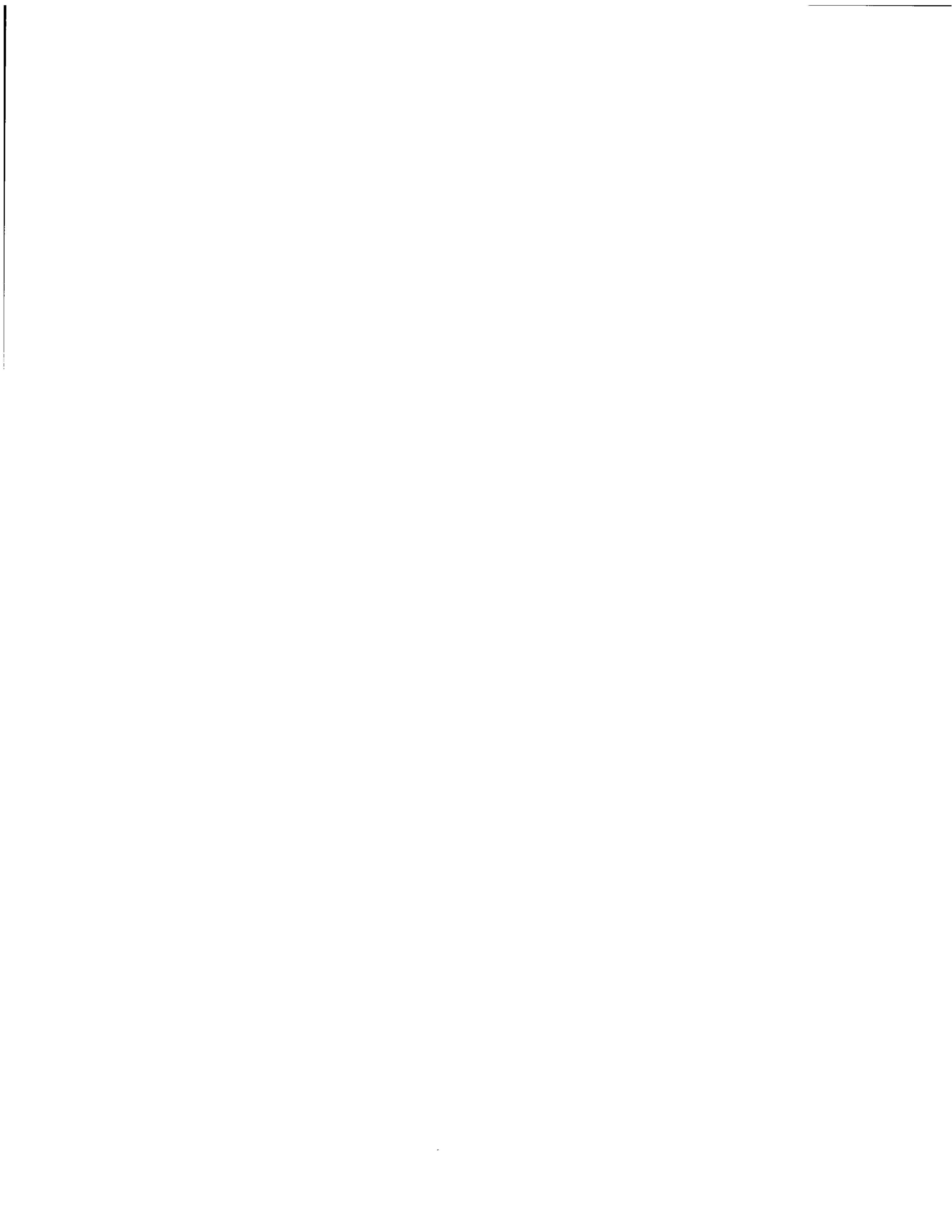
ADVISORY COMMITTEE ON BANKRUPTCY RULES

Amelia Island, FL
March 25-26, 2004



ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 25-26, 2004
Ritz-Carlton Hotel, Amelia Island, FL

Agenda

Introductory Items

1. Approval of minutes of September 2003 meeting.

2. Report on the January 2004 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 January 2004 meeting of the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee). Judge Montali will provide an oral report.

Action Items

4. Comments received on the preliminary draft amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006. Copies of the comments, which were distributed by mail on February 24, 2004, are included. Five additional comments on the preliminary draft amendment to Civil Rule 6 also are included.

5. Report by the Technology Subcommittee concerning proposed amendments to Rule 2002(g) (and possibly Rule 9001) 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. Information on the Bankruptcy Noticing Center's new National Creditor Registration Service is attached. Also included is the text of a similar provision in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S.1920, as passed by the House of Representatives on January 28, 2004.

6. Recommendation by the Technology Subcommittee concerning the proposal by Mr. Waldron to amend Rule 9014 to permit electronic service in connection with contested matters with respect to parties who are already receiving electronic service in the case.

7. Recommendation by the Consumer Subcommittee concerning the request by the Director of the Executive Office for United States Trustees to amend Rules 2003, 4002, 2016, and 7001, and to create a new Official Form, Disclosure of Compensation of Attorney for Debtor. Also included is a copy of Director's Procedural Form 203, Disclosure of Compensation of Attorney for Debtor.

8. Proposed Committee Note for the amendment to Schedule I of Official Form 6 approved at the September 2003 meeting. A copy of the first five pages of the Statement of

Financial affairs, Official Form 7, which includes language almost identical to that used in Schedule I, is attached.

9. Proposed amendment to Rule 3007(b) to clarify the procedure when an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001.

10. Proposed amendments to Rule 7023 or to Rule 7054 to correct a discrepancy with Civil Rule 23 as amended effective December 1, 2003. Copies of the revised portions of Rule 23 and of 28 U.S.C. § 2403, Intervention by United States or a State; Constitutional Question, are included.

11. Judge Mund's suggestion that the Committee propose a rule similar to proposed Civil Rule 5.1. Copies of comments on the proposed civil rule are attached.

12. (a) Request by the bankruptcy CM/ECF Working group to revise Official Form 10, Proof of Claim, and create a new Director's Form, Notice of Transfer of Claim.

    (b) Suggestion to revise the checkboxes on Official Form 10 for claims which replace or amend a previously filed claim.

13. Proposed amendments to Official Forms 10, 16D, and 17 as a result of the bankruptcy privacy amendments which took effect on December 1, 2003.

Information Items

14. Status of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, which was passed by the House of Representatives on January 28, 2004, by a vote of 265 - 99.

15. Report concerning the restyling of Civil Rules 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, the chair of the Style Subcommittee, will provide an oral report. Copies of the draft restyling of Civil Rules 16 - 22, 23.1 - 37, and 45 were distributed by email on January 21, 2004.

16. Report on the initial meeting of the subcommittee appointed by Judge David Levi, the chair of the Standing Committee, to review the E-Government Act, Pub. L. 107-347, and propose rules to implement its provisions. The Chairman will provide an oral report. Excerpts from the Act are attached.

17. Amendments to Schedule E of Official Form 6 and Official Form 10 to incorporate the automatic adjustment of the dollar amounts in section 507(a) of the Bankruptcy Code on April 1, 2004, pursuant to 11 U.S.C. § 104(b). A memorandum on the adjustment is included.

18. Amendments to Director's Procedural Forms 132, 200, and 201 to reflect the privacy amendments and changes in the Bankruptcy Court Miscellaneous Fee Schedule.

19. Proposed Director's Procedural Form B202, Statement of Military Service, for use by debtors who may be eligible for relief under the Servicemembers' Civil Relief Act of 2003, Pub. L. 108-189. A copy of an overview of the Act distributed to bankruptcy judges on February 17, 2004, is attached.

20. Report on the Conference on Electronic Discovery sponsored by the Civil Rules Committee on February 20-21, 2004, at Fordham University School of Law. The threshold issue for the Conference was whether amendments to the Civil Rules are needed concerning electronic discovery matters. Judge McFeeley and Professor Resnick will provide oral reports.

21. Reports on the Bankruptcy Committee's recommendation that the Advisory Committee work with the Bankruptcy Committee to develop rules regarding venue and on the mega chapter 11 conference sponsored by the Federal Judicial Center. Judge Montali will provide an oral report on the Bankruptcy Committee's recommendation. The report on the venue conference was distributed by email on February 4, 2004. Additional copies will be available at the meeting.

22. Report on the FJC survey of mandatory disclosure under Civil Rule 26. The report was to be distributed separately. Additional copies will be available at the meeting.

23. Report on the implementation of the new bankruptcy privacy rules. Mr. Wannamaker will provide an oral report. A memorandum from Judge John W. Lungstrum, the chair of the Committee on Court Administration and Case Management, on implementation of Judicial Conference privacy policy in the bankruptcy courts is attached. The memorandum includes a model notice of the electronic availability of case file information and a model local rule on public access to electronic case files. Also attached is a memorandum on inquiries about the implementation of the privacy amendments.

24. Report on the implementation of the CM/ECF system (case management/electronic case files) and electronic filing. Mr. Wannamaker will provide an oral report. A fact sheet on the CM/ECF project is attached.

25. Copy of the Supreme Court decision in *Kontrick v. Ryan*, __ U.S. __ (2004) concerning the time limitation in Rule 4004.

26. Report on the revision of the forms page on the judiciary's Internet website and on the JNET. Ms. Ketchum will provide an oral report.

27. Bull Pen: Amendment to Schedule G - Executory Contracts and Unexpired Leases. The amendment was approved in October 2002 and is to be published for comment in summer 2004 and presented to the Judicial Conference in September 2005 to take effect

in December 2005 simultaneously with the amendment to Rule 1007 requiring the debtor to file a mailing list with the names and addresses of all parties on Schedules D - H.

28. List and progress chart of proposed amendments.

29. Rules Docket

Administrative Matters

30. Next meeting reminder: *September 9 - 10, 2004, the Ritz-Carlton, Half Moon Bay, CA*

31. Discussion of date and location for spring 2005 meeting.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

March 2004

Chair:

Honorable A. Thomas Small
United States Bankruptcy Judge
United States Bankruptcy Court
Post Office Drawer 2747
Raleigh, NC 27602

Members:

Honorable R. Guy Cole, Jr.
Circuit Judge
United States Court of Appeals
127 Joseph P. Kinneary
United States Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Honorable Ernest C. Torres
Chief Judge
United States District Court
United States Courthouse
One Exchange Terrace
Providence, RI 02903-1779

Honorable Irene M. Keeley
Chief Judge
United States District Court
500 West Pike Street, 2nd Floor
Clarksburg, WV 26301

Honorable Thomas S. Zilly
United States District Judge
United States District Court
410 United States Courthouse
1010 Fifth Avenue
Seattle, WA 48104-1130

Honorable Laura Taylor Swain
United States District Judge
United States District Court
Thurgood Marshall United States
Courthouse, Room 1205
40 Foley Square
New York, NY 10007

Honorable Richard A. Schell
United States District Judge
United States District Court
United States Courthouse Annex
Bank One Building
200 North Travis Street
Sherman, TX 75090

Honorable James D. Walker, Jr.
United States Bankruptcy Judge
United States Bankruptcy Court
433 Cherry Street
Macon, GA 31201-7957

Honorable Christopher M. Klein
United States Bankruptcy Judge
United States Bankruptcy Court
3-200 United States Courthouse
501 I Street
Sacramento, CA 95814-2322

Honorable Mark B. McFeeley
United States Bankruptcy Judge
United States Bankruptcy Court
421 Gold Street, S.W., 6th Floor
Albuquerque, NM 87102

Professor Mary Jo Wiggins
University of San Diego
School of Law
5998 Alcala Park
San Diego, CA 92110

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Professor Alan N. Resnick
Hofstra University School of Law
121 Hofstra University
Hempstead, NY 11549-1210

Eric L. Frank, Esquire
DiDonato & Winterhalter, P.C.
1818 Market Street, Suite 3520
Philadelphia, PA 19103

Howard L. Adelman, Esquire
Adelman, Gettleman, Merens, Berish
& Carter, Ltd.
Suite 1050, 53 West Jackson Boulevard
Chicago, IL 60604

K. John Shaffer, Esquire
Stutman, Treister & Glatt, P.C.
1901 Avenue of the Stars, 12th Floor
Los Angeles, CA 90067

Director, Commercial Litigation Branch,
Civil Division, U.S. Dept. of Justice (ex officio)
J. Christopher Kohn, Esquire
1100 L Street, N.W., 10th Floor, Room 10036
Washington, DC 20005

Reporter:

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

Advisors and Consultants:

James J. Waldron
Clerk, United States Bankruptcy Court
Martin Luther King, Jr. Federal Building
and United States Courthouse
Third Floor, 50 Walnut Street
Newark, NJ 07102-3550

Lawrence A. Friedman
Director, Executive Office for
United States Trustees
20 Massachusetts Avenue, N.W., Suite 8000
Washington, DC 20530

Professor Bruce A. Markell
University of Nevada Las Vegas
William S. Boyd School of Law
4505 Maryland Parkway, Box 451003
Las Vegas, NV 89154-1003

Melissa B. Jacoby, Assistant Professor
Temple University
James E. Beasley School of Law
1719 N. Broad Street
Philadelphia, PA 19122

Patricia S. Ketchum, Esquire
1607 22nd Street, N.W.
Washington, DC 20008-1921

Liaison Member:

Honorable Harris L Hartz
United States Circuit Judge
United States Court of Appeals
710 United States Courthouse
333 Lomas Boulevard, N.W.
Albuquerque, NM 87102

Liaison from Committee on the Administration of the Bankruptcy System:

Honorable Dennis Montali
United States Bankruptcy Judge
United States Bankruptcy Court
235 Pine Street
San Francisco, CA 94104

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, DC 20544

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEES

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Judge Ernest C. Torres, Chair
Judge Richard A. Schell
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
Eric L. Frank, Esquire, Chair
Judge Laura Taylor Swain
Judge James D. Walker, Jr.
Professor Mary Jo Wiggins
James J. Waldron, *ex officio*

Subcommittee on Forms
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Judge Christopher M. Klein
Professor Mary Jo Wiggins
Eric L. Frank, Esquire
J. Christopher Kohn, Esquire
James J. Waldron, *ex officio*

Subcommittee on Privacy, Public Access, and Appeals
Howard L. Adelman, Esquire, Chair
Judge Ernest C. Torres
Judge James D. Walker, Jr.
K. John Shaffer, Esquire

Subcommittee on Style
Professor Alan N. Resnick, Chair
Judge Christopher M. Klein
Professor Mary Jo Wiggins

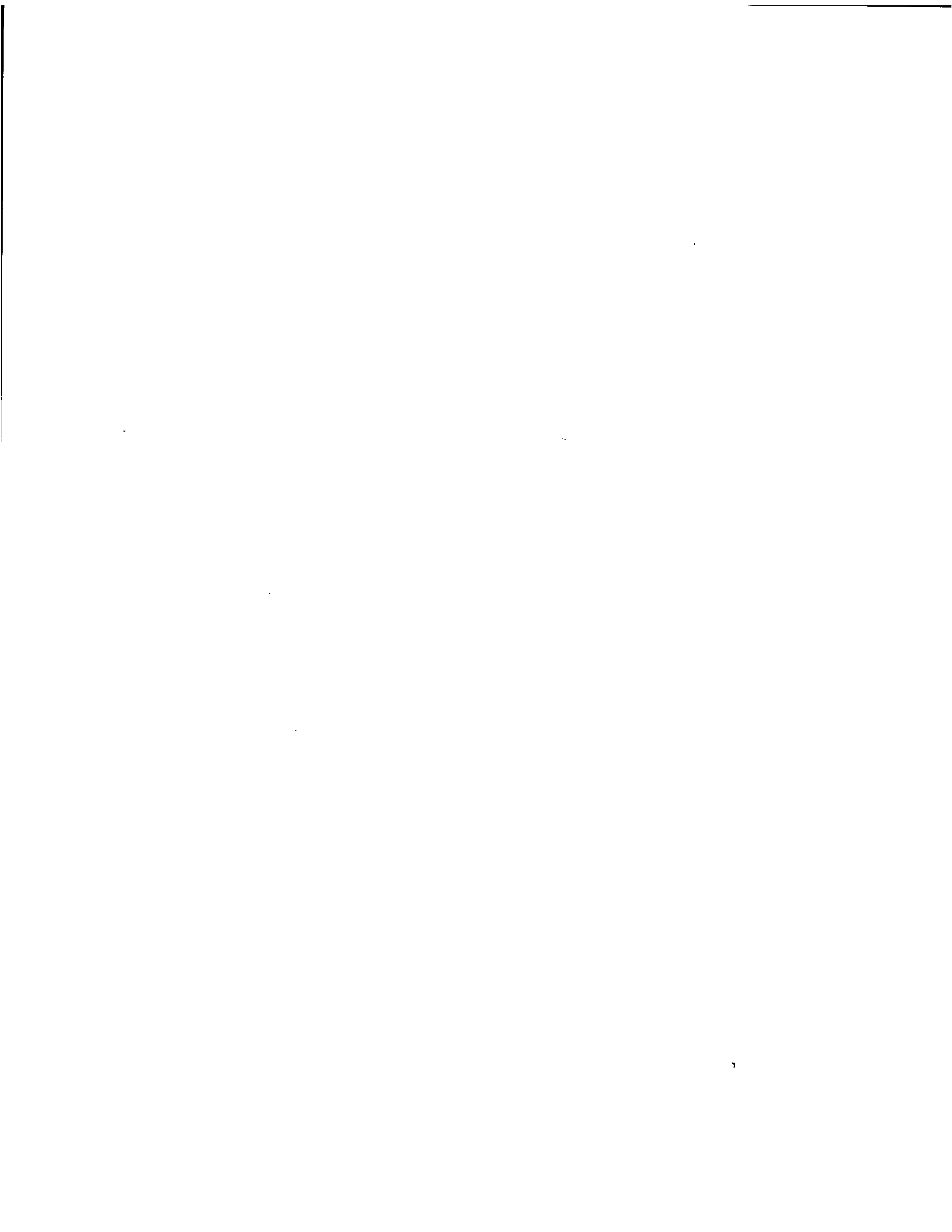
Subcommittee on Technology and Cross Border Insolvency
Judge Thomas S. Zilly, Chair
Judge Irene M. Keeley
Judge Laura Taylor Swain
Judge Mark B. McFeeley

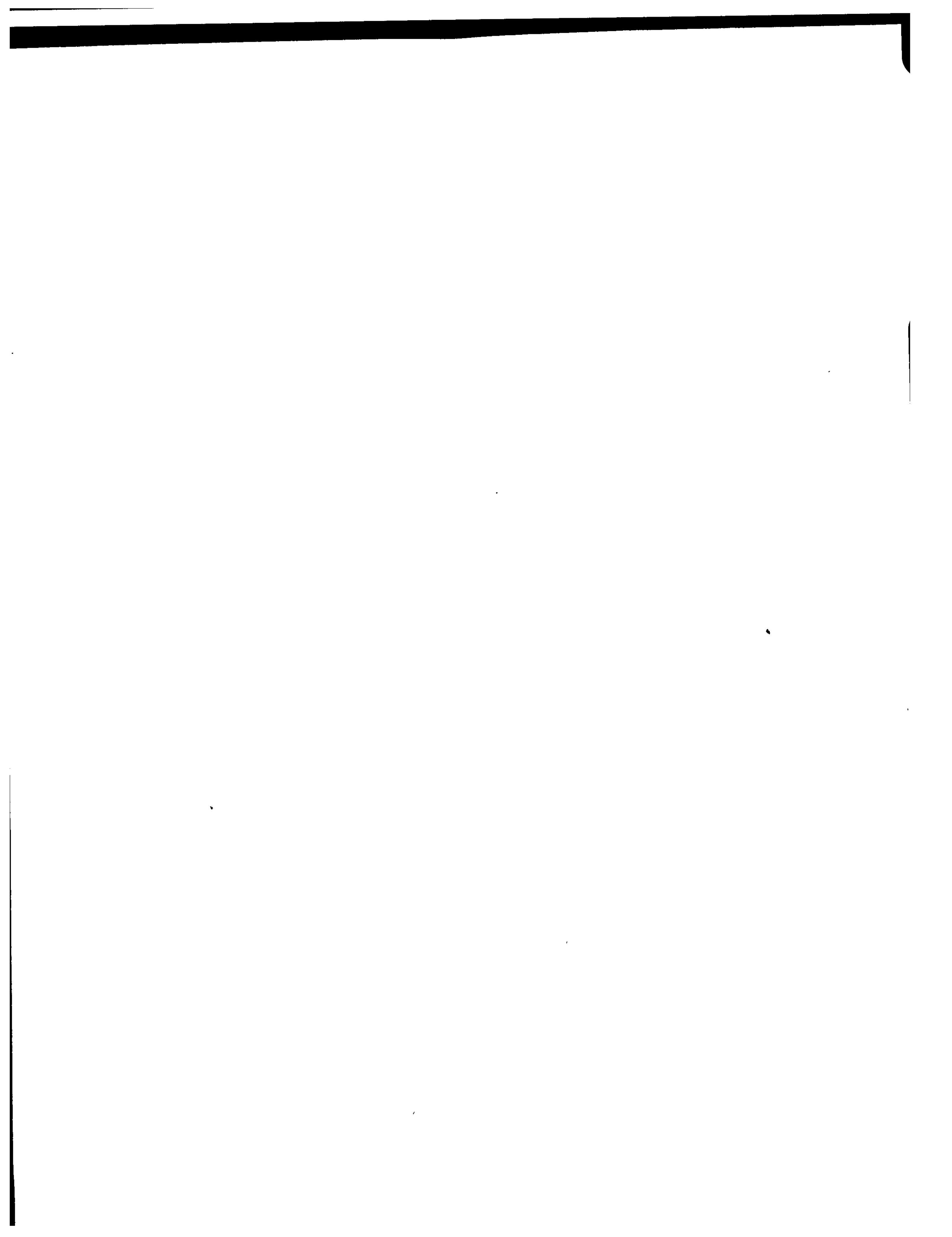
March 8, 2004
Projects

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs	Reporters
Honorable David F. Levi Chief Judge, United States District Court United States Courthouse 501 I Street, 14th Floor Sacramento, CA 95814	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02159
Honorable Samuel A. Alito, Jr. United States Circuit Judge 357 United States Post Office and Courthouse 50 Walnut Street Newark, NJ 07101	Prof. Patrick J. Schiltz University of St. Thomas School of Law 1000 La Salle Avenue, MSL 400 Minneapolis, MN 55403-2015
Honorable A. Thomas Small United States Bankruptcy Judge United States Bankruptcy Court Post Office Drawer 2747 Raleigh, NC 27602	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Edward E. Carnes United States Circuit Judge United States Court of Appeals United States Courthouse, Suite 500D One Church Street Montgomery, AL 36104	Prof. David A. Schlueter St. Mary's University School of Law One Camino Santa Maria San Antonio, TX 78228-8602
Honorable Jerry E. Smith United States Circuit Judge United States Court of Appeals 12621 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2698	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

March 8, 2004
Projects





ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 18-19, 2003
Stevenson, Washington

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 B. 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, and Professor Bruce A. Markell, advisor to the Committee, attended the meeting.

Bankruptcy Judge Dennis Montali, liaison to the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); Peter G. McCabe, secretary of the Committee on Rules of Practice and Procedure (Standing Committee); and Martha L. Davis, Principal Deputy Director, Executive Office for United States Trustees (EOUST), attended. Circuit Judge Anthony J. Scirica, chair of the Standing Committee; Circuit Judge Harris L. Hartz, liaison to the Standing Committee; Professor Daniel Coquillette, reporter of the Standing Committee; and Lawrence A. Friedman, Director, EOUST, were unable to attend.

The following additional persons attended the meeting: 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); James Ishida, Rules Committee Support Office; 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. Judge Zilly welcomed the Committee to Washington state. The Chairman announced the reappointment of Judge Zilly, Judge Klein, and Mr. Shaffer and the designation of Judge Hartz as liaison to the Standing Committee. The Chairman recognized Judge Gettleman, whose term expired with this meeting. The Chairman announced that Patricia Ketchum has retired and Mr. Wannamaker has replaced her as principal support staff for the Committee.

The Chairman praised the invaluable contributions of District Judge Norman C. Roettger, Jr., a member of the Committee, who passed away on July 26, 2003. Judge Roettger, who served on the federal bench for 31 years, had a keen mind and a wealth of knowledge about a wide and varied array of subjects. In addition to his Committee work, Judge Roettger was a great story teller and a wonderful dinner companion. Judge Zilly recalled Judge Roettger's appreciation for the work of the Committee and his contributions. **A motion to approve a memorial resolution recognizing Judge Roettger passed unanimously.**

The Committee approved the minutes of the April 2003 meeting.

The Chairman briefed the Committee on the June 2003 meeting of the Standing Committee. The Standing Committee approved proposed amendments to Rule 9014, technical amendments to Rules 1011 and 2002, and new Official Form 21. The Standing Committee approved the Committee's recommendation to publish proposed amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006 for public comment. Comments are due by February 16, 2004, and a public hearing on the comments has been tentatively scheduled for January 30, 2004, in Washington, D.C. District Judge David F. Levy has been designated as the new chair of the Standing Committee, replacing Judge Scirica, and District Judge Lee H. Rosenthal has been designated as the new chair of the Advisory Committee on Civil Rules (Civil Rules Committee), replacing Judge Levy.

The Chairman reported that the Standing Committee discussed interest in possible rules changes relating to mass torts litigation if Congress fails to act on asbestos legislation. Mr. Rabiej stated that no decision has been made on holding a mass torts conference to discuss the situation.

The Chairman reported that the Supreme Court has approved and transmitted to Congress amendments to Bankruptcy Rules 1005, 1007, 2002, 2003, 2009, 2016, and 7007.1. The

amendments will take effect on December 1, 2003, unless Congress enacts legislation to reject, modify, or defer them. The Chairman reported that proposed amendments to the Model Local Rules for Electronic Case Filing have been placed on the consent calendar for the September 2003 meeting of the Judicial Conference.

Judge Montali reported on the June 2003 meeting of the Bankruptcy Administration Committee. Circuit Judge Marjorie O. Rendell has been designated as the new chair of the Bankruptcy Committee. Judge Montali reported that a major issue at the June meeting was whether retired bankruptcy judges and magistrate judges who conduct mediation and arbitration sessions are practicing law, which would disqualify them from receiving cost-of-living increases in their pensions. Responding to concerns that reversing the Administrative Office's current interpretation would have a negative impact on the prospects for a cost-of-living adjustment for active judges, the Bankruptcy Administration Committee agreed to defer consideration of the issue.

After a spirited debate on proposed adjustments in the Miscellaneous Fee Schedule, including doubling the fee for motions for relief from the automatic stay, the Bankruptcy Administration Committee endorsed the changes by a 6-5 vote. The Bankruptcy Administration Committee recommended that the Judicial Conference express concern regarding legislation to provide for the expungement of the record of involuntary bankruptcy cases filed against individuals in bad faith and that the Conference request legislation to permit bankruptcy judges to hold court outside the district in emergencies.

Action Items

Rule 2002(g) — National Creditor Registry. The Bankruptcy Noticing Working Group has previously requested that the Committee consider amending Rule 2002(g) to permit creditors to receive notices on a national or regional basis. In addition, the Working Group asked 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. Section 315 of the Bankruptcy Reform Act of 2003, H.R. 975, as passed by the House of Representatives, includes a similar provision. When the Working Group's proposal was discussed at the last Committee meeting, Committee members expressed skepticism about the software that would be used to match creditor names and addresses in bankruptcy cases with the creditors who sign up to receive notices on a national or regional basis. The software is already used to identify creditors that have signed up to receive electronic notices on a district-by-district basis.

The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the noticing program. The contractor and AO staff explained the operation of the BNC's certified address-verification software, which is comparable to that used

by the United States Postal Service. The software determines whether any entities listed on the debtor's schedules have requested electronic notices. If there is not a perfect match between the creditor name and address supplied on the schedules and the names (or synonyms) and addresses of parties getting electronic notices, the notice is sent by mail to the address on the mailing matrix. The BNC representatives said approximately 1,100 entities use electronic noticing pursuant to 4,500 noticing agreements with the courts.

The Technology Subcommittee concluded (1) that any national creditor registry should only apply to chapter 7 and chapter 13 cases where high volume creditors are more likely to appear, (2) that the current registration system for electronic noticing works well but deleting the requirement for a separate noticing agreement for each district would facilitate operation of a national creditor registry, (3) that any potential problems with the accuracy and expedience on the part of notice providers other than the BNC could be addressed by performance standards set by the Administrative Office, and (4) that Rule 2002 should be amended. Judge Zilly, the chair of the subcommittee, said the only question is the form of the amendment.

The Reporter stated that the proposed legislation would let a creditor sign up for the national creditor registry with any bankruptcy court. He said he followed the proposed legislation in drafting an amendment to Rule 2002(g) because there is no downside once you are satisfied with the accuracy of the system and because creditors take the risk by opting into the system. Mr. Frank stated that he was concerned about the possibility of a notice intended for an unregistered creditor going to a creditor that has registered for the system. The Reporter said the BNC's matching software is very good and that there is only a very, very minor chance of a registered creditor getting a notice intended for an unregistered creditor. Mr. Waldron said there is an infinitesimal chance of two creditors having the same name and address in the same Zip Code.

The Chairman stated that Rule 2002 covers not just notices given by the BNC, but also notices given by the clerk, the chapter 13 trustee, the debtor, and other persons designated by the court to give notices. If they are required to send notices to a creditor's registered address, they need access to the name- and address-matching software. Mr. Frank stated that he does not understand how a debtor would comply if the debtor was required to give notice and if use of the creditor address registry is mandatory, not a safe harbor. Professor Resnick asked how the national registry would function if creditors could register an address to be used by all courts with any court. Mr. Waldron said the clerk would forward the address to the BNC, which would maintain the registry, but that it would be easier for the clerk if creditor addresses were all registered at one place. Judge Swain suggested that an Official Form be prescribed for registering creditor addresses. Professor Resnick stated that requiring creditors to file their preferred address with the court would have the advantage of making it a matter of record. Judge Walker asked what filing would mean in this context and how the clerk would keep and treat the requests.

Professor Markell stated that creditors are always trying to make notices directed to a

creditor's local address, such as a store, ineffective. He said it might be best to craft the amendment as a safe harbor until the proposed legislation passes. Judge Torres suggested adding a sentence that the court's failure to send a notice to a registered address does not render invalid an otherwise valid address. Professor Resnick suggested tracking that provision in Rule 5003(e).

Judge Montali said the current presumption is that a notice to an address listed by the debtor actually goes there. The Reporter said the proposed amendment provides that a notice sent to a creditor at its registered address is presumed to be the proper address for the notice. Mr. Adelman said the debtor who puts the correct address on the schedules should not bear the risk that a notice is mishandled. Professor Resnick said the Committee Note should explain the consequences of the debtor scheduling a correct address which is not the creditor's registered address and the notice going to another registered address. The Reporter said a computer error in matching creditor names and addresses would be the same as a postal carrier taking the notice to the wrong house.

Professor Resnick said the registry of government addresses maintained by the clerk under Rule 5003(e) could be a model for the amendment to Rule 2002. Judge Klein stated that the Rule 5003 registry is available to anyone sending notices. He suggested that someone should maintain a registry of creditor addresses which would be the basis of contractual agreements with creditors on noticing. The Reporter stated that the Working Group's proposal was not intended to create a registry as such and that the database of creditor names and synonyms and addresses would be massive and would have to be updated every time a creditor opens a new store. Judge Klein said debtors would use a creditor address registry because they want to get the most accurate addresses. Professor Resnick said the Committee declined to include municipal governments in the Rule 5003 registry because that would have been too many addresses.

Judge Walker suggested providing that a creditor could agree with an entity authorized to give notices as to the place and manner of receiving notices. The Reporter said that notice providers could be defined in Rule 9001 and that the provision for creditor agreements with notice providers could be included in Rule 2002. He said confidence in the notice providers would come from their certification by the AO. The Chairman said he had proposed this approach but that the Administrative Office expressed concern about setting technical standards and quality controls for authorized notice providers. Judge McFeeley said the clerk's office should not be excluded because CM/ECF will have the capacity to do this.

The Committee discussed how a deputy clerk mailing copies of a court order or a chapter 13 trustee sending notices would get a creditor's preferred address and how difficult that would be. Judge Klein said the BNC should be given latitude in implementing the proposal. Judge Swain said the amendment should be permissive, not mandatory, and should apply only to notices sent by the court. **The committee approved in principle permitting a creditor to obtain notices at a preferred address. The Chairman asked the Reporter to prepare alternative drafts of the proposed amendment for the next meeting. One draft would follow the subcommittee's recommendation, which would allow a creditor to notify a**

clerk's office of its preferred address. The other draft would allow a creditor and an approved notice provider to make their own arrangements. Professor Resnick suggested a third approach based on Rule 9036. **The Committee agreed to consider that as well.**

Rule 9036 — Confirmation of Receipt. Rule 9036 provides that electronic noticing is complete when the sender obtains electronic confirmation that the transmission has been received. The Reporter stated that confidence in the delivery of e-mail has increased greatly since the rule was added in 1993. The Technology Subcommittee met on May 19, 2003, in Washington, D.C., and heard from the contractor that operates the Bankruptcy Noticing Center (BNC) for the Judiciary as well as AO staff responsible for the program. The BNC conducted a test of the top 10 Internet Service Providers (ISPs) and obtained a 99.62 percent success rate for receipt of the messages, provided that the message contained a link to the notice rather than including the notice as an attachment. Because few ISPs offer return receipts, the Reporter stated that the confirmation requirement is arguably obsolete and may hinder the use of electronic noticing if enforced to its letter. The subcommittee recommended deleting the last sentence of Rule 9036, including the confirmation requirement.

Mr. Shaffer questioned why Rule 9014(b) requires that the motion initiating a contested matter be served in the manner provided for the service of a summons and complaint in Rule 7004 and, as a result, cannot be served electronically. He said many attorneys just serve the attorney for the other party electronically if both parties are already in the case and both attorneys are CM/ECF participants. Professor Resnick stated that contested matters are as important as any other litigation and, thus, historically service under Rule 7004 was required for contested matters. Judge Walker suggested that the rule be revised to cover a number of other means of sending notice, including electronic transmission. Judge Klein stated that because Civil Rule 5(b)(2)(D) already applies in adversary proceedings, the amendment to Rule 9036 should be as close as possible to the civil rule to avoid inconsistencies between the two rules. The Reporter stated that Rule 5(b)(2)(D) also applies in contested matters.

Judge Zilly suggested adding a statement that the electronic transmission is complete on transmission. Judge Montali said Rule 9036 should be consistent with Rule 9006(e), which provides that service of notice by mail is complete on mailing. The Committee discussed whether to add to Rule 9036 the provision in Civil Rule 5(b)(3), which is incorporated by Rule 7005, that service by electronic means is not effective if the party making service learns that the attempted service did not reach the intended person. Professor Resnick said requiring that a notice reach the intended "person" is ambiguous. Judge Klein said an attorney who does not open his mail or who is on vacation when notice is given could argue that he or she did not receive the notice. Mr. Shaffer said signing up for electronic noticing is voluntary and that participants assume the risk that their e-mail system may be down. **Judge Walker's motion to strike the last sentence in Rule 9036 and substitute, "Notice by electronic means is complete on transmission." carried with two dissenting votes.**

Restyling Civil Rules. The Civil Rules Committee has initiated a project to restyle the

Civil Rules. Restyled versions of Civil Rules 1 through 15 were presented to the Standing Committee in June and approved for publication in August 2004. The Civil Rules Committee is continuing its restyling effort and expects to have another substantial portion of the restyled rules ready for presentation to the Standing Committee next year and, if the Standing Committee approves, for publication along with the first group of restyled rules.

This Committee discussed whether to begin restyling the Bankruptcy Rules immediately or whether to wait. Professor Resnick stated that this Committee should wait to see what the Civil Rules Committee does and then respond. He said many of the Civil Rules are incorporated verbatim in the Bankruptcy Rules. Because the restyled Civil Rules will not be published until 2004 and because many of the changes are technical ones which do not require publication, Professor Resnick said waiting would, at worst, leave the Bankruptcy Rules only a year or two behind the Civil Rules in restyling. Judge Walker, the liaison to the Civil Rules Committee, said the Style Subcommittee of the Civil Rules Committee is very receptive to comments on the impact of changes in the Civil Rules on the Bankruptcy Rules.

Judge Zilly stated that Civil Rule 5 refers to electronic filings and service by electronic means if authorized by a local rule, but that many bankruptcy courts use general orders to authorize electronic filing and service. Professor Resnick stated that the Standing Committee prefers local rules, even if the rule refers to a general order. Mr. McCabe said the preferred practice was that the court authorize electronic filing and service in a local rule and then put the details in a general order or administrative procedure.

Mr. Rabiej said Civil Rules 1 through 37 and Rule 45 are to be published and that it would be difficult for each committee member to review the whole package. He suggested that the Chairman assign portions of the restyled rules for review. **The Chairman stated that, when restyled rules are approved by the Standing Committee, they will be sent to all committee members. Any member wishing to discuss any restyled rule should inform the Chairman and the restyled rule will be added to the agenda for the spring 2004 meeting.**

Rule 5001(b) — Court Locations. The courts have been preparing plans to ensure their continued operation in the event of emergencies. Mr. Wannamaker stated that, in the course of the emergency planning, it became clear that some courts would be best served by conducting matters in another district. Under the existing statute and Rule 5001(b), there is a serious question as to whether a bankruptcy judge could hold court in the next most available court location. This led to a proposal before the Judicial Conference to seek an amendment to 28 U.S.C. § 152(d), which would permit bankruptcy judges to hold court outside of the district if emergency conditions are present and no location for holding court is reasonably available within the district. In addition, it has been suggested that Rule 5001(b) be amended.

Mr. Shaffer suggested moving the phrase, "Except as provided in 28 U.S.C. § 152(d)," from the beginning of the second sentence to after the word "but" in line 7 in the draft amendment prepared by the Reporter. **There was no objection.** Judge Montali said it

sometimes is difficult to say just where the court is. For instance, the judge may conduct a hearing by teleconference from a hotel room while the parties and counsel are other locations. Mr. McCabe stated that judges conduct trials from remote locations by videoconference. **At the suggestion of Mr. Rabiej, the Committee approved the proposed amendment in principle but deferred further action. If legislation is passed authorizing bankruptcy judges to hold court out of district, the Chairman stated that the Committee would consider the request by e-mail ballot.**

Rule 7004(b)(3). Judge Robert J. Kressel has urged the Committee to consider revising Rule 7004(b)(3) to clarify the requirement for service of a summons and complaint on a corporation. Judge Kressel observed that the rule is unclear as to 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, or managing or general agent of XYZ, Inc." also is effective.

The Reporter stated that Judge Kressel's observation about the ambiguity of the rule is borne out in the case law. The Reporter presented two draft amendments to remove any perceived ambiguity. The first directed that the summons and complaint be served on a specific individual and the second was intended to clarify that under the current rule, generic service is acceptable. Professor Resnick and Judge Swain challenged whether the second draft amendment, which changed "an officer" to "any officer" clarifies the matter. Professor Resnick suggested inserting "by name or office." Mr. Frank stated that the Committee should not increase the burden on the party serving the summons and complaint and that mail addressed to the president or chief executive officer of a corporation should get to that person.

Judge Zilly and Judge Klein stated that they are reluctant to deviate from the parallel with the language of Civil Rule 4(h). Judge Klein said the district judges didn't seem to have a problem with that language in Rule 4(h). The Reporter stated that the bankruptcy rule permits service by first class mail while the civil rule requires delivering the documents to the person named. Judge Walker stated that young attorneys may serve the summons and complaint according to what they think is required by the rule. He said the Committee could be criticized if it knows that the existing rule is ambiguous, but doesn't fix it. Judge Montali and Judge Swain suggested setting out the address to be used in the rule. Judge Small stated that the Committee should decide whether to clarify the rule or to leave it as is. **With three members dissenting, the Committee decided that the rule was better left alone.**

Rule 3007 — Service of Objections to Claims. Judge Kressel has asked the Committee to consider amending Rule 3007 to clarify the service obligations of parties who object to claims. He suggested that these objections be treated as contested matters with service accomplished under Rule 7004 as provided in Rule 9014. The Reporter stated that Rule 9013 recognizes two forms of requests for orders — motions and applications. Mr. Frank agreed that there is some ambiguity in the rules about whether objections to claims are something separate from motions and applications. Because the claimant has already initiated the matter by filing the claim, Mr.

Frank said service under Rule 7005 would be more appropriate than service under Rule 7004. Judge Klein stated that the claim is consent to the court's jurisdiction and that, because the objection to the claim is the equivalent of the answer to a complaint, service should be under Rule 7005.

The Reporter presented a draft amendment requiring that an objection to a claim be made by a written motion. Professor Resnick opposed the change in terminology because, he stated, everybody knows these objections as objections to claims. He stated that requiring service under Rule 7005 would allow the objections to be served electronically. **Professor Resnick's motion not to make the change recommended by Judge Kressel carried without dissent.**

Rule 3007(b) provides that when an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding. Judge Klein stated that there is confusion in the courts on whether a separate adversary proceeding must be filed after the objection to claim. The Committee discussed the nature of the affirmative relief under Rule 3007 and how a clarification of the reference to an adversary proceeding in Rule 3007(b) should be worded. **The Committee agreed that a clarification is needed and that the Reporter draft a proposal for consideration at the spring meeting.**

Rule 5005(c). Judge Kressel has suggested that Rule 5005(c) be amended to add the clerk of the bankruptcy appellate panel (BAP) to the list of persons who are authorized, when they receive improperly filed or transmitted papers, to send the papers on to the proper person. The Reporter suggested also adding district judges to the second part of the rule.

The Committee discussed whether the rule should be revised to include papers erroneously filed in other districts and whether the reference to deeming erroneously delivered papers to have been filed is limited to the persons listed in the rule. Judge Walker said the discussion of hypothetical errors makes it clear that the last sentence refers only to the listed people. Judge Swain stated that adding other districts would enable parties to consider bundling their claims for the entire country and filing them in a single district. **The Committee agreed without dissent to add the clerk of the BAP and district court judges to the list of persons who are authorized to forward erroneously filed or transmitted papers to the proper person.**

Rule 9001(9) — Definition of Associate. Robert M. Barnes, a San Diego, California attorney, has requested an amendment to Rule 9001(9) to include accountants who are employed by accounting firms within the definition of "regular associates." The Reporter stated that the definition of "firm" in Rule 9001(6), which includes both law firms and accounting firms, is not parallel with the definition of "regular associate," which just includes attorneys. The Reporter presented a draft amendment to include attorneys regularly employed by, associated with, or of counsel to an individual attorney or firm, and accountants regularly employed by an individual accountant or firm. Judge Montali suggesting specifying law firms and accounting firms. Judge Swain stated that multidisciplinary practice could create more problems.

The Reporter stated that the change could focus attention on the rule and prompt other groups to ask to be included in the rule. The Reporter said that while there may be some ambiguity in the rule, the courts appear to be handling it and redrafting the rule may create more problems than it would solve. The Committee discussed the application of the rule to accountants employed by law firms and attorneys employed by accounting firms. Judge Walker stated that an application for employment could cover the issue. **Judge Swain's motion to make no change in the rule carried without dissent.**

Rule 9014 — Electronic Service. Mr. Waldron stated that several electronic filers in his court have complained that they are required to serve the motion initiating a contested matter in the manner provided for the service of a summons and complaint in Rule 7004. He said the attorneys question why service by mail of a paper copy of the motion is needed when the attorney for the party has already received a Notice of Electronic Filing through the CM/ECF system. Mr. Waldron presented draft amendments to Rule 9014 which would permit electronic service of the motion initiating a contested matter under Rule 7005 unless the debtor is the party against whom relief is sought. **The Chairman referred the proposal to the Technology Subcommittee.**

Rule 4003(c) — Burden of Proof. 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 had raised the issue with the Committee, noting that the allocation of the burden 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). At the time, the Committee determined that it would take no action on the issue until the case law developed further. The Reporter stated that a number of courts have identified the issue but none of them have held that Raleigh renders Rule 4003(c) ineffective. **After a brief discussion, the Committee agreed to take no action at this time but to continue monitoring developments in the case law.**

Suggestions by the Director of the EOUST Concerning Rules 2003, 4002, 2016, and 7001 and Schedule I, and New Official Form. The amendments submitted by Mr. Friedman, Director of the EOUST, fall into three categories. The first category involves the debtor's obligation to provide complete and accurate information to the trustee and United States trustee; the second category concerns the debtor's attorney's obligation to disclose compensation received or promised in connection with the bankruptcy case for the year prior to commencement of the case. The third category relates to the entry of an order denying a discharge under section 727(a)(8) or (9) of the Bankruptcy Code. Ms. Davis presented the proposed amendments. She stated that the amendments would make the bankruptcy process more efficient and effective for the 1.2 million debtors who file chapter 7 each year, many of whom receive a discharge and are out of the system within 90 days of filing.

• Schedule I. Ms. Davis stated that a non-filing spouse's income can be material to making substantial abuse determinations under section 707(b) of the Bankruptcy Code and evaluating the household expenses set out on Schedule J. She said that requiring chapter 7

debtors to disclose their non-filing spouses' income on Schedule I would save time and work for the United States trustees. Schedule I already requires disclosure of the non-filing spouse's income in chapter 12 and chapter 13 cases.

Mr. Frank asked whether a husband and wife who are separated would be considered as part of the same household. The Reporter stated that Schedule J permits them to schedule their expenses separately. Several speakers asked whether domestic partners and roommates would be required to disclose their income and whether their income is relevant to section 707(b) determinations. Professor Resnick said requiring 1.2 million chapter 7 debtors to provide more information outweighs concerns about a small number of section 707(b) cases and that the change could be viewed as taking a position on the substantive question of whether a non-filing spouse's income is included in the section 707(b) determination. Professor Markell and Judge McFeeley stated that a non-filing spouse effectively gets a discharge in a community property state, which is another reason for making the change. **Judge McFeeley's motion to add non-filing spouses of chapter 7 debtors to Schedule I carried without dissent.**

• Rule 7001. Ms. Davis stated that removing objections to the debtor's discharge under sections 727(a)(8) and (9) of the Code from Rule 7001 and permitting the objections to be made by motion would save time for the United States trustee and the court. Because most section 727(a)(8) and (9) objections are uncontested and the debtors are simply ineligible for discharge, she said some courts handle them by show cause orders or motions to dismiss. The Committee discussed whether previous discharges within six years should be added to the list of automatic bars to discharge under Rule 4004(c) and whether the debtor would get a discharge under the current rule if the United States trustee missed the deadline for filing an objection based on a previous discharge.

Judge Montali stated that objections to discharge for previous discharge are a complete waste of time. Professor Resnick stated that the discharge is so important that it should not be denied automatically. Several committee members questioned whether permitting these objections to discharges to be filed as motions would save time and resources, especially if the United States trustee could move for default against the debtor. Professor Wiggins stated that there is a distinction between objections under section 727(a)(8) and objections under section 727(a)(9). Ms. Davis agreed that objections under section 727(a)(9) for previous discharges in chapter 12 or chapter 13 present more factual issues. **The Chairman deferred the proposal to the next meeting.**

• Rule 2016(b) and New Official Form. The proposed amendments to Rule 2016(b) would require that the debtor's attorney disclose the details of the legal services to be provided, whether the attorney has taken any interest in property from the debtor, and whether the attorney has received any payments from the debtor within a year prior to the filing, regardless of whether the fees were in connection with or in contemplation of the bankruptcy filing. Ms. Davis stated that the proposed changes in attorney fee disclosures are intended to address two problems — debtors who have no idea of the details of their attorney's fee disclosure (or of the extent of the

legal services to be provided) when fees are disputed later in the case and attorneys who bundle non-bankruptcy services with the bankruptcy filing, arguably in order to avoid disclosing the full extent of their fees under the existing rule. Judge Klein said it is possible to argue that the bundled prepetition services were in anticipation of bankruptcy and must be disclosed under the current rule.

Professor Resnick stated that the rule is to implement section 329 of the Bankruptcy Code, which only requires the disclosure of fees in contemplation of or in connection with the bankruptcy case. The Reporter stated that the proposal raises questions of substantive law and goes beyond what can be fixed by changing the form. Professor Resnick questioned adopting a rule aimed at unethical lawyers when the rule goes well beyond the statute. Questioned about whether the proposal could require the disclosure of confidential or sensitive matters such as potential criminal matters or consideration of divorce, Ms. Davis said the disclosure form could be filed under seal. Judge Zilly stated that disclosing the payments for unrelated services would go beyond the statute but would not be privileged, but that disclosing the nature of the services may be a different matter. He said disclosing the fees would at least trigger a further inquiry by the United States trustee. Judge Gettleman said if the information is privileged, the attorney can assert the privilege and request redaction.

The Committee discussed the practice of unbundling services in which an attorney may agree only to prepare the petition and schedules and represent the debtor at the meeting of creditors. Professor Markell said some bankruptcy courts permit unbundling and others do not, but that the details of the legal services to be provided is a matter of disclosure. Judge Klein described the situation in which an attorney will not represent the debtor on a motion for relief from the automatic stay without additional payment. As a result, he said his court uses a district court rule to require attorneys to represent the debtor for the entire case except for adversary proceedings.

Mr. Frank questioned why the debtor should have to sign another piece of paper when it is the attorney's disclosure, not the debtor's. The Reporter stated that the debtor would sign the disclosure so that the attorney would not lie. Mr. Adelman said disclosure is good for the attorney and may provide a "safe harbor." Judge Walker said the change could be made in the Statement of Financial Affairs, which is signed by the debtor. **The Committee agreed to require the disclosure of all payments by the debtor within a year prior to the filing, either in the attorney fee disclosure or in the debtor's Statement of Financial Affairs. The Chairman asked the Reporter to circulate alternative drafts within a month.** Professor Resnick asked whether the change should be limited to chapter 7 and chapter 13 cases since Rule 2014 already applies in chapter 11 cases. Ms. Davis agreed that consumer cases are the focus of the proposal but stated that section 329 applies across the board.

• Rules 2003 and 4002. Ms. Davis stated that the trustee has a statutory duty to investigate the financial affairs of the debtor and the debtor is under a statutory obligation to surrender books and records relating to property of the estate. She said the proposal to require

the debtor to bring certain core documents to the meeting of creditors may impose a burden on the debtor but that she believes the documents would have been assembled by debtor and the debtor's attorney to prepare the schedules and statement of financial affairs. Ms. Davis stated that, if the debtor can't produce the documents, the debtor could file a statement explaining why not. She said the proposal was based on similar local rules.

Mr. Frank stated that the proposal would be a dramatic change in bankruptcy practice. He said the production of key backup documents in every case would raise the expense of filing bankruptcy substantially. The debtor is already under oath at the meeting of creditors and subject to further inquiry and production of documents. He said the United States trustee assumes the production will produce a significant number of objections to discharge and additional distributions to creditors but that, ultimately, it is a value judgment and matter of costs vs. benefits. Mr. Frank suggested that the proposal is so controversial that it should be referred to a subcommittee, which could solicit additional comments and report back to the full Committee.

Judge Zilly said the debtor should bring the crucial documents to the meeting of creditors, rather than the trustee having to continue the meeting for their production. Judge Torres asked why it would be onerous to produce the listed documents at the meeting. He said the documents appear to be relevant and the trustee would have to review them at some time. Judge Walker said a more practical, focused proposal is needed. He said the production should be treated as an objection to discovery documents, with the debtor required to produce only what the trustee is going to consider carefully. Judge Walker asked whether the debtor would be required to bring copies of the documents or the originals, which would be reviewed by the trustee during the meeting. One Committee member asked whether the trustee might image the documents at the meeting and return them to the debtor.

Professor Markell said the debtor already supplies the information in summary form on the schedules and statement of financial affairs. The trustee reviews the schedules and statements before the meeting of creditors and the meeting itself is very routine in most cases. He said the trustee inquires further when needed and continues the meeting in those cases. Professor Markell said the proposal would alter the cost of filing bankruptcy for consumer debtors and their attorneys. By analogy, he said, despite the existence of tax fraud, taxpayers have to file only limited information on their tax returns.

Judge Torres asked about the possibility of the United States trustee requesting documents before the meeting of creditors if the documents appear to be needed on the basis of a review of the schedules and statements. Professor Markell and Mr. Frank said informal discovery of this sort goes on now in many districts. Professor Wiggins said a targeted list of what is absolutely necessary would help the Committee make a cost-benefit analysis. Judge Gettleman asked whether, if the trustees are already doing their job, bringing lots of papers to the meeting would change things. Mr. Adelman stated that the proposal raises a privacy issue because the debtor's Social Security number is on some of the listed documents, including tax returns, which could be viewed by a number of people. He said, however, that some of the listed

documents stand out because their production would expedite the case and uncover issues. Professor Morris said all of the listed documents could be the basis of an objection to discharge if the debtor failed to produce them at the trustee's request. Professor Resnick stated that the proposal is an extreme one based on the assumption that the debtor is dishonest.

The Committee accepted Judge Klein's motion to refer the proposal to the Subcommittee on Consumer Issues. The Chairman stated that the subcommittee could meet in Washington, D.C., on January 30, 2004, and invite a focus group similar to the one convened on the privacy amendments to provide input from different viewpoints. Judge Zilly asked the EOUST to be more specific in light of the Committee's discussion. Mr. Shaffer asked about the requirement in the proposed amendment to Rule 4002 that, if the debtor used an incorrect Social Security number, the debtor must take steps to correct the bankruptcy court record and notify credit reporting agencies. Ms. Davis said one reason for the provision is to provide a road map for debtors and their attorneys so that they can furnish more accurate information.

Information Items

Uniform Rules. Rule 9029 states that local rules must conform to any uniform numbering system prescribed by the Judicial Conference. The Conference has directed that courts adopt a numbering system for local rules that corresponds with the relevant federal rules. (JCUS - SEP 88, p. 103; JCUS - MAR 96, p. 34). As the bankruptcy courts have begun accepting electronic filings over the Internet, the courts have been reviewing their local rules to determine how the rules should be revised to reflect the new electronic environment. Mr. McCabe stated that the Office of Judges Programs has received a number of requests for copies of the Uniform Numbering System for Local Bankruptcy Court Rules or for information on the system. The Uniform Numbering System was issued by the Committee in 1996 and revised slightly in April 2003. Earlier this year, copies of the Uniform Numbering System were distributed to all bankruptcy judges and posted on the JNET.

E-Government Act. Section 205(c)(3) of the E-Government Act of 2002, Pub. L. 107-347, requires that the Supreme Court prescribe rules to protect privacy and security concerns relating to the electronic filing of documents and the public availability of documents filed electronically. Mr. Rabiej said that the statute mandates that the new rules provide that a party filing a redacted document also may file an unredacted copy of the document under seal. At the request of the Judiciary, legislation has been introduced deleting the provision for dual filing. Mr. Rabiej said the Standing Committee has appointed a subcommittee to consider the rules required by the Act. He said changes may be needed in the bankruptcy rules, the civil rules, and the criminal rules.

Amendments to §§ 107 and 342(c) of the Bankruptcy Code. The Judiciary has requested revision of sections 107 and 342(c) of the Bankruptcy Code. The amendment to section 107

would authorize the court to redact "personal identifiers" in order to protect any person from identity theft or other harm. In addition, the revision would expand the scope of information a court could protect from "scandalous or defamatory matter" to "information that could cause undue annoyance, embarrassment, oppression or risk of injury to person or property." The amendment to section 342(c) would provide that a debtor include only the last four digits of his or her Social Security account number on notices the debtor provides to creditors.

Changes in the Claims Process. The CM/ECF Working Group's claims processing subcommittee is preparing recommendations to modify the proof of claim form and the process for filing claims in order to facilitate electronic filing and to accommodate the trade in buying claims. Judge McFeeley, the liaison to the subcommittee, said the proposed amendments are not yet ready to be submitted to this Committee. He said the revised form would be more suitable for filing claims as a datastream to the courts which are prepared to accept it.

If a claim is transferred after the proof of claim is filed, Rule 3001(e) requires that the clerk notify the alleged transferor by mail. Mr. Waldron said many claims buyers obtain notice waivers from the sellers although there are questions about the effectiveness of the waivers and his court does not allow them. He said processing the transfer of claims constitutes the largest increase in the clerk's office's workload in many districts. Professor Resnick said if there is fraud in the transfer, there also could be fraud in the waiver. Professor Markell said there is a legitimate business in buying consumer claims in bulk, even discharged chapter 7 claims. The Chairman stated that there is less concern about fraud when legitimate entities buy claims in chapter 13 but Judge McFeeley said it is difficult to write a rule that just applies to "legitimate" companies.

Professor Resnick stated that the 1991 amendments to the rule deleted disclosure of the compensation for the transfer and narrowed the provision to the disclosure of possible bogus transfers. The Reporter stated that the nature of the creditors involved has changed since 1991, when the transfer of chapter 11 claims was at issue. Professor Resnick said a cost-benefit analysis may be appropriate because the perception is that more sophisticated buyers are purchasing claims from vendors who should know what they are doing.

Implementation of the CM/ECF System. Mr. Wannamaker reported that implementation of the Case Management/Electronic Case Files (CM/ECF) system in the bankruptcy courts is continuing. Fifty-nine bankruptcy courts are live on the system and another twenty-nine courts and the District of Guam are in the process of implementing CM/ECF.

FJC Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic discussed the proposed study by the FJC of whether certain types of adversary proceedings should be exempted by rule from the mandatory disclosure provisions of Rule 7026 and Civil Rule 26. The study is intended to determine whether certain types of adversary proceedings are resolved before due dates for Rule 26 disclosures. Mr. Niemic said the study could include whether attorneys are making the disclosures or stipulating that they will not make them, whether judges are exempting

attorneys from the disclosure requirements, whether the judges think mandatory disclosure makes sense in adversary proceedings, and whether the courts are doing anything to increase compliance with the rule.

Mr. Niemic asked whether the Committee wanted a study based on a survey of the bankruptcy judges and, if so, whether the survey should be of a sample of the judges or of all bankruptcy judges. The Chairman suggested an email survey of all bankruptcy judges. He said the survey would remind the judges of the mandatory disclosure requirements in the rule. Judge Klein said the response rate might be lower with an email survey but that it could show the extent of support for the conventional wisdom that the mandatory disclosure is unnecessary. **The Chairman asked Mr. Niemic to go forward with the survey with the help of Judge Klein and another committee member to be designated later.**

Administrative Matters

The Committee's next scheduled meeting will be at the Ritz-Carlton Hotel, Amelia Island, FL, on March 25-26, 2004. The Committee discussed several locations as possible sites of the fall 2004 meeting, including Seattle, Monterey, Chicago, Santa Fe, Sundance, and Las Vegas. The Subcommittee on Consumer Issues will meet in Washington, D.C., on January 30, 2004. Trustees and debtors' attorneys will be invited to participate in the January 30 meeting.

Respectfully submitted,

James H. Wannamaker, III

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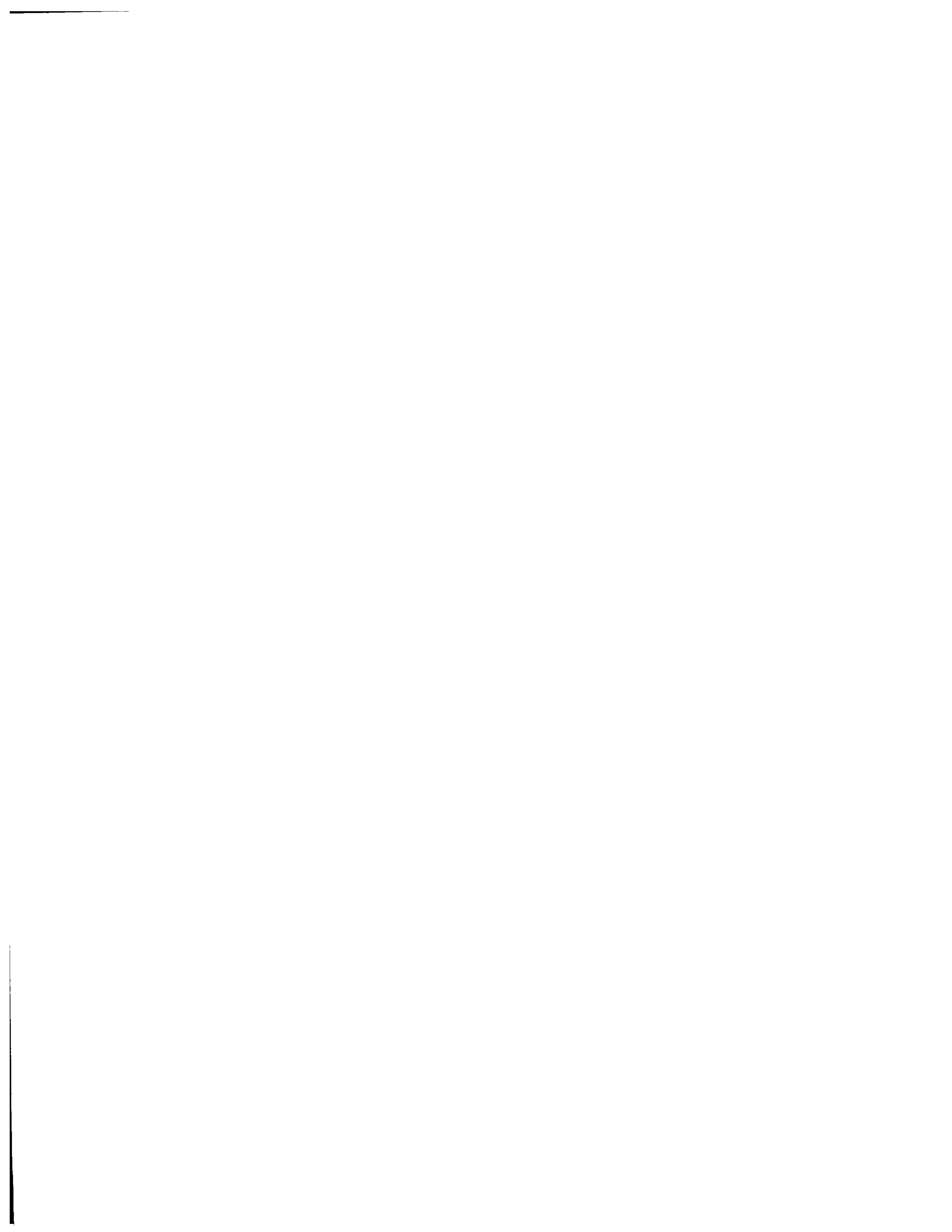
Judge Small and Professor Morris will report orally on the January 2004 meeting of the Standing Committee.

Judge Montali will report orally on the January 2004 meeting of the Bankruptcy Committee.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: WRITTEN COMMENTS ON PROPOSED RULES

DATE: MARCH 7, 2004

In August, 2003, we published for comment proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9006. In short, the amendment to Rule 1007 establishes a requirement that the debtor file a mailing matrix consistent with practice under virtually all local rules, and the amendments to Rules 3004 and 3005 are intended to make those rules consistent with § 501 (b) and (c) of the Bankruptcy Code. The amendment to Rule 4008 would establish a deadline for filing reaffirmation agreements and would allow the courts to hold the required hearings in those cases at times most appropriate to their dockets and schedules. Rule 7004 would be amended to authorize the clerk to issue summonses electronically, and the proposed amendment to Rule 9006 would clarify the method for counting the three-day period when service is made either by United States mail or electronically.

We received a total of seven comments on the proposals, and two of the comments were unqualified in their support of the proposals. Those comments were submitted by Mr. Jack Horsley (Comment 03-BK-001) and by the State Bar of California Committee on Federal Courts (03-BK-006). The remaining comments addressed the proposed amendments to Rules 3004, 3005, 4008, and 9006. No comments were submitted regarding the proposed amendments to Rules 1007 and 7004.

Comments on Rules 3004 and 3005

Mr. Mark Van Allsburg, the Clerk of the Bankruptcy Court for the District of Hawaii, submitted a comment on the proposed amendment to Rule 3004 in which he suggested that the rule amendment should not continue the requirement currently in the rule that requires the clerk to mail notice of the filing to the creditor, the debtor and the trustee. **Comment 03-BK-004.** He notes that it is often difficult even to know that a particular proof of claim is being filed by the debtor or the trustee so that the clerk may not be aware of a need to notify the other parties of the proof of claim. He suggests that the rule might authorize someone other than the clerk to give the notice, or the rule could simply direct the person filing the proof of claim to serve a copy of the claim on the debtor, the creditor and the trustee. Since this is not a change in the current rule, the comment could be considered a proposal that the Committee should consider at a subsequent meeting. The suggestion also could be addressed by an amendment to Official Form 10 that would add a check box to the form for a person to indicate that they are not the creditor who holds the claim, but rather that they are filing the claim either under Rule 3004 or 3005.

Hon. Dennis Michael Lynn (B. J., N.D. Tx.) submitted the second comment on Rules 3004 and 3005. **Comment 03-BK-005.** Judge Lynn's comments were addressed primarily to Rule 3005. He first suggested that the cross reference on lines 2 and 3 of Rule 3005 to "Rule 3002 or 3003(c)" should be changed to read "Rule 3002(c) or 3003(c)" to make it parallel to the language in Rule 3004. That "inconsistency" exists in the current rule, although the Committee Note to Rule 3005 does not indicate any reason why the inconsistency should exist. It seems that making the cross references in both Rules 3004 and 3005 is appropriate. That would simply require the insertion of "(c)" after "3002) in the rule. Judge Lynn's second suggestion for Rule

3005 is to move the phrase "file a proof of the claim" from line 7 of the proposed rule to line 2 of the proposal and immediately after the word "may". That would make the structure of Rules 3004 and 3005 more consistent. Again, I believe this is a valuable suggestion that the Committee should adopt.

Judge Lynn also suggested an amendment to Rule 9006(b)(3) in connection with the proposed changes to Rules 3004 and 3005. He suggests that Rule 9006 be amended to provide that the enlargement of time for filing a proof of claim either under Rule 3004 or 3005 be permissible only to the extent allowed under Rules 3002 (c) or 3003 (c). This proposal is not addressed to the amendments that were published for comment, so it is more appropriate to consider the suggestion as one that the Committee should evaluate at a future meeting.

Comments on Rule 4008

We received three comments on the proposed amendment to Rule 4008 that establishes a thirty day deadline after the entry of the discharge for the filing of reaffirmation agreements. Judge Robert E. Grant (B.J. N.D. IN.) expressed support for the adoption of a deadline for the filing of the agreements, but he took issue with the deadline set in the proposed amendment. **Comment 03-BK-002.** Specifically, he is concerned that the rule allowing the agreements to be filed post-discharge will create problems for the courts that will be called upon to determine whether the agreement was made prior to the entry of the discharge as required by the Code. His proposal is to require that the reaffirmation agreement be filed prior to the entry of the discharge in order to avoid this type of litigation. The Committee considered the timing of the filing and selected thirty days after the discharge for several reasons. Most significantly, the timing of the entry of the discharge is subject to local practice, and in many districts the discharge order is

entered quite early in a case. The debtor and creditor who are parties to the reaffirmation agreement may not know when the order will be entered, and if the agreement is made before that time, it should still be enforceable even if it takes a bit longer to accomplish the filing of the agreement with the court. Moreover, another reason for setting a deadline is to inform the courts of the need to hold a hearing. The fairly short time after the entry of the discharge that is allowed for filing the agreement should not delay the proceedings generally, and it should bring whatever applicable issues need to be addressed to the attention of the bankruptcy court in a timely fashion. Perhaps the Committee Note should be expanded to state these reasons for selecting a time after the entry of the discharge within which the agreement can be filed.

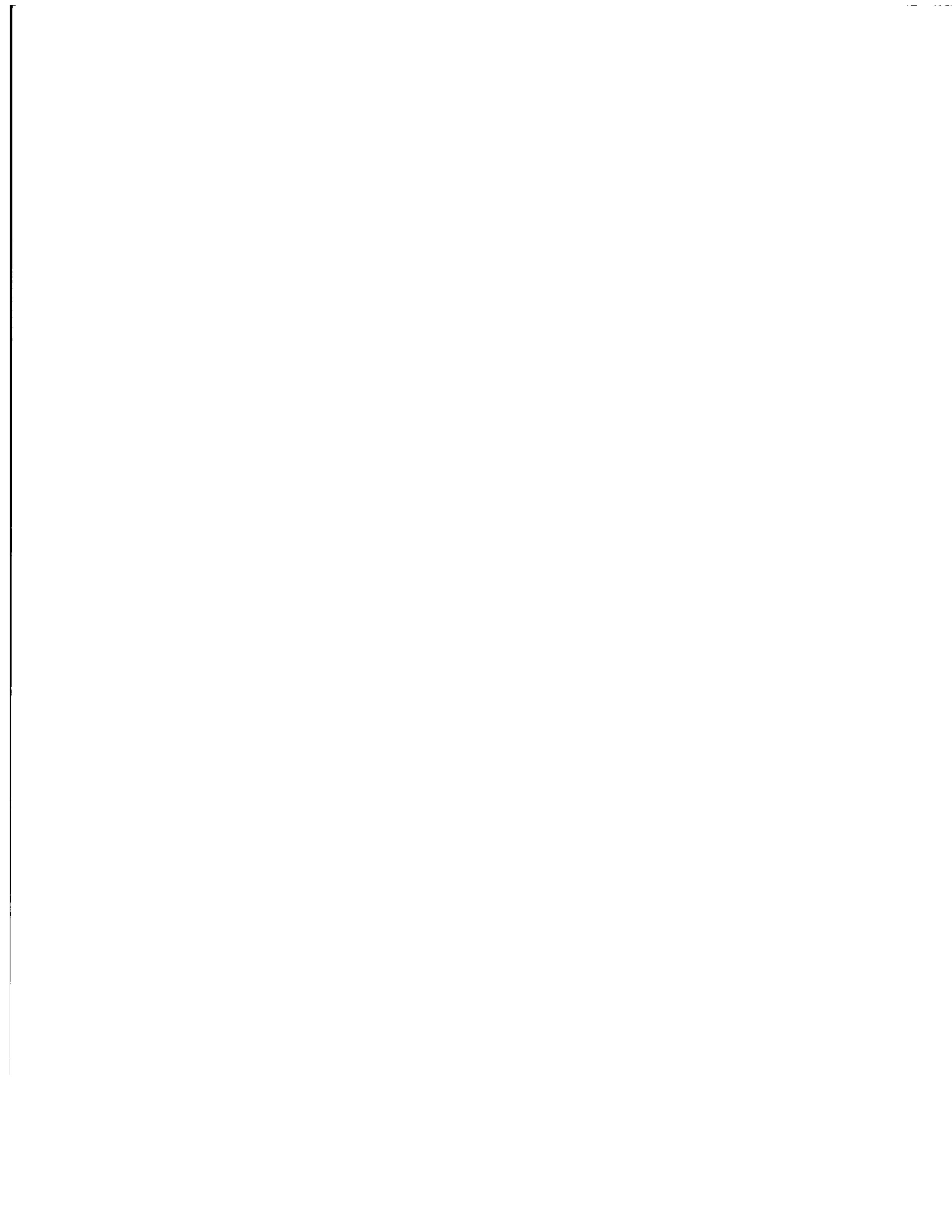
Judge Grant's suggestion that the reaffirmation filing date be the same as the discharge date was also proposed by Mr. Henry J. Sommer, a former member of the Committee. **Comment 03-BK-003.** Mr. Sommer argues that the discharge date is a better deadline for filing th reaffirmation agreement also because in some jurisdictions the cases are closed very quickly after the entry of the discharge. He suggested that if the Committee proceeds with the thirty day post-discharge deadline, that the Committee should amend Rule 5009 to prohibit the closing of cases until 30 days after the entry of the discharge.

Mr. Van Allsburg, the Clerk of the Bankruptcy Court for the District of Hawaii, also urged the Committee not to provide a post-discharge deadline for filing reaffirmation agreements. **Comment 03-BK-004.** Mr. Van Allsburg noted that the proposed deadlines will extend the life of cases and prevent the clerk from closing the cases as quickly as is done under the current practice. He stated that the delay in the closing of the case also will postpone creditor collection efforts that § 362 (c)(2)(A) would allow once the case is closed. It is unlikely that the

new deadline would have this impact given that the stay would already have expired under subsection (c)(2)(C) of that section. Thus, I do not believe that this provides a basis for objection to the deadline.

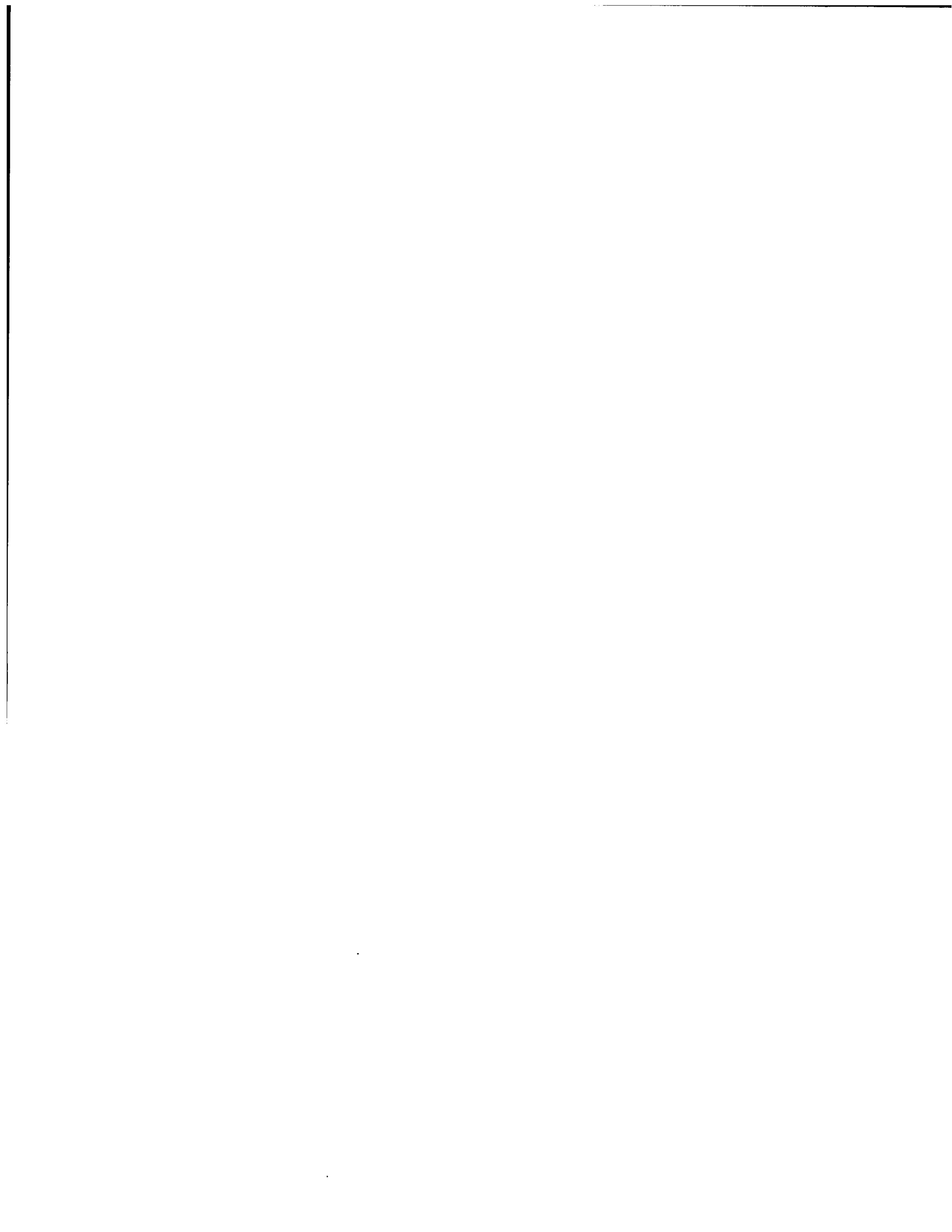
Comments on Rule 9006

As noted above, Judge Lynn suggested a new amendment to Rule 9006 to limit the enlargement of time for filing claims under Rules 3004 or 3005. **Comment 03-BK-005.** That comment was not addressed to the proposed amendment published for comment. The only comment received on the proposed amendment to Rule 9006 was submitted by Mr. Alex Manners of Compulaw LLC in Los Angeles. Mr. Manners' objection to the rule (his comments were addressed also to the comparable amendment of Civil Rule 6) primarily concerned the application of the rule in situations where intervening Saturdays, Sundays and holidays are excluded. These are time limits of less than 10 days under the Civil Rules and less than 8 days under the Bankruptcy Rules. Mr. Manners offered language to resolve the issue he raised, although it is unclear to me how his proposal is clearer than that offered by the Civil and Bankruptcy Rules proposals. The published amendments each include Committee Notes that set out specific examples of the operation of the rule. In fact, Rule 9006 has an even more extensive Committee Note than the Civil Rules counterpart, and I believe that the Committee Note is sufficient to address the problem noted by Mr. Manners.



2003 BANKRUPTCY RULES COMMENTS CHART

03-BK	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
03-BK-001 (Also 03-AP-011, 03-CV-002, 03-CR-002)	Jack E. Horsley, J.D.	10/17/03	All	10/23/03	
03-BK-002	Judge Robert E. Grant	10/29/03	4008	11/4/03	
03-BK-003	Henry J. Sommer, Esq.	11/17/03	4008		
03-BK-004	Mark Van Allsburg, Clerk	12/12/03 (Two separate e-mails)	3004 4008		
03-BK-005	Judge Dennis Michael Lynn	1/13/04	3004, 3005, 9006		
03-BK-006 (Also 03-AP-393, 03CV-008, 03-CR-004)	State Bar of California Committee on Federal Courts (Robert J. Schulze, Chair)	2/14/04	All		
03-BK-007 (Also 03-CV-012)	Alex Manners	1/29/04	9006		



RECEIVED 10/17/03

JACK E. HORSLEY, J.D.
LAWYER/AUTHOR
FELLOW AMERICAN COLLEGE OF TRIAL LAWYERS
913 NORTH 31ST STREET · MATTOON, ILLINOIS 61938-2271
(217) 235-5954
GENERAL, JAGD (HON. RES. [RET.])
SEE WHO'S WHO IN AMERICA AND
WHO'S WHO IN AMERICAN LAW
WHO'S WHO IN THE WORLD
CABLE: JALEY

03-AP-011

03-BK-001

October 10, 2003

03-CV-002

03-CR-002

Peter G. McCabe, ESq
Secretary
Committee on Rules of Practice And Procedure
of the
Judicial Conference of the United States
WASHINGTON D. C. 20544

Dear Mr. McCabe:

Thank you for your communicatin of August 26th and the Prelinary Draft of Proposed Amendments. I have studied the Draft carefully. It honors me to have been privileged, at your invitation, to make numerous analyses and suggestions about the work of your Committee.

The Preliminary Draft impresses me favorably. I noted especially the report on Rule 4 (Appeal As Of Right). I checked my files and I note it appears to take into consideration one of the suggestions I made in one of my analytical responses. To correct the unintended ambiguity in the comprehensive restyling of the 1998 Appellate Rules is something about which I commented in an analysis which I submitted. And clarifying that only written notice in which the time to allow to reopen the time to appeal is well supported.

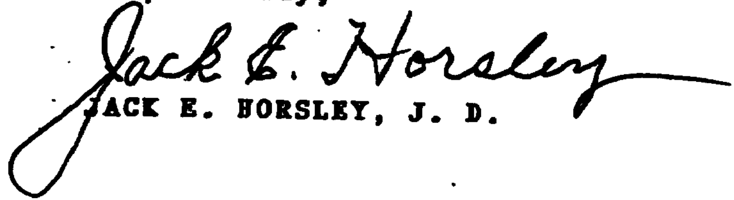
Furthermore, although I have had in my practice only a minimum experience in bankruptcy cases, I like the proposal about the time to make it incumbent on the debtot in a voluntary case to submit the list of names to which the Preliminary Draft refers.

Also, It is prudent to amend Rule 27 (Motions) to incorporate the new subdivision to which reference is made in the Preliminary Draft.

On balance it is my best judgment that the Prelinary Draft covers various amendments wisely and look upon it with favor.

Again, I thank you and your Committee for inviting me to particate by suggestions, and reactions to the excellent work being done.

Respectfully,



JACK E. HORSLEY, J. D.

JEH:mm

RECEIVED 10/29/03

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA

ROBERT E. GRANT, JUDGE

2128 E. ROSS ADAIR FEDERAL BUILDING
1300 SOUTH HARRISON STREET
FORT WAYNE, INDIANA 46802

03-BK-002

TELEPHONE: (260) 426 - 2455
FACSIMILE: (260) 424 - 3716

October 23, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Offices of the U.S. Courts
Thurgood Marshall Federal Building
Washington, D.C. 20544

Re: Proposed Amendment to Bankruptcy Rule 4008

Dear Mr. McCabe:

I was pleased to see that the committee proposes to amend Rule 4008 of the Federal Rules of Bankruptcy Procedure so that it includes a deadline by which reaffirmation agreements must be filed. Unfortunately, I think the committee has chosen an inappropriate deadline. Rather than thirty days after the entry of an order granting a discharge or confirming a chapter 11 plan, a much better choice would be to require reaffirmation agreements to be filed before either of those two events. The longer deadline the committee proposes risks creating confusion, as well as additional and otherwise unnecessary litigation.

Using the date of discharge as the deadline for filing reaffirmation agreements establishes a readily discernable and easily enforceable bright-line standard. It is also consistent with § 524(c)(1) of the Bankruptcy Code when it requires such agreements to be "made before the granting of the discharge." Allowing an additional thirty days beyond that date to file the agreement seems to dilute the statutory requirement and, by doing so, lays the groundwork for otherwise unnecessary litigation. I can easily imagine a set of circumstances arising after a default under a reaffirmation agreement filed during the thirty days following the entry of discharge, where the defaulting party defends based upon the proposition that the agreement was not made prior to the discharge but was really made shortly thereafter and is, therefore, unenforceable. I can also see controversies, and eventually published opinions, over how much of a reaffirmation agreement must be decided upon, and what terms can be left open, and still permit the agreement to be made before the discharge is granted. The courts already face these issues in civil litigation involving questions of contract formation. There is no reason to import them into the reaffirmation process.

I realize that debtors and creditors are not always able to complete the reaffirmation process, or to prepare and execute the documents needed to memorialize their understanding, prior to the entry of discharge. Nonetheless, the existing rules already provide a solution to this problem through Rule 4004(c)(2), which allows the court to defer the entry of discharge at the debtor's request. Indeed, I

always understood that one of the primary reasons for this particular provision was to give debtors and creditors additional time to complete the reaffirmation process.

The opportunity which Rule 4004 provides for deferring discharge also eliminates the need for the proposed change in Rule 4008 to allow the court to extend the time for filing reaffirmation agreements. The committee note to this portion of the proposed rule indicates that it contemplates the court having broad discretion to permit the late filing of reaffirmation agreements. This, I submit, creates fertile ground for breeding otherwise unnecessary litigation. Of course, no one really cares whether or not a reaffirmation agreement is enforceable until someone has defaulted in the performance of their obligations under it. I can easily imagine scenarios in which reaffirmation agreements are not filed until someone becomes interested in enforcing them. Of course, under those circumstances, the party in default would certainly like to have the opportunity to persuade the court that, in the proper exercise of its discretion, it should not permit the untimely filing – thereby rendering the agreement unenforceable. To make matters worse, this will often be taking place years after the bankruptcy case has been closed. Consequently, an issue which otherwise could quite rightly have been left to the state court – the enforcement of the reaffirmation agreement itself – will end up spawning satellite litigation in the bankruptcy court over a completely preliminary question – whether the belated filing of the reaffirmation agreement should be permitted.

It is in everyone's best interest for debtors and creditors to know precisely where they stand with one another at the conclusion of the bankruptcy. The proposed amendment to Rule 4008 does not facilitate this. Instead, by allowing reaffirmation agreements to be filed after – sometimes well after – the discharge has been entered, the proposed amendment leaves the relationship unsettled. Ambiguity is reduced when everyone can look to clearly discernable and readily identifiable rules to guide their conduct. Such rules also reduce the possibilities for litigation. I realize that it is not always possible to design procedural rules in ways that eliminate ambiguity or the possibility of litigation over their requirements. Nonetheless, this is not one of those situations. The deadline for filing reaffirmation agreements is one which readily lends itself to clearly identifiable, unambiguous deadlines. Indeed, Congress has already established such a deadline for the making of the agreement. The courts should reinforce that decision by creating an equally firm and identifiable deadline for the filing of the agreement.

I hope that the committee will reconsider its proposed amendment to Bankruptcy Rule 4008. I would suggest something along the following lines:

> A reaffirmation agreement shall be filed prior to the entry of an order granting a discharge. In the event additional time may be needed to file the agreement, the entry of discharge may be deferred in accordance with Rule 4004(c)(2).

Thank you for your consideration.

Respectfully yours,

Robert E. Grant

REG/JF

03-BK- 003

"Henry J. Sommer"
<hsommer@netaxs.com>

11/17/2003 10:11 AM

To: <Rules_Comments@ao.uscourts.gov>
cc:
Subject: Comment on Proposed Amendment to Bankruptcy Rule 4008.

I applaud the Advisory Committee for its proposal to set a deadline for the filing of reaffirmation agreements, which I have long advocated. However, I do not agree that the deadline should be 30 days after the discharge. My experience is that cases are sometimes closed immediately after the discharge is entered and that clerks refuse to accept filings in closed cases. Since this practice is unlikely to change, it makes sense to make the discharge date the deadline for filing a reaffirmation agreement, an agreement which in any event must be made before the discharge. In fact, I understand that a number of courts currently have local rules requiring reaffirmation agreements to be filed before the discharge, and there have been few problems with such rules.

If the Committee believes that a later deadline for filing is necessary, which creditors and perhaps some debtors' counsel would probably prefer, it should probably also amend Rule 5009 to prohibit the clerk's closing of the case until 30 days after discharge.

Henry J. Sommer
Philadelphia, PA
Phone 215-242-8639
Fax 215-242-2075

RECEIVED 12/12/03

03-BK-004

Mark Van Allsburg
12/11/2003 07:07 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Comment on Proposed FRBP 3004

Dear Committee Members:

The proposed rule provides that the Clerk provide notice to the trustee, the debtor and to the creditor when the trustee or the debtor files a claim on behalf of a creditor. The current rule has the same provision.

This is a real problem for the clerk's office. It is often very difficult to recognize that a claim has been filed by the trustee or by the debtor. Often the only clue is the signature on the bottom of the claim and the court staff does not pay much attention to this when docketing the claim.

Unless there is something in the **Code** which requires that notice be sent by the Clerk, then this rule should be written to require that the Clerk, <u>or some other person as the court directs</u>, shall send the notice. Or, and better yet, the rule could provide that the filing party serve copies of the claim to the creditor and trustee or debtor and then file a proof of service.

The wording of this section suggests that this duty cannot be delegated to another party which only makes sense if there is a Code provision which requires this. I don't see one -- although I could be wrong. Unless there is some good policy consideration this duty should be one which can be delegated.

Mark Van Allsburg
Clerk, USBC Hawaii

03-BK-004

12/12/03

Mark Van Allsburg
12/11/2003 07:32 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Proposed FRBP 4008

The proposed rule provides that parties will have 30 days after discharge to file a reaffirmation agreement. This rule is going to significantly delay the closing of cases. Presently this court, and probably many other courts, close cases at the same time as the discharge is issued. There are a lot of reaffirmation agreements filed and if we are required to allow such agreements to be filed for 30 days after the discharge then we will not close the cases for 30 additional days. And if it is a pro se debtor, the chances are really good that the closing will be delayed another 30-60 days for a hearing. I am not sure that this is terrible, but it will negatively affect creditors who waiting until a case is closed before certain collection actions [e.g. repossessions of collateral on debts which have not been reaffirmed. In the past, the parties were motivated to get reaffirmations done well before a discharge because they did not know with certainty when the discharge would be issued. I think that this is going to cause cases to last longer and that this will have negative effects.

Mark Van Allsburg
Clerk, USBC Hawaii

RECEIVED 1/13/04

03-BK-00

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
501 WEST TENTH STREET, ROOM 128
FORT WORTH, TX 76102-3643

CHAMBERS OF
DENNIS MICHAEL LYNN
U.S. BANKRUPTCY JUDGE

Telephone: (817) 333-6020
Facsimile: (817) 333-6002

January 6, 2004

Honorable A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Small:

I respectfully submit the following suggestions regarding the proposed amendments to the Federal Rules of Bankruptcy Procedure:

1. In the first sentence of Rule 3005, the reference should be to "Rule 3002(c)" to conform to the amendment to Rule 3004.

2. I would also suggest moving the later phrase "file a proof of the claim" to follow the word "may" in order to conform to Rule 3004.

3. I suggest further amending Rule 9006 to limit after-the-fact extensions of time for filing proofs of claim under Rules 3004 and 3005 based on excusable neglect. Extension under Rule 3004 or 3005 should only be permissible to the extent allowed under Rule 3002(c) or Rule 3003(c).

I hope these suggestions are of use.

Sincerely,

Dennis Michael Lynn

DML:bj

RECEIVED 2/14/04
Via E-mail

03-AP-393

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON FEDERAL COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

03-BK-006

03-CV-008

03-CR-004

February 13, 2004

Via E-Mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Federal Rule of Appellate Procedure 32.1

Dear Mr. McCabe:

The Advisory Committee on Appellate Rules of the United States Judicial Conference (the "Advisory Committee") has proposed Federal Rule of Appellate Procedure 32.1, requiring circuit courts to permit citation of "unpublished" judicial opinions, orders, judgments and other written dispositions.

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed proposed Federal Rule of Appellate Procedure 32.1, and appreciates the opportunity to submit these comments.[1] The Committee believes the new rule would have adverse effects on access to and administration of justice in the federal courts, and therefore opposes proposed Rule 32.1.[2]

The Committee has considered the Report of the Advisory Committee on Appellate Rules, dated May 22, 2003 ("Advisory Committee Report"), and the arguments in favor of and against the adoption of Rule 32.1. The Committee recognizes that certain considerations might weigh in favor of Rule 32.1. The Advisory Committee states that an estimated 80 percent of opinions issued by the circuit courts during recent years have been designated "unpublished." As a result, the Advisory Committee Note recommends adoption of the new rule for two

[1] The Committee's comments on other proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure are contained in a separate letter.

[2] By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, immigration, and appellate experience.

essential reasons: (1) to create a uniform standard of citation among the nation's courts,[3] and (2) to eliminate the risk of sanctions for citation of unpublished opinions.[4] Although these goals are well-intentioned, the adoption of Rule 32.1 will likely lead to negative consequences which far outweigh any potential benefits.

The Committee believes that adoption of Rule 32.1 would adversely impact access to justice by certain disadvantaged parties – including non-institutional, *pro se*, and prisoner litigants – while providing an advantage to institutional litigants with significant resources to monitor and analyze the vast number of unpublished decisions – such as the U.S. Department of Justice and institutional litigants. Initial access to unpublished decisions will be dependent upon computers and Internet access. Those parties lacking the necessary resources – or even the access to such resources in the case of prisoners – would be denied access to potentially relevant legal authority. Such limited access would unfairly disadvantage non-institutional, *pro se*, and prisoner litigants.[5]

The Committee also considered whether Rule 32.1 would result in a decrease in judicial efficiency and therefore impair the quality of justice. The Committee believes Rule 32.1 would undermine the courts' effective use of summary dispositions in routine cases. Each court should maintain the discretion to issue unpublished, uncitable opinions, briefly informing the parties of the decisional basis in routine cases. These non-precedential cases, presenting simple issues of well-settled law, are appropriate for unpublished summary disposition, without the discussion, reasoning and analysis necessary for opinions which may later be cited.

The Committee evaluated opposing scenarios that would likely result from the adoption of Rule 32.1. The Committee believes courts may spend significantly greater resources and time preparing unpublished decisions if they were made citable by Rule 32.1. The Committee is concerned that if unpublished decisions could be cited beyond the scope of each particular case,

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[3] Local circuit rules differ in their treatment of the citation of unpublished opinions – some allow it, others do not. According to the Advisory Committee, the "conflicting rules create a hardship for practitioners, especially those who practice in more than one circuit." Advisory Committee Report at 27. The Ninth Circuit Court of Appeals and district courts within the Ninth Circuit prohibit citation of "unpublished" opinions except in very limited circumstances. The Advisory Committee recognized that all circuit courts allow unpublished opinions to be cited in some circumstances, such as to support claims involving issue preclusion, claim preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Advisory Committee Report at 31.

[4] The Advisory Committee states that it "believes that restrictions on the citation of 'unpublished' or 'non-precedential' opinions – the violation of which can lead to sanctions or to formal charges of unethical conduct – are wrong as a policy matter." Advisory Committee Report at 27. According to the Advisory Committee, Rule 32.1 "will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public." Id. at 35.

[5] Some members of the Committee believe the potential impact of Rule 32.1 should be evaluated empirically, after full implementation of the E-Government Act of 2002. Under the E-Government Act of 2002, every court of appeals will be required to post all of its decisions – including unpublished decisions – on its website. That might have an impact on access to unpublished opinions, at least for litigants who otherwise have access to computers and the Internet.

authoring judges would likely spend unnecessary time and resources preparing carefully reasoned opinions in routine cases. Under this scenario, the Committee believes that Rule 32.1 is likely to impair the administration of justice by (1) needlessly increasing judicial workloads in the issuance of routine, unpublished case decisions, (2) diverting valuable judicial time and resources from crafting important published decisions affecting the law of a circuit, and (3) lengthening the period of time between the filing of an appeal and its disposition.[6] Alternatively, Rule 32.1 may lead courts to conserve judicial resources by issuing single-word dispositions in routine cases (e.g., "affirmed," "reversed"), rather than devoting time to crafting a carefully-worded opinion that sets forth the grounds or legal bases for disposition. Such an approach would allow courts to avoid drafting the brief statement found in current unpublished decisions, but would deprive litigants of any explanation of the court's decision. Moreover, the absence of even a short, plain explanation may adversely affect further appellate review. Neither scenario noted above would be a desirable result.

For the reasons discussed above, the Committee opposes the adoption of proposed Rule 32.1.

Disclaimer

This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Robert J. Schulze, Chair
State Bar Committee on Federal Courts

cc: Members, State Bar Committee on Federal Courts
Saul Bercovitch, Staff Attorney, State Bar of California

[6] The Committee understands that, in the Ninth Circuit, unpublished cases outnumber published cases by a factor of more than 5 to 1. Rule 32.1 could therefore have a significant impact on the time and attention devoted to researching and preparing the large body of unpublished decisions, which would likely slow judicial disposition rates significantly. *See Hart v. Messenari*, 266 F.3d 1155, 1178 (9th Cir. 2001) ("[T]he judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision.")

THE STATE BAR OF CALIFORNIA

– COMMITTEE ON FEDERAL COURTS

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

February 13, 2004

Via E-Mail: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Re: Proposed Amendments to the Federal Rules

Dear Mr. McCabe:

The State Bar of California's Committee on Federal Courts ("Committee") has reviewed and analyzed the proposed amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, and appreciates the opportunity to submit these comments.* By way of background, the Committee is comprised of attorneys throughout the State of California who specialize in federal court practice and volunteer their time and expertise to analyze and comment upon matters that have an impact on federal court practice in California. The Committee consists of a broad range of federal practitioners, including members with civil, criminal, bankruptcy, immigration, and appellate experience.

I. FEDERAL RULES OF APPELLATE PROCEDURE

A. Rule 4

The Committee supports in part an amendment to Rule 4(a)(6) proposed by the Advisory Committee on Appellate Rules, and suggests certain modifications to the proposed amendment.

Under Rule 4(a)(1)(A), an appellant must appeal a judgment or order within 30 days after its entry. Rule 4(a)(6) permits the district court to reopen the time for noticing an appeal on the motion of an appellant who has missed the deadline because he did not receive prompt notice of entry of the judgment or order in question. The proposed amendment to Rule 4(a)(6) would

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* The Committee's comments on proposed Federal Rule of Appellate Procedure 32.1 are contained in a separate letter.

substantively alter the Rule by changing (1) the circumstances qualifying as the threshold failure to receive notice, and (2) what triggers the deadline for bringing the motion.

The Committee supports the amendment as it relates to number (1), but proposes a somewhat different approach as to number (2). Generally, the Committee understands that the proposed amendment is intended to add clarity and certainty to the circumstances in which Rule 4(a)(6) comes into play; part (1) appears to achieve this goal, but part (2) does not.

1) Proposed amendment affecting the circumstances qualifying as the threshold failure to receive notice.

The Rule presently allows a motion to reopen the time for noticing an appeal when the appealing party was entitled to but did not timely receive notice, without further defining the term "notice." The amendment would specify that the notice to which the Rule refers is "notice under Federal Rule of Civil Procedure 77(d)." This change would appear to achieve the desired goal of eliminating litigation, confusion, and possible circuit splits on that issue. Therefore, the Committee supports this part of the proposed amendment.

2) Proposed amendment affecting what triggers the deadline for bringing the motion.

The Rule presently sets a time limit for bringing a motion for additional time to file the notice of appeal "within seven days after the moving party receives notice of the entry." The proposed amendment would change this time limit to "within 7 days after the moving party receives *or observes written* notice of the entry *from any source*." (Emphasis added.) The Committee believes this change would increase rather than decrease litigation, and would result in confusion and possible circuit splits regarding proper application of the revised Rule.

The proposed new requirement that the triggering notice be "written" appears to be an improvement over the present version of the Rule. The Rule currently refers to "notice" as triggering the seven-day deadline without stating whether that notice must be in writing. Some circuits have held that the notice must be written (*e.g., Bass v. U.S. Dept. of Agriculture*, 211 F.3d 959, 963 (5th Cir. 2000) (collecting cases)), while others such as the Ninth Circuit have held that oral notice is a sufficient trigger if the "quality of the communication" makes it "the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rentao, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). The amendment cures this conflict – as well as hair-splitting regarding when oral notice is the equivalent of written notice – by starting the clock only upon "written" notice of the judgment or order to be appealed.

However, the requirement that the notice be written does not eliminate all ambiguity or potential for litigation over when the time for bringing a motion under the Rule has begun to run. For example, it is not clear whether an e-mail is a "written" notice. *Cf., Carafano v. Metrosplash.Com. Inc.*, 339 F.3d 1119, 1122 (9th Cir. 2003) ("she also received numerous phone calls, voicemail messages, written correspondence, and e-mail from fans through her professional e-mail account").

Another proposed change to the Rule actually introduces new ambiguities. Specifically, under the proposed amendment, the seven-day clock begins running when the moving party "receives *or observes*" notice "*from any source*." (Emphasis added.) This appears to be an expansion of the circumstances under which the time to bring a motion starts to run. Because the proposed amendment opens the door to more informal methods of receiving notice, it introduces new uncertainties regarding when the time for bringing a motion under the Rule has begun to run.

Factual disputes regarding whether notice has been "observed" are likely to arise when a party opposing a motion under this section tries to show that the moving party had "observed" a notice that he had not "received." If, for example, the moving party's counsel can be shown to have looked at the docket in the court's office, or to have visited a website on which the docket is posted, the court might have to determine whether he or she actually focused on the line item indicating entry of the judgment or order.

It appears, then, that in attempting to bring greater clarity and certainty to the Rule's application, the proposed amendment gives with the right hand but then takes away with the left. The amendment requiring the triggering notice to be "written" should instead be coupled with the requirement that the moving party has actually received a piece of paper containing the notice, rather than merely "observing" the notice in some unspecified manner subject to dispute. Receipt of written notice is objectively determinable and less prone to difficult factual determinations than mere observation, which can be fraught with difficulties of proof.

The Committee believes that a better approach would be to tie the triggering event for filing a motion, like the circumstances qualifying as the threshold failure to receive notice, to the well-defined event of notice under Federal Rule of Civil Procedure 77(d). Specifically, the Rule should be amended to require that the motion be filed within a specified time after notice under Federal Rule of Civil Procedure 77(d) has been given. This change, like the other part of the amendment discussed above, would add clarity and certainty to the Rule, rather than re-injecting the uncertainty that the first part of the amendment was intended to eliminate.

The Committee therefore recommends that the proposed amendment should allow a party to bring a motion to reopen the time to file a notice of appeal only if:

> "the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party is given notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed, whichever is earlier."

B. Rules 26 and 45

The proposed amendments to Rules 26 and 45 redesignate "Presidents Day" as "Washington's Birthday" to conform to 5 U.S.C. § 6103(a), the statute officially establishing the

third Monday in February as "Washington's Birthday." The Committee supports this amendment.

C. Rule 27

The Committee supports the proposed amendment to proposed Rule 27(d)(1)(E), which provides that a motion, a response to a motion, and a reply to a response to a motion must comply with the typeface requirements of FRAP 32(a)(5) and the typestyle requirements of Rule 32(a)(6). The purpose of the proposed new subdivision (E) is to promote uniformity in federal appellate practice and to prevent abuses that might occur if no restrictions were placed on the size of typeface used in motion papers. This addition represents an attempt to promote fairness so as to better ensure that all parties have the same amount of text available for inclusion in their appellate motion papers.

D. Rule 28

The proposed change to Rule 28 would amend subdivision (c), addressing reply briefs, to delete a sentence that authorized an appellee that had cross-appealed to file a brief in reply to the appellant's response. All rules regarding briefing in cases involving cross-appeals have been consolidated into Rule 28.1. The proposed amendments would also delete subdivision (h), addressed to briefs in a case involving a cross-appeal. All rules involving such briefing have been consolidated into new Rule 28.1.

The Committee supports the proposed amendments to Rule 28 because it makes more sense to have all of the rules that pertain to cross-appeals consolidated under one rule.

E. Rule 28.1

New Rule 28.1 would provide a comprehensive set of rules governing briefing in cases involving cross-appeals. Some existing rules have been moved into new Rule 28.1 and some new provisions have been added to fill the gap in the existing rules. The new rules reflect the current practice of the large majority of the circuits and have been patterned after the requirements of Federal Rules of Appellate Procedure 28, 31 and 32 on briefs filed in cases that do not involve cross-appeals. Subdivision (c) provides for the filing of four briefs in a case involving a cross-appeal:

(1) "appellant's principal brief" must comply with Rule 28(a), must not exceed 30 pages, and it must be served and filed within 40 days after the record is filed;

(2) "appellee's principal and response brief" serves as the principal brief on the cross-appeal, it must also comply with Rule 28(a), must not exceed 35 pages, and must be served and filed within 30 days after the appellant's principal brief is served;

(3) "appellant's response and reply brief" must comply with Rule 28(a)(2) –(9) and (11), must not exceed 30 pages, and must be served and filed within 30 days after the appellee's principal and response brief is served; and

(4) "appellee's reply brief" must comply with Rule 28(c), must not exceed 15 pages, and must be served and filed within 14 days after appellant's response and reply brief is served.

In addition, Rule 28.1 provides for type-volume limitations. The type-volume limitations allow an appellant 14,000 words in its principal brief and 14,000 in its combined response and reply brief, for a total of 28,000 words. The appellee/cross-appellant is allowed 16,500 words for its combined principle brief and response brief and 7,000 for its reply brief for a total of 23,500 words. The Committee agrees that because cross-appeals are often protective in nature and the issues raised are often related to the underlying appeal, the cross-appellant does not necessarily always need as many words/length of brief as the appellant. Moreover, if a particular cross-appellant finds that he or she is in need of additional words/length of brief to argue his or her position, that cross-appellant may then file the appropriate motion with the court.

In summary, the Committee supports proposed Rule 28.1 as drafted.

F. Rule 34

The proposed amendment to Rule 34 is found at subdivision (d), addressing cross-appeals and separate appeals. A cross-reference has been changed to reflect the fact that, as part of an effort to collect within one rule all provisions regarding briefing in cases involving cross-appeals, former Rule 28(h) has been abrogated and its contents moved to new Rule 28.1(b).

The Committee supports this amendment.

G. Rule 35

The Committee supports the proposed amendment to Rule 35(a), which addresses when a hearing or rehearing en banc may be ordered by a court of appeals. The new rule would amend Rule 35(a) so that a "majority of the circuit judges who are in regular active service *and who are not disqualified* may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc." (proposed amendment in italics). Currently, two national standards – 28 U.S.C. § 46(c) and Rule 35(a) – provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these current standards apply to all of the courts of appeals, in practice, the circuits follow three very different approaches when one (or more) active judges are disqualified, as the Advisory Committee has recognized. Under the new rule, all circuits would follow the "case majority" approach, whereby disqualified judges would not be counted in the base in calculating whether a majority of judges have voted to hear a case en banc.

The Committee supports the proposed amendment for the same reasons set forth by the Advisory Committee. First, the Committee believes that it is important for all circuits to follow a consistent approach with respect to when a hearing or rehearing en banc is ordered. There are fundamental fairness concerns when an appellant's opportunity to have a hearing or rehearing en banc is largely dictated by the differing procedural approaches of the various circuits. Therefore, the Committee agrees with the proposed Committee Note that the courts of appeals "should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially, when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches." Second, the "absolute majority" approach[1] has an important drawback because it treats a disqualified judge, as a practical matter, as having voted against hearing a case en banc, even when that is not in fact true. Finally, the Committee agrees that the absolute majority approach is less preferable than the case majority approach, because the former can lead to the unjust result whereby the en banc court is left without authority to overturn a panel decision with which almost all of the circuit's active judges disagree.[2]

II. FEDERAL RULES OF BANKRUPTCY PROCEDURE

The Committee supports the proposed amendments to Bankruptcy Rules 1007, 3004, 3005, 4008, 7004, and 9005. The proposed amendments are designed to make notice provisions within the Rules consistent, and follow local practice.

III. FEDERAL RULES OF CIVIL PROCEDURE

A. Rule 5.1

New Rule 5.1 would impose a notice requirement on parties and a certification requirement on courts in cases where a party questions the constitutionality of a federal or state statute but the federal government (in the case of a challenge to a federal statute) or the state government (in the case of a challenge to a state statute) is not a party to the case. The purpose of these notice and certification requirements is to give the federal or state government an opportunity to intervene in the litigation.

---

[1] Under this approach, disqualified judges count in the base in considering whether a "majority" of judges have voted for hearing or rehearing en banc.

[2] For example, in a case in which five of a circuit's twelve active judges are disqualified, the case cannot be heard en banc even if six of the seven non-disqualified judges strongly disagree with the panel opinion, thereby permitting one active judge effectively to control circuit precedent, even over the objection of all of his or her colleagues.

Relocating the existing notice requirement from Rule 24 seems likely to highlight the notice requirement in a way the current rules fail to do. Imposing the notice requirement on the party making the constitutional argument seems logical, not particularly burdensome, and fair in light of the no-forfeiture provision of proposed subdivision (d). Accordingly, the Committee supports the concept underlying the proposed rule.

The Committee does not support, however, two specific provisions of the rule, and recommends that these provisions be changed. First, in subdivision (c) the proposed rule sets a minimum 60-day period for intervention by the federal or state government. The Committee disagrees with this provision, because the Committee believes it could tend to freeze action in a case for that 60-day period, to the potential detriment of a plaintiff seeking timely relief.[3] Rather than setting a blanket 60-day intervention period, the Committee believes the rule should leave the timing-of-intervention issue to the discretion of the courts, since in individual cases it likely will make sense to allow for a shorter or longer intervention period as circumstances vary.

The Committee notes that while current law provides for intervention of right by the federal government or a state government in a case raising a constitutional challenge, there is no minimum time period for intervention specified under current law. 28 U.S.C. § 2403. The Committee is aware of no evidence showing that the lack of a specified minimum period for intervention has caused any prejudice to the ability of the federal and state governments to win admission to cases in order to defend the constitutionality of their laws. The Committee also notes that Federal Rule of Civil Procedure 24 does not set a minimum period for intervention generally and instead provides only that intervention must be "timely," with timeliness determined by the circumstances of the individual case. Fed. R. Civ. P. 24(a), (b). To follow the same timing principle in new Rule 5.1, the Committee urges that subdivision (c) be deleted from the proposed rule.

Finally, the Committee is not persuaded by the justification for the 60-day intervention period advanced in the Committee Note – that this period "mirrors" the 60-day period established by Rule 12(a)(3)(A) for the federal government to file an answer to a complaint. Timing considerations can be different at the beginning of a case than in a case that may have been on file for months or years, as numerous cases subject to the notice requirement of proposed Rule 5.1 will have been. The Committee also notes that certain statutes require the federal government to answer complaints in less than 60 days, so the 60-day period established by Rule12(a)(3)(A) does not apply uniformly in all cases. *See, e.g.*, 5 U.S.C. § 552(a)(4)(C) (requiring federal government to answer Freedom of Information Act complaint within 30 days); 16 U.S.C. § 1855(f)(3)(A) (requiring federal government to answer complaint under Magnuson-Stevens Act within 45 days).

[3] The Committee recognizes that the Committee Note states that "the court retains authority to grant any appropriate interlocutory relief" during the pendency of the 60-day period. As a practical matter, though, the Committee believes that the specification of a minimum 60-day intervention period could make it less likely that a court will grant relief during this period, as some courts will be inclined to wait 60 days before acting.

As a separate issue, the Committee notes that, read literally, proposed Rule 5.1(a) would seem to require a party to file multiple notices of constitutional questions in a single case, since such a notice seemingly must be filed after each "pleading, written motion, or other paper" that draws the constitutionality of a state or federal statute into question. Such a requirement for multiple notices seems unnecessary to accomplish the purpose of providing notice, and unreasonably burdensome to the party raising the constitutional challenge. The Committee suggests that the proposed rule be redrafted to provide that a party need only file a notice of constitutionality once in any given case.

B. Rule 6(e)

Rule 6(e) sets forth the method for counting the time to respond to a pleading when the pleading is served by mail or one of the other methods set forth in Rule 5. Currently, Rule 6(e) provides that three additional days are to be provided but fails to state whether those days are to be added to the beginning or end of the prescribed period or taken into account by some other means. The proposed amendment clarifies that the additional days added to the response time are to be added after the prescribed period expires. The Committee supports this clarification.

C. Rule 27

The Committee supports the proposed amendments to Rule 27, which correct an outdated reference to Rule 4(d), and make other conforming changes.

D. Rule 45

The Committee supports the proposed amendments to Rule 45, which would be updated to conform to Rule 30, requiring that a notice of deposition set forth the means by which the deposing party intends to record the deposition

IV. FEDERAL RULES OF CRIMINAL PROCEDURE

A. Rule 32

The Committee supports the proposed amendments to Rule 32, which would be modified to provide for allocution for victims of felonies that do not involve either sexual abuse or violence.

B. Rule 32.1

The Committee supports the proposed amendments to Rule 32.1, which would be modified to address allocution rights at revocation and modification hearings.

C. <u>Rule 59</u>

The Committee supports proposed new Rule 59, which sets forth a procedure for a district judge to review nondispositive and dispositive decisions by magistrate judges.

<u>Disclaimer</u>

This position is only that of the State Bar of California's Committee on Federal Courts. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

Robert J. Schulze, Chair
State Bar Committee on Federal Courts

cc: Members, State Bar Committee on Federal Courts
Saul Bercovitch, Staff Attorney, State Bar of California

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Los Angeles, CA 90067
Ph. (310) 553-3355 • (800) 444-0020
Fx. (310) 553-7660
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1/29/04
Via Internet
03-CV-012
03-BK-007

January 29, 2004

Peter G. McCabe, Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the Courts
One Columbus Circle, N.E.
Washington, DC 20054

Dear Mr. McCabe:

Please find attached comments on proposed changes to Federal Rule of Civil Procedure 6(e) and Federal Rule of Bankruptcy Procedure 9006. I have also submitted these comments electronically via the Internet.

Sincerely,

Alex Manners
Director of Product Development
CompuLaw LLC

Comment on Proposed Change to Federal Rule of Civil Procedure 6(e) and Federal Rule of Bankruptcy Procedure 9006.

The current language of Rule 6(e) is silent on how time periods of less than 11 days are calculated when service is performed by mail and the time period is therefore subject to the provisions of Rule 6(a) and (e). The proposed amendment is a step in the right direction, but is still ambiguous as to this issue. The amendment also leaves another issue unresolved, and creates a new area of ambiguity, as discussed below.

The proposed amendment does nothing to clarify the question of whether the three additional days added by Rule 6(e) are calendar days, or are subject to Rule 6(a) and are to be counted as court days (excluding holidays and weekends). This issue can be resolved by amending Rule 6(e) to state that the three additional days are calendar days, or by adding language to state that the three days are not subject to the requirements of Rule 6(a).

Furthermore, the proposed amendment to Rule 6(e) may lead to confusion when calculating deadlines where the original period counted is longer than 10 days and, therefore, includes holidays and weekends. The question that arises is: If the last day of the original period lands on a holiday or weekend, does one move the date to the next court day pursuant to Rule 6(a) and then count the three additional days? Pursuant to the proposed language of Rule 6(e), 'the period' may be interpreted as the final day resulting from the original calculation, with the three days 'added after the period.'

For example,

> If a party is to respond to a discovery request 30 days after service of the demand, and the demand is served by mail, and the 30th day is a Saturday, then the last day of the original period for response would be moved to the following Monday. Then, pursuant to proposed Rule 6(e), if the 3 days are added after the prescribed period, the response would be due on the following Thursday.

This method of calculation would be a departure from the traditional and accepted method currently used, whereby attorneys simply count 33 days to determine the deadline.

The following changes to the proposed rule would clarify the issues stated above.

> (e) 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)(B),(C), or (D), 3 calendar days are added to the period, unless the period is less than 11 days, in which case 3 calendar days are added after the period.

However, the new language that is proposed for Rule 6(e) and used in the suggestion above may still be confusing, as the difference between adding three days 'to' or adding three days 'after' the period is not obvious. While in the process of amending this rule,

why partially clarify it when there is an opportunity to write a clear and unambiguous rule? With this in mind, Rule 6(e) should be amended as follows:

(e) 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)(B),(C), or (D), 3 calendar days are added to the period. If the original period is less than 11 days, the original period is subject to Rule 6(a), whereby holidays and weekends are excluded from the computation, and then three calendar days are added.

All comments here also apply to the proposed amendments to Federal Rule of Bankruptcy Procedure Rule 9006.

2003 CIVIL RULES COMMENTS CHART

03-CV	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
03-CV-001	Thomas J. Yerbich, Court Rules Attorney, District of Alaska	10/7	6		
03-CV-002 (Also 03-AP-011, 03-BK-001, 03-CR-002)	Jack E. Horsley, J.D.	10/17	All		
03-CV-003	Prof. Patrick J. Schiltz	10/20	6		
03-CV-004 (Also 03-AP-014)	Paul McNeill, Esq.	10/21	All		
03-CV-005 (Also 03-BK-F)	Judge Geraldine Mund	10/21	5.1		
03-CV-006	Eugene F. Hestres, Esq.	10/29	45		
03-CV-007	S. Christopher Slatten, Esq.	12/19	6		
03-CV-008 (Also 03-AP-393. 03-BK-006 03-CV-008 03-CR-004)	State Bar of California Committee on Federal Courts (Robert J. Schulze, Chair)	2/14/04	5.1, 6, 27, 45		
03-CV-009 (Also 03-AP-394 03-AR-005)	State Bar of Michigan Committee on U.S. Courts (Joseph G. Scoville, Chair)	2/5/04	5.1, 6		
03-CV-010 (Also 03-AP-395)	Bill Lockyer, Attorney General, State of California	2/9/04	5.1		

03-CV	NAME OF INDIVIDUAL AND/OR ORGANIZATION	DATE REC'D	RULE	DATE RESP	DATE OF FOLLOW UP
03-CV-011	U.S. Dept. of Justice (Peter D. Keisler, Assistant Attorney General, Civil Division)	2/13/04	5.1, 6		
03-CV-012 (Also 03-BK-007	Alex Manners	1/29/04	6		
03-CV-013 (Also 03-CR-006)	Federal Magistrate Judges Association (Judge Louisa S. Porter, President)	2/9/04	5.1, 6, 27, 45, and Admiralty Rules B & C		

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03-CV-001

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA
COURT RULES ATTORNEY
222 West Seventh Avenue, Stop 4
Anchorage, Alaska 99513-7564
e-mail: thomas_yerbich@akd.uscourts.gov

Thomas J. Yerbich
Court Rules Attorney

(907) 677-6136

September 26, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, DC 20544-0001

Re: Proposed Amendment to Rule 6, F.R.Civ.P (December 2005 Class)

Dear Mr. McCabe:

It is respectfully suggested that perhaps the Advisory Committee rejected what is the simplest approach, adding the three days to the prescribed period, too quickly in its attempt to clarify the application of Rule 6(e). The perceived impact on Rule 6(a) could easily be avoided by simply adding in the third sentence the words "determined without regard to subsection (e)" after the word "days" and before the comma (,). In so doing, the 10 days would not become 13 as the Committee feared. In tracking response times, this court uses the method of adding the three days to the prescribed number of days and, where the prescribed period is less than 11 days, uses business days instead of calendar days. For example, if the prescribed period is 10 days, count out 10 business days, then add three calendar days. If the prescribed period was 11 days or more, simply add the three days and count calendar days, *e.g.*, a 15-day prescribed period becomes 18 calendar days. In either instance, if after adding the three calendar days the last day falls on a Saturday, Sunday or Holiday, the response is due on the next business day. This is a very straightforward, uncomplicated method. In addition, in using that method, the "business" days available for response (disregarding any possible intervening holidays) for a 15-day period is fairly uniform: 13 days if served on Monday, Tuesday or Wednesday, and 12 days if served on Thursday or Friday.

The Committee appears to have focused almost exclusively on the interaction between 6(e) and 6(a). What the Committee does not appear to have addressed is the effect of substituting "after" for "to" in 6(e) when the last day of the prescribed period ends on a Saturday: as will be the case in every instance where the prescribed period is 15 days (a commonly used prescribed number of days) and the day of service is a Friday. If one simply adds three days "to" the 15 days results in the response being due 18 days after mailing, or on a Tuesday (even if Monday is a holiday). However, if the prescribed period is computed as provided in Rule 6(a), the 15 days would not end on Saturday but on the following Monday (if not a holiday) or Tuesday (if the following Monday is a holiday). Adding the three days to that would make the response due on the following Thursday (if Monday is not a holiday) or Friday (if Monday is a holiday). This is going to require those responsible for tracking response time (court and law office support staff) to remember that, if the service date is

a Friday, one can not simply count out the requisite of days (if service is effected on a day other than Friday, it makes no difference which method is used unless the last day of the prescribed period is a Tuesday that is also a holiday). In addition, if service is on Friday, the period in which to respond is 14 business days compared to 12 days if served on a Thursday or 13 days if served on any other day.[1] The rule in many offices will be "serve on Thursday and never on Friday." If something is mailed late on Thursday, it will probably not be delivered until the following Monday. If mailed on Friday, it will also probably be received on the following Monday. The difference is that the recipient has 13 full business days to respond to the Friday service and only 11 full business days to respond to the Thursday service! Surely this is an unintended result. It also provides one more gambit for attorneys to employ in the game of one-upmanship that far too many practitioners employ these days.[2]

A similar situation arises when the last prescribed day falls on a Tuesday that also happens to be one of the traditional holidays. Although the effect on the number of days to respond is not that dramatic, it does impose somewhat of a greater burden on those tracking response times. If the three days is simply added to the prescribed days, the response would come due on a Friday without further checking. However, the proposed amendment to 6(e) requires the "tracker" to note that the preceding Tuesday was a holiday and, therefore, the response is not due until the following Monday. Just one more intermediate count to be made and item to be checked; another potential area for errors to occur.

I suggest that there is an easier and less confusing method of clarifying the situation:

1. Amend subsection (e) by substituting "number of days" for "period" at the end of the sentence; and

2. To eliminate any adverse impact on the 11-day rule, in the third sentence of subsection (a), add "determined without regard to subsection (e)" after the word "days" and before the comma (,).

This approach eliminates the need to check whether the last day of the prescribed number of days falls on a Saturday, Sunday or holiday before adding the three days under Rule 6(e) yet results in uniformity. It also eliminates the significant disparity between Thursday or Friday service in those situations where the prescribed time is 15 days (or any other situation where the last prescribed day otherwise falls on a Saturday).

---

[1] For Friday service: five days of each of the first two following weeks plus four days of the third week following service. For Thursday service: one day of the week of service, five days in each of the first and second weeks following plus one day in the third week following service.

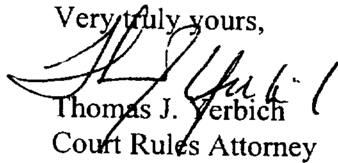
[2] The cynicism stemming from more than three decades in the practice of law and three score years of living does tend to surface from time to time.

One comment on counting the days if the time is determined in reverse, *i.e.*, preceding an event. The easiest solution to that is to have the prescribed period be "not later (or less) than the (number of days) before (the triggering date of event)." That way if the number of days counted backwards fall on a Saturday, Sunday or holiday, the due date would always be the last business day preceding. Perhaps this could be accomplished by adding a new subsection (f) to Rule 6 reading:

> Whenever a party has the right or is required to do some act or take some proceedings within a period of time before a specified date or event prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the right must be exercised, the required act performed or the proceedings taken, not later than the prescribed time preceding the specified date or event.

Thank you and the Advisory Committee for considering the foregoing comments.

Very truly yours,



Thomas J. Yerbich
Court Rules Attorney

"Schiltz, Patrick J."
<PJSCHILTZ@stthomas.edu>
10/15/2003 09:48 AM

To: "'McCabe Peter (Peter_McCabe@ao.uscourts.gov)'" <Peter_McCabe@ao.uscourts.gov>
cc: "'Cooper Edward (coopere@umich.edu)'" <coopere@umich.edu>, "'Rabiej John (John_Rabiej@ao.uscourts.gov)'" <John_Rabiej@ao.uscourts.gc "'Ishida James (James_Ishida@ao.uscourts.gov)'" <James_Ishida@ao.uscourts.gov>
Subject: Comment on Proposed Amendment to Civil Rule 6(e)

Dear Peter,

At the invitation of Ed Cooper, I submit this comment on the proposed amendment to Civil Rule 6(e).

I believe that the proposed amendment is sound and should be approved, but I recommend that language be added to the Committee Note to make certain that there is no ambiguity regarding the following situation: A paper is served by mail. The prescribed period is 30 days. The 30th day falls on a Saturday. Are the three days counted beginning on that Saturday — thus making the paper due on Tuesday — or are the three days counted beginning on Monday (when the prescribed period would expire under the time calculation provisions of the Civil Rules, in the absence of the three-day extension) — thus making the paper due on Thursday? Rule 6(e) is not entirely clear on this point.

In the Committee Note that I drafted for the proposed amendment to Appellate Rule 26(c) (which proposed amendment and Note have not, as of this writing, been approved by the Appellate Rules Committee), I described the operation of the proposed amendment as follows:

"Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday."

I also included the following example in the Note:

"To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005."

I recommend that the Civil Rules Committee add similar language -- and perhaps a similar example -- to the Note to the proposed amendment to Civil Rule 6(e).

Sincerely,
Patrick Schiltz

****
Prof. Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 LaSalle Avenue -- MSL 400
Minneapolis, MN 55403-2015

Phone: (651) 962-4896
Fax: (651) 962-4881
E-mail: pjschiltz@stthomas.edu
****

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S. CHRISTOPHER SLATTEN
7631 TAMPA WAY
SHREVEPORT, LOUISIANA 71105

03-CV-007

Tel: (318) 676-3265 **Fax: (318) 676-3274**

December 11, 2003

Peter G. McCabe
Secretary, Committee on Rules of Practice and Procedure
Administrative Office of the U. S. Courts
Washington, DC 20544

Re: Proposed Amendment to F.R.C.P. 6(e)

Dear Secretary McCabe:

I write to offer comments and suggestions about the proposed revision of Federal Rule of Civil Procedure 6(e). The proposed revision attempts to remove ambiguity from the rule, but I fear it does not quite get the job done in one respect. I suggest the addition of one word — calendar — to describe the additional three-day period granted by the rule. That simple change, already employed in the rule's F.R.A.P. counterpart, will remove all doubt on a nagging issue.

As proposed, the rule would read as follows:

> "Whenever a party must or may act within a prescribed period after service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days are added after the period."

The ambiguity about which I am writing stems from Rule 6(a)'s command that when a period of time prescribed by rule or order is less than 11 days, only business days are included in the computation; if the period is 11 days or more, all calendar days are counted. The intersection of Rules 6(a) and 6(e) results in three possible interpretations when the prescribed period is 10 days or less. A common situation in which the intersection is encountered is when a party must file his objections to a magistrate judge's report and recommendation within 10 days "after being served with a copy" of the recommendation. *See* 28 U.S.C. § 636(b)(1) and F.R.C.P. 72(b).

Some argue that when the 3-day mail rule is applicable to a 10-day period, the deadline is calculated by counting 10 business days plus 3 *business* days (because each of the two periods is less than 11 days). Others urge that three *calendar* days are added to the 10 business day period. A third (minority) view contends that a total of 13 days are now available and, because that is a period of 11 days or more, a count of 13 calendar days establishes the deadline. *See* 4B Wright & Miller, *Federal Practice and Procedure: Civil 3d* § 1171 (2002) and *Vaquillas Ranch Co., Ltd. v. Texaco Exploration and Production, Inc.*, 844 F.Supp. 1156 (S.D. Tex. 1994).

The text of the proposed revision squarely defeats the third argument by clarifying that the three days are added "after" the prescribed period. (The current rule says the three days are added "to" the prescribed period.) That change also appears to eliminate a related debate about whether the

three-day period is counted before or after the prescribed period is calculated. *See Kruger v. Apfel*, 25 F.Supp.2d 937 (E.D. Wis. 1998), *vacated on other grounds*, 214 F.3d 784 (7th Cir. 2000). The revision would not, however, make clear which of the first two options is correct. Are the "3 days ... added after the period" business or calendar days?

The Committee Note that follows the proposed revision provides an example that indicates the drafters intend the additional three-day period to be calendar days. In the example, a paper is mailed on Wednesday and the prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. The deadline is, therefore, the next business day, Monday. This example plainly indicates the three extra days are intended to be calendar days. I note, however, that the same Monday result would apply in the example even if the three-day period were business days. (Thursday, Friday and Monday).

Perhaps the Committee's example is sufficient to convince attorneys and judges that the rule is "10-business days plus three calendar days" when Rule 6(e) applies, but there is certainly room for doubt given Rule 6(a)'s indication that a three-day period means three business days. Given that potential for doubt, it would be preferable if the rule itself were clear on this important issue.

I suggest the Committee adopt the approach to this issue taken in F.R.A.P. 26(c). That rule specifies that when a party must act within a prescribed period following service, he gets an extra "3 calendar days". I suggest the word "calendar" also be inserted in F.R.C.P. 6(e) to avoid unnecessary ambiguity and keep the federal rules consistent in this regard. The Committee may also wish to consider proposing an amendment to Federal Rule of Criminal Procedure Article 45(e) to resolve the same ambiguity that resides in that rule.

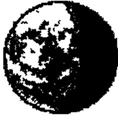
The simple addition of the word "calendar" to describe the additional 3-day period will avoid countless hours of wasted research by attorneys, judges and law clerks, will prevent numerous telephone calls to judge's chambers to ascertain deadlines, and may even prevent claims of legal malpractice based on a lawyer's incorrect guess at the interpretation of an ambiguous rule.

Thank you for your attention to these matters. I applaud the proposed clarification of Rule 6(e) and ask that you consider making this additional point of clarity during the process.

Yours truly,

Chris Slatten

RECEIVED 2/5/04



Nobody <nobody@uscbgov.ao.dcn>

02/05/2004 02:47 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Submission from http://www.uscourts.gov/rules/submit.html

03-CV-009 03-AP-394

03-CR-005

Salutation:
First: Joseph
MI: G
Last: Scoville
Org:

State Bar of Michigan, Committee on United States Courts

MailingAddress1: Michael Frank Building
MailingAddress2: 306 Townsend St
City: Lansing
State: Michigan
ZIP: 48933-2083
EmailAddress: scoville@miwd.uscourts.gov
Phone: (616) 456-2309
Fax:
Appellate: Yes
CivilRules: Yes
Comments:

February 5, 2004

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Re: Comments on Proposed Amendments to Civil and Appellate Rules

Dear Mr. McCabe:

I am writing as the chair of the State Bar of Michigan, Committee on the United States Courts ("U.S. Courts Committee"), to convey the Committee's comments on certain proposed amendments to the Civil and Appellate rules, published in August 2003. The U.S. Courts Committee is a standing committee of the State Bar of Michigan composed of practitioners and judges from both the Eastern and Western Districts of Michigan. The charge of the U.S. Courts Committee is "to concern itself with the administration, organization and operation of the United States Courts for the purpose of securing the effective administration of justice." In furtherance of this purpose, the U.S. Courts Committee has commented periodically on proposed amendments to the Federal Rules of Practice and Procedure,

focusing especially on the effect of proposed amendments from the practitioners' viewpoint. The comments submitted herein were approved at the Committee's meeting of December 9, 2003, and represent only the views of the Committee and not those of the State Bar of Michigan or its Board of Commissioners or Representative Assembly.

Rules of Civil Procedure

Rule 5.1, Constitutional Challenge to Statute - Notice and Certification; Rule 24(c), Intervention, Procedure. The proposal requires a party to give notice to the US or state attorney general when a filing questions the constitutionality of a federal or state law. The requirement is moved from Rule 24(c) to a new Rule 5.1. The rule is based on the requirement in 28 U.S.C. § 2403 for the court to certify such challenges to the attorney general and permit the attorney general to intervene.

The proposed amendment adds a requirement that a party not only "call the attention of the court" to the existence of such a challenge (present Rule 24(c)), but that the party also serve the attorney general. This is in addition to the court's notice to the attorney general. The proposal also adds a requirement for the court to set a deadline for the attorney general to intervene.

We recommend the following:

(a) The word "sued" should be deleted from proposed Rule 5.1(a)(1) and (a)(2), so that they read, respectively:

(1) if the question addresses an Act of Congress and no party is the United States, a United States agency, or an officer or employee of the United States sued in an official capacity .

(2) if the question addresses a state statute and no party is the state or a state officer, agency, or employee sued in an official capacity

As proposed, the rule would require notice when a governmental officer or employee is a plaintiff in an official capacity and a constitutional issue is raised, since, in that case, the officer is not "sued in an official capacity." The notice requirement should not apply in such a case, since the attorney general presumably represents an officer or employee suing in an official capacity. Dropping the word "sued" would limit the scope of the rule to cases where there is no governmental party or officer, either as a plaintiff or defendant. Fed. R. App. P. 44, a similar rule requiring notice of constitutional issues in the court of appeals, applies when an

agency, officer, or employee "is not a party in an official capacity" rather than "is not sued in an official capacity." Rule 5.1 should parallel the language of Fed. R. App. P. 44.

(b) The provisions in proposed Rules 5.1(a)(1)(B) and (a)(2)(B) requiring a party to serve notice on the attorney general should be deleted. This additional obligation on the party, not required by 28 U.S.C. § 2403, duplicates the court's certification of the issue to the attorney general under proposed Rule 5.1(b), a certification that the statute requires. There is no justification for placing a duplicative obligation on a party. Fed. R. App. P. 44, the corresponding appellate rule, does not require a party to serve notice but leaves it to the clerk to do so.

The advisory committee's report states that the "dual-notice requirement was drafted because the Department of Justice wishes to make quite sure that notice comes to its attention in timely fashion." We do not see why the court's certification would not provide timely notice, since the court presumably will give notice promptly after a party's filing of a notice of constitutional question under proposed Rule 5.1(a)(1)(A) or (a)(2)(A).

(c) If the advisory committee nonetheless decides to retain the provision requiring a party to serve notice, we recommend that proposed Rule 5.1(a)(2)(B) be revised to specify the manner of service on a state attorney general. Rule 5.1(a)(1)(B), by reference to Rule 4(i)(1)(B), specifies that service on the US attorney general is by registered or certified mail. The same method of service should be used for service on a state attorney general. We recommend that the phrase "by sending copies by registered or certified mail" be added to the end of Rule 5(a)(2)(B).

Rule 6(e), Additional Time After Certain Kinds of Service. Before commenting on the specific amendment proposed to Rule 6, we take this opportunity to advocate a complete overhaul of the methods of computing time set forth in the Federal Rules. It should now be clear that the computation of time under the Federal Rules has become unduly complicated and that ambiguities will remain, even after adoption of the amendment. For this reason, we strongly suggest that the Standing Committee reexamine the entire question of computation of time under the Civil, Criminal and Appellate Rules. We support a single method of computing time, applicable to all trial and appellate proceedings, based upon running time tied to a calendar week or multiples thereof. The only exception to the rule would arise when the last day of the period falls on a weekend or holiday. We are aware of several state systems that have adopted this method, including the State of Michigan. See Mich. Ct. R. 1.108.

We turn now to the proposed amendment, which deals

with an ambiguity in the current rule for the extension of a prescribed period of time by 3 days when service is by mail, by leaving a copy with the clerk for a person with no known mailing address, or by other consented means. The rule clarifies that the 3 days is added after the prescribed period of time, instead of before the period. The distinction makes a difference, as set out in the advisory committee's report. The amendment also clarifies that the 3 days is added "after the period" rather than added "to" the period. \1

FN
1. This makes a difference, for example, for a 10-day period. If 3 days are added "to" the period, it becomes a 13-day period and the exclusion of intervening weekends and holidays under Rule 6(a) does not apply. Adding the 3 days "after the period" preserves the exclusion of intervening weekends and holidays from the 10-day period and then adds the 3 days after computation of the period.

This amendment is desirable but does not address two other ambiguities in counting days. First is the question of whether the 3 days added under Rule 6(e) is itself a "period of time" under Rule 6(a) from which intervening weekends and holidays must be excluded. E.D. Mich. LR 6.1(b) addresses this by stating that the additional 3 days is "three consecutive calendar days." Although the advisory committee's report says that treating the 3 days as a separate period "can be rejected without regret," the proposed rule itself does not clearly exclude it. We recommend that the rule address this by modifying the last phrase in the rule to state "3 consecutive calendar days are added after the period."

The second ambiguity that should be addressed is how to apply the provision in Rule 6(a) extending the time period when the last day of the period falls on a weekend or holiday. Should that be applied before or after adding the 3 days under Rule 6(e)? E.D. Mich. LR 6.1 resolves this by specifying that the 3 days are added first and then, if the period as extended by 3 days ends on a weekend or holiday, the Rule 6(a) extension applies. We recommend that the following language be added: "The 3 days must be added before determining whether the last day of the period falls on a day that requires extension under Rule 6(a)."

The same problems addressed by the proposed amendment and our comments above arise under Fed. R. Crim. P. 45 and Fed. R. App. P. 26, the criminal and appellate counterparts to Fed. R. Civ. P. 6. Whatever amendments are proposed for the civil rules, there should be consistent amendments to the criminal and appellate rules.

Rules of
Appellate Procedure

New Rule 32.1, Citation of Unpublished

Opinions. This new rule would require courts to permit the citation of judicial opinions, orders, judgments or other written dispositions that have been designated as unpublished, non-precedential or the like. New Rule 32.1 would also require parties who cite unpublished or non-precedential opinions that are not available on a publicly accessible electronic database (such as Westlaw) to provide copies of those opinions to the court and to the other parties. The proposed rule does not address the precendential value that appellate courts must give to unpublished opinions.

The current local rules of some federal appellate courts abjuring the precedential value of their own unpublished opinions raises a troubling and controversial issue, and we agree with the criticisms of that practice set forth in the Advisory Committee note. For this reason, we would prefer that the proposed rule resolve this question completely by abolishing such restrictions. Nevertheless, we think that the proposed rule is a step in the right direction, as it will at eliminate local rules that restrict citation to unpublished authorities, such as 6 Cir.R.28 (g), and thereby bring uniformity among the Circuits and eliminate the threat of sanctions against those who transgress those local rules.

We appreciate the opportunity to comment on these proposed rule amendments.

Very truly yours,

/s/

Joseph G. Scoville

Chair, Committee on U.S Courts

State Bar of Michigan

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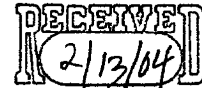
U. S. Department of Justice

Civil Division



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Office of the Assistant Attorney General

Washington, D.C. 20530

03-CV-011

February 13, 2004

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on Proposed (New) Federal Rule of Civil Procedure ("FRCP") 5.1 and the proposed amendments to FRCP 6(e). As the nation's principal litigator in the Federal courts, the Department has a strong and long-standing interest in participating in the rules amendment process. The Department takes particular interest in Proposed FRCP 5.1 as it seeks to implement the unique role of the Attorney General to defend Acts of Congress from constitutional challenge. The Department was directly involved in the drafting and shaping of the proposal from the outset, and we welcome this opportunity to express our strong support for the final proposal.

Proposed FRCP 5.1

Proposed FRCP 5.1 requires a party challenging the constitutionality of a statute in a non-government case to file a notice of constitutional challenge and serve a copy of the notice on the Attorney General.[1] The proposal implements the provisions of 28 U.S.C. § 2403, which provide that courts shall certify constitutional challenges to Acts of Congress to the Attorney General and permit the United States to intervene in the actions. Presently, the third sentence of FRCP 24 implements the certification requirement of § 2403, but there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding. Thus, the Department's primary purpose in supporting this proposal has been to increase the prospect that the Attorney General will receive notice in a timely manner. Each provision of the proposal is meant to serve this end.

[1] Proposed FRCP 5.1 also requires parties to notice the relevant State Attorney General when the constitutionality of state statutes are drawn into question. Although the Department has framed its comments around the rule's provisions that apply to constitutional challenges to Acts of Congress, our comments apply equally to the state statute provisions.

Proposed FRCP 5.1 does not alter the courts' statutory duty to certify a constitutional challenge under § 2403. Nonetheless, it is the Department's position that requiring notice from both the party challenging the statute and from the court will ensure that the Attorney General is made aware of constitutional challenges in a timely manner.[2] In response to any concern that the dual notice requirement creates an additional burden on the challenging party, it should be noted that FRCP 24(c) already imposes a duty on the challenging party to "call the attention of the court to its consequential duty" to certify the constitutional challenge. In addition, many district courts have imposed similar duties on challenging parties through local court rules.[3] To the extent that the proposal imposes the actual notice requirement directly on the party raising the challenge, it thereby reduces the initial burden on the courts and the clerks to identify cases in which certification under § 2403 is appropriate.

Cases in Which the New Rule Would Apply. Proposed FRCP 5.1 would apply in any case in which no party is the United States, a federal agency, or an officer or employee of the United States sued in an official capacity. Thus, it would apply even when one of the parties is a federal official sued in an individual capacity for acts and omissions occurring in connection with the performance of duties on behalf of the United States. Although the Department represents some officials sued in their individual capacities, these officials are sometimes represented by private counsel. Therefore, the Department supports the requirement of filing and serving notices in this subset of cases involving federal officials sued in their individual capacities.

Proposed FRCP 5.1 also provides that notice should be made when a party challenges an "Act of Congress." This term mirrors the term used in § 2403. The Department understands "Act of Congress" to encompass, at the least, all federal statutes, including joint resolutions. Moreover, although FRCP 24(c) applies when an Act of Congress that affects the public interest is challenged, the Rule would apply when any Act of Congress is challenged. It is the Department's belief that the Attorney General is in the best position to determine in the first instance whether an Act affects the public interest. A reviewing court can always disagree.

Time for Intervention/Stay of Proceedings Pending Appearance of the Attorney General. Proposed FRCP 5.1 requires that a court set a time to intervene for the Attorney General of not less than 60 days from the date of certification. The Department proposed that the Attorney General have at least a 60-day window to intervene in recognition of the Department's internal administrative

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[2] In instances in which a court sua sponte raises a constitutional challenge, the certification requirement of § 2403 will remain the only vehicle for notice to the Attorney General.

[3] See, e.g., S.D. Cal. 24.1; E.D. Cal. 24-133; N.D. Cal. 3-8; N.D. Ind. 24.1; S.D. Ind. 24.1; N.D. Iowa 24.1; S.D. Iowa 24.1; D. Kan. 24.1; M.D.N.C. 83.7; N.D. Okla. 24.1; D. Ore. 10.5; E.D. Wash. 24.1.

procedures that must be followed upon receipt of a notice.[4] These procedures include securing the Solicitor General's approval for intervention under 28 C.F.R. § 0.21. The Department nonetheless believes that the Rule does nothing to restrict the ability of the Attorney General to intervene under § 2403 in an action at any time. To clarify this important point, we suggest the inclusion of the following text in the Advisory Committee's Note:

> Nothing in this Rule shall be interpreted as restricting the ability of the Attorney General or his designee to intervene in an action more than 60 days after service of the notice or, in the event that there is noncompliance with this Rule, after a final order or judgment issues.

The proposed Committee Note does indicate that a court need not stay a case pending a response from the Attorney General. It suggests, however, that the court not make a final (as opposed to preliminary) determination sustaining a constitutional challenge before the 60 days (or whatever longer period is set by the court) for intervention has elapsed. The Note also reminds courts that a stay of proceedings might avoid a second round of briefing or a second hearing on the constitutional challenge should the Attorney General decide to intervene. The proposal, however, does not restrict a court's ability to reject a constitutional challenge at any time, even before notice and certification to the Attorney General. It is foreseeable that a district court will want the discretion to dismiss frivolous challenges to Acts of Congress without providing notice. The Department believes that providing the Attorney General with at least 60 days to intervene while leaving to the court the decision of whether to stay the proceedings or dismiss the challenge outright achieves the proper balance between ensuring that the Attorney General has an opportunity to intervene and avoiding any unnecessary delay.

Manner of Serving the Notice. Proposed FRCP 5.1 would require service of the notice on the Attorney General in the manner provided by FRCP 4(i)(1)(B), which is by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. The Department has considered various other methods for service, but has determined that service in the same manner that it receives complaints will best ensure timely and proper processing of notices.

The proposal also requires that the notice to the Attorney General include a copy of the pleading, motion, or paper raising the constitutional challenge. The Department believes strongly that because of the short time frame for the Attorney General to respond to 5.1 notices, it is important that the Department receive the paper raising the challenge as early as possible in order to analyze the challenge and decide whether to intervene. Requiring its inclusion with the notice will eliminate the added time necessary to obtain a copy of the relevant pleading and thus will serve to prevent any

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[4] The 60-day period mirrors the federal government's time to respond to complaints under FRCP 12(a)(3) and the federal government's time to file notices of appeal in Federal Rule of Appellate Procedure 4(a)(1)(B).

unnecessary delay in the court proceedings.

No Forfeiture. Proposed FRCP 5.1 carries forward similar text from FRCP 24(c) that the failure to file and send a notice does not forfeit a constitutional right.

Comparison with Parallel Appellate Rule 44. Proposed FRCP 5.1 is a departure from Federal Rule of Appellate Procedure 44. The Department deems such a departure justified due to the importance of the government's presence as a party in district court, where the factual record is made and constitutional arguments are developed. It also has been our experience that notification to the Attorney General under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure.

The Department strongly supports the enactment of Proposed FRCP 5.1 in its present form with one addition, as mentioned above, to the Advisory Committee's Note.

FRCP 6(e)

The Department supports the Committee's proposal to clarify FRCP 6(e). Our one suggestion is to change "3 days are added after the period" to "3 calendar days are added after the period." We believe this addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days.

We thank the Committee for this opportunity to share our views. If you have any further questions or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Peter D. Keisler
Assistant Attorney General
Civil Division

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: NATIONAL CREDITOR NOTICING RULES

The pending bankruptcy reform legislation includes a provision that is intended to create a national creditor noticing system to reduce costs and increase efficiency for creditors who are involved in a substantial number of cases nationwide. The legislation essentially would permit a creditor to register with any bankruptcy court to have notices sent to the creditor at the address submitted to the court. This system could create a number of problems, and the Technology Subcommittee, chaired by Judge Zilly, discussed and considered a variety of proposed rules changes to implement the legislation either in the form set out in section 315 of the reform legislation, or in some other form that still would permit national noticing of creditors but that might be more effective than the legislative proposal. After lengthy discussion, the Subcommittee was split as to whether a rules amendment is currently necessary. The Subcommittee instead offers the following reasons for not seeking to amend Rule 2002(g), and the Subcommittee further concluded that if the Committee believes that an amendment should be adopted, the form of that amendment should be as set out below.

During the period of the Subcommittee's consideration of proposed amendments to Rule 2002(g), the Director of the Administrative Office announced enhancements to the Electronic Bankruptcy Noticing National Creditor Registration Service. A copy of the Director's memorandum and a description of the service is included in the materials immediately after this memorandum. The program appears to accomplish much of what the proposed amendments to

Rule 2002(g) are intended to do. Creditors will deal primarily with the Bankruptcy Noticing Center ("BNC") to establish the noticing mechanism. It can be done on a national basis without the need to have contracts filed with each court. Notices can be sent through an Electronic Data Interchange, by fax, or by email. Since most creditors who are likely to participate in a national creditor registry will prefer electronic noticing, the program may well operate to provide a noticing service for national creditors that meets their needs and obviates the need for a rules amendment at this time.

Notwithstanding apparent support for the program, it does not solve the problem for all national creditors. Some creditors apparently do not currently receive their notices through electronic means. Issues of computer compatibility and the costs that some companies do not want to incur to become electronically compatible results in some creditors being ineligible for the new National Creditor Registration Service. Therefore, the Subcommittee concluded that it may still be wise to propose a rules amendment to address the issue for those creditors who do not participate in the electronic noticing program as well as to improve the rules generally to make national noticing possible directly under the rules without reliance on a program of the BNC. Thus, the Subcommittee considered the reform legislation version of such a rule as well as other rules amendments to accomplish the goal of national creditor noticing in cases under chapters 7 and 13.

In addition to the reform act type of provision, the Subcommittee considered amendments to Rule 2002(g) that would have permitted creditors to register their address or addresses with a bankruptcy court leaving to the court the task of making sure that the entities sending notices to the creditor would be aware of the creditor's registered address. Concern about the burden on

clerks' offices and the potential for significant overlap of efforts led the Subcommittee to reject a system that would permit creditors to register with a court and have the court then take the action to ensure that notices in all bankruptcy cases throughout the country were sent to the creditor at the registered address. Rather, the Subcommittee recommends that if the Committee wishes to pursue an amendment to Rule 2002(g) that it should be one that permits the creditor and a Notice Provider to reach their own agreement on the method and manner of service without the court having to monitor the process. The creditor and Notice Provider agree on the manner of service and the address to which the notices must be sent, and the notice is thereafter conclusively presumed to have been sent to the correct address.

The Subcommittee was evenly split as to whether to recommend that the Committee take no action on the proposed amendments to Rule 2002(g) given the status of the BNC National Creditor Registration Service or whether to proceed with a rules amendment given that rules changes take three years to become effective, and if the concept of a national creditor noticing system is sensible, then the Committee should undertake to recommend appropriate rules changes that can be in the works as the Committee continues to monitor developments under the BNC system. Thus, it is left to the Committee to decide whether to proceed with an amendment to Rule 2002(g) to be published for comment and eventually recommended to the Standing Committee for its approval.

The recommended version of Rules 2002(g) and 9001 provides that a Notice Provider and any interested entity may agree to the manner of the notice and the address to which a notice must be sent whenever the court directs the Notice Provider to give notices. This avoids the need for any filing with the court and the concomitant burden on the clerk's office to manage that

information not just for the court in which the filing is made, but for all courts in the bankruptcy system. The proposed version of Rule 2002(g) as set out below leaves these matters to the Notice Provider and the entity that agrees to receive the notices from the Notice Provider. The rule further provides that if the Notice Provider uses the address supplied by the entity receiving the notice, then the address is conclusively presumed to be proper. The Subcommittee rejected language that would have provided that the use of the address supplied by the entity made the notice conclusively presumed to be effective. If the Committee believes that an amendments should be proposed, the Subcommittee's recommended version of such amendments to Rules 2002(g) and 9001 is set out below.

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

1 * * * * *

2 (g) ADDRESSING NOTICES

3 (1) Notwithstanding subparts (2) - (4), in a case under

4 chapter 7 or 13, an entity and a Notice Provider may agree that

5 when the Notice Provider is directed by the court to give notice, the

6 Notice Provider shall give the notice to the entity in the manner

7 agreed to and at the address or addresses the entity supplies to the

8 Notice Provider. The address supplied by the entity is conclusively

9 presumed to be the proper address for the notice for purposes of

10 this subdivision. Failure of the Notice Provider to use the supplied

11 address does not invalidate any notice that is otherwise effective

12 under applicable law.

13 (2) ~~(1)~~ Notices required to be mailed under Rule 2002 to a

14 creditor, indenture trustee, or equity security holder shall be

15 addressed as such entity or an authorized agent has directed in its

16 last request filed in the particular case. For purposes of this

17 subdivision –

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

19 trustee that designates a mailing address constitutes a filed request

20 to mail notices to that address, unless a notice of no dividend has

21 been given under Rule 2002(e) and a later notice of possible

22 dividend under Rule 3002(c)(5) has not been given; and

23 (B) a proof of interest filed by an equity security

24 holder that designates a mailing address constitutes a filed request

25 to mail notices to that address.

26 ~~(2)~~ (3) If a creditor or indenture trustee has not filed a

27 request designating a mailing address under Rule 2002(g)~~(1)~~ (2),

28 the notices shall be mailed to the address shown on the list of

29 creditors or schedule of liabilities, whichever is filed later. If an

30 equity security holder has not filed a request designating a mailing

31 address under Rule 2002(g)~~(1)~~ (2), the notices shall be mailed to

32 the address shown on the list of equity security holders.

33 ~~(3)~~ (4) If a list or schedule filed under Rule 1007 includes
34 the name and address of a legal representative of an infant or an
35 incompetent person, and a person other than that representative
36 files a request or proof of claim designating a name and mailing
37 address that differs from the name and mailing address of the
38 representative included in the list or schedule, unless the court
39 orders otherwise, notices under Rule 2002 shall be mailed to the
40 representative included in the list or schedules and to the name and
41 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 renumbers (2) through (4). The new subdivision authorizes an entity and a Notice Provider to agree that the Notice Provider will give notices to the entity at the address or addresses set out in their agreement. Rule 9001(9) sets out the definition of a Notice Provider.

The business of many entities is national in scope, and technology currently exists to direct the transmission of notice (both electronically and in paper form) to those entities in an accurate and much more efficient manner than by sending individual notices to the same creditor by separate mailings. The rule authorizes an entity and a Notice Provider to determine the manner of the service as well as to set the address or addresses to which the notices must be sent. For example, a they could agree that all notices to the entity must be sent to a single, nationwide electronic or postal address. They could also establish local or regional addresses to which notices would be sent in matters pending in specific districts. Since the entity and Notice Provider also can agree on the date of the commencement of service under the agreement, there is no need to set a date in the rule after which notices would have to be sent to the address or addresses that the entity establishes. Furthermore, since the entity supplies the

address to the Notice Provider, use of that address is conclusively presumed to be proper. Nonetheless, if that address is not used, the notice still may be effective if the notice is otherwise effective under applicable law. This is the same treatment given under Rule 5003(e) to notices sent to governmental units at addresses other than those set out in that register of addresses.

The rule applies only in chapter 7 and 13 cases. It is in those cases that the volume of notices and the recurrent participation by specific entities in those cases make the Notice Provider agreements efficient.

The remaining subdivisions of Rule 2002(g) continue to govern the address for notices for any entity that does not enter into an agreement with a Notice Provider.

1 **RULE 9001. GENERAL DEFINITIONS**

2 * * * * *

3 (9) "Notice Provider" means any entity approved by the
4 Administrative Office of the United States Courts to give notice to
5 creditors under Rule 2002(g)(1).

6 (10) ~~(9)~~ "Regular associate" means any attorney regularly
7 employed by, associated with, or counsel to an individual or
8 firm.

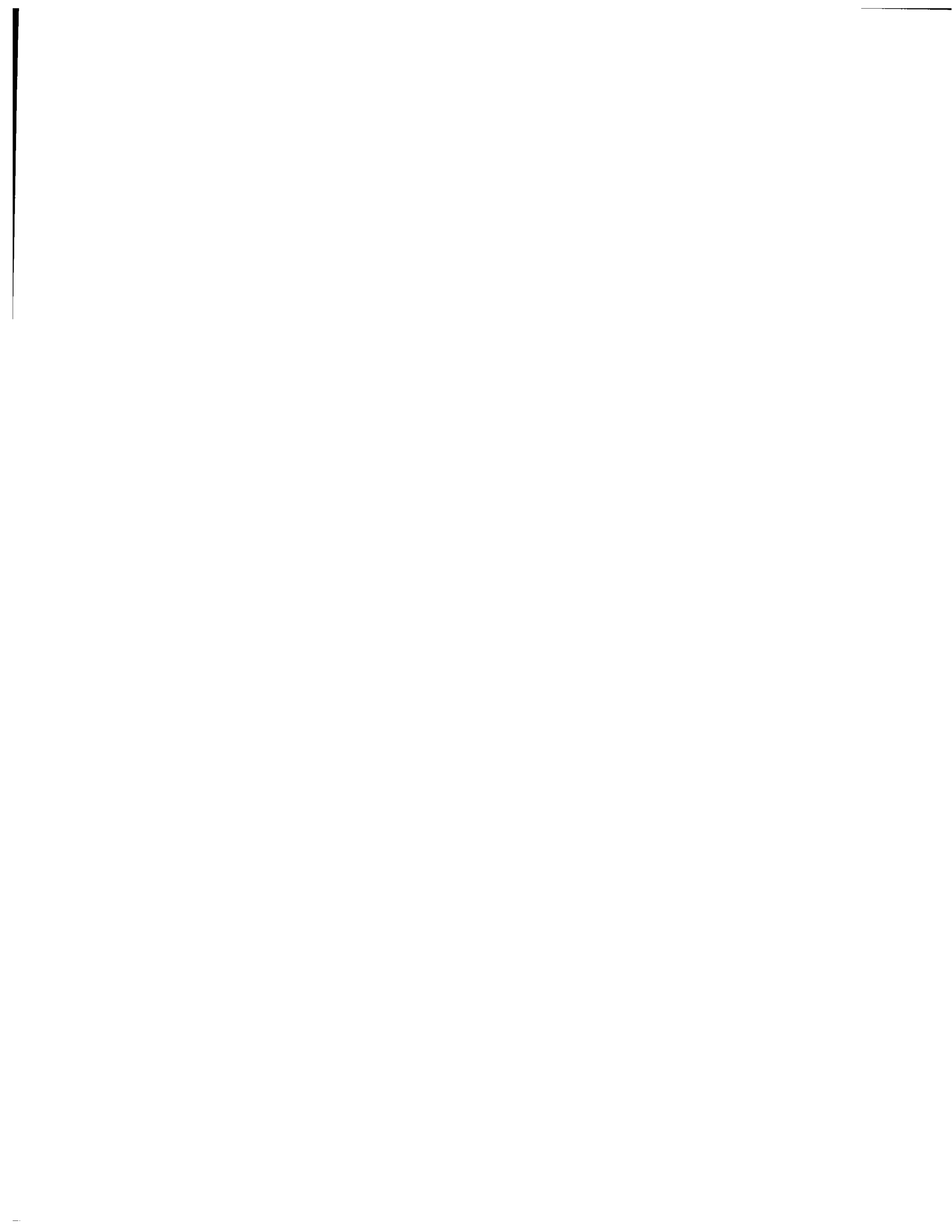
9 (11) ~~(10)~~ "Trustee" includes a debtor in possession in a
10 chapter 11 case.

11 (12) ~~(11)~~ "United States trustee" includes an assistant
12 United States trustee and any designee of the United States trustee.

COMMITTEE NOTE

The rule is amended to add the definition of a Notice Provider and to renumber the final three definitions in the rule. A Notice Provider is an entity approved by the Administrative Office of the United States Courts to enter into agreements with entities to give notice to those entities in the form and manner agreed to by those parties. The new definition supports the amendment to Rule 2002(g)(1) that authorizes a Notice Provider to give notices under Rule 2002.

Many entities conduct business on a national scale and receive vast numbers of notices in bankruptcy cases throughout the country. Those entities can agree with a Notice Provider to receive their notices in a form and at an address or addresses that the creditor and Notice Provider agree upon. There are processes currently in use that provide substantial assurance that notices are not misdirected. Any Notice Provider would have to demonstrate to the Administrative Office of the United States Courts that it could provide the service in a manner that ensures the proper delivery of notice to creditors. Once the Administrative Office of the United States Courts approves the Notice Provider to enter into agreements with creditors, those parties can establish the relationship that will govern the delivery of notices in cases under chapters 7 and 13 as provided in Rule 2002(g)(1).



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

November 24, 2003

MEMORANDUM TO ALL CLERKS, UNITED STATES BANKRUPTCY COURTS

Subject: Electronic Bankruptcy Noticing National Creditor Registration Service and Updated Web Site **(INFORMATION)**

I am pleased to announce enhancements to the Electronic Bankruptcy Noticing (EBN) program that will eliminate the need for clerk's office personnel to administer program-related paperwork while increasing the efficiency of national court noticing operations. Effective immediately, the Bankruptcy Noticing Center (BNC) will support a National Creditor Registration Service (NCRS) for electronic noticing. This service is being provided in conjunction with the launch of an updated, user-friendly EBN program web site.

The NCRS is offered based upon a recommendation by, and developed in close coordination with, the Bankruptcy Noticing Working Group. The new service provides the following benefits:

- Allows national noticing partners to sign-up for Electronic Data Interchange (EDI) services directly with the BNC.
- Eliminates the courts' local administrative burden of reviewing, mailing and maintaining copies of voluminous Trading Partner Agreements, Evidence of Authority forms, synonym name and address lists, court form samples, and other EBN documents.
- Eliminates the courts' burden of sending a package of form examples to each EDI noticing partner. The BNC will create a central electronic repository of all court forms for reference by noticing partners.
- Provides an easy-to-use web-based interface for noticing partners to prepare noticing agreements on-line.
- Allows current and new noticing partners to reduce the volume of EBN documentation required to initiate or change electronic noticing services.

- Provides more efficient service at lower costs, which will have the additional benefit of boosting EBN program participation.

- Provides clerk's office staff the ability to monitor trading partner activity at the BNC Intranet (http://www.noticingcenter.com).

The EBN noticing partner agreements and related forms have been updated and are posted on-line at http://www.EBNuscourts.com . All other aspects of the EBN program will remain unchanged. The Bankruptcy Court Administration Division will contact you shortly to confirm the court's intent to use the new registration service. BNC staff will coordinate with your office the posting of the court's standard notices supported by the EDI service on its web page. A document prepared by the BNC contractor, BAE Systems, is attached that provides a summary of major changes to the EBN program website.

Should you have any questions about these new services, please contact Gary McCaffrey, EBN Product Administrator at the AO's Bankruptcy Court Administration Division at (202) 502-1540, or by e-mail at *Gary McCaffrey/DCA/AO/USCOURTS.*

Leonidas Ralph Mecham

cc: Chief Judges, U.S. Bankruptcy Courts

Attachment

ATTACHMENT

Electronic Bankruptcy Noticing
National Creditor Registration Service
And
Updated Web Site

Overview

The Electronic Bankruptcy Noticing (EBN) website has been redesigned to guide visitors seamlessly through the process of obtaining EBN services with the goal of facilitating:

- Online sign up of noticing partners
- National EBN registration

The organization of information has been enhanced to provide a clear overall picture of the website as a whole and facilitates navigation between website levels. The main site menu provides fast and easy reference to major site sections:

- Sign Up
- Central Forms Repository
- Documentation

Centralized Sign-Up

The new National Creditor Registration Service (NCRS) expands the services offered by the BNC for handling EBN E-mail and FAX noticing agreements to include Electronic Data Interchange (EDI) Trading Partner Agreements and Evidence of Authority forms, virtually eliminating all paper handling and review functions by the court. All bankruptcy courts will be contacted to confirm the court's intent to use the new registration service. The BNC will maintain a database denoting courts that elect to use the NCRS, and courts that retain local responsibility, for all EBN services. Noticing partners for courts that elect to use the NCRS will be activated for EBN by sending the BNC a single noticing partner agreement and, if required, evidence of authority agreement.

An updated section of the web site presents a series of sub menus, drop down lists, and data entry screens that allow a noticing partner to input and/or select all the information necessary to sign up for, or modify, one or more of the EBN services – E-Mail, FAX, and EDI. The noticing partner will be able to select court districts, appropriate agreements, evidence of authority forms (if necessary), and enter name and address synonyms on-line. The system will automatically generate for the partner a list of courts that are covered by a single noticing agreement (national registration) and a list of courts that must be sent individual noticing agreements. PDF versions of the completed agreements will be generated with name and address synonym lists included and court name ("Sender") and subscriber ("Receiver") filled in as appropriate.

ATTACHMENT

Central Forms Repository

For courts that elect to use the NCRS and courts that retain local EBN sign-up responsibility (i.e., all courts), the BNC will maintain a central repository of court forms on the web site for reference by noticing partners. By clicking on a particular court, noticing partners will be able to view all notices for that court. The following information will be provided for each form:

- Form ID
- Form Name/Description
- PDF image of the form

This central forms repository will replace the current Exhibit 1 requirement of the EDI Trading Partner Agreement.

Uploading Forms

A login and information capture process will be provided for each court to add, delete, and replace forms on the web site. The court will be responsible for keeping forms current on the web site. The court will enter a Form ID, Name/Description, and PDF document for each form, which will then be uploaded to the BNC central forms database.

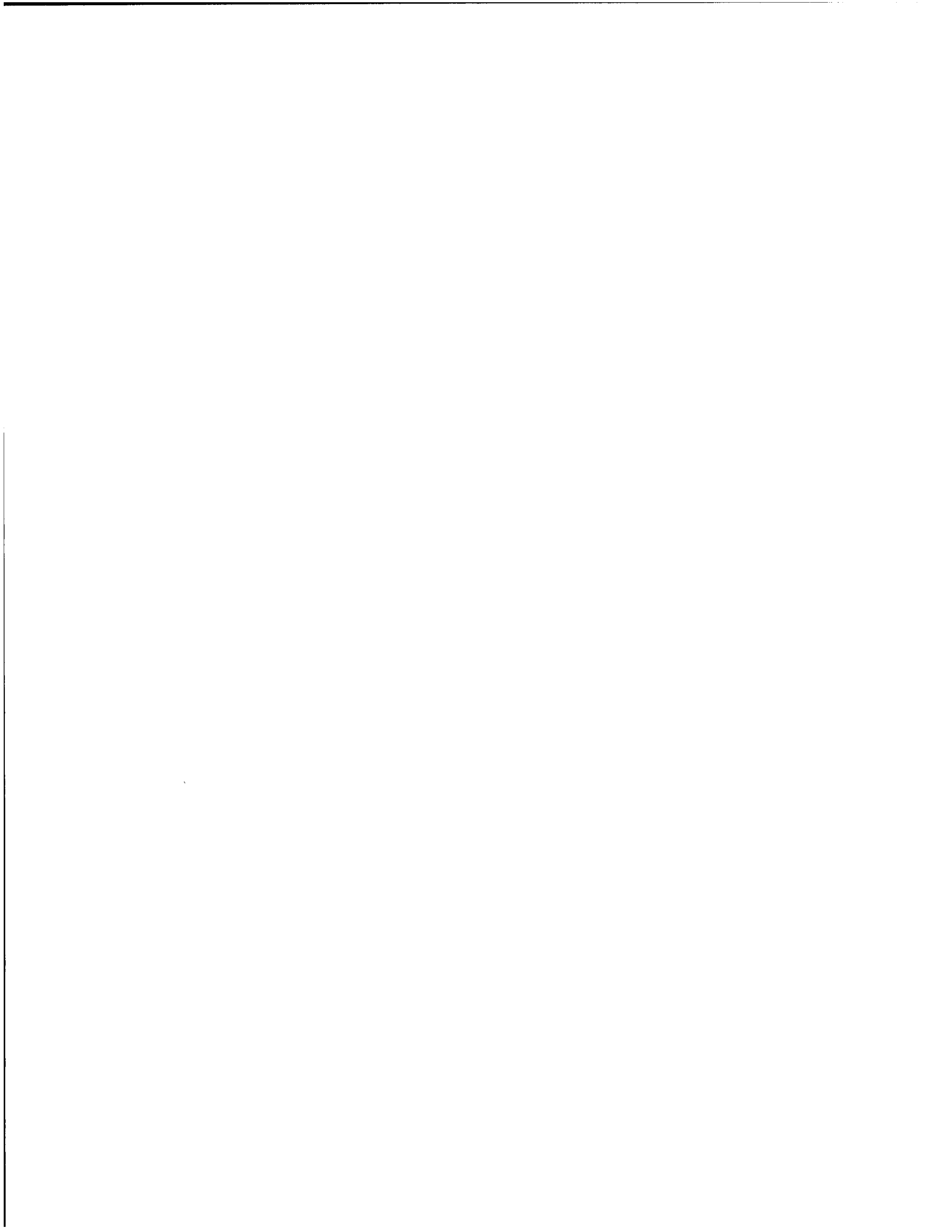
Viewing Forms

A link will be provided for viewing forms in the central repository. All courts will be listed and, by clicking on a particular court, trading partners will be able to view all notices for that court. The following information will be provided for each form:

- Form ID
- Form Name/Description
- PDF image of the form

Documentation

The EBN noticing partner agreements and related forms have been updated and are posted on-line at http://www.EBNuscourts.com . All other web site documentation and information regarding EBN services (how each service works, implementation guides, technical guides, FAQs) has been updated where appropriate.



Proposed amendments to section 342(c) of the Bankruptcy Code set out in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004, S.1920, as passed by the House of Representatives, on January 28, 2004.

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 9014 AND PAPER SERVICE OF ELECTRONICALLY FILED DOCUMENTS

DATE: MARCH 10, 2004

At the request of Jim Waldron, the Committee considered the issue of the need to serve a paper copy of a motion initiating a contested matter when the matter is commenced by an electronic filing. See materials behind Tab 12 in the September 2003 Agenda Book. After discussion at the September 2003 meeting, the matter was sent to the Technology Subcommittee. The Technology Subcommittee considered the issue further by teleconference and subsequent email communications. Mr. Waldron provided the Subcommittee with some informally collected data that further demonstrated that many practitioners fail to follow existing Rule 9014 that requires the service of the motion initiating a contested matter in the same manner as service of a summons and complaint under Rule 7004. Instead, they assume that electronic service of the motion is sufficient. The rule, of course, applies only to the service of the initial motion in the contested matter and not to subsequent papers filed in the action. Service of those papers is governed by Rule 7005.

The Technology Subcommittee concluded that electronic service of the initial motion should suffice as to any counsel to a party in the proceeding if that attorney is a participant in the CM/ECF program. The rule as proposed below also allows electronic service on any party, other than the debtor, who has made an appearance in the case and has consented in writing to

receiving service electronically. This is the effect of adopting Civil Rule 5(b)(2)(D) in proposed Rule 9014(b)(1)(A). There was some sentiment for retaining a requirement of service of a paper copy on all parties to the contested matter, with electronic service of the initial motion only on counsel for the party. The non-attorney participant in the CM/ECF program may not expect to receive the initial motion (which is effectively the same as a summons and complaint) by means of electronic service. Rather, they anticipate electronic notices only of other activity within the case. Moreover, if one views the initial motion as the functional equivalent of a summons and complaint, then even a participant in the CM/ECF program should be served with a paper copy of the motion just as they would be served with a paper copy of the summons and complaint under Rule 4(c)(1). The counter argument is that these entities have taken steps to participate electronically in bankruptcy cases and that agreement should apply as well to service of a motion commencing a contested matter.

The first version of Rule 9014 set out below would authorize the electronic service of the motion initiating a contested matter on any entity that is participating in the CM/ECF program as well as on the debtor's attorney. The debtor still would be entitled to be served with a paper copy of the motion. In the second version of the rule, paper service of the initial motion would have to be made on the debtor and any other party to the contested matter. Only the attorneys for the debtor and the parties to the contested matter would be served electronically.

RULE 9014. CONTESTED MATTERS

1 * * * * * *

2 (b) SERVICE.

3 (1) The motion shall be served in the manner provided for

4 service of a summons and complaint under ~~by~~ Rule 7004, except

5 that

6 (A) an entity, other than the debtor, that has made an

7 appearance in the case may be served in the manner provided by

8 Rule 5(b)(2)(D) F. R. Civ. P., and

9 (B) if the debtor is represented by an attorney, the

10 requirement in Rule 7004(b)(9) of service on the debtor's attorney

11 may be satisfied in the manner provided by Rule 5(b)(2)(D) F. R.

12 Civ. P.

13 (2) Any paper served after the motion shall be served in the

14 manner provided in Rule 5(b) F. R. Civ. P.

15 * * * * * *

COMMITTEE NOTE

The rule is amended to clarify the method of service of the motion initiating a contested matter. Service of the motion by any method is proper when the recipient of the service has already made an appearance in the case and has consented in writing to be served in that manner, including by electronic service. (See F. R. Civ. P. 5(b)(2)(D).) For example, a party that has given its consent to electronic service should both expect and prefer service to be made electronically. This applies to any party except the debtor who still must be served in the manner of the service of a summons

and complaint. Thus, the service requirements of Rule 7004(b) and (h) can be met by means of electronic service as allowed under F. R. Civ. P. 5(b)(2)(D) on any person other than the debtor. A party that consents in writing to service in any particular manner waives its right to receive service in a manner otherwise set out in Rule 7004(b) and (h).

There is no change in the service rules for papers that are served after the motion. Rule 7005 governs service of these papers.

Other changes are stylistic.

The following version of Rule 9014(b) would continue to require service on all parties to a contested matter of a paper copy of the motion initiating the matter. Counsel for those parties, including counsel for the debtor, however, could be served electronically. The Committee must determine whether electronic service of the motion initiating a contested matter is preferable to paper service.

RULE 9014. CONTESTED MATTERS (Electronic Service only on Counsel)

1 * * * * * *

2 (b) SERVICE.

3 (1) The motion shall be served in the manner provided for

4 service of a summons and complaint under Rule 7004, except that

5 (A) in addition to service on an entity other than the debtor,

6 an attorney for the entity may be served in the manner provided by

7 Rule 5(b)(2)(D) F. R. Civ. P., and

8 (B) if the debtor is represented by an attorney, the

9 requirement in Rule 7004(b)(9) of service on the debtor's attorney

10 may be satisfied in the manner provided by Rule 5(b)(2)(D) F. R.

11 Civ. P.

12 (2) Any paper served after the motion shall be served in the

13 manner provided in Rule 5(b) F. R. Civ. P.

14 * * * * * *

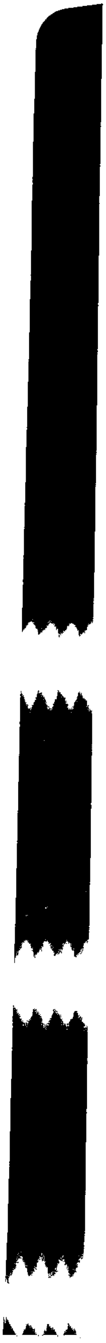
COMMITTEE NOTE

The rule is amended to clarify the method of service of the motion initiating a contested matter. Service of the motion on an attorney representing a party in the contested matter is allowed to be made under F. R. Civ. P. 5(b)(2)(D) by any means to which the attorney has agreed in writing. For example, electronic service on the attorney is appropriate if the attorney has consented to this form of service, and the attorney should both expect and prefer service to be made electronically. This service is in addition to service on the parties to the contested matter who still must be served under F. R. Civ. P. 4(c)(1).

There is no change in the service rules for papers that are served after the motion. Rule 7005 governs service of these papers.

Other changes are stylistic.

7



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: UNITED STATES TRUSTEE PROPOSALS

DATE: FEBRUARY 24, 2004

Mr. Lawrence Friedman, the Director of the Executive Office of the United States Trustee Program submitted a proposal for amendments to Rules 2003, 4002, 2016, and 7001 as well as a proposed amendment to Schedule I. The submission also included a proposed Official Form 21 to implement some of the changes proposed to Rule 2016. The Committee commenced its consideration of the proposals at the September meeting in Washington. The issue was sent to the Subcommittee on Consumer Issues for further consideration. Mr. Friedman's proposal is set out at the end of the materials in this tab of the agenda book.

The Subcommittee, chaired by Mr. Frank, met in Washington, D.C., on January 30, 2004, to continue its consideration of the matter. The Subcommittee also invited several persons to assist the Subcommittee by presenting their views of the pending proposals. The Subcommittee heard from Mr. Alan Stout and Mr. Paul Swanson, each of whom serves as a Chapter 7 panel trustee, as well as from Mr. Hank Hildebrand and Mr. Paul Davidson, Chapter 13 trustees. Mr. John Rao presented the view of the National Association of Consumer Bankruptcy Attorneys (NACBA). The Subcommittee heard first from Mr. Friedman and Ms. Martha Davis who presented the proposal. The invited guests then presented their views, and the members of the Subcommittee had an opportunity to question all of the speakers regarding the issues. At the conclusion of the presentations and the question and answer session, the Subcommittee

reconvened with only the Subcommittee members and Administrative Office personnel to consider the proposal.

Proposed Amendments to Rule 2003 and 4002

Mr. Friedman's proposal would amend Rules 2003 and 4002 to expand the duties of the debtor and counsel for the debtor. Under the proposal, the debtor would be required to bring a wide range of materials to the § 341 meeting of creditors including personal identification, evidence of current income and expenses, documents supporting the debtor's claim to ownership of property, evidence of insurance, and many other items. The purpose for requiring the information and documents is to assist the panel trustee and the United States trustee in the discharge of their duties. Mr. Friedman also noted that the proposals were intended to implement the debtor's duties as set out in § 521(3) and (4) of the Bankruptcy Code.

The chapter 7 panel trustees who made presentations to the Subcommittee indicated that requiring debtors to bring the documents and information to the meeting would enhance their ability to perform their duties as required by § 704. They also indicated that they currently receive substantial compliance with these requests in the absence of the proposed rules amendments. They suggested that there still are instances in which compliance is not forthcoming, and they asserted that having a rule available to support their efforts would be quite helpful. Each trustee noted that they considered it essential that the rules changes, whatever they may be, allow the trustees flexibility to tailor the requests to the needs they perceive in a particular case.

The chapter 13 trustees noted that their needs are somewhat different than those of the chapter 7 trustees. The chapter 13 trustees have a greater need for information relating to the

debtor's income and living expenses. They often have a significant interest in determining whether the debtor is maintaining appropriate insurance on his or her property (primarily auto insurance and possible homeowner's or renter's insurance). They tend to be less concerned with some items of interest to chapter 7 trustees, but they joined in the view that it would be appropriate to amend the rules to implement more fully the requirements of the debtor under § 521. They also stressed that the need for the information differs from case to case, and they suggested that flexibility should be maintained so that trustees can get to the information when they deem it necessary and appropriate.

Mr. Rao indicated that NACBA did not oppose the suggested amendment that would require debtors to present appropriate identification at the meeting of creditors. He argued against a number of the proposals on several grounds. First, he noted that the costs of compiling and delivering many of the materials set out in the proposal would be prohibitive for some debtors. He also noted that trustees usually do not want the information set out in the proposed rule either because the dollar amounts presented in the case are very low (thereby reducing the likelihood of any material omissions), or because the trustee, based on his or her experience and judgment, does not believe that further investigation of the debtor is necessary. He noted that the chapter 7 trustees who had spoken earlier estimated that they sought this additional information in only 20% to 30% of their cases. Nonetheless, the proposal would require the debtors to submit all of this information to the trustee in every case. He likewise noted that the trustees who had spoken did not relish the thought of keeping or storing the materials that might be submitted to them in observance of the proposed rule. He also noted that there may be privacy problems with the submission of all of the data (such as tax returns), and that the rule did not

address those issues.

The Subcommittee considered the presentations as well as over seventy written comments received from interested persons throughout the country. The comments noted many of the issues presented by the speakers and included concerns that the submission of these materials would also lengthen significantly the duration of § 341 meetings, that the information is largely irrelevant in a great many cases where it would be required, would impose significant additional costs on debtors and their counsel, and would lead many consumer bankruptcy attorneys to leave the practice with the gap remaining being filled by petition preparers who would create even greater problems for the system than have led to the introduction of the proposals in the first place. The vast majority of the written comments were opposed to the proposals to expand the debtor's duties through the rules amendments, although the proposals did have some supporters. A full report on the comments is not included because the proposals were not published for comment and the report would be unnecessarily lengthy given that the issue is before the Advisory Committee only to determine whether to recommend that the Standing Committee approve the proposal for publication and comment beginning in August 2004. If the proposals are published, the comments received in the process will be cataloged and summarized for the Committee.

The Subcommittee considered whether there is a need for any change in the current system, and if change is necessary, whether the change should be in the form of a listing of specific materials that debtors must supply to the trustee or whether a more general statement of the debtor's obligation to cooperate with the trustee would suffice. If the Subcommittee were to decide that the debtor should supply certain documentation or evidence at the § 341 meeting,

then the list of items or obligations would be identified.

The Subcommittee concluded that it is appropriate to expand the debtor's duties as set out in Rule 4002, but that there is no need to amend Rule 2003. Since the debtor's duties are included in Rule 4002, inserting the new obligations in that Rule is most appropriate. Furthermore, the rule already includes the debtor's duty generally to cooperate with the trustee, so there would be no need to restate it either in Rule 2003 or 4002. The Subcommittee believes that the rules should more specifically set out some duties for all debtors, and that trustees should retain their flexibility to seek other regularly compiled information in support of their duties. After lengthy discussion, the Subcommittee concluded that all debtors should be required to present appropriate personal identification (picture id and social security number verification) to the trustee at the § 341 meeting. The Subcommittee then concluded that the rule should support the trustees' efforts to administer the estate and perform their statutory duties, but that the rule need not apply to every debtor to meet this need. Instead, the rule should allow the trustee to request that the debtor provide within a stated time period certain materials or documents that would normally be in the possession of the debtor and that are relevant to the trustee's administration of the case. The rule already requires general cooperation with the trustee, so nothing in the rule as proposed should be read to limit a trustee's ability or right to seek further information from the debtor.

The Subcommittee's proposal requires the debtor to provide the materials to the trustee within 20 days of the request, or to submit a statement indicating that the debtor does not have the materials or documents. The Subcommittee did not consider in significant detail the amount of time allowed for the debtor to submit the materials or documents. A shorter period, for

example, 14 days, may be appropriate for at least two reasons. First, the documents and materials set out in proposed Rule 4002(b)(2) generally should be relatively accessible for the debtor, so sending them to the trustee within two weeks of a request should not be unduly burdensome. Moreover, if the debtor cannot locate or does not have the materials, a statement to that effect meets the requirements of the rule. Secondly, Under Rule 2003(a), the § 341 meeting can be held as early as twenty days after the commencement of the case. Therefore, if the trustee feels a need to have the materials available at the meeting, the trustee can act quickly to make the request and the materials and documents can be presented to the trustee prior to or at least at the meeting. This would serve to avoid the need to continue the meetings or seek other delays in relevant deadlines. No time limit is set for the submission of other materials that the trustee may request in a particular case. The range of these materials and documents is essentially unlimited, so the Subcommittee preferred to leave the process for obtaining that information to negotiations between the trustee and the debtor's counsel.

The recommendation of the Subcommittee on Consumer Issues for the amendment of Rule 4002 is set out below.

1 **4002. Duties of Debtor.**

2 (a) *General Duties.* In addition to performing other

3 duties prescribed by the Code and rules, the debtor shall:

4 (1) attend and submit to an examination at the times

5 ordered by the court;

6 (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) file a statement of any change of the debtor's address~~.~~; and

(6) 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.

(b) *Debtor's Duty to Provide Documentation at the Meeting of Creditors and on Request of Trustee or United States Trustee.*

(1) *Personal Identification.* In each case, an individual debtor shall bring to the meeting of creditors picture identification and evidence of Social Security number(s) or provide a written statement setting forth that such documentation is not applicable or in the debtor's possession;

29 (2) *Request for Financial Information.* In a particular

30 case, the trustee or the United States trustee may make a written

31 request to the debtor for the production of additional documents or

32 materials reasonably necessary for administration of the estate,

33 including:

34 (A) evidence of income, such as pay stubs, during

35 the ninety day period immediately preceding the

36 meeting of creditors;

37 (B) the debtor's federal income tax returns for the

38 two (2) years preceding the meeting of creditors,

39 with W-2s and any other attachments;

40 (C) statements for depository accounts, including

41 checking, savings, and money market accounts,

42 covering the time period that includes the date of

43 filing and the ninety day period prior to filing;

44 (D) title and lien documents relating to property of the

45 estate;

46 (E) homeowner or renter insurance policies; or

47 (F) automobile or other personal property insurance

48 policies.

49 (3) *Response to Request for Financial Information.*

50 Within twenty (20) days after receiving a request under

51 subparagraph (2), the debtor shall either:

52 (A) provide the requested documents or materials, to the

53 extent that the documents or materials are in the possession of the

54 debtor; or

55 (B) provide to the trustee or United States trustee a

56 written statement stating why the debtor cannot timely produce the

57 requested documents or materials, or setting forth the debtor's

58 objections to production of the requested documents or materials .

COMMITTEE NOTE

The rule is amended to implement the directives of § 521 (3) and (4) of the Bankruptcy Code that the debtor cooperate with the trustee to permit the trustee to perform the trustee's duties and to provide the trustee with materials and documents necessary to the administration of the estate. At the meeting of creditors, each individual debtor must present appropriate evidence of the debtor's identity and social security number or provide a statement that such evidence is not applicable or is not in the debtor's possession. The rule further requires that, upon written request, the debtor provide the trustee or the United States trustee with documents or materials which, in particular cases, may be needed by the trustee and United States trustee to perform their duties under the Code. The rule is not intended to authorize blanket requests to all debtors to produce all of the materials enumerated in subsection (b)(2) of the rule. The rule permits the trustee and the United States trustee to determine on a case by case basis whether further investigation is necessary and whether they believe that the production of additional documents and materials by the debtor is necessary. The rule does not require that the debtor create documents or obtain documents from third parties; rather, the debtor's obligation is to produce documents which the debtor possesses or that are

> under the debtor's control. If the debtor objects to a request for production of documents or materials under this rule, the dispute can be resolved by the court on motion of a party in interest under Rule 9014.

Proposed Amendments to Rule 2016 and the Proposal of a New Form

The Subcommittee also considered the proposal submitted by Mr. Friedman to amend Rule 2016(b) to require the attorney for the debtor to disclose substantially more information regarding the nature and scope of the representation that is required under the current version of Rule 2016. Again, there were a number of written comments that primarily objected to the proposal. The participants in the focus group discussion in Washington D.C. addressed the issue to a lesser extent than the proposed amendments to Rule 4002. They did, however, indicate support for the proposal to the extent that it might assist the trustees in identifying attorneys who engage in practices detrimental to the operation of the bankruptcy system. Mr. Hildebrand, a chapter 13 trustee, related that a few attorneys in his jurisdiction appear to be taking excessive fees and failing to disclose those fees by asserting that they performed legal services unrelated to the bankruptcy case. Mr. Friedman argued that this is a developing trend that the United States Trustee Program has observed and that steps need to be taken to curb the practice. To accomplish that oversight goal, the proposal would require the debtor's attorney to disclose the dollar amount of all fees paid or promised to be paid to the attorney by or on behalf of the debtor. The proposal submitted by the Director of the Executive Office of the United States Trustee also included a requirement that the attorney disclose the nature and scope of the representation to be provided in connection with the bankruptcy case. The proposal included as well a requirement that both the debtor and the debtor's attorney sign a form setting out the information.

The Subcommittee considered the proposal at the conclusion of the presentations. The consensus was that any amendment to the rule must take account of concerns for the preservation of the attorney client privilege. Furthermore, since the disclosure is one made by the debtor's attorney, it is appropriate only that the attorney execute the statement. Additionally, question 9 on the Statement of Financial Affairs (Official Form 7) already requires the debtor to disclose this same information on a form that the debtor must sign. Consequently, the Subcommittee concluded that the form need not include the debtor's signature.

The Subcommittee discussed the scope of the proposal, especially as it would have required the disclosure of the nature of the services that the attorney agreed to provide. While the amount of fees paid to the debtor's attorney is not privileged, disclosure of the scope of those services could violate the privilege. For example, the debtor may have sought legal advice as to a possible criminal matter. A debtor could seek advice about the possibility of commencing or defending a possible divorce action. The advice could involve the possibility of a nondischargeability action in the bankruptcy case. In each of these instances, the rule as proposed could lead to the disclosure of otherwise confidential communications. The Subcommittee recommends that the rule and the proposed disclosure form be amended as set out below. The rule would not require the disclosure of this information. In proper circumstances, the trustee or other party in interest can seek the information.

The form proposed by the Subcommittee is proposed as a replacement of Directors Form B203. Mr. Friedman requested that the form be an Official Form, but the Subcommittee did not consider it necessary to issue an Official Form. The current Director's Form is nearly universally used by attorneys, and it is included in the software programs, so there is arguably little need to

issue the form as an Official Form that requires publication and comment as well as approval by the Standing Committee and the Judicial Conference.

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

*****

1 (b) *Disclosure of Compensation Paid or Promised to*
2 *Attorney for Debtor.* Every attorney for a debtor, whether or not the
3 attorney applies for compensation, shall file and transmit to the
4 United States trustee within 15 days after the order for relief, or at
5 another time as the court may direct, the statement required by § 329
6 of the Code including whether the attorney has shared or agreed to
7 share the compensation with any other entity. The statement shall
8 include the particulars of any sharing or agreement to share by the
9 attorney, but the details of any agreement for the sharing of the
10 compensation with a member or regular associate of the attorney's
11 law firm shall not be required. <u>To the extent not privileged under</u>
12 <u>applicable law, the statement also shall disclose the dollar amount of</u>
13 <u>all other fees paid by or on behalf of the debtor to the attorney within</u>
14 <u>the one year period prior to the date the petition was filed, as well as</u>
15 <u>the details of any transfer, assignment or pledge of property, outright,</u>

16 in trust, or as security, from, or on behalf of the debtor within that

17 period. A supplemental statement shall be filed and transmitted to the

18 United States trustee within 15 days after any payment or

19 agreement not previously disclosed.

COMMITTEE NOTE

The rule is amended to expand the debtor's attorney's disclosure obligations regarding fees paid to the attorney by or on behalf of the debtor in the year prior to the commencement of the case, to the extent that such a disclosure is not privileged under applicable law. In addition to disclosing all fees for services rendered in connection with the bankruptcy case, as required by §329 of the Code, the disclosure by the attorney for the debtor will disclose all other compensation that the attorney received from or on behalf of the debtor for any services rendered in the year prior to the commencement of the case. The attorney needs only to disclose the amount of the compensation. The rule does not require automatic disclosure of the scope or the nature of the services rendered and the disclosure of the amount of the compensation should not be construed as a waiver of any applicable privilege. If the disclosure prompts action by a party in interest, the court can enter any appropriate order to protect the attorney client privilege.

The form proposed by Mr. Friedman included two questions (numbers 7 and 8) that would have required the debtor's attorney to disclose the nature and scope of the representation the attorney agreed to provide in the case. The form as set out below does not include those questions. As discussed above, the Subcommittee concluded that the form should not require the disclosure of this information in order to avoid the disclosure of otherwise confidential communications. The decision to exclude these questions from the form was also based on a concern that the courts have not reached any consensus as to the minimum scope of representation of a debtor in a bankruptcy case.

Including these questions could be construed as setting these minimum standards for representation, and it is arguably beyond the scope of the rules of practice and procedure to set these standards. Moreover, even if the rules can include such provisions, setting those standards would not be proper absent substantial additional consideration and investigation. The Subcommittee recognizes that the deletion of those questions from the form limits the effectiveness of the form to establish these minimal standards, but the variety of views held by the courts renders it imprudent to set the standards in this way.

Director's Form B203. DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR(S)

[Caption as in Form 16B.]

A. Compensation for services rendered in contemplation of or in connection with the 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 follows:

   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. Including the amounts listed above, the total amount of all direct and indirect monetary payments, transfers, and assignments to me by, or on behalf of, the debtor during the one-year period immediately preceding the filing of the petition is $ ____________________. In addition, I received the following direct or indirect transfers or assignments of other property from or on behalf of the debtor during that period: ____________________________________.

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: $

B. Compensation paid other than for services rendered in contemplation of or in connection with the current case:

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

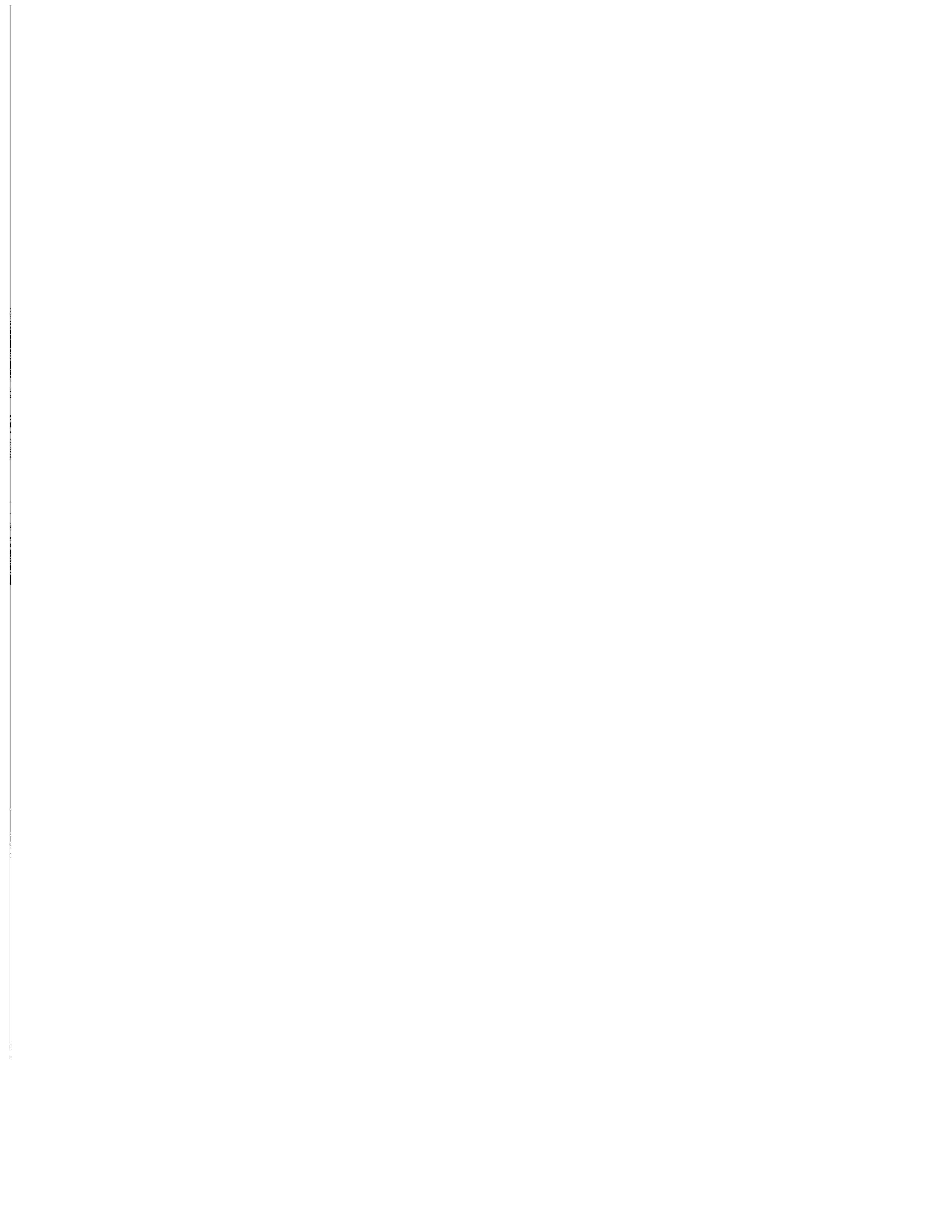
Name of Law Firm

COMMITTEE NOTE

The form requires the disclosure of all compensation paid or promised to be paid to the debtor's attorney in contemplation of or in connection with the case. A copy of any agreement between the debtor and the attorney could be attached to meet this requirement.

The form also requires the attorney to disclose any other compensation received from or on behalf of the debtor in the year prior to the commencement of the case for services rendered in any matter other than representation in contemplation of or in connection with the case. This disclosure extends only to the amount of the compensation and does not require the attorney to disclose the nature or scope of the representation. The scope and nature of the representation may be protected by the attorney client privilege, although neither Bankruptcy Rule 2016 nor this Official Form should be construed to mean either that the information is or is not protected by the privilege.

Please note that Part B requesting information about fees paid to the debtor's counsel in the year prior to the filing of the petition for services rendered *other than in connection with the case* would be deleted from the form if the Committee concludes that it is beyond the scope of the rules enabling act.



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: <u>Proposed Amendments to the Federal Rules of Bankruptcy Procedure</u>

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.

*****

(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.

[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);

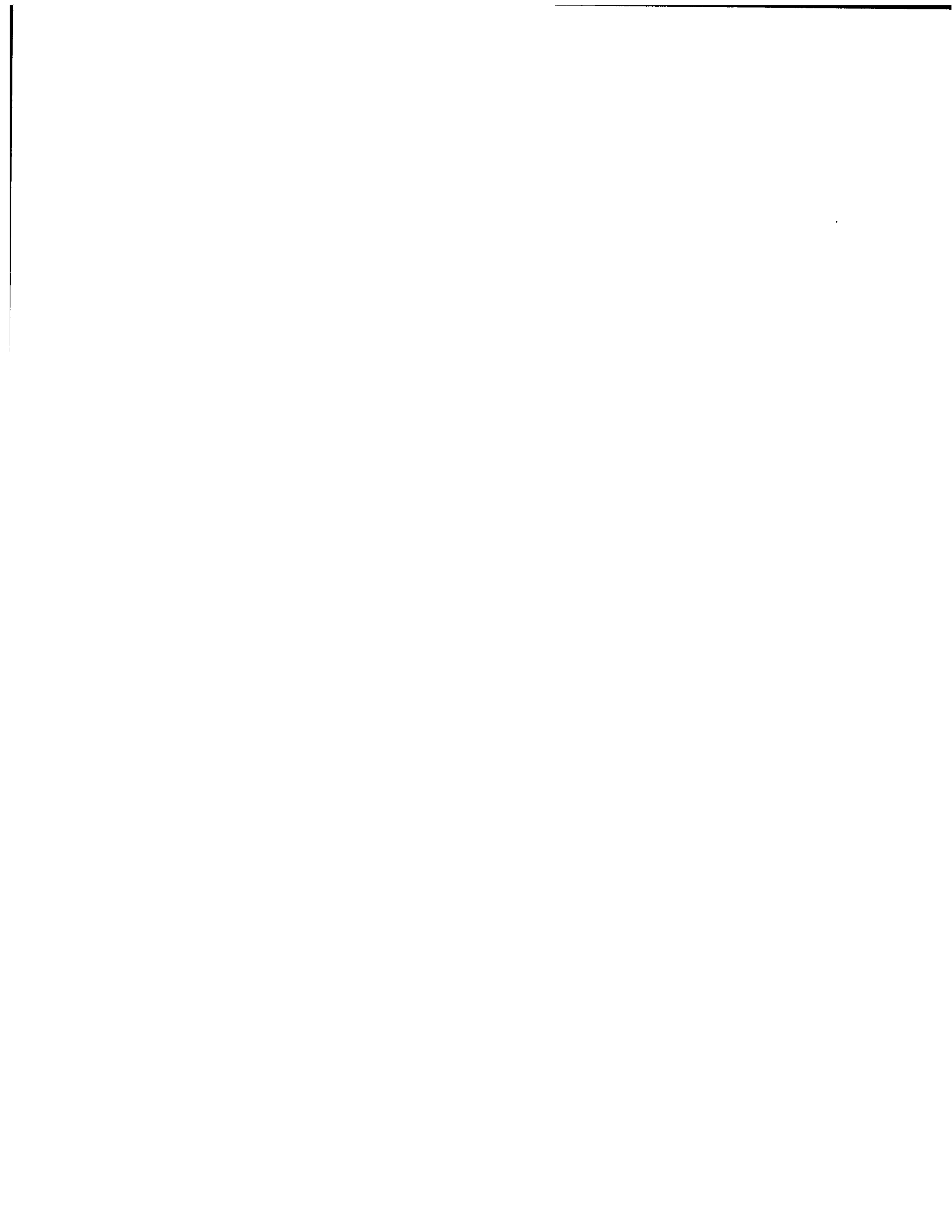
10. Evidence of the value of real estate in which the debtor has an interest (county auditor appraisal card or appraisal, if available);

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;

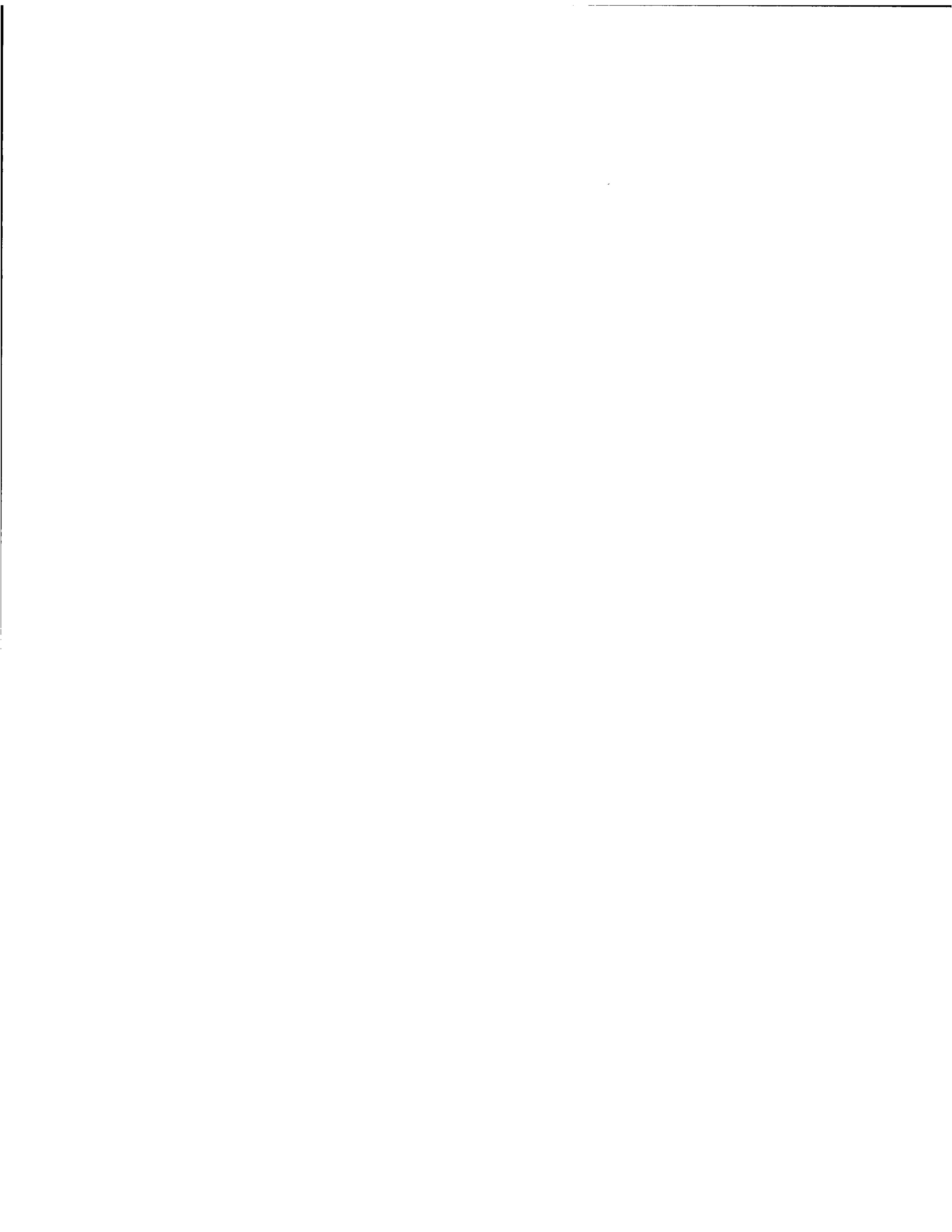
12. Pay vouchers or record of earnings for the forty (40) day period prior to the date your petition was filed in bankruptcy;

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

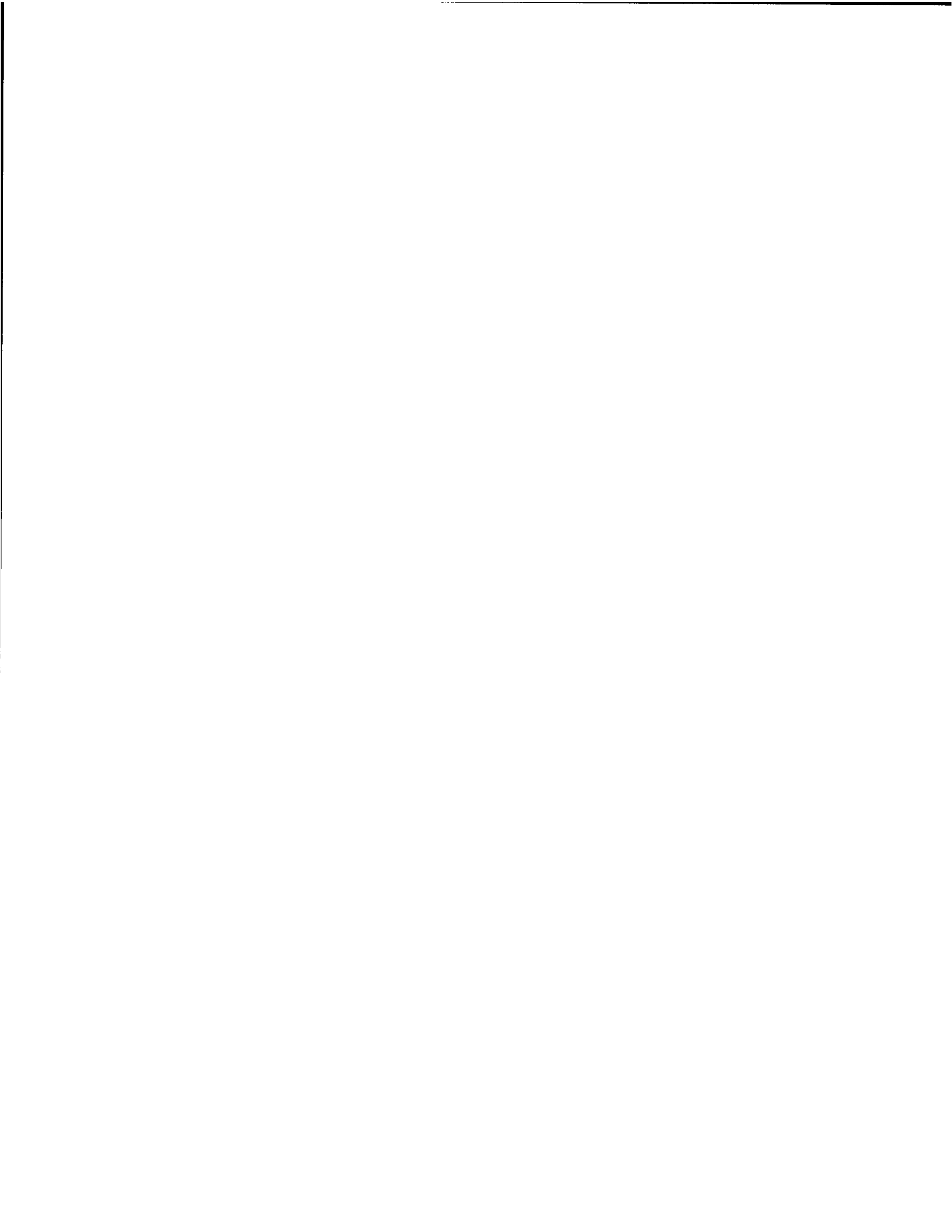
Name of Law Firm

Dated:

____
Signature of Debtor

Dated:

____
Signature of Joint Debtor



ATTACHMENT 3

Memorandum

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

To	From
Martha Davis Principal Deputy Director EOUST	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:

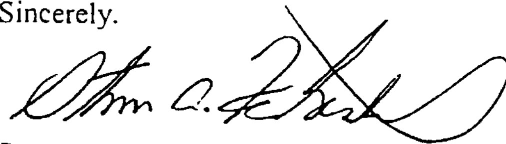
At the judges meeting on August 13, 2002, we determined:

(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.**

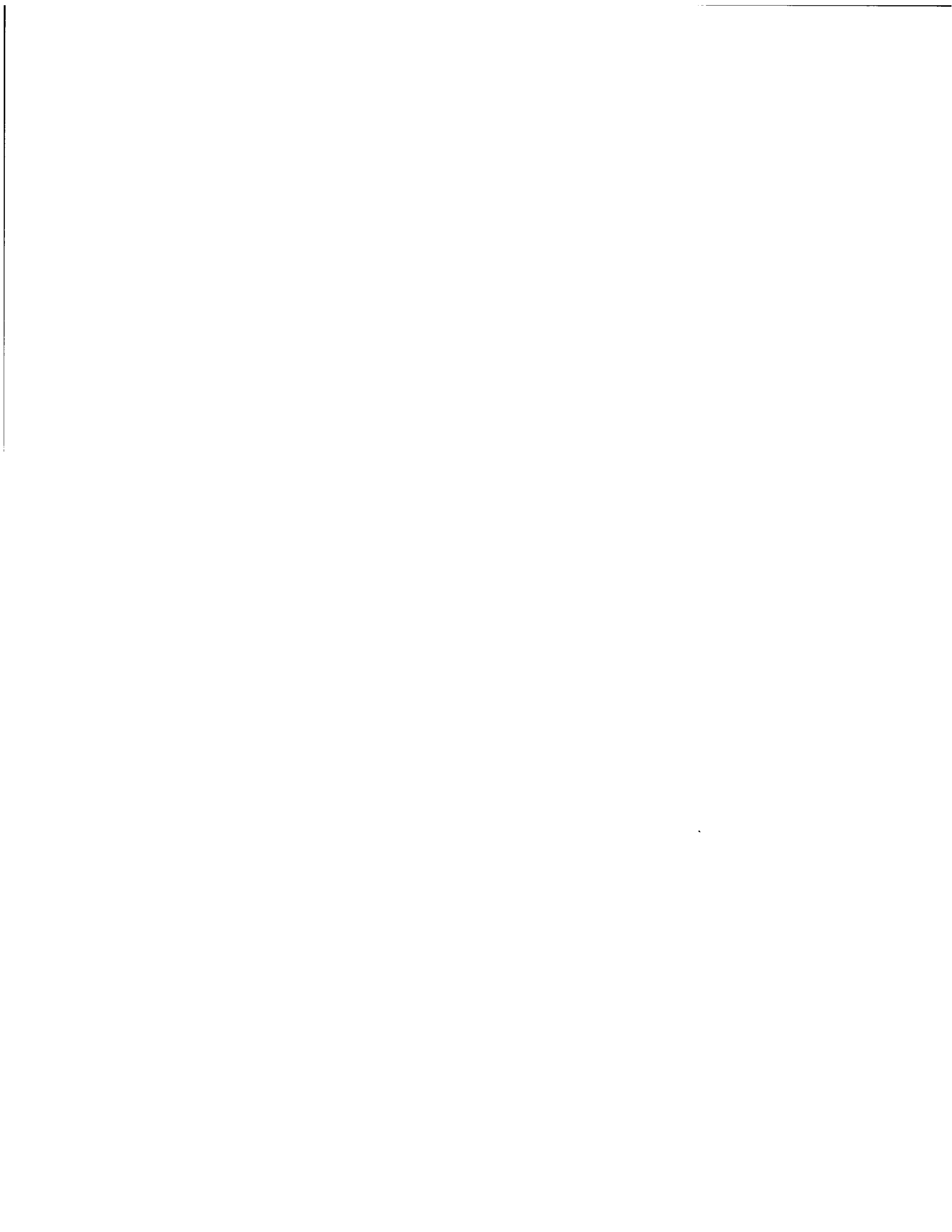
Order for the Debtor to Appear and Show Cause
Regarding Eligibility for a Discharge

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



B 203
(12/94)

United States Bankruptcy Court

________________ District Of ________________

In re

Case No. __________

Debtor

Chapter ________

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR

1. Pursuant to 11 U.S.C. § 329(a) and Fed. Bankr. P. 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 follows:

   For legal services, I have agreed to accept .... $__________

   Prior to the filing of this statement I have received .... $__________

   Balance Due .... $__________

2. The source of the compensation paid to me was:

   ☐ Debtor ☐ Other (specify)

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

   ☐ Debtor ☐ Other (specify)

4. ☐ 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 other person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation, is attached.

5. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the 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, statements 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;

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR (Continued)

d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters;

e. [Other provisions as needed]

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

CERTIFICATION

I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceedings.

______________________ ______________________________
Date *Signature of Attorney*

____
Name of law firm

MEMORANDUM

DATE: March 10, 2004

FROM: Patricia S. Ketchum

SUBJECT: Proposed Amendment to Form 6-I, Current Income of Individual Debtor(s)

TO: Advisory Committee on Bankruptcy Rules, Subcommittee on Forms

At the September 2003 meeting the Committee decided in principle to amend Form 6-I, the schedule of current income of individual debtor(s) to require a debtor to disclose the current monthly income of a nonfiling spouse in every chapter. At present, the form requires the nonfiling spouse's income to be disclosed only in a case filed under chapter 12 or chapter 13. The proposal to amend the form was included in the group of amendments to the rules and forms submitted by the Executive Office for United States Trustees. The amendment to Schedule I, Current Income of Individual Debtor(s) and a draft Committee Note are attached.

Schedule I, however, is not the only place in the official forms where the income of a nonfiling spouse must be disclosed. The Statement of Financial Affairs (Form 7), contains language almost identical to that used in Schedule I in 12 of the first 13 questions on the statement form. For example, in question 1, which is titled "Income from employment or operation of business," the following sentence is used: "(Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)". Does it make sense to require disclosure of a nonfiling spouse's current monthly income when we do not require disclosure of the nonfiling spouse's yearly income or role in the other matters covered in the Statement of Financial Affairs?

The time period for which income information is requested on the statement of financial affairs, however, is the two years prior to filing. In other questions on the statement, the reachback period varies from 90 days to two years. The longer time periods covered by the statement of financial affairs raise a number of issues concerning how much information a debtor should be required to disclose about the financial circumstances of a nonfiling spouse. If the

spouses were not married during the entire period covered by a particular question, is it appropriate to ask for any information relating to the nonfiling individual? Is the information requested in some of the questions properly relevant in a chapter 11 case filed by an individual but not in a chapter 7 case? Of the first 13 questions on the statement form, the only one which does not ask for information about the nonfiling spouse is question 9, "Payments related to debt counseling or bankruptcy." Should a request for disclosure about such payments by a nonfiling spouse be added to question 9? Should the subcommittee undertake to propose requiring disclosures concerning the nonfiling spouse on at least some of the matters covered in the statement of financial affairs? Or if requiring disclosure of only the spouse's current monthly income -- without the other information about the spouse's financial history-- does make sense, what should we add to the Committee Note to Schedule I about why it does?

For quick reference, the first 13 questions on the statement of financial affairs and time periods for which information is requested are as follows:

- 1) income from business or employment, 2 years prior to filing;
- 2) income from other sources, 2 years prior to filing;
- 3) preferential payments, 90 days prior to filing or 1 year if to an insider;
- 4) suits, seizures, garnishments, 1 year prior to filing;
- 5) repossessions, foreclosures, etc., 1 year prior to filing;
- 6) assignments, 120 days prior to filing; receiverships, 1 year prior to filing;
- 7) gifts, 1 year prior to filing;
- 8) losses, 1 year or since commencement of case;
- 9) payments for debt counseling or bankruptcy (advice), 1 year prior to filing;
- 10) other transfers, 1 year prior to filing;
- 11) closed financial accounts, 1 year prior to filing;
- 12) safe deposit boxes, 1 year prior to filing, and
- 13) setoffs, 90 days prior to filing.

The first five pages of the Statement of Financial Affairs, containing questions 1 through 13, are attached.

Attachments

Form B6I
~~(12/03)~~ (12/04)

In re ______________________________, Debtor

Case No. ______________________ (if known)

SCHEDULE I - CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor ~~in a chapter 12 or 13 case~~ whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status:	DEPENDENTS OF DEBTOR AND SPOUSE	
	RELATIONSHIP	AGE

Employment:	DEBTOR	SPOUSE
Occupation		
Name of Employer		
How long employed		
Address of Employer		

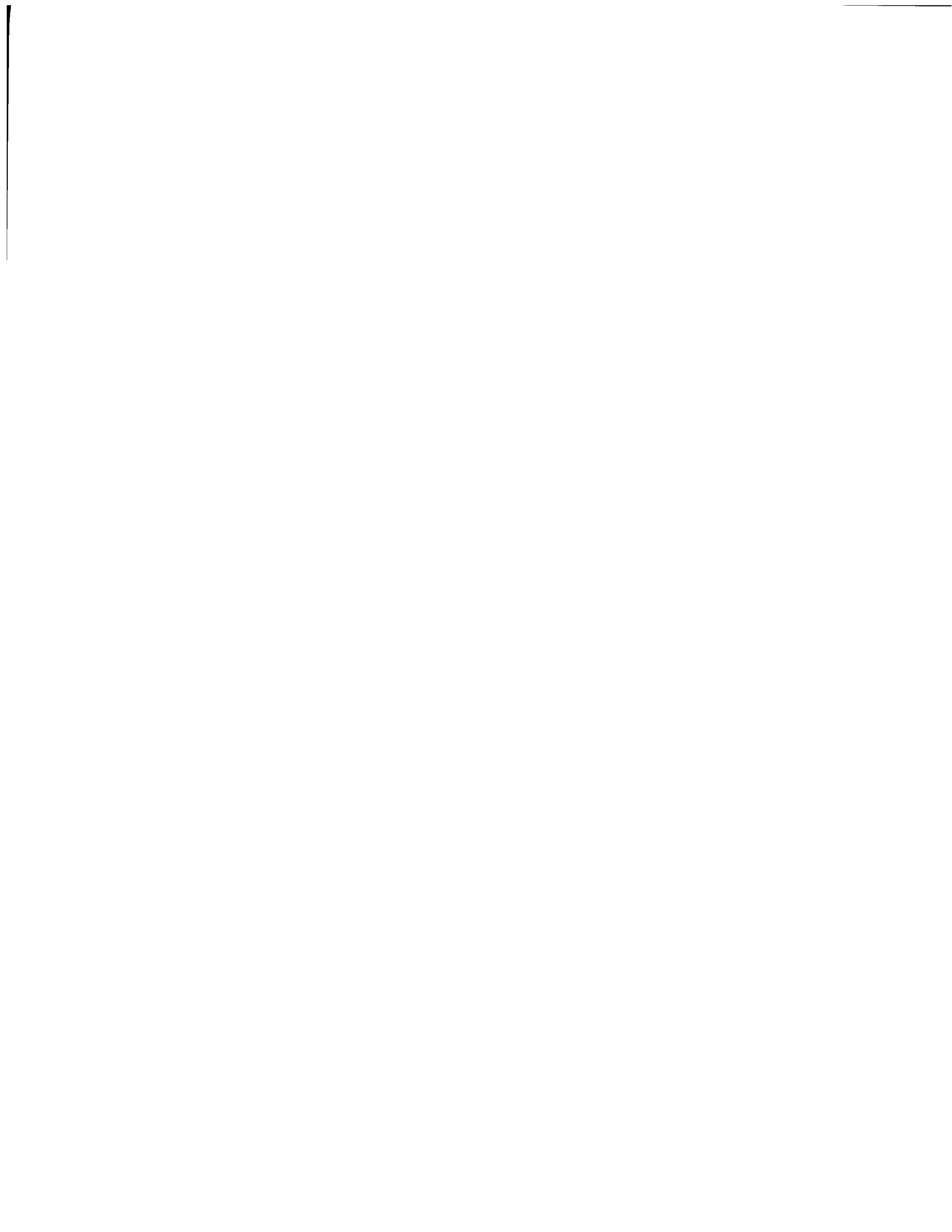
Income: (Estimate of average monthly income)	DEBTOR	SPOUSE
Current monthly gross wages, salary, and commissions (pro rate if not paid monthly.)	$	$
Estimated monthly overtime	$	$
SUBTOTAL	$	$
LESS PAYROLL DEDUCTIONS		
a. Payroll taxes and social security	$	$
b. Insurance	$	$
c. Union dues	$	$
d. Other (Specify: ______________________)	$	$
SUBTOTAL OF PAYROLL DEDUCTIONS	$	$
TOTAL NET MONTHLY TAKE HOME PAY	$	$
Regular income from operation of business or profession or farm (attach detailed statement)	$	$
Income from real property	$	$
Interest and dividends	$	$
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above.	$	$
Social security or other government assistance (Specify) ______________________	$	$
Pension or retirement income	$	$
Other monthly income	$	$
(Specify) ______________________	$	$
______________________	$	$
TOTAL MONTHLY INCOME	$	$

TOTAL COMBINED MONTHLY INCOME $______________ (Report also on Summary of Schedules)

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document:

2004 COMMITTEE NOTE

Schedule I (Current Income of Individual Debtor(s)) is amended to require a married debtor filing under any chapter of the Code to complete the column labeled "Spouse" whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. Disclosure of a nonfiling spouse's income in a chapter 7 case will help the United States trustee to determine whether to file a motion under section 707(b) of the Code. In a chapter 11 case filed by an individual, the disclosure will help creditors determine whether the plan is fair and equitable as required by § 1129(b) of the Code.



Form 7
(12/03)

FORM 7. STATEMENT OF FINANCIAL AFFAIRS

UNITED STATES BANKRUPTCY COURT

______________________________ DISTRICT OF ______________________________

In re: ______________________________, (Name) Debtor   Case No. ______________________________ (if known)

STATEMENT OF FINANCIAL AFFAIRS

This statement is to be completed by every debtor. Spouses filing a joint petition may file a single statement on which the information for both spouses is combined. If the case is filed under chapter 12 or chapter 13, a married debtor must furnish information for both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed. An individual debtor engaged in business as a sole proprietor, partner, family farmer, or self-employed professional, should provide the information requested on this statement concerning all such activities as well as the individual's personal affairs.

Questions 1 - 18 are to be completed by all debtors. Debtors that are or have been in business, as defined below, also must complete Questions 19 - 25. **If the answer to an applicable question is "None," mark the box labeled "None."** If additional space is needed for the answer to any question, use and attach a separate sheet properly identified with the case name, case number (if known), and the number of the question.

DEFINITIONS

"In business." A debtor is "in business" for the purpose of this form if the debtor is a corporation or partnership. An individual debtor is "in business" for the purpose of this form if the debtor is or has been, within the six years immediately preceding the filing of this bankruptcy case, any of the following: an officer, director, managing executive, or owner of 5 percent or more of the voting or equity securities of a corporation; a partner, other than a limited partner, of a partnership; a sole proprietor or self-employed.

"Insider." The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any owner of 5 percent or more of the voting or equity securities of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; any managing agent of the debtor. 11 U.S.C. § 101.

---

1. Income from employment or operation of business

None ☐

State the gross amount of income the debtor has received from employment, trade, or profession, or from operation of the debtor's business from the beginning of this calendar year to the date this case was commenced. State also the gross amounts received during the **two years** immediately preceding this calendar year. (A debtor that maintains, or has maintained, financial records on the basis of a fiscal rather than a calendar year may report fiscal year income. Identify the beginning and ending dates of the debtor's fiscal year.) If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income of both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE (if more than one)

2. Income other than from employment or operation of business

None ☐

State the amount of income received by the debtor other than from employment, trade, profession, or operation of the debtor's business during the **two years** immediately preceding the commencement of this case. Give particulars. If a joint petition is filed, state income for each spouse separately. (Married debtors filing under chapter 12 or chapter 13 must state income for each spouse whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

AMOUNT	SOURCE

---

3. Payments to creditors

None ☐

a. List all payments on loans, installment purchases of goods or services, and other debts, aggregating more than $600 to any creditor, made within **90 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATES OF PAYMENTS	AMOUNT PAID	AMOUNT STILL OWING

None ☐

b. List all payments made within **one year** immediately preceding the commencement of this case to or for the benefit of creditors who are or were insiders. (Married debtors filing under chapter 12 or chapter 13 must include payments by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR AND RELATIONSHIP TO DEBTOR	DATE OF PAYMENT	AMOUNT PAID	AMOUNT STILL OWING

---

4. Suits and administrative proceedings, executions, garnishments and attachments

None ☐

a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

CAPTION OF SUIT AND CASE NUMBER	NATURE OF PROCEEDING	COURT OR AGENCY AND LOCATION	STATUS OR DISPOSITION

None ☐

b. Describe all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON FOR WHOSE BENEFIT PROPERTY WAS SEIZED	DATE OF SEIZURE	DESCRIPTION AND VALUE OF PROPERTY

---

5. Repossessions, foreclosures and returns

None ☐

List all property that has been repossessed by a creditor, sold at a foreclosure sale, transferred through a deed in lieu of foreclosure or returned to the seller, within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSSESSION, FORECLOSURE SALE, TRANSFER OR RETURN	DESCRIPTION AND VALUE OF PROPERTY

---

6. Assignments and receiverships

None ☐

a. Describe any assignment of property for the benefit of creditors made within **120 days** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include any assignment by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF ASSIGNEE	DATE OF ASSIGNMENT	TERMS OF ASSIGNMENT OR SETTLEMENT

None ☐

b. List all property which has been in the hands of a custodian, receiver, or court-appointed official within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning property of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CUSTODIAN	NAME AND LOCATION OF COURT CASE TITLE & NUMBER	DATE OF ORDER	DESCRIPTION AND VALUE OF PROPERTY

7. Gifts

None ☐

List all gifts or charitable contributions made within **one year** immediately preceding the commencement of this case except ordinary and usual gifts to family members aggregating less than $200 in value per individual family member and charitable contributions aggregating less than $100 per recipient. (Married debtors filing under chapter 12 or chapter 13 must include gifts or contributions by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF PERSON OR ORGANIZATION	RELATIONSHIP TO DEBTOR, IF ANY	DATE OF GIFT	DESCRIPTION AND VALUE OF GIFT

---

8. Losses

None ☐

List all losses from fire, theft, other casualty or gambling within **one year** immediately preceding the commencement of this case **or since the commencement of this case**. (Married debtors filing under chapter 12 or chapter 13 must include losses by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

DESCRIPTION AND VALUE OF PROPERTY	DESCRIPTION OF CIRCUMSTANCES AND, IF LOSS WAS COVERED IN WHOLE OR IN PART BY INSURANCE, GIVE PARTICULARS	DATE OF LOSS

---

9. Payments related to debt counseling or bankruptcy

None ☐

List all payments made or property transferred by or on behalf of the debtor to any persons, including attorneys, for consultation concerning debt consolidation, relief under the bankruptcy law or preparation of a petition in bankruptcy within **one year** immediately preceding the commencement of this case.

NAME AND ADDRESS OF PAYEE	DATE OF PAYMENT, NAME OF PAYOR IF OTHER THAN DEBTOR	AMOUNT OF MONEY OR DESCRIPTION AND VALUE OF PROPERTY

---

10. Other transfers

None ☐

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. (Married debtors filing under chapter 12 or chapter 13 must include transfers by either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF TRANSFEREE, RELATIONSHIP TO DEBTOR	DATE	DESCRIBE PROPERTY TRANSFERRED AND VALUE RECEIVED

11. Closed financial accounts

None ☐

List all financial accounts and instruments held in the name of the debtor or for the benefit of the debtor which were closed, sold, or otherwise transferred within **one year** immediately preceding the commencement of this case. Include checking, savings, or other financial accounts, certificates of deposit, or other instruments; shares and share accounts held in banks, credit unions, pension funds, cooperatives, associations, brokerage houses and other financial institutions. (Married debtors filing under chapter 12 or chapter 13 must include information concerning accounts or instruments held by or for either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF INSTITUTION	TYPE OF ACCOUNT, LAST FOUR DIGITS OF ACCOUNT NUMBER, AND AMOUNT OF FINAL BALANCE	AMOUNT AND DATE OF SALE OR CLOSING

12. Safe deposit boxes

None ☐

List each safe deposit or other box or depository in which the debtor has or had securities, cash, or other valuables within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include boxes or depositories of either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF BANK OR OTHER DEPOSITORY	NAMES AND ADDRESSES OF THOSE WITH ACCESS TO BOX OR DEPOSITORY	DESCRIPTION OF CONTENTS	DATE OF TRANSFER OR SURRENDER, IF ANY

13. Setoffs

None ☐

List all setoffs made by any creditor, including a bank, against a debt or deposit of the debtor within **90 days** preceding the commencement of this case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.)

NAME AND ADDRESS OF CREDITOR	DATE OF SETOFF	AMOUNT OF SETOFF

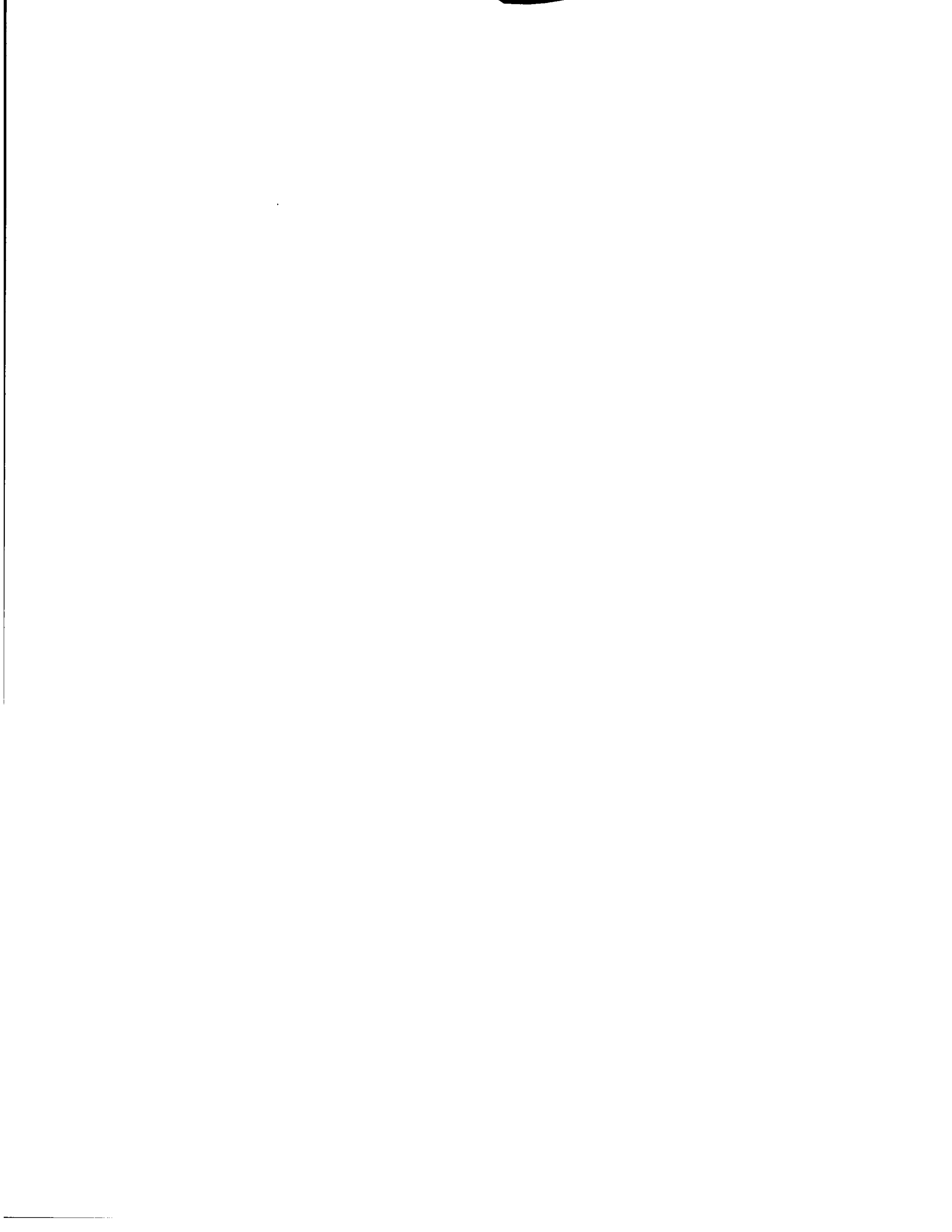
14. Property held for another person

None ☐

List all property owned by another person that the debtor holds or controls.

NAME AND ADDRESS OF OWNER	DESCRIPTION AND VALUE OF PROPERTY	LOCATION OF PROPERTY

15. Prior address of debtor



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 3007 AND REQUESTS FOR RELIEF

DATE: MARCH 8, 2004

Rule 3007 governs objections to claims. In most instances, a party in interest files an objection to a claim and the matter proceeds as a contested matter under Rule 9014.[1] The rule, however, recognizes that in many instances, the objection to the claim is joined with a request for relief of a kind set out in Rule 7001. Thus, the objection to claim, a contested matter, is joined with an adversary proceeding. In that event, Rule 3007 currently provides that "If an objection to a claim is joined with a demand for relief of a kind specified in Rule 7001, it becomes an adversary proceeding."

The language of the rule thus suggests that the inclusion of a certain demand for relief transforms the contested matter into an adversary proceeding. The rule does not, however, provide any direction as to the consequences of the transformation. That is, the rule does not direct the objector to comply with the provisions of Part VII of the rules. Instead, its silence could be understood as simply deeming the action to be an adversary proceeding without requiring compliance with the provisions of Part VII particularly as regards the commencement of the action. A simple and common example illustrates the problem.

---

[1] Rule 9013 suggests that the objection should be in the form of a motion, but the practice is to denominate the pleading as an "objection to claim." This is arguably consistent with Rule 9014(a) in that Rule 3007 "otherwise governs" the matter and a motion is therefore not required under Rule 9014(a).

A creditor files a proof of claim asserting a security interest in a chapter 7 debtor's motor vehicle. The claim includes the amount of the indebtedness claimed, and it includes unmatured interest in the amount of the claim. The outstanding indebtedness exceeds the value of the motor vehicle, so the future interest is objectionable under § 502(b)(2). This objection would be raised under Rule 3007, and it would initiate a contested matter. However, the trustee asserts that the creditor failed to perfect its interest in the motor vehicle under the applicable state law. This assertion challenges the validity of the lien and should be pursued under Rule 7001(2) as an adversary proceeding. Rule 3007 provides that while the objection that the trustee files would seem to initiate a contested matter, the fact that it challenges the creditor's asserted lien transforms the contested matter into an adversary proceeding. See, e.g., In re Octagon Roofing, 156 B.R. 214, 218 (Bankr. N.D. Il. 1993) (when trustee filed objection to claim and asserted strong-arm avoidance power in alleging that creditor failed to perfect lien, action became an adversary proceeding and separate filing of a complaint was unnecessary).

Under Rule 9014(b), the service of the objection to the claim must meet the requirements of service of a complaint under Rule 7004. Thus, the creditor whose claim is being challenged receives service of the documents in the same manner whether the action starts as a contested matter or if it is commenced by the filing of a complaint as an adversary proceeding. The only consequence to "transforming" a contested matter into an adversary proceeding is that the litigation proceeds under the full application of Part VII of the Rules rather than under the partial application of those rules to the extent that Rule 9014(c) provides. The transformation thus eliminates the need for the objection to be refiled as a complaint in order to continue the matter as an adversary proceeding.

Rule 3007 is derived from § 48a(8) of the Bankruptcy Act and former Bankruptcy Rule 306. In fact, the last sentence of Rule 3007 is taken nearly verbatim from former Rule 306. Thus, the concept that an objection to a claim that includes a request for relief of a kind specified in the adversary proceeding rule has been in the rules for many years. It has always operated simply to transform the contested matter to an adversary proceeding. Permitting the transformation has the salutary effect of allowing the action to go forward under the appropriate set of rules rather than requiring a new start to the action. See, e.g., Halverson v. Cameron (In re Mathiason), 16 F.3d 234 (8th Cir. 1993); In re Octagon Roofing, 156 B.R. 214 (Bankr. N.D. Ill. 1993). On the other hand, the case proceeding as an adversary proceeding may catch a party by surprise and result in a more complete resolution of the matter than was anticipated. Mathiason, 16 F.3d at 238 (trustee's failure to raise a challenge to joint tenancy status in an objection to a claim that included a request for a determination of the extent of a lien results in a waiver of that claim). Perhaps the rule could be more explicit in its statement of the effect of transforming a contested matter into an adversary proceeding. For example, Rule 7013 applies in adversary proceedings, but it does not apply in contested matters. Consequently, a party that expects the action to be a contested matter may conclude that compulsory counterclaims need not be asserted. If the action goes forward as an adversary proceeding, however, Rule 7013 would apply and compulsory counterclaims would have to be raised.

This is a result of a party misunderstanding or ignoring the final sentence of Rule 3007. This problem could be resolved by requiring a separate filing for objections to claims and for adversary proceedings. If Rule 3007 is limited to objections to claims that are contested matters, no misunderstanding will follow. This would require, however, that an objection to a claim that

included a request for relief would be dismissed as improper under Rule 3007. There would also need to be some provision governing the impact of a decision on the matter if the creditor failed to raise an objection to proceeding under the incorrect rule. The rule as currently drafted avoids these problems by deeming the action to be an adversary proceeding. The action proceeds with the full set of Part VII rules applying.

It may improve the rule to set apart in the rule the directive that the otherwise contested matter is deemed an adversary proceeding. The rule could be more explicit in describing the impact of the rule's providing that the action "becomes an adversary proceeding." A possible revision of Rule 3007 follows.

Rule 3007 Objections to Claims

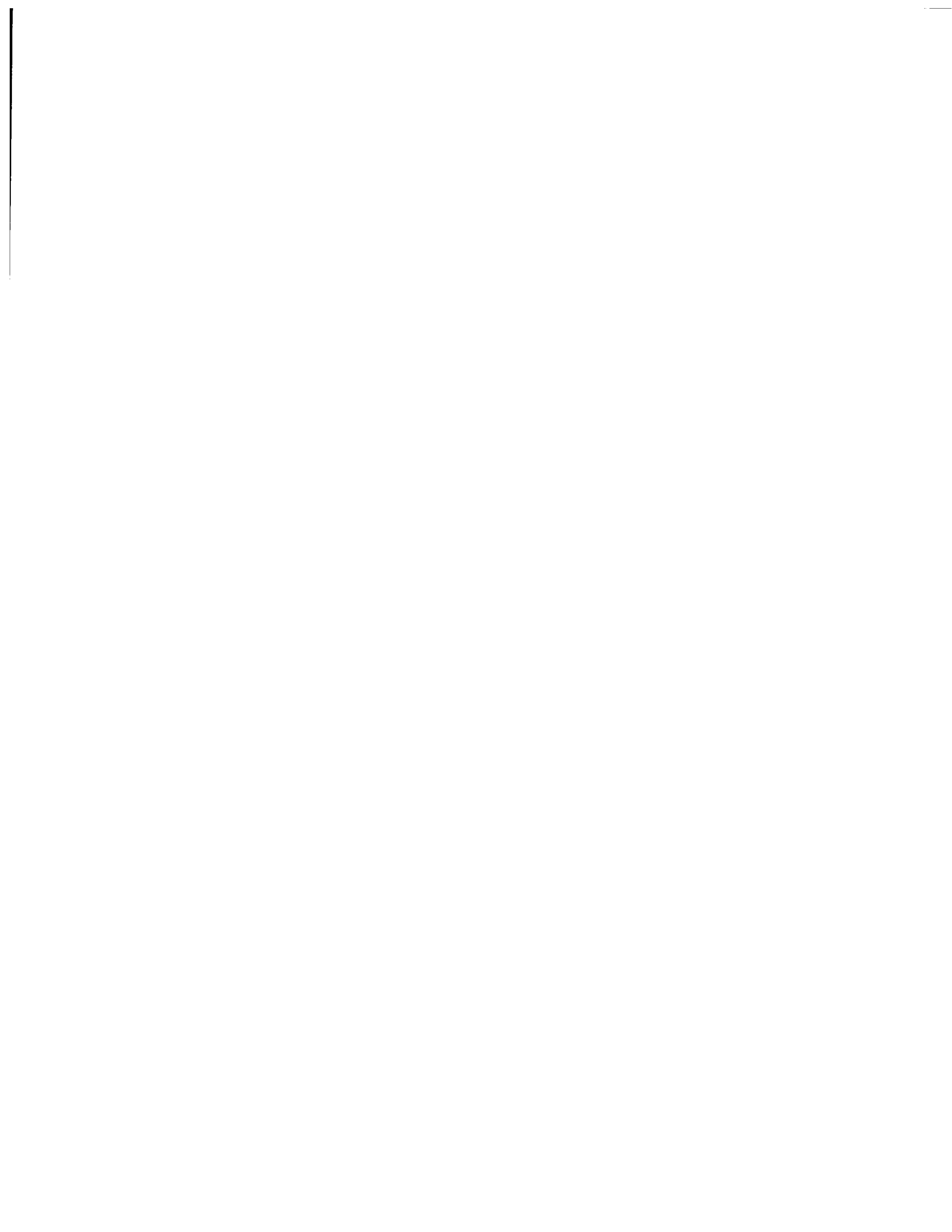
1 (a) An objection to the allowance of a claim shall be in writing and
2 filed. A copy of the objection with notice of the hearing thereon
3 shall be mailed or otherwise delivered to the claimant, the debtor or
4 debtor in possession and the trustee at least 30 days prior to the
5 hearing.
6 (b) If an objection to a claim is joined with a demand for relief of
7 the kind specified in Rule 7001, the action becomes an adversary
8 proceeding, the objection is deemed to be a complaint, and all of
9 Part VII of these Rules apply to the action ~~it becomes an adversary~~
10 ~~proceeding~~.

COMMITTEE NOTE

An objection to a claim initiates a contested matter. If,

> however, the objection includes also a request for relief of a kind specified in Rule 7001, the contested matter automatically becomes an adversary proceeding. The rule is amended to highlight that the objection that was filed to commence the contested matter is deemed to be a complaint and that the action goes forward as an adversary proceeding. As a result, all of Part VII of the rules apply to the action. The court can enter any order or take any action it could take in any other adversary proceeding.

The amendment to the rule is relatively minor and is not intended to make any substantive change in the rule. Another possible solution would be to revise the rule to require the party filing the objection that includes a request for adversary proceeding type of relief to file a complaint separate from the objection, but such an amendment would not likely solve the problem. The provision in the existing rule as well as the proposed subdivision (b) above recognize that parties will continue to combine objections to claims with requests for relief that are specified in Rule 7001. Thus, it seems that introducing a requirement that the objector file a separate complaint would be ineffectual. The parties that file such compound objections do so in apparent ignorance of Rule 7001. Rather than force these parties to refile the pleadings, the current rule instead attempts to make the best of the situation by permitting the actions to go forward without requiring the second filing of essentially the same document. Consequently, it does not seem appropriate to amend the rule to require the separate filing of a complaint. Moreover, unless the Committee believes that an amendment to the rule is necessary to provide essential clarification, it seems that no change is needed to Rule 3007.



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 7054 AMENDMENT TO CONFORM TO AMENDMENTS TO CIVIL RULES 7023 AND 7054

Professor Resnick raised an issue for consideration of the Committee due to a recent amendment of the Civil Rules. Currently, Bankruptcy Rule 7054(a) provides that Rule 54(a)-(c) apply in adversary proceedings. Rule 54(d), however, does not apply in adversary proceedings. That subdivision governs the award of costs and attorney fees in the absence of some other statutory directive. In class actions in bankruptcy cases, on the other hand, the award of costs are governed by Rule 7054(b).

Effective December 1, 2003, Rule 23 F. R. Civ. P. was amended to add new subdivisions (g) and (h). A copy of the revised portions of the rule is set out immediately after this memorandum. Rule 23(h) establishes new procedures for the award of attorney fees in class actions. Bankruptcy Rule 7023 provides that all of Rule 23 applies in adversary proceedings. Therefore, the new Rule 23(h) seems to apply in adversary proceedings. This new subdivision in Rule 23(h) provides that Rule 54(d) applies to awards of attorney fees in class actions. Thus, the Bankruptcy Rules exclude Civil Rule 54(d) from adversary proceedings, but Rule 7023 would reintroduce Civil Rule 54(d)(2) into adversary proceedings through the cross reference contained in new Civil Rule 23(h).

The revisions of Civil Rule 23 that became effective on December 1, 2003, were promulgated after long study and significant debate. Therefore, adoption of the process created

by those amendments seems most proper when limited to application in class actions. That requires an amendment to Bankruptcy Rule 7054 to allow Civil Rule 54(d) to apply in class actions. The absence of such an amendment leaves the Bankruptcy Rules inconsistent in that Rule 7054 states that Rule 54(d) does not apply in adversary proceedings, but Rule 7023 would incorporate Rule 54(d) by its wholesale adoption of Rule 23. Therefore, I would suggest that the Committee recommend to the Standing Committee that Rule 7054 be amended to provide explicitly that Civil Rule 54(d)(2) applies in adversary proceedings that are class actions. This would have the effect of treating these issues identically in class actions whether they are proceeding in a bankruptcy court or a district court. The amendment to Rule 7054 to accomplish this result is set out below.

Rule 7054. Judgments; Costs

1 (a) JUDGMENTS. Rule 54(a)–(c) F. R. Civ. P. applies in
2 adversary proceedings. Except as provided in Rule 7023, Rule
3 54(d) F. R. Civ. P. does not apply in adversary proceedings.
4 * * * * * *

COMMITTEE NOTE

The promulgation of the amendments including Rule 23(h) F. R. Civ. P. makes amendment of Bankruptcy Rule 7054(a) necessary. Rule 23 is applicable in its entirety in adversary proceedings by virtue of its incorporation by Rule 7023. That incorporation includes the cross reference in Rule 23(h) to Rule 54(d)(2). In the absence of an amendment to Rule 7054(a), ambiguity would exist as to whether Rule 54(d) through its cross reference in Rule 23(h) would apply in adversary proceedings or whether the exclusion of that portion of Rule 54 set out in

> Bankruptcy Rule 7054 would prohibit application of that subdivision of the civil rule. This amendment provides that Rule 54(d) applies only in the case of a class action proceeding under Rule 7023. Thus, Rule 54(d) still is not applicable generally to adversary proceedings, but this general rule is overridden in the case of a class action pending in the bankruptcy court.

This amendment is proposed to make the Bankruptcy Rules conform to changes in the civil rules. It is necessary because the amendments to Rule 23 created a conflict between Bankruptcy Rules 7023 and 7054 where none had previously existed. Since this is an amendment that is intended only to resolve the conflict created by the civil rules amendments and is not intended to have any substantive impact otherwise, the Committee may wish to propose the amendment to the Standing Committee for its adoption without the need for publication and comment. This will shorten the approval process by one year and will expedite the change necessary to make the bankruptcy and civil rules consistent.

The other alternative to amending Rule 7054 would be to propose an amendment to Rule 7023 to provide that Rule 23(h) does not apply in adversary proceedings. This would obviate the need to amend Rule 7054 because Civil Rule 54(d) would not be imported into Rule 7023 if subdivision (h) of Rule 23 were specifically excluded from applying in adversary proceedings. Amending the rule in this fashion would create a distinction in class actions in bankruptcy courts as compared to district courts creating the potential for forum shopping. As a result, I would not recommend this option for the Committee.

The promulgation of Rule 23(h) creates another potential conflict with the Bankruptcy Rules, though one that is not so immediately apparent or direct. Rule 23(h)(4) authorizes the court to refer matters to special masters and magistrate judges. Bankruptcy Rule 9031 specifically

provides that Rule 53 F. R. Civ. P. that govern the appointment of special masters does not apply in bankruptcy cases. In fact, the Committee has recently reiterated its view that Rule 53 should not be incorporated into the Bankruptcy Rules. Therefore, it seems appropriate to amend rule 7023 to clarify that Rule 23(d)(4) does not apply in adversary proceedings. An amendment to accomplish that objective follows.

Rule 7023. Class Proceedings

1 With the exception of subdivision (h)(4), Rule 23 F. R. Civ. P.

2 applies in adversary proceedings.

COMMITTEE NOTE

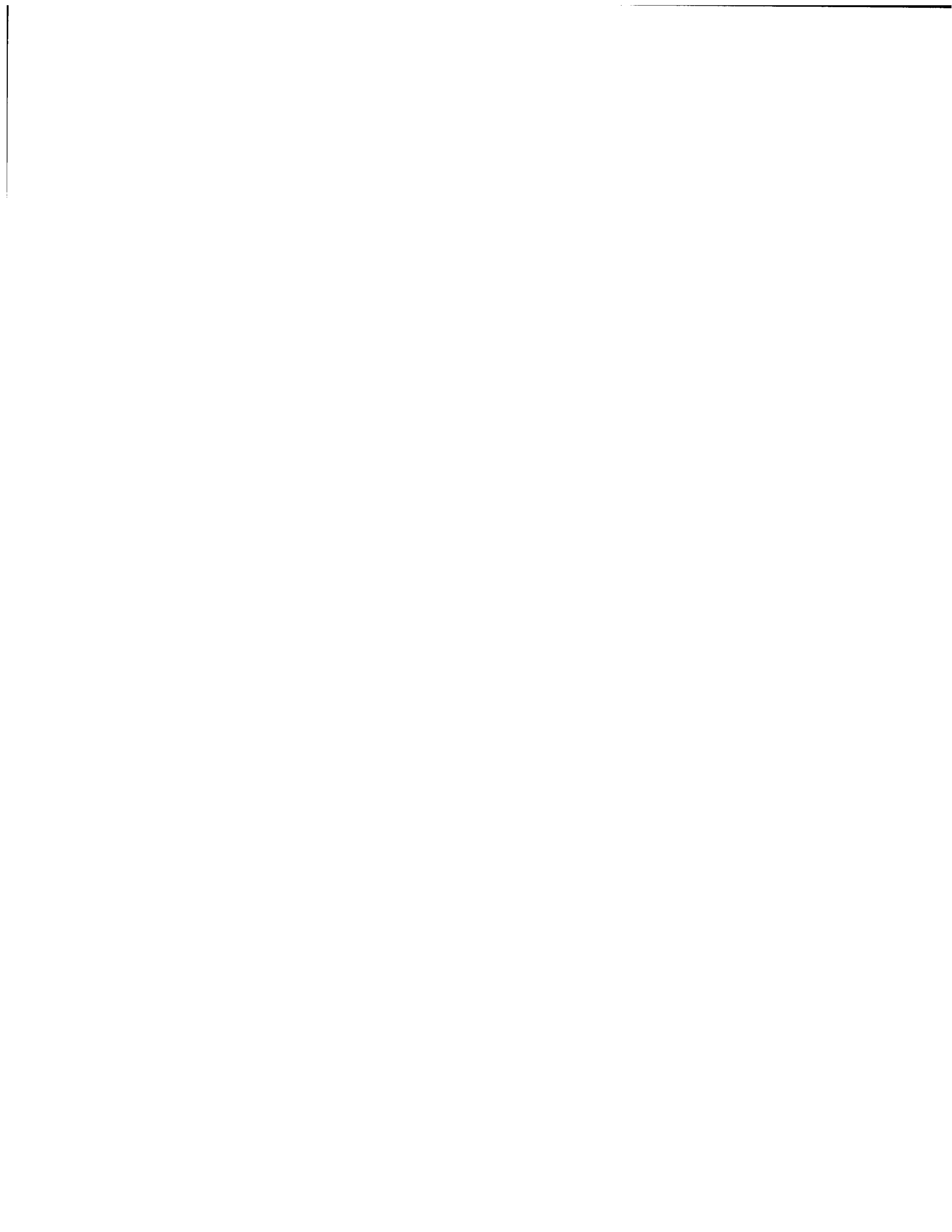
This amendment excludes Rule 23(h)(4) from adversary proceedings. That provision authorizes a court to refer to a special master or magistrate judge the issue of the proper amount of an attorney fee award in a class action. Bankruptcy Rule 9031 specifically provides that Rule 53 F. R. Civ. P. does not apply in bankruptcy cases thus effectively prohibiting the appointment of a special master. By making Rule 23(h)(4) inapplicable in adversary proceedings, Rule 7023 follows the policy of Rule 9031 to bar the appointment of a special master.

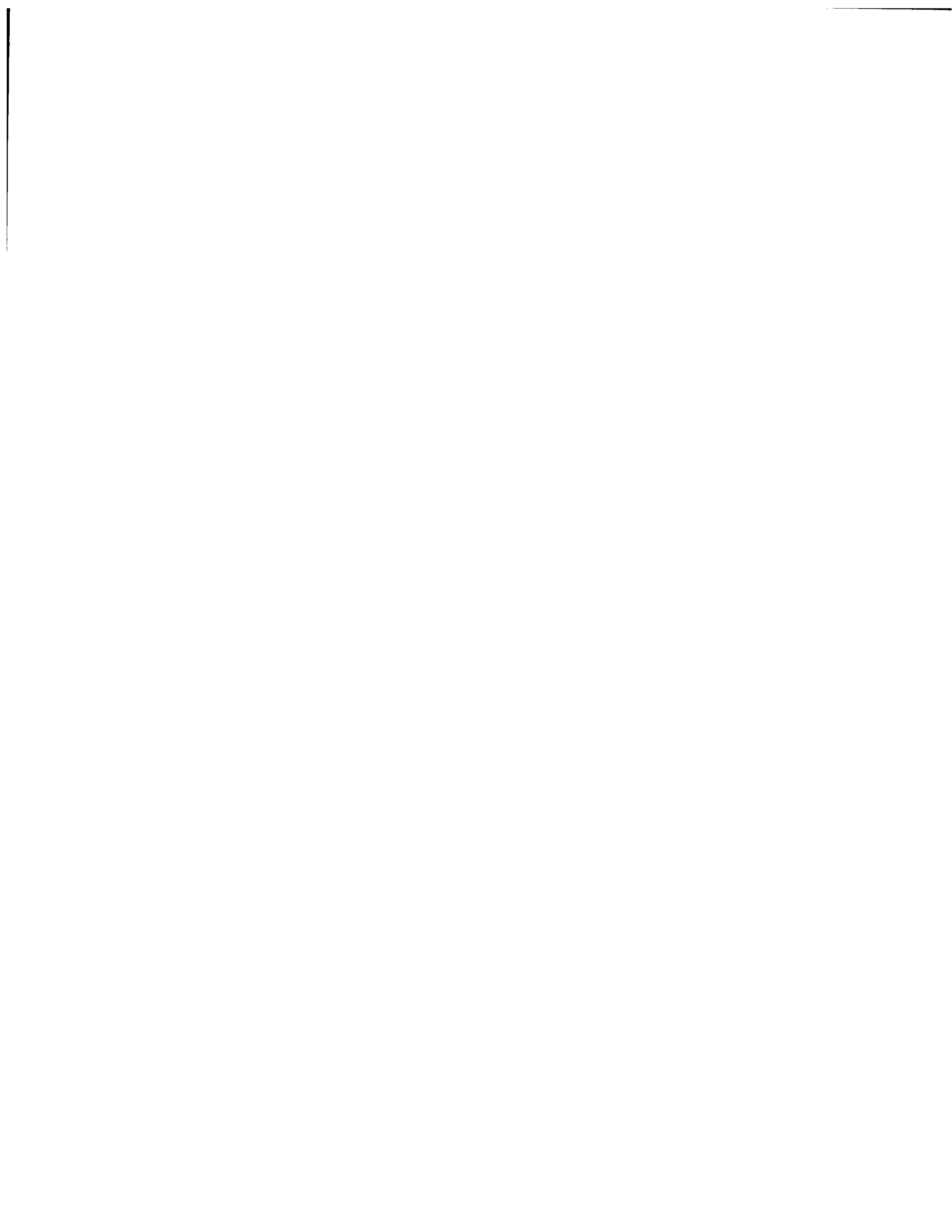
The amendment is not intended to have any other affect on the application of Rule 23 F. R. Civ. P. in adversary proceedings, and all of the remaining provisions of that rule will apply.

As with the proposed amendment to Rule 7054, this amendment can be viewed as a conforming amendment necessitated by the promulgation of the amendments to Civil Rule 23. If the Committee considers this amendment to be technical and conforming, there may be no need to publish the proposed amendment for comment, and the proposal could be recommended to the

Standing Committee for its adoption and recommendation to the Judicial Conference for its transmission to the Supreme Court.

Attachment





AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 23. Class Actions

* * * * *

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1) (A) When a person sues or is sued as a representative of a class, the court must — at an early practicable time — determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2) (A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or

not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

(e) Settlement, Voluntary Dismissal, or Compromise.

(1) **(A)** The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4) **(A)** Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

* * * * *

(g) **Class Counsel.**

(1) **Appointing Class Counsel.**

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,

- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

§ 2403. Intervention by United States or a State; constitutional question

(a) In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: CERTIFICATION OF CONSTITUTIONAL QUESTIONS AND PROPOSED CIVIL RULE 5.1

DATE: MARCH 8, 2004

Rule 24(c) of the Federal Rules of Civil Procedure currently sets the procedure when a party challenges the constitutionality of a federal or state statute. The rule is part of the intervention rule, and the Civil Rules Committee has proposed new civil rule 5.1 to replace a portion of Rule 24(c). The proposal was published for comment, and the comment period has now passed. We expect the proposal to be presented to the Standing Committee for its approval at the June 2004 meeting. The Committee Note to the proposed amendment states that the Committee believes the relocation of the rule to that portion of the rules that includes the initial filings in the case is more likely to come to the attention of parties than in its current location as a part of the rule governing intervention.

The rule implements 28 U.S.C. § 2403 which requires the court to certify to the appropriate state or United States Attorney General that the constitutionality of a state or federal statute that affects the public interest has been questioned in "any action, suit or proceeding." Proposed Rule 5.1 would require the parties to give notice to the Attorney General, and directs the court thereafter to certify that a constitutional issue has been raised. The Rule also provides that the United States has 60 days to intervene in the action. The 60 day period is the same as the period provided for the United States to answer a complaint under Rule 12(a)(3)(A). Rule 12(a)

does not apply in adversary proceedings (although Bankruptcy Rule 7012 does import the remaining provisions of Rule 12), and by way of contrast, Bankruptcy Rule 7012(a) establishes a 35 day period for the United States to answer a complaint. Consequently, consistent with the intent and structure of Proposed Rule 5.1, a Proposed Bankruptcy Rule 7005.1 should adopt the answer period set out in Rule 7012(a) as the time allowed for the United States to intervene under Rule 7005.1.

Existing Bankruptcy Rule 7024 provides that Rule 24 F. R. Civ. P. applies in adversary proceedings. If the civil rule is amended to delete a portion of subdivision (c) and to create a new Rule 5.1, then the cross reference in Bankruptcy Rule 7024 to Rule 24 will be insufficient. Therefore, if the Standing Committee accepts the recommendation of the Civil Rules Committee to present the amended Rule 24 and new Rule 5.1 to the Judicial Conference, we will need to be prepared to recommend a conforming amendment to the Bankruptcy Rules. A new Rule 7005.1 would provide that Rule 5.1 F. R. Civ. P. applies in adversary proceedings. Rule 9014(c) also should be amended to add Rule 7005.1 to the list of rules applicable in contested matters. These amendments arguably are conforming and may not need to be published for comment. In that event, the amendments to the Bankruptcy Rules could be proposed to the Standing Committee on a conditional basis. If the Standing Committee approves the Civil Rules amendments to Rule 24 and the promulgation of new Rule 5.1, then the Bankruptcy Rules conforming amendments would follow.

The amendment to Rule 9014 to include Rule 7005.1 among the adversary rules that apply in contested matters will be a change that could have significant impact in specific cases. Rule 7024 is not applicable in contested matters, so the provisions currently in Civil Rule 24 do

not apply in contested matters. To the extent that a portion of former Civil Rule 24(c) will be applicable in contested matters, the courts and parties will need to be more aware of the potential for the need to serve attorneys general and to have the court make certifications about these issues. For example, a party could allege that a particular state statute that governs foreclosure may be unconstitutional either as a due process violation, or because the statute is overridden in some manner by the Bankruptcy Code by operation of the Supremacy Clause. A myriad of other possibilities exist as well. Making Rule 7005.1 applicable in contested matters brings the procedural requirements into contested matters where they had not previously operated. It does seem that making the appropriate Attorney General aware that a statute that he or she is in a sense responsible for is both sensible and proper. Nevertheless, it does create the potential for additional burdens on the bankruptcy court.

The necessary amendments to the Bankruptcy Rules are set out below.

Rule 7005.1 CERTIFICATION OF CONSTITUTIONAL QUESTIONS.

1 (a) Rule 5.1(a), (b) and (d) F. R. Civ. P. applies in adversary
2 proceedings.
3 (b) INTERVENTION. The court shall set a time not less than 35
4 days form the Rule 5.1(b) certification for intervention by the
5 Attorney General or State Attorney General.

COMMITTEE NOTE

This rule is added to conform to the promulgation of new Rule 5.1 F. R. Civ. P. That rule governs the procedure when a party challenges the constitutionality of a state or federal statute. The civil rule provides a 60 day period for the United States to intervene in an action. That time frame is taken from Rule 12(a)(3)(A) of the civil rules. By way of contrast, Bankruptcy Rule 7012(a) establishes a 35 day period for the United States to serve an answer. This shorter period reflects the typically faster resolution of adversary proceedings in bankruptcy cases as compared to general civil litigation in the United States courts. Thus, it is appropriate to adopt a consistent time period for the United States to intervene in an action under Rule 7005.1 and to file an answer under Rule 7012(a).

Rule 9014 CONTESTED MATTERS

1 * * * * * *

2 (c) Unless the court directs otherwise, the following rules shall

3 apply: 7005.1, 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041,

4 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that

5 desires to perpetuate testimony may proceed in the same manner as

6 provided in Rule 7027 for the taking of a deposition before an

7 adversary proceeding. The court may at any stage in a particular

8 matter direct that one or more of the other Rules in Part VII shall

9 apply. The court shall give the parties notice of any order issued

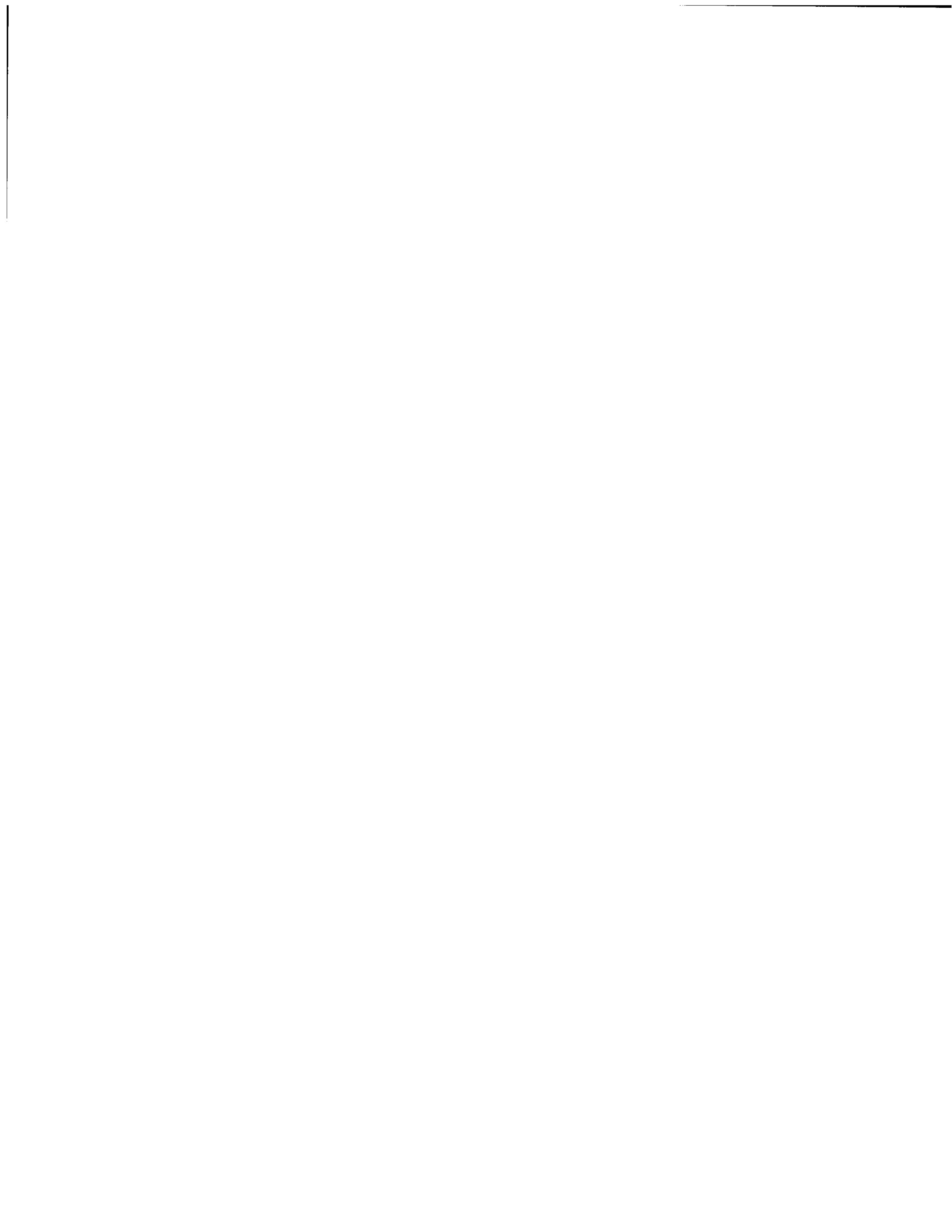
10 under this paragraph to afford them a reasonable opportunity to

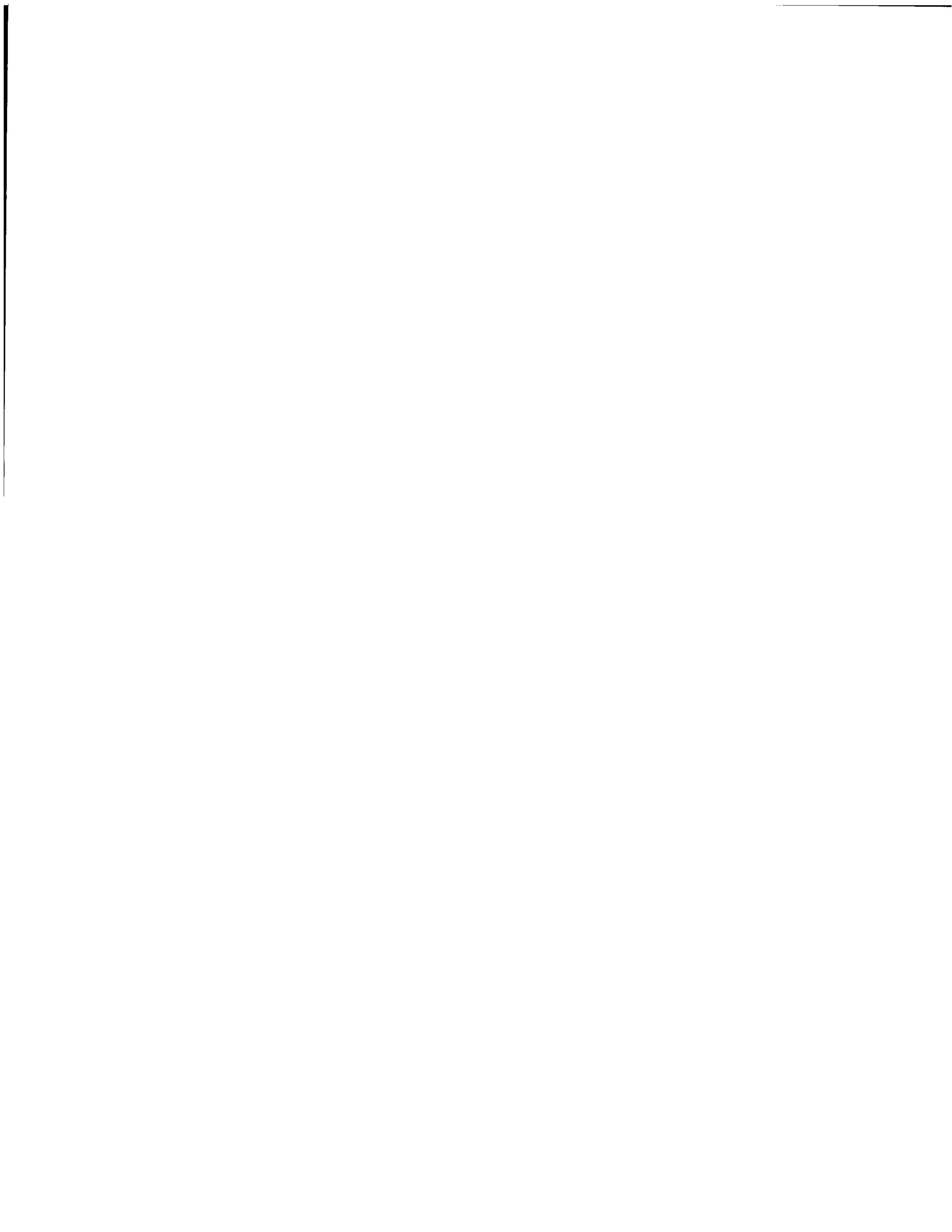
11 comply with the procedures prescribed by the order.

12 * * * * * *

COMMITTEE NOTE

The rule is amended to provide that Rule 7005.1 applies in contested matters. That rule governs the intervention of a State or the United States in a pending action when the constitutionality of a state or federal statute is questioned. Intervention of a State or the United States formerly was governed by F. R. Civ. P. 24(c) and is now governed by F. R. Civ. P. 5.1. The remaining provisions of Rule 24(c) addressing the procedure for intervention remain inapplicable in contested matters.





10/21/03

03-CV-005

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
21041 BURBANK BOULEVARD
WOODLAND HILLS, CALIFORNIA 91367

GERALDINE MUND

(818) 587-2840
FAX NO (818) 587-2951

03-BK-F

October 14, 2003

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Comments on Proposed Amendments to
the Federal Rules of Practice and Procedure

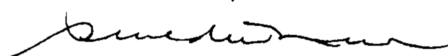
Dear Mr. McCabe:

I have the following comments on the proposed amendments to Federal rules:

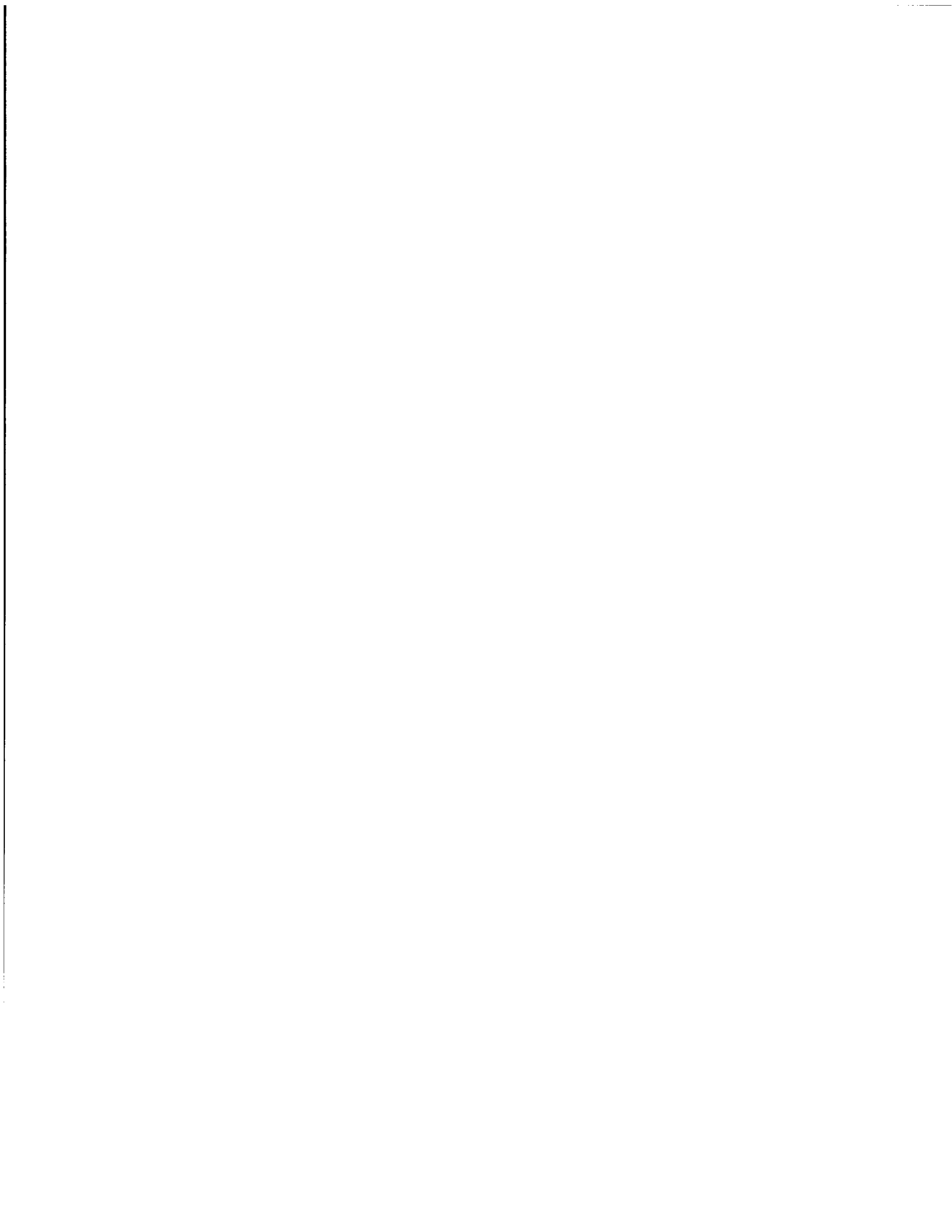
Federal Rule of Civil Procedure 5.1 might read better if it starts with "A party who files a pleading," rather than "A party that files a pleading." But the real issue here is that it seems that this rule should be incorporated in the Bankruptcy Rules, as we receive constitutional challenges to both state and federal statutes and there is no requirement here that notice be given in a bankruptcy case.

By way of example, California passed Code of Civil Procedure § 715.050 which effectively terminates the automatic stay on an eviction action if judgment is obtained pre-petition. This has been challenged a variety of times when a landlord seeks to evict without relief from the automatic stay. Sometimes the Sheriff's Department is named, but that is a county agency, the state is almost never aware of the action. If I can provide any further information, please let me know.

Very truly yours,



GERALDINE MUND
United States Bankruptcy Judge



MEMORANDUM

DATE: March 9, 2004

FROM: Patricia S. Ketchum

SUBJECT: Suggested Amendment to Form 10, Proof of Claim

TO: Advisory Committee on Bankruptcy Rules

An attorney in the Bankruptcy Judges Division of the Administrative Office, newly hired from private practice, has suggested amending page 2 of the Form 10, Proof of Claim, to help elminate confusion over what is meant by the words "replaces" and "amends" in connection with a previously filed claim. This part of the form historically has generated questions about what the difference is between between a claim that replaces and one than amends a previously filed claim. A copy of the proof of claim form currently in effect and two memos from the attorney explaining the suggested amendment are attached.

The claims subcommittee of the CM/ECF Working Group also is suggesting amendments to the proof of claim form, aimed primarily at facilitating electronic filing and processing of proofs of claim. One of the claims subcommittee's recommendations also would affect the replaces/amends section of the form. If the Committee determines that amendments to the form should be considered, combining the various suggestions would seem to be appropriate and efficient.

Attachments

FORM B10 (Official Form 10) (12/03)

UNITED STATES BANKRUPTCY COURT ______________ DISTRICT OF ______________

PROOF OF CLAIM

Name of Debtor

Case Number

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):

Name and address where notices should be sent:

Telephone number:

☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:__________

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other ______________________
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)

Last four digits of SS #: _______

Unpaid compensation for services performed

from ______________ (date) to______________ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ __________ (unsecured) __________ (secured) __________ (priority) __________ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. 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: $________________

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

6. Unsecured Nonpriority Claim $____________

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $__________

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)(____).

**Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment*

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

9. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Penalty for presenting fraudulent claim. Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

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 on 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 a 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.*

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. 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 the last four digits of your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:

Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:

If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:

Fill in the applicable amounts, including 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.

5. Secured Claim:

Check the appropriate place if the claim is a secured claim. You must state the type and value 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).

6. Unsecured Nonpriority Claim:

Check the appropriate place if you have an unsecured nonpriority claim, sometimes referred to as a "general unsecured claim". (See DEFINITIONS, above.) If your claim is partly secured and partly unsecured, state here the amount that is unsecured. If part of your claim is entitled to priority, state here the amount **not** entitled to priority.

7. Unsecured Priority Claim:

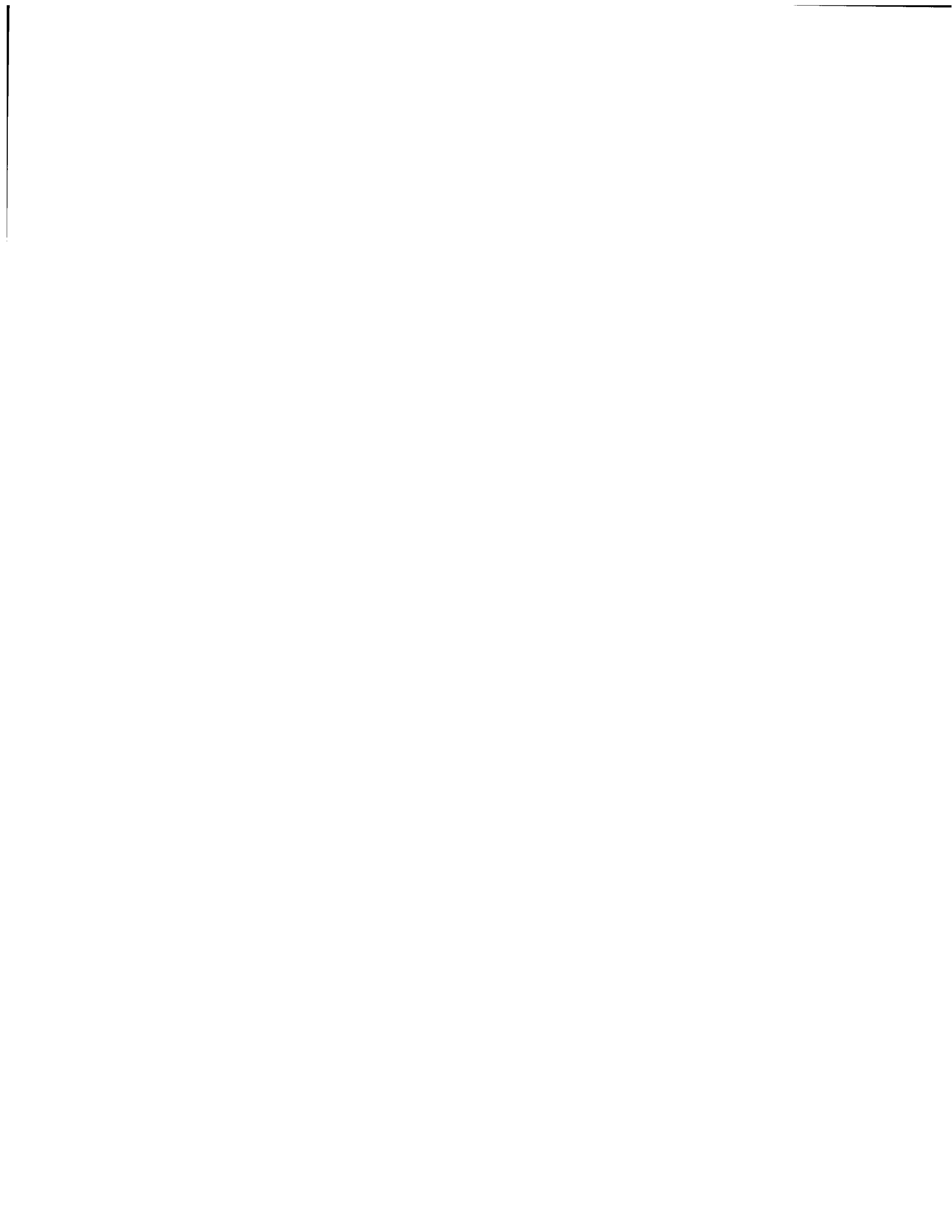
Check the appropriate place if you have an unsecured priority claim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly nonpriority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specify the type of priority claim.

8. Credits:

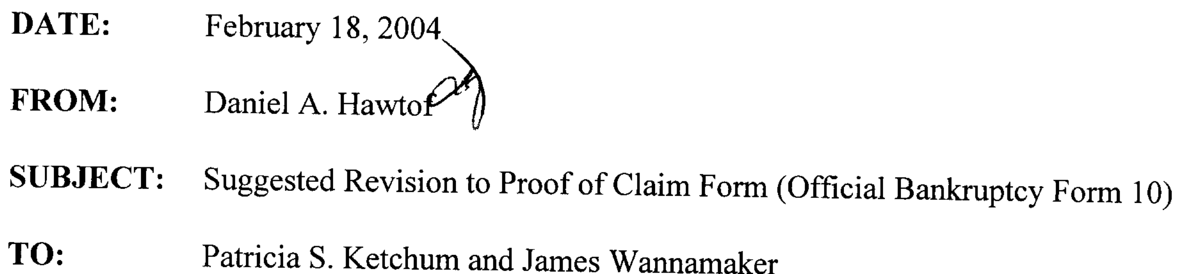
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.

9. 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.



ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum



DATE: February 18, 2004

FROM: Daniel A. Hawton

SUBJECT: Suggested Revision to Proof of Claim Form (Official Bankruptcy Form 10)

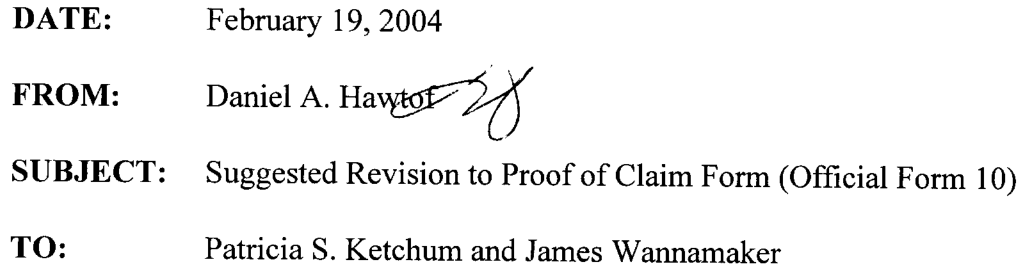
TO: Patricia S. Ketchum and James Wannamaker

In private practice, my colleagues and I often struggled with trying to understand the difference between the "replaces" and "amends" boxes just above the "Basis for Claim" section of the Proof of Claim Form (Form 10). Our initial thoughts were that when a claim is *amended*, it necessarily *replaced* the prior claim. Based on these initial thoughts, we could not determine the appropriate box to check when we filed a second proof of claim that made changes to a previously-filed claim. As you may be aware, there are no detailed instructions regarding these boxes.

After spending a significant amount of time researching the issue, we were unable to locate any guidance. Based purely on instinct, we concluded that the "amends" box should be checked when a creditor makes a change to a proof of claim it previously filed. We also concluded that the "replaces" box should be checked when a claim has been assigned to a new entity. Perhaps the "replaces" box should also be checked when a creditor files a proof of claim after one has been filed on its behalf by the debtor or trustee pursuant to Bankruptcy Rule 3004.

To this day, I am still not certain if our conclusions were correct. Perhaps the instructions on the back of Form 10 could be amended to clarify the difference between the two boxes. Please let me know if you would like to discuss this issue in more detail.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
Memorandum



DATE: February 19, 2004

FROM: Daniel A. Hawtof

SUBJECT: Suggested Revision to Proof of Claim Form (Official Form 10)

TO: Patricia S. Ketchum and James Wannamaker

Pursuant to your request, here are my suggestions for amending Official Form 10.

I would add the instructions set forth below on the back of the form.

> Check the "amends" box if you are filing a claim that makes a change or changes to a claim you previously filed.
>
> Check the "replaces" box if: (a) you are the assignee of a claim that has already been filed; or (b) you are filing a claim after the debtor or trustee filed a claim on your behalf pursuant to Bankruptcy Rule 3004.

Please let me know if you would like to discuss this issue in more detail.

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MEMORANDUM

DATE: March 8, 2004

FROM: Patricia S. Ketchum

SUBJECT: Privacy-Related Amendments to Official Forms 10, 16D, and 17

TO: Advisory Committee on Bankruptcy Rules

Since December 1. 2003, when the privacy-related amendments to the rules and official forms went into effect, it has come to my attention that there are three official forms that require conforming amendments. They are Form 10, Proof of Claim, Form 16D, Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor, and Form 17, Notice of Appeal. As all proposed amendments are conforming ones, the proposals could be forwarded to the Standing Committee and the Judicial Conference without publication for comment.

Form 10, Proof of Claim. The Committee amended the Proof of Claim form in 2003, as part of the privacy-related amendments, so that a wage claimant discloses only the last four digits of the claimant's social security number. Since December 1, 2003, however, court personnel have pointed out that the form does not limit to the last four digits the "Account or other number by which creditor identifies debtor." Many creditors identify debtors by their social security numbers, and even with respect to account numbers, the Judicial Conference privacy policy and the E-Government Act would restrict disclosure. The form should be amend to limit the information provided on form the to the last four digits of any account or other number the creditor uses to identify the debtor.

Form 16D, Caption for Use in Adversary Proceeding Other Than for a Complaint Filed by a Debtor. This form was titled simply "Form 16C, Caption for Use in Adversary Proceeding" until 1995 when the caption forms were amended to meet new statutory requirements enacted as part of the Bankruptcy Reform Act of 1994. Among the statutory amendments was the addition to the Code of § 342(c) which states that in any notice required to be given by a debtor to a

creditor the notice must include the debtor's address and taxpayer identification number. Accordingly, as the complaint serves as a notice of the filing of an adversary proceeding seeking relief against the defendant, the Committee determined that a new adversary caption form was needed. The Committee renumbered the caption forms, designating 16C as the number for the new caption to be used when the debtor files the adversary proceeding and designating 16D as the number for the pre-existing caption form which was to be used on subsequent documents and on all documents, including the complaint, in an adversary proceeding filed by any party other than the debtor. If the debtor is an individual, of course, the taxpayer identification number is the debtor's social security number, which must be furnished to any defendant creditor but not displayed in the court's public records. The December 2003 amendments, accordingly, abrogated Form 16C and directed debtors to provide their social security numbers to defendant creditors only on the creditor's copy of the summons that is served with the complaint. With Form 16C abrogated, it is not appropriate to continue to use the phrase "other than for a complaint filed by a debtor" in the title of Form 16D. Form 16D is now the only caption to be used in an adversary proceeding. In addition, the cross-reference in the note concerning the appropriate caption to use on a Notice of Appeal should be changed from the abrogated Form 16C to Form 16A.

Form 17, Notice of Appeal. The only amendment needed is to delete the reference to Form 16C from the directions concerning the proper caption to use. [Note: The attached copy of the form was taken from the website. The forms displayed there are the versions prepared for the Bankruptcy Forms Manual. As a convenience to lay users of the manual, typical captions were included. In the case of the Notice of Appeal, inclusion of a Form 16B, Short Title, may confuse some users and will be deleted when the amendments take effect.]

Copies of the forms with proposed amendments hand marked for clarity and proposed committee notes are attached. A copy of Form 16A is included for reference.

Attachments

FORM B10 (Official Form 10) (12/04)

UNITED STATES BANKRUPTCY COURT ______ DISTRICT OF ______		PROOF OF CLAIM
Name of Debtor	Case Number	
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): Name and address where notices should be sent: Last four digits of Telephone number:	☐ Check box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars. ☐ Check box if you have never received any notices from the bankruptcy court in this case. ☐ Check box if the address differs from the address on the envelope sent to you by the court.	THIS SPACE IS FOR COURT USE ONLY
Account or other number by which creditor identifies debtor:	Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:______	

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other ______
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)
  Last four digits of SS #: ______
  Unpaid compensation for services performed
  from ______ (date) to ______ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ ______ (unsecured) ______ (secured) ______ (priority) ______ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. 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: $______

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

6. Unsecured Nonpriority Claim $______

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $______

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)(____).

**Amounts are subject to adjustment on 4/1/04 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment*

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

9. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

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 on 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 a 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.*

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. 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 the last four digits of your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:

Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:

If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:

Fill in the applicable amounts, including 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.

5. Secured Claim:

Check the appropriate place if the claim is a secured claim. You must state the type and value 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).

6. Unsecured Nonpriority Claim:

Check the appropriate place if you have an unsecured nonpriority claim, sometimes referred to as a "general unsecured claim". (See DEFINITIONS, above.) If your claim is partly secured and partly unsecured, state here the amount that is unsecured. If part of your claim is entitled to priority, state here the amount **not** entitled to priority.

7. Unsecured Priority Claim:

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.

8. 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.

9. 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.

2004 COMMITTEE NOTE

The form is amended to specify that the creditor should provide only the last four digits of the account number by which the creditor identifies the debtor. Many creditors use a debtor's social security number as the debtor's account number. Reporting only the last four digits affords greater privacy to the debtor and matches the information shown in the public records of the court.

Official Form 16D
~~12/94~~
(12/04)

Form 16D. CAPTION FOR USE IN ADVERSARY PROCEEDING
~~**OTHER THAN FOR A COMPLAINT FILED BY A DEBTOR**~~

United States Bankruptcy Court

_______________ District Of _______________

In re ______________________________, *Debtor*	)	Case No. ________________
	)	
______________________________, *Plaintiff*	)	Chapter __________
	)	
v.	)	
	)	
______________________________, *Defendant*	)	Adv. Proc. No. ____________

COMPLAINT [*or* other Designation]

[If used in a Notice of Appeal (see Form 17) or other notice filed and served by a debtor, this caption must be altered to include the debtor's address and Employer's Tax Identification Number(s) or Social Security Number(s) as in Form 16~~C~~A.]

2004 COMMITTEE NOTE

The form is amended to reflect the 2003 abrogation of Form 16C. As a complaint initiating an adversary proceeding serves as a notice to the defendant of the filing of an action, a debtor filing an adversary proceeding must follow the notice requirements of § 342(c) of the Code. To protect individual privacy a debtor should use the defendant's copy of the summons to be served with the complaint to provide the information required by § 342(c) to any creditor named as a defendant.

Form 16A. CAPTION (FULL)

United States Bankruptcy Court

______________ District Of ______________

In re ______________________________________,	)	
Set forth here all names including married,	)	
maiden, and trade names used by debtor within	)	
last 6 years.]	)	
Debtor	)	Case No. ______________
	)	
	)	
Address ______________________________________	)	
	)	
______________________________________	)	Chapter __________
	)	
Employer's Tax Identification (EIN) No(s). [if any]:________	)	
______________________________________	)	
Last four digits of Social Security No(s).:______________	)	

[Designation of Character of Paper]

Official Form 17
~~(12/02)~~
(12/04)

United States Bankruptcy Court

________________ District Of ________________

In re ________________________,
Debtor

Case No. ____________________

Chapter ____________

[Caption as in Form 16A, 16B, ~~16C,~~ or 16D, as appropriate]

NOTICE OF APPEAL

________________________________, the plaintiff [*or* defendant *or* other party] appeals under 28 U.S.C. § 158(a) or (b) from the judgment, order, or decree of the bankruptcy judge (describe) entered in this adversary proceeding [*or other proceeding, describe type*] on the __________ day of ______________, _____.
(month) (year)

The names of all parties to the judgment, order, or decree appealed from and the names, addresses, and telephone numbers of their respective attorneys are as follows:

Dated: ________________________

Signed: ________________________________
Attorney for Appellant (or Appellant, if not represented by an Attorney)

Attorney Name: ____________________________

Address: ________________________________

____

Telephone No: ________________________________

If a Bankruptcy Appellate Panel Service is authorized to hear this appeal, each party has a right to have the appeal heard by the district court. The appellant may exercise this right only by filing a separate statement of election at the time of the filing of this notice of appeal. Any other party may elect, within the time provided in 28 U.S.C. § 158(c), to have the appeal heard by the district court.

If a child support creditor or its representative is the appellant, and if the child support creditor or its representative files the form specified in § 304(g) of the Bankruptcy Reform Act of 1994, no fee is required.

2004 COMMITTEE NOTE

The form is amended to reflect the 2003 abrogation of Form 16C.

14-15

The Committee will receive an oral briefing on the status of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2004

Professor Resnick, the chair of the Style Subcommittee, will provide an oral report concerning the restyling of Civil Rules and discuss how the committee might proceed in light of the impact on the Bankruptcy Rules

16

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: E-GOVERNMENT ACT OF 2002

DATE: MARCH 4, 2004

Congress enacted the E-Government Act of 2002 on December 17, 2002. Public Law 107-347, 116 Stat. 2913. The Act generally requires Federal agencies to promote the use of electronic government services, and § 205 of the Act governs the Federal courts. Subsection (a) of that section directs the courts to establish and maintain a website with a variety of information. Subsection (c)(1) provides that the courts must make all electronically filed documents publicly available online, although § 205 (c)(2) provides that documents filed under seal would not be made available. Section 205 (c)(3) of the Act directs the Supreme Court to promulgate rules to protect privacy and address security issues created by the electronic filing environment. Moreover, that statute provides that the rules, to the extent practicable, be uniform throughout the Federal courts.

Judge David Levi, Chair of the Standing Committee on Rules of Practice and Procedure, established a committee to consider and address the issues presented by the E-Government Act of 2002. The Committee, chaired by Judge Sidney Fitzwater, met in Phoenix in January. Judge Small and I attended the meeting on behalf of the Advisory Committee. The Committee considered several proposed solutions and concluded that the matter should be handled primarily at the Advisory Committee level. Professor Dan Capra, the Reporter for the Evidence Committee, is also serving as the Reporter for the E-Government Committee. Prof. Capra

drafted a template of a rule for use by the Committees with the expectation that they would address the issue at their Spring meetings. The Advisory Committees, through their Reporters, will work together to arrive at acceptable drafts which will be presented to the E-Government Committee for an email vote to be taken this summer. The Standing Committee will then consider the matter at its Fall meeting.

The template is set out below. It essentially provides that documents filed in the Federal courts should include only the last four digits of a social security number, that minor children should be identified by their initials only, that dates of birth should state only the year of birth, only the last four digits of financial accounts should be disclosed, and a home address should state only the city and state of the address. The template is provided for your information only, as Judge Small and I believe that it is more appropriate for the Bankruptcy Rules simply to incorporate the applicable Civil Rule into Part VII of the Bankruptcy Rules. That is, the Civil Rules Committee is currently considering the same template for adoption into the Civil Rules. In keeping with the stated goal of uniformity, the Bankruptcy Rules can simply adopt the Civil Rule by an appropriate cross reference to that rule. Proposed Bankruptcy Rule 70__ would accomplish that cross reference as would the proposed amendment to Rule 9014.

PRIVACY RULE TEMPLATE

Rule [ ] Filing and Privacy

(a) Personal Data Identifiers In Court Filings. Subject to (b) of this rule, a party filing any information or material with the court– whether electronically or in paper – must comply with the following procedures:

(1) Social Security Numbers. If a person's social security number must be included, the first five numbers must be deleted.

(2) Names of Minor Children. If the name of a minor child must be included, only the child's initials may be disclosed.

(3) Dates of Birth. If a person's date of birth must be included, only the year of birth may be disclosed.

(4) Financial-Account Numbers. If a financial-account number must be included, only the last four digits may be disclosed.

(5) Home Address. If a home address must be included, only the city and state may be disclosed.

(b) Unredacted Filing Under Seal. A party wishing to file an otherwise proper document containing the personal identifiers listed in (a) may file an unredacted document under seal. That document must be retained by the court as part of the record. The court may require the party to file a redacted copy for the public file.

(c) Judicial Conference Standards. A party must comply with all policies and interim rules adopted by the Judicial Conference to protect privacy and security concerns related to the public

availability of court filings.

Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy sets forth seven general principles:

1. There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.

2. Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.

3. Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.

4. Except where otherwise noted, the policies apply to both paper and electronic files.

5. Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.

6. The availability of case files at the courthouse will not be affected or limited by these policies.

7. Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

The Judicial Conference policy further provides that documents in [civil] case files should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file. Because case files are available over the internet through PACERNet, they are no longer protected by the "practical obscurity" that existed when the files were available only at the courthouse. Both the Judicial Conference policy and this rule take account of this technological development by preventing the widespread dissemination of personal data identifiers that otherwise would be included in court filings.

Parties should not include sensitive information in any document filed with the court unless it is necessary and relevant to the case. Parties must remember that any personal information not otherwise protected will be made available over the internet through PACERNet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act.

The clerk is not required to review documents filed with the court for compliance with this rule.

The template may not be adopted in this specific form by the other Advisory Committees or the Standing Committee. There has already been discussion about deleting subdivision (c) of the template and significantly shortening the Committee Note. In any event, the template gives you an idea of what the Standing Committee is likely to eventually consider. At the least, the Bankruptcy Rule version may differ from the template in that the debtor's home address is essential in many contested cases. Mortgagees initiate contested matters seeking relief from the automatic stay to commence or continue a foreclosure action on the debtor's residence. The request for relief and the order granting that relief will surely include the full address. The same can be said for objections

to a debtor's claimed homestead exemption. Thus, it would seem appropriate to include that information in the motion to initiate the action for relief from the stay or to object to the exemption. I have raised the issue of a full address in foreclosure actions with Professor Cooper, the Reporter for the Civil Rules Committee, and I expect that they will address the matter at their meeting later in the Spring.

As stated above, we do not believe that the Bankruptcy Rules require a complete version of the privacy rule. Rather, we suggest that Part VII of the Rules be amended to add a cross reference to the appropriate Civil Rule, and that Rule 9014 be amended to add that the new Part VII rule apply in contested matters. The proposals must account for the needs of the bankruptcy system to have a debtor's full address set out in a motion for relief from the stay or in an objection to a claim of a homestead exemption. Until the civil rules version is published, however, we can only assume that it will follow the template and proceed with that assumption in mind. Thus, the proposals for amendments to the Bankruptcy Rules are set out below.

RULE 70__. FILING AND PRIVACY

1 Rule __ F.R.Civ.P. applies in adversary proceedings.

COMMITTEE NOTE

The E-Government Act of 2002, Public Law 107-347, required the Supreme Court to promulgate rules to protect privacy and address security concerns when documents are filed electronically in the Federal courts. This rule makes Civil Rule __ that was adopted to implement the E-Government Act applicable in adversary proceedings.

RULE 9014. CONTESTED MATTERS

1 * * * * * *

2 (c) APPLICATION OF PART VII RULES. Unless the court
3 directs otherwise, the following rules shall apply: 70XX (a)(1)-(4),
4 (b), and (c), 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042,
5 7052, 7054-7056, 7064, 7069, and 7071. An entity that desires to
6 perpetuate testimony may proceed in the same manner as provided in
7 Rule 7027 for the taking of a deposition before an adversary
8 proceeding. The court may at any stage in a particular matter direct
9 that one or more of the other rules in Part VII shall apply. The court
10 shall give the parties notice of any order issued under this paragraph
11 to afford them a reasonable opportunity to comply with the
12 procedures prescribed by the order.

COMMITTEE NOTE

The amendment makes Rule 70__ applicable in contested matters. Rule 70__ provides that Rule __ F.R.Civ.P. applies in adversary proceedings with the exception of subdivision (a)(5) of that rule. The Civil Rule restricts the submission of specific kinds of information in order to protect the privacy and security of parties to the litigation. Subdivision (a)(5) restricts the publication of a party's residence to a listing of the city and state in which the residence is located. In contested matters seeking relief from the stay or objecting to a debtor's homestead exemption, the full address is an essential part of the movant's proof and should be included in the pleading. Thus, subdivision (a)(5) of the rule is not applicable in contested matters. If the debtor's address is not an essential fact in other contested matters, the full address should not be disclosed, and the court can, on

request of a party in interest, enter an appropriate order to restrict the use of the full address in the matter.

--H.R.2458--

(Became Public Law No: 107-347 on 12/17/2002)

One Hundred Seventh Congress

of the

United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington on Wednesday,

the twenty-third day of January, two thousand and two

An Act

To enhance the management and promotion of electronic Government services and processes by establishing a Federal Chief Information Officer within the Office of Management and Budget, and by establishing a broad framework of measures that require using Internet-based information technology to enhance citizen access to Government information and services, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE- This Act may be cited as the `E-Government Act of 2002'.

(b) TABLE OF CONTENTS- The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

Sec. 2. Findings and purposes.

TITLE I--OFFICE OF MANAGEMENT AND BUDGET ELECTRONIC GOVERNMENT SERVICES

Sec. 101. Management and promotion of electronic government services.

Sec. 102. Conforming amendments.

TITLE II--FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

Sec. 201. Definitions.

Sec. 202. Federal agency responsibilities.

Sec. 203. Compatibility of executive agency methods for use and acceptance of electronic signatures.

Sec. 204. Federal Internet portal.

Sec. 205. Federal courts.

Sec. 206. Regulatory agencies.

Sec. 207. Accessibility, usability, and preservation of government information.

Sec. 208. Privacy provisions.

Sec. 209. Federal information technology workforce development.

Sec. 210. Share-in-savings initiatives.

Sec. 211. Authorization for acquisition of information technology by State and local governments through Federal supply schedules.

Sec. 212. Integrated reporting study and pilot projects.

Sec. 213. Community technology centers.

Sec. 214. Enhancing crisis management through advanced information technology.

Sec. 215. Disparities in access to the Internet.

Sec. 216. Common protocols for geographic information systems.

TITLE III--INFORMATION SECURITY

Sec. 301. Information security.

Sec. 302. Management of information technology.

Sec. 303. National Institute of Standards and Technology.

Sec. 304. Information Security and Privacy Advisory Board.

Sec. 305. Technical and conforming amendments.

TITLE IV--AUTHORIZATION OF APPROPRIATIONS AND EFFECTIVE DATES

Sec. 401. Authorization of appropriations.

Sec. 402. Effective dates.

TITLE V--CONFIDENTIAL INFORMATION PROTECTION AND STATISTICAL EFFICIENCY

Sec. 501. Short title.

Sec. 502. Definitions.

Sec. 503. Coordination and oversight of policies.

Sec. 504. Effect on other laws.

Subtitle A--Confidential Information Protection

Sec. 511. Findings and purposes.

Sec. 512. Limitations on use and disclosure of data and information.

Sec. 513. Fines and penalties.

Subtitle B--Statistical Efficiency

Sec. 521. Findings and purposes.

Sec. 522. Designation of statistical agencies.

Sec. 523. Responsibilities of designated statistical agencies.

Sec. 524. Sharing of business data among designated statistical agencies.

Sec. 525. Limitations on use of business data provided by designated statistical agencies.

Sec. 526. Conforming amendments.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS- Congress finds the following:

(1) The use of computers and the Internet is rapidly transforming societal interactions and the relationships among citizens, private businesses, and the Government.

(2) The Federal Government has had uneven success in applying advances in information technology to enhance governmental functions and services, achieve more efficient performance, increase access to Government information, and increase citizen participation in Government.

(3) Most Internet-based services of the Federal Government are developed and presented separately, according to the jurisdictional boundaries of an individual department or agency, rather than being integrated cooperatively according to function or topic.

(4) Internet-based Government services involving interagency cooperation are especially difficult to develop and promote, in part because of a lack of sufficient funding mechanisms to support such interagency cooperation.

(5) Electronic Government has its impact through improved Government performance and outcomes within and across agencies.

(6) Electronic Government is a critical element in the management of Government, to be implemented as part of a management framework that also addresses finance, procurement, human capital, and other challenges to improve the performance of Government.

(7) To take full advantage of the improved Government performance that can be achieved through the use of Internet-based technology requires strong leadership, better organization, improved interagency collaboration, and more focused oversight of agency compliance with statutes related to information resource management.

(b) PURPOSES- The purposes of this Act are the following:

(1) To provide effective leadership of Federal Government efforts to develop and promote electronic Government services and processes by establishing an Administrator of a new Office of Electronic Government within the Office of Management and Budget.

(2) To promote use of the Internet and other information technologies to provide increased opportunities for citizen participation in Government.

(3) To promote interagency collaboration in providing electronic Government services, where this collaboration would improve the service to citizens by integrating related functions, and in the use of internal electronic Government processes, where this collaboration would improve the efficiency and effectiveness of the processes.

(4) To improve the ability of the Government to achieve agency missions and program performance goals.

(5) To promote the use of the Internet and emerging technologies within and across Government agencies to provide citizen-centric Government information and services.

(6) To reduce costs and burdens for businesses and other Government entities.

(7) To promote better informed decision making by policy makers.

(8) To promote access to high quality Government information and services across multiple channels.

(9) To make the Federal Government more transparent and accountable.

(10) To transform agency operations by utilizing, where appropriate, best practices

from public and private sector organizations.

(11) To provide enhanced access to Government information and services in a manner consistent with laws regarding protection of personal privacy, national security, records retention, access for persons with disabilities, and other relevant laws.

TITLE I--OFFICE OF MANAGEMENT AND BUDGET ELECTRONIC GOVERNMENT SERVICES

TITLE II--FEDERAL MANAGEMENT AND PROMOTION OF ELECTRONIC GOVERNMENT SERVICES

SEC. 201. DEFINITIONS.

Except as otherwise provided, in this title the definitions under sections 3502 and 3601 of title 44, United States Code, shall apply.

SEC. 202. FEDERAL AGENCY RESPONSIBILITIES.

(a) IN GENERAL- The head of each agency shall be responsible for--

(1) complying with the requirements of this Act (including the amendments made by this Act), the related information resource management policies and guidance established by the Director of the Office of Management and Budget, and the related information technology standards promulgated by the Secretary of Commerce;

(2) ensuring that the information resource management policies and guidance established under this Act by the Director, and the related information technology standards promulgated by the Secretary of Commerce are communicated promptly and effectively to all relevant officials within their agency; and

(3) supporting the efforts of the Director and the Administrator of the General Services Administration to develop, maintain, and promote an integrated Internet-based system of delivering Federal Government information and services to the public under section 204.

(b) PERFORMANCE INTEGRATION-

(1) Agencies shall develop performance measures that demonstrate how electronic government enables progress toward agency objectives, strategic goals, and statutory mandates.

(2) In measuring performance under this section, agencies shall rely on existing data collections to the extent practicable.

(3) Areas of performance measurement that agencies should consider include--

(A) customer service;

(B) agency productivity; and

(C) adoption of innovative information technology, including the appropriate use of commercial best practices.

(4) Agencies shall link their performance goals, as appropriate, to key groups, including citizens, businesses, and other governments, and to internal Federal Government operations.

(5) As appropriate, agencies shall work collectively in linking their performance goals to groups identified under paragraph (4) and shall use information technology in delivering Government information and services to those groups.

(c) AVOIDING DIMINISHED ACCESS- When promulgating policies and implementing programs regarding the provision of Government information and services over the Internet, agency heads shall consider the impact on persons without access to the Internet, and shall, to the extent practicable--

(1) ensure that the availability of Government information and services has not been diminished for individuals who lack access to the Internet; and

(2) pursue alternate modes of delivery that make Government information and services more accessible to individuals who do not own computers or lack access to the Internet.

(d) ACCESSIBILITY TO PEOPLE WITH DISABILITIES- All actions taken by Federal departments and agencies under this Act shall be in compliance with section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d).

(e) SPONSORED ACTIVITIES- Agencies shall sponsor activities that use information technology to engage the public in the development and implementation of policies and programs.

(f) CHIEF INFORMATION OFFICERS- The Chief Information Officer of each of the agencies designated under chapter 36 of title 44, United States Code (as added by this Act) shall be responsible for--

(1) participating in the functions of the Chief Information Officers Council; and

(2) monitoring the implementation, within their respective agencies, of information technology standards promulgated by the Secretary of Commerce, including common standards for interconnectivity and interoperability, categorization of Federal Government electronic information, and computer system efficiency and security.

(g) E-GOVERNMENT STATUS REPORT-

(1) IN GENERAL- Each agency shall compile and submit to the Director an annual E-Government Status Report on--

(A) the status of the implementation by the agency of electronic government initiatives;

(B) compliance by the agency with this Act; and

(C) how electronic Government initiatives of the agency improve performance in delivering programs to constituencies.

(2) SUBMISSION- Each agency shall submit an annual report under this subsection--

(A) to the Director at such time and in such manner as the Director requires;

(B) consistent with related reporting requirements; and

(C) which addresses any section in this title relevant to that agency.

(h) USE OF TECHNOLOGY- Nothing in this Act supersedes the responsibility of an agency to use or manage information technology to deliver Government information and services that fulfill the statutory mission and programs of the agency.

(i) NATIONAL SECURITY SYSTEMS-

(1) INAPPLICABILITY- Except as provided under paragraph (2), this title does not apply to national security systems as defined in section 11103 of title 40, United States Code.

(2) APPLICABILITY- This section, section 203, and section 214 do apply to national security systems to the extent practicable and consistent with law.

SEC. 203. COMPATIBILITY OF EXECUTIVE AGENCY METHODS FOR USE AND ACCEPTANCE OF ELECTRONIC SIGNATURES.

(a) PURPOSE- The purpose of this section is to achieve interoperable implementation of electronic signatures for appropriately secure electronic transactions with Government.

(b) ELECTRONIC SIGNATURES- In order to fulfill the objectives of the Government Paperwork Elimination Act (Public Law 105-277; 112 Stat. 2681-749 through 2681-751), each Executive agency (as defined under section 105 of title 5, United States Code) shall ensure that its methods for use and acceptance of electronic signatures are compatible with the relevant policies and procedures issued by the Director.

(c) AUTHORITY FOR ELECTRONIC SIGNATURES- The Administrator of General Services shall support the Director by establishing a framework to allow efficient interoperability among Executive agencies when using electronic signatures, including processing of digital signatures.

(d) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated to the General Services Administration, to ensure the development and operation of a Federal bridge certification authority for digital signature compatibility, and for other activities consistent with this section, $8,000,000 or such sums as are necessary in fiscal year 2003, and such sums as are necessary for each fiscal year thereafter.

SEC. 204. FEDERAL INTERNET PORTAL.

(a) IN GENERAL-

(1) PUBLIC ACCESS- The Director shall work with the Administrator of the General Services Administration and other agencies to maintain and promote an integrated Internet-based system of providing the public with access to Government information and services.

(2) CRITERIA- To the extent practicable, the integrated system shall be designed and operated according to the following criteria:

(A) The provision of Internet-based Government information and services directed to key groups, including citizens, business, and other governments, and integrated according to function or topic rather than separated according to the boundaries of agency jurisdiction.

(B) An ongoing effort to ensure that Internet-based Government services relevant to a given citizen activity are available from a single point.

(C) Access to Federal Government information and services consolidated, as appropriate, with Internet-based information and services provided by State, local, and tribal governments.

(D) Access to Federal Government information held by 1 or more agencies shall be made available in a manner that protects privacy, consistent with law.

(b) AUTHORIZATION OF APPROPRIATIONS- There are authorized to be appropriated to the General Services Administration $15,000,000 for the maintenance, improvement, and promotion of the integrated Internet-based system for fiscal year 2003, and such sums as are necessary for fiscal years 2004 through 2007.

SEC. 205. FEDERAL COURTS.

(a) INDIVIDUAL COURT WEBSITES- The Chief Justice of the United States, the chief judge of each circuit and district and of the Court of Federal Claims, and the chief bankruptcy judge of each district shall cause to be established and maintained, for the court of which the judge is chief justice or judge, a website that contains the following information or links to websites with the following information:

(1) Location and contact information for the courthouse, including the telephone numbers and contact names for the clerk's office and justices' or judges' chambers.

(2) Local rules and standing or general orders of the court.

(3) Individual rules, if in existence, of each justice or judge in that court.

(4) Access to docket information for each case.

(5) Access to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.

(6) Access to documents filed with the courthouse in electronic form, to the extent provided under subsection (c).

(7) Any other information (including forms in a format that can be downloaded) that the court determines useful to the public.

(b) MAINTENANCE OF DATA ONLINE-

(1) UPDATE OF INFORMATION- The information and rules on each website shall be updated regularly and kept reasonably current.

(2) CLOSED CASES- Electronic files and docket information for cases closed for more than 1 year are not required to be made available online, except all written opinions with a date of issuance after the effective date of this section shall remain available online.

(c) ELECTRONIC FILINGS-

(1) IN GENERAL- Except as provided under paragraph (2) or in the rules prescribed under paragraph (3), each court shall make any document that is filed electronically publicly available online. A court may convert any document that is filed in paper form to electronic form. To the extent such conversions are made, all such electronic versions of the document shall be made available online.

(2) EXCEPTIONS- Documents that are filed that are not otherwise available to the public, such as documents filed under seal, shall not be made available online.

(3) PRIVACY AND SECURITY CONCERNS- (A)(i) The Supreme Court shall prescribe rules, in accordance with sections 2072 and 2075 of title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically.

(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

(iv) To the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with chapter 131 of title 28, United States Code, shall be either in lieu of, or in addition, to, a redacted copy in the public file.

(B)(i) Subject to clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under subparagraph (A).

(ii) Pending issuance of the rules required under subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing shall comply with, and be construed in conformity with, subparagraph (A)(iv).

(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

(d) DOCKETS WITH LINKS TO DOCUMENTS- The Judicial Conference of the United States shall explore the feasibility of technology to post online dockets with links allowing all filings, decisions, and rulings in each case to be obtained from the docket sheet of that case.

(e) COST OF PROVIDING ELECTRONIC DOCKETING INFORMATION- Section 303(a) of the Judiciary Appropriations Act, 1992 (28 U.S.C. 1913 note) is amended in the first sentence by striking `shall hereafter' and inserting `may, only to the extent necessary,'.

(f) TIME REQUIREMENTS- Not later than 2 years after the effective date of this title, the websites under subsection (a) shall be established, except that access to documents filed in electronic form shall be established not later than 4 years after that effective date.

(g) DEFERRAL-

(1) IN GENERAL-

(A) ELECTION-

(i) NOTIFICATION- The Chief Justice of the United States, a chief judge, or chief bankruptcy judge may submit a notification to the Administrative Office of the United States Courts to defer compliance with any requirement of this section with respect to the Supreme Court, a court of appeals, district, or the bankruptcy court of a district.

(ii) CONTENTS- A notification submitted under this subparagraph

shall state--

(I) the reasons for the deferral; and

(II) the online methods, if any, or any alternative methods, such court or district is using to provide greater public access to information.

(B) EXCEPTION- To the extent that the Supreme Court, a court of appeals, district, or bankruptcy court of a district maintains a website under subsection (a), the Supreme Court or that court of appeals or district shall comply with subsection (b)(1).

(2) REPORT- Not later than 1 year after the effective date of this title, and every year thereafter, the Judicial Conference of the United States shall submit a report to the Committees on Governmental Affairs and the Judiciary of the Senate and the Committees on Government Reform and the Judiciary of the House of Representatives that--

(A) contains all notifications submitted to the Administrative Office of the United States Courts under this subsection; and

(B) summarizes and evaluates all notifications.

~~~~~~~~~~~~

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

END
~~~~~~~~~~~~

MEMORANDUM

DATE: March 4, 2004

FROM: Patricia S. Ketchum

SUBJECT: Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code and in Official Forms 6-E and 10 Pursuant to § 104(b) of the Code

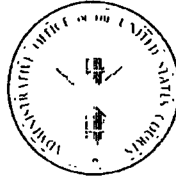
TO: Advisory Committee on Bankruptcy Rules

Section 104(b), which was added to the Bankruptcy Code by the Bankruptcy Reform Act of 1994, provides for the automatic adjustment of certain dollar amounts in the Code every three years according to a formula specified in the provision. The date on which the dollar amounts were first adjusted was April 1, 1995, and another adjustment is scheduled to take effect April 1, 2004. Several of the dollar amounts that are adjusted under § 104(b) appear in two of the official bankruptcy forms, Form 6-E, the schedule of Creditors Holding Claims Entitled to Priority, and Form 10, the Proof of Claim.

The dollar amount adjustments reflect the change in the Consumer Price Index for All Urban Consumers published by the United States Department of Labor for the three-year period ending December 31, 2003, and rounded to the nearest $25. Application of this formula to the dollars amounts in the specified provisions of the Bankruptcy Code is purely ministerial. Accordingly, the Judicial Conference in 1995 authorized the adjustments to be made and published in the Federal Register every three years without further action by the Conference. Amendment of the official forms to conform to the automatic adjustments made to the Code also is ministerial, and the Conference likewise authorized the amendments to be made every three years without further action by the Conference.

Copies of the memorandum sent to judges with a chart showing the adjustments to be made and the two official forms as they will appear on April 1, 2004, are attached.

Attachment



LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 5, 2004

MEMORANDUM TO: **CHIEF JUDGES, UNITED STATES COURTS OF APPEALS**
CHIEF JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES BANKRUPTCY COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS
BANKRUPTCY ADMINISTRATORS

SUBJECT: Automatic Adjustment of Certain Dollar Amounts in the Bankruptcy Code and Official Bankruptcy Forms **(INFORMATION)**

On April 1, 2004, automatic adjustments to the dollar amounts stated in various provisions of the Bankruptcy Code, Title 11,U.S.C., will become effective. These amended dollar amounts will apply to cases filed on or after April 1, 2004.

These amended dollar amounts will affect the eligibility of a debtor to file under Chapter 13 of the Bankruptcy Code, certain maximum values of property that a debtor may claim as exempt, the maximum amount of certain claims entitled to priority, the minimum aggregate value of claims needed to commence an involuntary bankruptcy, and the value of "luxury goods and services" deemed to be nondischargeable. In the Bankruptcy Reform Act of 1994, Congress provided for the automatic adjustment of these dollar amounts at three-year intervals commencing April 1, 1998. The relevant provisions are codified in of the Bankruptcy Code,11 U.S.C. § 104(b).

The adjustments reflect the change in the Consumer Price Index for All Urban Consumers published by the United States Department of Labor for the three-year period ending December 31, 2003, and rounded to the nearest $25. Use of this formula to adjust specified dollar amounts in the Bankruptcy Code was prescribed by Congress in the Bankruptcy Reform Act of 1994. 11 U.S.C. § 104(b)(1). The Judicial Conference on February 24, 2004, published the revised dollar amounts in volume 69, number 36, of the Federal Register, at page 8482, as required under 11 U.S.C. § 104(b)(2). The next three-year automatic adjustments of these dollar amounts will be published prior to March 1, 2007, and take effect April 1, 2007. Attached is a chart showing the affected sections of the Bankruptcy Code and both the current and the revised dollar amounts in those sections.

Two of the Official Bankruptcy Forms contain references to several of the affected dollar amounts. Accordingly, Official Form 6E, Schedule of Creditors Holding Claims Entitled to Priority, and Official Form 10, Proof of Claim, also will be amended April 1, 2004, and will apply to cases filed on or after that date. Copies of the amended forms are also attached.

Questions concerning the revised dollar amounts in the Bankruptcy Code and Official Bankruptcy Forms may be directed to Francis F. Szczebak, Chief, Bankruptcy Judges Division, at (202) 502-1900 or via e-mail at Frank Szczebak/DCA/AO/USCOURTS.

Leonidas Ralph Mecham

Attachments

Attachment

11 U.S.C.	**Dollar Amount to be Adjusted**	**New (Adjusted) Dollar Amount**
Section 109(e) - allowable debt limits for filing bankruptcy under Chapter 13	$290,525 (each time it appears) $871,550 (each time it appears)	$307,675 (each time it appears) $922, 975 (each time it appears)
Section 303(b) - minimum aggregate claims needed for the commencement of an involuntary bankruptcy		
(1) - in paragraph (1)	$11,625	$12, 300
(2) - in paragraph (2)	$11,625	$12, 300
Section 507(a) - priority claims		
(1) - in paragraph (3)	$4,650	$4,925
(2) - in paragraph (4)(B)(i)	$ 4,650	$4,925
(3) - in paragraph (5)	$ 4,650	$4,925
(4) - in paragraph (6)	$2,100	$2,225
Section 522(d) - value of property exemptions allowed to the debtor		
(1) - in paragraph (1)	$17,425	$18,450
(2) - in paragraph (2)	$ 2,775	$ 2,950
(3) - in paragraph (3)	$ 450 $ 9,300	$ 475 $ 9,850
(4) - in paragraph (4)	$ 1,150	$ 1,225
(5) - in paragraph (5)	$ 925 $ 8,725	$ 975 $ 9,250
(6) - in paragraph (6)	$ 1,750	$ 1,850
(7) - in paragraph (8)	$ 9,300	$ 9,850
(8) - in paragraph (11)(D)	$17,425	$18,450
Section 523(a)(2)(C) - "luxury goods and services" or cash advances obtained by the consumer debtor within 60 days before the filing of a bankruptcy petition, which are considered nondischargeable	$1,150 (each time it appears)	$1,225 (each time it appears)

Form B6E
(04/04)

In re ______________________, Case No.______________
Debtor (if known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS

A complete list of claims entitled to priority, listed separately by type of priority, is to be set forth on the sheets provided. Only holders of unsecured claims entitled to priority should be listed in this schedule. In the boxes provided on the attached sheets,s tate the name,m ailing address, including zip code, and last four digits of the account number, if any, of all entities holding priority claims against the debtor or the property of the debtor, as of the date of the filing of the petition. The complete account number of any account the debtor has with the creditor is useful to the trustee and the creditor and may be provided if the debtor chooses to do so.

If any entity other than a spouse in a joint case may be jointly liable on a claim, place an "X" in the column labeled "Codebtor," include the entity on the appropriate schedule of creditors, and complete Schedule H-Codebtors. If a joint petition is filed, state whether husband, wife, both of them or the marital community may be liable on each claim by placing an "H,""W,""J," or "C" in the column labeled "Husband, Wife, Joint, or Community."

If the claim is contingent, place an "X" in the column labeled "Contingent." If the claim is unliquidated, place an "X" in the column labeled "Unliquidated." If the claim is disputed, place an "X" in the column labeled "Disputed." (You may need to place an "X" in more than one of these three columns.)

Report the total of claims listed on each sheet in the box labeled "Subtotal" on each sheet. Report the total of all claims listed on this Schedule E in the box labeled "Total" on the last sheet of the completed schedule. R epeat this total also on the Summary of Schedules.

☐ Check this box if debtor has no creditors holding unsecured priority claims to report on this Schedule E.

TYPES OF PRIORITY CLAIMS (Check the appropriate box(es) below if claims in that category are listed on the attached sheets)

☐ **Extensions of credit in an involuntary case**

Claims arising in the ordinary course of the debtor's business or financial affairs after the commencement of the case but before the earlier of the appointment of a trustee or the order for relief. 11 U.S.C. § 507(a)(2).

☐ **Wages, salaries, and commissions**

Wages,s alaries, and commissions,i ncluding vacation, severance, and sick leave pay owing to employees and commissions owing to qualifying independent sales representatives up to $4,925* per person earned within 90 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(3).

☐ **Contributions to employee benefit plans**

Money owed to employee benefit plans for services rendered within 180 days immediately preceding the filing of the original petition, or the cessation of business, whichever occurred first, to the extent provided in 11 U.S.C. § 507(a)(4).

☐ **Certain farmers and fishermen**

Claims of certain farmers and fishermen, up to $4,925* per farmer or fisherman, against the debtor, as provided in 11 U.S.C. § 507(a)(5).

☐ **Deposits by individuals**

Claims of individuals up to $2,225* for deposits for the purchase,l ease,or r ental of property or services for personal,f amily, or household use, that were not delivered or provided. 11 U.S.C. § 507(a)(6).

Form B6E
(04/04)

In re ____, Case No. ________________________
Debtor (if known)

☐ **Alimony, Maintenance, or Support**

Claims of a spouse, former spouse, or child of the debtor for alimony, maintenance, or support, to the extent provided in 11 U.S.C. § 507(a)(7)

☐ **Taxes and Certain Other Debts Owed to Governmental Units**

Taxes, customs duties, and penalties owing to federal, state, and local governmental units as set forth in 11 U.S.C. § 507(a)(8).

☐ **Commitments to Maintain the Capital of an Insured Depository Institution**

Claims based on commitments to the FDIC, RTC, Director of the Office of Thrift Supervision, Comptroller of the Currency, or Board of Governors of the Federal Reserve System, or their predecessors or successors, to maintain the capital of an insured depository institution. 11 U.S.C. § 507 (a)(9).

* Amounts are subject to adjustment on April 1, 2007,a nd every three years thereafter with respect to cases commenced on or after the date of adjustment.

____ continuation sheets attached

Form B6E - Cont
(04/04)

In re ______________________________, Case No. ______________________
Debtor (If known)

SCHEDULE E - CREDITORS HOLDING UNSECURED PRIORITY CLAIMS
(Continuation Sheet)

____
TYPE OF PRIORITY

CREDITOR'S NAME, MAILING ADDRESS INCLUDING ZIP CODE, AND ACCOUNT NUMBER (See instructions.)	CODEBTOR	HUSBAND, WIFE, JOINT, OR COMMUNITY	DATE CLAIM WAS INCURRED AND CONSIDERATION FOR CLAIM	CONTINGENT	UNLIQUIDATED	DISPUTED	AMOUNT OF CLAIM	AMOUNT ENTITLED TO PRIORITY
ACCOUNT NO.								
ACCOUNT NO								
ACCOUNT NO.								
ACCOUNT NO.								
ACCOUNT NO.								

Sheet no ___ of ___ sheets attached to Schedule of Creditors Holding Priority Claims

Subtotal➤ (Total of this page) $

Total➤ (Use only on last page of the completed Schedule E.) (Report total also on Summary of Schedules) $

FORM B10 (Official Form 10) (04/04)

UNITED STATES BANKRUPTCY COURT ______ DISTRICT OF ______		PROOF OF CLAIM
Name of Debtor	Case Number	

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 box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

Name and address where notices should be sent:

☐ Check box if you have never received any notices from the bankruptcy court in this case.

☐ Check box if the address differs from the address on the envelope sent to you by the court.

Telephone number:

THIS SPACE IS FOR COURT USE ONLY

Account or other number by which creditor identifies debtor:

Check here if this claim ☐ replaces ☐ amends a previously filed claim, dated:______

1. Basis for Claim

- ☐ Goods sold
- ☐ Services performed
- ☐ Money loaned
- ☐ Personal injury/wrongful death
- ☐ Taxes
- ☐ Other ______
- ☐ Retiree benefits as defined in 11 U.S.C. § 1114(a)
- ☐ Wages, salaries, and compensation (fill out below)
  Last four digits of SS #: ______
  Unpaid compensation for services performed
  from ______ (date) to ______ (date)

2. Date debt was incurred:

3. If court judgment, date obtained:

4. Total Amount of Claim at Time Case Filed: $ ______ (unsecured) ______ (secured) ______ (priority) ______ (Total)

If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.

5. 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: $______

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

6. Unsecured Nonpriority Claim $______

☐ Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or only part of your claim is entitled to priority.

7. Unsecured Priority Claim.

☐ Check this box if you have an unsecured priority claim

Amount entitled to priority $______

Specify the priority of the claim:

- ☐ Wages, salaries, or commissions (up to $4,925),* 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 $2,225* 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)(____).

**Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment*

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

9. Supporting Documents: *Attach copies of supporting documents,* such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.

10. Date-Stamped Copy: To receive an acknowledgment of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim

THIS SPACE IS FOR COURT USE ONLY

Date	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any):

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

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 on 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 a 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.*

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. 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 the last four digits of your social security number and the dates of work for which you were not paid.

2. Date Debt Incurred:

Fill in the date when the debt first was owed by the debtor.

3. Court Judgments:

If you have a court judgment for this debt, state the date the court entered the judgment.

4. Total Amount of Claim at Time Case Filed:

Fill in the applicable amounts, including 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.

5. Secured Claim:

Check the appropriate place if the claim is a secured claim. You must state the type and value 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).

6. Unsecured Nonpriority Claim:

Check the appropriate place if you have an unsecured nonpriority claim, sometimes referred to as a "general unsecured claim". (See DEFINITIONS, above.) If your claim is partly secured and partly unsecured, state here the amount that is unsecured. If part of your claim is entitled to priority, state here the amount **not** entitled to priority.

7. Unsecured Priority Claim:

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.

8. 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.

9. 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.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: AMENDMENTS TO PROCEDURAL FORMS 132, 200, AND 201

DATE: MARCH 10, 2004

Recent increases in court fees and the privacy-related amendments to the rules and forms have necessitated minor revisions in three Director's Procedural Forms. Details of the changes are described below.

Director's Procedural Form 132, Application for Search of Bankruptcy Records, was revised to reflect the November 1, 2003, increase in the search fee to $26.

On November 1, the miscellaneous administrative fee payable in all cases under title 11 was increased to $39. Director's Procedural Form 201, Notice to Individual Consumer Debtor, recites the fees payable for filing for each chapter. The form was amended to state the new amount.

The December 1, 2003, amendments to the Bankruptcy Rules and Official Forms require all individual debtors to submit Official Form 21, Statement of Social Security Number. Director's Procedural Form 200, Required Lists, Schedules, Statements and Fees, sets out the documents which debtors must file and the fees which debtors must pay to file under each chapter of the Bankruptcy Code. The form was revised to include the new form and the increased amount of the administrative fee.

Copies of all three forms are attached.

B 132
(11/03)

United States Bankruptcy Court

______________ District of ________________

APPLICATION FOR SEARCH OF BANKRUPTCY RECORDS

Name of individual or business that is the subject of the search:	Social Security No. or Employer Tax I.D. No. of Subject:

Please search your records for the following information regarding the individual or business named above:
- pending or closed bankruptcy cases in this district;
- pending or closed adversary proceedings;
- judgments/evidence of satisfaction of judgments; and
- other [describe briefly]

Please search for the period from ____________________________to ________________________________.
A fee of $26.00 is charged for each name or item searched. Payment by check or money order must be enclosed. Please do not send cash through the mail.

Name, address, and phone number of the person requesting the search:

CERTIFICATE OF SEARCH

The undersigned clerk hereby certifies the following results of a diligent search of the records of the court:
[Check only the items for which a search was requested and a fee paid.]

A. Bankruptcy Cases:
1. ☐ None found.
2. Case filed on ___________________________.
(date)

☐ Voluntary ☐ Involuntary
☐ Pending ☐ Closed on ___________________________.
(date)

☐ Discharge granted on ___________________________.
(date)

B. Adversary Proceedings:
1. ☐ None found.
2. ☐ Subject is a party to the following proceeding:

____ v. ____
(Plaintiff) *(Defendant)*

Adversary Proceeding Number ______________________________, filed on ______________________________.
(date)

Pending Closed on ____.
(date)

Disposition: Dismissed on ____
(date)

Final Judgment entered on ____
(date)

Case Number of Related Bankruptcy Case ____.

____
Clerk of the Bankruptcy Court

____ By: ____
Date Deputy Clerk

UNITED STATES BANKRUPTCY COURT

REQUIRED LISTS, SCHEDULES, STATEMENTS AND FEES

Voluntary Chapter 7 Case

☐ **Filing Fee of $155.**
If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval Official Form 2 and Rule 1006(b), Fed R Bankr.P

☐ **Administrative fee of $39 and trustee surcharge of $15.**
These fees are payable in installments

☐ **Voluntary Petition (Official Form 1).**
Names and addresses of all creditors of the debtor.
Must be filed **WITH** the petition. Names and addresses not required if debtor files a schedule of liabilities with the petition. Rule 1007(a), Fed R.Bankr P

☐ **Statement of Social Security Number (Official Form 21).**
Required if the debtor is an individual. Must be submitted **WITH** the petition. Rule 1007(f), Fed.R.Bankr.P.

☐ **Schedules of assets and liabilities (Official Form 6).**
Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Schedule of executory contracts and unexpired leases (Schedule G of Official Form 6).**
Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Schedules of current income and expenditures.**
All debtors must file these schedules. If the debtor is an individual, Schedules I and J of Official Form 6 must be used for this purpose Must be filed with the petition or within 15 days. 11 U S.C. § 521(1) and Rule 1007(b) & (c), Fed.R.Bankr P

☐ **Statement of financial affairs (Official Form 7).**
Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Statement of intention regarding secured property (Official Form 8).**
Required **ONLY** if the debtor is an individual and the schedule of assets and liabilities contains consumer debts secured by property of the estate. Must be filed within 30 days or by the date set for the Section 341 meeting of creditors, whichever is **earlier.** 11 U.S.C. § 521(2).

☐ **Statement disclosing compensation paid or to be paid to the attorney for the debtor.**
Must be filed within 15 days or any other date set by the court. 11 U S.C. § 329 and Rule 2016(b), Fed R Bankr.P

☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110.**
Must be filed within 10 days. 11 U.S.C §110(h).

Voluntary Chapter 11 Case

☐ **Filing fee of $800.**
If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval. Official Form 2 and Rule 1006(b), Fed.R.Bankr.P

☐ **Administrative fee of $39.**
This fee is payable in installments.

☐ **Voluntary Petition (Official Form 1).**
Names and addresses of all creditors of the debtor.
Must be filed **WITH** the petition. Names and addresses not required if debtor files a schedule of liabilities with the petition. Rule 1007(a), Fed R Bankr.P

☐ **Statement of Social Security Number (Official Form 21).**
Required if the debtor is an individual. Must be submitted **WITH** the petition. Rule 1007(f), Fed.R.Bankr.P.

☐ **List of Creditors holding the 20 largest unsecured claims (Official Form 4).**
Must be filed **WITH** the petition. Rule 1007(d), Fed.R.Bankr.P.

☐ **Names and addresses of equity security holders of the debtor.**
Must be filed the petition or within 15 days, unless the court orders otherwise. Rule 1007(a)(3), Fed.R.Bankr.P.

☐ **Schedules of assets and liabilities (Official Form 6).**
Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Schedule of executory contracts and unexpired leases (Schedule G of Official Form 6).**
Must be filed with the petition or within 15 day. Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Schedule of current income and expenditures.**
All debtors must file these schedules. If the debtor is an individual, Schedules I and J of Official Form 6 must be used for this purpose. Must be filed with the petition or within 15 days. 11 U S.C. § 521(1) and Rule 1007(b) & (c), Fed.R.Bankr.P.

☐ **Statement of financial affairs (Official Form 7).**
Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed R.Bankr P.

☐ **Statement disclosing compensation paid or to be paid to the attorney for the debtor.**
Must be filed within 15 days or any other date set by the court. 11 U.S.C. § 329 and Rule 2016(b), Fed.R.Bankr.P.

☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110.**
Must be filed within 10 days. 11 U.S.C. §110(h).

Notice: Under 28 U S.C. § 1930(a) the debtor, or trustee if one is appointed, is required also to pay a fee to the United States trustee at the conclusion of each calendar quarter until the case is dismissed or converted to another chapter. The amount to be paid is:

$ 250 if disbursements total less than $15,000;
$ 500 if disbursements total between $15,000 and $75,000;
$ 750 if disbursements total between $75,000 and $150,000;
$1250 if disbursements total between $150,000 and $225,000;
$1500 if disbursements total between $225,000 and $300,000;
$3750 if disbursements total between $300,000 and $1,000,000,
$5000 if disbursements total between $1,000,000 and $2,000,000,
$7500 if disbursements total between $2,000,000 and $3,000,000,
$8000 if disbursements total between $3,000,000 and $5,000,000,
$10,000 if disbursements total more than $5,000,000.

REQUIRED LISTS, SCHEDULES, STATEMENTS AND FEES

Chapter 12 Case

- ☐ **Filing Fee of $200.**
  If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval Official Form 2 and Rule 1006(b), Fed R Bankr P.
- ☐ **Administrative fee of $39.**
  This fee is payable in installments.
- ☐ **Voluntary Petition (Official Form 1).**
  Names and addresses of all creditors of the debtor.
  Must be filed **WITH** the petition Names and addresses not required if debtor files a schedule of liabilities with the petition. Rule 1007(a), Fed.R.Bankr P
- ☐ **Statement of Social Security Number (Official Form 21).**
  Required if the debtor is an individual. Must be submitted **WITH** the petition Rule 1007(f), Fed.R.Bankr.P.
- ☐ **Schedules of assets and liabilities (Official Form 6).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Schedule of executory contracts and unexpired leases (Schedule G of Official Form 6).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Schedules of current income and expenditures.**
  All debtors must file these schedules. If the debtor is an individual, Schedule I and J of Official Form 6 must be used for this purpose. Must be filed with the petition or within 15 days. 11 U.S.C. § 521(1) and Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Statement of financial affairs (Official Form 7).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Statement disclosing compensation paid or to be paid to the attorney for the debtor.**
  Must be filed within 15 days or any other date set by the court. 11 U.S.C. § 329 and Rule 2016(b), Fed.R.Bankr P.
- ☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110.**
  Must be filed within 10 days 11 U.S.C. §110(h).
- ☐ **Chapter 12 Plan.**
  Must be filed within 90 days 11 U.S C. § 1221.

Chapter 13 Case

- ☐ **Filing fee of $155.**
  If the fee is to be paid in installments, the debtor must be an individual and must file a signed application for court approval. Official Form 2 and Rule 1006(b), Fed R.Bankr.P.
- ☐ **Administrative fee of $39.**
  This fee is payable in installments.
- ☐ **Voluntary Petition (Official Form 1).**
  Names and addresses of all creditors of the debtor.
  Must be filed **WITH** the petition. Names and addresses not required if debtor files a schedule of liabilities with the petition. Rule 1007(a), Fed.R Bankr P
- ☐ **Statement of Social Security Number (Official Form 21).**
  Required if the debtor is an individual. Must be submitted **WITH** the petition. Rule 1007(f), Fed R.Bankr.P.
- ☐ **Schedules of assets and liabilities (Official Form 6).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Schedule of executory contracts and unexpired leases (Schedule G of Official Form 6).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P.
- ☐ **Schedule of current income and expenditures.**
  All debtors must file these schedules If the debtor is an individual, Schedules I and J of Official Form 6 must be used for this purpose
  Must be filed with the petition or within 15 days. 11 U.S.C. § 521(1) and Rule 1007(b) & (c), Fed.R Bankr.P
- ☐ **Statement of financial affairs (Official Form 7).**
  Must be filed with the petition or within 15 days. Rule 1007(b) & (c), Fed.R.Bankr.P..
- ☐ **Chapter 13 Plan.**
  Must be filed with the petition or within 15 days. Rule 3015, Fed.R.Bankr.P.
- ☐ **Statement disclosing compensation paid or to be paid to the attorney for the debtor.**
  Must be filed within 15 days or any other date set by the court. 11 U.S.C. § 329 and Rule 2016(b), Fed.R Bankr P.
- ☐ **Statement disclosing compensation paid or to be paid to a "bankruptcy petition preparer" as defined in 11 U.S.C. § 110.**
  Must be filed within 10 days 11 U.S.C. § 110(h).

Involuntary Chapter 7 or 11 Petition

- ☐ **Filing fee of $155 for a Chapter 7 case or $800 for a Chapter 11 case.**
  Fee may not be paid in installments. Rule 1006(b), Fed.R.Bankr.P
- ☐ **Administrative fee of $39.**
  This fee may not be paid in installments Rule 1006(b), Fed.R.Bankr.P.
- ☐ **Involuntary petition (Official Form 5).**
  11 U S C § 303.

UNITED STATES BANKRUPTCY COURT

NOTICE TO INDIVIDUAL CONSUMER DEBTOR

The purpose of this notice is to acquaint you with the four chapters of the federal Bankruptcy Code under which you may file a bankruptcy petition. The bankruptcy law is complicated and not easily described. Therefore, you should seek the advice of an attorney to learn of your rights and responsibilities under the law should you decide to file a petition with the court. Court employees are prohibited from giving you legal advice.

Chapter 7: Liquidation ($155 filing fee plus $39 administrative fee plus $15 trustee surcharge)

1 Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts.

2. Under chapter 7 a trustee takes possession of all your property. You may claim certain of your property as exempt under governing law. The trustee then liquidates the property and uses the proceeds to pay your creditors according to priorities of the Bankruptcy Code.

3. The purpose of filing a chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed certain kinds of improper conduct described in the Bankruptcy Code, your discharge may be denied by the court, and the purpose for which you filed the bankruptcy petition will be defeated.

4. Even if you receive a discharge, there are some debts that are not discharged under the law. Therefore, you may still be responsible for such debts as certain taxes and student loans, alimony and support payments, criminal restitution, and debts for death or personal injury caused by driving while intoxicated from alcohol or drugs.

5. Under certain circumstances you may keep property that you have purchased subject to valid security interest. Your attorney can explain the options that are available to you.

Chapter 13: Repayment of All or Part of the Debts of an Individual with Regular Income ($155 filing fee plus $39 administrative fee)

1. Chapter 13 is designed for individuals with regular income who are temporarily unable to pay their debts but would like to pay them in installments over a period of time. You are only eligible for chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.

2. Under chapter 13 you must file a plan with the court to repay your creditors all or part of the money that you owe them, using your future earnings. Usually, the period allowed by the court to repay your debts is three years, but no more than five years. Your plan must be approved by the court before it can take effect.

3. Under chapter 13, unlike chapter 7, you may keep all your property, both exempt and non-exempt, as long as you continue to make payments under the plan.

4. After completion of payments under your plan, your debts are discharged except alimony and support payments, student loans, certain debts including criminal fines and restitution and debts for death or personal injury caused by driving while intoxicated from alcohol or drugs, and long term secured obligations.

Chapter 11: Reorganization ($800 filing fee plus $39 administrative fee)

Chapter 11 is designed for the reorganization of a business but is also available to consumer debtors. Its provisions are quite complicated, and any decision by an individual to file a chapter 11 petition should be reviewed with an attorney.

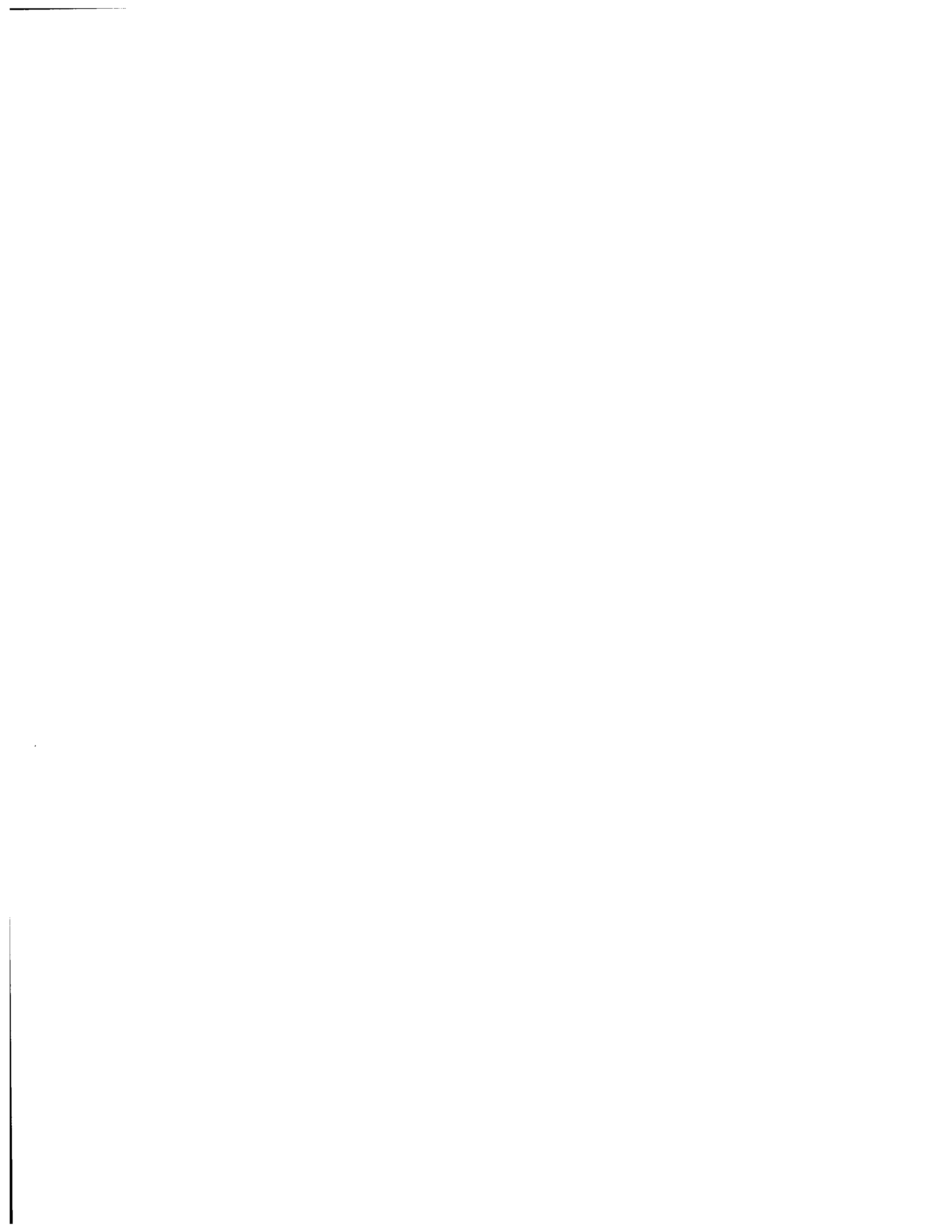
Chapter 12: Family Farmer ($200 filing fee plus $39 administrative fee)

Chapter 12 designed to permit family farmers to repay their debts over a period of time from future earnings and is in many ways similar to chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family - owned farm.

I, the debtor, affirm that I have read this notice.

Date	Signature of Debtor	Case Number

WHITE - DEBTOR COPY **PINK - COURT COPY**



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Form B202
04/04

–DRAFT--

United States Bankruptcy Court
____________________ District of ____________________

In re ____________________

Case Number ____________________
Chapter ____________________

STATEMENT OF MILITARY SERVICE

The Servicemembers' Civil Relief Act of 2003, Pub. L. No. 108-189, provides for the temporary suspension of certain judicial proceedings or transactions that may adversely affect military servicemembers, their dependents, and others. Debtors who may be eligible for relief under the act should complete this form and file it with the Bankruptcy Court.

IDENTIFICATION OF SERVICEMEMBER

- ☐ Self (Debtor or Codebtor)
- ☐ Non - Debtor Spouse (name)____________________
- ☐ Other (name of servicemember)____________________
  (servicemember's relationship to debtor)____________________
  (type of joint liability) ____________________

TYPE OF MILITARY SERVICE

U.S. Military Service (Army, Navy, Air Force, Marine Corps, or Coast Guard)

- ☐ Active Service since ____________________(date)
- ☐ Inductee - ordered to report on ____________________(date)
- ☐ Retired / Discharged ____________________(date)

U.S. Military Reserves and National Guard

- ☐ Active Service since ____________________(date)
- ☐ Impending Active Service -orders postmarked ____________________(date)
  Ordered to report on ____________________(date)
- ☐ Retired /Discharged ____________________(date)

Public Health Service, National Oceanic and Atmospheric Administration, or
U.S. Citizens Serving with Allied Forces (specify)____________________

- ☐ Active Service since ____________________(date)
- ☐ Retired/Discharged ____________________(date)

SIGNATURE OF DEBTOR

____________________ ____________________
Debtor Date

This statement is for information use only. Filing this statement with the Bankruptcy Court does not constitute an application for or invoke the benefits and relief available under the Servicemembers' Civil Relief Act of 2003.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

February 17, 2004

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES

SUBJECT: The Servicemembers Civil Relief Act of 2003 **(IMPORTANT INFORMATION)**

On December 19, 2003, the President signed into law H.R. 100, the Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (the act), which revises the Soldiers' and Sailors' Civil Relief Act of 1940. The purpose of the act is to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect servicemembers during their military service, thereby enabling them to devote their energy to the defense needs of the United States.

The act protects servicemembers, defined as members of the uniformed services on active duty or under a call to active service in the National Guard, and commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration in active service. The act's provisions are also extended to a servicemember's dependants (spouse, children, and others). It applies to any civil judicial or administrative proceeding commenced in any court or administrative agency of the United States or of any state or subdivision, including any commonwealth, territory, or possession of the United States and the District of Columbia. Therefore, the act applies to matters before the United States district courts. The act is effective as of December 19, 2003, and applies to any civil case that is not final before that date.

The attachment to this memorandum provides a general synopsis of the protections afforded to servicemembers by the act. Individual titles and sections of the act contain specific requirements for granting relief to a servicemember, exceptions to granting such relief, and penalties pursuant to title 18, United States Code, (including fines and or imprisonment) for violation of the act. Therefore, you are strongly encouraged to read the full text of the act, available from the Library of Congress at http://thomas.loc.gov.

If you have questions about the Servicemembers Civil Relief Act of 2003 or need assistance locating a copy of the law, please contact the Article III Judges Division at (202) 502-1860 or the Magistrate Judges Division at (202) 502-1830.

Leonidas Ralph Mecham

Attachment

ATTACHMENT

Review of the Servicemember's Civil Relief Act of 2003

A stay of proceedings, reopening of judgment, and other relief granted by the Servicemember's Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (the act), can be initiated at the court's discretion or upon application to the court by the servicemember or the servicemember's legal representative. The general standard for granting such extraordinary relief is that the servicemember's military service materially affects the servicemember's ability to defend a civil action or comply with the underlying obligation. Additionally, many of the provisions of this act continue to apply following the servicemember's release from military service.

If the act permits or requires an application to be made to a court, and the underlying matter is not before any court, such application may be made to any court which would otherwise have jurisdiction over the matter.

The act provides, in part, as follows:

- **Default Judgments.** Before entry of a default judgment, the plaintiff must file with the court an affidavit indicating whether the defendant is or is not in military service or that the plaintiff is unable to determine the defendant's military status. If the court cannot determine the defendant's military status based upon the affidavit(s), it may require the plaintiff to post a bond before entry of a default judgment. If it is later discovered that the defendant is in military service, the bond would be available to indemnify the defendant servicemember against any loss or damage suffered due to entry of a default judgment, should that default judgment be set aside.

  If it appears that the defendant is in military service, the court may not enter a judgment until after it appoints an attorney to represent the defendant. Further, the court may upon its own motion and shall upon application by counsel for the defendant grant a stay of proceedings for a minimum period of 90 days if there may be a defense to the action requiring the defendant's presence or if counsel is unable to contact the defendant or determine if a meritorious defense exists.

  A servicemember or representative may apply to the court to reopen the default judgment. The act authorizes a court to vacate or set aside a default judgment it entered against a servicemember during that servicemember's period of military service plus 60 days to allow the servicemember to defend the action if it appears

that the military service interfered with the ability to defend the civil action and the servicemember has a meritorious or legal defense to the action. The act specifically provides, however, that the rights, title, and interest acquired by a bona fide purchaser for value are not impaired by vacating the default judgment. An application to reopen a default judgment must be made during or up to 90 days after the servicemember's military service.

- **Stay of Proceedings When Servicemember Has Notice**. The act provides that at any stage before final judgment is entered in a civil action in which a servicemember is a party, the court may on its own motion or shall upon application of the servicemember (including supporting documentation) stay the action for a period of not less than 90 days. An application for a stay of proceedings does not constitute the servicemember's appearance or waiver of any substantive or procedural defenses. A servicemember may apply to the court for an extension of the initial stay. A court that refuses to grant an additional stay must appoint counsel to represent the servicemember in the action.

  When a civil action is stayed pursuant to the act, penalties for the servicemember's non-compliance with the underlying contract obligation shall not accrue during the period of the stay. Further, the court may reduce or waive any penalty incurred by the servicemember during the period of military service for failure to perform under the terms of a contract, if the military service materially affected the servicemember's ability to perform the obligation.

- **Stay of Execution or Vacation of Judgment, Attachment, or Garnishment.** A court may on its own motion or shall upon application stay the execution of any judgment or order entered against the servicemember and vacate or stay an attachment, garnishment of property or money, or debts in the possession of the servicemember or a third party, if it determines that the servicemember's ability to comply with a court judgment or order is materially affected by military service. This court power extends to actions or proceedings commenced before, during, or up to 90 days after the defendant's military service. The stay of execution may be ordered for the period of military service plus 90 days, or for any part thereof. The court may order the servicemember to make installment payments to the plaintiff during the stay period. With court approval, a plaintiff may proceed against non-military co-defendants.

- **Statute of Limitations.** The act tolls the statute of limitations for bringing any civil action or proceeding in a court by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns during the

servicemember's period of military service (excluding any statute of limitations under the Internal Revenue Code).

- **Interest Cap.** Interest on an obligation or liability, entered into by the servicemember or the servicemember and spouse jointly prior to the servicemember's entry into military service, can not bear interest in excess of six percent per year during the period of military service. Contract rate interest in excess of six percent is forgiven. The amount of any periodic payment due under the terms of the contract shall be reduced by the amount of the forgiven interest for that payment period.

  The servicemember must provide written notice and documentation to the creditor to access the limited interest rate provided by this act. A court, however, may grant a creditor relief from the interest cap if it finds the servicemember's ability to pay the contract rate of interest on the obligation is not materially affected by military service.

- **Evictions and Distress.** The act provides that, absent court order, a landlord may not evict a servicemember or dependants from a primary residence for which normal monthly rent does not exceed $2,400 (subject to an annual price inflation adjustment) or subject the premises to a distress action. Upon application by the landlord for an order permitting eviction or distress of the premises, the court may on its own motion or shall on application of the servicemember stay an eviction or proceeding for distress, or may adjust the obligation under the lease to preserve the interests of all parties. The court is empowered to grant equitable relief to a landlord if a stay of eviction is granted. An allotment from the servicemember's pay can be made to satisfy the terms of the court's order.

- **Protection Under Installment Contracts for Purchase or Lease.** The act provides that a contract for the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property, for which the servicemember made a deposit or installment payment before entering military service, may not be rescinded or terminated for a breach of terms occurring before or during military service without court order. Likewise, the property may not be repossessed absent a court order. Courts are granted the authority to order repayment to the servicemember of installment payments or deposits as a condition of termination of the contact, to stay the proceedings for an equitable period of time, or to make other equitable disposition to preserve the interests of all parties.

- **Mortgages and Trust Deeds.** In the case of a secured debt on real or personal property owned by the servicemember, which originated before the period of military service, the court may or shall upon application, after hearing, stay a proceeding to enforce the mortgage obligation brought during or within 90 days after the military service. Alternatively, the court may adjust the obligation to preserve the interests of all parties. Absent a court order or written agreement between the lender and the servicemember, a sale or foreclosure of the property for breach of a mortgage or trust obligation is not valid if made during or within 90 days after military service. As a condition of permitting foreclosure, repossession, or termination of the contract, the court may order the servicemember's equity in the property (as valued by court appointed appraisers) to be paid to the servicemember or dependents.

- **Termination of Residential or Motor Vehicle Leases.** A servicemember may terminate a residential or automotive lease entered into before the start of military service. Further, a servicemember, who executes a residential or automotive lease and subsequently receives military orders for a permanent change of duty station or to deploy for a period of not less than 90 days, may terminate such lease. A servicemember terminates a lease by delivery of written notice with documentation to the lessor, and by return of the motor vehicle not later than 15 days after delivery of the written notice. The act provides for payment of arrearage and other obligations incurred by termination of the lease and for refund of rents or lease payments made in advance.

- **Assignment of Insurance Policies.** If, prior to entry into military service, a servicemember assigned a life insurance policy to secure payment of an obligation, the assignee may not, absent court order, exercise any right or option obtained under the assignment during the period of military service plus one year. Exceptions to the prohibition include: by written consent of the servicemember; when the premiums are due and unpaid; or upon the death of the insured. A court may refuse to grant the assignee leave to exercise its rights under the assignment if the court determines that the servicemember's ability to comply with the terms of the underlying obligation is materially affected by military service.

- **Enforcement of Storage Liens.** A party that holds a lien on the property or effects of a servicemember may not, absent court order, foreclose or otherwise enforce any liens on such property during the servicemember's military service plus 90 days. The court may on its own motion or shall on application stay the foreclosure or adjust the obligation equitably.

- **Protection of Life Insurance.** The act provides protection to the servicemember for life insurance policies up to $250,000 in coverage and in force not less than 180 days before the date of the insured's entry into military service and at the time of application under the act. The insured, the insured's legal representative, or the insured's beneficiary may apply in writing for protection of the life insurance contract from lapse, termination, or forfeit for the nonpayment of a premium from the date of receipt of the application through the period of the insured's military service plus two years. After receipt of the application, the Secretary of Veterans Affairs determines whether the particular insurance contract is entitled to such protection. The Secretary will notify the insured and insurer of the determination. The insured and the insurer are deemed to have constructively agreed to any policy modification.

  Unpaid premiums due under a protected life insurance policy are to be treated as a policy loan on the policy. If the policy matures during the protection period, unpaid premiums plus interest will be deducted from the insurance proceeds.

  Unpaid premiums due on a policy protected by the act are guaranteed by the United States. The amount paid by the United States shall be treated as a debt owed to the United States by the servicemember. The United States may collect the debt from the servicemember or offset the debt against funds owed to the servicemember.

- **Taxes and Assessments**. The act addresses taxes or assessments (other than income tax) due and unpaid before or during the servicemember's period of military service. This includes taxes on personal property (*e.g.*, an automobile tax) and real property taxes. Absent a court order, the servicemember's personal or real property may not be sold to enforce collection of such tax. Further, the court may stay a proceeding to enforce the collection of a tax or assessment during the period of military service plus 180 days. Interest may accrue on the unpaid tax at a rate of six percent per year. If a servicemember's property is sold or forfeited to enforce the collection of a tax or assessment, the servicemember has the right to redeem the property or commence an action to redeem during the period of military service plus 180 days.

  The act also addresses a servicemember's income taxes. It provides that upon the servicemember's notice to the taxing authority, the collection of income tax on the income of a servicemember falling due before or during military service is deferred for a period of not more than 180 days after the servicemember's release from military service if the servicemember's ability to pay the income tax is

materially affected by military service. No interest or penalties accrue during this deferral period. However, the statute of limitations against the collection of an income tax obligation deferred pursuant to this act is tolled for the period of the servicemember's military service plus 270 days.

The act also addresses the issue of a servicemember's residence and domicile with respect to the person, personal property, and income of the servicemember due to the servicemember's presence or absence in any jurisdiction of the United States in compliance with military orders.

- **Anticipatory Relief.** The act provides that a servicemember may, during military service or within 180 days following release from the military, apply to a court for relief from any obligation or liability incurred by the servicemember before the servicemember's military service or from a tax or assessment falling due before or during the servicemember's military service. Subject to the act's requirements and court determination, servicemembers are able to apply for relief before a default occurs.

- **Business or Trade Obligations.** The act provides that if a servicemember's business has an obligation or liability for which the servicemember is personally liable, the servicemember's assets not held in connection with the business may not be available for satisfaction of the business' obligation or liability during the servicemember's military service.

- **Protection of Persons Secondarily Liable on Servicemember's Obligations.** The act permits a court to extend the protections granted to servicemembers to any persons secondarily liable on the servicemember's obligations. Whenever pursuant to the act a court stays, postpones, or suspends: (1) the enforcement of an obligation or liability; (2) the prosecution of a suit or proceeding; (3) the entry or enforcement of an order, writ, judgment, or decree; or (4) the performance of any other act, the court may also grant such relief to a surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on the obligation. Additionally, when a court vacates or sets aside the judgment or decree entered against the servicemember, the court may set aside or vacate a judgment or decree as to another person who is liable on the obligation.

  A surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on a servicemember's obligation may execute a waiver of these protections in a separate writing (with exceptions).

- **Bail Bond Not to be Enforced During Period of Military Service.** A court may not enforce a bail bond during the period of military service of the principal on the bond when the military service prevents the surety from obtaining the attendance of the principal. The court may discharge the surety and exonerate the bail, in accordance with principles of equity and justice, during or after the period of military service of the principal.

- **Waiver of Rights by a Servicemember**. A servicemember may waive the rights and protections provided by the act. A waiver permitting:

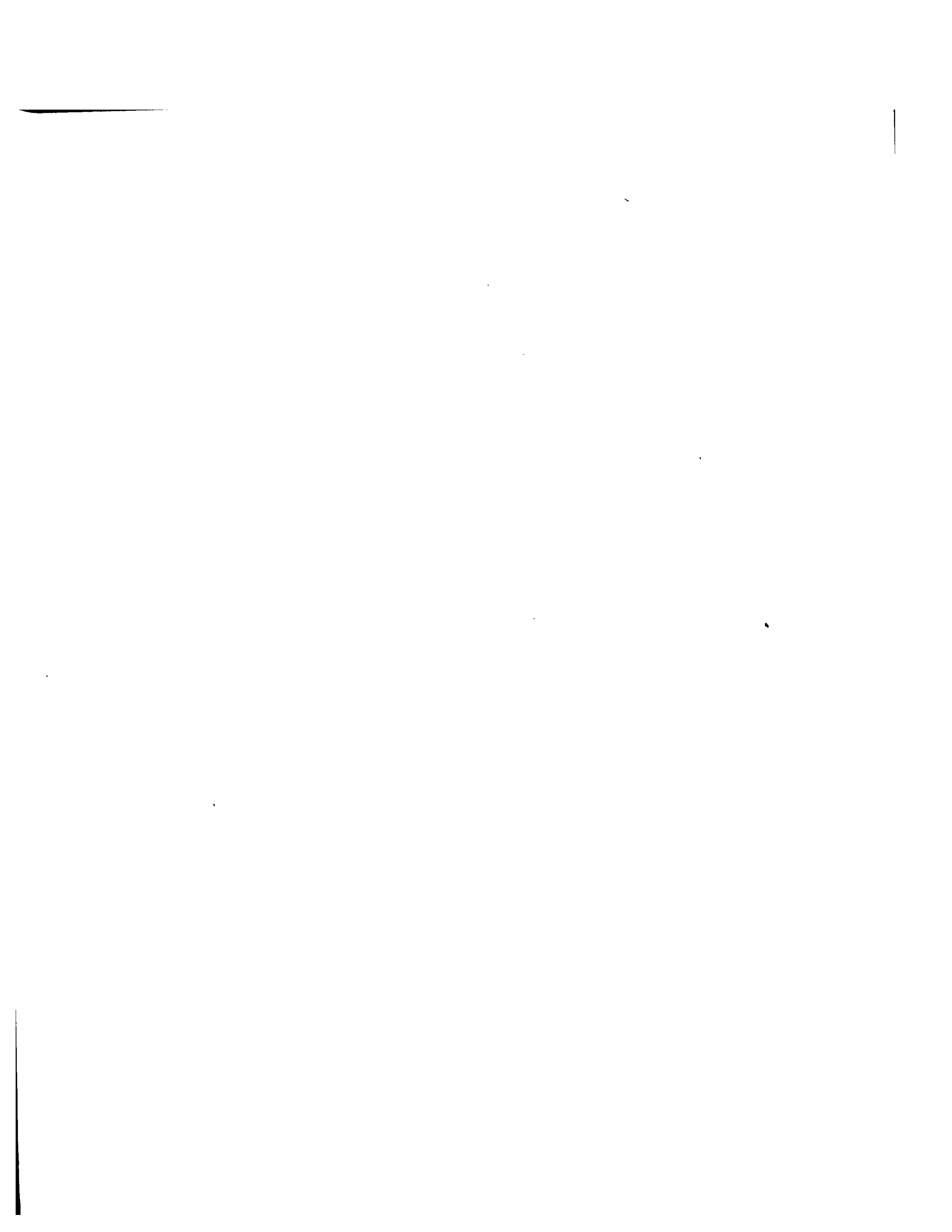
    1) modification, termination, or cancellation of a contract, lease, bailment, obligation secured by a mortgage, or other security interest; or

    2) permitting the repossession or foreclosure of property securing a debt

  must be made in a separate writing, executed during or after the servicemember's period of military service.

- **Other Topics Addressed.**

    - Effect of Exercise of Rights under the Act (e.g. prohibition on future denial or revocation of credit based upon exercise of rights under the act)
    - U.S. Citizens Serving with Allied Forces
    - Co-Defendants Not in Military Service
    - Extension of Protections to Reservists and Inductees
    - Rights in Public Lands // Desert Land Entries // Mining Claims // Mineral Permits

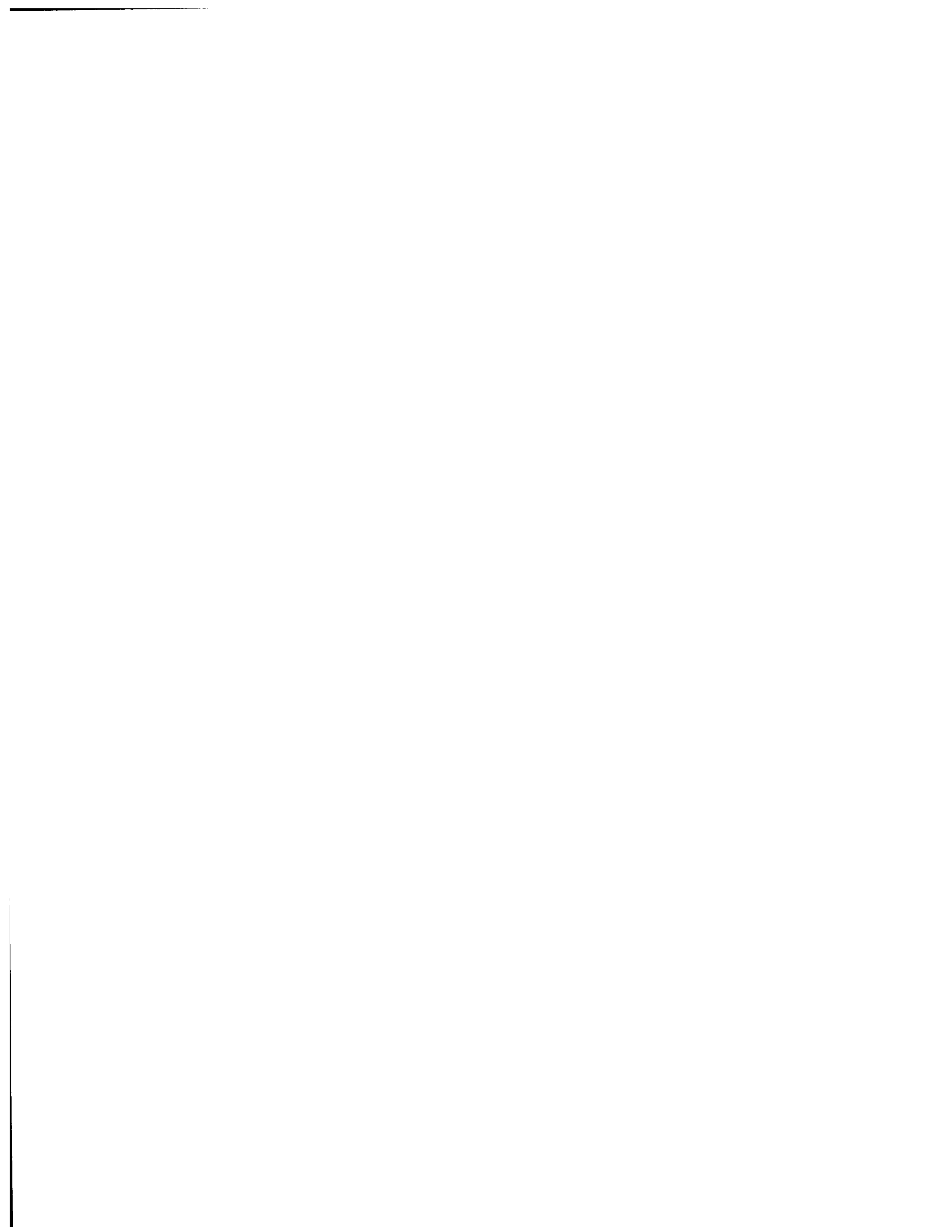


Judge McFeeley and Professor Resnick will report orally on the Conference on Electronic Discovery sponsored by the Civil Rules Committee

Judge Montali will report on the recommendation that the Advisory Committee work with the Bankruptcy Committee to develop rules regarding venue

A report on the mega chapter 11 conference sponsored by the Federal Judicial Center was distributed under separate cover

A report on the FJC survey of mandatory disclosure under Civil Rule 26 was distributed under separate cover



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: IMPLEMENTATION OF PRIVACY AMENDMENTS

DATE: MARCH 3, 2004

Since December 1, 2003, when the privacy-related amendments to the Bankruptcy Rules and Official Forms took effect, the Administrative Office has received a number of inquiries and requests from the courts, the United States Trustee program, other government agencies, and other organizations, including credit bureaus, concerning implementation of the changes. Many of the inquiries concern access to the debtor's full Social Security number by entities that are not scheduled as a creditor in the case or which prefer to use the debtor's Social Security number (instead of the case number) to track the case. Several courts have asked what standards should be used in considering applications for access to the information. Other inquiries concern how the courts should treat amendments to Form 21, Statement of Social Security Number.

Typical questions include the following:

- Are interested parties (other than creditors) such as taxing authorities, potential creditors, law enforcement agencies, regulatory agencies, and the like entitled to receive the debtor's full Social Security number? If a local rule requires these parties to be included on the mailing matrix, should they get the full number as a result of that inclusion?
- Who should notify creditors when the debtor amends his or her Statement of Social

Security Number? Who should notify the credit bureaus of the amended statement?

- Is the submission of an amended Statement of Social Security Number noted on the docket? As a public entry with no document attached or as a private entry accessible only to court employees?

- What happens when the debtor adds a creditor after the clerk has mailed the meeting of creditors notice?

- What happens if the debtor doesn't submit the Statement of Social Security Number with the petition? Should the clerk defer sending the meeting of creditors notice? If the debtor submits the statement a few days late, who notices creditors?

- Can the court give law enforcement agencies blanket access to the debtors' Social Security numbers on a showing of good cause?

- What constitutes good cause for releasing the debtor's Social Security number?

- Can the debtor's attorney retain the signed paper copy of the Statement of Social Security Number if the attorney submits the full Social Security number as part of filing the case electronically?

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

HONORABLE JOHN W LUNGSTRUM, CHAIR
HONORABLE W. HAROLD ALBRITTON
HONORABLE WILLIAM G. BASSLER
HONORABLE PAUL D. BORMAN
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HONORABLE ILANA DIAMOND ROVNER
HONORABLE JOHN R. TUNHEIM
HONORABLE T. JOHN WARD
HONORABLE SAMUEL GRAYSON WILSON

MEMORANDUM TO: JUDGES, UNITED STATES BANKRUPTCY COURTS
CLERKS, UNITED STATES BANKRUPTCY COURTS
BANKRUPTCY ADMINISTRATORS

SUBJECT: Implementation of Judicial Conference Policy on Privacy and Public Access to Electronic Case Files for Bankruptcy Cases

DATE: November 10, 2003

In September 2001, the Judicial Conference of the United States adopted a policy regarding privacy and public access to electronic case files (the privacy policy). The privacy policy contains several general principles which apply to all case file types. It also addresses civil, criminal, bankruptcy and appellate cases separately, as it was determined that the various case types, which contain diverse categories of information, can present different privacy issues. Unless Congress acts to the contrary, the Federal Rules of Bankruptcy Procedure will be amended December 1, 2003 to implement this privacy policy. Conforming amendments to the Official Bankruptcy Forms will also take effect on December 1, 2003.

The Judicial Conference Committee on Court Administration and Case Management is overseeing the implementation of the privacy policy in the courts. In March 2002 and April 2003, I sent memoranda to assist in the implementation of the policy for civil cases. This memorandum is intended to assist in the implementation of the privacy policy for bankruptcy cases.

The December 1, 2003 amendments to the Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms are intended to implement the Judicial Conference privacy policy; however, some documents not specifically addressed by the national rules or forms may contain data that should be protected. When filing these documents, filers should comply with the privacy policy and perform the appropriate redaction as explained further below. When filing Official Bankruptcy Forms, filers should include the information requested on the Official Form.

BANKRUPTCY CASE FILES

The policy for bankruptcy case files is derivative of the policy for civil case files, which states that documents in civil case files should be made available electronically to the same extent that they are available at the courthouse, provided that certain "personal data identifiers" are partially redacted by the litigants. These identifiers are Social Security numbers, dates of birth, financial account numbers, and names of minor children. For bankruptcy case files, the privacy policy provides:

> that documents in bankruptcy case files should be made generally available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

While this policy was adopted in 2001, its implementation in the bankruptcy courts has been delayed because of the necessary amendments to the Bankruptcy Code, Rules and corresponding forms. On December 1, 2003, amendments to select rules, barring Congressional action, and forms will become effective, thereby permitting implementation of those elements of the policy which do not require amendment to the Bankruptcy Code. Specifically, rules 1005 and 1007 will be amended to restrict display of a debtor's Social Security number to only the last four digits. Rule 2002 will be amended to provide that the debtor, creditor, case trustee and United States trustee or bankruptcy administrator receive the debtor's full Social Security number on their copy of the notice provided pursuant to 11 U.S.C. § 341. Additionally, the following Official Bankruptcy Forms have been amended to require only the last four digits of the debtor's Social Security and financial account numbers: 1, 3, 5, 6, 7, 8, 9, 10, 16A, 16C, and 19. A new Official Form 21, entitled Statement of Social Security Number, has been created. To access the full text of the rule and form amendments, except for the new Official Form 21, you may visit the Rules Committee website at http://www.uscourts.gov/rules/index/html and click on "Pending Rules Amendments Awaiting Final Action" and then select "Amendments Submitted to the Judicial Conference (Sept. 2002)." Official Form 21 is available at the same web address by clicking "Amendments Submitted to the Judicial Conference (Sept. 2003)." The Bankruptcy Court Administration Division sent memoranda regarding the operational changes necessitated by these amendments to all bankruptcy court clerks and bankruptcy administrators on July 24 and October 31, 2003. We are continuing to work with Congress to achieve the necessary amendments to the Bankruptcy Code.

The amendments to the Bankruptcy Rules and Official Forms will go a long way toward protecting personal identifying information in bankruptcy case file documents. In order to maximize the protection achieved by these amendments and to fully comply with the privacy policy, all court users need to be made aware of these changes and of the fact that certain

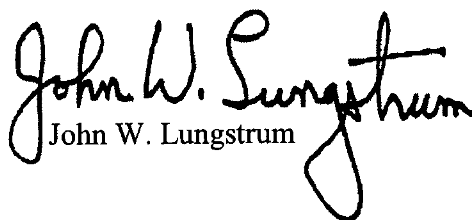
personal data identifiers should be modified or partially redacted if they are included in documents filed with the court. To assist your court in making all filers aware of this new practice, the following two documents are attached for your use: *Proposed Model Notice of Electronic Availability of Case File Information,* and *Proposed Guideline for a Local Rule for United States Bankruptcy Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*

These documents will also assist courts in complying with the E-Government Act of 2002 (Pub. L. No. 107-347) (the Act), which contains provisions relating to privacy protections and electronic access to case file documents. The Act requires the development of national rules to address privacy and security concerns relating to the electronic filing of documents and the public availability of documents filed electronically or converted to electronic form. It specifies that if those rules provide for the redaction of information, they shall also allow a party wishing to file a document containing such information to file an unredacted copy of the document under seal, which the court must retain as a part of the record. The court has the discretion to require a party to file a redacted copy of the same document for placement in the public file.

As noted above, the Judicial Conference policy requires litigants in bankruptcy cases to modify or partially redact personal data identifiers, such as Social Security numbers and dates of birth, contained in documents that will be made available electronically. Although the E-Government Act permits the Judicial Conference to issue interim rules and interpretive statements pending the adoption of rules, any interim provisions, as well as any rules or orders of the court, to the extent they provide for redaction of information, must be consistent with the Act's statutory redaction procedures outlined above. Thus, any local rule, order, or notice addressing redaction procedures must allow for the filing of unredacted versions of documents under seal as set forth in the statute. If you currently have redaction procedures in place, they should be amended to comply with these requirements immediately. The attached proposed guideline for a local rule can assist in amending redaction procedures to conform with the requirements of the E-Government Act.

We recognize that the E-Government Act's requirements do not mesh exactly with the judiciary's privacy policy. The Judicial Conference and the Administrative Office were aware that Congress was developing e-government legislation, and had commented on, and generally supported, an earlier version of the legislation that allowed the Conference to develop its own rules to address privacy and security concerns. The language of the E-Government Act regarding specific redaction procedures was added to the legislation at the eleventh hour and without consulting the judiciary. Efforts are under way to amend the current E-Government Act; however, it is not certain when or if such an amendment will become law.

If you have any questions regarding this memorandum, please contact Katie Simon of the Court Administration Policy Staff at 202-502-1560; Mary Louise Mitterhoff and Mary Fritsche of the Bankruptcy Court Administration Division at 202-502-1540; or James Wannamaker of the Bankruptcy Judges Division at 202-502-1910.



John W. Lungstrum

Attachments

cc: Circuit Executives
District Court Executives
Clerks, United States Courts

Attachment

Proposed Model Notice of Electronic Availability of Case File Information

For WebPACER/RACER Imaging Courts

The Office of the Clerk is now imaging pleadings for posting to WebPACER/RACER, through the court's Internet website. Any subscriber to WebPACER will be able to read, download, store and print the full content of imaged documents. The clerk's office is not imaging or posting documents sealed or otherwise restricted by court order. In the future, we anticipate accepting electronically filed documents and pleadings which will be available in the same manner as imaged documents.

For CM/ECF Courts

The Office of the Clerk is now accepting electronically filed documents and pleadings and making the content of these pleadings available on the court's Internet website via WebPACER. Documents and pleadings filed on paper will be imaged, posted to WebPACER, and will be similarly available. Any subscriber to WebPACER will be able to read, download, store and print the full content of electronically filed documents. The clerk's office will not make electronically available documents that have been sealed or otherwise restricted by court order.

For All Courts

You should not include sensitive information in any document filed with the court unless such inclusion is required by the Federal Rules of Bankruptcy Procedure or Official Bankruptcy Forms or the inclusion is otherwise necessary and relevant to the case. You must remember that any personal information not otherwise protected will be made available over the Internet via WebPACER. If sensitive information must be included, the following personal data identifiers must be partially redacted from the pleading, unless specifically required by statute, Federal Rule of Bankruptcy Procedure or Official Bankruptcy Form, whether it is filed traditionally or electronically: Social Security numbers, financial account numbers, dates of birth and the names of minor children. (See *Proposed Guideline for a Local Rule for United States Bankruptcy Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*)

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, also require the party to file a redacted copy for the public file.

In addition, exercise caution when filing documents that contain the following:

1) any personal identifying number, such as driver's license number;
2) medical records, treatment and diagnosis;
3) employment history;
4) individual financial information; and
5) proprietary or trade secret information.

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all documents and pleadings comply with the rules of this court requiring redaction of personal data identifiers. (See *Proposed Guideline for a Local Rule for United States Bankruptcy Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*) The clerk will not review each pleading for redaction.

Attachment

Proposed Guideline for a Local Rule for United States Bankruptcy Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files

(This guidance does not apply to the petition, schedules, statement of financial affairs, or other documents which are part of the Official Bankruptcy Forms, as these documents have been amended to comply with the Judicial Conference Privacy Policy)

To be inserted into the local rules of the court that address general rules of pleading in civil cases:

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all documents and pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court or required by statute, the Federal Rules of Bankruptcy Procedure or the Official Bankruptcy Forms.

a. **Social Security numbers.** If an individual's social security number must be included in a pleading, only the last four digits of that number should be used.

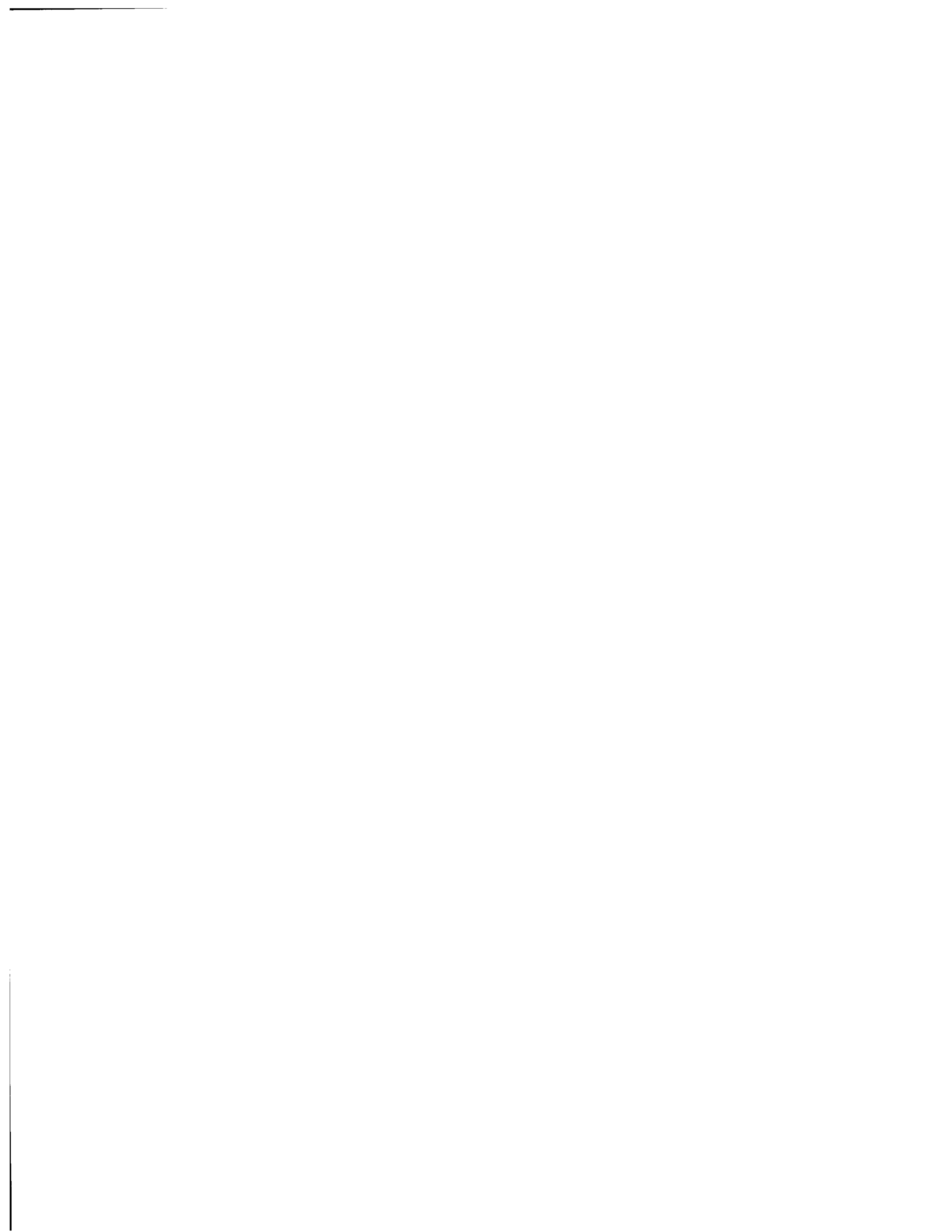
b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used. On Schedule I of Official Bankruptcy Form 6, list relationship and age of the debtor's dependents (i.e., son, age 6).

c. **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used. On Schedule I of Official Bankruptcy Form 6, list the age of each of the debtor's dependents.

d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used. On Schedules D, E, and F of Official Bankruptcy Form 6, debtors, if they so choose, may include their full account numbers to assist the trustee and creditors.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may file an unredacted document under seal. This document shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each document for compliance with this rule.



Report of the Judicial Conference Committee on Court Administration and Case Management on Privacy and Public Access to Electronic Case Files

. The Judicial Conference of the United States requested that its Committee on Court Administration and Case Management examine issues related to privacy and public access to electronic case files. The Committee on Court Administration and Case Management formed a special subcommittee for this purpose. This subcommittee, known as the Subcommittee on Privacy and Public Access to Electronic Case Files, consisted of four members of the Committee on Court Administration and Case Management: Judge John W. Lungstrum, District of Kansas, Chair; Judge Samuel Grayson Wilson, Western District of Virginia; Judge Jerry A. Davis, Magistrate Judge, Northern District of Mississippi; and Judge J. Rich Leonard, Bankruptcy Judge, Eastern District of North Carolina, and one member from each of four other Judicial Conference Committees (liaison Committees): Judge Emmet Sullivan, District of Columbia, liaison from the Committee on Criminal Law; Judge James Robertson, District of Columbia, liaison from the Committee on Automation and Technology; Judge Sarah S. Vance, Eastern District of Louisiana, liaison from the Committee on the Administration of the Bankruptcy System; and Gene W. Lafitte, Esq., Liskow and Lewis, New Orleans, Louisiana, liaison from the Committee on the Rules of Practice and Procedure. After a lengthy process described below, the Subcommittee on Privacy and Public Access to Electronic Case Files, drafted a report containing recommendations for a judiciary-wide privacy and access policy.

The four liaison Committees reviewed the report and provided comments on it to the full Committee on Court Administration and Case Management. After carefully considering these comments, as well as comments of its own members, the Committee on Court Administration and Case Management made several changes to the subcommittee report, and adopted the amended report as its own.

Brief History of the Committee's Study of Privacy Issues

The Committee on Court Administration and Case Management, through its Subcommittee on Privacy and Public Access to Electronic Case Files (the Subcommittee) began its study of privacy and security concerns regarding public electronic access to case file information in June 1999. It has held numerous meetings and conference calls and received information from experts and academics in the privacy arena, as well as from court users, including judges, court clerks, and government agencies. As a result, in May 2000, the Subcommittee developed several policy options and alternatives for the creation of a judiciary-wide electronic access privacy policy which were presented to the full Committee on Court Administration and Case Management and the liaison committees at their Summer 2000 meetings. The Subcommittee used the opinions and feedback from these committees to further refine the policy options.

In November 2000, the Subcommittee produced a document entitled "Request for Comment on Privacy and Public Access to Electronic Case Files." This document contains the alternatives the Subcommittee perceived as viable following the committees' feedback. The Subcommittee published this document for public comment from November 13, 2000 through January 26, 2001. A website at www.privacy.uscourts.gov was established to publicize the comment document and to collect the comments. Two hundred forty-two comments were received from a very wide

range of interested persons including private citizens, privacy rights groups, journalists, private investigators, attorneys, data re-sellers and representatives of the financial services industry. Those comments, in summary and full text format, are available at that website.

On March 16, 2001, the Subcommittee held a public hearing to gain further insight into the issues surrounding privacy and access. Fifteen individuals who had submitted written comments made oral presentations to and answered the questions of Subcommittee members. Following the hearing, the Subcommittee met, considered the comments received, and reached agreement on the policy recommendations contained in this document.

Background

Federal court case files, unless sealed or otherwise subject to restricted access by statute, federal rule, or Judicial Conference policy, are presumed to be available for public inspection and copying. See Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978) (holding that there is a common law right "to inspect and copy public records and documents, including judicial records and documents"). The tradition of public access to federal court case files is also rooted in constitutional principles. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-78 (1980). However, public access rights are not absolute, and courts balance access and privacy interests in making decisions about the public disclosure and dissemination of case files. The authority to protect personal privacy and other legitimate interests in nondisclosure is based, like public access rights, in common law and constitutional principles. See Nixon, 435 U.S. at 596 ("[E]very court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes").

The term "case file" (whether electronic or paper) means the collection of documents officially filed by the litigants or the court in the context of litigation, the docket entries that catalog such filings, and transcripts of judicial proceedings. The case file generally does not include several other types of information, including non-filed discovery material, trial exhibits that have not been admitted into evidence, drafts or notes by judges or court staff, and various documents that are sometimes known as "left-side" file material. Sealed material, although part of the case file, is accessible only by court order.

Certain types of cases, categories of information, and specific documents may require special protection from unlimited public access, as further specified in the sections on civil, criminal, bankruptcy and appellate case files below. See United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989) (noting that technology may affect the balance between access rights and privacy and security interests). To a great extent, these recommendations rely upon counsel and litigants to act to protect the interests of their clients and themselves. This may necessitate an effort by the courts to educate the bar and the public about the fact that documents filed in federal court cases may be available on the Internet.

It is also important to note that the federal courts are not required to provide electronic access to case files (assuming that a paper file is maintained), and these recommendations do not create any entitlement to such access. As a practical matter, during this time of transition when courts are implementing new practices, there may be disparity in access among courts because of varying technology. Nonetheless, the federal courts recognize that the public should share in the

benefits of information technology, including more efficient access to court case files.

These recommendations propose privacy policy options which the Committee on Court Administration and Case Management (the Committee) believes can provide solutions to issues of privacy and access as those issues are now presented. To the extent that courts are currently experimenting with procedures which differ from those articulated in this document, those courts should reexamine those procedures in light of the policies outlined herein. The Committee recognizes that technology is ever changing and these recommendations may require frequent re-examination and revision.

Recommendations

The policy recommended for adoption by the Judicial Conference is as follows:

General Principles

- There should be consistent, nationwide policies in federal courts in order to ensure that similar privacy protections and access presumptions apply regardless of which federal court is the custodian of a particular case file.
- Notice of these nationwide policies should be given to all litigants in federal court so that they will be aware of the fact that materials which they submit in a federal court proceeding could become available on the Internet.
- Members of the bar must be educated about the policies and the fact that they must protect their clients by carefully examining the documents that they file in federal court for sensitive, private information and by making the appropriate motions to protect documents from electronic access when necessary.
- Except where otherwise noted, the policies apply to both paper and electronic files.
- Electronic access to docket sheets through PACERNet and court opinions through court websites will not be affected by these policies.
- The availability of case files at the courthouse will not be affected or limited by these policies.
- Nothing in these recommendations is intended to create a private right of action or to limit the application of Rule 11 of the Federal Rules of Civil Procedure.

Case Types

Civil Case Files

Recommendation: That documents in civil case files should be made available electronically to the same extent that they are available at the courthouse with one exception (Social Security cases should be excluded from electronic access) and one change in policy (the requirement that certain "personal data identifiers" be modified or partially

redacted by the litigants). These identifiers are Social Security numbers, dates of birth, financial account numbers and names of minor children.

The recommendation provides for liberal remote electronic access to civil case files while also adopting some means to protect individual privacy. Remote electronic access will be available only through the PACERNet system which requires registration with the PACER service center and the use of a log in and password. This creates an electronic trail which can be retraced in order to determine who accessed certain information if a problem arises. Further, this recommendation contemplates that certain personal, identifying information will not be included in its full and complete form in case documents, whether electronic or hard copy. For example, if the Social Security number of an individual must be included in a document, only the last four digits of that number will be used whether that document is to be filed electronically or at the courthouse. If the involvement of a minor child must be mentioned, only that child's initials should be used; if an individual's date of birth is necessary, only the year should be used; and, if financial account numbers are relevant, only the last four digits should be recited in the document. It is anticipated that as courts develop local rules and instructions for the use and implementation of Electronic Case Filing (ECF), such rules and instructions will include direction on the truncation by the litigants of personal identifying information. Similar rule changes would apply to courts which are imaging documents.

Providing remote electronic access equal to courthouse access will require counsel and pro se litigants to protect their interests through a careful review of whether it is essential to their case to file certain documents containing private sensitive information or by the use of motions to seal and for protective orders. It will also depend upon the discretion of judges to protect privacy and security interests as they arise in individual cases. However, it is the experience of the ECF prototype courts and courts which have been imaging documents and making them electronically available that reliance on judicial discretion has not been problematic and has not dramatically increased or altered the amount and nature of motions to seal. It is also the experience of those courts that have been making their case file information available through PACERNet that there have been virtually no reported privacy problems as a result.

This recommended "public is public" policy is simple and can be easily and consistently applied nationwide. The recommended policy will "level the geographic playing field" in civil cases in federal court by allowing attorneys not located in geographic proximity to the courthouse easy access. Having both remote electronic access and courthouse access to the same information will also utilize more fully the technology available to the courts and will allow clerks' offices to better and more easily serve the needs of the bar and the public. In addition, it might also discourage the possible development of a "cottage industry" headed by data re-sellers who, if remote electronic access were restricted, could go to the courthouse, copy the files, download the information to a private website, and charge for access to that website, thus profiting from the sale of public information and undermining restrictions intended to protect privacy.

Each of the other policy options articulated in the document for comment presented its own problems. The idea of defining what documents should be included in the public file was rejected because it would require the courts to restrict access at the courthouse to information that has traditionally been available from courthouse files. This would have the net effect of allowing less

overall access in a technological age where greater access is easy to achieve. It would also require making the very difficult determination of what information should be included in the public file.

The Committee seriously considered and debated at length the idea of creating levels of access to electronic documents (i.e., access to certain documents for specific users would be based upon the user's status in the case). The Committee ultimately decided that levels of access restrictions were too complicated in relation to the privacy benefits which could be derived therefrom. It would be difficult, for example, to prohibit a user with full access to all case information, such as a party to the case, from downloading and disseminating the restricted information. Also, the levels of access would only exist in relation to the remote electronic file and not in relation to the courthouse file. This would result in unequal remote and physical access to the same information and could foster a cottage industry of courthouse data collection as described above.

Seeking an amendment to the Federal Rules of Civil Procedure was not recommended for several reasons. First, any such rules amendment would take several years to effectuate, and the Committee concluded that privacy issues need immediate attention. There was some discussion about the need for a provision in Fed. R. Civ. P. 11 providing for sanctions against counsel or litigants who, as a litigation tactic, intentionally include scurrilous or embarrassing, irrelevant information in a document so that this information will be available on the Internet. The Committee ultimately determined that, at least for now, the current language of Fed. R. Civ. P. 11 and the inherent power of the court are sufficient to deter such actions and to enforce any privacy policy.

As noted above, this recommendation treats Social Security cases differently from other civil case files. It would limit remote electronic access. It does contemplate, however, the existence of a skeletal electronic file in Social Security cases which would contain documents such as the complaint, answer and dispositive cross motions or petitions for review as applicable but not the administrative record and would be available to the court for statistical and case management purposes. This recommendation would also allow litigants to electronically file documents, except for the administrative record, in Social Security cases and would permit electronic access to these documents by litigants only.

After much debate, the consensus of the Committee was that Social Security cases warrant such treatment because they are of an inherently different nature from other civil cases. They are the continuation of an administrative proceeding, the files of which are confidential until the jurisdiction of the district court is invoked, by an individual to enforce his or her rights under a government program. Further, all Social Security disability claims, which are the majority of Social Security cases filed in district court, contain extremely detailed medical records and other personal information which an applicant must submit in an effort to establish disability. Such medical and personal information is critical to the court and is of little or no legitimate use to anyone not a party to the case. Thus, making such information available on the Internet would be of little public benefit and would present a substantial intrusion into the privacy of the claimant. Social Security files would still be available in their entirety at the courthouse.

Bankruptcy Case Files

Recommendation: That documents in bankruptcy case files should be made generally

available electronically to the same extent that they are available at the courthouse, with a similar policy change for personal identifiers as in civil cases; that § 107(b)(2) of the Bankruptcy Code should be amended to establish privacy and security concerns as a basis for the sealing of a document; and that the Bankruptcy Code and Rules should be amended as necessary to allow the court to collect a debtor's full Social Security number but display only the last four digits.

The Committee recognized the unique nature of bankruptcy case files and the particularly sensitive nature of the information, largely financial, which is contained in these files; while this recommendation does provide open remote electronic access to this information, it also accommodates the privacy concerns of individuals. This recommendation contemplates that a debtor's personal, identifying information and financial account numbers will not be included in their complete forms on any document, whether electronic or hard copy (i.e., only the last four digits of Social Security and financial account numbers will be used). As the recommendation recognizes, there may be a need to amend the Bankruptcy Code to allow only the last four digits of an individual debtor's Social Security number to be used. The bankruptcy court will collect the full Social Security number of debtors for internal use, as this number appears to provide the best way to identify multiple bankruptcy filings. The recommendation proposes a minor amendment to § 107(a) to allow the court to collect the full number, but only display the last four digits. The names of minor children will not be included in electronic or hard copies of documents.

As with civil cases, the effectiveness of this recommendation relies upon motions to seal filed by litigants and other parties in interest. To accomplish this result, an amendment of 11 U.S.C. § 107(b), which now narrowly circumscribes the ability of the bankruptcy courts to seal documents, will be needed to establish privacy and security concerns as a basis for sealing a document. Once again, the experiences of the ECF prototype and imaging courts do not indicate that this reliance will cause a large influx of motions to seal. In addition, as with all remote electronic access, the information can only be reached through the log-in and password-controlled PACERNet system.

The Committee rejected the other alternatives suggested in the comment document for various reasons. Any attempt to create levels of access in bankruptcy cases would meet with the same problems discussed with respect to the use of levels of access for civil cases. Bankruptcy cases present even more issues with respect to levels of access because there are numerous interests which would have a legitimate need to access file information and specific access levels would need to be established for them. Further, many entities could qualify as a "party in interest" in a bankruptcy filing and would need access to case file information to determine if they in fact have an interest. It would be difficult to create an electronic access system which would allow sufficient access for that determination to be made without giving full access to that entity.

The idea of collecting less information or segregating certain information and restricting access to it was rejected because the Committee determined that there is a need for and a value in

allowing the public access to this information. Further, creating two separate files, one totally open to the public and one with restricted access, would place a burden on clerks' offices by requiring the management of two sets of files in each case.

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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 Central
California Northern*
Connecticut*
District of Columbia*
Florida Northern*
Illinois Southern
Indiana Northern*
Indiana Southern*
Iowa Northern*
Kansas*
Kentucky Eastern
Kentucky Western
Maryland*
Maine*
Massachusetts*
Michigan Eastern
Michigan Western*
Minnesota
Missouri Eastern*
Missouri Western*
Nebraska*
New Hampshire
New Jersey*
New York Eastern*
New York Northern*
New York Southern*
New York Western*
Ohio Northern*
Ohio Southern*
Oklahoma Western
Oregon*
Pennsylvania Eastern*
Pennsylvania Middle*
Puerto Rico
South Dakota*
Texas Eastern
Texas Northern
Virginia Western
Washington Western*
Wisconsin Eastern*
Wyoming

Court of International Trade
Court of Federal Claims*

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

Bankruptcy Courts

Alabama Middle*
Alabama Northern
Alabama Southern*
Alaska*
Arizona*
Arkansas Eastern*
Arkansas Western*
California Northern
California Southern*
Colorado*
Connecticut
Delaware*
District of Columbia
Florida Middle*
Florida Northern*
Georgia Northern*
Hawaii*
Illinois Northern
Illinois Southern*
Indiana Northern*
Iowa Northern*
Iowa Southern*
Kansas
Kentucky Eastern*
Kentucky Western*
Louisiana Eastern*
Louisiana Middle*
Louisiana Western*
Maine*
Maryland*
Massachusetts*
Michigan Western*
Mississippi Northern
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 Middle
North Carolina Western*
Ohio Northern*
Ohio Southern*
Oklahoma Eastern
Oklahoma Northern*
Oregon
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*
Wisconsin Eastern
Washington Western*
West Virginia Northern*
West Virginia Southern*
Wisconsin Western*
Wyoming*

Courts Currently in the Process of Implementing CM/ECF

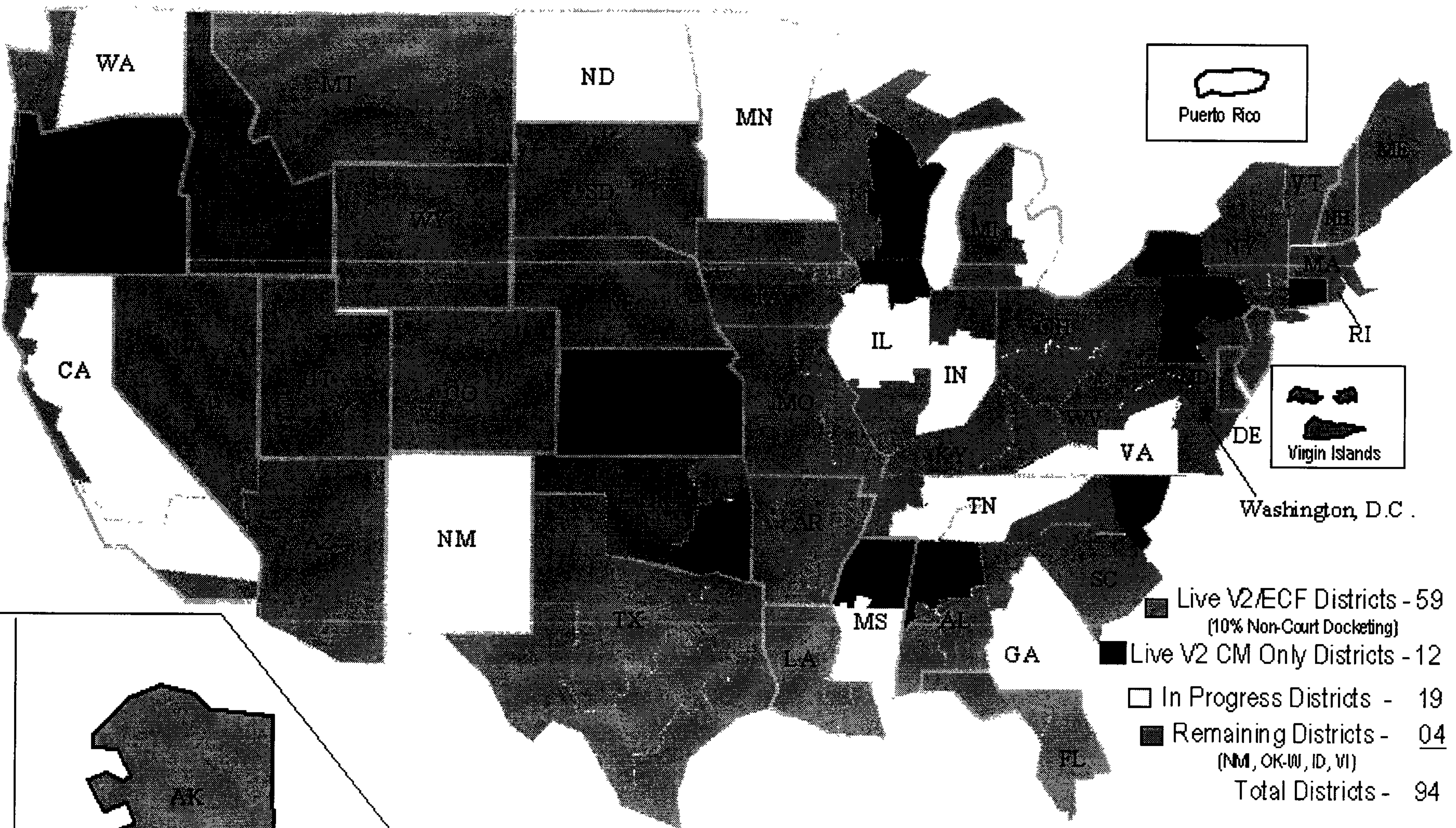
District Courts

Alabama Middle
Alabama Northern
California Eastern
Colorado
Delaware
Florida Middle
Georgia Middle
Georgia Northern
Guam
Illinois Central
Illinois Northern
Iowa Southern
Louisiana Middle
Louisiana Western
Mississippi Northern
Mississippi Southern
Oklahoma Northern
Tennessee Eastern
Tennessee Western
Texas Southern
Texas Western
Utah
Vermont
Washington Eastern
West Virginia Northern
West Virginia Southern

Bankruptcy Courts

California Central
California Eastern
Florida Southern
Georgia Middle
Georgia Southern
Guam
Illinois Central
Indiana Southern
Michigan Eastern
Minnesota
Mississippi Southern
New Mexico
North Carolina Eastern
North Dakota
Puerto Rico
Tennessee Eastern
Tennessee Middle
Virginia Western
Washington Eastern

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 3/03/04

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MEMORANDUM

DATE: March 4, 2004

FROM: Patricia S. Ketchum

SUBJECT: Supreme Court Opinion Concerning the Effect of a Bankruptcy Rule

TO: Advisory Committee on Bankruptcy Rules

On January 14, 2004, the Supreme Court ruled unanimously that the time limit for filing a complaint objecting to discharge in Rule 4004(a) is "unalterable" except as provided in the Rule 4004(b), resolving a conflict among the circuits concerning whether the time limits in Rules 4004 and 4007(c) are subject to equitable exceptions. The opinion, by Justice Ginsburg, discusses at length the effect and enforceablility of the bankruptcy rules. A copy of the Court's decision in Kontrick v. Ryan, ___ U.S. ____, 124 S.Ct. 906 (2004), is attached.

Attachment

Andrew J. KONTRICK, Petitioner,

v.

Robert A. RYAN.

No. 02–819.

Argued Nov. 3, 2003.

Decided Jan. 14, 2004.

Background: Creditor filed adversary complaint objecting to Chapter 7 debtor's discharge. The United States Bankruptcy Court for the Northern District of Illinois, John D. Schwartz, J., denied discharge on ground of transfers with intent to defraud creditor. Debtor appealed. The District Court, Harry D. Leinenweber, J., 2001 WL 630676, affirmed. Debtor appealed. The United States Court of Appeals for

the Seventh Circuit, 295 F.3d 724, affirmed. Certiorari was granted.

Holding: The Supreme Court, Justice Ginsburg, held that: debtor forfeits right to rely on time limit for creditor to file objections to discharge if debtor does not raise issue before bankruptcy court reaches merits of creditor's objection, abrogating *In re Coggin*, 30 F.3d 1443.

Affirmed.

1. Federal Courts ⟹1.1

Only Congress may determine lower federal court's subject-matter jurisdiction. U.S.C.A. Const. Art. 3, § 1.

2. Federal Courts ⟹1.1

Court-prescribed rules of practice and procedure for cases in federal district courts and courts of appeals do not create or withdraw federal jurisdiction.

3. Bankruptcy ⟹3312

Rules governing time limit for creditor to file objections to discharge do not concern court's subject-matter jurisdiction, lack of which can be raised at any time in same action. Fed.Rules Bankr.Proc.Rules 4004(a, b), 9006(b)(3), 11 U.S.C.A.

4. Federal Courts ⟹29.1, 542

Litigant generally may raise court's lack of subject-matter jurisdiction at any time in same civil action, even initially at highest appellate instance.

5. Federal Courts ⟹29.1

Subject-matter jurisdiction may not be attacked collaterally.

6. Bankruptcy ⟹3312

Bankruptcy rules governing time limit for creditor to file objections to discharge serve three primary purposes: (1) they inform objecting creditor of time he has to file complaint; (2) they instruct court on limits of its discretion to grant motions for complaint-filing-time enlargements; and (3) they afford debtor affirmative defense to complaint filed outside time limits. Fed. Rules Bankr.Proc.Rules 4004(a, b), 9006(b)(3), 11 U.S.C.A.

7. Bankruptcy ⟹3312

Debtor forfeits right to rely on time limit for creditor to file objections to discharge if debtor does not raise issue before bankruptcy court reaches merits of creditor's objection; abrogating *In re Coggin*, 30 F.3d 1443.

Syllabus *

A creditor in Chapter 7 liquidation proceedings has "60 days after the first date set for the meeting of creditors" to file a complaint objecting to the debtor's discharge. Fed. Rule Bkrtcy. Proc. 4004(a). The bankruptcy court may extend that period "for cause" on motion "filed before the time has expired." Fed. Rule Bkrtcy. Proc. 4004(b). Reinforcing Rule 4004(b)'s restriction on extension of the Rule 4004(a) deadline, Rule 9006(b)(3) allows enlargement of "the time for taking action" under Rule 4004(a) "only to the extent and under the conditions stated in [that rule]," *i.e.*, only as permitted by Rule 4004(b).

On April 4, 1997, petitioner Kontrick filed a Chapter 7 bankruptcy petition. After gaining three successive time extensions from the Bankruptcy Court, respondent Ryan, Kontrick's creditor, filed a complaint on January 13, 1998, objecting to Kontrick's discharge. Ryan alleged that Kontrick had transferred property, within one year of filing his petition, with

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

the intent to defraud creditors, and therefore did not qualify for discharge under 11 U.S.C. §§ 727(a)(2)-(5). Ryan filed an amended complaint on May 6, 1998, with leave of court, but without seeking or gaining a court-approved time extension. The amended complaint alleged with particularity that Kontrick had fraudulently transferred money to his wife, first by removing his own name from the family's once-joint checking account, then by continuing regularly to deposit his salary checks into the account, from which his wife routinely paid family expenses (the "family-account" claim). Kontrick's June 10, 1998, answer to the amended complaint did not raise the untimeliness of the family-account claim; on the merits, the answer admitted the transfers to the family account but denied that Kontrick had violated § 727(a)(2)(A). In response to Ryan's summary judgment motion, which appended a statement of material facts, Kontrick cross-moved to strike portions of Ryan's summary judgment filings, but did not ask the court to strike the amended complaint's family-account allegations. On February 25, 2000, the Bankruptcy Court awarded Ryan summary judgment on the family-account claim, concluding that Kontrick was not entitled to discharge because his transfers to the family account were made with intent to defraud at least creditor Ryan. Kontrick then moved for reconsideration. For the first time, Kontrick urged that the court was powerless to adjudicate the family-account claim. The amended complaint containing that claim, Kontrick observed, was untimely under Rules 4004(a) and (b) and 9006(b)(3). Those rules, Kontrick maintained, establish a mandatory, unalterable time limit of the kind Kontrick called "jurisdictional." The Bankruptcy Court denied reconsideration and entered final judgment, holding that Rule 4004's complaint-filing time instructions are not "jurisdictional," and that Kontrick had waived the right to assert the untimeliness of the amended complaint by failing squarely to raise the point before the court reached the merits of Ryan's objections to discharge. The District Court sustained the denial of discharge, and the Seventh Circuit affirmed. Both courts relied on decisions of sister Circuits holding that the timeliness provisions at issue are not "jurisdictional."

Held: A debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge. Pp. 914–918.

(a) Only Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1. Congress did so, as pertinent here, by instructing that "objections to discharges" are "[c]ore proceedings" within the bankruptcy courts' jurisdiction. 28 U.S.C. § 157(b)(2)(J). Congress did not build time constraints into that statutory authorization. Rather, the time constraints applicable to objections to discharge are contained in Bankruptcy Rules prescribed pursuant to § 2075. Such rules "do not create or withdraw federal jurisdiction." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274. As Bankruptcy Rule 9030 states, the Bankruptcy Rules "shall not be construed to extend or limit the jurisdiction of the courts." The filing deadlines prescribed in Rules 4004 and 9006(b)(3) are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate. Although Kontrick now concedes that those Rules are not properly labeled "jurisdictional" in the sense of describing a court's subject-matter jurisdiction, he maintains that the Rules have the same import as provisions governing subject-matter jurisdiction. A

litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action. *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462. Similarly, Kontrick urges, a debtor may challenge a creditor's objection to discharge as untimely under Rules 4004 and 9006(b)(3) at any time in the proceedings, even initially on appeal or certiorari. The equation Kontrick advances overlooks the critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule. Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point. Pp. 914–916.

(b) No reasonable construction of complaint-processing rules would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits. The relevant claim-processing rules in this case, Bankruptcy Rules 4004(a) and (b) and 9006(b)(3), include, among their primary purposes, affording the debtor an affirmative defense to a complaint filed outside the Rules 4004(a) and (b) time limits. It is uncontested that Ryan filed his complaint objecting to Kontrick's discharge outside those limits. Kontrick urges that nothing occurring thereafter counts, for the Rules' time prescriptions are unalterable, allowing no recourse to equitable exceptions. This case, however, involves no issue of equitable tolling or any other equity-based exception. Neither at the time Ryan filed the amended complaint containing the family-account claim nor anytime thereafter did he assert circumstances—equitable or otherwise—qualifying him for a time extension. The sole question is whether Kontrick forfeited his right to assert the untimeliness of Ryan's amended complaint by failing to raise the issue until after that complaint was adjudicated on the merits. In other words, how long did the affirmative defense Rules 4004(a) and (b) and 9006(b)(3) afforded Kontrick linger in the proceedings? The Seventh Circuit followed the proper path on this key question. It noted that time bars generally must be raised in an answer or responsive pleading. See Fed. Rule Civ. Proc. 8(c) (made applicable to bankruptcy court adversary proceedings by Fed. Rule Bkrtcy. Proc. 7008(a)). An answer may be amended to include an inadvertently omitted affirmative defense, and even after the time to amend "of course" has passed, "leave [to amend] shall be freely given when justice so requires." Fed. Rule Civ. Proc. 15(a) (made applicable to adversary proceedings by Fed. Rule Bkrtcy. Proc. 7015). Kontrick not only failed to assert the time constraints of Rules 4004(a) and (b) and 9006(b)(3) in a pleading or amended pleading responsive to Ryan's amended complaint. In addition, Kontrick moved to delete certain items from Ryan's summary judgment filings, but, even that far into the litigation, he did not ask the Bankruptcy Court to strike the family-account claim. Ordinarily, a defense is lost if it is not included in the answer or amended answer. See Fed. Rule Bkrtcy. Proc. 7012(b) (Fed. Rules Civ. Proc. 12(b)-(h) apply in adversary proceedings). Rules 12(h)(2) and (3) prolong the life of certain defenses, but time prescriptions are not among them. Even if a defense based on Bankruptcy Rule 4004 could be equated to "failure to state a claim upon which relief can be granted," the issue could be raised, at the latest, "at the trial on the merits." Fed. Rule Civ. Proc. 12(h)(2). Only lack of subject-matter jurisdiction is preserved post-trial. Fed.

Rule Civ. Proc. 12(h)(3). Kontrick's resistance to the family-account claim is not of that order. Pp. 916–918.

295 F.3d 724, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court.

E. King Poor, for petitioner.

James R. Figliulo, for respondent.

Kent L. Jones, for United States as amicus curiae, by special leave of the Court, supporting the respondent.

E. King Poor, Counsel of Record, Kimball R. Anderson, Michael J. Stepek, Laura D. Cullison, Winston & Strawn, LLP, Chicago, Illinois, Counsel for Petitioner Andrew J. Kontrick.

Michael A. Pollard, Anthony G. Stamato, Baker & McKenzie, Chicago, Illinois, G. Eric Brunstad, Jr., Bingham McCutchen, LLP, Hartford, Connecticut, James R. Figliulo, Counsel of Record, James H. Bowhay, Catherine Tetzlaff, Figliulo & Silverman, P.C., Chicago, Illinois, Counsel for Respondent.

For U.S. Supreme Court briefs, see:
2003 WL 21396448 (Pet.Brief)
2003 WL 22038388 (Pet.Brief)
2003 WL 21714998 (Resp.Brief)

Justice GINSBURG delivered the opinion of the Court.

This case concerns the duration of a right to object to a pleading on the ground that it was filed out of time. Under the Bankruptcy Rules governing Chapter 7 liquidation proceedings, a creditor has "60 days after the first date set for the meeting of creditors" to file a complaint objecting to the debtor's discharge. Fed. Rule Bkrtcy. Proc. 4004(a). That period may be extended "for cause" on motion "filed before the time has expired." Fed. Rule Bkrtcy. Proc. 4004(b). In the matter before us a creditor, in an untimely pleading, objected to the debtor's discharge. The debtor, however, did not promptly move to dismiss the creditor's plea as impermissibly late. Only after the Bankruptcy Court decided, on the merits, that the discharge should be refused did the debtor, in a motion for reconsideration, urge the untimeliness of the creditor's plea.

Bankruptcy Rule 4004's time prescription, the debtor maintains, is "jurisdictional," *i.e.,* dispositive whenever raised in the proceedings. Rejecting the debtor's "jurisdictional" characterization, the courts below held that Rule 4004's time prescription could not be invoked to upset an adjudication on the merits. We agree that Rule 4004 is not "jurisdictional." Affirming the judgment of the Court of Appeals for the Seventh Circuit, we hold that a debtor forfeits the right to rely on Rule 4004 if the debtor does not raise the Rule's time limitation before the bankruptcy court reaches the merits of the creditor's objection to discharge.

I

A debtor in a Chapter 7 liquidation case qualifies for an order discharging his debts if he satisfies the conditions stated in § 727(a) of the Bankruptcy Code. 11 U.S.C. § 727(a).[1] A discharge granted un-

1. Under § 727(a), the court may not grant a discharge of any debts if the debtor, *inter alia:* (1) is not an individual; (2) has, with intent to defraud a creditor, concealed, transferred, or destroyed property of the estate (A) in the year preceding bankruptcy or (B) during the bankruptcy case; (3) has destroyed books or records; (4) has knowingly (A) given a false oath or account, (B) presented or used a false claim, (C) attempted to obtain money by acting or forbearing to act, or (D) withheld documents relating to the debtor's property or financial affairs; or (5) has failed to explain a

der § 727(a) frees the debtor from all debts existing at the commencement of the bankruptcy proceeding other than obligations § 523 of the Code excepts from discharge. § 727(b).[2]

A debtor's discharge may be opposed by the trustee, the United States trustee, or any creditor. § 727(c)(1). Adjudication of "objections to discharg[e]," Congress provided, is a "[c]ore proceedin[g]" within the jurisdiction of the bankruptcy courts. 28 U.S.C. § 157(b)(2)(J). No statute, however, specifies a time limit for filing a complaint objecting to the debtor's discharge. Instead, the controlling time prescriptions are contained in the Federal Rules of Bankruptcy Procedure, specifically, Rules 4004(a) and (b) and 9006(b)(3).

In relevant part, Bankruptcy Rule 4004(a) states: "[A] complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed no later than 60 days after the first date set for the meeting of creditors." Rule 4004(b), governing extensions of the Rule 4004(a) filing deadline, provides: "[T]he court may for cause extend the time [Rule 4004(a) allows] to file a complaint objecting to discharge" if the motion is "filed before the time has expired." Reinforcing Rule 4004(b)'s restriction on extension of the Rule 4004(a) deadline, Rule 9006(b)(3) allows enlargement of "the time for taking action" under Rule 4004(a) "only to the extent and under the conditions stated in [that rule]," *i.e.*, only as permitted by Rule 4004(b).[3]

II

On April 4, 1997, petitioner, Dr. Andrew J. Kontrick, filed a Chapter 7 bankruptcy petition. Respondent, Dr. Robert A. Ryan, a major creditor and Kontrick's former associate in a cosmetic and plastic surgery practice, opposed Kontrick's discharge. After gaining three successive time extensions from the Bankruptcy Court, Ryan filed an original complaint on January 13, 1998, in which he objected to the discharge of any of Kontrick's debts. Ryan alleged that Kontrick had transferred property, within one year of filing the bankruptcy petition, with intent to defraud creditors, and therefore did not qualify for a discharge under 11 U.S.C. §§ 727(a)(2)-(5). App. to Pet. for Cert. 40.

Ryan filed an amended complaint on May 6, 1998, with leave of court, *ibid.*, but without seeking or gaining a court-approved time extension. The amended complaint particularized for the first time the debtor's violation of § 727(a)(2)(A) in

loss or deficiency of assets. 11 U.S.C. §§ 727(a)(1)-(5).

2. Section 523 categorizes debts that are nondischargeable. See, *e.g.*, 11 U.S.C. § 523(a)(1) (certain debts "for a tax or a customs duty"); § 523(a)(2)(A) (certain debts for money obtained by "false pretenses, a false representation, or actual fraud"); § 523(a)(5) (certain debts "to a spouse, former spouse, or child of the debtor" for "support of such spouse or child"); § 523(a)(6) (debts for "willful and malicious injury by the debtor")

3. Under Bankruptcy Rule 4007(c), essentially the same time prescriptions apply to complaints targeting the discharge of a particular debt pursuant to 11 U.S.C. § 523(c). See *supra*, at 911, n. 2. Rule 4007(c) tracks Rules 4004(a) and (b), and Rule 9006(b)(3) lists Rule 4007(c) as well as Rule 4004(a) among time prescriptions bankruptcy courts may enlarge "only to the extent and under the conditions stated [in the rules themselves]." Because of the practical identity of the time prescriptions for objections to the discharge of any debts under § 727(a) and for objections to the discharge of particular debts under § 523(c), courts have considered decisions construing Rule 4007(c) in determining whether the time limits delineated in Rules 4004(a) and (b) may be forfeited. See, *e.g.*, *In re Kontrick*, 295 F.3d 724, 730, n. 3 (C.A.7 2002) (citing *In re Santos*, 112 B.R. 1001, 1004, n. 2 (C.A.9 BAP 1990)).

this regard: Debtor Kontrick, creditor Ryan alleged, had fraudulently transferred money to Kontrick's wife, first by removing Kontrick's own name from the family's once-joint checking account, then by continuing regularly to deposit his salary checks into the account, from which his wife routinely paid family expenses (the "family-account" claim). *Id.*, at 52–53.[4]

Kontrick answered Ryan's amended complaint on June 10, 1998. His answer "did not raise the untimeliness of [the family-account] claim," Brief for Petitioner 4; on the merits, he admitted the transfers to the family account but denied violating § 727(a)(2)(A). In March 1999, after the parties engaged in acrimonious discovery, Ryan moved for summary judgment. As Local Bankruptcy Rule 402(M) (Bkrtcy. Ct. ND Ill.1994) instructs, Ryan appended to his motion "a statement of material facts as to which [he] contend[ed] there [was] no genuine issue." Kontrick cross-moved, in August 1999, to strike portions of Ryan's summary judgment filings.

Kontrick's motion to strike sought deletion of "new allegations," *i.e.*, allegations making their first appearance in the litigation in Ryan's summary judgment submissions—Ryan's statement of facts pursuant to Local Rule 402(M), accompanying exhibits, and corresponding portions of the summary judgment motion and memorandum. Motion to Strike and Response to [Ryan's] Statement of Facts Under Local Rule 402 N in No. 97 B 10353 (Bkrtcy. Ct. ND Ill.), pp. 2, 5, 26. Although Kontrick noted that the family-account allegations were stated only in the amended complaint and were absent from the original complaint, *id.*, at 3–4, he did not ask the court to strike those allegations. His response, instead, and in line with Local Rule 402(N), addressed the substance of the family-account claim. He admitted taking his name off the account, but observed that he did so "over four years before bankruptcy." *Id.*, at 13. He also acknowledged that, thereafter, he "deposited his paycheck into the account the same way he had always done." *Ibid.*

On February 25, 2000, the Bankruptcy Court ruled on the cross-motions, granting in part Kontrick's motion to strike, awarding summary judgment to Ryan on the family-account claim, and dismissing the remaining claims. The court used the amended complaint as its baseline; it struck as untimely "allegations not included in [that] complaint." App. to Pet. for Cert. 47; see *id.*, at 48–50. Homing in on Kontrick's continuing deposits into the account from which he had removed his name, the court concluded that Kontrick had transferred property with intent "to hinder, delay or defraud at least [creditor] Ryan." *Id.*, at 55. That course of conduct, coupled with Kontrick's testimony,[5] the court concluded, sufficed to prove a violation of § 727(a)(2) (described *supra*, at 910, n. 1). App. to Pet. for Cert. 55, 64. Accordingly, the court held, Kontrick was not entitled to a discharge of his debts.

Kontrick moved for reconsideration. He argued that the Bankruptcy Court lacked jurisdiction over the sole claim on which the court had granted summary judgment, the family-account claim. See *id.*, at 71. The court was powerless to adjudicate the

4. Although Kontrick took his name off the family bank account some four years prior to his bankruptcy petition, his salary check deposits continued into the one-year period preceding bankruptcy specified in 11 U.S.C. § 727(a)(2)(A) (described *supra*, at 910, n. 1). See App. to Pet. for Cert. 33, 52–53.

5. In a pre-bankruptcy deposition, Kontrick admitted he transferred the once-joint bank account to his wife to prevent his creditors from attaching the funds. See App. to Pet. for Cert. 53; 295 F.3d, at 727–728.

claim, Kontrick insisted, because the amended complaint containing the claim was untimely. Governing Rules 4004(a) and (b) and 9006(b)(3), see *supra*, at 911, Kontrick maintained, establish a mandatory, unalterable time limit of the kind he then called "jurisdictional." App. to Pet. for Cert. 71. It was the first time Kontrick appended a jurisdictional label to any pleading he filed relating to the family-account claim.

The Bankruptcy Court denied the reconsideration motion on June 8, 2000, and entered final judgment five days later. The court held that Rule 4004's complaint-filing time instructions are not "jurisdictional," and that Kontrick had waived the right to assert the untimeliness of the amended complaint by failing squarely to raise the point before the court reached the merits of Ryan's objections to discharge.

The District Court sustained the Bankruptcy Court's decision denying Kontrick's discharge. App. to Pet. for Cert. 25–38. The Court of Appeals for the Seventh Circuit, in turn, affirmed the judgment of the District Court. *In re Kontrick*, 295 F.3d 724 (C.A.7 2002). Both courts relied on decisions of sister Circuits holding that "the timeliness provisions at issue here are not jurisdictional." *Id.*, at 733 (citing *In re Benedict*, 90 F.3d 50, 54–55 (C.A.2 1996), and *Farouki v. Emirates Bank Int'l Ltd.*, 14 F.3d 244, 248 (C.A.4 1994)); accord, App. to Pet. for Cert. 31–32. Both courts also agreed with the Bankruptcy Court that Kontrick had waived the right to challenge Ryan's amended complaint as impermissibly late.

The Seventh Circuit found in Kontrick's papers opposing summary judgment nothing that placed in issue the timeliness of allegations in the amended complaint. 295 F.3d, at 735. Instead, according to the Court of Appeals, Kontrick apparently accepted creditor Ryan's amended complaint as properly filed; Kontrick used that complaint, not the original complaint, as a baseline to object to new allegations Ryan made for the first time in his statement of facts supporting summary judgment. *Ibid.* The Seventh Circuit further commented that "[t]he policy concerns of expeditious administration of bankruptcy matters and the finality of the bankruptcy court's decision hardly are fostered by requiring the bankruptcy court to consider the timeliness of an issue that it already has adjudicated." *Ibid.*

We granted certiorari in view of the division of opinion on whether Rule 4004 is "jurisdictional,"[6] 538 U.S. 998, 123 S.Ct. 1899, 155 L.Ed.2d 824 (2003), and we now affirm the judgment of the Seventh Circuit.[7]

6. Compare, *e.g., In re Coggin*, 30 F.3d 1443, 1450–1451 (C.A.11 1994) (referring to Rule 4004(b) as a "jurisdictional requirement" and a "jurisdictional bar"), with, *e.g., In re Benedict*, 90 F.3d 50, 54 (C.A.2 1996) ("time period imposed by Rule 4007(c) is not jurisdictional").

7. On brief and at oral argument, counsel for Kontrick suggested that, by noting that the family-account claim was not stated in the original complaint, Kontrick had implicitly invited dismissal of the claim. See Tr. of Oral Arg. 5; Brief for Petitioner 5 ("Kontrick . argued that in opposing Ryan's many other allegations as untimely, he had also sufficiently raised the untimeliness of the family account claim."). Kontrick's notation that the family-account claim was absent from the original complaint, the courts below agreed, fell short of an argument that the claim was untimely. 295 F.3d, at 735; App. to Pet. for Cert. 72. We have no cause to disturb that determination. In any event, we train our attention on the question Kontrick here presented: "[W]hether the deadline set by Rule 4004 is mandatory and jurisdictional and thus cannot be waived." Brief for Petitioner i. See also Pet. for Cert. i. We note, too, that the question whether the family-account claim

III

[1] Only Congress may determine a lower federal court's subject-matter jurisdiction. U.S. Const., Art. III, § 1. Congress did so with respect to bankruptcy courts in Title 28 (Judiciary and Judicial Procedure); in cataloging core bankruptcy proceedings, Congress authorized bankruptcy courts to adjudicate, *inter alia*, objections to discharge. See 28 U.S.C. §§ 157(b)(1) and (b)(2)(I) and (J). Certain statutory provisions governing bankruptcy courts contain built-in time constraints. For example, § 157(c)(1) addresses *de novo* district court review of bankruptcy court findings and conclusions in noncore proceedings; that provision confines review to "matters to which any party has timely and specifically objected."[8] The provision conferring jurisdiction over objections to discharge, however, contains no timeliness condition. Section 157(b)(2)(J) instructs only that "objections to discharges" are "[c]ore proceedings" within the jurisdiction of the bankruptcy courts.

[2] The time constraints applicable to objections to discharge are contained in Bankruptcy Rules prescribed by this Court for "the practice and procedure in cases under title 11." 28 U.S.C. § 2075; cf. § 2072 (similarly providing for Court-prescribed "rules of practice and procedure" for cases in the federal district courts and courts of appeals). "[I]t is axiomatic" that such rules "do not create or withdraw federal jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 370, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). As Bankruptcy Rule 9030 states, the Bankruptcy Rules "shall not be construed to extend or limit the jurisdiction of the courts." Rule 9030's forerunner—its counterpart in the Federal Rules of Civil Procedure, Rule 82—similarly states: "These rules shall not be construed to extend or limit the jurisdiction of the United States district courts...." See 12 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure § 3141, pp. 484–485 (2d ed. 1997) ("Rule 82 states [the] important principle" that "[t]he rules merely prescribe the method by which the jurisdiction granted the courts by Congress is to be exercised."); *Schacht v. United States*, 398 U.S. 58, 64, 90 S.Ct. 1555, 26 L.Ed.2d 44 (1970) ("The procedural rules adopted by the Court for the orderly transaction of its business are not jurisdictional...."). In short, the filing deadlines prescribed in Bankruptcy Rules 4004 and 9006(b)(3) are claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate.

[3] This much is common ground. Kontrick does not contend in this Court that the timing rules in question affect the subject-matter jurisdiction of the bankruptcy courts. See Tr. of Oral Arg. 9 (acknowledging that "[t]his case does not deal with subject matter jurisdiction"); *id.*, at 9–10 (explaining that counsel for Kontrick used the word "jurisdiction" "as a

could properly "relate back" to the original complaint was neither raised in the Seventh Circuit, 295 F.3d, at 729, n. 2, nor aired in this Court, see Tr. of Oral Arg. 33.

8. Provisions of a similar order, with built-in time constraints, include 28 U.S.C. § 2401(b) (tort claim against United States "shall be forever barred" unless presented "to the appropriate Federal agency within two years after [the] claim accrues" or civil action "is begun within six months after .. notice of final denial of the claim by the agency to which it was presented"); and § 2107(a) ("Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.").

[60]

shorthand" to indicate a nonextendable time limit).

Courts, including this Court, it is true, have been less than meticulous in this regard; they have more than occasionally used the term "jurisdictional" to describe emphatic time prescriptions in rules of court. "Jurisdiction," the Court has aptly observed, "is a word of many, too many, meanings." *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal quotation marks omitted). For example, we have described Federal Rule of Civil Procedure 6(b), on time enlargement, and correspondingly, Federal Rule of Criminal Procedure 45(b), on extending time, as "mandatory and jurisdictional." *United States v. Robinson,* 361 U.S. 220, 228–229, 80 S.Ct. 282, 4 L.Ed.2d 259 (1960). But see *Carlisle v. United States,* 517 U.S. 416, 419–433, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996) (holding that, over the prosecutor's objection, a court may not grant a postverdict motion for a judgment of acquittal filed one day outside the time limit allowed by Fed. Rule Crim. Proc. 29(c); this Court did not characterize the Rule as "jurisdictional"); *Taylor v. Freeland & Kronz,* 503 U.S. 638, 642–646, 112 S.Ct. 1644, 118 L.Ed.2d 280 (1992) (similar ruling regarding Fed. Rule Bkrtcy. Proc. 4003(b)). "[C]lassify[ing] time prescriptions, even rigid ones, under the heading 'subject matter jurisdiction'" can be confounding. *Carlisle,* 517 U.S., at 434, 116 S.Ct. 1460 (GINSBURG, J., concurring). Clarity would be facilitated if courts and litigants used the label "jurisdictional" not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

[4, 5] Though Kontrick concedes that Rules 4004 and 9006(b)(3) are not properly labeled "jurisdictional" in the sense of describing a court's subject-matter jurisdiction, he maintains that the Rules have the same import as provisions governing subject-matter jurisdiction. A litigant generally may raise a court's lack of subject-matter jurisdiction at any time in the same civil action, even initially at the highest appellate instance. *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 28 L.Ed. 462 (1884) (challenge to a federal court's subject-matter jurisdiction may be made at any stage of the proceedings, and the court should raise the question *sua sponte*); *Capron v. Van Noorden,* 2 Cranch 126, 127, 2 L.Ed. 229 (1804) (judgment loser successfully raised lack of diversity jurisdiction for the first time before the Supreme Court); Fed. Rule Civ. Proc. 12(h)(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.").[9] Just so, Kontrick urges, a debtor may challenge a creditor's objection to discharge as untimely under Rules 4004 and 9006(b)(3) any time in the proceedings, even initially on appeal or certiorari. Tr. of Oral Arg. 10–11 (a debtor may object after final judgment or on appeal "so long as it's within the same proceeding"); Brief for Petitioner 25, and n. 7 (same); Reply Brief 16, and n. 7 (citing lower court decisions supporting Kontrick's argument on the longevity of time limits stated in Rules 4004 and 9006(b)(3), *e.g., In re Poskanzer,* 146 B.R. 125, 131 (D.N.J.1992); *In re Rinde,* 276 B.R. 330, 333 (Bkrtcy. Ct. RI 2002); *In re Barley,* 130 B.R. 66, 69

9. Even subject-matter jurisdiction, however, may not be attacked collaterally. *Des Moines Nav. & R. Co. v. Iowa Homestead Co.,* 123 U.S. 552, 8 S.Ct. 217, 31 L.Ed. 202 (1887); see Restatement (Second) of Judgments § 12 (1982).

(Bkrtcy. Ct. ND Ind.1991); *In re Kirsch*, 65 B.R. 297, 300, 302 (Bkrtcy. Ct. ND Ill.1986)).

The equation Kontrick advances overlooks a critical difference between a rule governing subject-matter jurisdiction and an inflexible claim-processing rule. Characteristically, a court's subject-matter jurisdiction cannot be expanded to account for the parties' litigation conduct; a claim-processing rule, on the other hand, even if unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.

IV

[6] We turn back now to the relevant claim-processing rules in this case. Bankruptcy Rules 4004(a) and (b) and 9006(b)(3), governing proceedings over which bankruptcy courts have subject-matter jurisdiction,[10] serve three primary purposes. First, they inform the pleader, *i.e.*, the objecting creditor, of the time he has to file a complaint. Second, they instruct the court on the limits of its discretion to grant motions for complaint-filing-time enlargements. Third, they afford the debtor an affirmative defense to a complaint filed outside the Rules 4004(a) and (b) limits. This case involves the third office of the Rules.

It is uncontested that creditor Ryan filed his complaint objecting to debtor Kontrick's discharge outside the Rules' time limits. Kontrick urges that nothing occurring thereafter counts, for the Rules' time prescriptions are unalterable, allowing no recourse to "equitable exceptions." Brief for Petitioner 13, n. 4; see *id.*, at 8, 16–18. This case, however, involves no issue of equitable tolling or any other equity-based exception. Neither at the time creditor Ryan filed the amended complaint containing the family-account claim nor anytime thereafter did he assert circumstances—equitable or otherwise—qualifying him for a time extension. Whether the Rules, despite their strict limitations, could be softened on equitable grounds[11] is therefore a question we do not reach.[12] See Brief for United States as *Amicus Curiae* 16 ("[M]uch of [Kontrick's] argument is actually directed to an issue that is not presented in this case," *i.e.*, whether the timing rules here in question are alterable by recourse to " 'equitable exceptions imported from outside the rules.' ") (quot-

10. Like Federal Rule of Criminal Procedure 45(b) and Federal Rule of Appellate Procedure 26(b), Bankruptcy Rule 9006(b) is modeled on Federal Rule of Civil Procedure 6(b). See Advisory Committee's Note accompanying Rule 9006 ("*Subdivision (b)* is patterned after Rule 6(b) F.R.Civ.P. and Rule 26(b) F.R.App.P." (emphasis in original)).

11. Lower courts have divided on the question whether Bankruptcy Rules 4004 and 4007(c) allow equitable exceptions. Compare, *e.g.*, 295 F.3d, at 733 (Rules 4004 and 4007(c) "are subject to equitable defenses"); *In re Benedict*, 90 F.3d, at 54 (same conclusion regarding Rule 4007(c)); *Farouki v. Emirates Bank Int'l, Ltd.*, 14 F.3d 244, 248 (C.A.4 1994) (same conclusion regarding Rule 4004), with, *e.g.*, *In re Alton*, 837 F.2d 457, 459 (C.A.11 1988) (Rule 4007(c) confers no discretion to grant an untimely motion to extend the time to object, even if the creditor lacked notice of the bar date); *Neeley v. Murchison*, 815 F.2d 345, 346–347 (C.A.5 1987) (same).

12. Nor should anything in this opinion be read to suggest that a debtor and creditor may stipulate to the assertion of time-barred claims when such an accommodation would operate to the detriment of other creditors. See, *e.g.*, *In re Dollar*, 257 B.R. 364, 366 (Bkrtcy. Ct. SD Ga.2001) ("Although the defendant debtor would significantly benefit by the allowance of the amended complaint [reflecting the parties' pre-trial agreement to substitute an untimely § 523(a)(6) cause of action for a timely § 727(a)(2) claim,] the defendant's other creditors would be significantly harmed.").

ing Brief for Petitioner 13); Tr. of Oral Arg. 40 ("Whether [the bankruptcy court] would have had discretion to allow a late complaint . . . isn't before the Court, because [Ryan has not] claimed that [in this case] there is any equitable groun[d] for enlarging or extending the deadline, so that question isn't presented.").

We can assume, *arguendo,* that had Kontrick timely asserted the untimeliness of Ryan's amended complaint, Kontrick would have prevailed in the litigation. The question, in that event, would have been "whether the time restrictions in th[e] Rules are in such 'emphatic form' " as to preclude equitable exceptions. Brief for United States as *Amicus Curiae* 16 (citation omitted). See, *e.g., Carlisle,* 517 U.S., at 419–433, 116 S.Ct. 1460 (upholding timely challenge to one-day-late filing under Fed. Rule Crim. Proc. 29(c)); *Taylor,* 503 U.S., at 642–646, 112 S.Ct. 1644 (similar ruling regarding Fed. Rule Bkrtcy. Proc. 4003(b)); *Robinson,* 361 U.S., at 222–230, 80 S.Ct. 282 (similar ruling regarding Fed. Rule Crim. Proc. 45(b)). Here, however, the sole question is whether Kontrick forfeited his right to assert the untimeliness of Ryan's amended complaint by failing to raise the issue until after that complaint was adjudicated on the merits.[13] In other words, how long did the affirmative defense Rules 4004(a) and (b) and 9006(b)(3) afforded Kontrick linger in the proceedings?

[7] The Court of Appeals, we agree, followed the proper path on this key question. See 295 F.3d, at 734–735. Time bars, that court noted, generally must be raised in an answer or responsive pleading. See Fed. Rule Civ. Proc. 8(c) (made applicable to adversary proceedings in bankruptcy courts by Fed. Rule Bkrtcy. Proc. 7008(a)).[14] An answer may be amended to include an inadvertently omitted affirmative defense, and even after the time to amend "of course" has passed, "leave [to amend] shall be freely given when justice so requires." Fed. Rule Civ. Proc. 15(a); see Fed. Rule Bkrtcy. Proc. 7015 ("Rule 15 F.R.Civ.P. applies in adversary proceedings.").

Kontrick not only failed to assert the time constraints of Rules 4004(a) and (b) and 9006(b)(3) in a pleading or amended pleading responsive to Ryan's amended complaint. As earlier recounted, see *supra,* at 911–912, Kontrick moved to delete certain items from Ryan's summary judgment filings, but, even that far into the litigation, he did not ask the Bankruptcy Court to strike the family-account claim.

Ordinarily, under the Bankruptcy Rules as under the Civil Rules, a defense is lost if it is not included in the answer or amended answer. See Fed. Rule Bkrtcy. Proc. 7012(b) ("Rule 12(b)-(h) F.R.Civ.P. applies in adversary proceedings."); 5A C. Wright & A. Miller, Federal Practice and Procedure § 1347, p. 184 (2d ed. 1990)

13. As the Government notes, "[t]he issue in this case is more accurately described as one of forfeiture rather than waiver." Brief for United States as *Amicus Curiae* 7, n. 5. Although jurists often use the words interchangeably, "forfeiture is the failure to make the timely assertion of a right[;] waiver is the 'intentional relinquishment or abandonment of a known right.' *United States v. Olano,* 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938))." Brief for United States as *Amicus Curiae* 7, n. 5 (some internal quotation marks omitted).

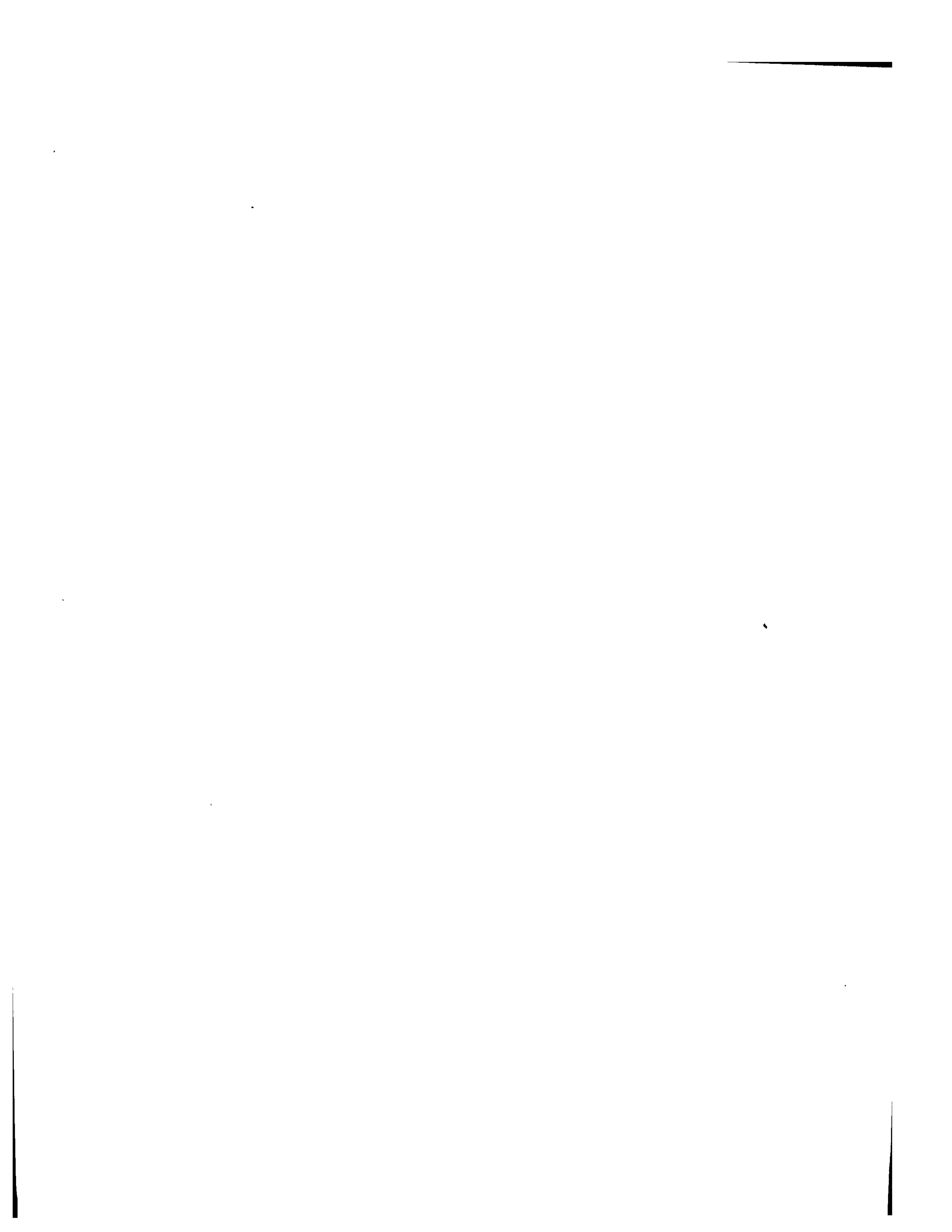
14. In fuller detail, Bankruptcy Rule 4004(d) provides that "[a] proceeding commenced by a complaint objecting to discharge is governed by Part VII of these rules." Part VII includes Bankruptcy Rule 7008(a), which states that "Rule 8 F.R.Civ.P. applies in adversary proceedings."

("A defense or objection that is not raised by motion or in the responsive pleading is waived unless it is protected by Rules 12(h)(2) or 12(h)(3) or by the successful invocation of the liberal amendment policy of Rule 15."). Rules 12(h)(2) and (3) prolong the life of certain defenses, but time prescriptions are not among those provisions. Even if a defense based on Bankruptcy Rule 4004 could be equated to "failure to state a claim upon which relief can be granted," the issue could be raised, at the latest, "at the trial on the merits." Fed. Rule Civ. Proc. 12(h)(2). Only lack of subject-matter jurisdiction is preserved post-trial. Fed. Rule Civ. Proc. 12(h)(3). And, as we earlier explained, see *supra*, at 914–916, Kontrick's resistance to the family-account claim is not of that order. No reasonable construction of complaint-processing rules, in sum, would allow a litigant situated as Kontrick is to defeat a claim, as filed too late, after the party has litigated and lost the case on the merits.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Seventh Circuit is

Affirmed.



Ms. Ketchum will provide an oral report on the revision of the forms page on the Judiciary's Internet website and on the JNET.

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Form B6G (DRAFT)

In re ______________________________,
Debtor

Case No. ______________________________
(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.

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2004

1011
2002(j)
9014

December 1, 2005

1007
3004
3005
4008
7004
9006

Official Form 6 - Schedule G

December 1, 2006

5005
9036

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 9/03 - Committee considered and approved in principle **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 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting **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 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting **PENDING FURTHER ACTION**

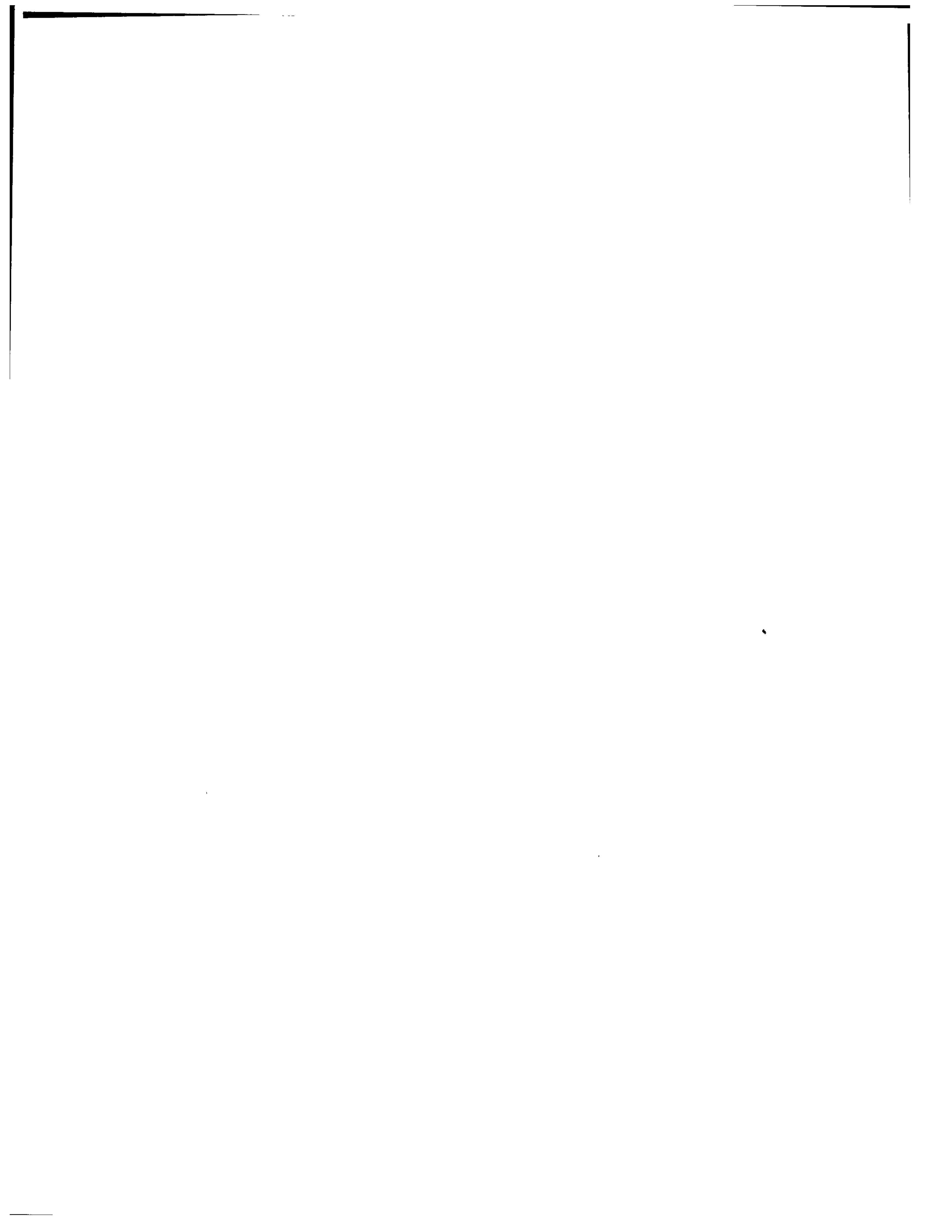
Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - 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 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting **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 9/03 - Committee considered and took no action but continues to monitor case law **PENDING FURTHER ACTION**
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter **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 9/03 - Committee considered and approved for publication 1/04 - Standing Committee approved for publication **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 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting **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 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 8/03 - Published for public comment **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 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication **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 9/03 - Committee considered and approved for publication **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**
Official Form B10 Amend Proof of Claim form.	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair, and Subcommittee on Forms **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**
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair **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**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number.	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **PENDING FURTHER ACTION**



The next meeting of the Committee will take place

September 9 - 10, 2004
at
Ritz-Carlton Hotel, Half Moon Bay, CA

The Committee will discuss dates and locations for
the Spring 2005 meeting.