004(b)(3).

9. Judge Kressel's suggestion concerning Rule 3007 and serving objections to claims.

10. Judge Kressel's suggestion to add the clerk of the BAP to the entities listed in Rule 5005(c).

11. Mr. Robert Barnes' suggestion concerning Rule 9001(9), definition of "regular associate."

12. Mr. Waldron's suggestion concerning electronic service of motions—Rules 9014 and 7004.

13. Judge Barry Russell's Rule 4003 suggestion concerning burden of proof for exemptions.

14. Suggestions by the Director of the Executive Office for United States Trustees concerning amendments to Rules 2003, 4002, 2016, and 7001, as well as creation of a new Official Form.

Information Items

15. Memo concerning posting on the J-Net of information on the revised Uniform Local Rule Numbering System.

16. Text of the proposed amendments to § 107 of the Bankruptcy Code.

17. Report on activities of the CM/ECF Working Group subcommittee on claims processing, including proposed amendments to Official Form 10. (Judge McFeeley will provide an oral report)

18. Report on the implementation of the CM/ECF system (case management/electronic case files) and electronic filing. (This will be an oral report)

19. Bull Pen: Schedule G - Executory Contracts and Unexpired Leases (to be published for comment summer 2004 and presented to JCUS 9/05 to take effect 12/05 simultaneously with amendment to Rule 1007 requiring debtor to file mailing list with names and addresses of all parties on Schedules D-H.)

20. List and progress chart of proposed amendments.

21. Rules Docket

Administrative Matters

22. Next meeting reminder: *March 25 - 26, 2003, Ritz-Carlton Hotel, Amelia Island, FL.*

23. Discussion of date and location for fall 2004 meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
September 2003

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Judge Ernest C. Torres
Judge Mark B. McFeeley
Howard L. Adelman, Esquire
K. John Shaffer, Esquire

Subcommittee on Business Issues
Professor Alan N. Resnick, Chair
Judge Thomas S. Zilly
Judge Christopher M. Klein
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, ex officio

Subcommittee on Consumer Issues
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Professor Mary Jo Wiggins
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Subcommittee on Forms
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Subcommittee on Style
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Judge Christopher M. Klein
Professor Mary Jo Wiggins

Subcommittee on Technology and Cross Border Insolvency
Judge Thomas S. Zilly, Chair
Judge Irene M. Keeley
Judge Norman C. Roettger, Jr.
Judge Laura Taylor Swain
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September 7, 2003
Projects

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of April 3-4, 2003
Longboat Key, Florida

Draft Minutes

The following members attended the meeting:

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

Professor Jeffrey W. Morris, Reporter, attended the meeting. District Judge Norman C. Roettger, Jr., a member of the Committee, was unable to attend.

Circuit Judge Anthony J. Scirica, chair of the Committee on Rules of Practice and Procedure (Standing Committee); District Judge Thomas W. Thrash, Jr., liaison to the Standing Committee; and Peter G. McCabe, secretary to the Standing Committee, attended. District Judge Bernice Bouie Donald, a former member of the Committee, attended. Bankruptcy Judge Jack B. Schmetterer, a member of the Committee on Federal-State Jurisdiction (Federal-State Committee); District Judge Lee H. Rosenthal, a member of the Advisory Committee on Civil Rules (Civil Rules Committee); David M. Bernick, a member of the Standing Committee; and Professor S. Elizabeth Gibson, University of North Carolina Law School, attended. Bankruptcy Judge Dennis Montali, liaison to the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee), and Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST), were unable to attend.

The following additional persons attended all or part of the meeting: Martha L. Davis, Principal Deputy Director, EOUST; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office,

Administrative Office of the United States Courts (Administrative Office); Patricia S. Ketchum and James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, 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 of the Standing Committee. Votes and other action taken by the Committee and assignments by the Chairman appear in **bold.**

Introductory Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. The Chairman recognized the contributions of Bankruptcy Judge Donald E. Cordova, a former member of the Committee, who died on February 16, 2003. The Chairman presented a certificate of appreciation to Judge Donald in recognition of her service as a member of the Committee. The Chairman presented a certificate of recognition to Ms. Ketchum in recognition of her outstanding work as principal support staff for the Committee under five different chairmen.

The Committee approved the minutes of the October 2002 meeting.

The Chairman reported on the January 2003 meeting of the Bankruptcy Administration Committee. The Bankruptcy Administration Committee adopted a revised mass torts report, which examines the mass torts recommendations of the National Bankruptcy Review Commission. The report, which was revised to incorporate comments from the Civil Rules Committee and the Federal-State Committee, includes an observation that bankruptcy is only one aspect of any solution to the problem of mass torts in the federal and state courts. The report also notes that the Review Commission recommendations raise constitutional issues that may not be resolved without guidance by the United States Supreme Court.

The Chairman stated that it was the view of the Bankruptcy Administration Committee that the continuing development and support of the Case Management/Electronic Case Files System (CM/ECF) is necessary to ensure future compatibility with court enhancements and advances in technology. To accomplish this, the Bankruptcy Administration Committee established a Subcommittee on Automation to assist the Committee in working with the Committee on Information Technology to define requirements for additional functionality.

The Chairman briefed the Committee on the January 2003 meeting of the Standing Committee. The Chairman reported that Mr. Bernick had expressed reservations about the impact of the proposed amendments to Rules 3004 and 3005 in mass torts cases. In order that the Committee could reconsider the proposed amendments after discussing mass torts, the Chairman withdrew the proposal from the Standing Committee. The Standing Committee approved the Committee's recommendation to publish a proposed amendment to Rule 4008 for

public comment.

The Chairman reported that the Supreme Court approved amendments Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, 7007.1 on March 27, 2003. The amendments were transmitted to Congress and will take effect on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer the amendments.

Discussion of Mass Torts

The Chairman said that the Standing Committee had devoted the final day of its January meeting to a general discussion of mass torts, and he thought that the Committee should start thinking about mass tort issues. As part of the discussion, he invited Mr. Bernick, a member of the Standing Committee, who has been a litigator in many mass tort cases, Professor Gibson of the University of North Carolina Law School, who has written extensively on the subject, and Judge Rosenthal, the chair of the Civil Rules Subcommittee on Class Actions, to discuss mass tort issues. In addition, Judge Schmetterer, a member of the Federal/State Committee; and Professor Resnick, a member of the Committee and the author of a recent law review article on resolving enterprise-threatening mass torts liability in bankruptcy, spoke briefly and participated in the discussion.

Professor Gibson said bankruptcy is an attractive alternative for companies facing thousands or millions of tort claims because: a bankruptcy case permits the consolidation of the litigation in a single forum with nationwide jurisdiction; the Bankruptcy Code's definition of claims is broad enough to include future claims; and the debtor can obtain a broad, comprehensive discharge of its liabilities. In addition, bankruptcy offers the protection of the automatic stay, which may be expanded to third parties in some circumstance; the bankruptcy court has exclusive jurisdiction over the debtor's property; and, unlike a civil class action, in a bankruptcy case, claimants do not have the opportunity to opt out of the proceeding. Professor Gibson outlined issues that may arise during the course of a mass torts bankruptcy. She said the inclusion of future claimants raises due process issues such as what kind of notice to give, the sufficiency of the appointment of a future claims representative, and whether a separate future claims representative is needed for each category of claimants.

Mr. Bernick said there is no clear litigation path for mass tort cases, inside or outside of bankruptcy. Outside of bankruptcy, no one court is in charge, and there is no single legal standard on which to determine liability and factual issues. Defendant conduct may be a common element, but its impact is plaintiff-specific. Mr. Bernick said it is very difficult for the courts to value a large number of individual claims, many of which are mediocre and a few of which are very valuable. Bankruptcy is appealing because it offers centralization before a single judge, tools to define liability and damages, the flexibility of section 105 of the Code, and the bankruptcy discharge. He said making the reorganization process work is arduous, however, because there is no clear litigation path and myriad issues must be wrestled to the ground. He

analyzed centralization, litigation, and closure issues in several major mass torts cases and concluded that, although asbestos cases are instructive, non-asbestos cases offer a better model for reforming the process.

Judge Rosenthal said her subcommittee was charged with ameliorating problems in class action cases and muting the corrosive effects of the process, which include overlapping, competing and duplicative class action suits in state and federal courts, lengthy delays, high litigation costs, and conflicts in rules and procedure, including the timing of class certification, the selection of class counsel, and determining which case will be tried first. After extensive study and discussion, the subcommittee concluded that rulemaking under the Rules Enabling Act could not solve the problem. Along with the Federal/State Committee, however, the Civil Rules Committee recommended the concept of minimal diversity for certain large, multi-state class actions in the federal courts with appropriate safeguards. In addition, the Supreme Court has forwarded to Congress proposed amendments to Civil Rule 23 concerning the conduct of class actions. If the amendments become effective December 1, 2003, as expected, they would apply in adversary proceedings in bankruptcy cases.

Professor Resnick said the 18-month limit on a chapter 11 debtor's exclusivity period in the pending Bankruptcy Reform Act, which has passed the House of Representatives, would change the dynamics of cases. He stated that what the Committee can do is limited by the nature of procedural rules and the absence of a supersession clause in section 2075 of title 28. Judge Schmetterer discussed the importance of the minimal diversity recommendation and of further analysis of the reform proposals made by the National Bankruptcy Review Commission and others.

After further discussion, the Advisory Committee concluded that additional mass tort-related amendments to the Bankruptcy Rules probably will have to be preceded by legislative action. The Chairman thanked Mr. Bernick, Judge Rosenthal, and Professor Gibson for their clear presentations of the difficult issues.

Action Items

Proposed Amendments to Rules 3004 and 3005. At its meeting in Hyannis, the Committee approved proposed amendments to Rules 3004 and 3005 to bring those rules in compliance with section 501(c) of the Bankruptcy Code. At the Standing Committee's January meeting, the Chairman withdrew the proposed amendments for further consideration after Mr. Bernick expressed reservations about the proposal's impact in mass tort cases. Mr. Bernick described a case in which he was involved where the chapter 11 debtor filed a proof of claim on behalf of mass tort claimants so that their claims could be brought before the court and adjudicated. Setting a bar date for filing claims in such a case may be very costly because of the difficulty in providing notice to thousands or millions of potential creditors of their need to file.

Mr. Bernick's comments and the proposed amendments were considered by an ad hoc Rule 3004/3005 Subcommittee of the Advisory Committee, which recommended going forward with the original proposal because of the apparent conflict with section 501(c). At the Committee meeting, a member of the committee asked whether a chapter 11 debtor could avoid the need to file a claim on behalf of the creditor by amending its schedules. Mr. Bernick responded that the claims are unliquidated. He said the debtor wants to file a claim on behalf of the creditors in order get a trial on the merits on scientific issues and to determine the value of the claim.

The ad hoc subcommittee also considered whether timeliness under section 501, could be construed to mean within a time for the court to efficiently resolve matters essential to the case. The subcommittee concluded that it is likely the term would be interpreted to mean within the time permitted by the rules. Professor Resnick said the phrase "timely filed" is used several places in the Bankruptcy Code and Rules and that there is danger in saying that "timely filed" refers to something other than the bar date. The Committee discussed whether the bankruptcy judge could set a bar date for a small number of creditors as a means of moving the case forward, such as a bar date for claims based on currently filed lawsuits, or utilize sections 105 and 502(c) of the Code to estimate claims, even if unfiled, so long as due process is satisfied.

The Reporter said the Committee Note attempted to leave to the discretion of the court the extent of a creditor's ability to amend a claim filed on its behalf by the debtor or the trustee. The Chairman said that the Committee had addressed the question raised at the Standing Committee and that if other questions remain, the Committee could address them along with any comments after publication of the proposed rules. **A motion to forward the proposed amendments to the Standing Committee and request their publication for comment passed without dissent.**

Proposed Amendment to Rule 9014. The Reporter stated that the Committee has received four comments as a result of the publication of the proposed amendment to Rule 9014. The proposed amendment would make the mandatory disclosure and meeting requirements of Civil Rule 26 inapplicable to contested matters unless the court directs otherwise. One of the comments suggested that the Committee Note be revised to make explicit the court's discretion to reinstate the excepted subdivisions of Civil Rule 26 in whole or in part. The Reporter recommended inserting the phrase "some or all" in the final sentence of the Committee Note.

The Committee discussed whether such an insertion is needed in either the proposed amendment or the Committee Note and whether the insertion would create a negative inference in other rules. Mr. Frank suggested not making the insertion in order to avoid any negative inference. **A motion to approve the proposed amendment and the Committee Note without revision and recommend their adoption passed without dissent.**

Proposed Amendment to Rule 2002(g). The Bankruptcy Noticing Working Group had previously requested that the Committee consider an amendment to Rule 2002(g) to create a

process to permit creditors to receive notices electronically on a national or regional basis. The Noticing Working Group also has requested that the Committee consider amending Rule 2002(g) to permit creditors to register in a single place the address or addresses they wish to be used in all cases and in all districts throughout the bankruptcy system. The Working Group noted that technological advances permit the Bankruptcy Noticing Center (BNC) to correct misaddressed notices, batch multiple notices to a single creditor, and enhance the desirability of creditor participation in the Electronic Bankruptcy Noticing program by sending a creditor's notices to a single address designated by the creditor, all at a substantial savings to the judiciary. The Technology Subcommittee discussed the propriety of such an amendment to Rule 2002(g) and concluded that the issue should be considered by the Committee.

The Committee discussed concerns that the debtor might submit a creditor name which the name-matching software would match with the wrong creditor and, as a result, the BNC would send a notice intended for creditor A to creditor B. The problem could be avoided by sending two copies of the notice, one to the address supplied by the debtor and one to the national or regional address supplied by the creditor. Committee members noted that the double notice solution could be accomplished by contract without amending the rule and that sending double notices would not increase efficiency in the noticing process. Professor Resnick and Mr. Shaffer suggested that creditors could be charged extra for the added value of receiving duplicate notices at a single address.

Mr. Waldron suggested that a creditor file its request for a single, national address with the court, rather than with the BNC, which is operated by a government contractor. Judge Swain said the proposed amendment would force the debtor to review each certificate of service to determine if the notice went to the right party. The Chairman characterized the task as a heavy burden. The Committee discussed the differences between the proposed amendment and the register of mailing addresses for governmental units maintained by the clerk pursuant to Rule 5003(c). Although the Technology Subcommittee proposed a safe harbor similar to that in Rule 5003(c), the two rules would function differently and the discussion indicated that it might be difficult to provide a "safe harbor" for debtors whose notices are misdirected.

Judge Zilly stated that the origin of the proposed amendment was the creditor's desire to have a single, national address which would alleviate the problem with notices going to the wrong person at a creditor's local address. The Committee discussed whether the creditor should bear the risk for mistakes, since it requested the convenience of a single address, or whether the BNC should bear the cost. The Committee also discussed whether the proposed amendment would govern lease rejections and other notices given directly by the debtor, overriding the notice address stated in the lease or contract.

Several Committee members expressed interest in questioning representatives of the BNC and the Noticing Group about the operation of the BNC and the proposed national address system. **Mr. Frank's motion to table consideration of the proposed amendment until the next meeting passed without dissent.** On May 19, the Technology Subcommittee will meet

with representatives of the BNC, the Noticing Group, and the Bankruptcy Court Administration Division at the Administrative Office to discuss the proposal.

Proposed Official Form 21 on Which an Individual Debtor is to Submit the Debtor's Full Social Security number to the Court. The proposed privacy-related amendments to Rules 1007 and 2002, which are scheduled to take effect on December 1, 2003, will require that an individual debtor submit to the court the debtor's complete Social Security number for use on the § 341 Notice to Creditors and by any case trustee, the United States trustee or bankruptcy administrator, or the court. The proposed new subdivision (f) of Rule 1007 also provides for a debtor who does not have a Social Security number to so state.

Judge Walker presented the proposed form and Committee Note as revised by the Subcommittee on Forms. The subcommittee recommended deleting the phrase *("If more than one, state all.")* both times it was used in the draft form, deleting the last sentence of the first paragraph of the Committee Note, and deleting the entire second paragraph of the draft Note as it appeared in the agenda book for the meeting. Judge Walker stated that the Subcommittee had anguished over whether to include the Individual Taxpayer Identification Number (ITIN), a nine-digit number which is used by certain aliens and others who cannot obtain a Social Security number. The subcommittee concluded that consideration of including the ITIN should be deferred to a future meeting.

Judge McFeeley asked why the subcommittee didn't want to know if the debtor has more than one Social Security number. Judge Walker said the courts' software systems don't permit capturing more than one Social Security number or including more than one number on the meeting of creditors notice. Ms. Davis said the United States trustees want to know if the debtor has multiple Social Security numbers. Judge Torres said the form should err on the side of including multiple numbers, even if multiple numbers can't be put into the system with current technology. Mr. Frank said the form is to implement the privacy policy and give notice to creditors, not to require the debtor to disclose crimes such as using multiple Social Security numbers.

Judge Klein stated the current petition form asks for the debtor's Social Security number or tax ID number and adds "(if more than 1, state all)." Because the purpose of the new form is to transfer this answer block from the petition to a form that's not part of the public file, he said that, at a minimum, the new form should include the same information. The Reporter stated that collecting multiple numbers may not be all that useful if the court's computer system sends out only one number, and creditors may get a different number from the one under which they extended credit.

Judge Swain stated that the petition form facially gives the debtor an opportunity to submit multiple Social Security numbers and that the new form should not lose that. Including only one number might prevent the debtor from discharging debt obtained under other numbers. She stated that even if only one Social Security number is included on the notice, creditors and

the trustee now can review petitions with more than one Social Security number. She said the new form should not cut off the debtor's opportunity to submit information.

Judge Walker suggested retaining the phrase "(if more than one, state all)" from the current petition form and asking the programers to revise the software which generates the section 341 notice. **A motion to approve the form as drafted, including the phrase, carried without dissent.** Although further changes are anticipated in the form in the future (possibly including the ITIN), the consensus of the Committee was that the proposed form is important enough that it should be an Official Bankruptcy Form, rather than the less formal Director's Procedural Form.

A committee member asked how an unscheduled creditor could get the debtor's Social Security number. The Reporter answered that, if the creditor extended credit under the debtor's Social Security number, the creditor can input that number in the court computer system to confirm the debtor's identity. Mr. Shaffer questioned the deletion of a statement in an earlier draft of the Committee Note that the court would make the debtor's Social Security number available to law enforcement. The Reporter stated that law enforcement agencies do not get the section 341 notice but that the United States trustee's use of the full number is not limited. **The Committee approved the Committee Note as revised by the Forms Subcommittee after deleting the word "Only" at the start of the next to last sentence.** The proposed form and Committee Note will be transmitted to the Standing Committee with a recommendation for their adoption.

Proposed Amendment to Rule 7004. The Committee briefly considered the electronic issuance of a summons under Rule 7004 at its meeting in Hyannis and referred the matter to the Technology Subcommittee. Judge Zilly discussed the three reasons for the electronic issuance identified by the subcommittee. First, the plaintiff can file the complaint electronically. Second, in many bankruptcy cases, the debtor or the trustee may file dozens or even hundreds of adversary proceedings at the same time. Finally, many attorneys are located a great distance from the court, and the issuance of a summons electronically is both more convenient and more efficient for that attorney. The Committee has informed the Civil Rules Committee that it is considering amending Rule 7004 to specifically authorize the electronic issuance of a summons. The Civil Rules Committee may have helpful suggestions on the matter and the bankruptcy amendment possibly may form the basis of a future amendment to the Civil Rules.

Professor Resnick suggested changing the reference to "subdivision (a)(2)" in the first line of the proposed amendment to a reference to "Rule 7004(a)(2)" and that the Committee Note refer to "Rule 7004(a)(2)" rather than to "subpart (a)(2) of the rule." The Committee discussed whether it is appropriate for the first sentence Committee Note to state there is some doubt that the clerk can issue a summons electronically under Civil Rule 4(a) and (b). At Judge Klein's suggestion, the Committee agreed to revise the sentence to state "This amendment specifically authorizes the clerk to issue a summons electronically."

Judge Klein stated that the civil rule refers to signing, sealing, and issuing a summons while the proposed amendment only refers to signing and sealing it but the Committee Note refers to issuing the summons electronically. The Reporter stated that the proposed amendment only referred to signing and sealing the summons electronically because these actions can be demonstrated physically. He said signing and sealing the summons is issuance. It was suggested that line 8 of the proposed amendment be revised to state "The clerk may sign, seal, and issue a summons electronically . . ."

A motion to approve the proposed amendment and Committee Note with Professor Resnick's suggested changes in Line 2 of the proposed amendment and in the Committee Note, the suggested change in line 8 of the proposed amendment, and Judge Klein's suggested change in the first sentence of the Committee Note carried without dissent. The proposed amendment and Committee Note will be transmitted to the Standing Committee with a request for their publication for comment.

Proposed Amendment to Rule 8001. At its meeting in Hyannis, the Committee considered whether to pursue an amendment to Rule 8001 to expedite the dismissal of appeals when an appellant has failed to complete the designation of the record in the matter in a timely fashion. The Committee referred the matter to the Subcommittee on Privacy and Public Access. During a teleconference, the subcommittee discussed the bankruptcy appeals process in those courts in which the members have had any experience, and no one indicated any problems with delays in these matters. Mr. Waldron stated that he had discussed the matter with several bankruptcy clerks and that, although the courts use a number of different procedures to bring unperfected appeals to the attention of the district court or the bankruptcy appellate panel, this does not appear to be a problem.

The Reporter discussed Appellate Rule 3, which requires that the clerk of the district court promptly send a copy of the notice of appeal to the clerk of the court of appeals. This would be more difficult in bankruptcy appeals because the appeal could go either to the district court or to the Bankruptcy Appellate Panel (BAP). Judge Klein stated that the bankruptcy courts in the 9th Circuit handle the matter by immediately sending a copy of the notice to the BAP unless the appellant has opted to take the appeal to the district court. If the appellee subsequently opts out of the BAP, the BAP sends the notice of appeal to the district court. This enables the BAP or the district court to monitor the status of the appeal. Judge McFeeley indicated the 10th Circuit BAP follows the same procedure, sending the notice of appeal to the district court if the appellee opts out of the BAP.

Judge Klein stated that there are a number of provisions in the rules governing bankruptcy appeals which deserve study and that the Committee should not go forward with a proposal to amend just a single rule. Judge Small suggested that the Committee accept the Subcommittee's recommendation that it not pursue the matter. **The Committee agreed by consensus.**

Proposed Amendment to Rule 1007 and Schedule G. At its meeting in Hyannis, the

Committee discussed the proper treatment of the parties listed on Schedule G — Executory Contracts and Unexpired Leases. The current schedule contains a note reminding the person completing the schedule that "[a] party listed on this schedule will not receive notice of the filing of this case unless the party is also scheduled in the appropriate schedule of creditors." The cautionary note may be misleading because it could be read to suggest that parties to executory contracts and unexpired leases may not be creditors. Therefore, the note may mislead debtors into concluding that they do not need to notify these parties of the case.

Judge Walker stated that all parties to the case should be notified but that there is no consistency in the treatment of parties to executory contracts and unexpired leases. He said that the proposed amendment requires a list containing the names and addresses of the persons included or to be included on Schedules D, E, F, and G, instead of a list of creditors. For the first time in the national rules, the Committee Note refers to a "mailing matrix," a phrase frequently used in local rules and in bankruptcy practice.

Professor Resnick suggested deleting the phrase "unless the court orders otherwise" in line 7 because it would limit the requirement to prepare and file the list rather than limiting notice to the parties listed. The Reporter and Mr. Adelman stated that the provision was intended for cases such as those in which the debtor is a manufacturer, software company, or franchiser with thousands of executory contracts. Judge Klein suggested providing that, unless the court orders otherwise, the parties listed on Schedule G shall be included on the list filed with the petition. Professor Resnick said the provision would encourage "boilerplate" motions for such relief and suggested that the matter be left to the court's power under 11 U.S.C. § 105.

The Committee agreed to delete the phrase "unless the court orders otherwise" in line 7, correct the spelling of "name" in line 12, correct the reference to "subdivision (a)(2)" in line 22, and the reference to "subsection (a)" in line 37. At Professor Wiggins' suggestion, the Committee agreed to revise the last sentence of the Committee Note to read: " This list may be amended when necessary. See Rule 1009(a)." At Professor Resnick's suggestion, the Committee agreed to delete the last sentence of the third paragraph of the Committee Note and the second sentence of the fifth paragraph. **Judge Walker's motion to approve the proposed amendments to Rule 1007 and Schedule G, as revised at the meeting, carried without dissent.** The proposed amendment and Committee Note will be transmitted to the Standing Committee with a request for their publication for comment.

Proposed Amendments to the Uniform Numbering System for Local Bankruptcy Court Rules. Acting on the recommendation of the Standing Committee, the Judicial Conference directed the courts to "adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure." In furtherance of that policy, the Committee developed and distributed to the courts a numbering system for local bankruptcy rules that corresponds to the numbering system in the Bankruptcy Rules. Ms. Ketchum stated that the use of the uniform numbers and the posting of local rules on court websites has made practicing bankruptcy law in multiple districts easier.

The uniform numbers have not been updated since the system was issued seven years ago. Ms. Ketchum stated that, as a result of changes in the national rules and the adoption of local rules for electronic filing, there is interest in revising the uniform numbering system. **Professor Resnick's motion to approve the changes proposed by Ms. Ketchum carried without dissent.** The Chairman suggested that the revision is a great opportunity to remind the courts about the uniform numbering system. **Ms. Ketchum said she would prepare a memorandum for distribution to the courts.**

Proposed Technical Amendments to Rules 1011 and 2002(j). The proposed technical amendment to Rule 1011 corrects a cross reference to Rule 1004. The Reporter stated that the proposed amendment does not require publication because it is purely technical and makes no substantive or procedural change in the rules or the bankruptcy process. **The amendment was approved by consensus.** The proposed technical amendment to Rule 2002(j) deletes the reference to District Director of Internal Revenue and provides for service on the agency at the address set out in the Rule 5003(g) register. The Committee approved the amendment and recommended its adoption without publication at the Tucson meeting. Rather than transmit proposed amendments piecemeal, the Committee delayed sending the technical amendment to Rule 2002(j) to the Standing Committee. **The technical amendments to Rule 1011 and Rule 2002(j) will be transmitted to the Standing Committee along with a recommendation that they be approved without publication.**

Proposed Development of National Chapter 13 Plan. The Forms Subcommittee considered a model chapter 13 plan form developed at a workshop during the 2002 meeting of the National Association of Chapter 13 Trustees and submitted by Judge Keith M. Lundin. One Committee member stated that everybody favors a standard form for chapter 13 plans but "they want to use their standard form, not yours." Several committee members expressed concern that a number of standard forms for chapter 13 plans are used across the country and that the Committee could spend a lot of time considering whether to adopt a standard form and, if so, which one. Professor Resnick described the work done several years ago by the Committee's former Chapter 13 Subcommittee. He said the subcommittee found that chapter 13 is working fine even though there are different practices in every district. **The Committee agreed not to pursue the matter.**

Information Items

CM/ECF Working Group Subcommittee on Claims. Judge McFeeley and Mr. Wannamaker reported on the work of the Claims Subcommittee of the Bankruptcy CM/ECF Working Group. Judge McFeeley said the subcommittee is considering recommending establishment of a national filing center for proofs of claim and streamlining the transfer of claims by large, institutional creditors. Mr. Wannamaker said the claims group also is considering how to make it easier for small creditors to file claims, possibly using a electronic form in the "fillable PDF" format. Judge McFeeley said the CM/ECF claims group has

scheduled a meeting in Washington in May and that the group currently has no recommendation for rules changes.

Implementation of the CM/ECF system. Ms. Ketchum reported that the implementation of the CM/ECF system has been a mixed blessing for the courts. The system has changed how filings get to the court and has given the attorneys, court staff, and judges better access to documents in the case, but it has made it more difficult for bankruptcy judges to sign orders. She said that creative ways to solve the problem are being developed as the courts become more familiar with the CM/ECF system.

Mr. Waldron said his court has been live on the CM/ECF system for a year. He said the biggest complaints are the volume of email to attorneys on Notices of Electronic Filing and the fact that the court continues to scan a large volume of paper. Mr. Waldron stated that he would like a rules amendment permitting electronic service of the motion initiating a contested matter. Ms. Ketchum said many attorneys err on the side of caution when they file and serve motions because they are unsure whether it will be a contested matter under Rule 9014, which requires service in the manner required for a summons and complaint under Rule 7004. **The Chairman asked Mr. Waldron to prepare a proposal for the next meeting.**

The E-Government Act of 2002. The Reporter stated that the Committee's approval of the proposed privacy amendments to the Bankruptcy Rules and Forms limiting the disclosure of a debtor's Social Security number to the last four digits had proved serendipitous with the enactment of the E-Government Act in December. The act provides that, if the rules require the redaction of certain categories of information to protect privacy and security concerns, a party who wishes to file an otherwise proper document containing such information, may file an unredacted document under seal as well as the redacted electronic version. Ms. Ketchum said there is concern that the provision will be burdensome for the courts.

Memorandum on Proposed Amendment to Rule 9036. The Administrative Office's Bankruptcy Noticing Working Group has previously requested that Rule 9036 be amended to eliminate the requirement that the sender of an electronic notice receive an electronic confirmation that the transmission has been received. A memorandum in support of amending Rule 9036 was distributed to the Committee.

Ms. Ketchum stated that the Bankruptcy Noticing Center is trying to expand the use of Electronic Bankruptcy Noticing over the Internet, which would reduce the Judiciary's printing and postage costs, speed the delivery of notices to the parties, and facilitate the use of automated processing by recipients. Many Internet service providers (ISPs), however, only offer negative receipts, not the affirmative receipts required by Rule 9036. In addition, doubts have been expressed about the reliability of transmitting the text of bankruptcy notices as large e-mail attachments. Ms. Ketchum said the BNC has experimented with sending e-mails with hyperlinks to the text of bankruptcy notices, which has worked in almost every instance. She said the Committee may wish to consider whether it is satisfied with a system which gives creditors a

message that they have a notice rather than the notice itself.

Mr. Waldron stated that the system only retains the links to the notice text for a limited time, possibly as short as two weeks. He said the BNC also is exploring the possibility of establishing its own ISP which would provide the electronic confirmations currently required by Rule 9036. **The chairman requested that the Technology Subcommittee meet in Washington, D.C., with the representatives of the Working Group and the BNC and that the Committee consider the matter at its September meeting.**

Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic reported that the FJC has encountered problems in its attempt to get information electronically for a study of whether mandatory disclosure is needed in some types of adversary proceedings under Rule 7026 and Civil Rule 26. He said the FJC will continue to investigate the matter but that a more costly review of the dockets in a sample of adversary proceedings may be necessary.

Administrative Matters

The Committee's next scheduled meeting will be at Skamania Lodge in Stevenson, WA, on September 18-19, 2003. The Committee discussed several East Coast locations as possible sites of the spring 2004 meeting. The Committee discussed several dates in March or early April as possibilities.

Respectfully submitted,

James H. Wannamaker, III

Judge Small and Professor Morris will report orally on the June 2003 meeting of the Standing Committee.

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Judge Montali will report orally on the June 2003 meeting of the Bankruptcy Committee.
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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: TECHNOLOGY SUBCOMMITTEE

RE: CENTRAL ELECTRONIC NOTIFICATION TO CREDITORS

DATE: AUGUST 28, 2003

On May 19, 2003, the Technology Subcommittee, chaired by Judge Zilly, met with representatives of the private contractor that operates the Bankruptcy Noticing Center (the "BNC") as well as with Administrative Office personnel who deal with the BNC and electronic noticing generally. The meeting provided an opportunity for the Subcommittee to gather information from the persons directly responsible for the operation of the electronic notification program under which creditors can agree to receive their notices electronically in cases throughout the country. In particular, the Subcommittee was interested in learning more about the process by which the BNC matches the names and addresses that the debtor provides with the names and addresses of creditors from throughout the country.

The private contractor representatives demonstrated the operation of the name and address matching system used to identify notice recipients which have requested electronic notices. The program uses a certified address verification system comparable to that used by the United States Postal Service. They noted that the USPS system has been used quite successfully for the past two years in adding the additional four numbers to existing zip codes. The system employs a matching process that takes both the name and the address supplied on the debtor's schedules and determines whether any of the listed entities have requested that they be served electronically rather than by a paper notice sent through the regular mail. Once a creditor is

identified in this manner, the notice will be sent to that creditor in an electronic format. The BNC will also bundle all of the notices that the creditor would receive in a single transmission. (BNC also bundles paper notices to creditors.) The creditor then receives the full set of electronic notices from the BNC for cases pending throughout the country. If the system does not identify a matching creditor from the information supplied by the debtor, BNC sends the notice to the creditor by paper through the post office. Both the BNC representatives and the Administrative Office representatives attested to the accuracy and dependability of the notice distribution system.

Several Subcommittee members raised concerns about the program and the need for creditors to receive notices in a timely fashion. Concerns were expressed about the consequences of the failure of a creditor to receive the notice and what relief may be available to a creditor in that position. The presenters acknowledged the issue and offered two primary responses. First, the problem of failed delivery already exists with respect to paper notices sent through the regular mail. Second, and more importantly, the creditors receiving electronic notices have affirmatively enrolled in the system. Therefore, they have already essentially assumed the risk of non-delivery of the notices. These creditors believe that the benefits of receiving notices electronically outweigh the risks of the system. It was also noted that the creditor support for the pending legislation and its call for a national creditor registration process is further evidence of a general creditor preference for receiving notices in this manner and on a nationwide basis. The BNC representatives indicated that there are currently approximately 1,100 users of the system who have executed a total of 4,500 noticing agreements. The Internal Revenue Service is the largest user of the system, and they report no significant problems. They find it to be much more

efficient and faster than service by the regular mail.

Other areas of concern to the Subcommittee included the current reach of the BNC and the application of the electronic noticing system and creditor registry in cases under the various chapters of the Bankruptcy Code. The BNC and Administrative Office representatives indicated that the system operates on behalf of the courts primarily in cases where there is a large volume of debtors with common creditors. These are predominately chapter 7 and 13 cases. Furthermore, the vast bulk of notices are given by the court. BNC also provides electronic noticing services to some chapter 13 standing trustees who have significant noticing obligations. Nevertheless, there are still many chapter 13 trustees (perhaps as many as 20 others) to whom the courts have delegated the obligation to serve a significant number of notices either through their own efforts or by contract with another entity that performs the notice function. Concerns were expressed about the reliability of those notice providers who would not likely have the volume, resources or experience of the current operator of the BNC.

The Subcommittee considered these issues and reached several conclusions. First, the Subcommittee concluded that the current system does not really apply in chapter 11 cases, so that any national creditor registry system should not be extended to chapter 11 cases. In fact, the Subcommittee concluded that any such system should be limited to chapter 7 and 13 cases where high volume creditors are much more likely to appear. There does not exist in the other chapters a sufficiently recurring group of creditors, so there is no need to include those chapters in any rules amendment. Moreover, in larger chapter 11 cases where electronic notice may be particularly advantageous and cost effective, the debtor or other interested parties can and usually do seek a specific court order on notice that resolves these issues on a case by case basis.

The Subcommittee also concluded, after discussion, that the creditor registration system that is currently in place for electronic notices is working well, even under the current rules. The electronic notice providers and creditors already enter into agreements to make the system work, but they note that the current system requires a separate noticing agreement for each district. The agreements are a standard form (suggested by the Administrative Office), and they simply require a signed agreement for each district in which the creditor wishes to participate. The agreements contain a list of synonyms for the creditor's name. Creating a national rule to govern the process would alleviate the need to execute separate noticing agreements by each creditor with every district from which the creditor would like to receive electronic notifications and the need to update the often lengthy lists of synonyms on a court-by-court basis. This savings may justify an amendment to Rule 2002(g) to facilitate a national creditor registry.

The Subcommittee also concluded after discussion that the potential problem of notice providing entities that do not meet the high standards of accuracy and expedience currently present in the BNC system can be addressed by requiring that any such entity must meet appropriate standards for performance as set by the Administrative Office. This would place the responsibility for maintaining high standards with the Office that already oversees the process. It would also place that authority in a single place rather than require individual districts to set and monitor performance standards, a task that the courts are not usually well situated to undertake. Creditors could register their name and addresses with any court, and that registration would constitute an agreement to accept notices electronically according to the registration terms established by the Administrative Office.

The Subcommittee concluded that such a system would improve the noticing of creditors,

and that Rule 2002(g) should be amended to accomplish that goal. A proposed amendment to the rule follows.

RULE 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

* * * * *

(g) ADDRESSING NOTICES

(1) Notwithstanding subparts (2) - (4), an entity may register with any court an address to be used by all bankruptcy courts or particular bankruptcy courts for any notice in a chapter 7 or chapter 13 case required to be given to that entity under Rule 2002. Not later than 30 days after the entity submits an address, the courts shall use the appropriate address supplied by the entity for such notices. A notice sent to the entity at the appropriate address supplied by that entity is conclusively presumed to be the proper address for the notice for purposes of this subdivision.

(2) ~~(1)~~ Notices required to be mailed under Rule 2002 to a creditor, indenture trustee, or equity security holder shall be addressed as such entity or an authorized agent has directed in its last request filed in the particular case. For purposes of this subdivision –

(A) a proof of claim filed by a creditor or indenture trustee

that designates a mailing address constitutes a filed request to mail notices to that address, unless a notice of no dividend has been given under Rule 2002(e) and a later notice of possible dividend under Rule 3002(c)(5) has not been given; and

(B) a proof of interest filed by an equity security holder that designates a mailing address constitutes a filed request to mail notices to that address.

~~(2)~~ (3) If a creditor or indenture trustee has not filed a request designating a mailing address under Rule 2002(g)~~(1)~~ (2), the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later. If an equity security holder has not filed a request designating a mailing address under Rule 2002(g)~~(1)~~ (2), the notices shall be mailed to the address shown on the list of equity security holders.

~~(3)~~ (4) If a list or schedule filed under Rule 1007 includes the name and address of a legal representative of an infant or an incompetent person, and a person other than that representative files a request or proof of claim designating a name and mailing address that differs from the name and mailing address of the representative included in the list or schedule, unless the court orders otherwise, notices under Rule 2002 shall be mailed to the representative included in the list or schedules and to the name and

address designated in the request or proof of claim.

* * * * *

COMMITTEE NOTE

A new subdivision (g)(1) is inserted in the rule, and the former subdivisions are renumbered (2) through (4). The new subdivision authorizes entities to submit an address or addresses to a court setting out the address or addresses at which the entity wishes to receive any notices sent under Rule 2002. The entity may direct that notices from specific bankruptcy courts be sent to specific addresses. For example, an entity could consolidate notices in to single, nationwide address, or it could establish regional addresses applicable to specific districts. When an entity registers an address applicable to fewer than all of the bankruptcy courts, the notice must be sent to the address designated by that entity for cases in the district where the case is pending.

This address register operates only in cases under chapters 7 and 13. The new address becomes effective 30 days after the entity submits the address to the court. To the extent that entities do not take advantage of this system by registering their address, the remaining subdivisions of Rule 2002(g) govern the address for notices.

Proposed amendments to section 342(c) of the Bankruptcy Code set out in section 315 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2003, H.R. 975, as passed by the House of Representatives

SEC. 315. GIVING CREDITORS FAIR NOTICE IN CHAPTERS 7 AND 13 CASES.

(a) NOTICE- Section 342 of title 11, United States Code, as amended by section 102, is amended--

(1) in subsection (c)--

(A) by inserting `(1)' after `(c)';

(B) by striking `, but the failure of such notice to contain such information shall not invalidate the legal effect of such notice'; and

(C) by adding at the end the following:

`(2)(A) If, within the 90 days before the commencement of a voluntary case, a creditor supplies the debtor in at least 2 communications sent to the debtor with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.

`(B) If a creditor would be in violation of applicable nonbankruptcy law by sending any such communication within such 90-day period and if such creditor supplies the debtor in the last 2 communications with the current account number of the debtor and the address at which such creditor requests to receive correspondence, then any notice required by this title to be sent by the debtor to such creditor shall be sent to such address and shall include such account number.'; and

(2) by adding at the end the following:

`(e)(1) In a case under chapter 7 or 13 of this title of a debtor who is an individual, a creditor at any time may both file with the court and serve on the debtor a notice of address to be used to provide notice in such case to such creditor.

`(2) Any notice in such case required to be provided to such creditor by the debtor or the court later than 5 days after the court and the debtor receive such creditor's notice of address, shall be provided to such address.

`(f)(1) An entity may file with any bankruptcy court a notice of address to be used by all the bankruptcy courts or by particular bankruptcy courts, as so specified by such

entity at the time such notice is filed, to provide notice to such entity in all cases under chapters 7 and 13 pending in the courts with respect to which such notice is filed, in which such entity is a creditor.

`(2) In any case filed under chapter 7 or 13, any notice required to be provided by a court with respect to which a notice is filed under paragraph (1), to such entity later than 30 days after the filing of such notice under paragraph (1) shall be provided to such address unless with respect to a particular case a different address is specified in a notice filed and served in accordance with subsection (e).

`(3) A notice filed under paragraph (1) may be withdrawn by such entity.

`(g)(1) Notice provided to a creditor by the debtor or the court other than in accordance with this section (excluding this subsection) shall not be effective notice until such notice is brought to the attention of such creditor. If such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision.

`(2) A monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) or for failure to comply with section 542 or 543 unless the conduct that is the basis of such violation or of such failure occurs after such creditor receives notice effective under this section of the order for relief.'.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 9036 AND ELECTRONIC CONFIRMATION OF RECEIPT OF NOTICE

DATE: SEPTEMBER 2, 2003

Rule 9036 was added to permit electronic noticing to entities who preferred that method over regular paper notice. The rule was added in 1993, and it provides that the notice is complete, "when the sender obtains electronic confirmation that the transmission has been received." This requirement of electronic confirmation arguably was consistent with email practices in place at the time the Supreme Court promulgated the rule. Internet service providers (ISPs) apparently provided the confirmation of receipt service to provide some comfort to the senders that their messages were being received. As people became more confident about the reliability of email, the need for confirmation of the receipt of these communications diminished. Thus, there have been requests to delete that prerequisite to effective notice from Rule 9036. Deletion of the requirement would also make sense in connection with the possible amendment of Rule 2002(g) establishing a process for national creditor registration for the receipt of notices by electronic means.

The Technology Subcommittee met on May 19, 2003, in Washington D.C., to consider whether to recommend such a change to Rule 9036. The Subcommittee heard from representatives of the private contractor that operates the Bankruptcy Noticing Center as well as from Administrative Office personnel responsible for the program. They all noted that most ISPs do not offer a confirmation of receipt service that Rule 9036 anticipates. Thus, the rule already is

arguably obsolete and may hinder the use of electronic noticing if enforced to its letter. They also described a test that they conducted of the top ten ISPs in the country. They established two email accounts with each provider and sent messages to the two accounts for approximately twenty days. There was a 99.62% success rate for the receipt of the messages. They asserted that this success rate compares favorably to the delivery success rate of the Postal Service for paper notices to creditors (although they had not conducted a formal survey to reach that conclusion). The emails sent to the accounts were text messages only and did not include any attached files. Their experience with attaching files to email messages is that it lowers the delivery success rate for the messages.

The presenters noted that most notices are text messages that may permit the reader to click on a link to another available document relevant to the notice. These messages are text messages that are delivered at the better than 99% rate. It is only when relevant document is actually attached as a file to the message that the delivery rate declines. Since most notices now being sent do not include these documents as attachments, but rather provide a link to the court's docket or other site, these notices are being received by creditors in effectively every instance. To the extent that they are not so received, the court could take whatever action it might take in the comparable circumstance of an allegedly missing paper notice.

The Subcommittee concluded and recommends that the Rule should be amended to delete the requirement of the confirmation of receipt of an electronic notice. The deletion of the last sentence of the rule accomplishes that goal and provides additional support for the national creditor registry in the proposed amendment to Rule 2002(g). The proposal is set out below.

RULE 9036. Notice by Electronic Transmission

Whenever the clerk or some other person as directed by the court is required to send notice by mail and the entity entitled to receive the notice requests in writing that, instead of notice by mail, all or part of the information required to be contained in the notice be sent by a specified type of electronic transmission, the court may direct the clerk or other person to send the information by such electronic transmission. ~~Notice by electronic transmission is complete, and the sender shall have fully complied with the requirement to send notice, when the sender obtains electronic confirmation that the transmission has been received.~~

COMMITTEE NOTE

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

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

STYLE 277

Proposed Amendments to the Federal Rules of Civil Procedure

Restyled Rules 1 through 15

May 23, 2003

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Current wording	Potential Stylistic Revision
I. SCOPE OF RULES — ONE FORM OF ACTION Rule 1. Scope and Purpose of Rules	TITLE I. SCOPE OF RULES; FORM OF ACTION Rule 1. Scope and Purpose
These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.	These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

COMMITTEE NOTE

The language of Rule 1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The merger of law, equity, and admiralty practice is complete. There is no need to carry forward the phrases that initially accomplished the merger.

[The former reference to "suits of a civil nature" is changed to the more modern "actions and proceedings." This change does not affect the question whether the Civil Rules apply to summary proceedings created by statute. See *SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003); see also *New Hampshire Fire Ins. Co. v. Scanlon*, 362 U.S. 404 (1960).]

Rule 2. One Form of Action	Rule 2. One Form of Action
There shall be one form of action to be known as "civil action".	There is one form of action — the "civil action."

COMMITTEE NOTE

The language of Rule 2 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS Rule 3. Commencement of Action	TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS Rule 3. Commencing an Action
A civil action is commenced by filing a complaint with the court.	A civil action is commenced by filing a complaint with the court.

COMMITTEE NOTE

The caption of Rule 3 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4. Summons	Rule 4. Summons
(a) Form. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.	**(a) Contents; Amendments.** **(1)** ***Contents.*** The summons must: **(A)** name the court and the parties; **(B)** be directed to the defendant; **(C)** state the name and address of the plaintiff's attorney or — if unrepresented — of the plaintiff; **(D)** state the time within which the defendant must appear and defend; **(E)** notify the defendant that a failure to appear and defend will result in a default judgment against the defendant for the relief demanded in the complaint; **(F)** be signed by the clerk; and **(G)** bear the court's seal. **(2)** ***Amendments.*** The court may allow a summons to be amended.
(b) Issuance. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.	**(b) Issuance.** Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. A summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served.
(c) Service with Complaint; by Whom Made. **(1)** A summons shall be served together with a copy of the complaint. The plaintiff is responsible for service of a summons and complaint within the time allowed under subdivision (m) and shall furnish the person effecting service with the necessary copies of the summons and complaint. **(2)** Service may be effected by any person who is not a party and who is at least 18 years of age. At the request of the plaintiff, however, the court may direct that service be effected by a United States marshal, deputy United States marshal, or other person or officer specially appointed by the court for that purpose. Such an appointment must be made when the plaintiff is authorized to proceed in forma pauperis pursuant to 28 U.S.C. § 1915 or is authorized to proceed as a seaman under 28 U.S.C. § 1916.	**(c) Service.** **(1)** ***In General.*** A summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m) and must furnish the necessary copies to the person who makes service. **(2)** ***By Whom.*** Any person who is at least 18 years old and not a party may serve a summons and complaint. **(3)** ***By a Marshal or Someone Specially Appointed.*** At the plaintiff's request, the court may direct that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so direct if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.

(d) Waiver of Service; Duty to Save Costs of Service; Request to Waive. (1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant. (2) An individual, corporation, or association that is subject to service under subdivision (e), (f), or (h) and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request **(A)** shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment or law to receive service of process) of a defendant subject to service under subdivision (h); **(B)** shall be dispatched through first-class mail or other reliable means; **(C)** shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed; **(D)** shall inform the defendant, by means of a text prescribed in an official form promulgated pursuant to Rule 84, of the consequences of compliance and of a failure to comply with the request; **(E)** shall set forth the date on which the request is sent; **(F)** shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent, or 60 days from that date if the defendant is addressed outside any judicial district of the United States; and **(G)** shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. If a defendant located within the United States fails to comply with a request for waiver made by a plaintiff located within the United States, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.	**(d) Waiving Service.** **(1)** ***Requesting a Waiver.*** An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: **(A)** be in writing and be addressed: **(i)** to the individual defendant; or **(ii)** for a defendant subject to service under Rule 4(h), to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process; **(B)** name the court where the complaint has been filed and be accompanied by a copy of the complaint, two copies of a waiver form, and a prepaid means for returning the form; **(C)** inform the defendant, using text prescribed in an official form promulgated under Rule 84, of the consequences of waiving and not waiving service; **(D)** state the date when the request is sent; **(E)** give the defendant a reasonable time of at least 30 days after the request was sent — or at least 60 days if the defendant is addressed outside any judicial district of the United States[1] — to return the waiver; and **(F)** be sent by first-class mail or other reliable means. **(2)** ***Failure To Waive.*** If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant the costs later incurred in making service, together with the costs, including a reasonable attorney's fee, of any motion required to collect these service costs.

1. The Style Subcommittee would prefer to say "or at least 60 days if sent to the defendant outside any judicial district of the United States."

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent, or 90 days after that date if the defendant was addressed outside any judicial district of the United States. (4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required. (5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service under subdivision (e), (f), or (h), together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.	(3) ***Time To Answer After a Waiver.*** A defendant that, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the date when the request was sent — or until 90 days after it was sent if the defendant was addressed outside any judicial district of the United States.[2/] (4) ***Results of Filing a Waiver.*** When the plaintiff files a waiver, proof of service is not required and, except as provided in Rule 4(d)(3), these rules apply as if a summons and complaint had been served at the time of filing the waiver. (5) ***Jurisdiction and Venue Not Waived.*** Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.
(e) Service Upon Individuals Within a Judicial District of the United States. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in any judicial district of the United States: (1) pursuant to the law of the state in which the district court is located, or in which service is effected, for the service of a summons upon the defendant in an action brought in the courts of general jurisdiction of the State; or (2) by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.	(e) **Serving an Individual Within a Judicial District of the United States.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver of service has been filed — may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction of the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or by law to receive service of process.

2. The Style Subcommittee would prefer to say "until 90 days after it was sent to the defendant outside any judicial district of the United States."

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: **(1)** by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or **(2)** if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice: **(A)** in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or **(B)** as directed by the foreign authority in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the law of the foreign country, by **(i)** delivery to the individual personally of a copy of the summons and the complaint; or **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or **(3)** by other means not prohibited by international agreement as may be directed by the court.	**(f) Serving an Individual in a Foreign Country.** Unless federal law provides otherwise, an individual — other than a minor, an incompetent person, or a person whose waiver of service has been filed — may be served at a place not within any judicial district of the United States: **(1)** by any internationally agreed means of service that is reasonably calculated to give notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; **(2)** if there is no internationally agreed means of service or if an international agreement allows other means of service, by a method that is reasonably calculated to give notice: **(A)** as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction; **(B)** as the foreign authority directs in response to a letter rogatory or letter of request; or **(C)** unless prohibited by the foreign country's law, by: **(i)** delivering a copy of the summons and of the complaint to the individual personally; or **(ii)** using any form of mail requiring a signed receipt, addressed and sent by the clerk to the individual; or **(3)** by other means not prohibited by international agreement, as the court directs.
(g) Service Upon Infants and Incompetent Persons. Service upon an infant or an incompetent person in a judicial district of the United States shall be effected in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state. Service upon an infant or an incompetent person in a place not within any judicial district of the United States shall be effected in the manner prescribed by paragraph (2)(A) or (2)(B) of subdivision (f) or by such means as the court may direct.	**(g) Serving a Minor or an Incompetent Person.** A minor or an incompetent person in a judicial district of the United States must be served by following state law for service of summons or like process on such a defendant in an action brought in the courts of general jurisdiction of the state where service is made. A minor or an incompetent person in a place not within any judicial district of the United States must be served in the manner prescribed by Rule 4(f)(2)(A), (f)(2)(B), or (f)(3).

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected: **(1)** in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or **(2)** in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.	**(h) Serving a Corporation, Partnership, or Association.** Unless federal law provides otherwise or the defendant's waiver of service has been filed, a domestic or foreign corporation, or a partnership or other unincorporated association that is subject to suit under a common name, must be served: **(1)** in a judicial district of the United States: **(A)** in the manner prescribed by Rule 4(e)(1) for serving an individual; or **(B)** by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process and — if the agent is one authorized by statute and the statute so requires — by also mailing a copy of each to the defendant; or **(2)** at a place not within any judicial district of the United States, in any manner prescribed by Rule 4(f) for serving an individual, except personal delivery under Rule 4(f)(2)(C)(i).

(i) Serving the United States, Its Agencies, Corporations, Officers, or Employees.

(1) Service upon the United States shall be effected

(A) by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court or by sending a copy of the summons and of the complaint by registered or certified mail addressed to the civil process clerk at the office of the United States attorney and

(B) by also sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and

(C) in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to the officer or agency.

(2) (A) Service on an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by also sending a copy of the summons and complaint by registered or certified mail to the officer, employee, agency, or corporation.

(B) Service on an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States — whether or not the officer or employee is sued also in an official capacity — is effected by serving the United States in the manner prescribed by Rule 4(i)(1) and by serving the officer or employee in the manner prescribed by Rule 4(e), (f), or (g).

(3) The court shall allow a reasonable time to serve process under Rule 4(i) for the purpose of curing the failure to serve:

(A) all persons required to be served in an action governed by Rule 4(i)(2)(A), if the plaintiff has served either the United States attorney or the Attorney General of the United States, or

(B) the United States in an action governed by Rule 4(i)(2)(B), if the plaintiff has served an officer or employee of the United States sued in an individual capacity.

(i) Serving the United States and Its Agencies, Corporations, Officers, or Employees.

(1) ***United States.*** To serve the United States, a party must:

(A) (i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought — or to an assistant United States attorney or clerical employee whom the United States attorney designates in a writing filed with the court clerk — or

(ii) send a copy of the summons and of the complaint by registered or certified mail to the civil-process clerk at the United States attorney's office;

(B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C.; and

(C) if the action challenges an order of a nonparty agency or officer of the United States, send a copy of each by registered or certified mail to the agency or officer.

(2) ***Agency; Corporation; Officer or Employee Sued in an Official Capacity.*** To serve an agency or corporation of the United States, or an officer or employee of the United States sued only in an official capacity, a party must serve the United States and also send a copy of the summons and of the complaint by registered or certified mail to the agency, corporation, officer, or employee.

(3) ***Officer or Employee Sued Individually.*** To serve an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States (whether or not the officer or employee is also sued in an official capacity), a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).

(4) ***Extending Time.*** The court must allow a party a reasonable time to cure its failure to:

(A) serve a person required to be served under Rule 4(i)(2), if the party has served either the United States attorney or the Attorney General of the United States; or

(B) serve the United States under Rule 4(i)(3), if the party has served an officer or employee of the United States sued in an individual capacity.

(j) Service Upon Foreign, State, or Local Governments. **(1)** Service upon a foreign state or a political subdivision, agency, or instrumentality thereof shall be effected pursuant to 28 U.S.C. § 1608. **(2)** Service upon a state, municipal corporation, or other governmental organization subject to suit shall be effected by delivering a copy of the summons and of the complaint to its chief executive officer or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process upon any such defendant.	**(j) Serving a Foreign, State, or Local Government.** **(1)** ***Foreign State.*** A foreign state or its political subdivision, agency, or instrumentality must be served in accordance with 28 U.S.C. § 1608. **(2)** ***State or Local Government.*** A state, a municipal corporation, or any other state-created governmental organization that is subject to suit must be served by: **(A)** delivering a copy of the summons and of the complaint to its chief executive officer; or **(B)** serving a copy of each in the manner prescribed by that state's law for serving a summons or like process on such a defendant.
(k) Territorial Limits of Effective Service. **(1)** Service of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant **(A)** who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located, or **(B)** who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place from which the summons issues, or **(C)** who is subject to the federal interpleader jurisdiction under 28 U.S.C. § 1335, or **(D)** when authorized by a statute of the United States. **(2)** If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.	**(k) Territorial Limits of Effective Service.** **(1)** ***In General.*** Serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant: **(A)** who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located; **(B)** who is a party joined under Rule 14 or Rule 19 and is served at a place within a judicial district of the United States and not more than 100 miles from the place where the summons was issued; **(C)** who is subject to federal interpleader jurisdiction under 28 U.S.C. § 1335; or **(D)** when authorized by a United States statute. **(2)** ***Federal Claim Outside State-Court Personal Jurisdiction.*** With respect to a claim that arises under federal law, serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if: **(A)** the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and **(B)** exercising jurisdiction is consistent with the United States Constitution and laws.

(l) **Proof of Service.** If service is not waived, the person effecting service shall make proof thereof to the court. If service is made by a person other than a United States marshal or deputy United States marshal, the person shall make affidavit thereof. Proof of service in a place not within any judicial district of the United States shall, if effected under paragraph (1) of subdivision (f), be made pursuant to the applicable treaty or convention, and shall, if effected under paragraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.	(l) **Proving Service.** (1) ***Affidavit Required.*** Unless service is waived, proof of service must be made to the court. Except for service by a United States marshal or deputy marshal, proof must be by the server's affidavit. (2) ***Service Outside the United States.*** Service not within any judicial district of the United States must be proved as follows: **(A)** if made under Rule 4(f)(1), as provided in the applicable treaty or convention; or **(B)** if made under Rule 4(f)(2) or (f)(3), by a receipt signed by the addressee, or by other evidence satisfying the court that the summons and complaint were delivered to the addressee. (3) ***Validity of Service.*** Failure to prove service does not affect the validity of service. The court may allow proof of service to be amended.
(m) Time Limit for Service. If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the court shall extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country pursuant to subdivision (f) or (j)(1).	**(m) Time Limit for Service.** If a defendant is not served within 120 days after the complaint is filed, the court — on motion or on its own after notice to the plaintiff — must dismiss the action without prejudice against that defendant or direct that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).
(n) Seizure of Property; Service of Summons Not Feasible. **(1)** If a statute of the United States so provides, the court may assert jurisdiction over property. Notice to claimants of the property shall then be sent in the manner provided by the statute or by service of a summons under this rule. **(2)** Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by service of summons in any manner authorized by this rule, the court may assert jurisdiction over any of the defendant's assets found within the district by seizing the assets under the circumstances and in the manner provided by the law of the state in which the district court is located.	**(n) Asserting Jurisdiction over Property or Assets.** (1) ***Federal Law.*** The court may assert jurisdiction over property if authorized by a United States statute. Notice to claimants of the property must be given in the manner specified by the statute or by serving a summons under this rule. (2) ***State Law.*** Upon a showing that personal jurisdiction over a defendant cannot, in the district where the action is brought, be obtained with reasonable efforts by serving a summons under this rule, the court may assert jurisdiction over the defendant's assets found within the district. Jurisdiction is acquired by seizing the assets under the circumstances and in the manner provided by state law in that district.

COMMITTEE NOTE

The language of Rule 4 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 4(d)(1)(B) corrects an inadvertent error in former Rule 4(d)(2)(G). The defendant needs two copies of the waiver form, not an extra copy of the notice and request.

Rule 4(g) changes "infant" to "minor." "Infant" in the present rule means "minor." Modern word usage suggests that "minor" will better maintain the intended meaning. The same change from "infant" to "minor" is made throughout the rules. In addition, subdivision (f)(3) is added to the description of methods of service that the court may order; the addition ensures the evident intent that the court not order service by means prohibited by international agreement.

Rule 4(i)(4) corrects a misleading reference to "the plaintiff" in former Rule 4(i)(3). A party other than a plaintiff may need a reasonable time to effect service. Rule 4(i)(4) properly covers any party.

Former Rule 4(j)(2) refers to service upon an "other governmental organization subject to suit." This is changed to "any other state-created governmental organization that is subject to suit." The change entrenches the meaning indicated by the caption ("Serving a Foreign, State, or Local Government"), and the invocation of state law. It excludes any risk that this rule might be read to govern service on a federal agency, or other entities not created by state law.

Rule 4.1. Service of Other Process	Rule 4.1. Serving Other Process
(a) Generally. Process other than a summons as provided in Rule 4 or subpoena as provided in Rule 45 shall be served by a United States marshal, a deputy United States marshal, or a person specially appointed for that purpose, who shall make proof of service as provided in Rule 4(l). The process may be served anywhere within the territorial limits of the state in which the district court is located, and, when authorized by a statute of the United States, beyond the territorial limits of that state.	**(a) In General.** Process — other than a summons under Rule 4 or a subpoena under Rule 45 — must be served by a United States marshal or deputy marshal or by a person specially appointed for that purpose. It may be served anywhere within the territorial limits of the state where the district court is located and, if authorized by a United States statute, beyond those limits. Proof of service must be made under Rule 4(l).
(b) Enforcement of Orders: Commitment for Civil Contempt. An order of civil commitment of a person held to be in contempt of a decree or injunction issued to enforce the laws of the United States may be served and enforced in any district. Other orders in civil contempt proceedings shall be served in the state in which the court issuing the order to be enforced is located or elsewhere within the United States if not more than 100 miles from the place at which the order to be enforced was issued.	**(b) Enforcing Orders: Committing for Civil Contempt.** An order committing a person for civil contempt of a decree or injunction issued to enforce United States law may be served and enforced in any district. Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States at a location within 100 miles from the place where the order was issued.

COMMITTEE NOTE

The language of Rule 4.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5. Serving and Filing Pleadings and Other Papers	Rule 5. Serving and Filing Pleadings and Other Papers
(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.	**(a) Service: When Required.** **(1)** ***In General.*** Except as these rules provide otherwise, each of the following papers must be served on every party: **(A)** an order stating that service is required; **(B)** a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants; **(C)** a discovery paper required to be served on a party, unless the court orders otherwise; **(D)** a written motion, except one that may be heard ex parte; and **(E)** a written notice, appearance, demand, or offer of judgment, or any similar paper. **(2)** ***If a Party Fails to Appear.*** No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4. **(3)** ***Seizing Property.*** If an action is begun by seizing property and no person is or need be named as a defendant, service — if required before the filing of an answer, claim, or appearance — must be made on the person who had custody or possession of the property at the time of seizure.

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Service under Rule 5(a) is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court's transmission facilities.

(3) Service by electronic means under Rule 5(b)(2)(D) is not effective if the party making service learns that the attempted service did not reach the person to be served.

(b) Service: How Made.

(1) ***Serving an Attorney.*** If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party.

(2) ***Service in General.*** A paper is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge or, if no one is in charge, in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed, at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address — in which event service is complete upon mailing;

(D) leaving it with the court clerk if the person's address is unknown;

(E) sending it by electronic means if the person consented in writing — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(F) delivering it by any other means that the person consented to in writing — in which event service is complete when the person making service delivers it to the agency designated to make delivery.

(3) ***Using Court Facilities.*** If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E).

(c) Same: Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.	**(c) Serving Numerous Defendants.** **(1)** ***In General.*** If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that: **(A)** defendants' pleadings and replies to them need not be served on other defendants; **(B)** any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and **(C)** the filing of any such pleading and service on the plaintiff or plaintiffs constitutes due notice of the pleading to all parties. **(2)** ***Notifying Parties.*** A copy of every such order must be served on the parties as the court directs.
(d) Filing; Certificate of Service. All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission. **(e) Filing With the Court Defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. A court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.	**(d) Filing.** **(1)** ***Required Filings; Certificate of Service.*** A party must, within a reasonable time after service, file any paper after the complaint that is required to be served, and must include a certificate of service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or to permit entry onto land, and requests for admission. **(2)** ***How Made—In General.*** A paper is filed by delivering it: **(A)** to the court[1] clerk; or **(B)** to a judge who agrees to accept it for filing, and who must then note the filing date on the paper and promptly send it to the clerk. **(3)** ***Electronic Filing, Signing, or Verification.*** A court may, by local rule, permit papers to be filed, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. A paper filed by electronic means in compliance with a local rule is a written paper for purposes of these rules. **(4)** ***Acceptance by Clerk.*** The clerk must not refuse to accept a paper presented for filing solely because it is not in the form prescribed by these rules or by a local rule or practice.

1. The Style Subcommittee does not believe that "court" is needed to clarify the meaning of "clerk" in this context.

COMMITTEE NOTE

The language of Rule 5 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 5(a)(1)(E) omits the former reference to a designation of record on appeal. Appellate Rule 10 is a self-contained provision for the record on appeal, and provides for service.

Former Rule 5(b)(2)(D) literally provided that a local rule may authorize use of the court's transmission facilities to make service by non-electronic means agreed to by the parties. That was not intended. Rule 5(b)(3) restores the intended meaning — court transmission facilities can be used only for service by electronic means.

Rule 5(d)(2)(B) provides that "a" judge may accept a paper for filing, replacing the reference in former Rule 5(e) to "the" judge. Some courts do not assign a designated judge to each case, and it may be important to have another judge accept a paper for filing even when a case is on the individual docket of a particular judge. The ministerial acts of accepting the paper, noting the time, and transmitting the paper to the court clerk do not interfere with the assigned judge's authority over the action.

Rule 6. Time	Rule 6. Computing and Extending Time
(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.	**(a) Computing Time.** The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute: **(1)** ***Day of the Event Excluded.*** Exclude the day of the act, event, or default that begins the period. **(2)** ***Exclusion from Brief Periods.*** Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days. **(3)** ***Last Day.*** Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is filing a paper in court — a day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. **(4)** ***"Legal Holiday" Defined.*** As used in these rules, "legal holiday" means: **(A)** the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and **(B)** any other day declared a holiday by the President, Congress, or the state where the district court is located.
(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b) and (c)(2), 52(b), 59(b), (d) and (e), and 60(b), except to the extent and under the conditions stated in them.	**(b) Extending Time.** **(1)** ***In General.*** When an act may or must be done within a specified time, the court in its discretion may for good cause extend the time: **(A)** with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or **(B)** on motion made after the time has expired if the party failed to act because of excusable neglect. **(2)** ***Exceptions.*** A court may not extend the time for acting under Rules 50(b) and (c)(2), 52(b), 59(b), (d), and (e), and 60(b), except as those rules permit.
(c) [Rescinded].	

(d) For Motions—Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.	**(c) Motions, Notices of Hearing, and Affidavits.** **(1)** ***In General.*** A written motion and notice of the hearing must be served at least 5 days before the time specified for the hearing, with the following exceptions: **(A)** when the motion may be heard ex parte; **(B)** when these rules set a different period; or **(C)** when a court order — which a party may, for good cause, apply for ex parte — sets a different period. **(2)** ***Supporting Affidavit.*** Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 1 day before the hearing, unless the court permits service at another time.
(e) Additional Time After Service Under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.	**(d) Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added to the period.[1]

COMMITTEE NOTE

The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

1. The Advisory Committee report to the Standing Committee includes a recommendation to publish a substantive revision of the current Rule 6(e). If the Standing Committee decides to publish the Rule 6(e) proposal, a decision on whether to include the substantive revision in restyled Rule 6(d) should be made at the time when restyled Rules 1-15 are to be published.

III. PLEADINGS AND MOTIONS **Rule 7. Pleadings Allowed; Form of Motions**	**TITLE III. PLEADINGS AND MOTIONS** **Rule 7. Pleadings Allowed; Form of Motions and Other Papers**
(a) Pleadings. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.	**(a) Pleadings.** Only these pleadings are allowed: **(1)** a complaint; **(2)** an answer to a complaint; **(3)** an answer to a counterclaim designated as a counterclaim; **(4)** an answer to a crossclaim; **(5)** a third-party complaint[1]; **(6)** an answer to a third-party complaint; and **(7)** if the court orders, a reply to an answer or a third-party answer.
(b) Motions and Other Papers. **(1)** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion. **(2)** The rules applicable to captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules. **(3)** All motions shall be signed in accordance with Rule 11.	**(b) Motions and Other Papers.** **(1)** ***In General.*** A request for a court order must be made by motion. The motion must: **(A)** be in writing unless made during a hearing or trial; **(B)** state with particularity the grounds for seeking the order; and **(C)** state the relief sought. **(2)** ***Form.*** The rules governing captions and other matters of form in pleadings apply to motions and other papers.
(c) Demurrers, Pleas, Etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.	

1. The Style Subcommittee omitted as redundant the qualifying phrase "if a person not an original party is brought in under Rule 14."

COMMITTEE NOTE

The language of Rule 7 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 7(a) stated that "there shall be * * * an answer to a cross-claim, if the answer contains a cross-claim * * *." Former Rule 12(a)(2) provided more generally that "[a] party served with a pleading stating a cross-claim against that party shall serve an answer thereto * * *." New Rule 7(a) corrects this inconsistency by providing for an answer to a crossclaim.

For the first time, Rule 7(a)(7) expressly authorizes the court to order a reply to a counterclaim answer. A reply may be as useful in this setting as a reply to an answer, a third-party answer, or a crossclaim answer.

Former Rule 7(b)(1) stated that the writing requirement is fulfilled if the motion is stated in a written notice of hearing. This statement was deleted as redundant because a single written document can satisfy the writing requirements both for a motion and for a Rule 6(c)(1) notice.

The cross-reference to Rule 11 in former Rule 7(b)(3) is deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 7(c) is deleted because it has done its work. If a motion or pleading is described as a demurrer, plea, or exception for insufficiency the court will treat the paper as if properly captioned.

Rule 7.1. Disclosure Statement	Rule 7.1. Disclosure Statement
(a) Who Must File: Nongovernmental Corporate Party. A nongovernmental corporate party to an action or proceeding in a district court must file two copies of a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.	**(a) Who Must File.** A nongovernmental corporate party must file two copies of a disclosure statement that:[1/] **(1)** identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or **(2)** states that there is no such corporation.
(b) Time for Filing; Supplemental Filing. A party must: **(1)** file the Rule 7.1(a) statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court, and **(2)** promptly file a supplemental statement upon any change in the information that the statement requires.	**(b) Time for Filing; Supplemental Filing.** A party must: **(1)** file the disclosure statement with its first appearance, pleading, petition, motion, response, or other request addressed to the court; and **(2)** promptly file a supplemental statement upon any change in the required information.

COMMITTEE NOTE

The language of Rule 7.1 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

1. In endorsing this change, the Style Subcommittee notes that deleting "in a district court" is inconsistent stylistically (though not substantively) with the disclosure statement provisions of the Appellate Rules and Criminal Rules, which specify the court. The subcommittee, however, believes that this kind of inconsistency should be permitted to assure the internal consistency of the Civil Rules (which otherwise assume that the forum is a district court).

Rule 8. General Rules of Pleading	Rule 8. General Rules of Pleading
(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.	**(a) Claims for Relief.** A pleading that states a claim for relief — whether an original claim, a counterclaim, a crossclaim, or a third-party claim — must contain: **(1)** a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; **(2)** a short and plain statement of the claim showing that the pleader is entitled to relief; and **(3)** a demand for the relief sought, which may include relief in the alternative or different types of relief.
(b) Defenses; Form of Denials. A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make denials as specific denials of designated averments or paragraphs or may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 11.	**(b) Defenses and Denials.** **(1)** ***In General.*** In responding to a pleading, a party must: **(A)** state in short and plain terms its defenses to each claim asserted against it; and **(B)** admit or deny the averments[1] asserted against it by an opposing party. **(2)** ***Denials — Responding to the Substance.*** A denial must fairly respond to the substance of the averment denied. **(3)** ***General and Specific Denials.*** A party that intends in good faith to deny all the averments of a pleading — including the jurisdictional grounds — may do so by a general denial. A party that does not intend to deny all the averments must either specifically deny designated averments or generally deny all except those specifically admitted. **(4)** ***Denying Part of an Averment.*** A party that intends in good faith to deny only part of an averment must admit the part that is true and deny the rest. **(5)** ***Lacking Knowledge or Information.*** A party that lacks knowledge or information sufficient to form a belief about the truth of an averment must so state, and the statement has the effect of a denial. **(6)** ***Effect of Failing to Deny.*** An averment — other than one relating to the amount of damages — is admitted if a responsive pleading is required and the averment is not denied. If a responsive pleading is not required, an averment is considered denied or avoided.

1. As a global comment, the Style Subcommittee would prefer to use "allegation" or "allege," rather than "averment" or "aver," wherever the latter appear in the current rules.

(c) **Affirmative Defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.	(c) **Affirmative Defenses.** (1) ***In General.*** In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: • accord and satisfaction; • arbitration and award; • assumption of risk; • contributory negligence; • discharge in bankruptcy; • duress; • estoppel; • failure of consideration; • fraud; • illegality; • injury by fellow servant; • laches; • license; • payment; • release; • res judicata; • statute of frauds; • statute of limitations; and • waiver. (2) ***Mistaken Designation.*** If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.
(d) **Effect of Failure to Deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.	
(e) **Pleading to Be Concise and Direct; Consistency.** (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required. (2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds. All statements shall be made subject to the obligations set forth in Rule 11.	(d) **Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.** (1) ***In General.*** Each averment must be simple, concise, and direct. No technical form is required. (2) ***Alternative Statements of a Claim or Defense.*** A party may include two or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. (3) ***Inconsistent Claims or Defenses.*** A party may state as many separate claims or defenses as it has, regardless of consistency.

(f) **Construction of Pleadings.** All pleadings shall be so construed as to do substantial justice.	(e) **Construing Pleadings.** Pleadings must be construed so as to do substantial justice.

COMMITTEE NOTE

The language of Rule 8 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Rule 9. Pleading Special Matters	Rule 9. Pleading Special Matters
(a) Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, the party desiring to raise the issue shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.	**(a) Capacity or Authority to Sue; Legal Existence.** **(1)** ***In General.*** Except when required to show that the court has jurisdiction, a pleading need not aver: **(A)** a party's capacity to sue or be sued; **(B)** a party's authority to sue or be sued in a representative capacity; or **(C)** the legal existence of an organized association of persons that is made a party. **(2)** ***Raising Those Issues.*** To raise any of those issues, a party must do so by a specific negative averment,[1] which must state any supporting facts that are peculiarly within the party's knowledge.
(b) Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.	**(b) Fraud, Mistake; Conditions of Mind.** In averring fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.
(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.	**(c) Conditions Precedent.** In pleading conditions precedent, it suffices to aver generally that all conditions precedent have occurred or been performed. But when denying that a condition precedent has occurred or been performed, a party must do so with particularity.
(d) Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.	**(d) Official Document or Act.** In pleading an official document or official act, it suffices to aver that the document was legally issued or the act legally done.
(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.	**(e) Judgment.** In pleading a judgment or decision of a domestic or foreign court, a judicial or quasi-judicial tribunal, or a board or officer, it suffices to plead the judgment or decision without showing jurisdiction to render it.
(f) Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.	**(f) Time and Place.** An averment of time or place is material when testing the sufficiency of a pleading.
(g) Special Damage. When items of special damage are claimed, they shall be specifically stated.	**(g) Special Damages.** If an item of special damage is claimed, it must be specifically stated.

1. The Style Subcommittee would prefer to say "a specific denial."

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).	**(h) Admiralty or Maritime Claim.** **(1)** ***How Designated.*** If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim for purposes of Rules 14(c), 38(e), and 82 and the Supplemental Rules for Certain Admiralty and Maritime Claims. A claim cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, whether or not so designated. **(2)** ***Amending a Designation.*** Amending a pleading to add or withdraw a designation is governed by Rule 15. **(3)** ***Designation for Appeal.*** A case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3).

COMMITTEE NOTE

The language of Rule 9 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 10. Form of Pleadings	Rule 10. Form of Pleadings
(a) **Caption; Names of Parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.	(a) **Caption; Names of Parties.** Every pleading must have a caption with the court's name, the title of the action, the file number, and a Rule 7(a) designation. In the complaint, the title of the action must include the names of all parties; in other pleadings, the title may name the first party on each side and refer generally to other parties.
(b) **Paragraphs; Separate Statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.	(b) **Paragraphs; Separate Statements.** A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If it would promote clarity, each claim founded on a separate transaction or occurrence — and each defense other than a denial — must be stated in a separate count or defense.
(c) **Adoption by Reference; Exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.	(c) **Adoption by Reference; Exhibits.** A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument attached to a pleading is a part of the pleading for all purposes.

COMMITTEE NOTE

The language of Rule 10 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions	Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions
(a) Signature. Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.	**(a) Signature.** Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name — or by a party personally if the party is not represented by an attorney. The paper must state the signer's address and telephone number, if any. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.
(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, — **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; **(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; **(3)** the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.	**(b) Representations to the Court.** By presenting to the court a pleading, written motion, or other paper — whether by signing, filing, submitting, or later advocating it — an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or expense; **(2)** the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; **(3)** the factual contentions have evidentiary support or, if specifically so identified, likely will have evidentiary support after a reasonable opportunity for further investigation or discovery; and **(4)** the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(c) Sanctions.

(1) ***In General.*** If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may (subject to the conditions below) impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) ***Motion for Sanctions.*** A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion must be served under Rule 5, but it may not be filed with or presented to the court if the challenged paper, claim, defense, contention, allegation, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion.

(3) ***On the Court's Initiative.*** On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) ***Nature of a Sanction.*** A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) ***Limitations on Monetary Sanctions.*** The court must not impose monetary sanctions:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) ***Requirements for an Order.*** An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.	**(d) Inapplicability to Discovery.** This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

COMMITTEE NOTE

The language of Rule 11 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 12. Defenses and Objections — When and How Presented — By Pleading or Motion — Motion for Judgment on the Pleadings	Rule 12. Defenses and Objections: When and How Presented — By Pleading or Motion; Motion for Judgment on the Pleadings; Pretrial Hearing; Consolidating and Waiving Defenses
(a) When Presented. **(1)** Unless a different time is prescribed in a statute of the United States, a defendant shall serve an answer **(A)** within 20 days after being served with the summons and complaint, or **(B)** if service of the summons has been timely waived on request under Rule 4(d), within 60 days after the date when the request for waiver was sent, or within 90 days after that date if the defendant was addressed outside any judicial district of the United States. **(2)** A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within 20 days after being served. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. **(3) (A)** The United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity, shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after the United States attorney is served with the pleading asserting the claim. **(B)** An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint or cross-claim — or a reply to a counterclaim — within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.	**(a) Time to Present a Responsive Pleading.** **(1)** ***In General.*** Except when another time is prescribed by this rule or a United States statute, the time for filing a responsive pleading is as follows: **(A)** A defendant must serve an answer: **(i)** within 20 days after being served with the summons and complaint; or **(ii)** if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent if the defendant was addressed outside any judicial district of the United States.[1] **(B)** A party must serve an answer to a counterclaim within 20 days after being served with the pleading that states the counterclaim. **(C)** A party must serve an answer to a crossclaim within 20 days after being served with the pleading that states the crossclaim. **(D)** A party must serve a reply to an answer within 20 days after being served with an order to reply unless the order specifies a different time. **(2)** ***United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.*** The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint or crossclaim — or an answer to a counterclaim — within 60 days after service on the United States attorney. **(3)** ***United States Officers or Employees Sued in an Individual Capacity.*** A United States officer or employee sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States must serve an answer to a complaint or crossclaim — or an answer to a counterclaim — within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

1. The Style Subcommittee would prefer to say "within 90 days after it was sent to the defendant outside any judicial district of the United States."

(4) Unless a different time is fixed by court order, the service of a motion permitted under this rule alters these periods of time as follows: (A) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.	(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows: (A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 10 days after notice of the court's action; or (B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the more definite statement is served.
(b) **How Presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	(b) **How to Present Defenses.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to join a party under Rule 19. A motion asserting any of these defenses must be made before pleading if a responsive pleading is permitted. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion. If a pleading sets forth a claim for relief that does not require a responsive pleading, an adverse party may assert at trial any defense to that claim.
(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.	(c) **Motion for Judgment on the Pleadings.** After the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings.
	(d) **Matters Outside the Pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.	[*Present Rule 12(d) has become restyled Rule 12(i).*]
(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.	**(e) Motion for a More Definite Statement.** A party may move for a more definite statement of a pleading to which a responsive pleading is permitted but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or make any other order that it considers appropriate.
(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.	**(f) Motion to Strike.** The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may take this action on its own or on a motion made by a party either before responding to the pleading or, if not permitted to respond, within 20 days after being served with the pleading.
(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.	**(g) Consolidating Defenses in a Motion.** **(1)** ***Consolidating Defenses.*** A motion under this rule may include any other motion allowed under this rule. **(2)** ***Limitation on Further Motions.*** Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule may not make another motion under this rule raising a defense or objection that was available to the party at the time of its earlier motion.

(h) Waiver or Preservation of Certain Defenses. **(1)** A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course. **(2)** A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits. **(3)** Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.	**(h) Waiving and Preserving Certain Defenses.** **(1)** ***When Waived.*** A party waives any defense under Rule 12(b)(2)-(5) by: **(A)** omitting the defense from a motion in the circumstances described in Rule 12(g)(2); or **(B)** neither making the defense by motion under this rule nor including it in a responsive pleading or in an amendment permitted by Rule 15(a)(1) as a matter of course. **(2)** ***When to Raise Certain Defenses.*** Failure to state a claim upon which relief can be granted, to join an indispensable party under Rule 19, or to state a legal defense to a claim may be raised: **(A)** in any pleading permitted or ordered under Rule 7(a); **(B)** by any motion under Rule 12(c); or **(C)** at trial. **(3)** ***Lack of Subject-Matter Jurisdiction.*** If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.
	(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)-(7) — whether made in a pleading or by motion — and a motion under Rule 12(c) must be heard and determined before trial unless the court orders a deferral until trial.

COMMITTEE NOTE

The language of Rule 12 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 12(a)(4) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Rule 13. Counterclaim and Cross-Claim	Rule 13. Counterclaim and Crossclaim
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.	**(a) Compulsory Counterclaim.** **(1)** ***In General.*** A pleading must state as a counterclaim any claim that — at the time of service — the pleader has against an opposing party if the claim: **(A)** arises out of the transaction or occurrence that is the subject matter of the opposing party's claim; and **(B)** does not require adding another party of whom[1] the court cannot acquire jurisdiction. **(2)** ***Exceptions.*** The pleader need not state the claim if: **(A)** when the action was commenced, the claim was the subject of another pending action; or **(B)** the opposing party sued on its claim by attachment or other process by which the court did not acquire personal jurisdiction over the pleader on that claim, and the pleader does not assert any counterclaim under this rule.
(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.	**(b) Permissive Counterclaim.** A pleading may state as a counterclaim any claim against an opposing party.
(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.	**(c) Relief Sought in a Counterclaim.** A counterclaim need not diminish or defeat the recovery sought by the opposing party. It may request relief exceeding in amount or differing in kind from that sought by the opposing party.
(d) Counterclaim Against the United States. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States or an officer or agency thereof.	**(d) Counterclaim Against the United States.** These rules do not expand the right to assert a counterclaim — or to claim a credit — against the United States or a United States officer or agency.
(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving a pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.	**(e) Counterclaim Maturing or Acquired After Pleading.** The court may permit a party to file a supplemental pleading asserting a counterclaim that matured or was acquired by the party after serving an earlier pleading.
(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.	**(f) Omitted Counterclaim.** The court may permit a party to amend a pleading to add a counterclaim if it was omitted through oversight, inadvertence, or excusable neglect or if justice so requires.

1. The Style Subcommittee would prefer, on style grounds, to use "over whom" rather than "of whom." The subcommittee cannot conceive of a substantive difference between the two phrases.

(g) **Cross-Claim Against Co-party.** A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.	(g) **Crossclaim Against a Coparty.** A pleading may state as a crossclaim any claim by one party against a coparty if the claim arises out of the transaction or occurrence that is the subject matter of the original action or of a counterclaim, or if the claim relates to any property that is the subject matter of the original action. The crossclaim may include a claim that the coparty is or may be liable to the crossclaimant for all or part of a claim asserted in the action against the crossclaimant.
(h) **Joinder of Additional Parties.** Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.	(h) **Joining Additional Parties.** Rules 19 and 20 govern the addition of a person as a party to a counterclaim or crossclaim.
(i) **Separate Trials; Separate Judgments.** If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b) when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.	(i) **Separate Trials; Separate Judgments.** If it orders separate trials under Rule 42(b), a court may render judgment on a counterclaim or crossclaim under Rule 54(b) when the court has jurisdiction to do so, even if the opposing party's claims have been dismissed or otherwise resolved.

COMMITTEE NOTE

The language of Rule 13 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The meaning of former Rule 13(b) is better expressed by deleting "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Both as a matter of intended meaning and current practice, a party may state as a permissive counterclaim a claim that does grow out of the same transaction or occurrence as an opposing party's claim even though one of the exceptions in Rule 13(a) means the claim is not a compulsory counterclaim.

Rule 14. Third–Party Practice	Rule 14. Third-Party Practice
(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The	**(a) When a Defending Party May Bring in a Third Party.** **(1)** ***Timing of the Summons and Complaint.*** A defending party may, as third-party plaintiff, serve a summons and complaint on a nonparty who is or may be liable to it for all or part of the claim against it. But the third-party plaintiff must, by motion, obtain the court's leave if it files the third-party complaint more than 10 days after serving its original answer. **(2)** ***Third-Party Defendant's Claims and Defenses.*** The person served with the summons and third-party complaint — the "third-party defendant": **(A)** must assert any defense against the third-party plaintiff's claim under Rule 12; **(B)** must assert any counterclaim against the third-party plaintiff under Rule 13(a), and may assert any counterclaim against the third-party plaintiff under Rule 13(b) or any crossclaim against another third-party defendant under Rule 13(g); **(C)** may assert against the plaintiff any defense that the third-party plaintiff has to the plaintiff's claim; and **(D)** may also assert against the plaintiff any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. **(3)** ***Plaintiff's Claims Against a Third-Party Defendant.*** The plaintiff may assert against the third-party defendant any claim arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff; and the third-party defendant must assert any defense under Rule 12 and any counterclaim under Rule 13(a), and may assert any counterclaim under Rule 13(b) or any crossclaim under Rule 13(g). **(4)** ***Motion to Strike, Sever, or Try Separately.*** Any party may move to strike the third-party claim, to sever it, or to try it separately. **(5)** ***Third-Party Defendant's Claim Against a Nonparty.*** A third-party defendant may proceed under this rule against a nonparty who is or may be liable to the third-party defendant for all or part of any claim against it.

third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.	(6) ***Third-Party Complaint In Rem.*** If within the admiralty or maritime jurisdiction, a third-party complaint may be in rem. In that event, a reference in this rule to the "summons" includes the warrant of arrest, and a reference to the defendant or third-party plaintiff includes, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.
(b) When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.	**(b) When a Plaintiff May Bring in a Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may bring in a third party if this rule would allow a defendant to do so.
(c) Admiralty and Maritime Claims. When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.	**(c) Admiralty or Maritime Claim.** (1) ***Scope of Impleader.*** If a plaintiff asserts an admiralty or maritime claim under Rule 9(h), the defendant or a person who asserts a right under Supplemental Rule C(6)(b)(i) may, as a third-party plaintiff, bring in a third-party defendant who may be wholly or partly liable — either to the plaintiff or to the third-party plaintiff — for remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. (2) ***Defending Against a Demand for Judgment for the Plaintiff.*** The third-party plaintiff may demand judgment in the plaintiff's favor against the third-party defendant. In that event, the third-party defendant must defend under Rule 12 against the plaintiff's claim as well as the third-party plaintiff's claim; and the action proceeds as if the plaintiff had sued both the third-party defendant and the third-party plaintiff.

COMMITTEE NOTE

The language of Rule 14 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 14 twice refers to counterclaims under Rule 13. In each case, the operation of Rule 13(a) depends on the state of the action at the time the pleading is filed. If plaintiff and third-party defendant have become opposing parties because one has made a claim for relief against the other, Rule 13(a) requires assertion of any counterclaim that grows out of the transaction or occurrence that is the subject matter of that claim. Rules 14(a)(2)(B) and (a)(3) reflect the distinction between compulsory and permissive counterclaims.

Rule 15. Amended and Supplemental Pleadings	Rule 15. Amended and Supplemental Pleadings
(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.	**(a) Amendments Before Trial.** **(1)** ***Amending as a Matter of Course.*** A party may amend its pleading once as a matter of course: **(A)** before being served with a responsive pleading; or **(B)** within 20 days after serving the pleading if a responsive pleading is not permitted and the action is not yet on the trial calendar. **(2)** ***Other Amendments.*** Except as allowed in Rule 15(a)(1), a party may amend its pleading only with the adverse party's written consent or by leave of court. The court should freely give leave when justice so requires. **(3)** ***Time to Respond.*** Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 10 days after service of the amended pleading, whichever is later.
(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.	**(b) Amendments During and After Trial.** **(1)** ***During Trial.*** If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may allow the pleadings to be amended. The court should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that admitting the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence. **(2)** ***After Trial.*** When issues not raised by the pleadings are tried by the parties' express or implied consent, they must be treated in all respects as if raised in the pleadings. A party may move — at any time, even after judgment — to amend the pleadings to conform them to the evidence and to raise the unpleaded issues. But failure to amend does not affect the result of the trial of these issues.

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when **(1)** relation back is permitted by the law that provides the statute of limitations applicable to the action, or **(2)** the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or **(3)** the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party. The delivery or mailing of process to the United States Attorney, or United States Attorney's designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of subparagraphs (A) and (B) of this paragraph (3) with respect to the United States or any agency or officer thereof to be brought into the action as a defendant.	**(c) Relation Back of Amendments.** **(1)** ***When an Amendment May Relate Back.*** An amendment to a pleading relates back to the date of the original pleading when: **(A)** the law that provides the applicable statute of limitations permits relation back; **(B)** the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set forth — or attempted to be set forth — in the original pleading; or **(C)** the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment: **(i)** received such notice of the action that it will not be prejudiced in defending on the merits; and **(ii)** knew or should have known that, but for a mistake concerning[1] the proper party's identity, the action would have been brought against it. **(2)** ***Notice to the United States.*** When the United States or a United States agency or officer is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.
(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.	**(d) Supplemental Pleadings.** On motion and reasonable notice, the court may, upon just terms, permit a party to serve a supplemental pleading setting forth any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. And if the court considers it advisable, the court may order that the adverse party plead to the supplemental pleading by a specified time.

1. The Style Subcommittee would prefer to use "about" rather than "concerning."

COMMITTEE NOTE

The language of Rule 15 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Former Rule 15(c)(3)(A) called for notice of the "institution" of the action. Rule 15(c)(1)(C)(i) omits the reference to "institution" as potentially confusing. What counts is that the party to be brought in have notice of the existence of the action, whether or not the notice includes details as to its "institution."

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: COURT LOCATION AND RULE 5001(b)

As the attached memorandum from the Committee on the Administration of the Bankruptcy System notes, the courts have been preparing plans to ensure the continued operation of the courts in the event of emergencies. While the focus apparently has been on the impact of terrorist activities, the recent widespread blackout provides another example of the need for such planning. In the course of that planning, it became clear that some courts would be best served to conduct matters in another district. This led to the proposal now before the Judicial Conference to seek an amendment to 28 U.S.C. § 152(d) that would permit bankruptcy judges to hold court outside of the district in which they normally preside if emergency circumstances are present. Under the current provision, there is serious question as to whether a bankruptcy judge could hold court in the next most available court. The statutory amendment would resolve the problem, but existing Rule 5001(b) could pose another hurdle.

The following amendment to Rule 5001 is offered to meet the problem that may arise in the event that the proposed legislation is enacted. The issue does not appear controversial, and any change approved by the Committee can be held in abeyance until Congress acts on the proposed legislation. Adoption of the proposed amendment to Rule 5001(b) by the Committee at this time would permit us to forward the proposal to the Standing Committee as soon as legislation is enacted and would expedite final promulgation of the amendment. On the other hand, it may be prudent to await enactment of the legislation to be sure that any amendment to

the rule is consistent with that legislation. While that would delay the effective date of the rule amendment, the statute could be construed as overriding the rule and would permit a bankruptcy judge to hold court outside of his or her regular district if the emergency circumstances anticipated by the statute are present. In that event, delay in the promulgation of the rule would not have an adverse impact on the courts.

RULE 5001. Courts and Clerks' Offices

* * * * *

(b) TRIALS AND HEARINGS; ORDERS IN CHAMBERS. All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. Except as provided in 28 U.S.C. § 152(d), all ~~All~~ other acts or proceedings may be done or conducted by a judge in chambers and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

COMMITTEE NOTE

The rule is amended to permit bankruptcy judges to hold hearings outside of the district in which the case is pending to the extent that the circumstances lead to the authorization of the court to take such action under the newly enacted amendment to 28 U.S.C. 152(d). Under that provision, bankruptcy judges may hold court outside of their districts in emergency situations and when the business of the court otherwise so requires. This amendment to the rule is intended to implement the legislation.

The proposed amendment could be adjusted to correspond to the statutory section that the

legislation finally adopts. Likewise, the reference in the Committee Note could be changed without difficulty. The Committee Note, however, might need to be changed if the language of any finally adopted statute differs in any significant way from the language of the proposal set out in the attached memorandum of the Committee on the Administration of the Bankruptcy System.

Bankruptcy Committee
Meeting of
June 4-6, 2003
Agenda Item B.6
Action Item

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

SUBJECT: Places of Holding Court

This agenda item is presented to the Committee for its consideration of an amendment to title 28 of the United States Code to permit bankruptcy judges to hold court outside their judicial districts in the event of an emergency. The Committee on Court Administration and Case Management is considering a similar provision for the courts of appeals and the district courts.

Courts and court units have been developing Continuity of Operations Plans (COOPs) as directed by the Conference Report accompanying the first FY 2002 emergency supplemental appropriations made in response to the events of September 11, 2001. Guidance for the plans was included in an October 17, 2001, memorandum by the Director of the Administrative Office entitled, "Emergency Preparedness in the Judiciary." Judges and court unit executives are finding these plans helpful in identifying potential problems in advance of a crisis, and as a blueprint for continuing the operations of the court.

In preparing their plans, some courts have found that in emergency conditions federal court facilities may be available in an adjoining district or circuit even if no similar facilities are reasonably available within the district or circuit. The issue has been raised in the district and bankruptcy courts in the Southern District of New York, in the Court of Appeals for the District of Columbia Circuit, and in other courts.

Oftentimes a courthouse in a district or circuit is closer to a courthouse in an adjoining district or circuit than the nearest place of holding court within the same district. This is particularly likely in cities such as New York, Washington, Kansas City, and Dallas where the metropolitan area includes parts of several judicial districts. In addition, with the implementation of the Case Management/Electronic Case Files system in the bankruptcy courts, the judges, court staff, and attorneys may continue to have access to case files even though the courthouse is inaccessible.

Although the Judicial Conference fixes the official duty stations and additional places of holding court for United States bankruptcy judges pursuant to 28 U.S.C. § 152(b)(1), the statute only authorizes bankruptcy judges to hold court within their own districts. Section 152(c) of the statute states: "Each bankruptcy judge may hold court at such places within the judicial district, in addition to the official duty station of such judge, as the business of the court may require." The one exception is section 152(d), which provides for the designation of a bankruptcy judge to serve in an adjacent or nearby

district with the approval of the Judicial Conference and each of the judicial councils involved.

Similar concerns have been raised in the courts of appeals and in the district courts. Section 48(b) of title 28 states: "Each court of appeals may hold special sessions at any place within the circuit as the nature of the business may require, and upon such notice as the court orders." Likewise, section 141 states: "Special sessions of the district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders."

Staff at the Administrative Office asked the General Counsel's office to research the issues relating to a court holding proceedings outside its own district or circuit in emergency situations and provide draft legislation for such authority. Jeffrey N. Barr, Assistant General Counsel, concluded in the attached memorandum that the current statute, on its face, appears to expressly restrict a district court or appellate court to holding special sessions within the district or circuit. Although the memorandum only specifically addresses the district and appellate courts, the language of section 152(c) is almost identical to that of sections 141 and 48(b), and the same conclusion appears to apply to the bankruptcy courts.

Section 152 could be amended to authorize bankruptcy judges to hold court outside their judicial districts in the event of an emergency by redesignating subsections

152(d) and 152(e) as subsections 152(e) and 152(f) and adding the following new subsection 152(d):

> Bankruptcy judges may hold court at such places outside the judicial district as the nature of the business of the court may require, and upon such notice as the court orders, upon a finding by either the chief judge of the bankruptcy court (or, if the chief judge is unavailable, by the most senior bankruptcy judge who is not unavailable) or by the judicial council of the circuit that because of emergency conditions no location within the district is reasonably available where the bankruptcy judges could hold court. Bankruptcy judges may transact any business at special sessions of court held outside the district that might be transacted at a regular session.

In addition to the amendment to title 28 to permit bankruptcy judges to hold court outside their judicial districts in the event of an emergency, revision of Federal Rule of Bankruptcy Procedure 5001(b) may be needed to facilitate the emergency hearings. Rule 5001(b) states:

> All trials and hearings shall be conducted in open court and so far as convenient in a regular court room. All other acts or proceedings may be done or conducted by a judge in chambers and at any other place within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

Although the proposed amendment to section 152 of title 28 provides that a bankruptcy judge **may** hold court outside the district in an emergency, the statute may override the procedural rule. In addition, in the event of an emergency, bankruptcy judges may hold court outside of the district only on urgent matters in which the parties would be expected to consent to the hearing location. Changing the rule to authorize hearings outside the district on the consent of the parties or in exigent situations, however, could reduce the

chance that an affected party would block a hearing by withholding its consent for purposes of delay or to obstruct administration of the case.

RECOMMENDATION

That the Committee recommend to the Judicial Conference that it seek legislation to permit bankruptcy judges to hold court outside their districts in the event of an emergency.

Attachment

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum

DATE: January 29, 2003

FROM: Jeffrey N. Barr, Assistant General Counsel

SUBJECT: Legislation to Permit Emergency Special Court Sessions Outside the District or Circuit

THRU: William R. Burchill, Jr., Associate Director and General Counsel

TO: Abel J. Mattos, Chief, Court Administration Policy Staff

This is in response to your request for draft legislation to make clear the authority of a district court or court of appeals to conduct court sessions outside the district or circuit, as the case may be, under emergency conditions in which no location inside the district or circuit is reasonably available for that purpose.

The current 28 U.S.C. § 141 provides,

> "Special sessions of the district court may be held at such places in the district as the nature of the business may require, and upon such notice as the court orders.
>
> Any business may be transacted at such a special session which might be transacted at a regular session."

(Emphasis added).

Similarly, the current 28 U.S.C. § 48(b) provides,

> "Each court of appeals may hold special sessions at any place within its circuit as the nature of the business may require, and upon such notice as the court orders. The court may transact any business at a special session which it might transact at a regular session."

(Emphasis added).

Both of these provisions, on their face, appear to expressly restrict a district court or circuit court to holding special sessions within the district or circuit. To be sure, if a court did

hold sessions outside the district or circuit in emergency conditions, and a party challenged that practice under the current statutory scheme, a reviewing court might well read sections 141 and 48 to permit the practice. These provisions might well be read to contain implicit exceptions for emergency circumstances, given that the possibility of such an emergency clearly was not contemplated or considered by Congress when it enacted these provisions. Even so, clearly there may be a benefit to eliminating such issues of statutory interpretation by modifying the statute to permit this practice unambiguously.

I propose the following amendments to these statutes. First, re-designate 28 U.S.C. § 141 as section 141(a). Then, add a new section 141(b), which could read as follows:

> "Special sessions of the district court may be held at such places outside the district as the nature of the business may require, and upon such notice as the court orders, upon a finding by either the chief judge of the district court (or, if the chief judge is unavailable, the most senior active judge of the district court who is not unavailable) or the judicial council of the circuit that because of emergency conditions no location within the district is reasonably available where such special sessions could be held.
>
> Any business may be transacted at a special session outside the district which might be transacted at a regular session.
>
> The district court may summon jurors from within the district to serve in any case in which special sessions are conducted outside the district pursuant to the provisions of this section."

Also, add a new subsection 48(e) to 28 U.S.C. § 48, which could read as follows:

> "Each court of appeals may hold special sessions at any place outside the circuit as the nature of the business may require, and upon such notice as the court orders, upon a finding by either the chief judge of the court of appeals (or, if the chief judge is unavailable, the most senior active judge of the court of appeals who is not unavailable) or the judicial council of the circuit that because of emergency conditions no location within the circuit is reasonably available where such special sessions could be held. The court may transact any business at a special session outside the circuit which it might transact at a regular session."

Both of these suggestions approach the problem by retaining the current statutory language that special court sessions must be held within the district or circuit, but adding language permitting an exception to that restriction if a finding of emergency conditions is made.

Both draft provisions would assign the authority to make that finding to either the chief judge of the court or the judicial council of the circuit. My thought was that, given that under emergency conditions this finding may be necessary in order for the court to sit at all, more than one entity should be accorded authority to make the decision. The idea is to reduce the

likelihood that efforts to conduct needed judicial proceedings during an emergency might be impeded merely because of a temporary inability to locate a particular judge or judges whose approval is needed.

Thus, under my proposal, the judicial council can make the finding, but in an emergency it might be impossible to summon a quorum of the judicial council to act, so there is a benefit in empowering the chief judge of the court also to make the finding. The chief judge can make the finding, but one can imagine a situation in which a maverick chief judge declined to do so for some reason over other judges' objections, so there is a benefit in also empowering the judicial council of the circuit to act (in effect empowering the judicial council to overrule the chief judge in this regard).

In an emergency, of course, the chief judge might be unavailable, so both provisions would empower the most senior active judge of the court who is available to act as chief judge to make the finding in the chief judge's absence.

The provision authorizing the district court to summon jurors from within the district, even if trial takes place outside the geographical bounds of the district, would recognize the constitutional command of the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Presumably this Sixth Amendment requirement will be met in a criminal trial held outside the district, as long as the jurors are drawn from inside the district.

Consent of the parties. This draft legislation will raise legal issues -- especially in criminal cases -- whenever proceedings are held outside the district or circuit without the parties' consent.

Even under the current statutory scheme, which includes no express statutory reference to special district court sessions outside the district, there is nevertheless ample authority to the effect that district courts may conduct special sessions outside the district. This authority, however, is limited to sessions held with the parties' consent, and even then may not extend to permit full criminal trials.

Fed. R. Civ. P. 77(b) eschews a strict limitation of district court sessions to within the district. That Rule states, "All other acts or proceedings may be done or conducted by a judge in chambers, . . . and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected

thereby." (Emphasis added). Clearly, the drafters of Rule 77(b) did not consider section 141, despite its express terms, to preclude any and all district court hearings from being conducted outside the district, as long as the parties consent.

Courts have noted with approval that Rule 77(b) permits a district court hearing outside the district in civil cases with the consent of the parties. See, e.g., In re Joint Eastern and Southern Districts Asbestos Litigation, 769 F.Supp. 85, 88 (E.D.N.Y., S.D.N.Y. 1991); In re Application to Take Testimony in Criminal Case Outside District, 102 F.R.D. 521, 523 (E.D.N.Y. 1984); Kramer v. Burlington Northern, Inc., 453 F.Supp. 114, 115 (W.D. Wisc. 1978), aff'd, 610 F.2d 819 (7th Cir. 1979). My research has not uncovered any case in which a court has found that such a practice violates 28 U.S.C. § 141. The Second Circuit in In re Associated Gas & Electric Co., 83 F.2d 734 (2nd Cir. 1936), rejected a district judge's attempt to conduct a civil trial outside the district, but there a party had expressly objected to the idea. No court has ever been presented with an attempt by a district court to hold regular sessions, even temporarily, outside the district.

The Federal Rules of Criminal Procedure do not contain any counterpart to Fed. R. Civ. P. 77(b). Nonetheless, courts have similarly permitted hearings and other judicial acts to be conducted outside the district in criminal cases with the consent of the defendant. See, e.g, In re Application, supra, 102 F.R.D. at 523-24. Such practices apparently have not been thought to violate 28 U.S.C. § 141. In no reported instance, however, has a district court attempted to conduct a full criminal trial outside the district.

If the district courts may conduct proceedings – albeit perhaps not full criminal trials – outside the district with the parties' consent despite the language of 28 U.S.C. § 141, it stands to reason that the courts of appeals may conduct sessions outside the circuit with the parties' consent despite the similar language of 28 U.S.C. § 48(b). Oral argument in the court of appeals, by contrast with district court proceedings, involves no fact-finding, receipt of evidence, or interrogation of witnesses. It consists of nothing more than legal argument by lawyers on both sides. Thus, oral argument in the court of appeals is much more plausibly analogized to a district court hearing on a legal issue (which clearly can be conducted outside the district with the parties' consent) than to a full trial on the merits, which has the potential to inconvenience parties and witnesses, not just attorneys. Indeed, oral argument, like a district court hearing on a legal issue, can easily be conducted by video, without regard to anyone's geographic location.

The potential problem with conducting full criminal trials outside the geographical confines of the district is the provision in Article III, section 2, which states, "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed." One court has remarked, in light of this provision, "No opinion is expressed on whether a court should try part of a criminal case outside the state even if consent of the defendant is given . . . [in view of] the possibility that this is a jurisdictional rather than a venue matter. This limitation does not apply to civil cases." In re Application, supra, 102 F.R.D. at 526.

In fact, however, it is common for courts to order, and for criminal defendants to agree to, a transfer of venue to a district outside the state where the crime was committed. See, e.g., United States v. Miller, 111 F.3d 747, 749 (10th Cir. 1997); United States v. Santiago, 83 F.3d 20, 24 (1st Cir. 1996); United States v. Wilson, 26 F.3d 142 (D.C. Cir. 1994), cert. denied, 514 U.S. 1051 (1995); 2 Wright & Miller, Federal Practice & Procedure Crim. 3d §§ 301 et seq. (2002). The many authorities permitting such transfer of venue stand for the proposition that this constitutional requirement is one of venue waivable by the defendant, and not jurisdictional. If this constitutional provision does not prevent a criminal defendant from consenting to transfer of a case to another district, there is no apparent reason why this constitutional provision should prevent a criminal defendant from consenting to trial of a case outside the district in emergency circumstances.

But what if the defendant does not consent? Is it constitutionally permissible to conduct a criminal trial outside the state where the crime was committed without the defendant's consent, even in emergency circumstances?

Perhaps one could argue that as long as a proper finding of a genuine emergency has been made, and the criminal trial is conducted as close to the state where the crime was committed as is reasonably possible, the trial can be treated, for constitutional purposes, as constructively having been held in that state. The trial would be conducted by the federal district court sitting in that state, presumably before a jury drawn from that state. The trial would have been held within the geographical confines of the state if emergency conditions had not made that impossible. In such circumstances, the trial arguably should be treated as having been conducted within the state.

The alternative, after all, would be that if an emergency made trial impossible in a particular state for a period of time, no criminal defendant charged with a crime committed in that state could be tried at all unless the defendant consented. This hardly seems acceptable. One cannot think that the framers of the Constitution would have countenanced such a result, had they thought of this issue. Holding criminal trials outside the state under genuine emergency conditions makes eminent practical sense.

Thus, I would argue that, in effect, the existence of a genuine emergency precluding trial within the state would serve, for purposes of constitutional venue, as a surrogate for the consent of the defendant to trial outside the state in ordinary conditions.

In my view, it is easily likely enough that such a procedure will be upheld as constitutional that such provisions can be recommended and enacted in good faith. If they are enacted, then of course the courts will be available to consider any constitutional challenges raised under Article III, section II. If criminal trials conducted outside the district without the defendant's consent are invalidated, then so be it, and the statute can then be amended or construed accordingly.

The suggested draft legislation reflects a judgment that it is best not to try to manipulate the statutory language to grapple with such potential constitutional difficulties, e.g., by providing that a criminal trial can be conducted outside the district only with the consent of the defendant. I propose making no such exception, in the reasonable expectation that such an approach will withstand constitutional challenge.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 7004(b)(3)

DATE: AUGUST 26, 2003

Rule 7004(b)(3) provides that service can be made on a domestic or foreign corporation

> by mailing a copy of the summons and complaint to the attention of an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

Judge Robert J. Kressel (Bankr. D. Mn.) has urged the Committee to consider a revision of the rule to clarify the obligation of the plaintiff when attempting service of a summons and complaint. Judge Kressel has observed that the rule is ambiguous in that it is unclear whether it requires the name of an individual who is an officer or appropriate agent on the envelope, or whether an envelope generically addressed to "any officer, managing or general agent of XYZ, Inc." also is effective.

His observation about the ambiguity of the rule is borne out in the case law as well. Some courts have held that the generically addressed mailing meets the requirements of the rule and constitutes effective service. For example, in In re C.V.H. Transport, Inc., 254 B.R. 331 (Bankr. M.D. Pa. 2000), the trustee brought a preference action against a corporate defendant. The trustee mailed a copy of the summons and complaint to the "officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process

Associates Commercial Corporation." Id. at 332. The court noted the split in the case law and considered whether the notice should have been sent to a specifically named individual of the corporation. After reviewing the history of the rule, the Advisory Committee Notes attached to the rule, and the minutes of a subsequent Advisory Committee meeting at which the subject was addressed, the court concluded that the generic address used for the mailing complied with Rule 7004(b)(3). C.V.H. Transport was cited and relied on by the court in In re Tudor, 282 B.R. 546 (Bankr. S.D. Ga. 2002).

Other courts have noted that service under the Bankruptcy Rules is made by first class mail and on a nationwide basis. They assert that entities receiving regular first class mail may not appreciate the significance of the documents contained in those envelopes, so it is important to be sure that the mail gets to the correct person in the organization. See, e.g., In re Pittman Mechanical Contractors, Inc., 180 B.R. 453 (Bankr. E.D.Va. 1995); In re South Atlantic Airlines, Inc., 249 B.R. 112 (Bankr. D.S.C. 2000)(in dicta, the court notes that Pittman's strict standard expresses a better interpretation of Rule 7004(b)(3) for policy purposes than the more lenient standard that would allow the generically addressed mailings). Mail that is generically addressed may not get to the proper person in a timely fashion, and companies may not have an adequate opportunity to answer or otherwise respond to the complaint.

The C.V.H. Transport decision noted that Rule 7004(b)(3) essentially copied former Rule 704(c). The Advisory Committee Note to Rule 704(c) provided that a mailing is sufficient under the rule if it "is addressed to the defendant's proper address and directed to the attention of the officer or agent by reference to his position or title." Furthermore, the minutes of the September 1999 meeting of the Advisory Committee on Bankruptcy Rules include a description of the

Committee's consideration of this issue, and the conclusion of the Committee at that time was that no change in the rule was necessary. Judge Kressel, who was a member of the Committee at that time, raised the issue of the ambiguity of the rule. Professor Resnick noted that the rule essentially copies Rule 4(h) of the Federal Rules of Civil Procedure and indicated that departure from that language would require some coordination with the Standing Committee to accomplish. Some Committee members apparently believed that the Rule is sufficient as drafted and does not appear to have created too many problems, and another Committee member concluded that requiring persons to list the specific name of the individual within the corporation to receive the notices might create even more problems.

Judge Kressel has noted in his correspondence that Bankruptcy Rule 7004(b)(3) and Civil Rule 4(h) differ in a material respect. That is, service under Rule 7004(b)(3) is accomplished by mailing a copy of the summons and complaint by first class mail, while service under the Civil Rules is accomplished personally by delivering the documents to the person named. This "personal" service thus requires the server to meet the person to whom the documents are being delivered, unlike the service under Rule 7004(b)(3) that is accomplished simply by placing the documents in a properly addressed envelope, affixing the necessary postage, and dropping the envelope in a mailbox. One could assert that the "personal" nature of service under the Civil Rule resolves (or at least dramatically reduces) the problem of notices not being received by the proper person. Bankruptcy service, on the other hand, includes no comparable protection against the notice being directed to the wrong person because it relies on the individual opening the mail for the corporation to direct the documents to the appropriate officer or agent. Therefore, requiring the notice to be sent by name to the appropriate officer or agent will increase the

likelihood that the notice will actually find its way to the proper person within the corporation or other entity.

The cases decided since Pittman Mechanical Contractors have generally concluded that mailings directed to a corporation's officers or managing or general agents without including the name of any officer or agent are sufficient. That reading also seems consistent with the language of the Rule itself and the directive in the Advisory Committee's note to Rule 7004(b)(3) and its predecessor Rule 704(c). The note to Rule 7004(b) states that it is taken from Rule 704(c). The Committee Note to Rule 704(c) stated that service by mail on a corporation does not require that the envelope include the name of an officer or agent "so long as the mail is addressed to the defendant's proper address and is directed to the attention of the officer or agent by reference to his position or title." Thus, the history and language of the rule suggest that service of a summons and complaint on "any officer, managing or general agent, or other agent authorized by appointment or by law to receive service of process for XYZ, Inc. meets the requirements of Rule 7004(b)(3).

It may be that the Committee believes that the rule either should be changed to require the inclusion of an individual's name as the officer or agent, or the Committee may conclude that service in the more generic form is sufficient, but that the Rule should be amended to remove any perceived ambiguity on the issue. Set out below are two versions of a revised Rule 7004(b). The first is to direct that the summons and complaint be served on a specific individual, and the second version is intended to clarify that under the current rule, generic service is acceptable.

RULE 7004. PROCESS; SERVICE OF SUMMONS, COMPLAINT

* * * * *

(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

* * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of a person who is an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

COMMITTEE NOTE

The rule is amended to require that service by mail on a corporation, partnership or unincorporated association be made on a specific person who occupies the office or serves as an agent rather than by serving the summons and complaint more generically on an officer of the entity. Addressing the service to a particular person provides greater assurance that the defendant will actually receive the notice and will have the appropriate opportunity to file a response. It should correspondingly reduce the number of times the courts must determine whether to grant relief from judgments under Rule 60 F.R.Civ.P. which is made applicable under Bankruptcy Rule 9024.

If the Committee wishes to clarify that the generic form of address on first class mail to defendants is sufficient, another amendment to the Rule might be possible. This is one of those issues that might best be handled simply by the issuance of a new Committee Note, but Committee Notes cannot be amended without a change in the rule itself. Consequently, the amendment below is intended to clarify that the current general practice of service by mail to an officer or agent is sufficient.

RULE 7004. PROCESS; SERVICE OF SUMMONS, COMPLAINT

* * * * *

(b) SERVICE BY FIRST CLASS MAIL. Except as provided in subdivision (h), in addition to the methods of service authorized by Rule 4(e)-(j) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

* * * * *

(3) Upon a domestic or foreign corporation or upon a partnership or other unincorporated association, by mailing a copy of the summons and complaint to the attention of ~~an~~ any officer, ~~a~~ managing or general agent, or ~~to any~~ other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

COMMITTEE NOTE

The rule is amended to clarify that service under subdivision (b)(3) is sufficient if it is addressed to an officer or agent of the defendant simply by reference to the person's position with the defendant corporation, partnership, or other unincorporated association. There is no need to address the documents to any specific individual or entity[1].

[1] This Committee Note could be expanded to include references to decisions that authorize the "generic" form of address as well as decisions that would be overruled by the amendment in that they would require a more specific name for a person who would receive the service. While we have tried to avoid including citations to cases in the Committee Notes, we have included them in some of the Notes. See, e.g., Committee Note to Rule 1004 (2002) (cases cited to demonstrate that authority of a partnership to commence a case is a matter of state law).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 3007 AND THE SERVICE OF OBJECTIONS TO CLAIMS

DATE: AUGUST 26, 2003

Judge Kressel has asked the Committee to consider an amendment to Rule 3007 to clarify the service obligations of parties in interest who object to claims. The rule provides that a copy of the objection must "be mailed or delivered to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing." Judge Kressel notes that the rule's reference to the objection being "mailed or delivered" could be construed as something other than service or notice, two concepts that currently exist in the rules. He suggests that these objections be treated as contested matters (and he acknowledges that they are likely assumed to be contested matters) with service then being accomplished under Rule 7004 as required by Rule 9014.

Rule 3007(a) could be improved by explicitly providing that an objection to a claim is made by motion to the court unless the objection is joined with a demand for relief of a kind specified in Rule 7001. The existing rule suggests that a party file a document called an "objection to claim". Indeed, 9 Collier on Bankruptcy ¶ 3007.01[3] at 3007-7 (15th Ed. Rev.) notes that as to the form of an objection, "[t]he best practice is to denominate an objection to a claim as just that." (Footnote omitted). Rule 9013 would suggest, however, that the objection should be in the form of a motion because it requests that the court order that the claim be disallowed, subordinated, etc., and it is not an application that is authorized by the Bankruptcy Rules. Thus, under Rule 9013, the document arguably should be denominated as a motion which

brings Rule 9014 into play. Under 9014(a), the motion would initiate a contested matter, and Rule 9014(b) directs in part that service be made "in the manner provided for service of a summons and complaint by Rule 7004."

Amending the rule to change the practice from filing an "objection to a claim" to filing a "motion to disallow/subordinate/etc. a claim" may create more problems than it solves. There is no indication in the case law that service problems exist, and local rules vary on the topic. Some courts have no local rule governing objections to claims, although many appear to include a local rule governing objections to claims. Interestingly, the local rule in the Eastern District of Virginia essentially requires objections to be made by motion and references objections to claims within its local rule under Rule 9013. If Rule 3007 were rewritten slightly, it could accomplish the goal of clarifying the service obligation and remove another potential for misunderstanding under Rule 9013. Rule 9013 suggests that there are only two forms for requests for orders: motions and applications. A pleading titled "objection to claim" would seem to violate Rule 9013. Amending Rule 3007 by requiring these objections to be made by motion would resolve that problem. The rule could be amended as follows.

RULE 3007. OBJECTIONS TO CLAIMS

(a) An objection to the allowance of a claim shall be made by written motion ~~in writing~~ and filed. At least 30 days prior to the hearing, a ~~A~~ copy of the motion ~~objection~~ with notice of the hearing thereon shall be ~~mailed or otherwise delivered to~~ served under Rule 9014 on the claimant, the debtor or debtor in possession, and the trustee, ~~at least 30 days prior to the hearing~~

except as provided in subdivision (b) of this rule. ~~If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.~~

(b) If a motion objecting to a claim is joined with a demand for relief of the kind specified in Rule 7001, it is an adversary proceeding.

COMMITTEE NOTE

The rule is amended to clarify that objections to claims are commenced by motion and initiate contested matters. As contested matters, service of the motion is governed by Rules 7004 and 9014. If the motion objecting to the claim includes a demand for relief that would otherwise be governed by the Rules of Part VII, the action is an adversary proceeding and not a contested matter. In that event, the parties would proceed under the Rules of Part VII rather than under Rule 9014.

The rule could be amended further to include more specific direction for these motions or objections. For example, a number of local rules specifically require the objecting party to state the name and address of the claimant, any number assigned to the claim or claims, and the nature of the objection. This is a fairly common provision in local rules when a local version of Rule 3007 has been adopted. This requirement could be set out in a new subdivision (c) of the rule. Many local rules include much greater detail as to the process for filing and pursuing the objections, but these provisions vary significantly from court to court and would not seem to be appropriate for inclusion in a national rule. These could also be included in an expanded version of an amended Rule 3007 if the Committee so desires.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 5005(c)

DATE: AUGUST 28, 2003

Judge Robert J. Kressel (Bankr. D. Mn.) has proposed an amendment to Rule 5005(c). That rule addresses errors in the filing or transmittal of papers. It authorizes a variety of persons who receive improperly filed or transmitted papers to send them on to the proper person. Judge Kressel points out that the list of persons who can send these papers on to the correct person does not include the clerk of the bankruptcy appellate panel. He proposes adding that clerk to the list.

Rule 5005(c) was amended in 1991 to include the United States trustee among the persons who may forward papers to the proper person. That amendment was necessary because of the creation of the United States trustee program after the initial promulgation of the rule. A similar circumstance arguably exists for the clerk of the bankruptcy appellate panel. The rule includes the clerk of the district court, at least in part because of the district courts' status as an appellate court in bankruptcy matters. The bankruptcy appellate panel clerk occupies the same position. Therefore, it seems appropriate to include that clerk in list set out in Rule 5005(c). The proposed amendment is set out below.

RULE 5005. FILING AND TRANSMITTAL OF PAPERS

* * * * *

(c) ERROR IN FILING OR TRANSMITTAL. A paper intended to be filed with the clerk but erroneously delivered to the United

States trustee, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the clerk of the bankruptcy court. A paper intended to be transmitted to the United States trustee but erroneously delivered to the clerk, the trustee, the attorney for the trustee, a bankruptcy judge, a district judge, the clerk of the bankruptcy appellate panel, or the clerk of the district court shall, after the date of its receipt has been noted thereon, be transmitted forthwith to the United States trustee. In the interest of justice, the court may order that a paper erroneously delivered shall be deemed filed with the clerk or transmitted to the United States trustee as of the date of its original delivery.

COMMITTEE NOTE

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

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 9001(9) – DEFINITION OF ASSOCIATE

DATE: AUGUST 27, 2003

We have received a request from Mr. Robert R. Barnes, a San Diego, California, attorney, to consider an amendment to Rule 9001(9) which is the definition of a "regular associate" for purposes of the Bankruptcy Rules. Mr. Barnes notes that Rule 2014(b) anticipates that an accounting partnership or corporation may assign "any partner, member, or regular associate" of the firm to work on matters for which the court has authorized the firm to act without any further order of the court. Mr. Barnes notes also that Rule 9001(6) includes accounting partnerships and corporations in the definition of "firm" for purposes of the rules. Thus, he argues, the definition of "regular associate" in Rule 9001(9) should not be limited to attorneys as in the current rule.

Mr. Barnes urges a fairly minor change in the rule. He would simply amend Rule 9001(9) to include accountants who are employed by accounting firms with the definition of regular associate. His letter notes that it may be possible for accountants employed by order of the bankruptcy court to in turn employ attorneys (particularly tax attorneys), but that limiting the Rule 2014 "sub" employment of professionals by accounting firms to those of their employees who happen to be attorneys seems inconsistent with the Rule itself. It does seem that the intent of Rule 2014 is to allow accountants who are employed by the court approved accounting firm to perform services for which they can be compensated without further order of the court. To accomplish that end, Rule 9001(9) could be amended to include the accountants employed by

accounting firms as a "regular associate".

RULE 9001. GENERAL DEFINITIONS

* * * * *

(9) "Regular associate" means any attorney regularly employed by, associated with, or counsel to an individual attorney or firm, and any accountant regularly employed by an individual accountant or firm.

COMMITTEE NOTE

The rule is amended to expand the definition of regular associate to include accountants employed by another individual accountant or accounting firm. Rule 2014(b) specifically authorizes both attorneys and accountants who are employed by firms that have been approved for employment in a case to perform legal and accounting services without further order of the court. This amendment clarifies that accountants employed by firms or individual accountants have the same status as an associate employed by a law firm.

The rule could have been amended simply by adding "or accountant" after "attorney" as it appears in the current version of the rule. That form of amendment, however, could create some problems. For example, a law firm may employ an accountant to perform internal accounting services for the firm. If the law firm is employed as counsel for the debtor in possession in a chapter 11 case, the firm might assert that its in house accountant could perform compensable accounting services for the debtor in possession. The debtor in possession would have filed an application seeking an order approving the employment of the law firm to perform a wide range of tasks for the debtor in possession. While the application and any affidavit filed by the law firm in support of the application might include information about the in house accountant and

his or her skills and experience, it is also likely that the application may not include that information. The accountant's actions could range from the preparation of the monthly operating reports for the debtor in possession to significant forensic accounting activities. While these scenarios should not occur without the specific approval of the court, expanding the definition of "regular associates" to include accountants could have these unintended consequences.

I have been unable to find any reported decisions addressing this issue. I have also not found any decisions where courts have limited the administrative expense claims of accounting firms because of work performed by accountants who were employees of the accounting firm whose employment by the debtor in possession or trustee the court had earlier approved. Thus, there is some question whether there is a need for the change. It would seem that the courts are handling the problem (if indeed the issue has been raised in any case), so that this may be a solution in search of a problem.

Another potential problem that might follow from the proposed amendment to Rule 9001(9) is that it may cause other groups to seek similar definitional status under the rules. For example, turnaround management professionals, marketing experts, financial planners, investment bankers, and any number of other persons may seek to be included in the definition. To the extent that the Committee decides to include accountants, as proposed, it strengthens the argument that members of the other groups are not and cannot be included in the groups covered by the employment of professionals provisions in the rules. These issues arguably are much better left to the courts to decide on a case by case basis. Amending the rule as proposed could result in the courts being more limited in their ability to address issues concerning the employment and compensation of professional persons. It does not seem likely that the limited

amendment of the definition of "regular associate" should have such far reaching consequences.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WALDRON

RE: PROPOSED AMENDMENT TO RULE 9014

DATE: SEPTEMBER 5, 2003

I am submitting this you in accordance with my comments at the last Committee meeting. As I indicated then, electronic filers have complained that they are still required to serve in paper for any contested manner. I have two versions of an amendment. If you think that this is not yet ripe for discussion and would like to consider it further, that would be fine with me.

In drafting this proposed amendment to Fed. R. Bankr.P. 9014, the following relevant rules and issues and were recognized and/or considered:

(a) Service is governed under the Federal Rules of Civil Procedure at F. R.Civ.P. 4 (Summons) or F.R.Civ.P. 5(Service and Filing Pleadings and Other Papers).

(b) Fed. R. Bankr.P. 7004 (Process; Service of Summons; Complaint) at subparagraph (b) allows for service by first class mail. Subparagraph (b)(9) requires service upon the debtor, and if the debtor is represented by an attorney, to the attorney.

(c) Fed. R. Bankr.P. 9014(b) currently provides that a motion in a contested matter be served in the manner provided for service of a summons and complaint by Rule 7004, therefore requiring service by first class mail, upon the debtor and debtor's attorney. It further allows for any paper served after the motion to be served in the manner provided by Rule 5(b) F.R. Civ.P.

(d) F. R.Civ.P. 5(a) provides for service of *inter alia*, "every written motion" upon each of the parties. Service on a party represented by an attorney is made on the attorney

under F.R.Civ.P. 5(b), unless the court orders otherwise.

(e) Under F.R.Civ.P. 5(b)(2)(D) service may be effectuated by electronic means consented to in writing by the person served. If authorized by local rule, a party may make service under subparagraph (D) through the court's transmission facilities.

II. Preliminary Draft of Proposed Amendment to Bankruptcy Rule 9014

Rule 9014. Contested Matters.

(a) MOTION. 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 directs otherwise.

(b) SERVICE. The motion shall be served in the manner provided ~~for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.~~ **by Rule 5(b) F.R.Civ.P. Where the party against whom relief is sought is the debtor, the motion shall be served in the manner provided by Rule 7004(b)(9).**

III. Committee Note (Proposed)

Subdivision (b) is amended to permit parties to serve papers, *including the original motion*, in the manner provided by Rule 5(b) F.R.Civ.P. , which provides the opportunity for service by electronic transmission at subdivision (2)(D). Where the debtor is the party against whom relief is sought, this amendment preserves the requirement under Fed. R. Bankr.P. 7004(b)(9), of service by first class mail, upon the debtor, and if the debtor is represented by an attorney, to the attorney.

Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter, thereby requiring parties to serve original motions under Rule 7004. In order to allow

parties to avail themselves of the benefits of service by electronic transmission, the Rule is amended to provide a mechanism for service of the original motion by electronic means, including service of a copy through the court's transmission facilities under Rule 5(b)(2)(D), where such service is authorized by local rule. Service of written motions under the Federal Rules of Civil Procedure is authorized by F.R.Civ.P. 5. The purpose of the final sentence of subdivision (b) is to maintain the requirement of service upon a debtor and a debtor's attorney by first class mail under Rule 7004(b)(9).

IV. Preliminary Draft of Proposed Amendment to Bankruptcy Rule 9014 (Alternative)

Rule 9014. Contested Matters.

(a) MOTION. 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 directs otherwise.

(b) SERVICE. The motion shall be served in the manner provided ~~for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.~~ **by Rule 5(b) F.R.Civ.P. Where the party against whom relief is sought is the debtor, the motion shall be served in the manner provided by Rule 7004(b)(9), except in addition to the manner of service authorized by Rule 7004(b)(9), if the debtor is represented by an attorney, the attorney may be served in the manner provided by Rule 5(b) F.R.Civ.P.**

V. Committee Note (Proposed) (Alternative)

Subdivision (b) is amended to permit parties to serve papers, *including the original motion*, in the manner provided in Rule 5(b) F.R.Civ.P. , which provides the opportunity for service by electronic transmission at subdivision (2)(D). Where the debtor is the party against whom relief is sought, this amendment preserves the requirement under Fed. R. Bankr.P. 7004(b)(9), of service by first class mail, upon the debtor, and if the debtor is represented by an

attorney, to the attorney, with the exception that if the debtor is represented by an attorney, in addition to service by first class mail, service upon the attorney may also be made in the manner provided in Rule 5(b) F.R.Civ.P.

Whenever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve that dispute is a contested matter, thereby requiring parties to serve original motions under Rule 7004. In order to allow parties to avail themselves of the benefits of service by electronic transmission, the Rule is amended to provide a mechanism for service of the original motion by electronic means, including service of a copy through the court's transmission facilities under Rule 5(b)(2)(D), where such service is authorized by local rule. Service of written motions under the Federal Rules of Civil Procedure is authorized by F.R.Civ.P. 5. The purpose of the final sentence of subdivision (b) is to maintain the requirement of service upon a debtor and a debtor's attorney by first class mail under Rule 7004(b)(9), with the exception that if the debtor is represented by an attorney, service upon the attorney may also be made by electronic transmission under F.R. Civ.P 5(b).

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: BURDEN OF PROOF FOR OBJECTIONS TO EXEMPTIONS

DATE: AUGUST 26, 2003

At the March 2002 meeting, the Committee considered whether to amend Rule 4003(c) to reverse the burden of proof from the objecting party to the party who would have that burden under applicable nonbankruptcy law. Judge Barry Russell (Bankr. C.D. Cal.) had raised the issue with the Committee, noting that the allocation of burdens of proof under Rule 4003(c) is arguably inconsistent with the Supreme Court's decision in Raleigh v. Illinois Dept. of Revenue, 530 U.S. 15 (2000). The Committee determined that it would not take action on the issue until the case law developed further. This brief memorandum provides an update for the Committee as to those developments.

A number of courts have addressed the issue of the proper burden of proof under Rule 4003(c) since the Supreme Court's decision in Raleigh. The majority have not cited Raleigh in their opinions and have maintained the allocation of the burden as set out in the rule under which the objecting party bears the burden. See, e.g., In re Fixel, 286 B.R. 638 (Bankr. N.D. Oh. 2002); In re Owens, 269 B.R. 794 (Bankr. N.D. Ill. 2001); In re Thompson, 263 B.R. 134 (Bankr. W.D. Okla. 2001); In re Allen, 254 B.R. 497 (Bankr. M.D. Fla. 2000). There are several cases that have recognized the issue in dicta and questioned whether the allocation of the burden of proof under Rule 4003(c) is proper given Raleigh. These cases generally have reached their decisions on other grounds, but they each note the potential problem and thereby signal a potential basis for

decisions in future cases. See, e.g., In re Williams, 280 B.R. 857 (9th Cir. BAP 2002); In re Greenfield, 289 B.R. 146 (Bankr. S.D. Cal. 2003).

I have not found any decisions to date that specifically hold that the Supreme Court's decision in Raleigh renders Rule 4003(c) ineffective. The discussion of the issue in the Williams and Greenfield cases might generate additional decisions on the topic. However, it seems prudent to continue to await case law development of the issue.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: PROPOSALS FROM THE DIRECTOR OF THE EXECUTIVE OFFICE FOR UNITED STATES TRUSTEES

DATE: AUGUST 25, 2003

Attached is a submission from the Director of the Executive Office for United States Trustees with proposals for amendments to Bankruptcy Rules 2003, 4002, 2016, and 7001, as well as Official Form 21[1]. These amendments fall into three categories. The first category involves the debtor's obligation to provide complete and accurate information. The amendments to Rules 2003 would require debtors to bring a list of items to the § 341 meeting of creditors as set out in proposed Rule 2003(b)(1) (A) - (O) as well as under proposed Rule 4002 to provide information to the trustee or the United States trustee about a wide range of related matters. The amendment to Rule 4002 would even require the debtor to notify credit reporting agencies if the debtor used an incorrect social security number in connection with the bankruptcy case. Finally, there is a proposal to amend Schedule I to require chapter 7 debtors to disclose a non-filing spouse's income.[2] The proposal states that the courts consider the non-filing spouse's income in

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[1] There is a pending recommendation for the approval of a new Official Form 21. That form is the debtor's social security number form that is to be submitted to the clerk. Thus, the United States Trustee Program proposed form should be renumbered if it is acceptable to the Committee.

[2] The proposal urges that the information be required in chapter 7 cases, but it also refers to chapter 11 cases. ("The simple addition of chapters 7 and 11 to the form will save the United States trustee a lot of work.") However, the stated reason for the addition, gathering information for § 707(b) purposes, would not apply in chapter 11.

making substantial abuse determinations under § 707(b), so it is appropriate to require the debtor to disclose that information on Schedule I. The Schedule already requires this information in cases under chapters 12 and 13, so the amendment to the form would simply be by the insertion of the number "7" on the form.

The second category of amendments relates to the debtor's attorney's obligation to disclose the compensation received or promised in connection with the bankruptcy case for the year prior to the commencement of the case. The proposal would amend Rule 2016 to require that the debtor as well as the attorney sign the fee disclosure statement and that the disclosure include "the details of the legal services to be provided to the debtor for the fee disclosed". It would also expand the range of issues to be disclosed to include whether the attorney has taken any interest in any property from the debtor either outright or through some other form of transfer including trust interests, security interests, assignments, and pledges. The amendment also would require the attorney to disclose any fees paid by the debtor in the year prior to the commencement of the case without regard to whether the fees were incurred in connection with or in contemplation of the case. These changes arguably are intended to protect debtors by ensuring that the amount of fees and the scope of the attorney's representation of the debtor are clearly set out and available for the court to review. If the fees seem excessive, the court can take action under Rule 2017 to order disgorgement of the fee. Disgorgement would either be in favor of the bankruptcy estate or the person who supplied the funds to pay the fee if that person is not the debtor. There is some question whether the court can order the disgorgement of a fee for prebankruptcy services unrelated to the case under the authority of either § 329 or Rule 2017. These transfers may be vulnerable under one of the trustee's avoiding powers; however, they

would not seem to be subject to recovery based on a court's action under the aforementioned Code section or Rule. Indeed, if the concern is the recovery of excessive fees, it would seem that neither the one year disclosure term set out in § 329 nor the limitation in Rule 2016 to services in connection with the case would be applicable. Thus, the proposed amendment may be subject to challenge under the theory that the changes seek information essentially unrelated to the purpose of the disclosure in the first place. Moreover, the amendment does not even go as far as it might because it is limited to the disclosure of fees paid in the year prior to the date of the filing of the petition. It would not require disclosure of the "old" retainer in the Prudhomme case cited on page 6 of the proposal in support of the amendment.

The proposal also includes a recommendation for the promulgation of a new Official Form 21[3]. This form would implement the expanded disclosure requirements from amended Rule 2016. It would require attorneys to be much more explicit and complete in their agreements to perform specific services for the debtor. On the other hand, many courts have held that an attorney who represents a debtor is obligated to complete that representation in the absence of court approval of the attorney's withdrawal without regard to any agreement the attorney may have had with the debtor. See, e.g., In re Egwim, 291 B.R. 559 (Bankr. N.D. Ga. 2003)(core representation of a debtor includes matters relating to the discharge and the reaffirmation of real estate, and attorney ordinarily may not limit representation to exclude these matters). So, including an Official Form that appears to allow a debtor's attorney to limit the scope of the representation (see Part A 8 of the form) may conflict with the holdings of courts that prohibit such limitations.

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[3] The form would likely be identified as Official Form 22. See note 1 supra.

The final area for which the Director has offered an amendment relates to the entry of an order denying a discharge under either § 727(a)(8) or (9). These provisions include the six year time limitations on the debtor's eligibility to receive another discharge. Under § 727(a)(8), the debtor may not receive a discharge if another discharge was granted to the debtor in either a chapter 7 or chapter 11 case that was commenced within six years of the commencement of the second case. Section 727(a)(9) addresses whether the debtor can receive a discharge if he or she has received a discharge in a prior case under either chapter 12 or 13. If the prior chapter 12 or 13 case was commenced within six years of the current chapter 7 case, the debtor can receive a discharge if the payments under the chapter 12 or 13 plan equaled 100% of the allowed unsecured claims, or those payments equaled at least 70% of the unsecured claims and constituted the debtor's best efforts at repaying the obligations.

Rule 7001 provides that any proceeding to object to or to revoke a discharge is an adversary proceeding. This was true as well under predecessor Bankruptcy Rule 701. The proposal would remove two forms of objection to a debtor's discharge from the list of discharge objections that must be commenced by the filing of a complaint. Instead, for these two types of objections, a motion would suffice to bring the matter to the court. The rationale for the proposal is that there is a very limited scope of inquiry necessary to determine if the debtor is ineligible for a discharge under these sections. Certainly, in a § 727(a)(8) case, the relevant facts are the dates of the commencement of the two cases and the entry of a discharge in the first case. As the proposal notes, the court could take judicial notice of these matters that would be found in a court's records. Presumably, this ease of proof would also make summary judgment available to the plaintiff. As to cases under § 727(a)(9), however, more evidence will be required. The

proposal notes that the court in those cases must determine whether the payments made under the previously confirmed chapter 12 or 13 plan represented the debtor's best efforts. It is also true that the court must determine that the payments equaled at least 70% of the allowed claims. There could be proof problems with this issue if there are discrepancies with the records of the chapter 13 trustee, the debtor, and creditors. These issues could require significantly more that just the taking of limited testimony of the debtor and a review of court records. Thus, it seems that the argument in favor of adopting a streamlined approach to objections to discharge are not as compelling with respect to § 727(a)(9) objections as they may be for (a)(8) objections.

More generally, the discharge is the central point of the case for the debtor. In a sense, treating all objections to discharge as adversary proceedings underscores this significance. The number of cases arising under § 727(a)(8) should be minimal. Debtors in that situation would more likely file a chapter 13 petition. So, streamlining the process would generate only the very smallest time savings for the process. Actions under § 727(a)(9), on the other hand, may arise more frequently, but debtors in this situation also have chapter 13 available if needed. If they choose to proceed under chapter 7, it would seem that they and their attorneys would have considered the possibility of an objection to the discharge and have prepared a defense accordingly. That defense could be complex and may include evidence that is neither available in court records or through the testimony simply of the debtor. For example, an objecting creditor might base the objection on evidence of the debtor's post-confirmation lifestyle. This could involve far ranging testimony and documentary evidence.

Given that the time savings is likely to be minimal, and given the importance of the discharge to the fresh start, there does not seem to be a compelling need to amend Rule 7001 to

treat some objections to discharge as contested matters rather than adversary proceedings.

U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director

Washington, D.C. 20530

August 1, 2003

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Century Station, Room 220
300 Lafayette Street Mall
Raleigh, NC 27602

Professor Jeffrey W. Morris
University of Dayton
School of Law
300 College Park
Dayton, OH 45469-2772

Re: **Proposed Amendments to the Federal Rules of Bankruptcy Procedure**

Dear Judge Small and Professor Morris:

On behalf of the United States Trustee Program, I am pleased to submit the following proposals to amend the Federal Rules of Bankruptcy Procedure and ask that they be considered by the Advisory Committee on Bankruptcy Rules. The proposals fall into four general areas.

1. Proposed Amendments to Facilitate Performance of Duties by Debtors and Trustees

Bankruptcy trustees often ask debtors to provide supporting documentation for the assets, liabilities, income and expenses they report on their bankruptcy petitions schedules and statements. In several districts, debtors are already required to produce these documents by local rule. Based on our experience, we have found that such a rule fosters good bankruptcy practice and improves administration, and we would urge the Committee to adopt a similar requirement into the national rules.

Under all chapters of the Bankruptcy Code, the trustee has a statutory duty to "investigate the financial affairs of the debtor." 11 U.S.C. § 704(4). The debtor has a corresponding statutory duty to "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate." 11 U.S.C. § 521(4). There currently is no national rule that implements these obligations. While the absence of a rule

does not foreclose the trustee from asking for information or lessen the debtor's duty to be forthcoming, it does affect the process insofar as it places the burden on the trustee to affirmatively seek out information in the first instance. If the trustee requests no information, the debtor has no obligation to be forthcoming, and the trustee's "investigation" consists only of his or her review of the filed petition, schedules and statements, and the debtor's testimony at the § 341 meeting. The better practice, and the one most experienced trustees use to find assets, confirm valuations, or unravel financial dealings, is to require debtors to produce certain basic documents to confirm what they have claimed in the petition, schedules and statements. Correspondingly, the better practice for bankruptcy counsel and their clients is to assemble similar documents in advance of filing to ensure, among other things, that they provide accurate information to the bankruptcy court.[1]

Based on the documents that are reported to be most useful among trustees and incorporated in some local rules,[2] we propose the following changes to implement the debtor's duty. This proposal attempts to limit production to those core documents that a reasonably diligent trustee would seek. The production of these documents should not be unduly burdensome because they would have been assembled by the debtor and debtor's attorney to prepare the petition, schedules and statements. For example, many of them will be the basis for the information reported on Schedule I and the Statement of Affairs. A national rule would establish a minimum standard of what all debtors should be expected to "surrender" and ensure trustees have basic information to inspect early in a case. It would also prepare trustees to more readily identify and recover assets instead of leaving such matters to subjective, ad hoc assessments.[3]

Our proposal amends Rule 2003 in order to tie the production of the documents with the conduct of the first meeting of creditors. We would also propose a complementary amendment to Rule 4002 to include the debtor's obligation to cooperate with and furnish such information as the United States trustee and trustee may request. Finally, we would amplify the debtor's duties to require the debtor to take action to correct inaccurate information resulting from the intentional or inadvertent misuse of a Social Security number.

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[1] A bankruptcy case is commenced with the filing of a bankruptcy petition. 11 U.S.C. §§ 301-303. If the schedules and statements are not filed with the petition, they must be filed within 15 days. Fed. R. Bankr. P. 1007(c). All the documents must be verified, Fed. R. Bankr. P. 1008; they also "may be amended by the debtor as a matter of course at any time before the case is closed," Fed. R. Bankr. P. 1009.

[2] Attached at Attachment 1 are copies of similar local rules that have been adopted in some districts.

[3] In certain circumstances, the failure to keep or produce such information could lead to denial of a debtor's discharge. See, e.g., 11 U.S.C. § 727(a)(3) (concealing, destroying, falsifying or failing to preserve books and records unless justified under the circumstances) and § 727(a)(4)(D) (knowingly and fraudulently withholding possession of any recorded information relating to the debtor's property or financial affairs).

Rule 2003. Meeting of Creditors or Equity Security Holders.

*****

(b) *Debtor's Duty to Provide Documentation at Meeting.*

(1) Financial Information. Unless the trustee or United States trustee instructs otherwise, in each case under chapter 7, 12, and 13, and in each individual case under chapter 11, the debtor shall bring the following documentation to the § 341 meeting or furnish a written statement setting forth why such documentation is not applicable or available:

(A) Picture identification and proof of Social Security number(s) in a form prescribed by the United States trustee;

(B) Documents to support the entries on Schedule I including all pay stubs or other proof of earnings received and amounts deducted from earnings during the ninety day period immediately preceding the § 341 meeting;

(C) Copies of the debtor's federal, state, and local income tax returns for the two (2) years preceding the meeting of creditors, with W-2s and any other attachments;

(D) Documents to support the entries on Schedule J including canceled checks, check register, paid bills or other proof of expenses;

(E) Copies of bank or credit union statements for all depository accounts including checking, savings, money market or other, which show the balance on hand on the date of filing and all transactions during the ninety day period prior to filing;

(F) Copies of stock certificates, bonds, brokerage statements, or other evidence of deposits, savings or investments.

(G) Copies of original and duplicate certificates of title for titled assets including but not limited to

automobiles, boats, motorcycles, trailers, and mobile homes;

(H) Copies of security agreements, financing statements, and personal property leases, including any lease relating to a leased motor vehicle;

(I) For all real estate in which the debtor has an interest:

(1) Title documents including deeds, registered land certificates of title, land contracts, or leases;

(2) Copies of all mortgages and liens;

(3) Evidence of the value of real estate such as independent appraisal, if available, or current tax statement or assessment;

(J) Copies of closing statements for any interest in real estate sold by the debtor within the year prior to filing;

(K) Copies of any separation agreements, divorce judgments and property settlement agreements entered into or granted during the twelve (12) months prior to filing;

(L) Copies of homeowners or renters insurance polices;

(M) Copies of life insurance policies either owned by the debtor or insuring the debtor's life;

(N) In chapter 12 and chapter 13 cases, copies of casualty insurance policies; and

(O) If the petition, statements and schedules were filed by electronic means, the original signed petition, statements and schedules.

(2) *Additional Information.* Nothing in this paragraph shall limit the debtor's duty to provide such additional information as the trustee or United States Trustee may request.

4002. Duties of Debtor.

In addition to performing other duties prescribed by the Code and rules, the debtor shall (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; ~~and~~ (5) cooperate with, and furnish such information as, the United States trustee or trustee may request concerning the debtor's identity, income, expenses, assets, liabilities, or other matter relevant to the administration of the case; (6) file a statement of any change of the debtor's address~~.~~; and (7) if the debtor used an incorrect Social Security number in connection with the bankruptcy filing, take steps to correct the bankruptcy court record and notify credit reporting agencies.

2. **Proposed Amendments to Provide Additional Disclosures & Protections for Debtors**

Bankruptcy Rule 2016 implements 11 U.S.C. § 329(a) which requires every attorney representing a debtor to file a statement of the compensation paid or agreed to be paid "in contemplation of or in connection with" the bankruptcy case. We urge the Committee to amend Rule 2016(b) to require the disclosure of more information concerning the financial relationship between the debtor and debtor's counsel.

First, counsel should be required to enumerate the actual services that are going to be provided to the debtor and the debtor should be required to sign the statement. Too often, when the subject of attorney compensation arises in post-petition inquiries, the debtor and the attorney disagree about the terms of the engagement. This happens more frequently in legal representations where there is no written fee agreement. Having the debtor sign the detailed statement of compensation ensures that debtor is aware of counsel's representations and would help to alleviate this problem.

Second, counsel should be required to disclose all fees received from the debtor within the last year, regardless of whether they are "in contemplation of or in connection with" a bankruptcy case. This would provide a broader understanding of the total amount of professional fees paid by, or on behalf of, the debtor to debtor's counsel. If, for example, counsel was paid $10,000.00 for an uncontested divorce occurring 8 months prior to the petition date, this fee would have to be disclosed under the revised Rule 2016(b). See, e.g., In re Zepecki, 258 B.R. 719 (Bankr. 8th Cir. 2001) (upholding disgorgement of excessive fees paid in contemplation of bankruptcy instead of the purported real estate sales and tax transaction). Under existing rules, this information might otherwise only be revealed in the response to question 10 of the statement of financial

affairs[4], and then only if the debtor did not deem such a payment to be in the ordinary course of business. The court, the parties, and the United States trustee should be afforded a more certain opportunity to be apprized of such legal payments.

Clarification of Rule 2016(b) disclosures also appears warranted in light of the Fifth Circuit's decision in In re Prudhomme, 43 F.3d 1000 (5th Cir. 1995). There, the Court upheld disgorgement of an undisclosed retainer that counsel had received two year prior to bankruptcy. finding *inter alia* that it was paid in contemplation of the bankruptcy. The amendment proposed below does not extend the period for reporting beyond one year, but it does amplify and clarify the nature and extent of the information to be disclosed.

In addition to making the changes to Rule 2016(b) set forth below, we propose adoption of a new Official Form. A suggested form appears at Attachment 2.

Rule 2016. Compensation for Services Rendered and Reimbursement of Expenses.

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(b) Disclosure of Compensation Paid or Promised to Attorney for Debtor. Every attorney for a debtor, whether or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by § 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall be signed by the attorney and the debtor, and shall include the details of the legal services to be provided to the debtor for the fee disclosed, and the particulars of any sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. The statement shall also include disclosure of all fees paid by the debtor or on behalf of the debtor to the attorney within a one year period prior to the date the petition was filed, as well as the details of any transfer, assignment or pledge of property, outright, in trust, or as security, from, or on behalf of the debtor. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.

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[4] Question 10 is entitled "**Other transfers**"

"a. List all other property, other than property transferred in the ordinary course of the business or financial affairs of the debtor, transferred either absolutely or as security within one year immediately preceding the commencement of this case."

3. **Proposed Amendment to Allow Certain § 727 Actions to be Brought by Motion**

The United States Trustee Program recommends that the Advisory Committee adopt streamlined procedures to prevent the debtor's discharge in two limited instances provided in 11 U.S.C. § 727(a)(8) and (9). Section 727(a)(8) provides that a chapter 7 discharge shall not be granted if the debtor previously received a chapter 7 or chapter 11 discharge in a case commenced within six years before the date of the filing of the petition. Section 727(a)(9) similarly provides that a chapter 7 discharge shall not be granted if the debtor received a chapter 12 or chapter 13 discharge in a case commenced within six years before the date of filing of the petition unless creditors were repaid 100% or, alternatively, 70% and the plan was filed in good faith and payments represented the debtor's best effort.

Under the existing rules, Fed. R. Bank P. 4004(d) and 7001(4), a party must file an adversary complaint to deny or revoke a debtor's discharge under § 727(a)(8) and (9). Instead of requiring a complaint to be filed, we propose that a motion should suffice to bring to the court's attention the fact that the debtor is not eligible to receive a discharge because of the prior discharge. Since adversary proceedings are far more time-consuming and expensive than motions, this amendment would save considerable resources for all parties including the courts.

Use of a motion is appropriate given the limited scope of inquiry that is necessary to rule on the issues involved. There is generally no need for discovery in these matters. The court can take judicial notice of its own records as well as those of another bankruptcy court to determine whether granting a discharge would violate § 727(a)(8) or (9). Because of the limited scope of inquiry, there is little potential for abuse of this procedure. Further, debtors would still be given notice and an opportunity to respond thereby safeguarding their interests as well.

The only area in which testimony or evidence may be necessary would involve a determination of "good faith" and "best efforts" under Section 727(a)(9)(B). In that instance limited testimony by the debtor would likely be sufficient; otherwise, evidence would generally be contained in the court files.

The following proposed amendment to Rule 7001(4) of the Federal Rules of Bankruptcy Procedure would allow these specific uncomplicated proceedings to be brought by motion. Conforming changes would also have to be made to Rule 4004, and may be advisable elsewhere in the Federal Rules to recognize the use of motions in these two limited instances.

We attach a motion for order to show cause procedure which is being successfully used in the Northern District of Texas. See Attachment 3.

Rule 7001. Scope of Rules of Part VII.

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceeding:

*****

(4) a proceeding to object to or revoke a discharge, except that a proceeding to object to or revoke a discharge under the provisions of § 727(a)(8) or § 727(a)(9) may be brought by motion.

4. **Proposed Amendment to Schedule I - Current Income of Individual Debtors.**

The instructions to Schedule I should be amended to insert "7," between "chapter" and "12." The income of a non-filing spouse is relevant to a Section 707(b) analysis and has been for some time. See Matter of Strong, 84 B.R. 541, 543 (Bankr. N.D. Ind. 1988) ("There is no justification for ignoring the impact of a non-petitioning spouse's income on a debtor's financial situation."). Given that the current language in Schedule I requires only disclosure of a non-filing spouse's income in chapter 12 or 13 cases, the burden is on the United States Trustee or chapter 7 trustee to elicit this information either prior to or at the Section 341(a) meeting. The simple addition of chapters 7 and 11 to the form will save the United States trustee a lot of work.

Thank you for giving these proposals your prompt consideration. If there is any information or assistance that we can provide please do not hesitate to call me or Martha L. Davis at (202) 307-1391.

Very truly yours,

Lawrence A. Friedman
Director

Enclosures

ATTACHMENT 1

Eastern District of Michigan

RULE 2003-2 Documentation at the Meeting of Creditors

In cases under chapters 7, 12, and 13, and in individual cases under chapter 11, to the extent they are in the debtor's possession and are applicable to the case, the debtor shall have available at the meeting of creditors, neatly arranged, all of the following:

- **(a)** documents to support all entries on Schedule I, including wage stubs, tax returns, or other proof of earnings;
- **(b)** documents to support all entries on Schedule J, including canceled checks, paid bills, or other proof of expenses;
- **(c)** certificates of title (originals if available, otherwise copies) for titled assets, including vehicles, boats and mobile homes;
- **(d)** originals of bank books; check registers; bonds; stock certificates; bank, brokerage and credit card statements;
- **(e)** copies of leases, mortgages, deeds and land contracts;
- **(f)** copies of life insurance policies either owned by the debtor or insuring the debtor's life;
- **(g)** current property tax statements;
- **(h)** asset appraisals;
- **(i)** keys to non-exempt buildings and vehicles;
- **(j)** divorce judgments and property settlement agreements; and
- **(k)** in chapter 12 and chapter 13 cases, copies of casualty insurance policies.

(5) the terms of any financing involved, including the interest rate;

(6) a description of any method or proposal by which the interest held by any other entity in the collateral affected by the credit may be protected; and

(7) copies of all documents by which the interest of all entities in the collateral affected by the credit was created or perfected, or, if any of those documents are unavailable, the reason for the unavailability. The debtor shall make its best effort to obtain and file any documents which are unavailable as soon as possible after the motion is filed.

(c) **Preliminary Hearing.** If the debtor asserts an immediate need for the obtaining of credit, the court may schedule a preliminary hearing on the motion after notice has been provided to any entity claiming an interest in the collateral affected by the credit to be obtained. Notice provided pursuant to LBR 9013-3 may be by telephone or telecopier (fax) if time does not permit written notification.

4002-1 DEBTOR - DUTIES

(a) **Procedure.**

(1) **Requests by Case Trustee.** The debtor shall comply promptly with all trustee requests for information whether oral or written. Not later than twenty (20) days after service of any written request on the debtor and the debtor's counsel, debtor shall serve on the trustee the information and/or documents requested; or serve on the trustee and file a written motion for a protective order, a memorandum in support and a request for a hearing.

(2) **Requests by United States Trustee.** Each debtor in a chapter 7 case shall bring to the §341 meeting either the following documentation, if applicable, or a statement using the designated letter for identification, setting forth why such documentation is not applicable or available.

(A) Title documents to all real estate in which the debtor has an interest, including deeds, land contracts, or leases, and closing statements for any interest in real estate sold by the debtor within the last year;

(B) All mortgages and liens upon real estate in which the debtor has an interest and details of all certificates of judgment; including the name of the judgment creditor, date of filing, judgment docket number, page and amount;

(C) All life insurance policies owned by the debtor;

(D) Certificates of title (or copies) to all motor vehicles, including boats, owned by the debtor;

(E) Federal income tax return for the last calendar year filed by the debtor;

(F) Separation agreements or decrees of dissolution or divorce entered into or granted during the last year;

(G) All documents evidencing the debtor's interest in any retirement account, including individual retirement accounts, account statements, summary plan descriptions and qualification letters from the IRS. For individual retirement accounts, an accounting of all contributions to the account since its inception is also required;

(H) Security agreements, financing statements, and personal property leases;

(I) Stock certificates, bonds, credit union and savings accounts passbooks or statements, and other evidence of investments or savings;

(J) Evidence of the value of real estate in which debtor has an interest (county auditor appraisal card or appraisal, if available);

(K) If the debtor acquires an interest in property within 180 days after the date of filing of the petition (1) by request, devise or inheritance, (2) as a result of a property settlement agreement with the debtor's spouse or of an interlocutory or final decree, or (3) as a beneficiary of a life insurance policy or of a death benefit, **the chapter 7 trustee must be notified immediately.**

(b) **Limited Filing with the Court.** The trustee shall not file a copy of a request for information unless the debtor fails to comply with this rule and the trustee or any other party in interest requests the court to compel compliance. The debtor shall not file a copy of a response to a request for information unless it is in the form of amendments to schedules, statements of affairs or other statements or lists required to be filed by Rule 1007, or unless the debtor is otherwise required to do so.

(c) **Sanctions.** Failure to comply with a trustee's request for information may result, after notice and hearing, in the imposition of sanctions.

4002-2 ADDRESS OF DEBTOR

The change of address required to be filed by Rule 4002 shall be served according to LBR 9013-3.

4003-1 EXEMPTIONS

(a) **Service of Objection.** Any objection by the trustee or other party in interest to property claimed as exempt shall be served pursuant to LBR 9013-3.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO

Case No. _____

NOTICE TO INDIVIDUAL CONSUMER DEBTOR(S)
11 U.S.C. Section 342(b)

PLEASE TAKE NOTICE THAT as a consumer debtor, you are advised, pursuant to the provisions of 11 U.S.C. Section 342(b), prior to the commencement of your case that you may proceed under any one of the following chapters of Title 11, United States Code:

Chapter 7	**Liquidation, or**
Chapter 11	**Reorganization, or**
Chapter 12	**Family farmer, or**
Chapter 13	**Repayment of all or part of the debts of an individual with regular income**

By filing a petition in bankruptcy you have invoked the jurisdiction of a United States Court. If you do not appear as ordered you may either be arrested and conveyed to court by a United States Marshal, or your case dismissed and discharge in bankruptcy denied.

All of your property is now under the exclusive control of the United States Bankruptcy Court. It is your duty to keep and preserve that property and be accountable to the proper court officials.

The law requires that you attend and submit to an examination under oath concerning the conduct of your affairs, the cause of your bankruptcy, your transaction with creditors and other persons, the amount, kind and whereabouts of your property and possessions, and all other matters which may affect the administration and settlement of your estate of the granting of your discharge.

You are not to dispose of any property, including money, or allow any creditors to take such property without the written authority of the court. The right of your secured creditors will be determined by the court, and no creditors now have the right to possess any property upon which they claim to have a lien or interest.

If you have changed your address since you filed your petition, so inform the trustee at the meeting of creditors. Should you change your address thereafter, be sure to keep the court informed of your correct address up until the time your case is closed.

If you need information or advice as to your rights and obligations under the law, contact your attorney. **The court cannot give you legal advice.**

Date:_____

Michael D. Webb
Clerk, U.S. Bankruptcy Court

CHAPTER 7 CASES

SEE REVERSE SIDE FOR ADDITIONAL INFORMATION

IT IS NECESSARY TO BRING THE FOLLOWING PAPERS TO THE MEETING OF CREDITORS WITH YOU:

1. Title documents to all real estate in which the debtor has an interest, including deeds, land contracts, or leases, and closing statements for any interest in real estate sold by the debtor within the last year;

2. All recorded mortgages and recorded liens upon real estate in which the debtor has an interest and details of all certificates of judgement; including the name of the judgment creditor, date of filing, judgment docket number, page and amount;

3. All life insurance policies owned by the debtor;

4. Certificate of title (or copies) to all motor vehicles, boats, etc., owned by the debtor;

5. Federal income tax return for the last calender year filed by the debtor;

6. Separation agreements or decrees of dissolution or divorce entered into or granted during the last year;

7. All documents evidencing the debtor's interest in any retirement account(s), including individual retirement account(s), account statement(s), summary plan description(s) and qualification letter(s) from the IRS. For individual retirement account(s), an accounting of all contributions to the account(s) since its inception is also required;

8. Security agreement(s), financing statement(s), and personal property lease(s);

9. Stock certificate(s), bond(s), credit union and saving(s) account(s) passbook(s) and/or saving(s) account(s) statement(s), checking account statement(s) and other evidence of investment(s) or saving(s);

10. Evidence of the value of real estate in which the debtor has an interest (county auditor appraisal card or appraisal, if available);

11. List of debtor's personal property with each item's estimated market value, if same does not appear in the schedules filed in this matter;

12. Pay vouchers or record of earnings for the forty (40) day period prior to the date your petition was filed in bankruptcy;

13. If the debtor acquires an interest in property within 180 days after the date of filing of the petition (a) by request, devise or inheritance, (b) as a result of a property settlement agreement with the debtor's spouse or of an interlocutory or final decree, or (c) as a beneficiary of a life insurance policy or of a death benefit, **the chapter 7 trustee must be notified immediately.**

14. Bring you current driver's license or other picture ID, such as the Ohio Identification card or any other ID that has your name, photograph and social security number on it.

ATTACHMENT 2

Proposed Form 21. Disclosure of Compensation of Attorney for Debtor

Form 21. DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR(S)

[Caption as in Form 16B.]

A. Compensation for current case:

1. Pursuant to 11 U.S.C. § 329(a) and Bankruptcy Rule 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follow:

   For legal services, I have agreed to accept..... $_____
   Prior to the filing of this statement I have received.. $_____
   Balance Due..... $_____

2. Expenses for the current case: I certify that I have received the following amounts for payment of expenses:

   ❑ Filing Fee..... $_____
   ❑ Other (specify)..... $_____

3. The source of the compensation and expenses paid to me for the current case was:

   ❑ Debtor's wages, earnings or services rendered by debtor. If debtor rendered services as compensation, please state the details of what was done by the debtor and the value of the services:
   ❑ Other (Specify, e.g., tax refund, proceeds from sale of stock or name and address of person providing the funds):

   _____

4. The source of compensation to be paid to me is:

   ❑ Debtor's Chapter 13 plan.
   ❑ Other (Specify, e.g., tax refund, proceeds from sale of stock or name and address of person providing the funds):

   _____

5. Other than as disclosed above, I have received no transfer, assignment or pledge of property, outright or in trust, from, or on behalf of the debtor, except:

   _____

6. In regard to 11 U.S.C. § 504:

   ☐ I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

   ☐ I have agreed to share the above-disclosed compensation with a person or persons who are not members or associates of my law firm. The amount paid or to be paid along with the name and address of the person or entity with whom the compensation is shared is set forth below. In addition, a copy of the compensation sharing agreement is attached.
   Name:
   Address:
   Amount: $

7. In return for the above-disclosed fees, I have agreed to render legal service for all aspects of this bankruptcy case, including:

   a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;
   b. Preparation and filing of any petition, schedules, statement of affairs and plan which may be required;
   c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;
   d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters;
   e. Specify other:

8. By agreement with the debtor(s), the above-disclosed fee does not include the following services:

B. Previous compensation:

1. In the year prior to the filing of this bankruptcy case, the debtor or another on behalf of the debtor has directly or indirectly paid to me the amount of $_____for other debt counseling or representation in bankruptcy cases.
2. In the year prior to the filing of this bankruptcy case, the debtor or another on behalf of the debtor has directly or indirectly paid to me the amount of $_____for other legal representation and advice.

CERTIFICATION

I certify that the foregoing is a complete statement of any agreement or arrangement for payment of legal fees and expenses for representation of the debtor(s) in this bankruptcy proceeding.

Dated:

_____
Signature of Attorney

Name of Law Firm

Dated:

_____
Signature of Debtor

Dated:

_____
Signature of Joint Debtor

ATTACHMENT 3

Memorandum

Subject	Date
727(a)(8)	July 15, 2003

To

Martha Davis
Principal Deputy Director
EOUST

From

William T. Neary
United States Trustee
Region VI

At our meeting in San Francisco last week, you inquired regarding the streamlined procedure we have adopted in Dallas to prevent the issuance of discharges in situations wherein the debtor is ineligible to receive one under 727(a)(8). Rather than drafting, filing and serving a complaint, followed by a motion for summary judgment, our court has agreed to issue an OSC on our motion in such situations. I have attached a copy of a letter from Chief Judge Felsenthal in Dallas confirming the procedure, as well as a sample motion used in one such situation. This shortcut has proven to be a timesaver for our staff without in any significant way infringing upon the procedural safeguards which an adversary proceeding provides.

WTN:jss

Attachment

United States Bankruptcy Court
Northern District of Texas
U.S. Courthouse
1100 Commerce Street
Dallas, Texas 75242-1496

Chambers of
Steven A. Felsenthal
Chief Judge

Telephone
(214) 753-2040

August 19, 2002

William T. Neary, United States
Trustee for the Northern District of Texas
1100 Commerce St., 9th Floor
Dallas, TX 75242

Dear Bill:

At the judges meeting on August 13, 2002, we determined:

(1) For a debtor who has received a discharge in a case under Title 11 within six years of a new case, the debtor's ineligibility for a discharge should be raised by the entry of an order to show cause, thereby giving the debtor notice and an opportunity to be heard. When your office discovers such a case, please bring it to our attention with a request for the entry of an order to show cause, with a draft order.

(2) For Chapter 13 trustee's final report and account to creditors, the trustee must provide notice to all the creditors. Please communicate this decision to the Standing Chapter 13 Trustees. I understand that previously two of the four trustees provided notice to all creditors and that recently the other two have agreed to do likewise.

Thank you for your assistance.

Sincerely.

Steven A. Felsenthal
Chief United States Bankruptcy Judge

SAF:as

cc: Hon. Robert C. McGuire
Hon. Barbara J. Houser
Hon. Robert L. Jones
Hon. D.M. Lynn
Hon. Harold C. Abramson
Tawana Marshall

United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 976
Dallas, TX 75242 (214) 767-8967

Mary Frances Durham,
for the United States Trustee

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JACQUELINE YVONNE SMITH	§	**CASE NO: 02-35882-BJH-7**
	§	
Debtor	§	**Chapter 7**
		Hearing: No hearing required

Motion for an Order to Show Cause
Regarding Eligibility for a Discharge

Comes now the United States Trustee and files this his Motion for an Order to Show Cause Regarding Eligibility for a Discharge in the above-referenced chapter 7 case. In support of his Motion for an Order to Show Cause, the United States Trustee respectfully represents as follows:

Jurisdiction

The bankruptcy court has jurisdiction to determine this matter under 28 U.S.C. §§ 1334 and 157, and 11 U.S.C. §§ 105 and 727(a)(8). This is a core proceeding under 28 U.S.C. § 157(b).

Facts

1. The debtor filed this voluntary chapter 7 case on July 10, 2002. The first meeting of creditors was held August 16, 2002, and the debtor is scheduled to be discharged on October 15,

2002.

2. The debtor filed a previous voluntary chapter 7 petition on November 6, 1996, and received a chapter 7 discharge on March 19, 1997, Bankruptcy Case No. 96-38251-RCM-7.

3. The debtor employed the same attorney for both cases.

Argument

4. The debtor is not eligible for a discharge in this case because she was granted a discharge in a case commenced within six years of the filing of the pending case. 11 U.S.C. § 727(a)(8).

Relief Requested

5. The United States Trustee asks the court to set a Show Cause Hearing and order the debtor to appear and show cause why she should be granted a discharge in the pending case. The United States Trustee asks for any further relief to which he may be justly entitled.

August 26, 2002

William T. Neary
United States Trustee

Mary Frances Durham, TXB #00790144
United States Department of Justice
Office of the United States Trustee
1100 Commerce Street, Room 976
Dallas, TX 75242 (214) 767-8967, ext. 241

Certificate of Service

I hereby certify that I mailed a copy of the foregoing document by first class United States mail, postage prepaid, on August 27, 2002, to the following:

Jacqueline Yvonne Smith, 6444 Wanklyn Street, Dallas TX 75237
J. Vernon Johnson, Jr., 2730 N. Stemmons Freeway, Stemmons Tower West Suite 501, Dallas TX 75207
Cunningham, Jim, 6412 Sondra, Dallas, TX 75214

Mary Frances Durham

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JACQUELINE YVONNE SMITH	§	**CASE NO: 02-35882-BJH-7**
	§	
Debtor	§	**Chapter 7**
		Hearing: September 19, 2002 1:15 p.m.

Order for the Debtor to Appear and Show Cause Regarding Eligibility for a Discharge

Came on for consideration, the United States Trustee's Motion for an Order to Show Cause Regarding Eligibility for a Discharge in the above-referenced chapter 7 case. The United States Trustee asserted that the debtor is ineligible for a discharge because she received a discharge on March 19, 1997, in Bankruptcy Case No. 96-38251-RCM-7, which she filed on November 6, 1996. It would appear that the debtor is ineligible to receive a discharge in this case, and therefore, the court hereby

ORDERS Jacqueline Yvonne Smith to appear in the United States Court House, United States Bankruptcy Court Room at 1100 Commerce Street, 14th Floor, Dallas, Texas, 75242 on **SEPTEMBER 19, 2002 AT 1:15 P.M.** and show cause why she should be granted a discharge in this case; the court further

ORDERS that should Jacqueline Yvonne Smith fail to appear or show cause why she is eligible for a discharge, the clerk shall not enter a discharge in this case.

Date: _____

_____
United States Bankruptcy Judge

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

June 30, 2003

MEMORANDUM TO ALL BANKRUPTCY JUDGES

SUBJECT: Revised Uniform Local Rule Numbering System **(INFORMATION)**

As the bankruptcy courts have converted to the Case Management/Electronic Court Files (CM/ECF) system and begun accepting electronic filings over the Internet, those courts also have been reviewing their local rules to determine how they should be amended to reflect the new electronic environment. The Bankruptcy Judges Division has received many requests for copies of the Uniform Numbering System for Local Bankruptcy Court Rules that originally was issued in 1996, and earlier this year the Division made the numbering system available to courts electronically on the J-Net. You can find the uniform local rule numbering system at http://jnet.ao.dcn/judgescorner/bankruptcy/ULRNSystem.pdf.

Rule 9029 of the Federal Rules of Bankruptcy Procedure requires that local bankruptcy court rules be numbered to correspond with the national rules. Specifically, Rule 9029 states that local rules "must conform to any uniform numbering system prescribed by the Judicial Conference." The Judicial Conference has directed that courts "adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure." JCUS-MAR 96, pp. 34-35.

As a service to the courts, the Advisory Committee on Bankruptcy Rules distributed a numbering system for local bankruptcy court rules which it had developed in anticipation of the Judicial Conference's action. The Advisory Committee at its April 2003 meeting reviewed the numbering system and has revised it slightly to include several topics which have grown in importance since 1996 – court security, financial disclosure by corporate parties, and electronic service.

The Judicial Conference has mandated only that the number of a particular local rule correspond with the relevant number of the Federal Rules of Practice and Procedure. Many national rules, however, address matters about which there is no apparent need for local rules, and users may perceive "gaps" in the numbering system where there is no uniform local rule

number assigned to a national rule. Although this exclusion is deliberate, it is not intended to preclude a court from prescribing a local rule using one or more numbers not found in the attached material. Frequently encountered local rule topics not related to any national rule, on the other hand, have been assigned to the Part of the national rules to which each topic is most closely related, *e.g.,* Part V, "Courts and Clerks," and have been given available numbers within the Part, starting with 1070, 2070, etc.

Questions about the Uniform Numbering System for Local Bankruptcy Court Rules should be directed to Patricia S. Ketchum, Senior Attorney, Bankruptcy Judges Division, Administrative Office of the United States Courts, by telephone at (202) 502-1908, or by e-mail to Patricia Ketchum/DCA/AO/USCOURTS, or to James Wannamaker, Bankruptcy Judges Dvision, at (202) 502-1910, James Wannamaker/DCA/AO/USCOURTS.

Peter G. McCabe

Proposed amendments to sections 107 and 342(c) of the Bankruptcy Code

Sec.____RESTRICTION OF PUBLIC ACCESS TO CERTAIN INFORMATION CONTAINED IN BANKRUPTCY CASE FILES

Section 107 of title 11, United States Code, is amended by striking the entirety of subsection (b) and inserting the following:

" (b) On request of a party in interest, the bankruptcy court shall, and on the bankruptcy court's own motion, the bankruptcy court may, protect an entity with respect to a trade secret or confidential research, development, or commercial information.

(c) The bankruptcy court for cause may protect a person with respect to:

(1) any 'means of identification' listed in section 3(d) of the Identity Theft and Assumption Deterrence Act of 1998 as amended [18 U.S.C. § 1028(d)(4)]; and

(2) information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property

contained in a paper filed, or to be filed, in a case under this title."

Section-by-section analysis:

This amendment would implement Judicial Conference policy regarding protection of certain information contained in bankruptcy case files from public disclosure by means of four revisions to section 107 of the Bankruptcy Code.

First, the amendment would transform former subsection (b)(1) regarding protection of trade secret or confidential research, development, or commercial information into a new subsection (b). No substantive change would be made to this provision.

Second, the amendment would create a new subsection (c) to allow the court for cause to authorize the redaction of personal identifiers to protect a debtor, creditor, or other person from identity theft or other harm. The amendment incorporates by reference section 3(d) of the Identity Theft and Assumption Deterrence Act of 1998 with regard to the types of personal identifiers that may be redacted. These include the debtor's or other person's name, social security account number, date of birth, driver's license number,

alien registration number, government passport number, employee or taxpayer identification number, unique biometric data, unique electronic identification number, electronic address or routing code, and telecommunication identifying information or access device. The amendment would also permit the court to exercise its discretion to protect personal identifiers by means other than redaction where appropriate in the circumstances of the case.

Third, this new subsection (c) would have the effect of striking from the current provision "scandalous or defamatory matter" as a basis for protection of a person and instead allow the court for cause to seal or redact "information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property." This language is drawn from Federal Rule of Civil Procedure 26 regarding the issuance of protective orders in the course of discovery. This new provision would expand the authority of the bankruptcy court to allow the court to protect information, such as the home or employment address of a debtor, because of a personal security risk, including fear of injury by a former spouse or stalker. It would also allow the court to protect other information normally considered private, such as medical information which, if publicly disclosed, could result in untoward consequences to the debtor or others.

Finally, this provision would allow the protection of information under subsection (c) "contained in a paper filed, or to be filed," in a bankruptcy case. This provision is intended to provide persons the opportunity to request protection of the information not only after it is filed with the court, but prior to filing as well. This authority would be especially useful in an electronic filing environment, where information once filed is immediately available to the public.

Sec. ____ SECURITY OF SOCIAL SECURITY ACCOUNT NUMBER OF DEBTOR IN NOTICE DEBTOR PROVIDES TO CREDITOR

Section 342 (c) of title 11, United States Code, is amended by inserting the phrase "last four digits of the" immediately prior to the phrase "taxpayer identification number"

Section-by-section analysis:

This amendment would implement Judicial Conference policy that social security account numbers be protected from public disclosure in court documents.

Section 342(c) of title 11, United States Code, currently requires a debtor to include his or her taxpayer identification number, which for an individual is almost uniformly his or her social security account number, on any notice the debtor gives to his or her creditors. Debtors are required to give such notice in various contexts, including the filing of adversary proceedings, such as a complaint to determine the dischargeability of a debt, or contested matters, such as a motion to avoid a lien impairing an exemption.

As a copy of such notice is required to be filed with the court, court files routinely include unredacted social security numbers of debtors. By requiring only the last four digits of a taxpayer identification number to appear on the notice, the debtor's full social security number will no longer appear in the court file and thus be protected from public disclosure.

UNITED STATES BANKRUPTCY COURT **DISTRICT OF** **PROOF OF CLAIM**

COMPLETE THIS FORM AND ELECTRONICALLY FILE AT XXX ECF LOCATION OR IF UNABLE TO ELECTRONICALLY FILE MAIL A COPY OF THIS FORM TO XXX COURT ADDRESS *Court ID:*

Name of Debtor	**Case Number**	**Chapter (e.g. 7, 11, 12, or 13)**

NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Name of Creditor (The person or other entity to whom the debtor owes money or property):	☐ Check this box to indicate that this claim amends previously filed claim: Court Claim Number _____ filed on _____
Name and Address where notices should be sent:	
Name and address where payments should be sent (if different from above): Telephone number:	**Name of Present Holder of Claim (The person or other entity to whom the claim of the creditor listed to the left has been assigned)** Telephone Number:
Account or other number by which creditor identifies debtor:	**Account or other number by which creditor identifies debtor:**
1.) Total Amount of Claim at case filing: $ 0.00	**2.) Basis for claim:** _____

3. Secured Claim.

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other_

Value of Collateral: $_____ Annual Interest Rate %

Amount of arrearage and other charges at time case filed included in secured claim, if any $_

Total Amount of Secured Claim $_ 0.00

(may not exceed value of collateral.)

4. Unsecured Claim Entitled to Priority under 11 U.S.C. 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4,650),* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3)
- ☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a) (4).
- ☐ Up to $2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6).
- ☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child -11 U.S.C. § 507(a) (7).
- ☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a) (8).
- ☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a) ( ).

Amount Entitled to Priority $_____.

**Amounts are subject to adjustment on 4/1/98 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

5. SUMMARY OF PROOF OF CLAIM:

TOTAL AMOUNT OF CLAIM $ 0.00 **(From Section 1)**

Secured $ 0.00 **(From Section 3)**

Priority $ 0.00 **(From Section 4)**

Unsecured $_ **(Total Claim Less Secured Less Priority)**

7. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim

8. Supporting Documents: Attach a summary of claim and how it is computed If secured, attaché redacted pages from security documents showing parties, collateral, description, signatures, and evidence of perfection of lien Provide name, address, telephone number, and email address of person, if different than person signing below who could provide complete documents supporting claim

DO NOT SEND ORIGINAL DOCUMENTS AND DO NOT ATTACH MORE THAN 10 PAGES OF SUPPORTING DOCUMENTATION.

If the documents are not available, explain _____

FOR COURT USE ONLY

Date	The person filing this claim should sign it, unless submitted electronically Print name and title, if any, and state address, email address and Telephone number if different from notice address above

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor

The person, corporation, or other entity that has filed a bankruptcy case is called the debtor

Creditor

A creditor is any person, corporation, or other entity to whom the debtor owed a debt to the date that the bankruptcy case was filed

Proof of Claim

A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim) This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed

Secured Claim

A claim is a secured claim to the extent that the creditor has a lien on property of the debtor (collateral) that gives the creditor the right to be paid from that property before creditors who do not have liens on the property

Examples of liens are a mortgage on real estate and a security interest in a car, truck boat, television set, or other item of property A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim (See also *Unsecured Claim*)

Unsecured Claim

If a claim is not secured claim it is an unsecured claim A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full

Unsecured Priority Claim

Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims) The most common types of priority claims are listed on the proof of claim form Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as *Unsecured Nonpriority Claims*

Date Stamped Copy

To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of this proof of claim. Date stamped copies can also be downloaded from the Electronic Case Filing Web site

Items to be completed in Proof of Claim form (if not already filled in)

Court , Name of Debtor, and Case Number:

Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number If you received a notice of the case from the court, all of this information is near the top of the notice

Information about Creditor:

Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices from the bankruptcy court about this case, if your address differs from that to which the court sent notice, or if this proof of claim replaces or changes a proof of claim that was already filed, check the appropriate box on the form

1.) Total Amount of Claim at Time Case Filed:
Fill in the total amount of the entire claim If interest or other charges in addition to the principal amount of the claim are included, check the appropriate place on the form and attach an itemization of the interest and charges

3.) Secured Claim:
Check the appropriate place if the claim is a secured claim You must state the value and type of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed A claim may be partly secured and partly unsecured (See DEFINITIONS, above)

4) **Unsecured Claim Entitled to Priority under 11 U.S.C. 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.**
Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority (See DEFINITIONS, above) A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law Check the appropriate place to specify the type of priority claim

5.) Summary of Proof of Claim

Total amount of claim should match the total amount of claim from Section 1 The secured line should match the total amount of the Secured Claim from Section 3 The priority line should match the total amount of the Amount Entitled to Priority from Section 4 The unsecured amount should be the total amount of the claim less secured and priority from sections 3 and 4. If the claim is fully Unsecured, the total amount of the claim from Section 1 and total amount of claim in Section 5 should match this line

7.) Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

8.) Supporting Documents:
You must attach to this proof of claim form copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents If documents are not available, you must attach an explanation of why they are not available

Basis for Claim:

Check the type of debt for which the proof of claim is being filed If the type of debt is not listed, check "Other" and briefly describe the type of debt If you were an employee of the debtor, fill in your social security number and the dates of work for which you were not paid

CASE MANAGEMENT/ELECTRONIC CASE FILES (CM/ECF) FACT SHEET
September 2003

The federal judiciary is now well underway with the nationwide implementation of its new Case Management/Electronic Case Files (CM/ECF) systems. CM/ECF not only replaces the courts' aging electronic docketing and case management systems, but also provides courts the option to have case file documents in electronic format, and to accept filings over the Internet.

CM/ECF systems are now in use in twenty-five district courts, sixty bankruptcy courts, the Court of International Trade and the Court of Federal Claims. Most of these courts are accepting electronic filings. More than 10 million cases are on CM/ECF systems. And more than 40,000 attorneys and others have filed documents over the Internet. Under current plans, the number of CM/ECF courts will increase steadily each month into 2005. Each court goes through an implementation process that takes about 10 months.

Attorneys practicing in courts offering the electronic filing capability are able to file documents directly with the court over the Internet. The CM/ECF system uses standard computer hardware, an Internet connection and a browser, and accepts documents in Portable Document Format (PDF). The system is easy to use – filers prepare a document using conventional word processing software, then save it as a PDF file. After logging onto the court's web site with a court-issued password, the filer enters basic information relating to the case and document being filed, attaches the document, and submits it to the court. A notice verifying court receipt of the filing is generated automatically. Other parties in the case then automatically receive e-mail notification of the filing.

CM/ECF also provides courts the ability to make their documents available to the public over the Internet. The Judicial Conference has adopted a set of recommendations relating to privacy and public access to electronic case files. As part of the process to develop these recommendations, public comment was sought on a number of possible approaches. The Judicial Conference's Committee on Court Administration and Case Management is overseeing implementation of the recommendations.

There are no added fees for filing documents over the Internet using CM/ECF; existing document filing fees do apply. Electronic access to court data is available through the Public Access to Court Electronic Records (PACER) program. Litigants receive one free copy of documents filed electronically in their cases, which they can save or print for their files. Additional copies are available to attorneys and the general public for viewing or downloading at seven cents per page, with a maximum cost per document of $2.10. Directed by Congress to fund electronic access through user fees, the judiciary has set the fee at the lowest possible level sufficient to recoup program costs.

The national roll-out of the CM/ECF system for bankruptcy courts started in early 2001, and is scheduled to take two to three years. The CM/ECF system for district courts began to roll out nationally in May 2002. Implementation of the CM/ECF system for appellate courts is currently scheduled to begin in late 2004.

For more information, please contact: Karen Redmond, Office of Public Affairs (202) 502-2600

Relevant websites:

http://www.uscourts.gov/cmecf/cmecf.html

http://www.privacy.uscourts.gov/

http://www.pacer.psc.uscourts.gov/

Courts Currently Operational on CM/ECF
* *Courts Accepting Electronic Filing*

District Courts
Alabama Southern
California Northern*
District of Columbia*
Indiana Southern*
Iowa Northern
Kansas*
Kentucky Eastern
Kentucky Western
Maryland*
Maine
Massachusetts
Michigan Western*
Missouri Western*
Nebraska*
New York Eastern*
Ohio Northern*
Ohio Southern*
Oregon*
Pennsylvania Eastern*
Pennsylvania Middle*
South Dakota
Texas Northern
Washington Western*
Wisconsin Eastern*
Wyoming

Court of International Trade
Court of Federal Claims*

Bankruptcy Courts
Alabama Middle*
Alabama Southern*
Alaska*
Arizona*
Arkansas Eastern*
Arkansas Western*
California Northern
California Southern*
Colorado*
Delaware*
Florida Middle*
Georgia Northern*
Hawaii*
Illinois Northern
Illinois Southern*
Indiana Northern*
Iowa Northern*
Iowa Southern*
Kentucky Eastern*
Kentucky Western*
Louisiana Eastern*
Louisiana Middle*
Louisiana Western*
Maine*
Maryland*
Massachusetts
Michigan Western
Missouri Eastern*
Missouri Western*
Montana*
Nebraska*
Nevada*
New Hampshire*
New Jersey*
New York Eastern*
New York Northern*
New York Southern*
New York Western
North Carolina Western*
Ohio Northern*
Ohio Southern
Pennsylvania Eastern*
Pennsylvania Middle
Pennsylvania Western*
Rhode Island
South Carolina*
South Dakota*
Tennessee Western
Texas Eastern*
Texas Northern*
Texas Southern*
Texas Western*
Utah*
Vermont*
Virginia Eastern*
Washington Western*
West Virginia Northern
West Virginia Southern
Wisconsin Western*
Wyoming*

Courts Currently in the Process of Implementing CM/ECF

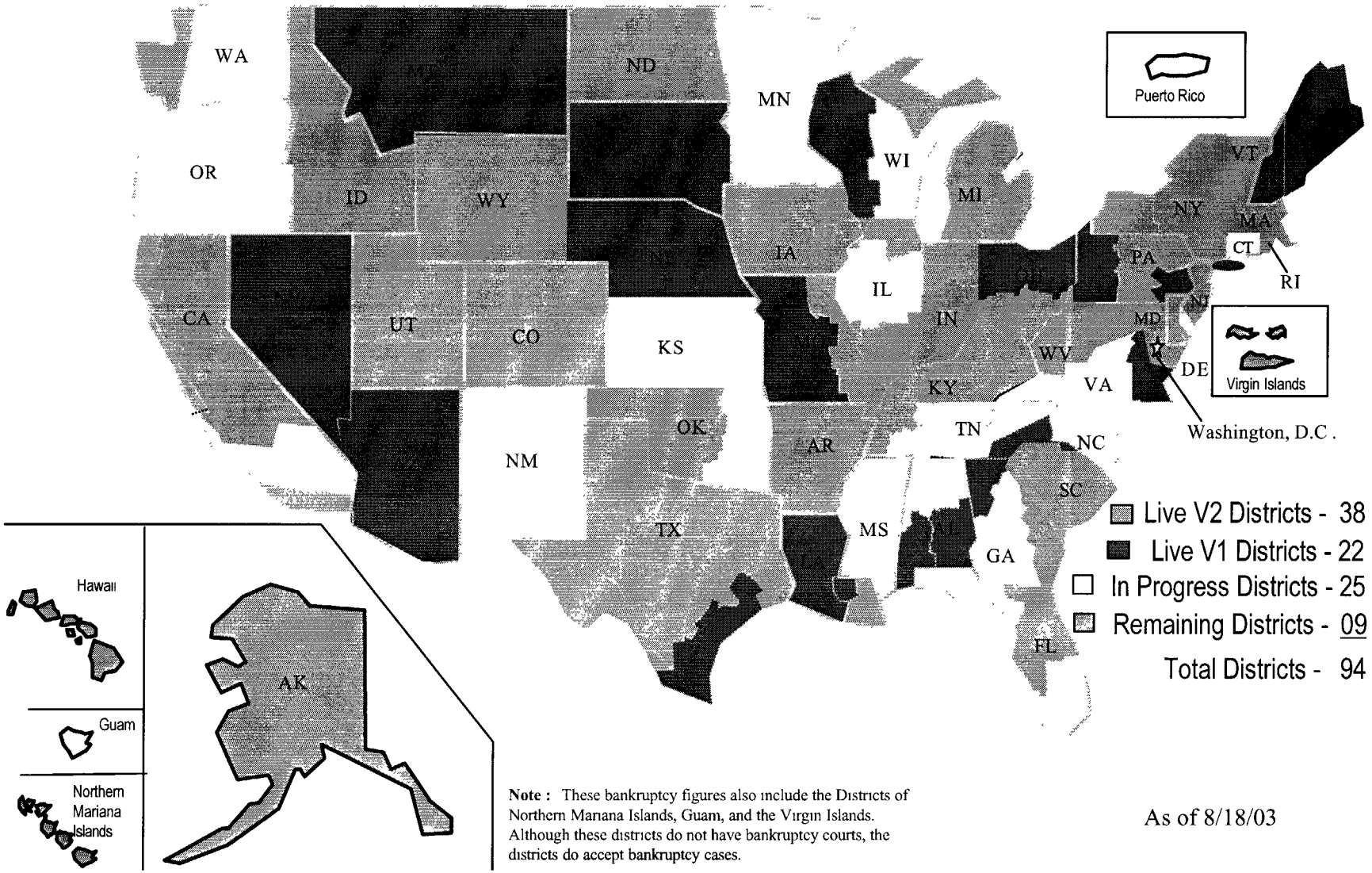
District Courts

Alabama Middle
California Central
California Eastern
Connecticut
Florida Middle
Florida Northern
Georgia Middle
Georgia Northern
Illinois Central
Illinois Northern
Illinois Southern
Indiana Northern
Louisiana Western
Michigan Eastern
Minnesota
Missouri Eastern
New Hampshire
New Jersey
New York Northern
New York Southern
New York Western
Oklahoma Northern
Oklahoma Western
Puerto Rico
Tennessee Eastern
Tennessee Western
Texas Eastern
Texas Southern
Utah
Virginia Western
West Virginia Southern

Bankruptcy Courts

Alabama Northern
California Central
California Eastern
Connecticut
District of Columbia
Florida Northern
Florida Southern
Georgia Middle
Georgia Southern
Guam
Illinois Central
Indiana Southern
Kansas
Michigan Eastern
Minnesota
Mississippi Northern
Mississippi Southern
New Mexico
North Carolina Eastern
North Carolina Middle
North Dakota
Oklahoma Eastern
Oklahoma Northern
Oregon
Puerto Rico
Tennessee Eastern
Tennessee Middle
Washington Eastern
Wisconsin Eastern
Virginia Western

Bankruptcy Court
CM/ECF Implementation



Note : These bankruptcy figures also include the Districts of Northern Mariana Islands, Guam, and the Virgin Islands. Although these districts do not have bankruptcy courts, the districts do accept bankruptcy cases.

As of 8/18/03

Districts

<u>In Progress</u>

AL-N, CA-C, CT, DC,

FL-N, FL-S, GA-M, GUAM, IL-C,

KS, MN, MS-N, MS-S, NC-E,

NC-M, NM, OK-E, OK-N,

OR, PR, TN-E, TN-M,

VA-W, WA-E, WI-E,

As of 8/18/03

This material will be distributed at the meeting

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2003

1007
2003
2009
2016
7007.1 (new rule)

December 1, 2003, Privacy Amendments

1005
1007
2002
Official Forms 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, 19, and 21

December 1, 2004

1011
2002(j)
9014

December 1, 2005

1007
3004
3005
4008
7004
9006

Official Form 6 - Schedule G

BANKRUPTCY RULES SUGGESTIONS DOCKET
(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket No., Source & Date	Status
	BANKRUPTCY RULES	
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered **PENDING FURTHER ACTION**
Rule 2003 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**
Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**

Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3007 Serving a copy of the objection on the claimant.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**
Rule 4003 Impose burden of proof upon the debtor.	01-BK-D Judge Barry Russell 4/4/01	4/01 - Referred to chair and reporter 3/02 - Committee considered and deferred decision **PENDING FURTHER ACTION**
Rule 4004 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**

Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq., for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment **PENDING FURTHER ACTION**
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel to entities already listed.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon.	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 7001 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**
Rule 7004(b)(3) To ensure that service on a corporation by mail reaches the appropriate individual.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**

Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01-BK-A Jay L. Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 9001 Expand definition to include an accountant.	03-BK-C Robert R. Barnes, Esq. 7/3/03	7/03 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 9014 Allow local districts the option of amending rule.	02-BK-E Thomas J. Yerbich, Esq. 2/22/02	5/02 - Referred to chair and reporter 8/02 - Draft excepting provisions of Civil Rule 26 in contested matters published for comment 4/03 - Committee approved 6/03 - Standing Committee approved for publication **PENDING FURTHER ACTION**
Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee **PENDING FURTHER ACTION**
	BANKRUPTCY FORMS	

Official Form 1 Amend Exhibit C to the Voluntary Petition.	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Schedule I Amend to make applicable in Chapter 7 and 11 proceedings	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter **PENDING FURTHER ACTION**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
	SUBJECT MATTER	
Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**

The next meeting of the Committee will take place

March 25 - 26, 2004
at
Ritz-Carlton Hotel, Amelia Island, GA

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The Committee will discuss dates and locations for
the Fall 2004 meeting.
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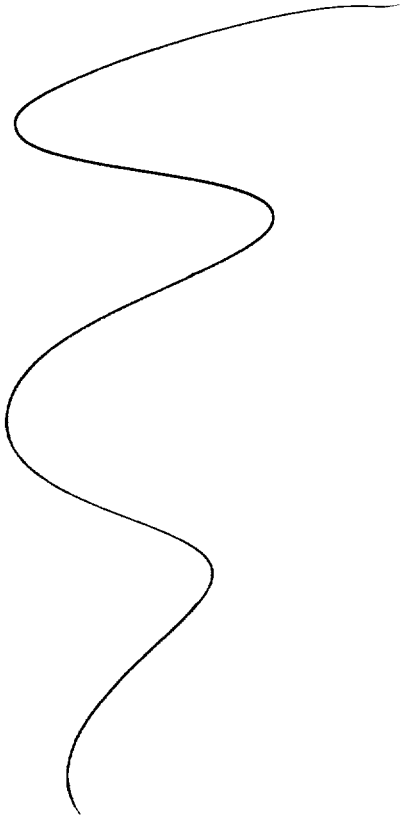
Supplemental

Agenda

Book

Materials



Preliminary Research Design

Should Certain Types of Adversary Proceedings Be Exempt, under the Bankruptcy Rules, from Civil Rule 26 Mandatory Disclosure Requirements?

Robert J. Niemic[1]
Research Division
Federal Judicial Center

September 15, 2003

[1] A special thanks goes to Elizabeth C. Wiggins (Beth Wiggins) for her advise, consultations, and drafting suggestions.

Background

At the October 2002 meeting of the Committee, the Reporter presented his September 18, 2002 memorandum regarding Mandatory Disclosure in Adversary Proceedings. See Attachment 1. The memorandum queried whether some categories of adversary proceedings (APs) should be exempt from the mandatory disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure, which are made applicable to AP's by Rule 7026. The particular provisions that are relevant to mandatory disclosure are Fed. R. Civ. P. 26(a)(1), 26(a)(2), 26(a)(3), and 26(f). The hypothesis in the research project the Reporter proposed is this: whether applying the provisions of Rule 26(a) and 26(f) to adversary proceedings (APs) in certain types of AP's is meaningless--because many, if not most, of these types of adversary proceedings conclude before the expiration of the mandatory disclosure periods.[1]

At the October 2002 meeting, the Committee Chair asked the Federal Judicial Center to identify how frequently APs conclude before the expiration of the mandatory disclosure period and in which types of APs, if any, this commonly occurs. The Chair asked us at the Center to look into whether this information could be collected electronically and to report back at the April 2003 Committee meeting. At that meeting, we reported that it was not feasible to electronically gather the information needed for the study from existing AO or FJC databases for several interrelated reasons. The Committee Chair then asked us to further explore whether relevant information was accessible electronically and, if it was not, develop a proposal for obtaining it through a survey.

Our further exploration included reviewing randomly selected electronic docket sheets of closed APs. We observed that we could not rely on these docket sheets to tell us whether mandatory disclosure had taken place in most of the APs we reviewed, even those where the time between filing and disposition of the AP was over a year. Whether the AP lasted a year or less, we observed only occasional references to mandatory disclosure and even more rare instances where a court docketed the occurrence of disclosure. After further consideration, including review of database information and closed-case docket sheets, we concluded that the research objectives described in the Reporter's September 2003 memorandum would be better met using a survey for several interrelated reasons. (See *infra* Rationale for a Survey on page 3.)

Before describing the rationale and design of the proposed survey, we summarize the Center's prior research regarding the implementation of the disclosure provisions in the bankruptcy courts. Attachment 2 is the full report, which was issued in December 2000 and authored by Beth Wiggins and

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[1] This issue concerning the applicability of the disclosure provisions to APs is related in general terms to a pending amendment to Rule 9014, which would exempt contested matters from the mandatory disclosure requirements of Rule 26. That amendment, if not disapproved, will become effective on December 1, 2004.

Although some information about type of APs exists in electronic form, its use would require hand-checking it against docket sheets due to the lack of its specificity and uniformity across districts. Even if such information existed electronically or could be efficiently collected manually, Rule 26 mandatory disclosure provisions are not uniformly applied for APs across all bankruptcy courts. And, researchers have not documented the inter-district (and perhaps even intra-district) differences in application since the 2000 amendments became effective. Thus, if no disclosure takes place in an AP, docketed information would probably not tell us why (e.g., party stipulation, judge waiver of the disclosure requirements, or implicit disregard for the requirements).

A survey of bankruptcy judges could provide neutral and reliable information about:

- the mandatory requirements of Rule 26 making a difference in certain types of APs;
- what types of APs should be exempt from these Rule 26 provisions;
- at approximately what rate have attorneys voluntarily complied with the Rule 26 provisions;
- a court's actively pursuing, or not pursuing, compliance with the provisions; or
- reasons a court might or might not actively pursue compliance for certain types of APs.

The response rate of bankruptcy judges to Center questionnaires is generally very high, and judges have consistently provided insightful information through survey methods. A side benefit of surveying bankruptcy judges is that it will inform them of the Committee's concerns and provide them with an efficient way to provide input.

Questionnaire

Possible questions to be used in the questionnaire are listed below in general form. The questions in the final questionnaire will be drafted in a more precise and questionnaire-appropriate manner. Multiple choice or open-ended questions will be used depending on the nature of the question and the range of possible responses. Following below are some potential questions:

Do you think certain types of adversary proceedings (APs) should be exempt, under the Bankruptcy Rules, from Civil Rule 26 mandatory disclosure requirements?

Yes
No
Not sure

(Mark your answers to Questions __-__ here)

Types of Adversary Proceedings:

Type 1	Type 2	Type 3	Type 4	Type 5	Type 6	Type 7	Type 8	Others: (please specify)

Attachment 1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: MANDATORY DISCLOSURE IN ADVERSARY PROCEEDINGS

DATE: SEPTEMBER 18, 2002

Rule 26 of the Federal Rules of Civil Procedure requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. This rule is made applicable to adversary proceedings by Rule 7026. The Advisory Committee has recently proposed an amendment to Rule 9014 to exempt contested matters from these mandatory disclosure requirements. Exempting these actions from the operation of the mandatory disclosure rules is necessary because many, if not most, contested matters conclude before the expiration of the mandatory disclosure periods. The question has been raised as to whether some categories of adversary proceedings should likewise be exempted from the mandatory disclosure requirements.

Rule 26 itself excludes certain kinds of actions from the mandatory disclosure requirements. Under Rule 26(a)(1)(E), there are eight categories of cases to which the disclosure obligations are inapplicable. The Committee Note to the Rule accompanying the 2000 amendment states that the enumerated actions involve "little or no discovery in most cases." Thus, the Civil Rules recognize that it is appropriate to limit the application of the mandatory disclosure rules when they are not necessary.[1] There may be a number of categories of adversary

[1] Interestingly, Rule 26(a)(1)(E)(vi) excludes "an action by the United States to collect on a student loan guaranteed by the United States." Section 523 (a)(8) actions may often present the same issues, although matters of proof relevant to an finding of undue hardship can sometimes

proceedings that should be exempted from these disclosure on the grounds that they generally are resolved prior to the conclusion of the mandatory disclosure periods. The range of adversary proceedings is essentially unlimited, and the premise of Rule 26 is that it applies to all civil actions except the eight listed in Rule 26(a)(1)(E). It seems appropriate to determine whether any particular categories of adversary proceedings should be exempted from the mandatory disclosure provisions made applicable in adversary proceedings by Rule 7026.

The primary reason to exclude some adversary proceedings from the mandatory disclosure requirements is that the actions are resolved quickly. Determining which actions conclude quickly enough might be accomplished most effectively by studying the case statistics compiled by the Administrative Office. To the extent that the information is unavailable or insufficient to reach a conclusion, it may be appropriate to conduct additional study through the Federal Judicial Center to identify categories of adversary proceedings that usually involve limited discovery and that are resolved relatively quickly. I conducted an unscientific survey of attorneys throughout the country, and it would appear that the mandatory disclosure requirements of Rule 26, made applicable to both adversary proceedings and contested matters by Bankruptcy Rules 7026 and 9014, respectively, are honored much more in their breach than followed. If these requirements are to be followed, and the integrity of the rules protected, then it would seem prudent to determine the appropriate limits of the rule and propose an amendment that will exclude some adversary proceedings from the mandatory disclosure rules and leave them in place, consistent with district court practice, for the remaining actions.

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require significant factual and expert testimony discovery.

Attachment

Implementation of the Disclosure Provisions in Federal Rule Civil Procedure 26 by the United States Bankruptcy Courts

Elizabeth C. Wiggins and Shannon Wheatman
Research Division
Federal Judicial Center

December 2000

Fed. R. Civ. P. 26(a), as amended December 1, 1993, required the disclosure of certain information without awaiting a formal discovery request and amended Fed. R. Civ. P. 26(d) and (f) provided for the deferral of formal discovery until parties have met to discuss and plan discovery and to make or arrange for the exchange of discloseable information. (See the attached description of the amendments.) Fed. R. Bankr. P. 7026 made Fed. R. Civ. P. 26 applicable to adversary proceedings and by virtue of Fed. R. Bankr. P. 9014, it is applicable to contested matters unless the courts otherwise directs.

A significant feature of Civil Rule 26, as amended in 1993, was the option given to courts to exempt all cases or categories of cases from some or all of the rule's requirements. In 1994-95, the Federal Judicial Center summarized whether United States Bankruptcy Courts had opted out of the provisions and presented that information to the Advisory Committee on Bankruptcy Rules.

Findings of the 1994-1995 FJC Study

We found that many courts had modified the national discovery rules for bankruptcy practice in their districts and that other courts were likely to do so in the future. Specifically, at the time of our 1995 report, we found that for adversary proceedings, 50 courts opted out of 26(a)(1), 26 opted out of 26(a)(2–3), and 43 courts opted out of 26(f). Other courts were not enforcing 26(a)(1), 26(a)(2)-(3), and 26(f) although they had not formally opted out of the provisions. Also, a number of courts had opted out of only subparts of the provisions.

In addition, and not surprisingly, even more courts had opted out of the amended rule provisions for contested matters. Sixty-seven courts opted out of 26(a)(1), 42 opted out of 26(a)(2–3), and 59 courts opted out of 26(f). As with adversary proceedings, other courts were not enforcing 26(a)(1), 26(a)(2)-(3), and 26(f) for contested matters although they had not formally opted out of the provisions. And again, a number of courts had opted out of only subparts of the provisions.

we collected updated information from the courts during the summer of 2000.[1] This information is set out in the attached chart, which identifies districts that have:

- "opted out" of some or all of the disclosure provisions;
- implemented the disclosure provisions differently for adversary proceedings and contested matters;
- issued a court order or adopted a local rule on the disclosure provisions.

It also summarizes other discovery-related requirements in effect in the districts to the extent we were provided that information. Appendix A to this document describes the disclosure provisions of Fed. R. Civ. P. 26, prior to its December 1, 2000 amendment, and Appendix B explains how to use the attached chart to understand bankruptcy courts' responses to the disclosure requirements of prior Fed. R. Civ. P. 26.

Some technicalities and nuances may have been lost in compilation of the chart. Thus, it is best used as an overview of the bankruptcy courts' responses to amended Rule 26 and their disclosure requirements. **Users who need to know specific requirements–for example, attorneys handling cases in bankruptcy court–should not rely on the chart nor cite it as legal authority.**

Summary of Findings of the Updated Study

Nearly all bankruptcy courts have adopted a local rule (85 courts), issued a general order (23 courts), or both adopted a rule and issued an order (two courts) modifying the national disclosure provisions in effect prior to December 1, 2000.

The majority of courts (62) reacted to the disclosure provisions in the same way for adversary proceedings and for contested matters. For example, the:

- District of Massachusetts opted out of 26(a)(1)-(3), (d), and (f) for both adversary proceedings and contested matters.

- District of Connecticut opted out of 26(a)(1)-(3) but not 26(d) and (f) for both adversary proceedings and contested matters.

- Northern District of Ohio reported that the amended provisions were in

[1] We asked each bankruptcy clerk to review for accuracy the information for his or her district that we had on file from the 94-95 study, and to send us update local rules and general orders. Nearly all districts complied; for others we relied on published local rules.

provisions by local rule, and courts that had changed the national provisions somewhat but retained their basics. They were in effect for contested matters in fewer districts _26 or 35 if you include opt-court courts that had adopted similar disclosure provisions by local rule, and courts that had changed the national provisions somewhat but retained their basics.

These results clearly demonstrate that courts have opted out of and otherwise modified the disclosure provisions of Rule 26 for adversary proceedings and, to a lesser degree, for contested matters. If the amendments effective December 1, 2000 rendered the opt-outs for adversary proceedings void, bankruptcy practice across the country may change in significant ways.

Table 1

Bankruptcy Courts' Responses to Rule 26 Disclosure Provisions for Adversary Proceedings

	26(a)(1)	26(a)(2–3)	26(f)
Opted out by general order or local rule	62	29	50
Reported provision was not in effect but did not adopt local rule or issue general order to that effect	2	2	2
Opted out in part by general order or local rule (e.g., opt in or out only for certain proceedings; opt out only of part of provision)	2	6	2
Opted out but adopted similar provision by local rule	2	2	3
In Effect	20	40	31
In effect but provisions somewhat changed by general order or local rule	4	13	4
Under study	1	1	1
Missing information	1	1	1
Total Districts			

Table 2

Bankruptcy Courts' Responses to Rule 26 Disclosure Provisions for Contested Matters

	26(a)(1)	26(a)(2–3)	26(f)
Opted out by general order or local rule	75	46	63
Reported provision was not in effect but did not adopt local rule or issue general	2	2	2

Appendix A

Description of Disclosure Provisions in Fed. R. Civ. P. 26 in its pre-Dec. 1, 2000 version

Rule 26(a)(1), Initial Disclosure. Except as otherwise stipulated or as directed by order or local rule, a party must provide, without awaiting a discovery request, the following information at or within ten days of the meeting of counsel required by Rule 26(f):

- name, address, and telephone number of all persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, with identification of the subjects of the information;
- a copy or description by category and location of all documents, data compilations, and tangible things in the party's possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings;
- computation of damages claimed, with supporting documentation to be available for copying or inspection; and
- insurance policies that may satisfy the judgment, to be available for inspection or copying.

Rule 26(a)(2), Expert Disclosure. Parties must disclose the identity of persons who may testify as experts at trial [(a)(2)(A)] and, except as otherwise stipulated or as directed by the court, must provide a written report prepared and signed by the expert [(a)(2)(B)] containing:

- a complete statement of all opinions to be expressed by the expert and the basis for them;
- the data or other information considered by the expert in forming the opinions;
- exhibits to be used to summarize or support the opinions;
- qualifications of the expert;
- compensation to be paid the expert; and
- a list of cases in which the expert has testified at trial or by deposition in the last four years.

In the absence of other directions by the court, disclosure of experts must be made at least 90 days before the case is to be ready for trial or within 30 days of another party's disclosure when intended only to contradict or rebut that disclosure.

Rule 26(a)(3), Pretrial Disclosure. A party must provide the following

Appendix B

Using the Attached Chart to Understand Bankruptcy Courts' Responses to the Disclosure Provisions of Prior Federal Rule of Civil Procedure 26

The chart is arranged by circuit, and within the circuit, alphabetically by district. If the responding court made a distinction between adversary proceedings and contested matters, that distinction is made in the chart. Column 1 shows which parts of Rule 26(a)(1–3) are in effect, either because the court explicitly adopted the provision or because the court did not explicitly reject the provision. Column 2 shows which courts have clearly opted out of parts or all of these provisions. Columns 3 and 4 contain information about the courts' requirements for timing and sequence of discovery and their treatment of the 26(f) requirements of a meeting prior to initiation of formal discovery. Enforcement of 26(d) is dependent on 26(f), so these columns should be read together. Column 5 notes other discovery-related requirements in effect in the districts to the extent we were provided that information. Column 6 provides the number of the local rule adopted or court order issued in response to amended Rule 26, if any, and Column 7 indicates which courts reported that they had not yet made a decision regarding the amendments or had made only a provisional decision.

FEDERAL BANKRUPTCY COURT IMPLEMENTATION OF 1993 AMENDMENTS TO FED. R. CIV. P. 26

ELIZABETH C. WIGGINS AND SHANNON WHEATMAN
FEDERAL JUDICIAL CENTER

DECEMBER 2000
REVISED TABLE

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
00DC[1]	D. D.C.	26(a)(2) & (3) are in effect for adversary proceedings.	Opted out of 26(a)(1) for adversary proceedings, and 26(a)(1)-(3) for contested matters, unless otherwise ordered.	Opted out of 26(d) for adversary proceedings and contested matters, unless otherwise ordered.	In effect.		Local Bankruptcy Court Rule 7026-1.	

[1] The information in the table is derived from orders and local rules issued or adopted by district or bankruptcy courts subsequent to or in anticipation of the 1993 federal rule amendments and from discussions with bankruptcy and district court clerks and other court staff. It reports practices of the courts prior to the December 1, 2000 amendments to Fed. Civ. R. 26.The table should not be cited as legal authority or substituted for a careful examination of federal or local rules and court orders. This table is a revision of the one presented to the Advisory Committee on Bankruptcy Rules at its meeting on September 21, 1994. Naomi Medvin and F. James Kearney helped prepare that table and the accompanying report

Column 1 shows which parts of Rule 26(a)(1)–(3) are in effect, either because the court explicitly adopted the provision or because the court did not explicitly reject the provision. Column 2 shows which courts have clearly opted out of parts or all of these provisions. Columns 3 and 4 contain information about the courts' requirements for timing and sequence of discovery and their adoption of 26(f) requirements of a meeting prior to initiation of formal discovery. Enforcement of 26(d) is dependent on 26(f), so these columns should be read together. Column 5 notes other discovery-related requirements in effect in the districts to the extent we were provided that information. Column 6 specifies the local rule adopted or court order issued in response to Rule 26, if any, and Column 7 indicates which courts reported that they had not yet made a decision regarding the amendments or had made only a provisional decision.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
01	D. Me.	No explicit rejection of 26(a)(1)–(3) for contested matters.	Opted out of 26(a)(1) for adversary proceedings. Scope, sequence and timing of disclosures called for by 26(a)(2) & (3) are determined on a proceeding-by proceeding basis.	No explicit rejection of 26(d) for contested matters or adversary proceedings. Inoperative for adversary proceedings due to non-implementation of 26(f).	26(f) not in effect for adversary proceedings. No explicit rejection for contested matters.	Discovery governed by the pretrial scheduling order pursuant to LBR 7016(d). Prior to filing discovery motions, counsel shall meet to resolve disputes. See LBR 7026 (b)(1).	Local Bankruptcy Court Rule 7026-1.	
01	D. N.H.	26(a)(2)(A) & (B) when ordered by the court or if the court has not established the time for disclosure at the time set by 26(a)(3). 26(a)(3) in effect when such disclosure is mandated by 7016-2	Opted out of 26(a)(1), unless otherwise ordered.	26(d) in effect.	26(f) in effect except parties should meet "as soon as practical" (rather than "at least 14 days") before the preliminary pretrial conference. 26(f) not in effect for pro se cases.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
02	E.D. N.Y.		Not in effect at this time.	Not in effect at this time.	Not in effect at this time.		None	Clerk reports that disclosure rules require further study by the District Court. Amendments not yet addressed formally by the Bankruptcy Court.
02	N.D. N.Y.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters unless otherwise ordered in a given proceeding.	Opted out of 26(d) for adversary proceedings and contested matters unless otherwise ordered in a given proceeding.	Opted out of 26(f) for adversary proceedings and contested matters unless otherwise ordered by the court.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
02	D. Vt.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a) (1)-(3) for contested matters unless specifically ordered by the court.	Opted out of 26(d) for contested matters unless specifically ordered by the court. No explicit rejection of rule for adversary proceedings.	Opted out of 26(f) for contested matters unless specifically ordered by the court. No explicit rejection of rule for adversary proceedings.		Bankruptcy Court General Order 93-6	
03	D. Del.	26(a)(1) - (3) appear to be in effect.		26(d) appears to be in effect.	26(f) appears to be in effect.		Local District Court Rules 5.4 and 16.2.	
03	D. N.J.	26(a)(1)-(3) are in effect, in the discretion of the court.		No explicit rejection of 26(d).	In effect, in the discretion of the court.		Local Bankruptcy Court Rule 7026-1 & Civil Rule 26.1	
03	E.D. Pa.		Opted out of 26(a)(1)-(3) unless otherwise ordered.	Opted out of 26(d) unless otherwise ordered	Opted out of 26(f) unless otherwise ordered.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
03	D. V.I.							A study committee appointed by the Chief Judge is reviewing amendments to make recommendations for implementation and proposed local rule changes to the court. NEED TO FOLLOWUP WITH COURT.
04	D. Md.	No explicit rejection of 26(a)(2) and 26(a)(3) for adversary proceedings and contested matters. 26(a)(1) in effect for certain adversary proceedings.	Opted out of 26(a)(1) for all contested matters, and for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan.	26(d) in effect only where meeting of the parties is required; not for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan, and not for contested matters.	Opted out of 26(f) for all contested matters, and for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
04	W.D. N.C.	26(a)(1)-(3) in effect for adversarial proceedings to recover money or property having a value greater than $75,000.	26(a)(1)-(3) does not apply to contested matters, unless otherwise ordered.	26(d) applicable if 26(f) applies.	26(f) applicable for any adversary proceeding to recover money or property having a value greater than $75,000. 26(f) not applicable for contested matters, unless otherwise ordered.		Local Bankruptcy Court Rule 7026-1.	
04	D. S.C.	No explicit rejection of 26(a)(2)(A) or 26(a)(3) for adversary matters.	Opted out of 26(a)(1) – (3) for contested matters, unless otherwise ordered by the court. Opted out of 26(a)(1) and 26(a)(2)(B)& (C) for adversary proceedings, unless otherwise ordered by the court.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for contested matters and adversary proceedings, unless otherwise ordered by the court.	Requirements of 26(a)(3) deemed met if the parties provide that information in the Joint Pretrial Order.	Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
04	S.D. W. Va.	No explicit rejection or modification of 26(a)(3) in District Court Local Rules.	District Court LR Civ P 3.01 incorporates 26(a)(1) & (2): Initial disclosure timing requirements are revised to 30 days after 26(f) meeting; local rule also details sequence and timing of disclosures regarding experts.	District Court LR Civ P 2.01(b) incorporates 26(d) requirements, but no explicit deferral provision included.	District Court LR Civ P 2.01(b) incorporates 26(f) requirements.	District Court LR Civ P 3.01, effective Aug. 1, 1994 incorporates control of discovery for district courts. District Court LR Civ P 2.01 (b) requires parties to meet at least 21 days before the scheduling conference to report on all 26(f) matters. At the meeting, parties consider complexity of the case and appropriateness of case-management monitoring, trial by a magistrate judge, and use of ADR.	None	Court is in the process of determining what bankruptcy proceedings and matters will be subject to district court local rules described in columns 1–5 of this chart.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
05	S.D. Miss.		Opted out of 26(a)(1)-(3) subject to further order of the Court or a specific order of a Bankruptcy Judge in a particular case or proceeding.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) subject to further order of the Court or a specific order of a Bankruptcy Judge in a particular case or proceeding.	Also opted out of 26(a)(4).	Bankruptcy Court Internal Operating Order of Jan. 10, 1994	
05	E.D. Tex.		Opted out of 26(a)(1)-(3), unless otherwise ordered by the court.	No explicit rejection of 26(d).	No explicit rejection of 26(f).		Local Bankruptcy Court Rule 7026	
05	N.D. Tex.	No explicit rejection of 26(a)(2)(A) & (B) and 26 (a)(3) for adversary proceedings.	Opted out of 26(a) for contested matters. For adversary proceedings opted out of 26(a)(1); and modified 26(a)(2)(C) to require expert witness disclosures be made at least 45 days before trial.	Opted out of 26(d) for contested matters and adversary proceedings.	Opted out of 26(f) for contested matters and adversary proceedings.		Bankruptcy Court Standing Order No. 94-2.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
06	E.D. Ky.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters unless otherwise ordered by the court.	No explicit rejection of 26(d) but rule inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested matters unless otherwise ordered by the court.		Local Bankruptcy Court Rule 7026-1.	
06	W.D. Ky.	26(a)(1)-(3) in effect for adversary proceedings unless otherwise ordered by the Court.	Opted out of Rule 26(a)(1)-(3) for contested matters unless otherwise ordered by the Court.	Opted out of 26(d) for contested matters unless otherwise ordered by the Court. 26(d) in effect for adversary proceedings unless otherwise ordered by the Court.	Opted out of 26(f) for contested matters unless otherwise ordered by the Court. 26(f) in effect for adversary proceedings unless otherwise ordered by the Court.		Bankruptcy Court General Order No. 94-2	
06	E.D. Mich.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters, except by order of a judge.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested matters, except by order of a judge.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
06	E.D. Tenn.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a)(1)-(3) for contested matters and proceedings under Bankruptcy Rule 1018, unless otherwise ordered.	No explicit rejection of rule for adversary proceedings. Rule inoperative due to non-implementation of 26(f) for contested matters and proceedings under Bankruptcy Rule 1018.	Opted out of 26(f) for contested matters and proceedings under Bankruptcy Rule 1018, unless otherwise ordered; no explicit rejection of rule for adversary proceedings.		Local Bankruptcy Court Rule 7026-1	
06	M.D. Tenn.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters.	Opted out for adversary proceedings and contested matters.	Opted out for adversary proceedings and contested matters.	Uniform pretrial procedures in the Bankruptcy Court provide for prompt discovery; there is therefore no need to implement FRCP 26(a)(1).	Local Bankruptcy Rule 5.01.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
07	N.D. Ind.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a)(1)-(3) for contested matters, except as otherwise ordered or agreed by parties.	No explicit rejection of 26(d) for adversary proceedings. Inoperative due to non-implementation of 26(f) for contested matters.	Opted out of 26(f) for contested matters, except as otherwise ordered or agreed by parties. No explicit rejection of 26(f) for adversary proceedings.		General Order No. 94-2.	
07	S.D. Ind.	No explicit rejection of 26(a)(2) & (3).	Opted out 26(a)(1).	Opted out.	Opted out.		District Local Rule 26.3	
07	E.D. Wis.		Opted out.	Opted out.	Opted out.		District Court Order of Jan. 7, 1994.	
07	W.D. Wis.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1), unless otherwise ordered by the court.	No explicit rejection. Inoperative due to non-implementation of 26(f).	Opted out of 26(f), unless otherwise ordered by the court.		District Court General Order of Dec. 6, 1993	
08	E.D. Ark.		26(a)(1)-(3) are not in effect unless otherwise ordered or agreed to by parties.	Opted out.	Opted out although parties are encouraged to confer.	Also opted out of 26(a)(4).	Local Bankruptcy Court Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
08	S.D. Iowa	26(a)(2)(A) and 26(a)(3) in effect unless otherwise ordered in individual cases.	Opted out of 26(a)(1), 26(a)(2)(B) & (C) unless otherwise ordered in individual cases.	Opted out of 26(d).	26(f) in effect.	Court is amending local bankruptcy rules and does not adopt recent amendments to District Court rules dealing with discovery.	Bankruptcy Court Order of July 1, 1994; District Court Order–Misc. No. M1-33; District Court Order –Misc. No. M1-33(A)	Court will continue to apply current local bankruptcy rules until the local bankruptcy rules are amended.
08	D. Minn.		Opted out of 26(a)(1)-(3) for adversary proceedingsand contested matters.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedingsand contested matters.	Local Rule 7037-1.	Local Bankruptcy Court Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
08	D. N.D.	No explicit rejection of 26(a)(2)(A) & (B); further, no explicit rejection of provisions of 26(a)(2)(C) & 26(a)(3) dealing with matters other than timing.	Opted out of 26(a)(1) for adversary proceedings and contested matters and the timing requirements under 26(a)(2)(C) and 26(a)(3).	Opted out of 26(d).	Opted out of 26(f).		Local Bankruptcy Court Rule 7026-1	
08	D. Neb.	26(a)(1)-(3) in effect for adversary matters commenced after March 1, 1994, unless otherwise ordered by the court.	Opted out of 26(a)(1)-(3) for contested matters, unless otherwise ordered by the court.	Opted out of 26(d) for contested matters and adversary proceedings, unless otherwise ordered by the court.	Opted out of 26(f) for contested matters and adversary proceedings, unless otherwise ordered by the court.	General Order 94-1 specifies that the disclosure required by 26(a)(1) shall be made within 45 days after the answer is filed.	Bankruptcy Court General Order No. 94-1	
08	D. S.D.	Presumably all in effect.		Presumably in effect.	Presumably in effect.		none	Clerk reports no local rules, general orders, or standing orders as of Mar. 29, 2000.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Ariz.	26(a)(1)-(3) in effect for adversary proceedings. No explicit rejection of 26(a)(2) & (3) for contested matters.	Opted out of 26(a)(1) for contested matters.	26(d) in effect for adversary proceedings. 26(d) not in effect for contested maters.	26(f) in effect for adversary proceedings. 26(f) not in effect for contested maters.	Also opted out of 26(a), 26(d), 26(f) for contested involuntary petitions.	Bankruptcy Court General Order No. 59.	
09	C.D. Cal.	26(a)(2)(C) is in effect. No explicit rejection of 26(a)(2)(A) & (B).	Opted out of 26(a)(1) & (3).	Opted out.	Opted out.		Bankruptcy Court General Order No. 94-05; District Court General Order 339-C	
09	E.D. Cal.	No explicit rejection of 26(a)(2)(A) & (C).	Opted out of 26(a)(1), 26(a)(2)(B) and 26(a)(3) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Opted out of 26(d) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Opted out of 26(f) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Expert witness disclosure requirements performed in accordance with court order or FRCP 30, 33, & 34. Pre-trial disclosures pursuant to LBR 9017 or court order.	Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Idaho		Opted out of 26(a)(1)–(3) unless specifically ordered by Court. Local District Court Rule 26.2 regarding disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f). Local District Court Rule 26.2 regarding disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.	Opted out of 26(f) unless specifically ordered by Court. Local District Court Rule 26.2 disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.		Bankruptcy Court General Order No. 101	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Mont.		Opted out of 26(a)(1) – (3) for contested matters and adversary proceedings.	Opted out of 26(d) for contested matters and adversary proceedings.	Opted out of 26(f) for contested matters and adversary proceedings.	Goals of Rule 26 amendments met by local rules. District Court CJRA plan permits pre-discovery disclosure under LBR 2(b) for adversary proceedings upon application of a party. The Court may order a pretrial conference under LBR 2(c) for complex cases.	Local Bankruptcy Court Rule 7001-1.	
09	D. Nev.	26(a)(2)(A) & (3) are in effect, unless otherwise ordered. Timing controlled by local rule.	Opted out of 26(a)(1) and 26(a)(2)(B), unless otherwise ordered.	Opted out of 26(d) as to limitations on commencement of discovery but adopted the other tenets.	Opted out of 26(f) for contested matters and other actions ordered by the court. No rejection of 26(f) for adversary proceedings.	Discovery conducted in accordance with FRCP and local rules in effect.	Local Bankruptcy Rule 7026, 7030, 7031, 7032, & 7036.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	E.D. Wash.	26(a)(1)–(3) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.		26(d) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.	26(f) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.		District Court General Order of Dec. 11, 1993; Bankruptcy Court General Order No. 2 of Feb. 10, 1994 (effective date of Rules 26(a)(1)-(3), 26(d), and 26(f) delayed to allow court to further consider effect of amended rules); Bankruptcy Court Order dated Oct. 31, 1994	
09	W.D. Wash.	26(a)(2) & (3) are in effect, although the timing and content of disclosure modified by local rule. No explicit rejection of 26(a)(1).		No explicit rejection of discovery deferment of 26(d). Provision regarding sequence of discovery is in effect.	No explicit rejection of 26(f).		Bankruptcy Court Local Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
10	D. N.M.	26(a)(2) & (3) timing requirements established by court order in each adversary proceeding.	Opted out of 26(a)(1) for contested matters and adversary proceedings unless otherwise ordered by the judge in a particular case. Opted out of 26(a)(2) & (3) for contested matters.	Opted out of discovery deferment in 26(d) for contested and adversary matters unless ordered by a judge. No rejection of provision regarding sequence of discovery.	Opted out of 26(f) for contested and adversary matters unless otherwise ordered by presiding judge.		Bankruptcy Court Local Rule 7026-1.	
10	E.D. Okla.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1).	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f).		Bankruptcy Court Local Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
10	W.D. Okla.	No explicit rejection of 26(a)(2) & (3).	Follow Local Rule 7016(b) in lieu of 26(a)(1).	Opted out.	Follow Local Rule 7016(b) in lieu of 26(f).	Local Rule 7016 authorizes court to manage discovery matters in scheduling order. Local Rule 7016 requires meeting of parties prior to scheduling conference.	Local Bankruptcy Rule 7026 & 7016.	
10	D. Utah	26(a)(1)-(3) in effect for adversary proceedings filed with the court on/after April 4, 1994.	Opted out of 26(a)(1)-(3) for contested matters unless requested by a party or ordered by the court on a case-by-case basis.	Opted out of 26(d) for contested matters unless requested by a party or ordered by the court on a case-by-case basis. 26(d) in effect for adversary proceedings.	Opted out of 26(f) for contested matters unless requested by a party or ordered by the court on a case-by-case basis. 26(f) in effect for adversary proceedings.		Bankruptcy Court Local Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
11	N.D. Ala.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters, unless otherwise ordered or stipulated.	Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested orders, unless otherwise ordered or stipulated.		Bankruptcy Court Local Rule 7026-1.	
11	S.D. Ala.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1) for cases filed under Part VII, FRBP, unless the court orders otherwise upon its own motion or on a motion filed by a party.	No explicit rejection of 26(d).	No explicit rejection of 26(f).		Bankruptcy Court Local Rule 7026-1.	
11	M.D. Fla.		26(a)(1)-(3) not mandatory for adversary proceedings and contested matters unless stipulated by parties or otherwise ordered by the court.	Inoperative unless 26(f) meeting is ordered.	26(f) not mandatory for adversary proceedings and contested matters unless stipulated by parties or otherwise ordered by the court.		Local Bankruptcy Rule 7026.1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
11	N.D. Ga.	No explicit rejection of 26(a)(2) & (3) for adversary proceedings or contested matters.	Opted out of 26(a)(1) except as may be agreed by the parties or as ordered by the judge in a specific adversary proceeding or contested matter.	Opted out of 26(d) except as may be agreed by the parties or as ordered by the judge in a specific adversary proceeding or contested matter.	Opted out of 26(f) except as ordered by the judge. 26(f) conference encouraged but not obligatory.		Bankruptcy Court Local Rule 7026-1; Bankruptcy Court General Order of 5/13/94.	
11	S.D. Ga.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1).	No explicit rejection of 26(d). Inoperative due to the non-implementation of 26(f).	Opted out.		Local District Rule 26.1	

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

GLEN K. PALMAN
Chief

Bankruptcy Court
Administration Division

September 16, 2003

MEMORANDUM TO PETER McCABE

SUBJECT: September 18-19 Meeting of the Advisory Committee on Bankruptcy Rules

I am writing to you in your capacity as Secretary of the Committee on Rules of Practice and Procedure. My office has had the opportunity to review the agenda item recommending the modification to Fed.R.Bank.P. 2002(g) that will be considered by the Advisory Committee on Bankruptcy Rules at its scheduled meeting to be held in Washington state at the end of this week.

I believe that the item fairly represents the recommendation previously made by the Bankruptcy Noticing Working Group as well as the discussion held with the Technology Subcommittee at its meeting in May 2003.

There is one issue addressed in the agenda item for which I would offer additional clarification for the committee members. On page 4, the first paragraph states that third party notice providers that do not meet the standards present in the Bankruptcy Noticing Center system "can be addressed by requiring that any such entity must meet appropriate standards for performance as set by the Administrative Office." It goes further to state that the AO would continue to maintain appropriate standards for performance, and that the AO would monitor performance standards.

My office has received this language and we are well positioned to comply with it by proceeding as follows:

- The AO will continue to review and modify appropriate noticing performance standards through current processes, e.g. consulting with the AO's Bankruptcy Noticing Working Group, coordinating with Judicial Conference committees, as appropriate, and by following the judiciary's contractual process.

- To provide the ability for all noticing agents to comply with the proposed changes to Fed.R.Bank.P. 2002(g), the national creditor name and address database will be made available through electronic means. Unlimited access will be provided to all bankruptcy court users, including private entities that provide noticing service to trustees or other case parties, attorneys, and the two non-BNC districts (Tennessee-Middle, Oklahoma-Western). In addition, the database could be accessed by BNC courts to facilitate ad hoc local noticing.

Please contact me should you or the Committee require additional information.

Glen K. Palman

cc: Noel J. Augustyn
Jim Wannamaker, BJD

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
U.S. COURTHOUSE, SUITE 8W
300 SOUTH FOURTH STREET
MINNEAPOLIS, MINNESOTA 55415

ROBERT J. KRESSEL
JUDGE

03-BK-B

July 2, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and
Procedure
Administrative Office of the United States Courts
OJP-AD/4-180, Thurgood Marshall Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Bankruptcy Rules

Dear Peter:

I write to ask the Advisory Committee on Bankruptcy Rules to consider a number of the current bankruptcy rules.

1. Rule 7004(b)(3). I think that this rule is currently ambiguous and needs attention. It is copied, in large part, from Civil Rule 4(h), except, of course, for the provision for service by mail. In the Civil Rule, the requirement that it be served on one of the designated people makes sense. Because you are generally accomplishing personal service, the person serving process has to seek out the person, serve the process, and whatever return of service is provided to the court would contain the name and, hopefully, the office of the person that actually received the process. When you are serving by mail under Rule 7004(b)(3), it doesn't work as well, at least as written. The question that the rule leaves unanswered is whether, when the pleading is mailed, the envelope must have the actual name of one of the qualifying people or whether simply using the title is sufficient? Thus, frequently complaints or other pleadings are addressed to "President, ABC Corporation, etc." Arguably, this complies with the rule. I've also seen returns of service in which the address simply copied the language of the rule, so that the envelope was addressed to "Officer, Managing or General Agent, ABC Corporation . . . ." I am not sure that either of these examples meets the spirit of the rule, which is to ensure that the complaint or other service of process shows up in the hands of someone who will actually have the incentive and the authority to deal with it.

While I suppose that resolution of this can wait a decision of a court, I would personally prefer that the Rules Committee address it.

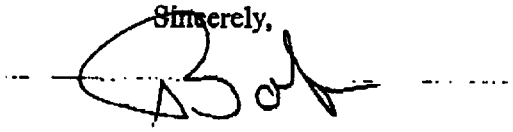
2. My second issue also deals with the subject of service. Rule 3007 deals with objections to claims and contains what I find to be somewhat odd language. It provides that "a copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant. . . ." I would think that an objection to claim is a contested matter which would require service under Rule 7004. Maybe that is implied, so that the idea is that, not only will the objection be served, but that a copy will be mailed as provided in the rule, although I doubt that this is what is meant. I would think that the rule can be changed to provide for "service" on the claimant. Whether service on the other entities is appropriate or merely notice, I leave to the Committee to decide. In general, it seems to me the rules use the concepts of either service or notice, but this idea that it be mailed without specifying whether that is service or notice, creates an ambiguity.

   If the Committee decides to address this rule, I have a related suggestion which ties in somewhat into the first issue I raised. I would think that it might be appropriate to provide that service on the claimant could be made by mailing a copy of the objection and a notice of the hearing to the person who signed the proof of claim on behalf of the claimant. At least in those situations where a proof of claim has been filed. This service could be an optional service in addition to that service provided in Rule 7004 or in lieu of Rule 7004, whichever the Committee thought makes the most sense.

3. Lastly, on a less momentous note, I would ask that the Committee consider adding the Clerk of the Bankruptcy Appellate Panel to those entities listed in Rule 5005(c).

Please give my personal regards to the members of the Committee, especially the Chair.

Sincerely,



Robert J. Kressel

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July 3, 2003

Advisory Committee on Bankruptcy Rules
Attn: Hon. A. Thomas Small, Chairman
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Advisory Committee on Bankruptcy Rules
Attn: Prof. Jeffrey W. Morris, Reporter
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Re: Federal Rule of Bankruptcy Procedure 9001:
Definition of "Regular Associate"

Dear Judge Small and Professor Morris:

I believe that the definition of "regular associate" in Fed. R. Bankr. P. 9001(9) logically needs to be expanded to include an *accountant* as well as an attorney. The present definition of regular associate limits, inadvertently I think, the scope of two other portions of the Federal Rules of Bankruptcy Procedure.

I begin with Fed. R. Bankr. P. 2014(b), titled, "Services Rendered by Member or Associate of Firm of Attorneys or Accountants." With references to attorneys omitted, the rule reads in relevant part:

> "If an accounting partnership or corporation is employed as an accountant, or if a named accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as accountant so employed, without further order of the court."

Federal Rule of Bankruptcy Procedure 9001(6) defines "firm":

> "(6) '***Firm***' includes a partnership or professional corporation of attorneys or accountants."[1]

[1] A separate question is whether this definition is strictly necessary, since the Code's definitions of "accountant" and "attorney" already includes professional association, corporation, or partnership. 11 U.S.C. § 101(1), (4). "Firm" therefore literally includes a professional corporation of professional corporations. "Firm" could instead be defined to include nonindividual accountants and nonindividual attorneys, although my wording seems clumsy.

Finally, Rule 9001(9) defines "regular associate":

> "(9) ***'Regular Associate'*** means any attorney regularly employed by, associated with, or counsel to an individual or firm."

"Regular associate," or at least the concept that that defined term seeks to capture, should include any *accountant* regularly employed by an individual or firm. The heading of Rule 2014(b) contemplates, by its terms, a member *or associate* of a firm of accountants. Rule 2014(b) itself refers to a *partner, member, or regular associate* of an approved accountant (whether that approved accountant is an accounting partnership, an accounting corporation, or an individual accountant). The definition of "firm" includes a partnership or professional corporation of accountants.

Yet if "regular associate" is limited to an attorney (and excludes accountant), confusion follows. With respect to accountants, the heading of Rule 2014(b) would be limited to "a member or *attorney* associate of a firm of accountants." The Rule itself would mean that an approved accountant (whether accounting partnership, accounting corporation, or individual accountant) could, without further court order, obtain assistance from a regular associate, so long as that associate were an attorney, but if the associate were an accountant, then a further court order would be required. Similarly, under Rule 9001, although an accounting partnership or professional corporation would be a "firm," the "regular associates" of that accounting firm would include attorneys and *exclude* accountants.

I do not believe that the above implications reflect the intent of the rules and its draftsmen. Although many accountants, especially nowadays, employ attorneys, often in the tax arena, I do not think that the interplay of Rules 2014(b) and 9001 was intended to be restricted to those somewhat unusual situations. Further, I note that Rule 2014(b) is based in large part on former Bankruptcy Rule 215(f). Rule 215(f) uses the term "regular associate," and former Rule 901 defines "accountant" and "attorney," but I cannot find a former rule that restricts "regular associate" to an attorney only.

If I am correct — the intent of the Rules is to allow *accountants* employed by court-approved accountants to be utilized without further court order— then the definition of Rule 9001(9) should be changed to allow that to happen. This might require some complicated drafting. "Associate" is a common description of an employee attorney of another attorney; it may be less common in the accounting world. And "counsel" would seem limited specifically to lawyers. Thus, the definition, and perhaps even the defined term itself, might need to be

rewritten or restructured. Perhaps something like "affiliated professional," although "affiliate" is itself a defined term under the Code.

If I am wrong — the limitation to attorney that I describe is deliberate and intentioned — then I would suggest that Rule 2014(b) needs to be rewritten and clarified.

I realize that in light of the important work that the Advisory Committee does year after year, this small definitional glitch is not momentous. Nevertheless, I look forward to the benefit of your comments on this matter. Thank you.

Very truly yours,

Robert R. Barnes

Robert R. Barnes

COMPARING PROCEDURAL DELAYS IN MOTION COMPARED TO COMPLAINT

Assuming no answer is filed.

MOTION	COMPLAINT
File the motion (most jurisdictions do not require formal service of process)	Prepare complaint, adversary cover sheet, and service of process.
Debtor has 20 days to respond. *Cf.* Fed. R. Bankr. P. 2002(a),	Debtor has 30 days to answer
Order may be entered at this point in jurisdictions with negative notice.	Prepare a notice of default judgment. Fed. R. Bankr. P. 7055(b)(1)
ONE UST DOCUMENT; NO COURT HEARING TIME; TOTAL TIME FOR DEFAULT = APPROXIMATELY 30 DAYS	Because the issue involves the Debtor's discharge, which is not solely a monetary issue, it is prudent to file a motion for default judgment. Fed. R. Bankr. P. 7055(b)(2).
	By local rule, this may require 20 day negative notice language or some type of response period for the Debtor.
	Judgment denying discharge entered.
	FIVE UST DOCUMENTS; NO COURT HEARING TIME; TOTAL TIME FOR DEFAULT = APPROXIMATELY 60- 90 DAYS;

Assuming answer is filed.

MOTION	COMPLAINT
File the motion (most jurisdictions do not require formal service of process)	Prepare complaint, adversary cover sheet, and service of process.
Debtor has 20 days to respond. *Cf.* Fed. R. Bankr. P. 2002(a),	Debtor has 30 days to answer
Debtor files response	Debtor files answer
Court conducts hearing	In many jurisdictions, Court sets pre-trial conference or requires a certification of disclosure of evidence; calendaring of trial setting, pre-trial deadlines, and certification issues.
Judgment denying discharge entered.	UST files motion for summary judgment – earliest it can be filed is 20 days after complaint is filed. Fed. R. Bankr. P. 7056(a); Generally, motion for summary judgment would be filed after answer as default judgment would be available otherwise.
ONE UST DOCUMENT; ONE DEBTOR PLEADING; ONE COURT HEARING; TOTAL TIME TO OBTAIN = APPROXIMATLEY 45 DAYS	By local rule, Court may require 20 day negative notice language for motion for summary judgment; at least ten days notice is required. Fed. R. Bankr. P. 7056(b).
	Debtor files answer.
	Court may set hearing on summary judgment issues
	Judgment denying discharge entered; calendaring events canceled.
	FOUR UST DOCUMENTS; TWO DEBTOR PLEADINGS; ONE-TWO COURT HEARINGS; CALENDARING; TOTAL TIME TO OBTAIN = APPROXIMATELY 60-120 DAYS

Examples:

Jessie B. Owen, Case number LA 02-16046 ER - debtor filed multiple chapter 7 cases where she had received a discharge at least twice in the past 6 years. This was her 3rd filing. I filed a complaint under 727(8), waited for the summons, spent three days tracking the summons in order to ensure it was served on time, and then attended two status conferences. I also spent a significant amount of time contacting her attorney of record to see if he was representing her in the adversary proceeding although he filed a notice of limited appearance. Only after a three phone calls and one letter did I finally get an acknowledgment that he did not represent the debtor in the adversary. We obtained a default judgment which I prepared, had entered and then had to check the docket to make sure the case was then closed. This whole process took about three to four months.

Dianne Mandell Miller, LA 01-46674 ER - debtor filed three times (a previous chapter 7 and a previous chapter 13 which was then converted to chapter 7), manipulating her hyphenated name and transposing two digits of her social security number to get around a previous discharge and a 180 day bar against refiling which was imposed on the converted chapter 13 for failure to show up twice at the first meeting of creditors. On Debtor's SFA #4 she stated she had not filed any previous bankruptcies. The complaint cited 727(a)(4) and 727(a)(8). *(Note: With the proposed expedited procedure, the UST would only rely on 727(a)(8)).* We were required to appear at two status conferences and after the default, another status conference to close up the matter. The whole process took approximately five months.

Materials
circulated
at
meeting

Attach to Item 19.

Form B6G (DRAFT)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE G- EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any time share interests. If all leases and contracts will not fit on this page, use continuation sheets in a similar format.

Provide the names and complete mailing addresses of all other parties to each lease or contract described, using the same format as in Schedules D, E, and F. Use as many name and address boxes as necessary to list each party to any lease or contract and separate each lease or contract scheduled. State the nature of debtor's interest in each contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease.

☐ Check this box if debtor has no executory contracts or unexpired leases to report on this Schedule G.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF EACH OTHER PARTY TO LEASE OR CONTRACT	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT

COMMITTEE NOTE

The form is amended to implement an amendment to Rule 1007 by deleting the instruction that parties to these contracts and leases will not receive notice of the bankruptcy case unless they are listed on one of the schedules of liabilities. Even though a contract or lease may be an asset of the debtor or the debtor may be current on any lease or contract payment obligations, other parties to these transactions may have an interest in the bankruptcy case and should receive notice.

Attach to Item 6.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: CIVIL RULES RESTYLING PROJECT

DATE: SEPTEMBER 3, 2003

The Advisory Committee on Civil Rules has initiated a project to restyle the civil rules. The Committee presented the restyled versions of Rules 1 through 15 to the Standing Committee in June. They are attached to this memorandum. The Standing Committee approved those restyled rules for publication, but those rules will not be published for comment until August of 2004. In the meantime, the Advisory Committee is continuing the restyling effort and expects to have another substantial portion of the restyled rules ready for presentation to the Standing Committee next year. At that time, assuming Standing Committee approval, the first and second groups of restyled rules would be published for comment. There are at least two reasons for withholding publication of the first group of rules until the second group is ready. First, the publication of the larger group will give the bench and bar a better feel for the scope and nature of the project. Second, and more importantly, the restyling of rules in the second group may cause a need to revise Rules 1 through 15 because of amendments later in the civil rules. Thus, although the Standing Committee approved the first 15 rules, the expectation is that the language of those rules may change yet again before they are published for comment.

The civil rules restyling could require amendments to the bankruptcy rules. Some changes may be just technical and could be made without publication. Some changes may be stylistic and required in order to maintain consistency between the two sets of rules to the extent possible. Finally, some changes may have a substantive impact on the bankruptcy rules and may

require even greater scrutiny and consideration by this Committee. In any event, we cannot know what form the civil rules will take until they are adopted by the Standing Committee and approved for submission to the Judicial Conference. Therefore, we will monitor the changes and can consider submitting comments to the Civil Rules Committee regarding the published versions.

The attached draft of the restyled civil rules is for your information only at this time. There is no need yet to review them for comment or revision. We will discuss the process for the review and comment on the restyled civil rules and determine what action or actions we should take as a Committee.

Preliminary Research Design

Should Certain Types of Adversary Proceedings Be Exempt, under the Bankruptcy Rules, from Civil Rule 26 Mandatory Disclosure Requirements?

Robert J. Niemic[1]
Research Division
Federal Judicial Center

September 15, 2003

[1] A special thanks goes to Elizabeth C. Wiggins (Beth Wiggins) for her advise, consultations, and drafting suggestions.

Background

At the October 2002 meeting of the Committee, the Reporter presented his September 18, 2002 memorandum regarding Mandatory Disclosure in Adversary Proceedings. See Attachment 1. The memorandum queried whether some categories of adversary proceedings (APs) should be exempt from the mandatory disclosure requirements of Rule 26 of the Federal Rules of Civil Procedure, which are made applicable to AP's by Rule 7026. The particular provisions that are relevant to mandatory disclosure are Fed. R. Civ. P. 26(a)(1), 26(a)(2), 26(a)(3), and 26(f). The hypothesis in the research project the Reporter proposed is this: whether applying the provisions of Rule 26(a) and 26(f) to adversary proceedings (APs) in certain types of AP's is meaningless--because many, if not most, of these types of adversary proceedings conclude before the expiration of the mandatory disclosure periods.[1]

At the October 2002 meeting, the Committee Chair asked the Federal Judicial Center to identify how frequently APs conclude before the expiration of the mandatory disclosure period and in which types of APs, if any, this commonly occurs. The Chair asked us at the Center to look into whether this information could be collected electronically and to report back at the April 2003 Committee meeting. At that meeting, we reported that it was not feasible to electronically gather the information needed for the study from existing AO or FJC databases for several interrelated reasons. The Committee Chair then asked us to further explore whether relevant information was accessible electronically and, if it was not, develop a proposal for obtaining it through a survey.

Our further exploration included reviewing randomly selected electronic docket sheets of closed APs. We observed that we could not rely on these docket sheets to tell us whether mandatory disclosure had taken place in most of the APs we reviewed, even those where the time between filing and disposition of the AP was over a year. Whether the AP lasted a year or less, we observed only occasional references to mandatory disclosure and even more rare instances where a court docketed the occurrence of disclosure. After further consideration, including review of database information and closed-case docket sheets, we concluded that the research objectives described in the Reporter's September 2003 memorandum would be better met using a survey for several interrelated reasons. (See *infra* Rationale for a Survey on page 3.)

Before describing the rationale and design of the proposed survey, we summarize the Center's prior research regarding the implementation of the disclosure provisions in the bankruptcy courts. Attachment 2 is the full report, which was issued in December 2000 and authored by Beth Wiggins and

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[1] This issue concerning the applicability of the disclosure provisions to APs is related in general terms to a pending amendment to Rule 9014, which would exempt contested matters from the mandatory disclosure requirements of Rule 26. That amendment, if not disapproved, will become effective on December 1, 2004.

Although some information about type of APs exists in electronic form, its use would require hand-checking it against docket sheets due to the lack of its specificity and uniformity across districts. Even if such information existed electronically or could be efficiently collected manually, Rule 26 mandatory disclosure provisions are not uniformly applied for APs across all bankruptcy courts. And, researchers have not documented the inter-district (and perhaps even intra-district) differences in application since the 2000 amendments became effective. Thus, if no disclosure takes place in an AP, docketed information would probably not tell us why (e.g., party stipulation, judge waiver of the disclosure requirements, or implicit disregard for the requirements).

A survey of bankruptcy judges could provide neutral and reliable information about:

- the mandatory requirements of Rule 26 making a difference in certain types of APs;
- what types of APs should be exempt from these Rule 26 provisions;
- at approximately what rate have attorneys voluntarily complied with the Rule 26 provisions;
- a court's actively pursuing, or not pursuing, compliance with the provisions; or
- reasons a court might or might not actively pursue compliance for certain types of APs.

The response rate of bankruptcy judges to Center questionnaires is generally very high, and judges have consistently provided insightful information through survey methods. A side benefit of surveying bankruptcy judges is that it will inform them of the Committee's concerns and provide them with an efficient way to provide input.

Questionnaire

Possible questions to be used in the questionnaire are listed below in general form. The questions in the final questionnaire will be drafted in a more precise and questionnaire-appropriate manner. Multiple choice or open-ended questions will be used depending on the nature of the question and the range of possible responses. Following below are some potential questions:

Do you think certain types of adversary proceedings (APs) should be exempt, under the Bankruptcy Rules, from Civil Rule 26 mandatory disclosure requirements?

Yes
No
Not sure

(Mark your answers to Questions __-__ here)

Types of Adversary Proceedings:

Type 1	Type 2	Type 3	Type 4	Type 5	Type 6	Type 7	Type 8	Others: (please specify)

Attachment 1

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: MANDATORY DISCLOSURE IN ADVERSARY PROCEEDINGS

DATE: SEPTEMBER 18, 2002

Rule 26 of the Federal Rules of Civil Procedure requires a series of actions by parties including the disclosure of a variety of information and participation in a discovery conference. This rule is made applicable to adversary proceedings by Rule 7026. The Advisory Committee has recently proposed an amendment to Rule 9014 to exempt contested matters from these mandatory disclosure requirements. Exempting these actions from the operation of the mandatory disclosure rules is necessary because many, if not most, contested matters conclude before the expiration of the mandatory disclosure periods. The question has been raised as to whether some categories of adversary proceedings should likewise be exempted from the mandatory disclosure requirements.

Rule 26 itself excludes certain kinds of actions from the mandatory disclosure requirements. Under Rule 26(a)(1)(E), there are eight categories of cases to which the disclosure obligations are inapplicable. The Committee Note to the Rule accompanying the 2000 amendment states that the enumerated actions involve "little or no discovery in most cases." Thus, the Civil Rules recognize that it is appropriate to limit the application of the mandatory disclosure rules when they are not necessary.[1] There may be a number of categories of adversary

[1] Interestingly, Rule 26(a)(1)(E)(vi) excludes "an action by the United States to collect on a student loan guaranteed by the United States." Section 523 (a)(8) actions may often present the same issues, although matters of proof relevant to an finding of undue hardship can sometimes

proceedings that should be exempted from these disclosure on the grounds that they generally are resolved prior to the conclusion of the mandatory disclosure periods. The range of adversary proceedings is essentially unlimited, and the premise of Rule 26 is that it applies to all civil actions except the eight listed in Rule 26(a)(1)(E). It seems appropriate to determine whether any particular categories of adversary proceedings should be exempted from the mandatory disclosure provisions made applicable in adversary proceedings by Rule 7026.

The primary reason to exclude some adversary proceedings from the mandatory disclosure requirements is that the actions are resolved quickly. Determining which actions conclude quickly enough might be accomplished most effectively by studying the case statistics compiled by the Administrative Office. To the extent that the information is unavailable or insufficient to reach a conclusion, it may be appropriate to conduct additional study through the Federal Judicial Center to identify categories of adversary proceedings that usually involve limited discovery and that are resolved relatively quickly. I conducted an unscientific survey of attorneys throughout the country, and it would appear that the mandatory disclosure requirements of Rule 26, made applicable to both adversary proceedings and contested matters by Bankruptcy Rules 7026 and 9014, respectively, are honored much more in their breach than followed. If these requirements are to be followed, and the integrity of the rules protected, then it would seem prudent to determine the appropriate limits of the rule and propose an amendment that will exclude some adversary proceedings from the mandatory disclosure rules and leave them in place, consistent with district court practice, for the remaining actions.

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require significant factual and expert testimony discovery.

Attachment

Implementation of the Disclosure Provisions in Federal Rule Civil Procedure 26 by the United States Bankruptcy Courts

Elizabeth C. Wiggins and Shannon Wheatman
Research Division
Federal Judicial Center

December 2000

Fed. R. Civ. P. 26(a), as amended December 1, 1993, required the disclosure of certain information without awaiting a formal discovery request and amended Fed. R. Civ. P. 26(d) and (f) provided for the deferral of formal discovery until parties have met to discuss and plan discovery and to make or arrange for the exchange of discloseable information. (See the attached description of the amendments.) Fed. R. Bankr. P. 7026 made Fed. R. Civ. P. 26 applicable to adversary proceedings and by virtue of Fed. R. Bankr. P. 9014, it is applicable to contested matters unless the courts otherwise directs.

A significant feature of Civil Rule 26, as amended in 1993, was the option given to courts to exempt all cases or categories of cases from some or all of the rule's requirements. In 1994-95, the Federal Judicial Center summarized whether United States Bankruptcy Courts had opted out of the provisions and presented that information to the Advisory Committee on Bankruptcy Rules.

Findings of the 1994-1995 FJC Study

We found that many courts had modified the national discovery rules for bankruptcy practice in their districts and that other courts were likely to do so in the future. Specifically, at the time of our 1995 report, we found that for adversary proceedings, 50 courts opted out of 26(a)(1), 26 opted out of 26(a)(2–3), and 43 courts opted out of 26(f). Other courts were not enforcing 26(a)(1), 26(a)(2)-(3), and 26(f) although they had not formally opted out of the provisions. Also, a number of courts had opted out of only subparts of the provisions.

In addition, and not surprisingly, even more courts had opted out of the amended rule provisions for contested matters. Sixty-seven courts opted out of 26(a)(1), 42 opted out of 26(a)(2–3), and 59 courts opted out of 26(f). As with adversary proceedings, other courts were not enforcing 26(a)(1), 26(a)(2)-(3), and 26(f) for contested matters although they had not formally opted out of the provisions. And again, a number of courts had opted out of only subparts of the provisions.

we collected updated information from the courts during the summer of 2000.[1] This information is set out in the attached chart, which identifies districts that have:

- "opted out" of some or all of the disclosure provisions;
- implemented the disclosure provisions differently for adversary proceedings and contested matters;
- issued a court order or adopted a local rule on the disclosure provisions.

It also summarizes other discovery-related requirements in effect in the districts to the extent we were provided that information. Appendix A to this document describes the disclosure provisions of Fed. R. Civ. P. 26, prior to its December 1, 2000 amendment, and Appendix B explains how to use the attached chart to understand bankruptcy courts' responses to the disclosure requirements of prior Fed. R. Civ. P. 26.

Some technicalities and nuances may have been lost in compilation of the chart. Thus, it is best used as an overview of the bankruptcy courts' responses to amended Rule 26 and their disclosure requirements. **Users who need to know specific requirements–for example, attorneys handling cases in bankruptcy court–should not rely on the chart nor cite it as legal authority.**

Summary of Findings of the Updated Study

Nearly all bankruptcy courts have adopted a local rule (85 courts), issued a general order (23 courts), or both adopted a rule and issued an order (two courts) modifying the national disclosure provisions in effect prior to December 1, 2000.

The majority of courts (62) reacted to the disclosure provisions in the same way for adversary proceedings and for contested matters. For example, the:

- District of Massachusetts opted out of 26(a)(1)-(3), (d), and (f) for both adversary proceedings and contested matters.

- District of Connecticut opted out of 26(a)(1)-(3) but not 26(d) and (f) for both adversary proceedings and contested matters.

- Northern District of Ohio reported that the amended provisions were in

[1] We asked each bankruptcy clerk to review for accuracy the information for his or her district that we had on file from the 94-95 study, and to send us update local rules and general orders. Nearly all districts complied; for others we relied on published local rules.

provisions by local rule, and courts that had changed the national provisions somewhat but retained their basics. They were in effect for contested matters in fewer districts _26 or 35 if you include opt-court courts that had adopted similar disclosure provisions by local rule, and courts that had changed the national provisions somewhat but retained their basics.

These results clearly demonstrate that courts have opted out of and otherwise modified the disclosure provisions of Rule 26 for adversary proceedings and, to a lesser degree, for contested matters. If the amendments effective December 1, 2000 rendered the opt-outs for adversary proceedings void, bankruptcy practice across the country may change in significant ways.

Table 1

Bankruptcy Courts' Responses to Rule 26 Disclosure Provisions for Adversary Proceedings

	26(a)(1)	26(a)(2–3)	26(f)
Opted out by general order or local rule	62	29	50
Reported provision was not in effect but did not adopt local rule or issue general order to that effect	2	2	2
Opted out in part by general order or local rule (e.g., opt in or out only for certain proceedings; opt out only of part of provision)	2	6	2
Opted out but adopted similar provision by local rule	2	2	3
In Effect	20	40	31
In effect but provisions somewhat changed by general order or local rule	4	13	4
Under study	1	1	1
Missing information	1	1	1
Total Districts			

Table 2

Bankruptcy Courts' Responses to Rule 26 Disclosure Provisions for Contested Matters

	26(a)(1)	26(a)(2–3)	26(f)
Opted out by general order or local rule	75	46	63
Reported provision was not in effect but did not adopt local rule or issue general	2	2	2

Appendix A

Description of Disclosure Provisions in Fed. R. Civ. P. 26 in its pre-Dec. 1, 2000 version

Rule 26(a)(1), Initial Disclosure. Except as otherwise stipulated or as directed by order or local rule, a party must provide, without awaiting a discovery request, the following information at or within ten days of the meeting of counsel required by Rule 26(f):

- name, address, and telephone number of all persons likely to have discoverable information relevant to disputed facts alleged with particularity in the pleadings, with identification of the subjects of the information;
- a copy or description by category and location of all documents, data compilations, and tangible things in the party's possession, custody, or control that are relevant to disputed facts alleged with particularity in the pleadings;
- computation of damages claimed, with supporting documentation to be available for copying or inspection; and
- insurance policies that may satisfy the judgment, to be available for inspection or copying.

Rule 26(a)(2), Expert Disclosure. Parties must disclose the identity of persons who may testify as experts at trial [(a)(2)(A)] and, except as otherwise stipulated or as directed by the court, must provide a written report prepared and signed by the expert [(a)(2)(B)] containing:

- a complete statement of all opinions to be expressed by the expert and the basis for them;
- the data or other information considered by the expert in forming the opinions;
- exhibits to be used to summarize or support the opinions;
- qualifications of the expert;
- compensation to be paid the expert; and
- a list of cases in which the expert has testified at trial or by deposition in the last four years.

In the absence of other directions by the court, disclosure of experts must be made at least 90 days before the case is to be ready for trial or within 30 days of another party's disclosure when intended only to contradict or rebut that disclosure.

Rule 26(a)(3), Pretrial Disclosure. A party must provide the following

Appendix B

Using the Attached Chart to Understand Bankruptcy Courts' Responses to the Disclosure Provisions of Prior Federal Rule of Civil Procedure 26

The chart is arranged by circuit, and within the circuit, alphabetically by district. If the responding court made a distinction between adversary proceedings and contested matters, that distinction is made in the chart. Column 1 shows which parts of Rule 26(a)(1–3) are in effect, either because the court explicitly adopted the provision or because the court did not explicitly reject the provision. Column 2 shows which courts have clearly opted out of parts or all of these provisions. Columns 3 and 4 contain information about the courts' requirements for timing and sequence of discovery and their treatment of the 26(f) requirements of a meeting prior to initiation of formal discovery. Enforcement of 26(d) is dependent on 26(f), so these columns should be read together. Column 5 notes other discovery-related requirements in effect in the districts to the extent we were provided that information. Column 6 provides the number of the local rule adopted or court order issued in response to amended Rule 26, if any, and Column 7 indicates which courts reported that they had not yet made a decision regarding the amendments or had made only a provisional decision.

FEDERAL BANKRUPTCY COURT IMPLEMENTATION OF 1993 AMENDMENTS TO FED. R. CIV. P. 26

ELIZABETH C. WIGGINS AND SHANNON WHEATMAN
FEDERAL JUDICIAL CENTER

DECEMBER 2000
REVISED TABLE

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
00DC[1]	D. D.C.	26(a)(2) & (3) are in effect for adversary proceedings.	Opted out of 26(a)(1) for adversary proceedings, and 26(a)(1)-(3) for contested matters, unless otherwise ordered.	Opted out of 26(d) for adversary proceedings and contested matters, unless otherwise ordered.	In effect.		Local Bankruptcy Court Rule 7026-1.	

[1] The information in the table is derived from orders and local rules issued or adopted by district or bankruptcy courts subsequent to or in anticipation of the 1993 federal rule amendments and from discussions with bankruptcy and district court clerks and other court staff. It reports practices of the courts prior to the December 1, 2000 amendments to Fed. Civ. R. 26.The table should not be cited as legal authority or substituted for a careful examination of federal or local rules and court orders. This table is a revision of the one presented to the Advisory Committee on Bankruptcy Rules at its meeting on September 21, 1994. Naomi Medvin and F. James Kearney helped prepare that table and the accompanying report

Column 1 shows which parts of Rule 26(a)(1)–(3) are in effect, either because the court explicitly adopted the provision or because the court did not explicitly reject the provision. Column 2 shows which courts have clearly opted out of parts or all of these provisions. Columns 3 and 4 contain information about the courts' requirements for timing and sequence of discovery and their adoption of 26(f) requirements of a meeting prior to initiation of formal discovery. Enforcement of 26(d) is dependent on 26(f), so these columns should be read together. Column 5 notes other discovery-related requirements in effect in the districts to the extent we were provided that information. Column 6 specifies the local rule adopted or court order issued in response to Rule 26, if any, and Column 7 indicates which courts reported that they had not yet made a decision regarding the amendments or had made only a provisional decision.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
01	D. Me.	No explicit rejection of 26(a)(1)–(3) for contested matters.	Opted out of 26(a)(1) for adversary proceedings. Scope, sequence and timing of disclosures called for by 26(a)(2) & (3) are determined on a proceeding-by proceeding basis.	No explicit rejection of 26(d) for contested matters or adversary proceedings. Inoperative for adversary proceedings due to non-implementation of 26(f).	26(f) not in effect for adversary proceedings. No explicit rejection for contested matters.	Discovery governed by the pretrial scheduling order pursuant to LBR 7016(d). Prior to filing discovery motions, counsel shall meet to resolve disputes. See LBR 7026 (b)(1).	Local Bankruptcy Court Rule 7026-1.	
01	D. N.H.	26(a)(2)(A) & (B) when ordered by the court or if the court has not established the time for disclosure at the time set by 26(a)(3). 26(a)(3) in effect when such disclosure is mandated by 7016-2	Opted out of 26(a)(1), unless otherwise ordered.	26(d) in effect.	26(f) in effect except parties should meet "as soon as practical" (rather than "at least 14 days") before the preliminary pretrial conference. 26(f) not in effect for pro se cases.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
02	E.D. N.Y.		Not in effect at this time.	Not in effect at this time.	Not in effect at this time.		None	Clerk reports that disclosure rules require further study by the District Court. Amendments not yet addressed formally by the Bankruptcy Court.
02	N.D. N.Y.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters unless otherwise ordered in a given proceeding.	Opted out of 26(d) for adversary proceedings and contested matters unless otherwise ordered in a given proceeding.	Opted out of 26(f) for adversary proceedings and contested matters unless otherwise ordered by the court.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
02	D. Vt.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a) (1)-(3) for contested matters unless specifically ordered by the court.	Opted out of 26(d) for contested matters unless specifically ordered by the court. No explicit rejection of rule for adversary proceedings.	Opted out of 26(f) for contested matters unless specifically ordered by the court. No explicit rejection of rule for adversary proceedings.		Bankruptcy Court General Order 93-6	
03	D. Del.	26(a)(1) - (3) appear to be in effect.		26(d) appears to be in effect.	26(f) appears to be in effect.		Local District Court Rules 5.4 and 16.2.	
03	D. N.J.	26(a)(1)-(3) are in effect, in the discretion of the court.		No explicit rejection of 26(d).	In effect, in the discretion of the court.		Local Bankruptcy Court Rule 7026-1 & Civil Rule 26.1	
03	E.D. Pa.		Opted out of 26(a)(1)-(3) unless otherwise ordered.	Opted out of 26(d) unless otherwise ordered	Opted out of 26(f) unless otherwise ordered.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
03	D. V.I.							A study committee appointed by the Chief Judge is reviewing amendments to make recommendations for implementation and proposed local rule changes to the court. NEED TO FOLLOWUP WITH COURT.
04	D. Md.	No explicit rejection of 26(a)(2) and 26(a)(3) for adversary proceedings and contested matters. 26(a)(1) in effect for certain adversary proceedings.	Opted out of 26(a)(1) for all contested matters, and for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan.	26(d) in effect only where meeting of the parties is required; not for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan, and not for contested matters.	Opted out of 26(f) for all contested matters, and for adversary proceedings seeking to revoke an Order of Confirmation of a Chapt. 11, 12, or 13 plan.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
04	W.D. N.C.	26(a)(1)-(3) in effect for adversarial proceedings to recover money or property having a value greater than $75,000.	26(a)(1)-(3) does not apply to contested matters, unless otherwise ordered.	26(d) applicable if 26(f) applies.	26(f) applicable for any adversary proceeding to recover money or property having a value greater than $75,000. 26(f) not applicable for contested matters, unless otherwise ordered.		Local Bankruptcy Court Rule 7026-1.	
04	D. S.C.	No explicit rejection of 26(a)(2)(A) or 26(a)(3) for adversary matters.	Opted out of 26(a)(1) – (3) for contested matters, unless otherwise ordered by the court. Opted out of 26(a)(1) and 26(a)(2)(B)& (C) for adversary proceedings, unless otherwise ordered by the court.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for contested matters and adversary proceedings, unless otherwise ordered by the court.	Requirements of 26(a)(3) deemed met if the parties provide that information in the Joint Pretrial Order.	Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
04	S.D. W. Va.	No explicit rejection or modification of 26(a)(3) in District Court Local Rules.	District Court LR Civ P 3.01 incorporates 26(a)(1) & (2): Initial disclosure timing requirements are revised to 30 days after 26(f) meeting; local rule also details sequence and timing of disclosures regarding experts.	District Court LR Civ P 2.01(b) incorporates 26(d) requirements, but no explicit deferral provision included.	District Court LR Civ P 2.01(b) incorporates 26(f) requirements.	District Court LR Civ P 3.01, effective Aug. 1, 1994 incorporates control of discovery for district courts. District Court LR Civ P 2.01 (b) requires parties to meet at least 21 days before the scheduling conference to report on all 26(f) matters. At the meeting, parties consider complexity of the case and appropriateness of case-management monitoring, trial by a magistrate judge, and use of ADR.	None	Court is in the process of determining what bankruptcy proceedings and matters will be subject to district court local rules described in columns 1–5 of this chart.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
05	S.D. Miss.		Opted out of 26(a)(1)-(3) subject to further order of the Court or a specific order of a Bankruptcy Judge in a particular case or proceeding.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) subject to further order of the Court or a specific order of a Bankruptcy Judge in a particular case or proceeding.	Also opted out of 26(a)(4).	Bankruptcy Court Internal Operating Order of Jan. 10, 1994	
05	E.D. Tex.		Opted out of 26(a)(1)-(3), unless otherwise ordered by the court.	No explicit rejection of 26(d).	No explicit rejection of 26(f).		Local Bankruptcy Court Rule 7026	
05	N.D. Tex.	No explicit rejection of 26(a)(2)(A) & (B) and 26 (a)(3) for adversary proceedings.	Opted out of 26(a) for contested matters. For adversary proceedings opted out of 26(a)(1); and modified 26(a)(2)(C) to require expert witness disclosures be made at least 45 days before trial.	Opted out of 26(d) for contested matters and adversary proceedings.	Opted out of 26(f) for contested matters and adversary proceedings.		Bankruptcy Court Standing Order No. 94-2.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
06	E.D. Ky.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters unless otherwise ordered by the court.	No explicit rejection of 26(d) but rule inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested matters unless otherwise ordered by the court.		Local Bankruptcy Court Rule 7026-1.	
06	W.D. Ky.	26(a)(1)-(3) in effect for adversary proceedings unless otherwise ordered by the Court.	Opted out of Rule 26(a)(1)-(3) for contested matters unless otherwise ordered by the Court.	Opted out of 26(d) for contested matters unless otherwise ordered by the Court. 26(d) in effect for adversary proceedings unless otherwise ordered by the Court.	Opted out of 26(f) for contested matters unless otherwise ordered by the Court. 26(f) in effect for adversary proceedings unless otherwise ordered by the Court.		Bankruptcy Court General Order No. 94-2	
06	E.D. Mich.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters, except by order of a judge.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested matters, except by order of a judge.		Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
06	E.D. Tenn.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a)(1)-(3) for contested matters and proceedings under Bankruptcy Rule 1018, unless otherwise ordered.	No explicit rejection of rule for adversary proceedings. Rule inoperative due to non-implementation of 26(f) for contested matters and proceedings under Bankruptcy Rule 1018.	Opted out of 26(f) for contested matters and proceedings under Bankruptcy Rule 1018, unless otherwise ordered; no explicit rejection of rule for adversary proceedings.		Local Bankruptcy Court Rule 7026-1	
06	M.D. Tenn.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters.	Opted out for adversary proceedings and contested matters.	Opted out for adversary proceedings and contested matters.	Uniform pretrial procedures in the Bankruptcy Court provide for prompt discovery; there is therefore no need to implement FRCP 26(a)(1).	Local Bankruptcy Rule 5.01.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
07	N.D. Ind.	No explicit rejection of 26(a)(1)-(3) for adversary proceedings.	Opted out of 26(a)(1)-(3) for contested matters, except as otherwise ordered or agreed by parties.	No explicit rejection of 26(d) for adversary proceedings. Inoperative due to non-implementation of 26(f) for contested matters.	Opted out of 26(f) for contested matters, except as otherwise ordered or agreed by parties. No explicit rejection of 26(f) for adversary proceedings.		General Order No. 94-2.	
07	S.D. Ind.	No explicit rejection of 26(a)(2) & (3).	Opted out 26(a)(1).	Opted out.	Opted out.		District Local Rule 26.3	
07	E.D. Wis.		Opted out.	Opted out.	Opted out.		District Court Order of Jan. 7, 1994.	
07	W.D. Wis.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1), unless otherwise ordered by the court.	No explicit rejection. Inoperative due to non-implementation of 26(f).	Opted out of 26(f), unless otherwise ordered by the court.		District Court General Order of Dec. 6, 1993	
08	E.D. Ark.		26(a)(1)-(3) are not in effect unless otherwise ordered or agreed to by parties.	Opted out.	Opted out although parties are encouraged to confer.	Also opted out of 26(a)(4).	Local Bankruptcy Court Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
08	S.D. Iowa	26(a)(2)(A) and 26(a)(3) in effect unless otherwise ordered in individual cases.	Opted out of 26(a)(1), 26(a)(2)(B) & (C) unless otherwise ordered in individual cases.	Opted out of 26(d).	26(f) in effect.	Court is amending local bankruptcy rules and does not adopt recent amendments to District Court rules dealing with discovery.	Bankruptcy Court Order of July 1, 1994; District Court Order–Misc. No. M1-33; District Court Order –Misc. No. M1-33(A)	Court will continue to apply current local bankruptcy rules until the local bankruptcy rules are amended.
08	D. Minn.		Opted out of 26(a)(1)-(3) for adversary proceedingsand contested matters.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedingsand contested matters.	Local Rule 7037-1.	Local Bankruptcy Court Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
08	D. N.D.	No explicit rejection of 26(a)(2)(A) & (B); further, no explicit rejection of provisions of 26(a)(2)(C) & 26(a)(3) dealing with matters other than timing.	Opted out of 26(a)(1) for adversary proceedings and contested matters and the timing requirements under 26(a)(2)(C) and 26(a)(3).	Opted out of 26(d).	Opted out of 26(f).		Local Bankruptcy Court Rule 7026-1	
08	D. Neb.	26(a)(1)-(3) in effect for adversary matters commenced after March 1, 1994, unless otherwise ordered by the court.	Opted out of 26(a)(1)-(3) for contested matters, unless otherwise ordered by the court.	Opted out of 26(d) for contested matters and adversary proceedings, unless otherwise ordered by the court.	Opted out of 26(f) for contested matters and adversary proceedings, unless otherwise ordered by the court.	General Order 94-1 specifies that the disclosure required by 26(a)(1) shall be made within 45 days after the answer is filed.	Bankruptcy Court General Order No. 94-1	
08	D. S.D.	Presumably all in effect.		Presumably in effect.	Presumably in effect.		none	Clerk reports no local rules, general orders, or standing orders as of Mar. 29, 2000.

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Ariz.	26(a)(1)-(3) in effect for adversary proceedings. No explicit rejection of 26(a)(2) & (3) for contested matters.	Opted out of 26(a)(1) for contested matters.	26(d) in effect for adversary proceedings. 26(d) not in effect for contested maters.	26(f) in effect for adversary proceedings. 26(f) not in effect for contested maters.	Also opted out of 26(a), 26(d), 26(f) for contested involuntary petitions.	Bankruptcy Court General Order No. 59.	
09	C.D. Cal.	26(a)(2)(C) is in effect. No explicit rejection of 26(a)(2)(A) & (B).	Opted out of 26(a)(1) & (3).	Opted out.	Opted out.		Bankruptcy Court General Order No. 94-05; District Court General Order 339-C	
09	E.D. Cal.	No explicit rejection of 26(a)(2)(A) & (C).	Opted out of 26(a)(1), 26(a)(2)(B) and 26(a)(3) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Opted out of 26(d) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Opted out of 26(f) unless otherwise ordered by the court in the specific adversary proceeding or contested matter.	Expert witness disclosure requirements performed in accordance with court order or FRCP 30, 33, & 34. Pre-trial disclosures pursuant to LBR 9017 or court order.	Local Bankruptcy Court Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Idaho		Opted out of 26(a)(1)–(3) unless specifically ordered by Court. Local District Court Rule 26.2 regarding disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f). Local District Court Rule 26.2 regarding disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.	Opted out of 26(f) unless specifically ordered by Court. Local District Court Rule 26.2 disclosure not applicable in contested matters or adversary proceedings unless specifically ordered by the Court.		Bankruptcy Court General Order No. 101	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	D. Mont.		Opted out of 26(a)(1) – (3) for contested matters and adversary proceedings.	Opted out of 26(d) for contested matters and adversary proceedings.	Opted out of 26(f) for contested matters and adversary proceedings.	Goals of Rule 26 amendments met by local rules. District Court CJRA plan permits pre-discovery disclosure under LBR 2(b) for adversary proceedings upon application of a party. The Court may order a pretrial conference under LBR 2(c) for complex cases.	Local Bankruptcy Court Rule 7001-1.	
09	D. Nev.	26(a)(2)(A) & (3) are in effect, unless otherwise ordered. Timing controlled by local rule.	Opted out of 26(a)(1) and 26(a)(2)(B), unless otherwise ordered.	Opted out of 26(d) as to limitations on commencement of discovery but adopted the other tenets.	Opted out of 26(f) for contested matters and other actions ordered by the court. No rejection of 26(f) for adversary proceedings.	Discovery conducted in accordance with FRCP and local rules in effect.	Local Bankruptcy Rule 7026, 7030, 7031, 7032, & 7036.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
09	E.D. Wash.	26(a)(1)–(3) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.		26(d) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.	26(f) in effect for adversary proceedings filed on or after Nov. 1, 1994; in effect for any adversary proceedings filed before Nov. 1, 1994 and to any other contested matter if specifically ordered by the judge.		District Court General Order of Dec. 11, 1993; Bankruptcy Court General Order No. 2 of Feb. 10, 1994 (effective date of Rules 26(a)(1)-(3), 26(d), and 26(f) delayed to allow court to further consider effect of amended rules); Bankruptcy Court Order dated Oct. 31, 1994	
09	W.D. Wash.	26(a)(2) & (3) are in effect, although the timing and content of disclosure modified by local rule. No explicit rejection of 26(a)(1).		No explicit rejection of discovery deferment of 26(d). Provision regarding sequence of discovery is in effect.	No explicit rejection of 26(f).		Bankruptcy Court Local Rule 7026-1	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
10	D. N.M.	26(a)(2) & (3) timing requirements established by court order in each adversary proceeding.	Opted out of 26(a)(1) for contested matters and adversary proceedings unless otherwise ordered by the judge in a particular case. Opted out of 26(a)(2) & (3) for contested matters.	Opted out of discovery deferment in 26(d) for contested and adversary matters unless ordered by a judge. No rejection of provision regarding sequence of discovery.	Opted out of 26(f) for contested and adversary matters unless otherwise ordered by presiding judge.		Bankruptcy Court Local Rule 7026-1.	
10	E.D. Okla.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1).	No explicit rejection of 26(d). Inoperative due to non-implementation of 26(f).	Opted out of 26(f).		Bankruptcy Court Local Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
10	W.D. Okla.	No explicit rejection of 26(a)(2) & (3).	Follow Local Rule 7016(b) in lieu of 26(a)(1).	Opted out.	Follow Local Rule 7016(b) in lieu of 26(f).	Local Rule 7016 authorizes court to manage discovery matters in scheduling order. Local Rule 7016 requires meeting of parties prior to scheduling conference.	Local Bankruptcy Rule 7026 & 7016.	
10	D. Utah	26(a)(1)-(3) in effect for adversary proceedings filed with the court on/after April 4, 1994.	Opted out of 26(a)(1)-(3) for contested matters unless requested by a party or ordered by the court on a case-by-case basis.	Opted out of 26(d) for contested matters unless requested by a party or ordered by the court on a case-by-case basis. 26(d) in effect for adversary proceedings.	Opted out of 26(f) for contested matters unless requested by a party or ordered by the court on a case-by-case basis. 26(f) in effect for adversary proceedings.		Bankruptcy Court Local Rule 7026-1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
11	N.D. Ala.		Opted out of 26(a)(1)-(3) for adversary proceedings and contested matters, unless otherwise ordered or stipulated.	Inoperative due to non-implementation of 26(f).	Opted out of 26(f) for adversary proceedings and contested orders, unless otherwise ordered or stipulated.		Bankruptcy Court Local Rule 7026-1.	
11	S.D. Ala.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1) for cases filed under Part VII, FRBP, unless the court orders otherwise upon its own motion or on a motion filed by a party.	No explicit rejection of 26(d).	No explicit rejection of 26(f).		Bankruptcy Court Local Rule 7026-1.	
11	M.D. Fla.		26(a)(1)-(3) not mandatory for adversary proceedings and contested matters unless stipulated by parties or otherwise ordered by the court.	Inoperative unless 26(f) meeting is ordered.	26(f) not mandatory for adversary proceedings and contested matters unless stipulated by parties or otherwise ordered by the court.		Local Bankruptcy Rule 7026.1.	

Circuit	District	1 Provisions of FRCP 26(a)(1)–(3) that are in effect	2 Provisions of FRCP 26(a)(1)–(3) that are not in effect	3 FRCP 26(d) (Timing and Sequence of Discovery)	4 FRCP 26(f) (Meeting of Parties)	5 Other related requirements in effect	6 Bankruptcy or District Court Order or Local Rule, if any	7 Court has not yet made decision or has made only a provisional decision
11	N.D. Ga.	No explicit rejection of 26(a)(2) & (3) for adversary proceedings or contested matters.	Opted out of 26(a)(1) except as may be agreed by the parties or as ordered by the judge in a specific adversary proceeding or contested matter.	Opted out of 26(d) except as may be agreed by the parties or as ordered by the judge in a specific adversary proceeding or contested matter.	Opted out of 26(f) except as ordered by the judge. 26(f) conference encouraged but not obligatory.		Bankruptcy Court Local Rule 7026-1; Bankruptcy Court General Order of 5/13/94.	
11	S.D. Ga.	No explicit rejection of 26(a)(2) & (3).	Opted out of 26(a)(1).	No explicit rejection of 26(d). Inoperative due to the non-implementation of 26(f).	Opted out.		Local District Rule 26.1	

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

GLEN K. PALMAN
Chief

Bankruptcy Court
Administration Division

September 16, 2003

MEMORANDUM TO PETER McCABE

SUBJECT: September 18-19 Meeting of the Advisory Committee on Bankruptcy Rules

I am writing to you in your capacity as Secretary of the Committee on Rules of Practice and Procedure. My office has had the opportunity to review the agenda item recommending the modification to Fed.R.Bank.P. 2002(g) that will be considered by the Advisory Committee on Bankruptcy Rules at its scheduled meeting to be held in Washington state at the end of this week.

I believe that the item fairly represents the recommendation previously made by the Bankruptcy Noticing Working Group as well as the discussion held with the Technology Subcommittee at its meeting in May 2003.

There is one issue addressed in the agenda item for which I would offer additional clarification for the committee members. On page 4, the first paragraph states that third party notice providers that do not meet the standards present in the Bankruptcy Noticing Center system "can be addressed by requiring that any such entity must meet appropriate standards for performance as set by the Administrative Office." It goes further to state that the AO would continue to maintain appropriate standards for performance, and that the AO would monitor performance standards.

My office has received this language and we are well positioned to comply with it by proceeding as follows:

- The AO will continue to review and modify appropriate noticing performance standards through current processes, e.g. consulting with the AO's Bankruptcy Noticing Working Group, coordinating with Judicial Conference committees, as appropriate, and by following the judiciary's contractual process.

- To provide the ability for all noticing agents to comply with the proposed changes to Fed.R.Bank.P. 2002(g), the national creditor name and address database will be made available through electronic means. Unlimited access will be provided to all bankruptcy court users, including private entities that provide noticing service to trustees or other case parties, attorneys, and the two non-BNC districts (Tennessee-Middle, Oklahoma-Western). In addition, the database could be accessed by BNC courts to facilitate ad hoc local noticing.

Please contact me should you or the Committee require additional information.

Glen K. Palman

cc: Noel J. Augustyn
Jim Wannamaker, BJD

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
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300 SOUTH FOURTH STREET
MINNEAPOLIS, MINNESOTA 55415

ROBERT J. KRESSEL
JUDGE

03-BK-B

July 2, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and
Procedure
Administrative Office of the United States Courts
OJP-AD/4-180, Thurgood Marshall Building
One Columbus Circle, N.E.
Washington, DC 20544

Re: Bankruptcy Rules

Dear Peter:

I write to ask the Advisory Committee on Bankruptcy Rules to consider a number of the current bankruptcy rules.

1. Rule 7004(b)(3). I think that this rule is currently ambiguous and needs attention. It is copied, in large part, from Civil Rule 4(h), except, of course, for the provision for service by mail. In the Civil Rule, the requirement that it be served on one of the designated people makes sense. Because you are generally accomplishing personal service, the person serving process has to seek out the person, serve the process, and whatever return of service is provided to the court would contain the name and, hopefully, the office of the person that actually received the process. When you are serving by mail under Rule 7004(b)(3), it doesn't work as well, at least as written. The question that the rule leaves unanswered is whether, when the pleading is mailed, the envelope must have the actual name of one of the qualifying people or whether simply using the title is sufficient? Thus, frequently complaints or other pleadings are addressed to "President, ABC Corporation, etc." Arguably, this complies with the rule. I've also seen returns of service in which the address simply copied the language of the rule, so that the envelope was addressed to "Officer, Managing or General Agent, ABC Corporation . . . ." I am not sure that either of these examples meets the spirit of the rule, which is to ensure that the complaint or other service of process shows up in the hands of someone who will actually have the incentive and the authority to deal with it.

While I suppose that resolution of this can wait a decision of a court, I would personally prefer that the Rules Committee address it.

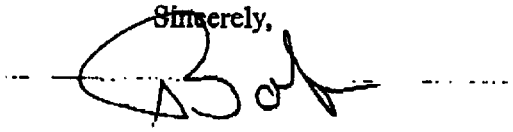
2. My second issue also deals with the subject of service. Rule 3007 deals with objections to claims and contains what I find to be somewhat odd language. It provides that "a copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant. . . ." I would think that an objection to claim is a contested matter which would require service under Rule 7004. Maybe that is implied, so that the idea is that, not only will the objection be served, but that a copy will be mailed as provided in the rule, although I doubt that this is what is meant. I would think that the rule can be changed to provide for "service" on the claimant. Whether service on the other entities is appropriate or merely notice, I leave to the Committee to decide. In general, it seems to me the rules use the concepts of either service or notice, but this idea that it be mailed without specifying whether that is service or notice, creates an ambiguity.

   If the Committee decides to address this rule, I have a related suggestion which ties in somewhat into the first issue I raised. I would think that it might be appropriate to provide that service on the claimant could be made by mailing a copy of the objection and a notice of the hearing to the person who signed the proof of claim on behalf of the claimant. At least in those situations where a proof of claim has been filed. This service could be an optional service in addition to that service provided in Rule 7004 or in lieu of Rule 7004, whichever the Committee thought makes the most sense.

3. Lastly, on a less momentous note, I would ask that the Committee consider adding the Clerk of the Bankruptcy Appellate Panel to those entities listed in Rule 5005(c).

Please give my personal regards to the members of the Committee, especially the Chair.

Sincerely,



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July 3, 2003

Advisory Committee on Bankruptcy Rules
Attn: Hon. A. Thomas Small, Chairman
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Advisory Committee on Bankruptcy Rules
Attn: Prof. Jeffrey W. Morris, Reporter
University of Dayton School of Law
300 College Park
Dayton, OH 45469-2772

Re: Federal Rule of Bankruptcy Procedure 9001:
Definition of "Regular Associate"

Dear Judge Small and Professor Morris:

I believe that the definition of "regular associate" in Fed. R. Bankr. P. 9001(9) logically needs to be expanded to include an *accountant* as well as an attorney. The present definition of regular associate limits, inadvertently I think, the scope of two other portions of the Federal Rules of Bankruptcy Procedure.

I begin with Fed. R. Bankr. P. 2014(b), titled, "Services Rendered by Member or Associate of Firm of Attorneys or Accountants." With references to attorneys omitted, the rule reads in relevant part:

> "If an accounting partnership or corporation is employed as an accountant, or if a named accountant is employed, any partner, member, or regular associate of the partnership, corporation, or individual may act as accountant so employed, without further order of the court."

Federal Rule of Bankruptcy Procedure 9001(6) defines "firm":

> "(6) '***Firm***' includes a partnership or professional corporation of attorneys or accountants."[1]

[1] A separate question is whether this definition is strictly necessary, since the Code's definitions of "accountant" and "attorney" already includes professional association, corporation, or partnership. 11 U.S.C. § 101(1), (4). "Firm" therefore literally includes a professional corporation of professional corporations. "Firm" could instead be defined to include nonindividual accountants and nonindividual attorneys, although my wording seems clumsy.

Finally, Rule 9001(9) defines "regular associate":

> "(9) ***'Regular Associate'*** means any attorney regularly employed by, associated with, or counsel to an individual or firm."

"Regular associate," or at least the concept that that defined term seeks to capture, should include any *accountant* regularly employed by an individual or firm. The heading of Rule 2014(b) contemplates, by its terms, a member *or associate* of a firm of accountants. Rule 2014(b) itself refers to a *partner, member, or regular associate* of an approved accountant (whether that approved accountant is an accounting partnership, an accounting corporation, or an individual accountant). The definition of "firm" includes a partnership or professional corporation of accountants.

Yet if "regular associate" is limited to an attorney (and excludes accountant), confusion follows. With respect to accountants, the heading of Rule 2014(b) would be limited to "a member or *attorney* associate of a firm of accountants." The Rule itself would mean that an approved accountant (whether accounting partnership, accounting corporation, or individual accountant) could, without further court order, obtain assistance from a regular associate, so long as that associate were an attorney, but if the associate were an accountant, then a further court order would be required. Similarly, under Rule 9001, although an accounting partnership or professional corporation would be a "firm," the "regular associates" of that accounting firm would include attorneys and *exclude* accountants.

I do not believe that the above implications reflect the intent of the rules and its draftsmen. Although many accountants, especially nowadays, employ attorneys, often in the tax arena, I do not think that the interplay of Rules 2014(b) and 9001 was intended to be restricted to those somewhat unusual situations. Further, I note that Rule 2014(b) is based in large part on former Bankruptcy Rule 215(f). Rule 215(f) uses the term "regular associate," and former Rule 901 defines "accountant" and "attorney," but I cannot find a former rule that restricts "regular associate" to an attorney only.

If I am correct — the intent of the Rules is to allow *accountants* employed by court-approved accountants to be utilized without further court order— then the definition of Rule 9001(9) should be changed to allow that to happen. This might require some complicated drafting. "Associate" is a common description of an employee attorney of another attorney; it may be less common in the accounting world. And "counsel" would seem limited specifically to lawyers. Thus, the definition, and perhaps even the defined term itself, might need to be

rewritten or restructured. Perhaps something like "affiliated professional," although "affiliate" is itself a defined term under the Code.

If I am wrong — the limitation to attorney that I describe is deliberate and intentioned — then I would suggest that Rule 2014(b) needs to be rewritten and clarified.

I realize that in light of the important work that the Advisory Committee does year after year, this small definitional glitch is not momentous. Nevertheless, I look forward to the benefit of your comments on this matter. Thank you.

Very truly yours,

Robert R. Barnes

Robert R. Barnes

COMPARING PROCEDURAL DELAYS IN MOTION COMPARED TO COMPLAINT

Assuming no answer is filed.

MOTION	COMPLAINT
File the motion (most jurisdictions do not require formal service of process)	Prepare complaint, adversary cover sheet, and service of process.
Debtor has 20 days to respond. *Cf.* Fed. R. Bankr. P. 2002(a),	Debtor has 30 days to answer
Order may be entered at this point in jurisdictions with negative notice.	Prepare a notice of default judgment. Fed. R. Bankr. P. 7055(b)(1)
ONE UST DOCUMENT; NO COURT HEARING TIME; TOTAL TIME FOR DEFAULT = APPROXIMATELY 30 DAYS	Because the issue involves the Debtor's discharge, which is not solely a monetary issue, it is prudent to file a motion for default judgment. Fed. R. Bankr. P. 7055(b)(2).
	By local rule, this may require 20 day negative notice language or some type of response period for the Debtor.
	Judgment denying discharge entered.
	FIVE UST DOCUMENTS; NO COURT HEARING TIME; TOTAL TIME FOR DEFAULT = APPROXIMATELY 60- 90 DAYS;

Assuming answer is filed.

MOTION	COMPLAINT
File the motion (most jurisdictions do not require formal service of process)	Prepare complaint, adversary cover sheet, and service of process.
Debtor has 20 days to respond. *Cf.* Fed. R. Bankr. P. 2002(a),	Debtor has 30 days to answer
Debtor files response	Debtor files answer
Court conducts hearing	In many jurisdictions, Court sets pre-trial conference or requires a certification of disclosure of evidence; calendaring of trial setting, pre-trial deadlines, and certification issues.
Judgment denying discharge entered.	UST files motion for summary judgment – earliest it can be filed is 20 days after complaint is filed. Fed. R. Bankr. P. 7056(a); Generally, motion for summary judgment would be filed after answer as default judgment would be available otherwise.
ONE UST DOCUMENT; ONE DEBTOR PLEADING; ONE COURT HEARING; TOTAL TIME TO OBTAIN = APPROXIMATLEY 45 DAYS	By local rule, Court may require 20 day negative notice language for motion for summary judgment; at least ten days notice is required. Fed. R. Bankr. P. 7056(b).
	Debtor files answer.
	Court may set hearing on summary judgment issues
	Judgment denying discharge entered; calendaring events canceled.
	FOUR UST DOCUMENTS; TWO DEBTOR PLEADINGS; ONE-TWO COURT HEARINGS; CALENDARING; TOTAL TIME TO OBTAIN = APPROXIMATELY 60-120 DAYS

Examples:

Jessie B. Owen, Case number LA 02-16046 ER - debtor filed multiple chapter 7 cases where she had received a discharge at least twice in the past 6 years. This was her 3rd filing. I filed a complaint under 727(8), waited for the summons, spent three days tracking the summons in order to ensure it was served on time, and then attended two status conferences. I also spent a significant amount of time contacting her attorney of record to see if he was representing her in the adversary proceeding although he filed a notice of limited appearance. Only after a three phone calls and one letter did I finally get an acknowledgment that he did not represent the debtor in the adversary. We obtained a default judgment which I prepared, had entered and then had to check the docket to make sure the case was then closed. This whole process took about three to four months.

Dianne Mandell Miller, LA 01-46674 ER - debtor filed three times (a previous chapter 7 and a previous chapter 13 which was then converted to chapter 7), manipulating her hyphenated name and transposing two digits of her social security number to get around a previous discharge and a 180 day bar against refiling which was imposed on the converted chapter 13 for failure to show up twice at the first meeting of creditors. On Debtor's SFA #4 she stated she had not filed any previous bankruptcies. The complaint cited 727(a)(4) and 727(a)(8). *(Note: With the proposed expedited procedure, the UST would only rely on 727(a)(8)).* We were required to appear at two status conferences and after the default, another status conference to close up the matter. The whole process took approximately five months.

Materials
circulated
at
meeting

Attach to Item 19.

Form B6G (DRAFT)

In re _____, **Case No.** _____
Debtor **(If known)**

SCHEDULE G- EXECUTORY CONTRACTS AND UNEXPIRED LEASES

Describe all executory contracts of any nature and all unexpired leases of real or personal property. Include any time share interests. If all leases and contracts will not fit on this page, use continuation sheets in a similar format.

Provide the names and complete mailing addresses of all other parties to each lease or contract described, using the same format as in Schedules D, E, and F. Use as many name and address boxes as necessary to list each party to any lease or contract and separate each lease or contract scheduled. State the nature of debtor's interest in each contract, i.e., "Purchaser," "Agent," etc. State whether debtor is the lessor or lessee of a lease.

☐ Check this box if debtor has no executory contracts or unexpired leases to report on this Schedule G.

NAME AND MAILING ADDRESS, INCLUDING ZIP CODE, OF EACH OTHER PARTY TO LEASE OR CONTRACT	DESCRIPTION OF CONTRACT OR LEASE AND NATURE OF DEBTOR'S INTEREST. STATE WHETHER LEASE IS FOR NONRESIDENTIAL REAL PROPERTY. STATE CONTRACT NUMBER OF ANY GOVERNMENT CONTRACT

COMMITTEE NOTE

The form is amended to implement an amendment to Rule 1007 by deleting the instruction that parties to these contracts and leases will not receive notice of the bankruptcy case unless they are listed on one of the schedules of liabilities. Even though a contract or lease may be an asset of the debtor or the debtor may be current on any lease or contract payment obligations, other parties to these transactions may have an interest in the bankruptcy case and should receive notice.

Attach to Item 6.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: CIVIL RULES RESTYLING PROJECT

DATE: SEPTEMBER 3, 2003

The Advisory Committee on Civil Rules has initiated a project to restyle the civil rules. The Committee presented the restyled versions of Rules 1 through 15 to the Standing Committee in June. They are attached to this memorandum. The Standing Committee approved those restyled rules for publication, but those rules will not be published for comment until August of 2004. In the meantime, the Advisory Committee is continuing the restyling effort and expects to have another substantial portion of the restyled rules ready for presentation to the Standing Committee next year. At that time, assuming Standing Committee approval, the first and second groups of restyled rules would be published for comment. There are at least two reasons for withholding publication of the first group of rules until the second group is ready. First, the publication of the larger group will give the bench and bar a better feel for the scope and nature of the project. Second, and more importantly, the restyling of rules in the second group may cause a need to revise Rules 1 through 15 because of amendments later in the civil rules. Thus, although the Standing Committee approved the first 15 rules, the expectation is that the language of those rules may change yet again before they are published for comment.

The civil rules restyling could require amendments to the bankruptcy rules. Some changes may be just technical and could be made without publication. Some changes may be stylistic and required in order to maintain consistency between the two sets of rules to the extent possible. Finally, some changes may have a substantive impact on the bankruptcy rules and may

require even greater scrutiny and consideration by this Committee. In any event, we cannot know what form the civil rules will take until they are adopted by the Standing Committee and approved for submission to the Judicial Conference. Therefore, we will monitor the changes and can consider submitting comments to the Civil Rules Committee regarding the published versions.

The attached draft of the restyled civil rules is for your information only at this time. There is no need yet to review them for comment or revision. We will discuss the process for the review and comment on the restyled civil rules and determine what action or actions we should take as a Committee.