ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Seattle, WA
September 14-15, 2006

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 14-15, 2006
Seattle, Washington

Agenda

Introductory Items

1. Approval of minutes of Chapel Hill meeting March 9-10, 2005. (Judge Zilly)

2. Oral reports on meetings of other Rules Committees:

(A) June 2006 meeting of the Committee on Rules of Practice and Procedure. (Judge Zilly and Professor Morris). A copy of the draft minutes is attached.
(B) Report on Advisory Committee on Appellate Rules Committee. (Judge Zilly)
(C) June 2006 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Zilly)
(D) May 2006 meeting of Advisory Committee on Civil Rules. (Judge Walker)
(E) April 2006 meeting of Advisory Committee on Evidence. (Judge Klein)

Action Items

3. Report by the Subcommittee on Attorney Conduct and Health Care. (Judge Schell)

(A) Possible amendment to Rule 9011 as a result of new bankruptcy law. Memo by Professor Morris outlining various alternatives; comments letter by Senators Grassley and Sessions; letter from ABA Task Force.

(B) Judge Mannes' recommendation (06-BK-A) concerning small claims (of less than $5,000) by corporations and other entities without a lawyer. Memos by Professor Morris; Judge Mannes' e-mails of April 6, 2005, and March 16, 2006.

(C) ABA recommendation concerning CM/ECF training. Response of July 28, 2006, by the Administrative Office to the ABA letter of April 17, 2006, to circuit executives.

4. Report by the Subcommittee on Technology and Cross Border Insolvency. (Judge McFeeley and Professor Morris)

(A) Judge Bufford's proposed changes to chapter 15 rules. Memo by Professor Morris including subcommittee report and proposed changes to Rules 1010, 2002(p), and 5009 and proposed new Rules 15001, 15002, and 15003; Judge Bufford's memo and proposed rules.

(B) Oral report on EOUST request regarding "smart forms." Mr. Walton's e-mail to Judge Zilly of March 2006 concerning the mandatory use of data-enabled "smart forms." Mr. Walton's proposed draft letter to the Committee on Information Technology will be distributed separately.

5. Report of Subcommittee on Privacy, Public Access, and Appeals. (Judge Klein)

(A) Judge Adam's proposal to amend the separate document provisions of Rule 9021. Memo by Professor Morris and Item 10 from the Sarasota agenda (which also was item10a from the Santa Fe agenda).

(B) Judge Steen's opinion in In Re Mosley; and possible amendment to Rule 3019. Memo by Professor Morris; Judge Steen's opinion.

6. Report of Subcommittee on Forms. (Judge Walker) Memo by Professor Morris.

(A) Proposal to make Director's Form 240, Reaffirmation Agreement, an Official Form. Memo by Ms. Ketchum and Mr. Wannamaker

(B) Proposal to modify Form 240 (06-BK-B). Memo by Ms. Ketchum and Mr. Wannamaker; copies the current (8/1/06) version of Form 240 and the revision proposed by the Forms Subcommittee.

(C) Possible change to Official Form 10 in light of 11 U.S.C. § 1325 and case decisions. Memo to the Subcommittee by Professor Morris.

(D) Discussion of possible changes to Official Forms 19A and 19B in light of new Code section 110(b)(2). Memo by Professor Morris; copy of the revision of Form 19B proposed by the Forms Subcommittee.

7. Review of possible changes to Interim Rule 1007(c). Memo by Professor Morris to be distributed at the meeting. (Judge Klein and Professor Morris) Copies of Judge Klein's e-mail of August 8, 2006, and Judge Zilly's response of August 9, 2006.

8. Review of Time-Computation Template and possible research of Code sections and effect of revisions. (Professor Morris) Memo by Professor Morris; list of Bankruptcy Code time periods of less than eight days prepared by Professor Catherine T. Struve, Reporter for the Advisory Committee on Appellate Rules.

Discussion Items

9. Oral report concerning the restyling of the Civil Rules; impact on the bankruptcy rules. (Judge Zilly and Professor Morris).

10. Oral Report on Joint Subcommittee on Venue and Chapter 11 Matters. (John Shaffer).

11. Judge Walker's letter of May 24, 2006, regarding the review and modernization of the Bankruptcy Forms.

Information Items

12. Rules Docket.

13. Discussion on electronic transmission of agenda materials. (Judge Zilly).

14. Report on posting of "fillable PDF" forms on the U.S. Court's website. Copy of the agenda item prepared for Bankruptcy Administration Committee.

15. Mr. Wannamaker's e-mail concerning pending legislation to increase the chapter 7 filing fee and its impact on the rules and forms. (Mr. Wannamaker.) Copy of section 7 of HR 5585, Financial Netting Improvements Act of 2006.

16. Report on revision of Director's Forms 104, Adversary Proceeding Cover Sheet, and 281, Appearance of Child Support Creditor* or Representative. (Mr. Wannamaker) Copies of revised forms 104 and 281.

17. Comment by Judge Geraldine Mund on Interim Rule 1006 and bankruptcy petition preparers.

18. Comments by Commercial Law League of America on the Interim Rules (05-BR-38).

19. Letter from Clerk of Court Dana C. McWay on behalf of the Bankruptcy CM/ECF Working Group requesting a review of Rules 8006 and 8007 concerning the transmission of the record on appeal.

20. Next meeting reminder: March 29-30, 2007, at Marco Island, Florida

ADVISORY COMMITTEE ON BANKRUPTCY RULES

August 15, 2006

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Peter G. McCabe
Secretary, Committee on Rules of
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J. Michael Lamberth, Esquire

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Judge Christopher M. Klein
Judge Eugene R. Wedoff

CM/ECF Working Group
Judge Mark McFeeley

ADVISORY COMMITTEE ON BANKRUPTCY RULES

			Start Date	End Date
Thomas S. Zilly Chair	D	Washington (Western)	Member: 2000 Chair: 2004	---- 2007
G. Eric Brunstad, Jr.	ESQ	Connecticut	2005	2008
Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2006
Irene M. Keeley	D	West Virginia (Northern)	2002	2008
Christopher M. Klein	B	California (Eastern)	2000	2006
J. Christopher Kohn*	DOJ	Washington, DC	-----	Open
J. Michael Lamberth	ESQ	Georgia	2005	2008
Mark B. McFeeley	B	New Mexico	2001	2007
William H. Pauley III	D	New York (Southern)	2005	2008
Lawrence Ponoroff	ACAD	Louisiana	2004	2007
Richard A. Schell	D	Texas (Eastern)	2003	2006
K. John Shaffer	ESQ	California	2000	2006
Laura Taylor Swain	D	New York (Southern)	2002	2008
James D. Walker, Jr.	B	Georgia (Middle)	1999	2006
Eugene R. Wedoff	B	Illinois (Northern)	2004	2007
Jeffrey W. Morris Reporter	ACAD	Ohio	1998	Open

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 8-10, 2006
Chapel Hill N.C.

Draft Minutes

The following members attended the meeting:

District Judge Thomas S. Zilly, Chairman
Circuit Judge R. Guy Cole, Jr.
District Judge Irene M. Keeley
District Judge William H. Pauley III
District Judge Richard A. Schell
District Judge Laura Taylor Swain
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
K. John Shaffer, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, Reporter
Circuit Judge Edward Leavy, former chairman
District Judge Adrian G. Duplantier, former chairman
Bankruptcy Judge Paul Mannes, former chairman
Bankruptcy Judge Thomas Small, former chairman
Bankruptcy Judge Eric L. Frank, former member
Professor Alan N. Resnick, former reporter, former member
Howard L. Adelman, Esquire, former member
Circuit Judge Harris L. Hartz, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Professor Edward J. Janger, advisor to the Committee
Professor Daniel R. Coquillette, reporter to the Standing Committee
Professor Daniel J. Capra, reporter to the Advisory Committee of Evidence Rules (participated by telephone).
Peter G. McCabe, secretary of the Standing Committee
Donald F. Walton, Acting Deputy Director, Executive Office for U.S. Trustees (EOUST)
Mark A. Redmiles, National Civil Enforcement Coordinator, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey

Professor Melissa B. Jacoby, advisor to the Committee
Interim Dean Gail B. Agrawal, University of North Carolina School of Law
Patricia S. Ketchum, advisor to the Committee
John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Rules Committee Support Office, Administrative Office
James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen Scott Myers, Bankruptcy Judges Division, Administrative Office
Elizabeth Wiggins, Federal Judicial Center (FJC)
Philip S. Corwin, Butera & Andrews, Washington, D.C.
Jeffrey A. Tassey, Tassey & Associates, Washington, D.C.
Karl F. Kaufman, Sidley Austin Brown & Wood, Washington, D.C.

The following person was unable to attend the meeting:

Bankruptcy Judge Dennis Montali, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)

The following summary of matters discussed at the meeting should be read in conjunction with the 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 the members, former members, liaisons, advisers, staff, and guests to the meeting. He commended the staff of the Administrative Office on their efforts in compiling and organizing many changes to the agenda material made just days before the meeting. The Chairman specially praised the support provided by Gail Mitchell and Judith Krivit, and he commended John Rabiej, James Isida, James Wannamaker, and Scott Myers on their efforts as well.

The Chairman directed the Committee's attention to the minutes of the previous two meetings. **The Committee voted without objection to approve the minutes of the September 2005 meeting in Santa Fe. It also approved minor corrections to the minutes of the March 2005 meeting in Sarasota, Florida.**

The Chairman and Mr. McCabe briefed the Committee on the January 2006 meeting of the Standing Committee. Copies of the Standing Committee minutes were distributed to the attendees.

Judge Klein reported on the most recent meeting of the Bankruptcy Administration Committee. He said that none of the issues under consideration by the Bankruptcy Administration Committee had any bankruptcy rule implications.

Judge Klein also reported on most recent meeting of the Committee on Evidence Rules. He stated that the Evidence Rules Committee is not currently proposing any amendments to the rules.

Judge Walker reported on the most recent meeting of the Committee on Civil Rules. He discussed revisions of Civil Rules 8, 15, 26, 33 & 36, and said that the Civil Rules Committee is currently working on two broad topics: (1) setting forth a uniform computation of time under the rules; and (2) changes to rule 56 and notice pleading.

The Chairman remarked that due to late-filed comments on certain rules and forms, a number of agenda items would be discussed "out of order." He explained that the time-frame between the end of the comment period and the spring meeting this year was very short, and that there had been no published cutoff date for submitting comments to the interim rules at all. As a result, many comments were received after the agenda materials were initially compiled, and consideration of some of the new comments required changes in the organizational structure of the agenda materials. To avoid a similar problem next year, he suggested possibly moving the spring meeting from March to April.

Action Items

Rules Published in 2005 (Agenda Item 3)

In memos dated February 6, 2006, February 16, 2006, and February 22, 2006, the Reporter described the public comments and the comments of the Style Subcommittee of the Standing Committee to proposed amendments published in 2005 to Rule 1014, 3001, 3007, 4001, 6006, 7001.1 and proposed new Rules 6003, 9005.1 and 9037. The Chairman said that discussion of the proposed changes to Rule 9037 regarding privacy would be tabled until Thursday, when Professor Capra would be able to participate by telephone.

Rules 7001.1 and 9005.1. Because there were no comments to the proposed changes to Rule 7001.1 regarding the time for filing a corporate ownership statement, and proposed Rule 9005.1 regarding the applicability of FRCP 5.1 in cases under the Code, the Chairman entertained motions to approve each rule as published. **The motions to recommend final approval of Rules 7001.1 and 9005.1 as published carried without dissent.**

Rule 3001 and Form 10. The Chairman then took up the proposed changes and comments to Rule 3001 and asked to Committee to focus on the Reporter's February 22, 2006, memo (at Agenda Item 3(a)). The Chairman noted that changes to Official Form 10 would be considered in conjunction with the proposed changes to Rule 3001.

The Reporter summarized the proposed changes to Rule 3001 as: limiting the length of attachments to a proof of claim form (generally 25 pages, and 5 pages where the attachment evidences the perfection of a security interest); a requirement for excerpts and a summary to describe what would otherwise be voluminous attachments; and a change in the rule to require submission of "copies" of a writing as opposed to "original or duplicates" to evidence a claim.

The Reporter summarized the comments into three categories: (1) no change is needed; (2) the costs in preparing a summary and excerpting relevant portions of the writing would be too expensive; and (3) the five-page limit for evidence of perfection of a security interest was too short.

Some members of the Committee agreed that there may be a benefit to limiting attachments to preserve court resources, such as limited bandwidth available to upload and store voluminous attachments, but that the need to excerpt portions of the writing and to create a summary whenever the arbitrary page limit was reached would be costly to claimants. Professor Resnick and Judge Wedoff suggested withdrawing the rule because they thought it might create a trap for the unwary creditor and because they thought technology would catch up.

The Reporter noted that withdrawing all proposed amendments to Rule 3001 would leave in effect a provision in the rule that allows claimants to submit an original writing (as opposed to a copy or duplicate) as evidence a claim. He pointed out that because of electronic filing many courts have sought authorization to destroy any paper claims and attachments after they are scanned and placed on the electronic claims docket, and that claimants may not realize that their original documents may not be returned. Therefore, he suggested pulling only the proposed amendments that deal with page limits.

Mr. Waldron commented that the page limitation changes were suggested not only to preserve court resources, but because some "bulk claims filers" had complained that many courts already impose non-uniform limits on attachment length by local rule or general order. The proposed amendments to the national rule would make any limitations uniform.

The Chairman summarized the Committee's discussion as two alternative motions: to withdraw the proposed amendments to 3001 in their entirety; or withdraw only the page limit proposals. **The Committee voted without dissent to withdraw all proposed amendments to Rule 3001.**

Ms. Ketchum summarized the proposed changes to Form 10. The changes are described in detail at Agenda Items 9(b) and 9(b).

In light of the Committee's decision to withdraw the proposed amendments to Rule 3001, Ms. Ketchum indicated the changes to Form 10 dealing with page limits would be deleted. Ms. Ketchum noted, however, that the current version of Form 10 at box 7 admonishes the claimant: "DO NOT SEND ORIGINAL DOCUMENTS" as an attachment to the claim. She said that this directive may be inconsistent with current Rule 3001, which, as the Reporter pointed out, allows the claimant to attach either original *or* duplicate documents in support of the claim. Several members were in favor of some sort of warning on the claim form because it was likely that any documents submitted to the court would be destroyed after they were scanned into electronic versions. Professor Resnick suggested revisiting Rule 3001 and removing the reference to original documents in that rule. The consensus was that there was no need to revise the rule, but that the language on Form 10 should be strengthened to warn that any attachments to the proof of claim would be destroyed. A motion was made to recommend changing the admonishment to

"DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING"; to approve all stylistic changes; and to remove the proposed language regarding page limits to attachments. **The motion carried without opposition.**

Rule 1014. The Joint Subcommittee on Venue (the "Joint Subcommittee") reviewed the comments to the published amendments to Rules 1014, 3007, 4001 and 6006 and new Rule 6003. The Reporter's memo of March 1, 2006, at Agenda Item 3(a) discusses the Joint Subcommittee's recommendations. The Joint Subcommittee Noted that no comments have been received with respect to the proposed amendments to Rule 1014 and recommended that the rule be promulgated as published. **A motion to recommend final approval of the published amendments to Rule 1014 carried without opposition.**

Rule 3007. The Reporter and Mr. Shaffer reviewed the comments to proposed Rule 3007 amendments dealing with omnibus claims objections and described the recommendations made by the Joint Subcommittee concerning the comments. The Reporter's March 1, 2006, memo at Agenda Item 3(a) contains a black-line version of the changes recommended by the Joint Subcommittee.

The Joint Subcommittee rejected comments that suggested allowing the local court to "opt in" or "opt out" of the proposed amendments to Rule 3007 because it believed the rule was already limited in scope and that additional discretion would frustrate the goal of creating a uniform, national standard for omnibus claims objections. In discussing the proposed changes, a Committee member suggested changing the word "replaced" in 3007(d)(3) with "amended."

Judge Wedoff moved that the Committee recommend final approval of Rule 3007 with the changes suggested by the Joint Subcommittee and with the substitution of "amended" for "replaced" in 3007(d)(3). **The motion carried without opposition.**

Rule 4001. The Reporter's March 1, 2006, memo at Agenda Item 3(a) discusses the Joint Subcommittee's review and recommendations with respect to the Rule 4001 comments, and contains a black-line version of the rule illustrating many of the proposed changes.

As published, the changes to Rule 4001 required that motions under subsections (b), (c), and (d) contain an introductory summary no longer than three pages. A comment by the National Bankruptcy Conference (NBC) suggested that the three-page cut-off was too limiting, and that instead the rule should simply require "a brief introductory statement." The Joint Subcommittee rejected this change as too open-ended, but, as an alternative, suggested changing the proposed page limit for the introductory statement from three to five pages.

The Joint Subcommittee supported suggestions that the introductory statement be contain cross-references to the material provisions in the motions or proposed orders, and that motions for authority to obtain credit under subsection (c) should explain the extent to which any interim relief might impact the estate if the court later refuses to grant final relief as requested.

The NBC and Judge Marvin Isgur recommended that service under the proposed changes to 4001(b), (c) and (d) be expanded to include service on all persons who have requested service of all pleadings. The Joint Subcommittee rejected this suggestion because it would create an inconsistency with the service requirements under subsection (a) of the rule, and because including a like change in subsection (a) would require republication and would delay adoption of the existing recommended changes.

The Joint Subcommittee considered the NBC's objection to an explicit reference to Rule 9024 in the proposed changes to 4001. In light of the NBC's comments, the Joint Subcommittee recommended removing the reference to Rule 9024, but suggested language to make clear that the court may grant "appropriate relief if it determines that the introductory statement in the motion did not adequately disclose a material element of the agreement or proposed order."

After an initial discussion, **the Committee voted to recommend the following changes to the proposed amendments to Rule 4001:**

- **the page limit for the introductory statements contemplated in subsections (b), (c) and (d) was changed from three to five pages;**
- **the phrasing regarding introductory statements was changed from "shall include an introductory statement ..." to "shall consist of, or if ... more than five pages .. begin with, a concise statement ..."** (to address Judge Isgur's concern that if the entire motion was five pages or less, that a separate introduction need not be set out).

The Committee agreed with the Joint Subcommittee's reasoning and **voted not to recommend that service in subsections (b), (c), and (d) be expanded to include parties requesting service.**

The changes to the rule as published included a new subsection (c)(1)(B) that contains a list of certain significant provisions, which, if present in the motion, must be listed in the introductory statement to draw attention to their existence. The new subsection also required the movant to "explain why" any of the provisions on the (c)(1)(B) list, if present in the proposed credit agreement or order, were necessary. The NBC recommended that the "explain why" language be removed. The Joint Subcommittee agreed with NBC's recommendation. Although there was divergence of opinion as to whether an "explain why" provision would elicit useful information, **the Committee voted to omit such a requirement in the rule.**

The NBC also recommended that the list of significant provisions to be disclosed in the introductory statement of a motion to obtain credit be expanded to require disclosure of any provisions: setting deadlines to file a plan or disclosure agreement; to obtain disclosure statement approval; or for the entry of a confirmation order. The Joint Subcommittee supported the NBC's recommendation. **The Committee agreed and voted to recommend augmenting the list at subdivision (c)(1)(B) to require disclosure in the introductory statement of "the establishment of deadlines for filing a plan of reorganization, for approval of a disclosure statement, for a hearing on confirmation, or for entry of a confirmation order."**

There were diverging opinions about the proposed new Rule 4001(c)(1)(C). As published, subsection (c)(1)(C) made explicit reference to the applicability of Rule 9024 if a court determines later in the case that an introductory statement did not adequately disclose material elements of the credit agreement. The NBC commented that a specific reference to Rule 9024 in Rule 4001 could be construed to mean that applicability of Rule 9024 was somehow different in other rules. The Joint Subcommittee suggested replacing the Rule 9024 reference with: "the court may grant appropriate relief if it determines that [the summary] did not adequately disclose a material element of the [credit agreement]." Some Committee members said that even the Joint Subcommittee's proposal inappropriately created an inference that the court's ability to revisit an order or action was different in Rule 4001 than in other rules. **Upon motion, the Committee voted to recommend deleting subdivision (c)(1)(C) from the proposed amendments to the Rule 4001.**

The Committee voted to recommend final approval of the proposed changes to Rule 4001 (as amended at the meeting) without dissent. The Reporter distributed a copy of the rule with revisions to the Committee on Friday.

Rule 6003 ("First Day Orders"): The Joint Subcommittee reviewed the comments to Rule 6003 and agreed with suggestions that motions to reject unexpired leases should not be limited during the first 20 days of a bankruptcy case. The Joint Subcommittee Noted that the standard to allow rejection of a lease was easily met, and almost all such motions are allowed. Accordingly, prohibiting the debtor from rejecting leases during the first 20 days of the case created the possibility of unnecessary rental obligations without any corresponding benefits. **The Committee agreed with the Joint Subcommittee and voted to recommend final approval of the proposed changes to Rule 6003 as published after deleting references to the rejection of executory contracts or unexpired leases.**

Rule 6006 (Omnibus Motions to Assume, Assign or Reject Executory Contracts and Leases): The published amendment to Rule 6006 added a new subsection setting procedures for and limiting the use of omnibus motions to assume, reject or assign multiple executory contracts or unexpired leases in certain circumstances. The Joint Subcommittee recommended a change in the published language to include motions "to assume, but not assign to more than one assignee unexpired leases of real property." **The Committee voted to recommend final approval of the proposed amendments to Rule 6006 as published, with the changes suggested by the Joint Subcommittee.**

Standing Committee Style Subcommittee Recommendations regarding the Published Rules (Rules 3001, 3007, 4001, 6003, 6006): The Style Subcommittee of the Standing Committee suggested a number of changes to the published rules as set out at Agenda Item 3(b). The Reporter reviewed the suggested changes and made recommendations in his memo, also set out at Agenda Item 3(a). **The Committee voted to recommend approval of all style changes supported in the Reporter's memo.**

Rule 9037: The Reporter and Professor Capra (who participated by telephone), discussed the comments on Rule 9037 (the bankruptcy rule version of the E-Government Rule) and recommended changes. The basis for discussion was The Reporter's March 6, 2006, memo

distributed at the committee meeting, which contained a copy of the rule with suggested amendments. The primary changes in March 6 version of the rule as compared to the rule as published were:

- Published subdivision (d)(1) became (a)(2)
- Published subdivisions (c) and (d) were combined into a new (c)(1) and (c)(2)
- An exemption from the redaction requirement was added for financial account numbers in forfeiture actions
- A new subdivision was proposed at the end of the rule (subdivision (g)), to state explicitly that parties and their counsel have the duty to redact documents, not the clerk or court reporters
- Stylistic changes offered by the Style Subcommittee of the Standing Committee

The Reporter reviewed the newly proposed subdivision (g), (Duty to Redact) at lines 61-69, which had been proposed by the Court Reporters Association. The first sentence in subdivision (g), which affirmatively puts the responsibility for redaction on the parties and their counsel, was supported by the Federal Magistrate Judges Association. The Reporter recommended deleting all of subdivision (g) because it was not the sort of position normally taken in the Rules. The Committee reviewed the changes set out in the March 6 memo. After discussion, **the Committee approved the changes in Rule 9037(a)(1) and additionally changed lines 8-9 to read "and an individual's tax identification number." It approved the new subdivision (a)(2) and corresponding deletion of former subdivision (d)(1). It approved the insertion of "whose decision becomes part of the record" in subdivision (b)(2) and it approved the insertion of subdivision (b)(5) (redaction requirement in forfeiture proceedings) at lines 28-29. Finally, it voted to delete proposed subdivision (g) and voted to recommend final approval of the rule with the changes discussed above.**

Interim Rules (Agenda Item 4)

The Chairman told the Committee that there has been almost uniform adoption of the Interim Rules, as shown by Agenda Item 4(b), a chart summarizing adoption sorted by court. The Chairman said that since adoption, comments had been received only on Rules 1007, 1015, 2002, 2015, 2015.3, 3016, and 8001. The Reporter prepared a summary of the comments at Agenda Item 4(c).

The Chairman moved that the Committee recommend publishing as proposed national rules those Interim Rules that received no comments. **The Committee voted without dissent to recommend publishing for public comment as proposed new national rules all Interim Rules that received no comments, namely: the proposed amendments to Rules 1006, 1010, 1011, 1017, 1019, 1020, 2003, 2007.1, 3002, 3003, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 6004, 8003, 9006, 9009 and proposed new Rules 1021, 2007.2, 2015.1, 2015.2, 5008, 5012 and 6001.**

Rules 1010, 1011, *Agenda Item 6(b)*: Although not part of the interim rule changes, the Reporter recommended amending Rules 1010 and 1011 to make Rule 7007.1 (requirement to file ownership statement) applicable in involuntary petitions. He argued that the process of filing an

adversary proceeding is akin to filing a complaint and that Rule 1010 already requires the petitioning creditors to serve the summons and a copy of the involuntary petition in the manner of service of a summons and complaint. The Reporter's suggested revisions to Rules 1010 and 1011 are set out at Agenda Item 6(b). **The Committee approved the Reporter's suggested changes to Rules 1010 and 1011 with minor stylistic changes to Rule 1010, and deletion of the last sentence in the Committee Note for Rule 1011 and voted to recommend the rules be published for public comment 2006.**

Rule 1007: The Reporter reported a number of problems related to the new requirement for individual debtors to complete credit counseling prepetiton and file the appropriate certificate. In his February 24, 2006, memo at Agenda Item 4(c), the Reporter recommended: changing subdivision (b)(3) of the rule to permit the debtor to file a statement that he or she had completed credit counseling but had not received the certificate yet; and adding a new provision to subdivision (c) allowing the debtor to file the certificate within 15 days after commencement of the case if the new provision in subdivision (b)(3) was applicable. The Reporter also proposed a new Director's Form that clerks could use to apprise debtors that filing a case without first completing the credit counseling requirement could result in case dismissal, the payment of a new filing fee for a subsequent case, and a limit of the automatic stay in the subsequent case.

The Committee supported the proposed amendments to the rule with suggested changes to the proposed language at new subdivision (b)(3)(B). Judge Wedoff advocated language changes to the Reporter's suggested form, as well as making the form an Official Form that the debtor would be required to complete and file with the petition. **After discussion, the Committee voted to recommend reformatting subdivision (b)(3) into (b)(3)(A) – (D) and adding new language at subdivision (b)(3)(B).**

At the Chairman's suggestion, Judge Wedoff agreed to draft a proposed official form for the Committee's consideration, and agreed to make changes to subdivision (b)(3) that would require use of the new form. Judge Wedoff's revisions were distributed the following day and **the Committee voted 12-1 to recommend subdivision (b)(3) and proposed new Official Form 23A, as revised by Judge Wedoff. The Committee also recommended redesignating Official Form 23 (a "Statement of Completion" signed by the debtor) as Form 23B.** After the meeting was completed, some members suggested additional stylistic changes to newly designated Form 23A, and suggested redesignating it as Exhibit D to the petition, to help ensure that debtors would not confuse it with the Statement of Completion form. **The Committee voted by e-mail to approve the stylistic changes to the new form, and changed its designation to Exhibit D of the petition. The Committee also amended its prior vote and voted to leave the designation for Form 23 unchanged.**

The Reporter discussed a problem raised by Judge Karen Overstreet regarding completion of the approved financial management course by individual debtors in chapter 7 and 13. Some debtors, rather than filing the Official Form 23 as required by Interim Rule 1007(b)(7), file instead a certificate created by the agency performing the personal financial management course. Judge Oversteet suggested amending subdivision (b)(7) to allow alternative filings, either Official Form 23, or a "certificate of completion" generated by the provider.

The Reporter recommended that no change be made to the subdivision (b)(7) because the problem will likely resolve itself as practitioners and debtor education providers become more familiar with distinctions under the Code between prepetition credit counseling and postpetition debtor education. **The Committee agreed with the Reporter's recommendation.**

The Committee voted to recommend that the new Exhibit D and all recommended changes to Rule 1007 discussed above be published for public comment, and additionally that the new Exhibit D go into effect October 1, 2006. The Committee also recommended that the proposed Rule 1007 changes be incorporated into Interim Rule 1007 to be recommended to the courts for adoption as a local rule effective October 1, 2006.

Rule 2002: The Reporter discussed a request made by the NBC that a mechanism be created in the Rules to implement new creditor noticing requirements under § 342(f) and (g) of the Code, added by BAPCPA. The new Code provisions allow a creditor to treat a notice as potentially ineffective until it is received by a person or subdivision that the creditor has designated to receive notices under the Bankruptcy Code so long as the creditor has established "reasonable procedures" to ensure that notice is sent to the correct person and organizational subdivision. But the additions to § 342 do not describe how a creditor establishes it has "reasonable procedures" in place if it wishes to assert that a particular notice was not effective under § 342(g).

In his February 24, 2006, memo at Agenda Item 4(c), The Reporter proposed language to be included in a new Rule 2002(g)(5) that would provide creditors with procedures to comply with § 342(f) and (g). After discussion, Judge Wedoff volunteered to rewrite the proposed language to reflect comments from the Committee. A revised version of Rule 2002(g)(5) with a proposed Committee Note was distributed to the Committee on Thursday. **The Committee voted to recommend the proposed Rule 2002(g)(5) and the proposed Committee Note as revised by Judge Wedoff with minor stylistic changes.** The stylistic changes were incorporated into a final draft of the rule distributed at the meeting.

Referencing Agenda Item 4(h), the Chairman and the Reporter outlined draft chapter 15 rules proposed by Judge Samuel Bufford. The proposed chapter 15 rules were comprehensive and would be relevant to many of the changes addressed in Interim Rules 2002(p) and (q), 3002(c)(6), and 5012.

Because of time constraints, and because there are relatively few chapter 15 cases, most of which are administered by sophisticated counsel, the Chairman recommended that Judge Bufford's proposed rules first be considered by a subcommittee before review by the full Committee. The Reporter agreed with this approach, but believed that some of Judge Bufford's suggestions could be addressed by changes to existing rules.

In his February 8, 2006, memo at Agenda Item 4(h), the Reporter suggested changes to Rule 2002 that would address some of the concerns raised by Judge Bufford. At page 9 of his memo, the Reporter added new paragraphs 3 and 4 to Rule 2002(p) which, if adopted, would require that notice to a foreign creditor be given in the official language of the country to which the notice is sent, and that notice of a creditor with a foreign address be delivered in the same

manner that notices in legal proceedings are delivered in the foreign country. However, the Reporter did not recommend the changes because he believed the requirements could be unnecessarily expensive for the debtor.

A number of Committee members said that the proposed notice might not even be effective. For example, if all the transactions between the debtor and the foreign creditor were conducted in English, or some other language that was not the "official language" of the creditor's country, requiring notice in the "official language" of the creditor could be less effective than if the notice was provided in English. A member suggested that there could also be problems if the creditor was from a country with more than one "official language." **The Committee voted not to amend Rule 2002(p) with the proposed new paragraphs 3 and 4.**

The Reporter did recommend amending Rule 2002(q)(1) and (2) to include the United States trustee in the list of entities who must receive notice of a petition for recognition, or of a court's intention to communicate with foreign courts or foreign representatives. The Committee agreed that the United States trustee should receive notice of these events, but some members thought it would be more appropriate to amend 2002(k), which already contained a list of events that required notice to the United States trustee. **On motion, the Committee rejected the Reporter's proposed amendment to Rule 2002(q) and instead recommended adding Rule 2002(q)(1) and (2) to the list in Rule 2002(k). The Chairman referred Judge Bufford's proposed chapter 15 rules to the Subcommittee on Technology and Cross Border Insolvency.**

The Committee voted to recommend that the proposed changes to Rule 2002 as discussed above be published for public comment.

Rules 4008; 4004(c)(1); 9006(b)(3) and (c)(2): Judge Wedoff discussed a need to amend Rule 4008 to improve clarity, and to ensure that a discharge was not entered before the court reviewed, and, if necessary, held a hearing, with respect to any reaffirmation agreements. **The Committee approved the proposed amendments to Rule 4008 as set out at Agenda Item 7(b), with minor stylistic changes, and recommended publishing the rule for public comment.** A version with stylistic changes was distributed to the Committee the next day. **The Committee also voted to amend Rule 9006(b)(3) and (c)(2) by adding Rule 4008 to the respective lists in those rule subdivisions, and to recommend publishing the changes for public comment.**

Judge Wedoff also recommended at Agenda Item 7(b) that Rule 4004(c)(1) be amended by adding a new subdivision (K) that would provide for entry of the discharge unless a motion to extend the time to file a reaffirmation agreement under 4008(a) was pending. However, the Committee failed to consider the proposed change to Rule 4004(c)(1) during the meeting. **After the meeting, the Committee approved the proposed addition of subdivision (K) by e-mail and recommended publishing Rule 4004(c)(1) as amended.**

Rule 8001, *Agenda Item 4(g)*: Judge Klein referred the Committee to the Reporter's February 3, 2006, memo at Agenda Item 4(g) discussing three proposed changes to Rule 8001.

Judge Klein first discussed a technical revision at subdivision f(1) (lines 23-25 of the rule as set forth in The Reporter's memo), that deleted the reference to the temporary procedural requirements set out in the uncodified provision of BAPCPA. Judge Hartz discussed some problems with use of the word "effective" in the change. **After discussion, the Committee voted to recommend the change to subdivision (f)(1) as set out in the Reporter's memo to be published for public comment.**

Judge Klein next discussed a new subdivision (f)(5) proposed to reinforce the idea that certification by the lower court does not mean the court of appeals will exercise its discretion and accept the case. In effect, the new (f)(5) requires the proponent of the direct appeal to seek permission from the court of appeals in accordance with F.R. App. P. 5. There was considerable discussion regarding the proposed language for (f)(5) and some members thought that the new provision was unnecessary. No member moved to withdraw the proposed amendment in its entirety, however, and the Reporter incorporated the suggested changes into a rewrite that was distributed to the Committee the next day. The primary change to the proposed language was to require the party desiring to pursue the direct appeal to seek permission from the appellate court no later than 30 days after certification by the lower court. **The Committee voted to recommend for publication for public comment, the proposed subdivision (f)(5) as revised.**

The last item Judge Klein discussed was a change to subdivision (e) of the rule which redesignated (e) as (e)(1) and created a new (e)(2). The new (e)(2) provides a procedure for transferring an appeal to the bankruptcy appellate panel after an election to have the appeal heard by the district court had been made. It explicitly recognizes the district court's authority to transfer an appeal to a bankruptcy appellate if all the parties seek the transfer, but also recognized the district court's authority to retain jurisdiction despite a transfer request. Judge Klein explained that the proposed addition was designed to prevent strategic behavior by the parties and to prevent the waste of judicial resources. **The Committee voted to recommend for publication for public comment, the redesignation of subdivision (e) as (e)(1) and the addition of subdivision (e)(2).**

Agenda Item 5, Report by the Attorney Conduct and Health Care Subcommittee

Judge Schell reported on two items referred to the Attorney Conduct and Health Care Subcommittee at the Santa Fe Committee meeting. The first issue concerned June 21, 2005 letter from the ABA Task Force on Attorney Discipline, and the second issue concerned a proposal by Judge Paul Mannes to allow corporate creditors to be represented by non-attorneys where the claim amount is small.

In its letter, the ABA Task Force noted that BAPCPA imposes new duties on individual debtor attorneys in chapter 7 of "reasonable investigation," and "inquiry." The ABA Task Force is concerned about how these new duties might impact issues of attorney discipline, suspension, and disbarment. It suggests that the Committee include in the Federal Rules of Bankruptcy Procedure a recommendation that each bankruptcy court consider implementing an appropriate review and discipline process (or review such processes already in place) with the new attorney

duties in mind and with an aim to protect the rights of both the attorneys and debtors likely to be impacted by the statutory requirements.

The subcommittee recommended no action on the Task Force's proposal for several reasons: (1) the proposal is beyond the scope of the Committee, which is to recommend rules of bankruptcy procedure; (2) Rule 9011 already provides a procedure to discipline attorneys in cases; and (3) procedures for disciplining attorneys are generally promulgated by the district court, not the bankruptcy court.

The subcommittee also recommended no action on Judge Mannes's proposal because there is a significant body of case law prohibiting corporate entities from appearing in federal court without counsel. The subcommittee also believed that Congress may have implicitly addressed the matter when it amended § 341(c) with BAPCPA to allow some unrepresented creditors to appear and be heard at the meeting of creditors. The subcommittee concluded that Congress' express approval of unrepresented creditors at a § 341 arguably implies it decided not to allow creditors to appear in other aspects of the case without an attorney. **The Committee agreed with the subcommittee and rejected: (1) the proposal of the ABA Task Force on Attorney Discipline to make suggestions to bankruptcy courts regarding attorney discipline; and (2) Judge Mannes's proposal to allow the participation of corporate creditors without attorneys in cases where the claim amount is small.**

Report of the Business Subcommittee; Small Business Forms

The Reporter's February 4, 2006, memo, at Agenda Item 6(c), provides an overview of the Business Subcommittee's work. As described in the memo, the subcommittee proposed three new official forms: Form 25B, Small Business Disclosure Statement; Form 25C, Periodic Financial Reporting Form for Small Business Debtors; and Form 26, Reporting Form for Related Entities in which the Debtor Holds a Substantial or Controlling Interest. In addition, the subcommittee proposed minor changes to Form 25A, Small Business Plan (previously recommended for publication at the Committee's Santa Fe meeting). The subcommittee also proposed amendments to Bankruptcy Rules 2015, 2015.2, 3016, 9009 and a new Rule 2015.3. Judge Swain and Professor Janger reviewed the Business Subcommittee's proposals.

Rule 2015(a)(6), *Agenda Item 4(e)*: Professor Janger said that the proposed addition of subdivision (a)(6) to Rule 2015 was necessary to implement new requirements set forth in BAPCPA that a small business debtor submit certain periodic reports to the trustee. In its review of the rule, the Committee changed "15 days" at line 14 to "20 days" and added the following sentence to the end of 2015(a)(6): "The obligation to file reports under this subdivision terminates on the effective date of the Plan, dismissal, or conversion of the case." The Committee added the following to the end of the Committee Note: "Reporting under this rule does not relieve the debtor or the trustee of any other obligations to provide information or documents to the United States trustee." **The Committee without objection voted to recommend the proposed amendment and Committee Note for publication for public comment.**

Form 25C, *Agenda Item 6(c)(4)*: Professor Janger explained that the subcommittee designed new Official Form 25C "Small Business Operating Report," to collect the information required by proposed Rule 2015(a)(6). Professor Resnick suggested several stylistic changes, including globally changing "you" to "the debtor" and "did you" to "have you." A number of members thought that the "Projections" table on page four should be redesigned to report whether actual financial numbers were higher or lower than projected numbers. And Judge Wedoff suggested regrouping certain questions so that negative information was easier to identify. **Upon motion, the Committee voted to recommend Official Form 25C for publication for public comment, after review by the Style Subcommittee.**

Rules 3016(d) and 9009 *Agenda Items 4(e) and 6(c)(6)*: Professor Janger explained that although the small business plan and disclosure statement forms developed by the Business Subcommittee were proposed as official forms, such forms are not statutorily required. Accordingly, the subcommittee recommended adding a subdivision (d) to Rule 3016 that allows the court to approve plans and disclosure statements that conform to the official forms or to approve forms used by local rule. It also recommended amending Rule 9009 to start with the phrase, "Except as provided in Rule 3016(d) ...," to allow for permissive use of the new forms. Mr. Walton and Judge Wedoff argued that § 1125(f)(2) of the Code and § 433 of BAPCPA require use of the new official forms. **After further discussion, the Committee voted to recommend the addition of Rule 3016(d), and the changes to Rule 9009 for publication for public comment.**

Rule 3016(b) *Agenda Item (4)(f)*: The Reporter suggested a new change to Rule 3016(b). As amended by the Interim Rules, Rule 3016(b) addresses a change in the Code that allows the plan document to also serve as the disclosure statement in a small business case. To comply with the rule, the plan proponent must specially designate the document so that parties will know that a separate disclosure statement will not be filed. The Reporter suggested changing the new language in 3016(b) to make clear that the *court* must determine that the document filed can serve both as a plan and disclosure statement, and that the proponent's mere designation of the document as a plan and disclosure statement does not end the matter. **The Committee voted to recommend Rule 3016(b) for publication for public comment *without* the Reporter's suggested change.**

Form Small Business Plan, *Agenda Item 6(c)(1)*: Professor Janger described minor changes to the small business plan previously approved by the Committee last fall, including a change in the caption, and the addition of section 3.03 to the plan (regarding priority tax claims). Additionally, the Business Subcommittee drafted and recommended a Committee Note for the form plan. The Committee suggested changing the caption so that it included the name of the proponent and the date of the submission (i.e., "*Debtor's* Plan of Reorganization dated _____"). Mr. Walton suggested that the plan should be mandatory, but the Chairman rejected the motion as having been previously considered and voted on. **The Committee approved the plan and official comments with changes, and voted without opposition to publish the form plan for public comment.**

Small Business Disclosure Statement (Form 25B), *Agenda Item 6(c)(2)*: Judge Swain and Professor Janger provided an overview of the process the Business Subcommittee took in

developing its recommendation for a form disclosure statement. The new Form 25B was developed over the course of many subcommittee conference calls and represented the input of all the subcommittee members including considerable input from John Byrnes of the EOUST.

Professor Janger described the subcommittee's belief that there were three basic objectives of the new forms: (1) to provide adequate information to creditors, both sophisticated and unsophisticated; (2) to provide information to help the judge to evaluate the plan's compliance with § 1129 of the Code; and (3) to aid help an unsophisticated debtor's counsel comply with the statutory confirmation requirements. Professor Janger said that the new form was a product of compromise and that the majority of the subcommittee believed it met the objectives set by Congress to create a form to balance: (1) the reasonable needs of the courts, the United States trustee, creditors, and other parties in interest for reasonably complete information; and (2) economy and simplicity for debtors.

Mr. Walton spoke on behalf of the EOUST. He said that the EOUST was appreciative of the subcommittee's efforts. But he thought the subcommittee's form was still too complex and full of legalize for the typical unsecured creditor. In particular, the EOUST is sensitive to creditor complaints that participation in chapter 11 cases is prohibitively expensive, especially in small cases, because hiring counsel to interpret the documents filed in the case usually costs more than any potential recovery. Accordingly, Mr. Walton advocated a simpler form as being much more likely to encourage creditor involvement in small cases.

Mr. Walton also took issue with one of the Business Subcommittee's suggested purposes of the form disclosure statement. He believed it was unlikely that a court would rely on a disclosure statement to determine whether a plan was confirmable or not. In closing, Mr. Walton recommended that the subcommittee's proposed disclosure statement be rejected, and that instead the subcommittee be reconvened to consider a simpler "Plain English" form disclosure statement based on the draft submitted by the EOUST at Agenda Item 6(c)(2).

Judge Swain responded that although the Business Subcommittee only recently received the EOUST's draft disclosure statement, it *had* considered the document. Moreover, she noted, early in the process the subcommittee considered and rejected a similar document advocated by the EOUST as misleading or simply inaccurate.

Mr. Brunstad said that he preferred the form disclosure statement prepared by the Business Subcommittee because it provided more information. And Judge Walker said he thought the subcommittee's effort was probably the "lowest level" version of a disclosure statement likely to be useful, even if it wasn't drafted in terms preferable to some creditors. Judge Klein supported use of the subcommittee's form because it tells the creditor up front how much and when it is likely to receive a distribution, and because the form would also be useful in guiding unsophisticated debtor's lawyers through a chapter 11 confirmation.

The Chairman suggested the Committee go through the subcommittee's proposed disclosure statement and then vote on whether or not to recommend it. Mr. Janger told the Committee that if the form were adopted that he would amend it to include a table of contents, and to conform the caption to the changes that the Committee already approved for the form

plan. Members of the Committee suggested some stylistic changes and the following additional changes:

- A new subsection II-G entitled "Claims Objections" stating that "Except to the extent that a claim is already allowed pursuant to a final non-appealable order, the Debtor reserves the right to object to claims. Therefore, even if your claim is allowed for voting purposes, you may not be entitled to a distribution if an objection to your claim is later upheld. The procedures for resolving disputed claims are set forth in Article __ of the Plan."
- Mr. Shaffer suggested changing existing exhibit D to require the most recently filed operating report (instead of all operating reports) and suggested deleting existing exhibit C, (tax returns).

The Committee voted without dissent to approve the changes noted above and to recommend the Business Subcommittee's form disclosure statement for publication for public comment.

Possible Combined Form Plan and Disclosure Statement, *Agenda Item 6(c)(3)*: The Business Subcommittee reported that it has not attempted to draft a proposed combined plan and disclosure statement for use in small business cases. The Chairman moved to table the project for a year so that the subcommittee would have the benefit of comments on the form plan and form disclosure statement that the Committee just recommended for publication. Judge Swain seconded the motion. **The Committee voted without dissent to defer the decision of whether the Business Subcommittee should draft and propose a combined form plan and disclosure statement.**

Rule 2015.3, Form 26, *Agenda Item 6(c)(5)*: Professor Janger explained that the Business Subcommittee proposed a new Rule 2015.3 and a new Official Form 26 to address a new requirement imposed by § 419 of BAPCPA that the debtor make periodic reports of valuation, profitability and operations concerning entities in which it has a substantial or controlling interest. An initial problem faced by the subcommittee was that the term "substantial or controlling interest" is not defined in the Code, but rather is a factual determination that the court ultimately must decide. However, the subcommittee believed that some guidance was needed so that parties would know when to fill out the form. The subcommittee elected to set a presumption that 20% control or ownership is a substantial or controlling interest.

Another issue, explained Professor Janger, is that the statutory reporting requirement appears to address only debtors, not the estate, debtors in possession, or trustees. The subcommittee elected to require reporting from the debtor in possession and any trustee because it thought such entities would more likely be able to fulfill the reporting requirements. **After making a number of stylistic changes, the Committee voted to recommend Form 26, Rule 2015.3, and the accompanying Committee Note be published for public comment.**

Means-Test Forms

Agenda Item 7(a) (Means-Test Form Review): Judge Wedoff reported on the recommendations of the Means-Test Working Group with respect to changes in two of the

means-test forms (Forms 22A and 22C). The working group, consisting of Judge Wedoff, Judge Frank, and Mr. Redmiles, discussed in detail the suggestions and comments received from the NBC, the Financial Services Roundtable (FSR), and others, as well as suggestions developed internally. Many of the suggestions had already been considered and rejected by the Committee when it recommended the means-test forms in the summer of 2005. The changes recommended by working group and the NBC's February 17, 2006, comments were included at Agenda Item 7(a). The FSR comments were distributed at the meeting.

The working group suggested a number of stylistic changes in the means-test forms to improve clarity. And it recommended other changes (in the "Other Necessary Expenses" categories for child care and telecommunications, and the "Other payments on secured claims" category, for example) to more closely track the statutory language and IRS definitions. The working group also reworded the instructions at line 17 of Form 22C (Chapter 13) so that the debtor would always be directed to complete part III of the form, regardless of whether the debtor was above or below the state median. The changes recommended by the working group were incorporated into the forms included as Agenda Item 7(a). In reviewing the changes, the Committee removed the words "in Default" in the middle column of table in the "Other secured claims" box (line 43 on Form 22A, and line 48 on Form 22C). **The Committee voted to recommend adopting all the changes proposed by the working group as set out in Forms 22A and 22C at Agenda Item 7(a) (as amended) and also recommended that the changes become effective October 1, 2006.**

The working group considered but rejected the following suggestions:

(1) A suggestion by the NBC that the chapter 13 form be revised to allow a deduction of income used to pay the debtor's household expenses but not actually received by the debtor (such has payment by a grandparent of a child's school tuition) from the calculation of disposable income. *The working group recommended no change.*

(2) A suggestion by the NBC to allow inclusion of expenses in an "Other Necessary Expenses" box even if such expenses do not fit into the IRS Other Necessary Expense categories listed on the form. *The working group recommended no change, as provisions for listing "Additional Expense Claims" already exist at the end of the means-test forms.*

(3) A suggestion by the NBC that non-filing spousal income not be counted in the calculation of the § 707(b)(7) safe harbor, if it can be shown that the non-filing spouse's income is not being contributed to the debtor's household income. *The working group noted that this suggestion was considered and rejected by the Committee at its last meeting.*

(4) The FSR suggested that the projected chapter 13 expenses multiplier in the chapter 7 and 13 forms indicate a cap of 10%. *The working group recommended no changes because the form currently directs the debtor to use the actual multiplier as reported by the United States trustee, and no multiplier is greater than 10%.*

(5) The FSR suggested removing language in the forms that allows the debtor to argue unemployment income is "a benefit received under the Social Security Act"

and that it should therefore be excluded from the CMI calculation. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(6) The FSR suggested that the chapter 7 form be changed to require that below-median-income filers complete the expense portion of the form even though such filers are not subject to a presumption of abuse. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(7) The FSR suggested changing the forms to allow an automobile ownership deduction only if the debtor is actually making lease or note payments on an owned vehicle. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(8) The FSR suggested deleting line 13 from the chapter 13 form (which allows the debtor to contend that a non-filing spouse's income was not contributed to household expenses). *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

(9) The FSR suggested deleting the "Additional Expense Claims" categories at the end of the chapter 7 and 13 forms. *The working group recommended no changes because this issue was considered and rejected by the Committee at its last meeting.*

Forms (Other than Means-Test Forms and Small Business Forms)

The Chairman advised the Committee that the EOUST has strongly requested that the rules require the use of data-enabled forms and that the Administrative Office produce data-enabled forms. The Chairman referred the matter to the Subcommittee on Technology and Cross Border Insolvency for consideration.

Mr. Ketchum reported to the Committee on the work of the Forms Subcommittee.

Agenda Item 9(b), Form 10: Ms. Ketchum reminded the Committee that it already approved the changes proposed for Form 10 when it discussed proposed amendments to Rule 3001 earlier in the meeting. She noted, however, that there had been some discussion about whether to replace the word "copies" in box 7 with the word "duplicates." **The Committee voted without dissent to approve use of the word "copies."**

Agenda Item 9(c)(1): Ms. Ketchum described the need to conform the forms to incorporate the requirement that if a "minor child" is listed, that the name, address, and legal relationship of any person described in Rule 1007(m) also be included. Ms. Ketchum explained that the conforming language was needed in Forms 4, 6B, 6G, 6H and 7. **The Committee approved all of the "minor child" conforming language changes made to Forms 4, 6B, 6G, and 6H, and recommended the changes be published for public comment.**

Ms. Ketchum said there had been a minor change to the declaration page for Form 6 to indicate that an additional page was being filed. She proposed changing the direction to report

the total number of pages listed on the summary of schedules page from "plus 1" to "plus 2." Judge Frank asked whether it was possible to remove the "plus" language altogether. **After a discussion, the Committee approved the "plus 2 change" and recommended that the change become effective on October 1, 2006.**

Ms. Ketchum described an additional change to Form 7 at question 3. The new language directs the debtor not to list creditor payments that aggregate less than $600. **The Committee approved the change, and voted to recommend the change be published for public comment.**

Ms. Ketchum described suggested changes to Form 6B (questions 13, 14 and 21) which referenced new Rule 2015.3. The Committee alternatively discussed changing or deleting the proposed language. **After discussion, the Committee voted to delete the suggested changes to questions 13, 14 and 21 of Form 6B.**

Ms. Ketchum described changes to Forms 9G, 9H, and 9I. Forms 9G and 9H had been changed to include "Family Fisherman" and 9I was amended to include a reference to Rule 3002(c)(1) at the deadline for a governmental unit to file a proof of claim. **The Committee approved the changes to 9G, 9H and 9I and voted to recommend they go into effect October 1, 2006.**

Agenda Item 9(c)(2): Ms. Ketchum reviewed several changes to the forms that were needed to capture statistical information required by BAPCPA and noted that if approved, such changes should go into effect October 1, 2006.

Form 1. A number of changes were made. Ms. Ketchum noted new language requiring debtors to identify themselves as "tax exempt" rather than "nonprofit" in the middle box, and new language added to the "Chapter 11 Debtors" box. A Committee member suggested the introductory language in the middle box to "Check one box," and members discussed changing the choice between "Consumer/Non-Business" and "Business" to "Debts are primarily consumer debts (personal family household debt)" and "Debts are primarily business debts" so that the distinction more closely follows language used in the Code.

Ms. Ketchum noted that there was newly proposed language on the third page of Form 1 whereby individual debtors certified they had completed the credit counseling requirement. But the Committee decided the new language was not necessary in light of the prior decision to create a new Official Form 23A which would require a similar certification and would warn the debtor that the failure to complete credit counseling prepetition would result in dismissal of the case unless an exception applied.

Form 5. Ms. Ketchum reviewed suggested changes made to conform Form 5 to Form 1. Committee members suggested additional conforming changes.

Form 6. Ms. Ketchum described the addition of boxes needed to collect statistical information at Form 6-Summary, 6D, 6E, 6F, 6I, and 6J. And she noted that Form 6-Summary

was redesigned to collect additional statistical information. The Committee suggested a number of stylistic changes.

The Committee approved the suggested changes to Forms 1, 5, 6-Summary, 6D, 6E, 6F, 6I and 6J, and asked Ms. Ketchum to incorporate the changes into final versions for review by the Forms Subcommittee. The Committee voted to recommend that the changes go into effect October 1, 2006.

The Chairman recapped the recommended changes to the forms. **To be published for public comment: Forms 3A, 3B, 4, 6B, 6G, 6H, 7, 10, 24, 25A, 25B, 25C, and 26. To be published for public comment *and* to go into effect in October 1, 2006: Forms 1, 5, 6-Summary, 6D, 6E, 6F, 6I, 6J, 6-Declaration, 9G, 9H, 9I, 22A, 22C, and 23. In addition, all other forms amended in October 2005 are to be published for comment.**

Additional Action Items

Rule 1005, *Agenda Item 9(d)*: The Reporter said that although the although the Committee had already updated the forms to incorporate the BAPCPA changes that increased the time between chapter 7 discharges from six to eight years, a conforming change was also required for Rule 1005. **The Committee voted to recommend the conforming change to Rule 1005 to be published for public comment.**

Rule 1015, *Agenda Item 4(g)*: The Reporter recommended a technical change to Rule 1015(b) to update references in the rule in accordance with nomenclature changes made by BAPCPA to section 522 of the Code. **The Committee approved the technical changes to Rule 1015(b) without objection.**

Agenda Item 10: The Reporter discussed the Standing Committee's appointment of an Ad Hoc Committee to consider the propriety of introducing new time computational rules for adoption by the Appellate, Bankruptcy, Civil, and Criminal Rules Committees. He noted that this was a multi-step process and that the Ad Hoc Committee's first task was to identify the time computational rules among each set of rules, and to propose amendments to harmonize the counting of days under each set of rules. He referred the Committee to Judge Kravitz's January 20, 2006, memo which included a template for the time computational rules including Bankruptcy Rule 9006. The Reporter also prepared a revised Rule 9006 that incorporated the Ad Hoc Committee's suggestions. **The Committee approved Judge Kravitz's memo as a template for reviewing and recommending changes to Rule 9006. The Chairman asked the Reporter to study further the changes and to prepare a list of all bankruptcy rules with time periods.**

Agenda Item (6)(a): The Reporter addressed an issue that had arisen in partial response to In re State Line Motel, Inc., 322 B.R. 123 (9th Cir. BAP 2005), which held that service of an objection to claim is sufficient if it is mailed or otherwise delivered to a claimant under Rule 3007. The court rejected the argument made by many that service should be in the manner of a complaint as set out in Rule 7004. The Reporter said that the State Line at least raises the issue of

whether the rules should be amended to clarify the service requirements for a proof of claim. However, the Reporter recommended no amendments to the rules at this time. He noted that two bankruptcy opinions had been published since State Line came out, and both accepted the State Line reasoning. He argued that the consistent decisions of the courts on this issue suggest that it is premature for the Rules Committee to weigh in on the issue. **After discussing the Reporter's recommendation, the Committee voted to make no changes to the rules with respect to proper service of an objection to a proof of claim.**

Agenda Item 7(d): The Reporter discussed a proposed amendment to Rule 1007 that would required a chapter 13 debtor to provide annual income updates, but recommended no action at this time. **The Committee took no action.**

Agenda Item 8(a): Judge Adam's proposal to amend the separate document provisions of Rule 9021 – Santa Fe Agenda Item 10(a). **The Chairman deferred the subcommittee report until the next meeting.**

Agenda Item 8(b): Judge Klein reviewed a proposed change suggested by Judge Rasure to Rule 3002(c)(5) to require the filing of a proof of claim by a date certain in a case with newly discovered assets so that the trustee and the court can more easily identify untimely claims. **The Committee approved the proposed change to Rule 3002(c)(5) to be published for public comment.**

Information and Discussion Matters

Agenda Item 11, Report concerning the restyling of the Civil Rules; impact on bankruptcy rules: The Chairman referred the Committee to the Reporter's memo at Agenda Item 11. **No action was taken.**

Agenda Item 12, E-Government Rule – Bankruptcy Rule 9037: The Chairman noted that the Committee considered and made changes to 9037 earlier in the meeting.

Agenda Item 13, Report of Joint Subcommittee on Venue and Chapter 11 Matters: The Chairman noted that the Joint Subcommittee previously made its report in the context of its review of the comments to Rules 1014, 3007, 4001 and 6006 and new Rule 6003.

Agenda Item 14, Revision of Director's Procedural Forms 240, Reaffirmation Agreement, and 281, Appearance of Child Support Creditor or Representative: **The Chairman asked the Forms Subcommittee to review proposed changes presented by Ms. Ketchum to Director's Forms 240 and 281.**

Agenda Item 15, Discussion on electronic transmission of agenda materials: **No action.**

Agenda Item 16, Discussion of place and time for the Spring 2007 meeting: The Chairman asked members to e-mail suggestions.

Administrative Matters

The Chairman recognized the excellent work of Howard Adelman, Judge Eric Frank, and Professor Alan Resnick and thanked them for their contributions to the Committee over the years. To commemorate their contributions, the Chairman presented each individual with a certificate signed by Director of the Administrative Office, Ralph Leonidas Mecham, and Chief Justice John G. Roberts, Jr. As an additional token of appreciation, the Committee also presented Professor Resnick with a bowl engraved with the name of each committee chairman who served while Professor Resnick was the reporter or a committee member.

Respectfully submitted,

Stephen Scott Myers

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Item 2 will be an oral report.

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Draft minutes of the June 2006 meeting of the Standing Committee are attached.
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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 22-23, 2006
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 22-23, 2006. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
John G. Kester, Esquire
Judge Mark R. Kravitz
William J. Maledon, Esquire
Deputy Attorney General Paul J. McNulty
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, the committee's reporter; Peter G. McCabe, the committee's secretary; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida, Jeffrey N. Barr, and Timothy K. Dole, attorneys in the Office of Judges Programs of the Administrative Office; Emery Lee, Supreme Court Fellow at the Administrative Office; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr., consultant to the committee. Professor R. Joseph Kimble, style consultant to the committee, participated by telephone in the meeting on June 23.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Thomas S. Zilly, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Susan C. Bucklew, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Deputy Attorney General McNulty attended part of the meeting on June 22. The Department of Justice was also represented at the meeting by Associate Attorney General Robert D. McCallum, Jr.; Alice S. Fisher, Assistant Attorney General for the Criminal Division; Ronald J. Tenpas, Associate Deputy Attorney General; Benton J. Campbell, Counselor to the Assistant Attorney General; and Jonathan J. Wroblewski and Elizabeth U. Shapiro of the Criminal Division.

INTRODUCTORY REMARKS

Judge Levi welcomed Supreme Court Justice Samuel A. Alito, Jr. to the meeting and presented him with a plaque honoring his service as a member and chair of the Advisory Committee on Appellate Rules.

Later in the day, Chief Justice John G. Roberts, Jr. came to the meeting, greeted the members, and spent time with them in informal conversations. Judge Levi presented the Chief Justice with a framed resolution expressing the committee's appreciation, respect, and admiration for his support of the rulemaking process and his service as a member of the Advisory Committee on Appellate Rules. Judge Levi noted that the Chief Justice had been nominated as the next chair of that committee, but his elevation to the Supreme Court had intervened with the succession. The Chief Justice expressed his appreciation for the work of the rules committees and emphasized that he had experienced that work from the inside.

Judge Levi reported that Professor Struve had been appointed by the Chief Justice as the new reporter for the Advisory Committee on Appellate Rules, succeeding Patrick Schiltz, who had just been sworn in as a district judge in Minnesota. Judge Levi pointed out that Professor Struve had written many excellent law review articles and has been described as "shockingly prolific."

Judge Levi noted that Dean Kane would retire as dean of the Hastings College of the Law on June 30, 2006. He also reported that she, Judge Murtha, and Judge Thrash would be leaving the committee because their terms were due to expire on September 30, 2006. He said that their contributions to the committee had been enormous, particularly as the members of the committee's Style Subcommittee. He also reported with sadness that the terms of Judge Fitzwater and Justice Wells were also due to expire on September 30, 2006. They, too, had made major contributions to the work of the committee and would be sorely missed. He noted that all the members whose terms were about to expire would be invited to the next committee meeting in January 2007.

Judge Levi noted that the civil rules style project had largely come to a conclusion. The committee, he said, needed to make note of this major milestone. He said that the style project was extremely important, and it will be of great benefit in the future to law students, professors, lawyers, and judges. The achievement, he emphasized, had been the joint product of a number of dedicated members, consultants, and staff.

In addition to recognizing the Style Subcommittee – Judges Murtha and Thrash and Dean Kane – Judge Levi singled out Judge Rosenthal, chair of the Advisory Committee on Civil Rules, and Judges Paul J. Kelly, Jr. and Thomas B. Russell, who served as the chairs of the advisory committee's two style subcommittees. Together, they

shepherded the style project through the advisory committee. Judge Levi also recognized the tremendous assistance provided by Professors R. Joseph Kimble, Richard L. Marcus, and Thomas D. Rowe, Jr., and by Joseph F. Spaniol, Jr., all of whom labored over countless proposed drafts, wrote and read hundreds of memoranda, and participated in many meetings and teleconferences.

Judge Levi also thanked the staff of the Administrative Office for managing the process and providing timely and professional assistance to the committees – Peter G. McCabe, John K. Rabiej, Jeffrey A. Hennemuth, Robert P. Deyling, and Jeffrey N. Barr, and their excellent supporting staff – who keep the records, arrange the meetings, and prepare the agenda books. Finally, he gave special thanks to Professor Cooper who, he emphasized, had been the heart and soul of the style project. Professor Cooper was tireless and relentless in reviewing each and every rule with meticulous care and great insight. He helped shape every decision of the committee.

Judge Levi said that there was little to report about the March 2006 meeting of the Judicial Conference. He noted that the Supreme Court had prescribed the proposed rule amendments approved by the Judicial Conference in September 2005, including the package of civil rules governing discovery of electronically stored information. The amendments, now pending in Congress, are expected to take effect on December 1, 2006.

Judge Levi also thanked Brooke Coleman, his rules law clerk, for her brilliant work over the last several years in assisting him in all his duties as chair of the committee. He noted that she would soon begin teaching at Stanford Law School.

Judge Levi reported that Associate Attorney General McCallum had been nominated by the President to be the U.S. ambassador to Australia. Accordingly, he said, this was likely to be Mr. McCallum's last committee meeting. He emphasized that he had been a wonderful member and had established a new level of cooperation between the rules committees and the Department of Justice. He said that it is very important for the executive branch to be involved in the work of the advisory committees, especially when its interests are affected. He noted that the Department is a large organization, and its internal decision making on the federal rules works well only when its top executives, such as the Associate Attorney General, are personally involved. He emphasized that Mr. McCallum had attended and participated in all the committee meetings, and that he is a brilliant lawyer and a great person.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 6-7, 2006.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported on three legislative matters affecting the rules system. First, he pointed out that the Rules Enabling Act specifies that, unlike other amendments to the federal rules, any rule that affects an evidentiary privilege must be enacted by positive statute. He noted that the Advisory Committee on Evidence Rules had been working for several years on potential privilege rules, including a rule on waiver of the attorney-client privilege and work product protection. But before the committee could proceed seriously with a privilege waiver rule, it should alert Congress to all the relevant issues and obtain its acceptance in pursuing legislation to enact the rule. Accordingly, he said, Judge Levi and he had met on the matter with the chairman of the Judiciary Committee of the House of Representatives, F. James Sensenbrenner, Jr.

Chairman Sensenbrenner recognized that legislation would be necessary to implement the rule. Judge Levi reported that the chairman was very supportive and had urged the committee by letter to promulgate a rule that would: (1) protect against inadvertent waiver of privilege and protection, (2) permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and (3) allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in later proceedings.

Mr. Rabiej reported that the Advisory Committee on Evidence Rules had drafted a proposed rule, FED. R. EVID. 502, addressing the three topics suggested by Chairman Sensenbrenner. He added that Judge Levi would meet on June 23 with the chief counsel to the Senate Judiciary Committee and others to discuss the proposed rule.

Second, Mr. Rabiej reported that the Advisory Committee on Bankruptcy Rules had produced a comprehensive package of amendments and new rules to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. He pointed out that two senators had written recently to the Chief Justice objecting to three provisions in the advisory committee's proposed rules. The Director of the Administrative Office responded to the senators by explaining the basis for the advisory committee's decisions on these provisions and emphasizing that the committee would examine afresh the senators' suggestions, along with other comments submitted by the public, as part of the public comment process.

Third, Mr. Rabiej noted that a provision of the Class Action Fairness Act of 2005 required the Judicial Conference to report on the best practices that courts have used to make sure that proposed class action settlements are fair and that attorney fees are reasonable. He said that the Judicial Conference had filed the report with the judiciary committees of the House and Senate in February 2006. The thrust of the report

emphasized that the extensive 2003 revisions to FED. R. CIV. P. 23 had provided the courts with a host of rule-based tools, discretion, and guidance to scrutinize rigorously class action settlements and fee awards. The revised rule was intended largely to codify and amplify the best practices that district courts had developed to supervise class action litigation.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported on the status of pending projects of the Federal Judicial Center. He directed the committee's attention to two projects.

First, he noted, the Center was working with the Administrative Office to monitor developments in the courts following the Class Action Fairness Act of 2005. He said that the study was showing that class-action filings had increased since the Act. But not many class action cases are being removed from the state courts. Rather, he said, cases that previously would have been filed in the state courts are now being filed in the federal courts as original actions.

Second, the Center was studying the issue of appellate jurisdiction and how it affects resources in the appellate courts and district courts. He said that the Center would examine the exercise of jurisdiction under 28 U.S.C. § 1292(b), and a report would be forthcoming soon. He added, in response to a question, that concerns had been expressed regarding § 1292(b) motions in patent cases. He said that it had been difficult in the past to get district courts to certify an appeal and for the courts of appeals to accept the appeal. But the reluctance seems to have diminished, and changes are being seen.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Rules for Final Approval

FED. R. APP. P. 25(a)(5)
FED. R. BANKR. P. 9037
FED. R. CIV. P. 5.2
FED. R. CRIM. 49.1

Judge Fitzwater explained that the four proposed rules have been endorsed by the Technology Subcommittee and the respective advisory committees. They comply with the requirement of the E-Government Act of 2002 that rules be prescribed "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The substance of the proposed rules,

he said, was based on the privacy policy already developed by the Court Administration and Case Management Committee and adopted by the Judicial Conference. In essence, since all federal court documents are now posted on the Internet, the proposed rules impose obligations on people filing papers in the courts to redact certain sensitive information to protect privacy and security interests.

Professor Capra added that the statute specifies that the rules must be uniform "to the extent practicable." He referred to the chart in the agenda book setting forth the proposed civil, criminal, and bankruptcy rules side-by-side and demonstrating how closely they track each other. (The proposed amendment to the appellate rules would adopt the privacy provisions followed in the case below.) He said that the subcommittee and the reporters had spent an enormous amount of time trying to make the rules uniform, even down to the punctuation. He pointed out that individual rules differ from the template developed by the Technology Subcommittee only where there is a special need in a particular set of rules. For example, a special need exists in criminal cases to protect home addresses of witnesses and others from disclosure. Therefore, the criminal rules, unlike the civil and bankruptcy rules, require redaction of all but the city and state of a home address in any paper filed with the court. Professor Coquillette added that the consistent policy of the Standing Committee since 1989 has been that when the same provision applies in different sets of federal rules, the language of the rule should be the same unless there is a specific justification for a deviation.

Judge Levi pointed out that the Court Administration and Case Management Committee had raised two concerns with the proposed privacy rules. First, that committee had suggested that the criminal rules require redaction of the name of a grand jury foreperson from documents filed with the court. But, he said, the signature of a foreperson on an indictment is essential, and there has been litigation over the legality of an indictment that does not bear the signature of the foreperson.

Second, the Court Administration and Case Management Committee had raised concerns over arrest and search warrants that have been executed. Initially, he said, the Department of Justice had argued, and the advisory committee was persuaded, that the effort required to redact information from arrest and search warrants would be considerable and that redaction of these documents should not be imposed. Now, though, the Department was suggesting that search warrants can be redacted, but not arrest warrants. Judge Levi said that he had advised the Court Administration and Case Management Committee that these matters needed to be studied further, but he did not want to delay approval of the privacy rules because of the concerns over warrants.

The committee without objection by voice vote agreed to send the proposed new rules to the Judicial Conference for final approval.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachment of December 9, 2005 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 25(a)(5)

Judge Stewart reported that the advisory committee had met in April and that the E-Government privacy rule had been the major item on its agenda. He pointed out that the proposed appellate rule on privacy differs from the proposed civil, criminal, and bankruptcy rules in that it adopts a policy of "dynamic conformity." In other words, the appellate rule provides simply that the privacy rule applied to the case below will continue to apply to the case on appeal. He added that the advisory committee had been unanimous in approving this approach. The only objections raised in the committee related to some of the suggested style changes.

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Informational Items

Judge Stewart reported that the other items in the committee's report in the agenda book were informational. First, he said, the advisory committee had begun to consider implementing the time-computation template developed by the Standing Committee's Time-Computation Subcommittee by establishing a subcommittee to work on it. The subcommittee would begin work this summer to consider each time limit in the appellate rules. He added that Professor Struve had initiated the project with an excellent memorandum in which she identified time limits set forth in statutes. There is concern about statutes that impose time limits, he said, because FED. R. APP. P. 26 specifies that the method of counting in the rules is applicable to statutes. One problem is that the time limits for complying with many statutes — often 10 days — may be shortened because the template calls for counting each day, while the current time computation rule excludes weekends and holidays if a time limit is less than 11 days.

Judge Stewart reported that the advisory committee had also been asked to consider the provision in the time-computation template addressing the "inaccessibility" of the clerk's office. He said that the advisory committee would add Fritz Fulbruge, clerk

of the Court of Appeals for the Fifth Circuit in New Orleans, to the subcommittee. He has had relevant, actual experience with inaccessibility as a result of Hurricane Katrina.

Judge Stewart said that the advisory committee had conducted a thorough discussion of the "3-day rule" – FED. R. APP. P. 26(c). The committee voted unanimously not to make any change in the rule at the present time, but the members had a lively debate on the topic. Since electronic filing and service are just being introduced in the courts of appeals nationally, the committee will monitor their impact on the 3-day rule to see whether the rule should be modified.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Zilly and Professor Morris presented the report of the advisory committee, as set forth in Judge Zilly's memorandum and attachments of May 24, 2006 (Agenda Item 11).

Judge Zilly reported that the advisory committee had been very busy during the last 12 months, particularly in drafting rules and forms to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. In all, the committee had held six meetings. The most recent, held in March 2006 at the University of North Carolina in Chapel Hill, had lasted three full days, and the advisory committee took two additional votes after the meeting.

He noted that a great deal of material was being presented to the Standing Committee. In all, more than 70 changes to the rules were under consideration. He said that the advisory committee was recommending:

(1) final approval of eight rules not related to the recent bankruptcy legislation;
(2) withdrawal of one rule published for public comment;
(3) final approval of an amendment to Interim Bankruptcy Rule 1007 and a related new exhibit to the petition form;
(4) final approval of seven additional changes to the forms, to take effect on October 1, 2006;
(5) publication of a comprehensive package of amendments to the rules to implement the recent bankruptcy legislation, most of which had been approved earlier as interim rules; and
(6) publication of all the revisions in the Official Forms.

Amendments for Final Approval

Judge Zilly reported that the proposed amendments to FED. R. BANKR. P. 1014, 3001, 3007, 4001, 6006, and 7007.1 and new rules 6003, 9005.1, and 9037 had been published for comment in August 2005. A public hearing on them had been scheduled for January 9, 2006. But there were no requests to appear, and the hearing was cancelled. He noted that the proposed Rules 3001, 4001, 6006 and new Rule 6003 had generated a good deal of public comment.

FED. R. BANKR. P. 1014(a)

Judge Zilly said that Rule 1014 (dismissal and transfer of cases) would be amended to state explicitly that a court may order a change of venue in a case on its own motion.

Joint Subcommittee Recommendations on
FED. R. BANKR. P. 3007, 4001, 6003, and 6006

Judge Zilly explained the origin of the proposed changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003. He said that about three years ago, the Bankruptcy Administration Committee of the Judicial Conference, chaired by Judge Rendell, and the Advisory Committee on Bankruptcy Rules had formed a joint subcommittee to examine a number of issues arising in large chapter 11 cases. As a result of the subcommittee's work, changes to Rules 3007, 4001, and 6006, and proposed new Rule 6003 were published. He added that the advisory committee was recommending a number of minor changes to the four rules as a result of the public comments.

FED. R. BANKR. P. 3007

Judge Zilly explained that Rule 3007 (objection to claims) was being amended in several ways. It would preclude a party in interest from including in a claims objection any request for relief that requires an adversary proceeding. The proposed rule would allow omnibus claims objections. Objections of up to 100 claims could be filed in a single objection to claims. It would also limit the nature of objections that may be joined in a single filing, and it would establish minimum standards to protect the due process rights of claimants.

FED. R. BANKR. P. 4001

Judge Zilly noted that Rule 4001 (relief from the automatic stay and certain other matters) would be amended to require that movants seeking approval of agreements related to the automatic stay, approval of certain other agreements, or authority to use

cash collateral or obtain credit submit along with their motion a proposed order for the relief requested and give a more extensive notice of the requested relief to parties in interest. The rule would require the movant to include within the motion a statement not to exceed five pages concisely describing the material provisions of the relief requested. Judge Zilly noted that the advisory committee had made some changes in the rule after publication, including deletion of an unnecessary reference to FED. R. BANKR. P. 9024 (relief from judgment or order).

FED. R. BANKR. P. 6003

Judge Zilly explained that proposed Rule 6003 (interim and final relief immediately following commencement of a case) is new. It would set limits on a court's authority to grant certain relief during the first 20 days of a case. Absent a need to avoid immediate and irreparable harm, a court could not grant relief during the first 20 days of a case on: (1) applications for employment of professional persons; (2) motions for the use, sale, or lease of property of the estate, other than a motion under FED. R. BANKR. P. 4001; and (3) motions to assume or assign executory contracts and unexpired leases. He added that subdivision (c) had been amended following publication to delete a reference to the rejection of executory contracts or unexpired leases. The amendment, he said, allows a debtor to reject burdensome contracts or leases.

FED. R. BANKR. P. 6006

Judge Zilly reported that the proposed amendments to Rule 6006 (assumption, rejection, or assignment of an executory contract or unexpired lease) would authorize omnibus motions to reject executory contracts and unexpired leases. It would also authorize omnibus motions to assume or assign multiple executory contracts and unexpired leases under specific circumstances. The amended rule would establish minimum standards to ensure protection of the due process rights of claimants. Following publication, the advisory committee amended the rule to allow the trustee to assume but not assign multiple executory contracts and unexpired leases in an omnibus motion.

FED. R. BANKR. P. 7007.1

Judge Zilly explained that the proposed new Rule 7007.1 (corporate ownership statement) would require a party to file its corporate ownership statement with the first paper filed with the court in an adversary proceeding.

FED. R. BANKR. P. 9005.1

Judge Zilly noted that the proposed Rule 9005.1 (constitutional challenge to a statute) is new. It would make the new FED. R. CIV. P. 5.1 applicable to adversary proceedings, contested matters, and other proceedings within a bankruptcy case.

The committee without objection by voice vote agreed to send the proposed amendments and new rules to the Judicial Conference for final approval.

FED. R. BANKR. P. 9037

As noted above on page 7, the committee approved the proposed new Rule 9037 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee. Adopted in compliance with § 205 of the E-Government Act of 2002, the rule would protect the privacy and security concerns arising from the filing of documents with the court, both electronically and in paper form, because filed documents are now posted on the Internet.

Judge Zilly noted that the proposed new bankruptcy rule is similar to the companion civil and criminal rules. It is slightly different in language, though, because it uses the term "entity," a defined term under the Bankruptcy Code, rather than "party" or "person." Entity includes a governmental unit under § 101(15) of the Code, while "person" excludes it in the definition section of the Code § 101(41).

Withdrawal of an Amendment

FED. R. BANKR. P. 3001(c) and (d)

Judge Zilly reported that the advisory committee had decided to withdraw the proposed amendments to Rule 3001 (proof of claim) following publication. The current rule states that when a claim (or an interest in property of the debtor) is based on a writing, the entire writing must be filed with the proof of claim. The proposed amendments, as published, would have provided that if the writing supporting the claim were 25 pages or fewer, the claimant would have to attach the whole writing. But if it exceeded 25 pages, the claimant would have to file relevant excerpts of the writing and a summary, which together could not exceed 25 pages. Similarly, any attachment to the proof of claim to provide evidence of perfection of a security interest could not exceed five pages in length.

Judge Zilly said that the advisory committee had received several comments opposing the amendments. One organization objected to the rule on the grounds that

summaries would be difficult to prepare. In light of the comments, the committee discussed increasing the page limitation on proof of perfection from five to 15 pages. After considering and debating all the comments, though, the committee decided to recommend that no changes be made to Rule 3001. But it agreed to change Form 10 (the proof of claim form) to warn users against filing original documents. The proposed language on the form would advise: "Do not send original documents. Attached documents may be destroyed after scanning."

The committee without objection approved withdrawal of the proposed amendment by voice vote.

Amendments to an Interim Rule and the Official Forms

Judge Zilly explained that to conform to the 2005 bankruptcy legislation, the committee had prepared interim rules that were then approved by the Standing Committee and the Executive Committee of the Judicial Conference for use as local rules in the courts. The interim rules had been drafted as revised versions of the Federal Rules of Bankruptcy Procedure. The courts were encouraged, but not required, to adopt them as local rules. The interim rules included 35 amendments to the existing rules and seven new rules. All the courts adopted the rules before the October 17, 2005, effective date of the bankruptcy law, some with minor variations.

In addition, the advisory committee prepared amendments to 33 of the existing Official Forms and created nine new forms, all of which were approved in August 2005 by the Standing Committee and the Judicial Conference, through its Executive Committee. The forms, under FED. R. BANKR. P. 9009, became new Official Forms and must be used in all cases.

Judge Zilly reported that the advisory committee had received comments from various sources on both the interim rules and the Official Forms. Based on those comments, it was now recommending a change in Interim Rule 1007 to require a debtor to file an official form that includes a statement of the debtor's compliance with the new pre-petition credit counseling obligation under § 109(h) of the Code. The amendment would be sent to the courts with the recommendation that it be adopted as a standing order effective October 1, 2006. Also based on the comments, the advisory committee was recommending changes to OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, and 23 and new Exhibit D to OFFICIAL FORM 1. In addition, he said, the advisory committee recommended having the Judicial Conference make the changes in the Official Forms and have them take effect on October 1, 2006.

FED. R. BANKR. P. 1007

Judge Zilly explained that the 2005 Act had amended § 109(h) of the Bankruptcy Code to require that all individual debtors receive credit counseling before commencing a bankruptcy case. In its current form, Interim Rule 1007 (lists, schedules, statements, and other documents) implements § 109(h) by requiring the debtor to file with the petition either: (1) a certificate from the credit counseling agency showing completion of the course within 180 days of filing; (2) a certification attesting that the debtor applied for but was unable to obtain credit counseling within 5 days of filing; or (3) a request for a determination by the court that the debtor is statutorily exempt from the credit counseling requirement.

Case law developments have shown that some debtors have completed the counseling but have been unable to obtain a copy of the certificate from the provider of the counseling. As a result, debtors have filed a petition with the court, paid a filing fee, and then had their case dismissed by the court even when they had received the counseling but not filed the certificate. The proposed amendments to Rule 1007(b) and (c) address the problem by permitting debtors in this position to file a statement that they have completed the counseling and are awaiting receipt of the appropriate certificate. In that event, the debtor will have 15 days after filing the petition to file the certificate with the court.

Professor Morris added that the advisory committee was recommending amending both the interim rule and the final Rule 1007.

The committee without objection by voice vote agreed to send the proposed amendment to the interim rule to the Judicial Conference for final approval.

OFFICIAL FORMS 1, 5, 6, 9, 22A, 22C, 23
and Exhibit D to OFFICIAL FORM 1

Judge Zilly added that the advisory committee was recommending a new Exhibit D to OFFICIAL FORM 1 (voluntary petition) to implement the proposed amendment to Rule 1007(b)(3). Exhibit D is the debtor's statement of compliance with the credit counseling requirement. Among other things, it includes a series of cautions informing debtors of the consequences of filing a bankruptcy petition without first receiving credit counseling. Many pro se debtors, for example, are unaware of the significant adverse consequences of filing a petition before receiving the requisite counseling, including dismissal of the case, limitations on the automatic stay, and the need to pay another filing fee if the case is refiled. The warnings may deter improvident or premature filings, and they should both reduce the harm to those debtors and ease burdens on the clerks, who often are called upon to respond to inquiries from debtors on these matters.

Judge Zilly added that the advisory committee was recommending that the Judicial Conference make changes in the following seven Official Forms, effective October 1, 2006:

1	Voluntary petition
5	Involuntary petition
6	Schedules
9	Notice of commencement of a case, meeting of creditors, and deadlines
22A	Chapter 7 statement of current monthly income and means test calculation
22C	Chapter 13 statement of current monthly income and calculation of commitment period and disposable income
23	Debtor's certification of completion of instructional course concerning personal financial management

Judge Zilly reported that the advisory committee recommended that OFFICIAL FORMS 1, 5, and 6 be amended to implement the statistical reporting requirements of the 2005 bankruptcy legislation that take effect on October 17, 2006. The proposed amendments to OFFICIAL FORMS 9, 22A, 22C, and 23 are stylistic or respond to comments received on the 2005 amendments to the Official Forms.

Judge Zilly pointed out that each of the forms was described in the agenda book. Once approved by the Judicial Conference, he said, they would become official and must be used in all courts. But, he said, the proposed changes in the seven forms will also be published for public comment, even though they will become official on October 1, 2006, because they had been prepared quickly to meet the statutory deadline and had not been published formally.

The committee without objection by voice vote agreed to send the proposed revisions in the forms to the Judicial Conference for final approval.

Amendments to the Rules for Publication

Judge Zilly reported that the advisory committee was seeking authority to publish the interim rules – together with proposed amendments to five additional rules not included in the interim rules – as a comprehensive package of permanent amendments to implement the 2005 bankruptcy legislation and other recent legislation. They would be published in August 2006 and, following the comment period, would be considered afresh by the advisory committee in the spring of 2007 and brought back to the Standing Committee for final approval in June 2007.

Thirty-five of the rules that the advisory committee was seeking authority to publish had been approved previously by the Standing Committee. They had to be in place in the bankruptcy courts in advance of the effective date of the Act, October 17, 2005 – FED. R. BANKR. P. 1006, 1007, 1009, 1010, 1011, 1017, 1019, 1020, 1021, 2002, 2003, 2007.1, 2007.2, 2015, 2015.1, 2015.2, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5003, 5008, 5012, 6004, 6011, 8001, 8003, 9006, and 9009. Judge Zilly explained that minor modifications, largely stylistic in nature, had been made in the rules. More significant improvements had been made to nine of the rules and are explained in the agenda book – FED. R. BANKR. P. 1007, 1010(b), 1011(f), 2002(g)(5), 2015(a)(6), 3002(c)(5), 4003, 4008, and 8001(f)(5).

Judge Zilly reported that five changes to the rules in the package were new and had not been seen before by the Standing Committee. Changes to four rules were necessary to comply with the various provisions of the Act, but did not have to be in place by October 17, 2005 – FED. R. BANKR. P. 1005, 2015.3, 3016 and 9009 (the changes to 3016 and 9009 are distinct from previous changes to those rules made by the Interim Rules). In addition, the proposed change to Rule 5001 was necessary to comply with the new 28 U.S.C. § 152(c), which authorizes bankruptcy judges to hold court outside their districts in emergency situations.

He noted that the proposed amendment to Rule 1005 (caption of the petition) conforms to the Act's increase in the minimum time allowed between discharges from six to eight years. New Rule 2015.3 would implement § 419 of the Act requiring reports of financial information on entities in which a Chapter 11 estate holds a controlling or substantial interest. The proposed amendment to Rule 3016(d) (filing plan and disclosure statement) would implement § 433 of the Act and allow a reorganization plan to serve as a disclosure statement in a small business case. The amendment to Rule 9009 (forms) would provide that a plan proponent in a small business Chapter 11 case need not use the Official Form of a plan of reorganization and disclosure statement.

The committee without objection approved the proposed amendments for publication by voice vote.

Amendments to the Official Forms for Publication

Judge Zilly reported that the advisory committee recommended publishing for comment all the amendments made to the 20 forms amended or created in 2005 to implement the changes brought about because of the Act (*i.e.*, OFFICIAL FORMS 1, 3A, 3B, 4, 5, 6, 7, 8, 9, 10, 16A, 18, 19A, 19B, 21, 22A, 22B, 22C, 23, and 24). He noted that publishing for comment forms already in effect as Official Forms was an unusual step. But because the new law required so many changes to the forms, the advisory committee wanted to give the bench and bar a full, formal opportunity to comment on them.

Judge Zilly said that the advisory committee had, at the direction of Congress, finished drafting and was recommending publishing for comment, three new forms to be used in small business cases: Form 25A (sample plan of reorganization); Form 25B (sample disclosure statement); and Form 26 (form to be used to report on value, operations, and profitability as required by § 419 of the Act). He noted that new Rule 2015.3 would require the debtor in possession to file Form 26 in all Chapter 11 cases. He also said that the advisory committee's recommended new change to Rule 9009 was on account of the congressional directive that the sample plan and sample disclosure statement (Forms 25A and 25B) be illustrative only. The change excepts Forms 25A and 25B from Rule 9009's general requirement that the use of applicable Official Forms is mandatory.

The committee without objection approved the proposed forms for publication by voice vote.

Informational Items

Judge Zilly noted that when Congress enacted the 2005 legislation, it required the debtor's attorney in a Chapter 7 case to certify that the attorney has no knowledge, after inquiry, that the information provided by the debtor in the schedules and statements is incorrect. The legislation also states that it is the sense of Congress that FED. R. BANKR. P. 9011 should be modified to include a provision to that effect. In addition, he said, Senator Grassley and Senator Sessions had sent letters urging the committee to include the provision in the rule and forms.

Judge Zilly said that the advisory committee was not yet recommending any change to Rule 9011 or to any of the forms. As it stands now, he said, Rule 9011 provides that an attorney's signature on any paper filed with the court other than the schedules amounts to a certification by the attorney after a reasonable inquiry that any factual allegations are accurate. Changes made by the Act would generally extend the attorney's certification to bankruptcy schedules, at least in chapter 7. He said that it has been a long-standing, consistent principle of the committee not to amend the rules simply to restate statutory provisions. He stated the advisory committee takes the Senators' concerns seriously and has formed a subcommittee to further consider how Rule 9011 and the forms might be amended, and that the subcommittee would report on its progress at the next advisory committee meeting in September.

Judge Zilly reported that the term of Professor Alan Resnick had come to an end. He had been the advisory committee's reporter, and then a member of the committee, for more than 20 years. Judge Zilly noted that Professor Resnick has an extraordinary institutional memory and unmatched insight and wisdom that will be greatly missed by the committee. Judge Zilly also thanked the committee's current reporter, Professor

Morris, its consultant on the bankruptcy forms, Patricia Ketchum, and the staff attorneys in the Administrative Office who have supported the committee with great talent and dedication – James Wannamaker and Scott Myers.

Judge Levi concluded the discussion by observing the enormity of the work and the work product of the advisory committee in implementing the comprehensive 500-plus page legislation within such a short time period.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set out in Judge Rosenthal's memorandum and attachments of June 2, 2006 (Agenda Item 12).

Amendments for Final Approval

FED. R. CIV. P. 5.2

As noted above on page 7, the committee approved the proposed E-Government privacy rule and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

STYLE PACKAGE

Judge Rosenthal explained that the final product of the style project, presented to the Standing Committee for final approval, consisted of four separate parts:

(1) the pure style amendments to the entire body of civil rules – FED. R. CIV. P. 1-86;
(2) the style-plus-substance amendments – FED. R. CIV. P. 4(k), 9(h), 11(a), 14(b), 16(c)(1), 26(g)(1), 30(b), 31, 40, 71.1, and 78;
(3) the restyled civil forms; and
(4) the restyled version of rule amendments currently pending in Congress – FED. R. CIV. P. 5.1, 24(c), and 50 – and the electronic discovery rules – FED. R. CIV. P. 16, 26, 33, 34, 37, and 45.

Judge Rosenthal reported that the advisory committee had made a few changes in the rules following publication, two of which are particularly important. First, she said, the committee expanded the note to FED. R. CIV. P. 1 to provide more information about the style project and its intentions. She noted that the committee had decided at the very start of the style project that there needed to be a brief statement somewhere in the rules

or accompanying documents describing the aims and style conventions of the project. The committee concluded ultimately that the statement should be placed in an expanded note to Rule 1 identifying the drafting guidelines used and summarizing what the committee did and why. The committee note, for example, emphasizes that the style changes to the civil rules are intended to make no changes in substantive meaning. It also explains the committee's formatting changes and rule renumbering and its removal of inconsistencies, redundancies, and intensifying adjectives.

Second, the advisory committee responded to a fear expressed in some of the public comments that when the restyled rules take effect on December 1, 2007, they will supersede any potentially conflicting provision in existing statutes. Judge Rosenthal explained that that clearly was not the intent of the committee. Moreover, she said, supersession had not proven to be a problem with the restyled appellate rules and criminal rules.

She pointed out that Professor Cooper had prepared an excellent memorandum emphasizing that the committee intended to make no change in any substantive meaning in any of the rules. It also recommends a new FED. R. CIV. P. 86(b) that would make explicit the relationship between the style amendments and existing statutes, putting to rest any supersession concern. The proposed new rule specifies that if any provision in any rule other than new Rule 5.2 "conflicts with another law, priority in time for the purpose of 28 U.S.C. § 2072(b) is not affected by the amendments taking effect on December 1, 2007."

The committee without objection by voice vote agreed to send all the changes recommended by the style project to the Judicial Conference for final approval.

Judge Rosenthal commended Judge Levi and Judge Anthony Scirica – the current and former chairs of the Standing Committee – for their decision to go forward with restyling the civil rules after completion of the appellate and criminal rules restyling projects. She noted that an attempt had been made in the 1990's to begin restyling the civil rules, but the project had been very difficult and time-consuming. After laboring through several rules, the advisory committee decided at that time that the effort was simply too difficult and time-consuming, and it was detracting from more pressing matters on the committee's agenda. Therefore, the civil rules project had been deferred for years. She said that it took a great deal of vision, belief, and understanding of the benefits for Judges Scirica and Levi to bring it back and see it through to its successful conclusion.

Judge Rosenthal thanked the Standing Committee's Style Subcommittee – Judges Thrash and Murtha and Dean Kane – emphasizing that they had been tireless, gracious, and amazing. Also, she said, Professors Marcus and Rowe had been stalwarts of the

project, researching every potential problem that arose. The project, she added, could not have been handled without the support of the Administrative Office – Peter McCabe, John Rabiej, James Ishida, Jeff Hennemuth, Jeff Barr, and Bob Deyling – who coordinated the work and kept track of 750 different documents and versions of the rules. She added that Joe Spaniol had been terrific, offering many great suggestions that the committee adopted.

Judge Rosenthal explained that it was hard to say enough about Professor Kimble's contributions. The results of the style project, she said, are a testament to his love of language. His concept was that the rules of procedure can be as literary and eloquent as any other kind of writing. His stamina and dedication to the project, she said, had been indispensable.

Finally, she thanked Professor Cooper, explaining that he had been the point person at every stage of the project. Noting the extremely heavy volume of e-mail exchanges and memoranda during the course of the project, she emphasized that Professor Cooper had read and commented on every one of them and had been an integral part of every committee decision. His unique combination of acute attention to detail and thorough understanding of civil procedure had kept the project moving in the right direction and made the final product the remarkable contribution to the bench and bar that it will be. She predicted that within five years, lawyers will not remember that the civil rules had been phrased in any other way.

Professor Cooper added that the most important element to the success of the project, by far, had been the decision to accelerate the project and get the work done within the established time frame. The success, he said, was due to Judge Rosenthal. The project had been completed well ahead of time and turned out better than any of the participants could have hoped. Judge Murtha and Professor Kimble echoed these sentiments and expressed their personal satisfaction and pride in the results.

Informational Items

Judge Rosenthal reported that the advisory committee had approved several amendments for publication at its last meeting. The committee, though, was not asking to publish the amendments in August 2006, but would will defer them to August 2007. The bar, she said, deserves a rest. Therefore, the advisory committee was planning to come back to the Standing Committee in January 2007 with proposed amendments to FED. R. CIV. P. 13(f) and 15(a), and 48, and new Rule 62.1. The proposals, she said, were described in the agenda book.

FED. R. CIV. P. 13(f) and 15(a)

Judge Rosenthal explained that the proposed amendments to Rules 13(f) (omitted counterclaim) and 15(a) (amending as a matter of course) deal with amending pleadings. Rule 13(f) is largely redundant of Rule 15 and potentially misleading because it is stated in different terms. Under the committee's proposal, an amendment to add a counterclaim will be governed by Rule 15. The Style Subcommittee, she said, had recommended deleting Rule 13(f) as redundant, but the advisory committee decided to place the matter on the substance track, rather than include it with the style package.

Judge Rosenthal reported that the advisory committee's proposal to eliminate Rule 13(f) would be included as part of a package of other changes to Rule 15. It would also amend Rule 15(a) to make three changes in the time allowed a party to make one amendment to its pleading as a matter of course.

Professor Cooper added that the advisory committee had decided not to make suggested amendments to Rule 15(c), dealing with the relation back of amendments. The committee had not found any significant problems with the current rule. Moreover, the proposed changes would be very difficult to make because they raise complex issues under the Rules Enabling Act. Therefore, the committee had removed it from the agenda.

One member suggested that the proposed change to Rule 15 could take away a tactical advantage from defendants by eliminating their right to cut off the plaintiff's right to amend. The matter, he said, could be controversial. Judge Rosenthal responded that the advisory committee had thought that amendment of the pleadings by motion is routinely given. Moreover, it is often reversible error for the court not to allow an amendment. She said that the publication period will be very helpful to the committee on this issue.

FED. R. CIV. P. 48(c)

Judge Rosenthal reported that the advisory committee would propose an amendment to Rule 48 (number of jurors; verdict) to add a new subdivision (c) to govern polling of the jury. The proposal, she said, had been referred to the advisory committee by the Standing Committee. She explained that it was a simple proposal to address jury polling in the civil rules in the same way that it is treated in the criminal rules. But, she added, there is one difference between the language of the civil and criminal rules because parties in civil cases may stipulate to less than a unanimous verdict.

FED. R. CIV. P. 62.1

Judge Rosenthal reported that the advisory committee would propose a new Rule 62.1 (indicative rulings). It had been on the committee agenda for several years and would provide explicit authority in the rules for a district judge to rule on a matter that is the subject of a pending appeal. Essentially, it adopts the practice that most courts follow when a party makes a motion under FED. R. CIV. P. 60(b) to vacate a judgment that is pending on appeal. Almost all the circuits now allow district judges to deny post-trial motions and also to "indicate" that they would grant the motion if the matter were remanded by the court of appeals for that purpose. The proposed new rule would make the indicative-ruling authority explicit and the procedure clear and consistent.

Professor Cooper added that the advisory committee was considering publishing two versions of the indicative-ruling proposal. One alternative would provide that if the court of appeals remands, the district judge "would" grant the motion. The other would allow the district judge to indicate that he or she "might" grant the motion if the matter were remanded. The court of appeals, though, has to determine whether to remand or not.

One member inquired as to why the advisory committee had decided to number the new rule as Rule 62.1 and entitle it "Indicative Rulings." Professor Cooper explained that the advisory committee at first had considered drafting an amendment to Rule 60(b) because indicative rulings arise most often with post-judgment motions to vacate a judgment pending on appeal. The committee, however, ultimately decided on a rule that would apply more broadly. Therefore, it placed the proposed new rule after Rule 62, keeping it in the chapter of the rules dealing with judgments. Judge Stewart added that the Advisory Committee on Appellate Rules would like to monitor the progress of the proposed rule and might consider including a cross-reference in the appellate rules. Judge Rosenthal welcomed any suggestions and said that the committee was open to a different number and title for the rule.

FED. R. CIV. P. 30(b)(6)

Judge Rosenthal reported that the advisory committee had heard from the bar that many practical problems have arisen with regard to Rule 30(b)(6) depositions of persons designated to testify for an organization. The committee was in the process of exploring whether the problems cited could be resolved by amendments to the rules. She noted that the committee had completed a brief summary and was looking further at particular aspects in which amendments might be helpful. For example, should the rules protect against efforts to extract an organization's legal positions during a deposition? Some treatises state that if a witness testifies, the testimony binds the organization. But that is not the way the rule was intended to operate. Therefore, the advisory committee would consider whether the rule should be changed to make it clear that this is not the case.

That, she said, is just one of the problems that has been cited regarding depositions of organizational witnesses.

FED. R. CIV. P. 26(a)

Judge Rosenthal said that the advisory committee was also considering whether changes were needed to the provision in Rule 26(a) (disclosures) that requires some employees to provide an expert's written report. She noted that the rule and the case law appear to differ as to the type of employee who must give an expert's report. The rule says that no report is needed unless the employee's duties include regularly giving testimony, but the case law is broader. She also noted that the ABA Litigation Section has asked the House of Delegates to approve recommendations with respect to discovery of a trial expert witness's draft reports and discovery of communications of privilege matter between an attorney and a trial expert witness. These questions also will be considered.

One of the members suggested that the advisory committee's inquiry of Rule 26(a) should be broadened to also include the problems that have arisen with regard to the testimony of treating physicians.

FED. R. CIV. P. 56

Judge Rosenthal said that the final area being considered by the advisory committee involves the related subjects of summary judgment and notice pleading. She added that the committee planned to address issues in a leisurely way. She noted that the committee's work on restyling FED. R. CIV. P. 56 (summary judgment) was the most difficult aspect of the style project. It was a frustrating task because the rule is badly written and bears little relationship to the case law and local court rules. Since the national rule is so inadequate, she said, local court rules abound. She said that the advisory committee had decided to limit its focus to the procedures set forth in the summary judgment rule. Some of the time periods currently specified in the rule, such as leave to serve supporting affidavits the day before the hearing, are impracticable. But, she said, there was no enthusiasm in the advisory committee for addressing the substantive standard for summary judgment. That would continue be left to case law.

Related to summary judgment, she noted, is the issue of pleading standards. Much interest had been expressed over the years in reexamining the current notice pleading standard system. To that end, she said, the advisory committee had examined how it might structure an appropriate inquiry into both summary judgment and notice pleading. Certainly, she recognized, it would be difficult, and very controversial, to attempt to replace notice pleading with fact pleading. But, she said, the advisory committee had not closed the door on the subject.

As part of the inquiry, the advisory committee has considered recasting Rule 12(e) (motion for a more definite statement) and giving it greater applicability. Today, a pleading has to be virtually unintelligible before a motion for a more definite statement will be granted. The committee will consider liberalizing the standard as a way to help focus discovery.

FED. R. CIV. P. 54(d)(2), 58(c)(2)

Professor Cooper reported that the Advisory Committee on Appellate Rules had suggested that the Civil Rules Committee consider the interplay between the rules that integrate motions for attorney fees and the rules that govern time for appeal – FED. R. CIV. P. 54(d)(2) (claims for attorney's fees) and 58(c)(2) (entry of judgment, cost or fee award) and Fed. R. App. P. 4 (time to appeal). He explained that there is a narrow gap in the current rules. But, he said, the Civil Rules Committee was of the view that the matter was extremely complex, and that it was better to live with the current complexity than to amend the rules and run the risk of unintended consequences or even greater complexity.

Judge Rosenthal reported that the Advisory Committee on Civil Rules has begun to work on the time-computation project and would consider it further at its September 2006 meeting. She predicted that the committee could likely come to the conclusion that the problem of time limits set forth in statutes will not turn out to be as great in practice as in theory. The committee planned to go forward in accord with the initial schedule.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Bucklew and Professor Beale presented the report of the advisory committee, as set forth in Judge Bucklew's memorandum and attachments of May 20, 2006 (Agenda Item 7).

Amendments for Final Approval

FED. R. CRIM. P. 11(b)

Judge Bucklew reported that the proposed amendment to Rule 11 (pleas) was part of a package of amendments needed to bring the rule into conformity with the Supreme Court's decision in *United States v. Booker,* 543 U.S. 220 (2005), which effectively made the federal sentencing guidelines advisory rather than mandatory.

She noted that Rule 11(b) specifies the matters that a judge must explain to the defendant before accepting a plea. Under the current rule, the judge must advise the defendant of the court's obligation to apply the sentencing guidelines. But, since *Booker*

has made the guidelines advisory, that advice is no longer appropriate. Accordingly, the amended rule specifies that the judge must inform the defendant of the court's obligation to "calculate" the applicable range under the guidelines, as well as to consider that range, possible departures under the guidelines, and the other sentencing factors set forth in 18 U.S.C. § 3553(a).

Judge Bucklew said that the advisory committee had received comments both from the federal defenders and the U.S. Sentencing Commission. The defenders, she said, had argued that the proposed amendment would give too much prominence to the guidelines, and they suggested that the committee recast the language to require a judge to consider all the factors in 18 U.S.C. § 3553(a). The Sentencing Commission asked the committee to change the word "calculate" to "determine and calculate." The advisory committee, she said, had considered both suggestions in detail, but it decided not to make the proposed changes and agreed to send the proposed amendment forward as published.

Professor Beale added that the advisory committee had added a paragraph to the committee note pointing out that there have been court decisions stating that under certain circumstances, the court does not have to calculate the guidelines *(e.g., United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005)). She pointed out that the added language was limited and had been worked out with the Department of Justice to make sure that it is not too broad.

One member suggested, though, that the added paragraph was inconsistent with the developing case law in his circuit, which requires district judges to calculate the guidelines in every case. Other members suggested, though, that it is a waste of time for a judge to calculate the guidelines in, say, a case with a mandatory minimum sentence. Some participants suggested possible improvements to the language of the last paragraph of the note. Judge Bucklew and Professor Beale agreed to work on the language during the lunch break, and subsequently reported their conclusion that the language should be withdrawn.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(d) and (h)

Judge Bucklew reported that the advisory committee had proposed several changes to Rule 32 (sentence and judgment). First, it inserted the word "advisory" into the heading of Rule 32(d)(1) (presentence report) to emphasize that the sentencing guidelines are advisory rather than mandatory.

She noted that the committee had received several comments on the proposed revision of subdivision (h) (notice of intent to consider other sentencing factors) to require notice to the parties of a judge's intent to consider other sentencing factors. The current rule, she said, specifies that if the court is going to depart under the guidelines for a reason of which the parties have not been notified, the court must provide "reasonable notice" and a chance to argue. She explained that the advisory committee would expand the rule to require reasonable notice whenever the court is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence for a reason not identified either in the presentence report or a party's pre-hearing submission. She said that the advisory committee had added more specific language to the rule following the comment period, stating that the notice must specify "any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence."

Professor Beale added that there had been litigation on this matter, but the committee was of the view that non-guideline sentences should be treated the same as departures. She noted that the committee had also adopted some refinements in language suggested by the Sentencing Commission.

Judge Bucklew reported that the advisory committee had added language to Rule 32(d)(2)(F) to require the probation office to include in the presentence report any other information that the court requires, including information relevant to the sentencing factors specified in 18 U.S.C. § 3553(a). Professor Beale said that the central question is how much information the probation office must include in the presentence investigation report. As revised, the rule specifies that the report must include any other information that the court requires, including information relevant to the factors listed in § 3553(a). She noted that the probation offices in many districts already include this information in the reports. But, she added, there is quite a variance in practice, and the revised language will provide helpful guidance.

A member expressed concern about the provision requiring special notice of a non-guidelines sentence, questioning whether it would undercut the right of allocution and interfere with judicial discretion. He suggested that matters arise at an allocution that the judge should take into account and may affect the sentence. He asked whether the sentencing judge would be required to adjourn the hearing and instruct the parties to return later. He also saw a difference between the obligation to notify parties in advance that the judge is considering a departure under the guidelines and a sentence outside the guidelines.

Other members shared the same concerns and expressed the view that the language of the proposed rule might restrict the authority of a judge to impose an appropriate sentence under *Booker* and 18 U.S.C. § 3553(a). One asked what the remedy

would be for a failure by the court to comply with the requirement. He added that there is also the question of whether the defendant can forfeit rights on appeal under the rule by not raising objections in the district court.

Judge Bucklew said that the case law in the area was very fluid. She noted that the advisory committee had no intention of restricting the court or requiring that any formal notice be given. Rather, she said, the focus of the committee's effort had been simply to avoid surprise to the parties. One participant emphasized that the rule uses the term "reasonable notice," which has not changed since *Booker* and has a long history of interpretation. Another participant noted that lawyers will have to look at the law of their own circuit.

One member added that the problem of surprise arises because parties normally have an expectation that the judge will impose a sentence within the guideline range. But, he added, in at least one circuit, the guidelines are now only one factor in sentencing, and the parties do not have the expectation of a guideline sentence.

Judge Hartz moved to send the proposed amendments to subdivision (h) back to the advisory committee to consider the matter anew in light of the concerns expressed and the developing case law. One member noted that the appellate court decisions on these precise points appear to be going in different directions. Another added that the matter is very fluid, and the committee should avoid writing into the rules a standard that will change over time.

The committee with one objection approved Judge Hartz's motion to send the proposed revisions to Rule 32(h) back to the advisory committee.

The committee without objection by voice vote agreed to send the proposed amendments to Rule 32(d) to the Judicial Conference for final approval.

FED. R. CRIM. P. 32(k)

Judge Bucklew reported, by way of information, that the advisory committee had decided to withdraw the published amendment to Rule 32(k) (judgment). It would have required judges to use a standard judgment and statement of reasons form prescribed by the Judicial Conference. But, she said, a recent amendment to the USA PATRIOT Act requires judges to use the standard form. Thus, there was no longer a need for an amendment.

FED. R. CRIM. P. 35(b)

Judge Bucklew reported that the only purpose of the proposed amendment to Rule 35 (correcting or reducing a sentence) was to remove language from the current rule that seems inconsistent with *Booker*. She added that the National Association of Criminal Defense Lawyers had suggested during the comment period that any party should be allowed to bring a Rule 35 motion, not just the attorney for the government. She said that the advisory committee did not adopt the change and recommended that the rule be approved as published.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 45(c)

Judge Bucklew explained that the proposed revision of Rule 45 (computing and extending time) would bring the criminal rule into conformance with the counterpart civil rule, FED. R. CIV. P. 6(e) (additional time after certain kinds of service). It specifies how to calculate the additional three days given a party to respond when service is made on it by mail and certain other specified means.

The committee without objection by voice vote agreed to send the proposed amendment to the Judicial Conference for final approval.

FED. R. CRIM. P. 49.1

As noted above on page 7, the committee approved the proposed new Rule 49.1 (privacy protection for filings made with the court) and voted to send it to the Judicial Conference for final approval as part of its discussion of the report of the Technology Subcommittee.

Amendments for Publication

FED. R. CRIM. P. 29

Judge Bucklew reported that the proposed revision to Rule 29 (motion for judgment of acquittal) had a long and interesting history. She pointed out that the proposal had been initiated by the Department of Justice in 2003. The principal concern of the Department, she said, was that a district judge's acquittal of a defendant in the middle of a trial prevents the government from appealing the action because of the Double Jeopardy Clause of the Constitution. She explained that the Department's

proposed rule would have precluded a judge in all cases from granting an acquittal before the jury returns a verdict.

Judge Bucklew noted that the advisory committee had considered the rule at two meetings, in 2003 and 2004. At the first, she said, the committee had been inclined to approve a rule in principle, and it asked the Department of Justice to provide additional information. At the second meeting, however, the committee decided that no amendment to Rule 29 was necessary.

At the January 2005 Standing Committee meeting, the Department made a presentation in favor of amending Rule 29. In doing so, it pointed to a number of cases in which district judges had granted acquittals in questionable cases. As a result, she said, the Standing Committee returned the rule to the advisory committee and asked it to: (1) draft a proposed amendment to Rule 29, and (2) recommend whether that amendment should be published.

Judge Bucklew reported that the advisory committee had considered the rule again, and it took several meetings to refine the text. The committee was in agreement on the language of the rule. But, she said, it was divided on wisdom of proceeding with the rule as a matter of policy. It recommended publication by a narrow vote of 6-5. She noted that one committee member had been absent, and his vote would have made the vote 7-5 for publication.

She emphasized that the reservations of certain members were not as to the language of the rule, but as to the policy. The objectors, she explained, were concerned that the rule would restrict the authority of trial judges to do justice in individual cases and to further case management. She added that there also was real doubt among the advisory committee members as to the need for any amendment. They accepted the fact that there had been a few cases of abuse under the current rule, but the number of problems had been minimal.

Judge Bucklew stated that the revised Rule 29 would specify that if a court is going to grant a motion for acquittal before the jury returns a verdict, it must first inform the defendant personally and in open court of its intent. The defendant then must waive his or her double jeopardy rights and agree that the court may retry the case if the judge is reversed on appeal.

One of the participants observed that a sentence in the proposed committee note declared that the rule would apply equally to motions for judgment of acquittal made in a bench trial. Professor Beale replied that the rule did not apply to bench trials, and the sentence would be removed.

Deputy Attorney General McNulty thanked the advisory committee and the Standing Committee for considering the recommendations of the Department of Justice. He said that Department attorneys felt very strongly about the subject and wanted the committee to go forward with publication. He added that the vast majority of judges exercise their Rule 29 authority wisely and in a way that allows the government to seek judicial review. But, he said, there had been some bad exceptions that have had a large impact and had undercut the jury's ability to decide the case and the government's right to have its charging decision given appropriate deference. He said that Rule 29 presented a unique situation that needed to be addressed, and he added that it had been the policy of Congress to provide greater opportunity to the government for appellate review.

Finally, he said, the waiver approach adopted by the advisory committee with the revised rule achieves a fine balance. It gives the judge the opportunity to do justice and further case management objectives, while preserving the right of the government to appeal. He concluded by strongly urging the committee to approve publication.

One of the members objected on the grounds that the rule represents a major shift in the architecture of trials that would upset the balance in criminal trials and diminish the rights of defendants. First, he said, such a large change in criminal trials should be made by Congress through legislation, and not through rulemaking by the committee. Second, he expressed concern over the closeness of the vote in the advisory committee. The 6-5 vote, he said, was essentially a statistical tie, and the fact that the matter had been debated and deferred at so many meetings demonstrates that there are serious problems with the proposal. Third, he expressed concern that the defendant must waive his or her constitutional rights. This, he said, was unsettling. Fourth, he emphasized that he was aware of many instances in which the government overcharges, particularly by including extraneous counts and peripheral defendants. The courts, he argued, should have the power to winnow out the extra charges and defendants, and the hands of judges should not be bound by the rule. Fifth, he said that it is unfair for defendants to have a "sword of Damocles" hanging over their heads for two or three years, while the government appeals the trial judge's decision to acquit. Finally, he summarized, the rule was sure to lead to unintended consequences, and the changes the government wants should not be made through the rules process.

Several members of the committee expressed sympathy for these views, but they nevertheless announced that they favored publication of the rule.

Judge Levi added some background on the history of the rules. He noted that it had been on the agenda for some time, and it had been approved originally by the advisory committee with considerable support, perhaps by an 8-4 vote. Then, however, at the next meeting the committee changed its mind.

Initially, he explained, the proposal of the Department of Justice had been to prevent a judge from entering a pre-verdict of acquittal in any circumstances. But the district judges on the advisory committee asked how they would be able to deal with problems arising from excess defendants, excess counts, and hung juries.

The waiver proposal, he said, had been developed to address these competing concerns. It would preserve the discretion of the district judges and help them manage their cases. Yet it would give the government the right to appeal a district judge's pre-verdict acquittal. Nevertheless, he pointed out, the advisory committee rejected the waiver proposal and decided that no change was needed in the rule.

At the January 2005 Standing Committee meeting, Associate Deputy Attorney General Christopher Wray made strong arguments in support of the proposed rule amendment that included the waiver procedure. Judge Levi said that the Department had been very persuasive, and the Standing Committee took a strong position and directed the advisory committee to draft a proposed amendment. Then, he said, the Department went back to the advisory committee and made the argument for the proposed amendment, which the committee approved on a 6-5 vote.

Judge Levi said that he would prefer to handle the proposal through the rulemaking process, rather than have the Department go to Congress for legislation.

One member expressed concerns over the proposal, but said that he had been convinced to support publication because the rule was supported by Robert Fiske, a distinguished member of the advisory committee who had served as both a prosecutor and defense lawyer. He added that while the number of abuses is very small, the cases in which abuse has occurred under Rule 29 have tended to be prominent.

He added that the rules do in fact affect the architecture of trials. The waiver proposal, he said, may be unique, but it is an innovative attempt to assist judges in managing cases and addressing overcharging by prosecutors. He added that it was important to foster dialogue between the judiciary and the Department of Justice and to solicit the views of the bench and bar on the proposal. To date, he said, the proposal had been debated only by the members of the committees, but not by the larger legal community. Publication, he said, would be very beneficial.

Another member said that the proposed rule is a very nice solution to the problem. He said that it can be a travesty of justice when a judge makes a mistake under the current rule. The right of a judge to grant an acquittal remains in the rule, but it is subject to further judicial scrutiny.

One member asked whether there were other rules that require defendants to waive their constitutional rights. One member suggested that an analogy might be made to conditional pleas under FED. R. CRIM. P. 11(a)(2). Professor Capra added that FED. R. CRIM. P. 7 provides for waiver of indictment by the defendant, and FED. R. CRIM. P. 16 (discovery and inspection) contains waiver principles when the defendant asks for information from the government. Both require a defendant to waive constitutional rights in order to take advantage of the rule.

Judge Levi pointed out that the committee could withdraw the rule after the public comment period, and it had done so with other proposals in the past. But, he said, as a matter of policy, the committee should not publish a proposal for public comment unless it has serious backing by the rules committees.

One member expressed concern that if the rule were published, it might lead the public to believe that it enjoyed the unanimous support of the committee. Judge Levi responded that the committee does not disclose its vote in the publication because it wants the public to know that it has an open mind. Mr. Rabiej explained that the publication is accompanied by boilerplate language that tells the public that the published rule does not necessarily reflect the committee's final position. He added that the report of the advisory committee is also included in the publication, and it normally alerts the public that a proposal is controversial.

The Deputy Attorney General stated that the Department of Justice wanted to have its points included in the record to continue the momentum into the next stage of the rules process. He said that he had been surprised over the arguments that the proposed change should be made by legislation, rather than through the rules process. He pointed out that he had worked as counsel for the House Judiciary Committee for eight years and had heard consistently from the courts that the rulemaking process should be respected. He said that it was in the best interest of all for the proposal to proceed through the rulemaking process, rather than have the Department seek legislation. He noted that while there had only been a few cases of abuse by district judges, those few tended to occur in alarming situations and could be cited by the Department if it were to seek legislation.

He said that the Department had worked for several years on the proposal with the committees through the rulemaking process and would like to continue on that route. The proposal, he said, had substantial merit and should be published.

He added that the Department disagreed with the characterization that the proposed amendment would alter the playing field. Rather, he said, it would preserve the right to present evidence and to have the court's ruling on acquittal preserved for appellate review. A pre-verdict judgment of acquittal, he emphasized, stands out from all

other actions and is inconsistent with the way that other matters are handled in the courts. He pointed out, too, that the Department was deeply concerned about the dismissal of entire cases without appellate review. On the other hand, it was not as concerned with a court dismissing tangential charges. He concluded that the Department would do all it could to work toward a balanced solution to a very difficult problem. The waiver proposal, he said, is a good approach. It is a good compromise and offered a balanced solution to the competing interests. He said that the Department appreciated the opportunity to come back to the committee.

One member suggested deleting the word "even" from line 20 in Rule 29(a)(2). It was pointed out that the word had been inserted as part of the style process. Judge Levi suggested that Style Subcommittee take a second look at the wording as part of the public comment process.

The committee, with one dissenting vote, approved the proposed rule for publication by voice vote.

FED. R. CRIM. P. 41(b)(5)

Judge Bucklew reported that the proposed amendment to Rule 41(b)(search warrants) would authorize a magistrate judge to issue a search warrant for property located in a territory, possession, or commonwealth of the United States that lies outside any federal judicial district. Currently, a magistrate judge is not authorized to issue a search warrant outside his or her own district except in terrorism cases..

She noted that the Department of Justice had raised its concern about the gap in authority at the last meeting of the advisory committee. The Department had asked the committee to proceed quickly because of concerns over the illegal sales of visas and like documents. It felt constrained because overseas search warrants could not be issued in the districts where the investigations were taking place. She explained that the proposed amendment to Rule 41(b)(5) would allow an overseas warrant to be issued by a magistrate judge having authority in the district where the investigation is taking place, or by a magistrate judge in the District of Columbia. The advisory committee, she added, had voted 10-1 to publish the rule.

Judge Bucklew advised the committee of developments that had occurred since the vote. She noted that at Judge Levi's suggestion, Mr. Rabiej had sent the proposal to Judge Clifford Wallace, who chairs the Ninth Circuit's Pacific Islands Committee. In turn, Judge Wallace contacted the Chief Justice of American Samoa, who objected to the proposed amendment. Judge Wallace suggested that the proposal be remanded back to the advisory committee in order to give American Samoa a chance to respond. She added that she was not sure exactly what American Samoa's concerns were, but it appeared that

the Chief Justice did not want judges in other parts of the country issuing warrants for execution in American Samoa.

Judge Bucklew reported that after speaking with Judge Wallace, the Administrative Office had polled the advisory committee as to whether it should wait until the Chief Justice of American Samoa and the Pacific Islands Committee of the Ninth Circuit respond. Accordingly, it voted 9-2 to allow time for a response. She noted that the Department of Justice representative objected, along with one other advisory committee member. She added that later discussions have suggested that the proposal could still be published, with American Samoa and the Pacific Islands Committee commenting during the public comment period.

She pointed out that after the advisory committee meeting, the House of Representatives passed a bill containing a provision similar to the proposal to amend Rule 41(b). Basically, it would allow investigation of possible fraud and corruption by officers and employees of the United States in possible illegal sales of passports, visas, and other documents. It would authorize the district court in the District of Columbia to issue search warrants for property located within the territorial and maritime jurisdiction of the United States. She added that she was not sure what the Department's position would be on the bill, and she noted that the legislation probably did not cover everything in the proposed rule amendment.

Professor Beale said that the Department of Justice's largest concern was with visa fraud. This, in turn, was connected with larger issues of illegal immigration and terrorism. In addition, the question arose whether the committee would have to republish the current proposal if its reference to a territory of the United States were deleted following the public comment period. She concluded that republication would probably not be required. She explained that subdivision (a) of the rule, which refers to territories, was not connected to subdivisions (b) and (c), which authorize search warrants for property in diplomatic or consular missions and residences of diplomatic personnel. She said that the committee could place brackets around subdivision (a) and invite comment from American Samoa and others as to whether subdivision (a) should be included.

Judge Bucklew also pointed out, as mentioned in the advisory committee's report, that a similar, but broader proposal had been approved by the Judicial Conference but rejected by the Supreme Court in 1990.

Judge Levi suggested bracketing the language regarding American Samoa. He noted from speaking with Judge Wallace that there is a great deal of sensitivity in American Samoa about any intrusion into its judicial process. He noted that the situation is very different from the other Pacific Islands territories, such as Guam and the Northern Marianas, both of which have Article I federal district courts. The history of how the

United States acquired American Samoa is different from that of other territories, and the relevant treaty explicitly requires the United States to respect the judicial culture of American Samoa. He noted, too, that there had been a proposal to establish an Article I federal court in American Samoa, but it has been very controversial.

Judge Levi also pointed out that Judge Wallace warned that if the proposal to amend Rule 41 is published without bracketing American Samoa, there could be a good deal of needless controversy generated. The primary concern of the Department of Justice, he said, is with oversees searches, and not with American Samoa. He asked whether the advisory committee would be amenable to bracketing the language dealing with American Samoa.

Judge Bucklew responded that the advisory committee would certainly approve placing brackets around the provision to flag it for readers. She said that the proposed amendments to Rule 41 were very beneficial, and it would be a shame not to have them proceed because of a controversy over a matter of relatively minor concern to the government.

The committee unanimously approved the proposed amendment, with the pertinent language of subsection (A) bracketed, for publication by voice vote.

MODEL FORM 9 ACCOMPANYING THE SECTION 2254 RULES

Mr. Rabiej stated that the committee needed to abrogate Form 9 accompanying the § 2254 rules. He noted that the form is illustrative and implements Rule 9 of the § 2254 rules (second or successive petitions). The form, however, was badly out of date, even before the habeas rules were restyled, effective December 1, 2004. For example, it contains references to subdivisions in Rule 9 that no longer exist and includes provisions that have been superseded by the Antiterrorism and Effective Death Penalty Act of 1996.

He added that when the restyled habeas corpus rules had been published for comment in August 2002, the advisory committee received comments from district judges recommending that the form not be continued because the courts relied instead on local forms. The courts wanted to retain flexibility to adapt their forms to local conditions instead of following a national form. The advisory committee and its habeas corpus subcommittee did not specifically address abrogation of the form. Thus, technically Form 9 still remains on the books. He added that the form had been causing some confusion, and the legal publishing companies no longer include it in their publications. In addition, Congressional law revision counsel thought that the form had been abrogated and no longer included it in their official documents. Therefore, Mr. Rabiej said, it would be best for the committee to officially abrogate the form through the

regular rulemaking process. *i.e.,* approval by the committee and forwarding to the Supreme Court and Congress.

The committee without objection by voice vote agreed to ask the Judicial Conference to abrogate Form 9 accompanying the § 2254 Rules.

Informational Items

Judge Bucklew reported that the advisory committee was still working on a proposed amendment to FED. R. CRIM. P. 16 (discovery and inspection), which would expand the government's obligation to disclose exculpatory and impeaching information to the defendant. She said that the matter was controversial, and the Department of Justice was strongly opposed to any rule amendment. Instead, she said, it had offered to draft amendments to the *United States Attorneys' Manual* as a substitute for an amendment. The matter, she added, was still in negotiation. Deputy Attorney General McNulty and Assistant Attorney General Fisher said that the Department was still working on the manual and was hopeful of making progress.

Judge Bucklew said that the committee was also considering a possible amendment to FED. R. CRIM. P. 41 (search warrants) that would address search warrants for computerized and digital data. It was also looking at possible amendments to the § 2254 rules and § 2255 rules to restrict the use of ancient writs and prescribe the time for motions for reconsideration.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachments of May 15, 2006 (Agenda Item 8).

New Rule for Publication

FED. R. EVID. 502

Judge Smith reported that the advisory committee had only one action item to present — proposed new FED. R. EVID. 502 to govern waiver of attorney-client privilege and work product protection. He referred back to the report of the Administrative Office and Mr. Rabiej's description of the exchange between Judge Levi and the chairman of the House Judiciary Committee. He noted that the committee had received a specific request from Chairman Sensenbrenner to draft a rule that would:

1. protect against inadvertent waiver of privilege and protection,

2. permit parties and courts to disclose privileged and protected information to protect against the consequences of waiver, and

3. allow parties and entities to cooperate with government agencies by turning over privileged and protected information without waiving the privilege and protection as to any other party in subsequent proceedings.

He explained that rules that affect privilege must be addressed by Congress and enacted by legislation. Thus, the rules committees could produce a rule through the Rules Enabling Act process that would then be enacted into law by Congress.

Judge Smith noted that the advisory committee had conducted a very profitable conference at Fordham Law School in New York at which 12 invited witnesses commented on a proposed draft of the rule. He said that the committee had refined the rule substantially as a result of the conference, and the improved product was ready for approval by the Standing Committee to publish. He explained that the rule incorporated the following basic principles agreed upon unanimously by the advisory committee:

1. A subject-matter waiver should be found only when privileged material or work product has already been disclosed and a further disclosure "ought in fairness" to be required.

2. There should be no waiver if there is an inadvertent disclosure and the holder of the protection takes reasonable precautions to prevent disclosure and reasonably prompt measures to rectify the error.

3. Selective waiver should be allowed.

4. Parties should be able to get an order from a court to protect against waiver vis a vis non-parties in both federal and state courts.

5. Parties should be able to contract around the common-law waiver rules. But without a court order, their agreement should not bind non-parties.

Judge Smith pointed out that the rule included some controversial matters, but it was needed badly to control excessive discovery costs. He said that the burdens and cost of preserving the privileged status of attorney-client information and trial preparation materials had gotten out of hand without deriving any countervailing benefits.

Judge Smith pointed out that selective waiver was the most controversial provision in the rule. It would protect a party making a disclosure to a government law enforcement or regulatory agency from having that disclosure operate as a waiver of the privilege or protection vis a vis non-governmental persons or entities. He explained that the advisory committee would place the provision in brackets when the rule is published and state that the committee had not made a final decision to include it in the rule.

Professor Capra agreed that the most controversial aspect of the rule was the selective waiver provision. He pointed out that the proposed rule takes a position inconsistent with most current case law. He emphasized that the advisory committee had not decided to promulgate that part of the rule, so the provision is set forth in brackets. In addition, the accompanying letter to the public states that the committee had not made a decision to proceed and wanted comments directed to the advisability of including a selective waiver provision. Judge Levi added that Chairman Sensenbrenner had specifically asked the committee to include a selective waiver provision in the rule.

Professor Capra explained that the original version of the rule had a greater effect on state court activity and sought to control state law and state rules on waiver. But the Federal-State Jurisdiction Committee of the Judicial Conference – and the advisory committee itself after its hearing in New York – concluded that the draft was too broad. Accordingly, it was amended and now covers only activity occurring in a federal court.

Judge Levi noted that the representative of an American Bar Association's Task Force on the Attorney-Client Privilege opposed the rule at the New York conference because he said that it would foster the "coercive culture of waiver." The task force, he explained, is concerned that waivers are being extorted by government agencies from businesses as part of the regulatory and law enforcement processes.

Judge Levi added that he had spoken to the chair of the task force and emphasized that the committee was not trying to encourage the use of waivers. Nor was it taking a position on Department of Justice memoranda to U.S. attorneys encouraging them to weigh a corporations's willingness to waive the attorney-client privilege in assessing its level of cooperation for sentencing purposes. Rather, he emphasized, the rules committee was just trying to promote the public interest by facilitating the conduct of government investigations into public wrongs. Judge Levi added that, in response to the concerns of the ABA task force, the committee should include a statement in the publication to the effect that the committee was not taking a position regarding the government's requests for waivers. The addition, he said, could avoid misdirected criticism of the rule.

Associate Attorney General McCallum agreed that the explanation would be helpful to the organized corporate bar. He said that the Department had been surprised by the feedback at the Fordham conference, where some participants had voiced strong

opposition to the proposal on the ground that it would foster a culture of waiver. He said that the Department supported the pending new Rule 502 and would continue to work with the organized bar over their concerns.

One member questioned the effect of the proposal on state court proceedings. He asked whether the advisory committee had examined the power of Congress under the Commerce Clause of the Constitution to effect changes in the rules of evidence in the state courts. Professor Capra responded that the committee had indeed examined the issue and had invited an expert to testify on it at the mini-conference. In addition, he said, Professor Kenneth Broun, a consultant to the committee and a former member of the committee, had also completed a good deal of research on the issue. He said that the proposed rule dealt only with the effect on state court proceedings of disclosures made in the federal courts. It did not address the more questionable proposition of whether the rule could control disclosures made in state court proceedings. The literature, he said, suggests that Congress has the power to regulate even those disclosures. But, he said, the advisory committee narrowed the rule to cover only disclosure at the federal level.

One member asked whether the Department of Justice favored selective waiver in order to promote law enforcement and regulatory enforcement efforts. He noted that he had sat on a case in which the panel of the court of appeals had asked the Department to file an amicus curiae brief on the issue, but had received none. He said that the panel had been frustrated by the uncertainty regarding the Department's views on the issue. Associate Attorney General McCallum pointed out that the Department acts as both plaintiff and defendant and that some components of the Department strongly favor selective waiver. He noted, by way of example, that the prosecutions in the Enron case would have been more difficult and time-consuming if waivers had not been given. The waivers, he emphasized, had been voluntarily given with the advice of counsel. He explained that the Department favors selective waiver, but had not yet taken an official position on the matter.

Judge Levi explained that the purpose of selective waiver is to encourage companies to cooperate in regulatory enforcement proceedings. He said that the Securities and Exchange Commission favored the proposed Rule 502, and it would be very helpful to obtain the views of other law enforcement and regulatory authorities in order to develop the record for the advisory committee. Professor Capra added that the strong weight of authority among the circuits, as expressed in the case law, was against selective waiver. Therefore, he said, there needed to be a strong showing in favor of it during the public comment period. Judge Levi concurred and added that a strong case also needs to be made by the state attorneys general and other regulatory authorities.

The committee unanimously approved the new rule for publication by voice vote.

Informational Items

Professor Capra reported that the advisory committee had been monitoring the developing case law on testimonial hearsay following *Crawford v. Washington,* 541 U.S. 36 (2004). He noted that the Supreme Court had just issued some opinions dealing with *Crawford,* but the issues in the cases were relatively narrow and do not provide sufficient guidance on how to treat hearsay exceptions in the federal rules. The advisory committee, he said, would continue to monitor developments, and it wanted to avoid drafting rules that later could become constitutionally questionable.

Professor Capra also reported that the advisory committee was considering restyling the Federal Rules of Evidence, mainly to conform the rules to the electronic age and to account for information in electronic form. He noted that the committee had had discussions on how to address the matter, and it had considered the possibility of restyling the entire body of evidence rules. He added that he planned to work with Professor Kimble to restyle a few rules for the committee to consider at its next meeting. Finally, he noted, the view of the Standing Committee on whether to restyle the evidence rules will be very important.

Professor Capra reported that draft legislation was being considered in Congress that would establish a privilege for journalists. The legislative activity, he said, stemmed in part from the controversies surrounding the celebrated cases involving the imprisonment of New York Times reporter Judith Miller and the leak of the identity of C.I.A. employee Valerie Plame. He explained that the Administrative Office had reviewed the proposed legislation and offered some suggestions on how its language could be clarified. Mr. Rabiej added that many of the suggestions had been adopted by the Congressional drafters.

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Judge Kravitz and Professor Struve presented the report of the subcommittee, as set forth in Judge Kravitz's memorandum of January 20, 2006 (Agenda Item 9).

Judge Kravitz reported that the advisory committees at their Spring 2006 meetings had embraced the time-computation template developed by the subcommittee, including its key feature of counting all days and not excluding weekends and holidays.

He pointed out that the Standing Committee at its January 2006 meeting had asked the subcommittee and the advisory committees specifically to address two issues: (1) the inaccessibility of a clerk's office to receive filings; and (2) whether to retain the provision that gives a responding party an additional three days to act when service is

made on it by mail or by certain other means, including electronic means. He noted that the advisory committees had decided that the issue of inaccessibility needed additional study, and the subcommittee was willing to take on the task. Professor Capra added that the Technology Subcommittee had already considered these issues as part of its participation in the project to develop model local rules to implement electronic filing.

As for the "three-day rule," Judge Kravitz reported that the sense of the advisory committees was to leave the rule in place without change at this time. He said that it seemed odd to give parties an extra three days when they have been served by electronic means, but many filings are now made electronically over weekends and the committees were concerned about potential gamesmanship by attorneys. So, the general inclination has been not to amend the rule at this point.

Judge Kravitz said that the Advisory Committee on Civil Rules had suggested some helpful improvements to the template. First, he noted, the language of the template speaks in terms of filing a "paper." But in the electronic age, he said, it makes sense to eliminate the word "paper."

Second, he pointed out that the template speaks in terms of a day in which "weather or other conditions" make the clerk's office inaccessible. He said that the advisory committee was concerned about the specific reference to "weather" because it implies that only physical conditions may be considered. Instead, the language might be improved by simply referring to a day on which the clerk's office "is inaccessible." The committee note could explain, though, that elimination of the word "weather" is not intended to remove weather as a condition of inaccessibility.

Third, the advisory committee suggested deleting state holidays as days to exclude in computing deadlines. Most federal courts, he said, are in fact open on state holidays. He noted that the subcommittee had not decided to make this change, but would be amenable to doing so if the Standing Committee expressed support for the change.

Fourth, he said that the advisory committee had noted that "virtual holidays" were not included in the template, *e.g.*, the Friday after Thanksgiving and the Monday before a national holiday that falls on a Tuesday. Some federal courts, he said, are effectively closed on those days, although their servers are available to accept electronic filings.

Fifth, he said that the advisory committee had suggested including a definition of the term "last day" in the text of the rule. He reported that Professor Cooper had drafted a potential definition, drawing on the text of local court rules implementing electronic filings. It states that, for purposes of electronic filing, the "last day" is midnight in the time zone where the court is located. For other types of filings, it is the normal business hours of the clerk's office, or such other time as the court orders or permits.

Judge Kravitz explained that the civil, bankruptcy, and appellate rules – unlike the criminal rules – apply in calculating statutory deadlines as well as rules deadlines. He pointed out that Professor Struve had completed an excellent memorandum on the subject in which she identified many important statutory deadlines. Her initial study had found more than 100 statutory deadlines of 10 days or fewer. Many of them, he added, are found in bankruptcy. Moreover, some apply not to lawyers, but to judges. Under the current rules, he said, a deadline of 10 days usually means 14 days or more because weekends and holidays are not counted. But under the approach adopted in the template, 10 days will mean exactly 10 days.

Judge Kravitz reported that the Advisory Committee on Civil Rules had suggested that the advisory committees should consider expressing all, or most, time periods in multiples of seven days. The concept, he noted, seems generally acceptable but may not work well across-the-board for all deadlines. It may be, he said, that deadlines below 30 days would normally be expressed in multiples of seven, but the longer periods now specified in the rules, such as 30, 60, or 90 days might be retained.

Finally, Judge Kravitz thanked Judge Patrick Schiltz, former reporter for the appellate rules committee and special reporter for the time-computation project, for his superb research and memoranda and for drafting the template and supporting materials that got the project moving. He also thanked Professor Struve for picking up the work from Judge Schiltz and for her excellent memorandum on statutory deadlines. He also praised the advisory committees for their dedication to the project and their invaluable help to the subcommittee.

Professor Struve highlighted the backward-counting provision in the template rule and wondered about its practical effect. Judge Kravitz explained that the advisory committee had wanted a simple rule. He acknowledged that there are scenarios under the template in which litigants may lose a day or two in filing a document, and judges would gain a day or two. But, he said, even though the subcommittee consisted mostly of practicing attorneys, all endorsed the basic principle – in the interest of simplicity – that once one starts counting backward, the count should continue in the same direction.

Professor Cooper added that the bar for years had urged the Advisory Committee on Civil Rules to make the rules as clear as possible, and one attorney recently had asked the committee to draft a clear rule telling users how to count backwards, *e.g.*, to calculate a deadline when a party has to act a certain number of days *before* an event, such as a hearing. To that end, he said, it might be advisable to put back into the template the words "continuing in the same direction," which had been dropped from an earlier draft in the interest of simplicity. Including those words would make it clear that backward counting follows the same pattern as forward counting. A member of the committee strongly urged including the clarifying language in the rule.

Judge Kravitz said that the most difficult issue appeared to be the applicability of the rule to statutory deadlines. A few statutes, he said, speak specifically in terms of calendar days. But when statutes do not specify calendar days, it can be assumed that only business days are counted under the current rule when a deadline is 10 days or fewer. He pointed out that the practical impact of the template rule would be to shorten statutory deadlines of 10 days or fewer. That result, he said, might undercut the bar's acceptance of the time-computation project.

Professor Morris added that the template rule would have a substantial impact on bankruptcy practice because a great many state statutes are in play in bankruptcy cases. Under the current bankruptcy rule, he said, the statutes are calculated by counting only business days.

Professor Morris also noted that the proposed template rule speaks of inaccessibility in such a way that it could be interpreted to include inaccessibility on a lawyers' end, as well as the inaccessibility of the clerk's office to accept filings. He suggested that the rule might be broad enough to cover the situation where a law firm's server is not working.

Judge Rosenthal explained that the civil advisory committee had considered that situation and had decided tentatively that it was not possible to write a rule to cover all situations. She suggested that it should be left up to the lawyers to decide whether they need to ask a court for an extension of time in appropriate situations. She cautioned, however, that there are a handful of time limits in the rules that a court has no authority to extend.

One participant urged that the time had come to move forward with the time-computation project, despite the complications posed by statutory deadlines. He suggested, moreover, that Congress might well be amenable to making appropriate statutory adjustments in this area to accommodate the time-computation project, especially if the bar associations agree with the committee's proposal.

Judge Levi asked whether the subcommittee was contemplating further changes or additions to the template. Judge Kravitz responded that at least three changes should be made. First, he said the subcommittee would eliminate the word "paper." Second, he said that he had been persuaded to eliminate the word "weather," so the rule would state simply that the last day is not counted if the clerk's office is "inaccessible." Third, he agreed to add to the rule a definition of "last day" along the lines of Professor Cooper's proposal. That definition, he noted, is workable and already exists in most of the local court rules dealing with electronic filing.

In addition to those three changes, Judge Kravitz said that he had no objection to eliminating state holidays from the rule if there were support for the change. As for closure of the federal court on a "virtual holiday," he said that the problem would be taken care of by revising the rule to specify that the last day is not counted if the clerk's office is inaccessible. Several members of the committee suggested that both state holidays and virtual holidays be eliminated from the rule. Thus, the only exclusions in the rule would be for federal holidays and days when the clerk's office is "inaccessible." Another member added that it should be made clear in the rule that "inaccessibility" applies only to problems arising at the courthouse, and not in a lawyer's office.

Judge Kravitz noted that the instructions from the Standing Committee were for the advisory committees to review individually each of the individual time limits in their respective rules and to recommend appropriate adjustments to them in light of the template's mandate to count all days, including weekends and holidays.

One participant suggested that the only significant issue relating to statutes was the problem that the proposed rule would shorten statutory deadlines of 10 days or fewer. Another participant pointed out, though, that the supersession provision of the Rules Enabling Act might also be implicated.

One advisory committee chair suggested that it would be very helpful for the advisory committees to have a list of all the various statutory deadlines and an indication of how often they actually arise in daily situations. Some of the statutes, she said, might make a big difference in federal practice, such as the 10 days given a party by statute to object to a magistrate judge's report.

One member said that the problem of shortening statutory deadlines had the potentiality of undermining the whole time-computation project and wasting a great deal of time and work by the advisory committees.

Another added that it was questionable whether judges have authority to extend statutory deadlines. He suggested that it might be appropriate to speak with members of Congress about the issue. Another participant said that Congress might give its blessing to fine tuning the calculation of statutory deadlines, as long as the particular deadlines affected are not politically charged.

Professor Struve added that she had just scratched the surface with her initial research into statutory deadlines. She said that it would be a truly major project to gather all the statutes, and the committee was bound to make a mistake or two. Professor Cooper pointed out that, unless the new rule also sweeps up all future statutes, some time periods could end up being counted one way and others another way – the worst possible outcome.

One member asked whether lawyers in fact even look to the federal rules to calculate a deadline in a statute. Or do they merely look to the statute itself? In other words, if a statutory deadline is 10 days, do lawyers assume that it means 10 days, as set forth in the plain language of statute itself, or 14 days, as calculated under the federal rules?

Judge Kravitz suggested that the choice for the advisory committees was either: (1) to continue their examination of each time limit in their respective rules, or (2) to try to solve the statutory deadline problems first, present a solution to those problems at the January 2007 Standing Committee meeting, and then resume work on the specific time limits. One advisory committee chair said that it was important to have a firm road map in place before the advisory committees commit themselves to a great deal of work.

One participant concluded that the committees may not be able to resolve all the open questions regarding statutory interpretation and the interplay between statutes and rules. Professor Cooper pointed out that supersession questions already make it unclear in several instances whether a statute or a related rule should control the computation of a given time limit. Many of those questions have never been faced and answered. In the interest of simplicity, though, he suggested that it may make sense simply to abolish the 11-day rule explicitly for both rules and statutes, even if that results in certain statutory time limits being shortened.

Two members suggested that another possible resolution of the statutory problems would be to eliminate all reference in the rule to calculating time limits set forth in statutes. Therefore, the rules, as revised, would apply only in calculating time limits set forth in rules and court orders. Another member pointed out that this solution would bring the civil and bankruptcy rules into line with the current criminal rules, which do not extend to calculation of statutory time limits.

One advisory committee chair suggested that there was great value in continuing the momentum that the Technology Subcommittee had created. She said that the civil advisory committee had made a good deal of progress, and it would be best to continue its work over the summer, despite the uncertainties over statutes.

Another advisory committee chair pointed out that there is a difference between counting hours and counting days. Under the rules, he explained, days are considered as units, not 24-hour periods. Therefore, a party has until the end of the last day in which to act. On the other hand, in counting hours, an hour counts as exactly 60 minutes, not as a unit. Therefore, a party has exactly 60 minutes in which to act. The time period is not rounded up to the end of the last hour. He suggested that the committee consider specifying in the template that 60 minutes is 60 minutes precisely.

One participant recommended that the committee consider whether Congress contemplates that its statutes will be interpreted according to the time-computation provisions in the federal rules. He suggested that the committee, by changing the method of calculating shorter statutory deadlines, might be contradicting the intentions of Congress in enacting the statutes.

Judge Kravitz added that the rule should provide clear advice to judges and lawyers on how to count time limits set forth in statutes. The proposed revision of the federal rules would effectively shorten the time for people to act. Therefore, he said, the committee should study such matters as how judges and lawyers actually count time in statutes, how many statutory deadlines there are, how often they arise in the courts, and whether they have caused practical problems. Once the committees understand these issues better, they should be able to propose the appropriate solution to the problem of counting time as set forth in statutes.

One member emphasized that the bar wants a clear, revised rule, and the time has come to promulgate it. Among other things, he said, lawyers are deeply concerned about achieving clarity because missing a deadline is a serious mistake that can lead to a malpractice claim. He suggested, among other things, that the committee expressly solicit the views of the bar regarding statutory deadlines or hold a conference with members of the bar on the subject.

Judge Levi suggested that each advisory committee decide how it should proceed on the matter in light of the discussion. Judge Stewart added that the template, with the various adjustments suggested at the meeting, provides the appropriate vehicle for the advisory committees.

LONG RANGE PLANNING

Mr. Ishida reported that the Judicial Conference's Long Range Planning Group, comprised of the chairs of the Conference's committees, had met in March 2006, and its report was included in the agenda book (Agenda Item 10). The group, he said, was preparing the agenda for its next meeting and had asked the chairs of each committee to submit suggested topics.

The planning group first asked the Standing Committee to identify key strategic issues affecting the rulemaking process and to report on what initiatives or actions it was taking to address those issues. Second, the planning group asked the committee to identify trends in the courts that merit further study and could lead to new rules. Mr. Ishida asked the members to consider these requests and send him any ideas that could be included in the committee's report to the planning group.

Mr. McCabe suggested that it would be very helpful for the committee to take advantage of the new statistical system being built by the Administrative Office. He said that the committee should consider the kinds of data that might be extracted from court docket events to develop a sound empirical basis for future rules amendments. Judge Levi endorsed the Administrative Office's efforts to improve and expand collection of statistical information from the courts.

One member suggested that the committee might also consider pro se cases as an area that needed to be addressed in future rulemaking.

Judge Levi agreed to work with Mr. Ishida on a response from the committee to the long range planning group.

NEXT COMMITTEE MEETING

The next committee meeting of the committee will be held in Phoenix in January 2007. The exact date of the meeting was deferred to give the chair and members an opportunity to check their calendars and for the staff to explore the availability of accommodations.

Respectfully submitted,

Peter G. McCabe,
Secretary

3-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: AMENDMENTS TO RULE 9011

DATE: JULY 26, 2006

The Subcommittee on Attorney Conduct met by teleconference to consider whether to propose amendments to Rule 9011. The issue was raised by Congress in a provisions contained in the 2005 Act. Congress specifically requires attorney certifications of information contained on the petition and schedules in chapter 7 cases under § 707(b)(4)(C) and (D). The 2005 Act also includes a provision stating the sense of Congress that Rule 9011 should be amended to expand the obligations of attorneys and parties to provide truthful information in papers submitted to the court and trustees. The Subcommittee on Attorney Conduct has now had an opportunity to consider that provision which did not amend the Bankruptcy Code (or any other provision of the United States Code). Section 319 of the 2005 Act states that

> It is the sense of Congress that rule 9011 of the Federal Rules of Bankruptcy Procedure (11 U.S.C. App.) should be modified to include a requirement that all documents (including schedules), signed and unsigned, submitted to the court or to a trustee by debtors who represent themselves and debtors who are represented by attorneys be submitted only after the debtors or the debtors' attorneys have made reasonable inquiry to verify that the information contained in such documents is –
>
> (1) well grounded in fact; and
>
> (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

The Committee also received a comment from Senator Grassley dated August 18, 2005 (Comment # 05-BK-001) and another dated March 13, 2006 submitted by Senators Grassley and

Sessions (Comment # 05-B-033) raising the related issue of the need for the Rules to include a provision that implements § 704(b)(4)(C) and (D). Those provisions state that the attorney's signature constitutes a certification by the attorney that the petition and other documents are correct based on a reasonable investigation. The comments are attached in separate documents.

The certification is made under § 704(b)(4)(C) and (D), so it is applicable only in chapter 7 cases. Section 319 of the 2005 Act, on the other hand, is not limited to chapter 7 cases, nor is it limited to documents that are filed with the court. The stated sense of Congress also differs from Rule 9011 in that it applies to any document submitted not just to the court, but also to the trustee. Also unlike Rule 9011, § 319 refers only to debtors' attorneys. Furthermore, the certification requirement in § 319 of the Act would be based on a standard that differs from the standard currently included in Rule 9011. Thus, there are a number of differences between existing Rule 9011 and the sense of Congress concerning the rule as set out in § 319 of the 2005 Act.

Rule 9011(a) excludes lists, schedules, and statements from its reach. This has led some to assert that the attorney makes no representation to the court regarding these items. *See, e.g.,* In re Engel, 246 B.R. 784, 788-89 (Bankr. M.D. Pa. 2000). As compared to the petition, the attorney does not sign these documents. Only the debtor signs these forms. Subdivision (b) of the rule, however, arguably expands the reach of the rule by making the representations applicable to any document that is presented to the court "whether by signing, filing, submitting, or later advocating" the paper. *See, e.g.,* In re Kelley, 255 B.R. 783, 786 (Bankr. N.D. Ala. 2000). In § 319, the sense of Congress is that the debtor's attorney must have made "a reasonable inquiry to verify that the information contained in such documents is – (1) well

grounded in fact; and (2) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." Rule 9011 is more specific and more expansive in its standard. The person governed by the rule must have made "an inquiry reasonable under the circumstances." Whether the reference to the specific circumstances is different from the standard included in the sense of Congress is debatable. Clearly, however, the language differs. Moreover, Rule 9011(b)(2) through (4) includes more expansive bases for making statements or denying matters than are set out in § 319.

Amending Rule 9011

The Subcommittee concluded that the statement of Congressional intent was sufficiently strong that the issue of whether to amend Rule 9011 should be presented to the Advisory Committee. The Subcommittee's decision was not to recommend a specific amendment to Rule 9011, but only to offer some alternatives for the Advisory Committee to consider. It also did not conclude that any amendment should be made to Rule 9011. Rather, the Subcommittee believes that a decision whether to amend Rule 9011 should be made in the first instance by the Advisory Committee. The Subcommittee also concluded that a meeting at which interested parties such as the American Bar Association, Commercial Law League, National Association of Bankruptcy Trustees, National Association of Chapter 13 Trustees, National Bankruptcy Conference, National Association of Consumer Bankruptcy Attorneys, and others could meet and discuss the issues might be particularly helpful to the Advisory Committee. Similar programs have been held at law schools in the past to consider matters such as the newly proposed electronic discovery rules.

Notwithstanding the Subcommittee's view that the Advisory Committee should make the

initial decision as to whether Rule 9011 should be amended, the Subcommittee did arrive at a consensus that any amendment to Rule 9011 should not initially be expanded to include all documents submitted to trustees as suggested in § 319. This would expand dramatically the scope of Rule 9011, and the potentially substantial volume of materials that might be turned over to a trustee[1] could create situations where the need for debtor's counsel to conduct an investigation into the accuracy of the documents will delay the submission of important information to the detriment of creditors and other interested parties.

Potential amendments to Rule 9011(a) and (b) are set out below. The Subcommittee did not consider whether any amendments should be made to the remaining subdivisions of the rule. The first alternative adopts language that would amend Rule 9011 in a manner that adopts a substantial portion of the language of § 319 of the 2005 Act. The second alternative retains much more of the current language of Rule 9011 while attempting to implement the sense of the Congress as expressed in § 319. After considering these options, the Subcommittee recommends that no amendments be made to Rule 9011 at this time, but that further consideration of these possible amendments be considered through focus group meetings or other public discussions with interested parties[2]. The Advisory Committee could then reconsider whether it is appropriate to amend Rule 9011.

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[1] Under § 1103(c) of the Code, the a creditors' committee performs many of the functions of a trustee, and the rule could be construed to apply to submissions to the creditors' committee. The Subcommittee did not believe that the rule should be expanded to apply to the transmission of documents and information to the creditors's committee.

[2] The Subcommittee vote was three members in favor of making no amendment to Rule 9011, and two members in favor of the Alternative A form of amendment. Four of the five members of the Subcommittee also voted in favor of conducting further study of the matter.

ALTERNATIVE A – SECTION 319 LANGUAGE

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every petition, pleading, written motion, and other paper, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) REPRESENTATIONS TO THE COURT BY ALL PARTIES AND ATTORNEYS; REPRESENTATIONS BY DEBTORS AND BY DEBTORS' ATTORNEYS.

(1) By presenting to the court, whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

~~(1)~~ (A) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in

the cost of litigation;

~~(2)~~ (B) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

~~(3)~~ (C) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

~~(4)~~ (D) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(2) All documents (including schedules), signed and unsigned, filed[3] with the court by debtors who represent themselves and by debtors who are represented by attorneys shall be filed only after the debtors or the debtors's attorneys have made a reasonable inquiry to verify that the information contained in such documents is –

(A) well grounded in fact; and

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[3] I have substituted "filed" for "submitted," which is the word Congress used in § 319, because we have used "submitted" for a different purpose under Rules 1007(f) and 1009(c). If this rule were to apply only to documents that are submitted rather than filed, the rule would apply only to the debtor's Official Form 21, the Debtor's Statement of Social Security Number.

(B) warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

* * * * *

COMMITTEE NOTE

Subdivision (b) of the rule is amended by adding a new subparagraph that establishes obligations on debtors and their counsel with respect to the veracity of information contained in any document that they file with the court. This new obligation implements the sense of Congress as set out in § 319 of Public Law No. 109-8.

This proposed amendment essentially adds the language of § 319 to Rule 9011. This is the most direct way to implement that sense of Congress. In my view, however, it highlights several problems with this proposal. First, it creates a different standard for review of the actions of attorneys based on the identity of their client. For example, counsel for a creditor or the trustee could assert that the information contained in a document is likely to have factual support after a subsequent period of discovery. That option would not be available to an attorney who is representing a debtor. To more starkly illustrate the distinction, suppose that the trustee sues the debtor and a transferee to recover a fraudulent transfer. The attorney for the transferee would be subject to subdivision (b)(1) of the rule, and the attorney for the debtor would be subject to subdivisions (b)(1) and (b)(2), even though they would each be filing an answer to the same complaint. Perhaps this is what Congress wants, but there is no specific indication in § 319 that this is so. Nonetheless, this is arguably consistent with the plain meaning of § 319.

A solution to this inconsistency is to make the same standard applicable to any party and

the attorney for any party in the case. That could be accomplished by deleting existing subdivision (b) of the rule and inserting in its place what is denominated above as subdivision (b)(2). This would seem to go beyond implementing § 319, and there is no indication that Congress had such a solution in mind. It would also make Rule 9011 even more inconsistent with Civil Rule 11. Finally, it would establish a new standard that the courts would have to interpret as compared to the standard currently in Rule 9011 and Civil Rule 11. I do not believe that Congress intends to insert a competing standard for these matters, and I think that the Civil Rules Committee and the Standing Committee may not be interested in taking on such an issue.

ALTERNATIVE B – EXPANDED SCOPE OF EXISTING RULE 9011

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

(a) SIGNATURE. Every ~~petition, pleading, written motion, and other~~ paper~~, except a list, schedule, or statement, or amendments thereto,~~ filed with the court shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

10 * * * * *

COMMITTEE NOTE

Subdivision (a) of the rule is amended to expand its direct application to all papers filed in a case. The exclusion for lists, schedules, and statements is deleted. The attorney makes the representations described in subdivision (b) of the rule for all papers that the attorney signs and files with the court. The rule does not apply to papers that might be provided to other parties or the trustee or United States trustee.

A different solution to the problem would be to make Rule 9011 specifically applicable to lists, schedules, and statements but to maintain the established standards already included in the rule. This will avoid the problem of conflicting standards of acceptable behavior while implementing what appears to be the primary purpose of § 319. This can be done simply by deleting the limitations contained in existing Rule 9011(a) and highlighting the purpose of the change in the Committee Note. This form of revision will also require that the lists, schedules and statements be amended to include a signature line for the attorney for the debtor. The Rule could be rewritten to make the reach of Rule 9011 to these documents even without the attorney's signature, but I think that making the attorney sign each of these documents would be more effective in bringing to the attorney's attention the significance of the representation being made to the court. The Rule might be amended as follows to accomplish that purpose.

ALTERNATIVE C: EXPANDED SIGNATURE REQUIREMENT

Rule 9011. Signing of Papers; Representations to the Court; Sanctions; Verification and Copies of Papers

1 (a) SIGNATURE. Every petition, pleading, written motion, and

other paper, ~~except~~ including a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name. A party who is not represented by an attorney shall sign all papers. Each paper shall state the signer's address and telephone number, if any. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

* * * * *

COMMITTEE NOTE

Subdivision (a) of the Rule is amended to extend the obligation to sign papers to the lists, schedules, and statements. These may also be signed by the debtor, and requiring the debtor's attorney to sign these papers brings more directly to the attorney's attention the obligation to verify the accuracy of the information being provided.

The potential changes to Rule 9011 are likely to be very controversial. Other possible changes to the rule include limiting the expansion of the rule to cases under specific chapters (e.g., chapters 7 and 13) and proposing more specific standards for the extent of the investigation necessary to constitute a "reasonable inquiry" or an "inquiry reasonable under the circumstances." It would seem difficult, if not impossible, to draft a rule with specific guidelines for the scope of investigations in the myriad circumstances covered by the rule. In fact, we have stated in response to the first letter from Senator Grassley that such matters are better left to the

courts that will have before them the specific facts of a case in which to determine whether a particular investigation was sufficient. Thus, I have not attempted to draft such a provision. Of course, if the Committee believes that would be an improvement to the rule, I will prepare and distribute such a provision.

The American Bar Association has already communicated with the Committee expressing concerns about the impact of the 2005 Act on attorney liability. I would expect other groups to have similar views. Of course, some groups and Congress may have a different position, and the Committee should consider all of these matters carefully. A symposium or similar gathering might provide the Committee with valuable information and analysis of the issues. If the Committee believes that such a program would not be productive or sufficiently helpful, and it believes that amendments to Rule 9011 are appropriate, then the proposals set out above (or others that might be suggested) could be brought back to the Committee at the March meeting for further consideration and possible recommendation to the Standing Committee for publication in August, 2007.

The Subcommittee can choose to recommend a particular amendment to Rule 9011, or it could conclude that it should recommend no change. The Subcommittee also could in either event suggest that the matter be studied further including supporting a symposium or similar event.

Attorney Certification Under § 707(b)(4)(C) and (D)

The Subcommittee also considered whether to recommend an amendment to Rule 9011 to include language that implements § 707(b)(4)(C) and (D) of the Code. The 2005 Act amended

§ 707(b) to introduce the means test for eligibility for chapter 7 relief. It also added provisions that impose additional duties on debtors' attorneys. Specifically, § 707(b)(4)(C) and (D) provide that

> (C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has–
>
> (i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and
>
> (ii) determined that the petition, pleading, or written motion--
>
> (I) is well grounded in fact; and
>
> (II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).
>
> (D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

In their comment on the Interim Rules, Senators Grassley and Sessions correctly note that § 707(b)(4)(C) and (D) provide that an attorney's signature "shall constitute a certification" regarding the attorney's investigation of the underlying facts contained on the petition, pleadings, or written motions. The Interim Rules do not include any provision to implement these subparagraphs of § 707(b). The Committee did not propose any such provision because the language of the statute is self executing. The Committee has generally operated on the assumption that a rule should not simply restate the statute, so statutory provisions that are self executing have no counterparts in the Bankruptcy Rules. For example, § 521(a)(5) requires the debtor to "appear at the hearing required under section 524(d)." Neither Bankruptcy Rule 4002

(Duties of Debtor) nor Rule 4008 (Discharge and Reaffirmation Agreement) includes that specific directive because the statutory language is sufficient.

Section 707(b)(4)(C) essentially copies the existing language in Rule 9011(b). There are differences in the language, but the nature of the provisions are very similar. Section 707(b)(4)(D), on the other hand, introduces a new wrinkle. As noted above, Rule 9011(a) specifically excludes from the list of documents that an attorney must sign any "list, schedule, or statement, or amendment thereto." Rule 9011(a) and (b) clearly anticipate the debtor's attorney signing the petition, but § 707(b)(4)(D) now states that the signature on the petition is a certification by the attorney that he or she is unaware of incorrect information in the schedules. By statute, therefore, Congress has expanded the effective reach of Rule 9011.[4] The Committee has previously concluded that the self-executing nature of the statutory provision made amendment of Rule 9011 or the promulgation of some other rule unnecessary. First, we have always worked under the assumption that the Rules should not merely restate the statute. Second, if you attempt to restate the statute without just repeating its exact text, you run the risk of creating confusion or a different standard of review of the conduct subject to the rule as compared to the statute. Nevertheless, in response to the Senators' comment, the Subcommittee should consider whether to amend Rule 9011 to specifically incorporate the new obligation, or to amend Official Form 1, the petition, to include certification language for the debtor's attorney that captures the new obligation.

Rule 9011 could be amended by inserting another paragraph into subdivision (b) that

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[4]It should be noted that the statutory provision refers only to the schedules and not to any statements or lists which are included in the "signature" exception of Rule 9011(a).

would incorporate the § 707(b)(4)(D) certification language. This could be done by inserting the following at the beginning of subdivision (b):

> In a chapter 7 case, the signature of an attorney on the petition is a certification that the attorney has no knowledge, after an inquiry reasonable under the circumstances, that the information in the schedules filed with such petition is incorrect.

The rule would then continue in its present form. This would avoid the problem of redesignating any subdivisions of the rule, something we always try to avoid, and it largely copies the statute so that there should be no problem with altering the expectations of Congress. Another way to make the change would be to designate the proposed language set out above as subdivision (b)(1) with existing (b)(1)-(4) becoming subdivisions (b)(2)(A)-(D). This would create some difficulty for persons conducting research in the area, but the disruption would be minimal.

Another solution would be to keep the rules as they are, but to amend Official Form 1 to include the language of § 707(b)(4)(D) on the petition. For example, Exhibit B on the petition already requires the debtor's attorney to certify that certain information has been provided to the debtor. That certification could be expanded to pick up the new certification required under § 707(b)(4)(D). Of course, both the potential rule and form amendment would be limited in their application to chapter 7 cases.

The fact that Congress included this obligation in § 707 means that it does not apply in the other chapters. One could argue that Congress therefore did not intend that obligation to apply to debtors' attorneys in cases under the other chapters. In chapters 11, 12, and 13, the

payments to creditors are often made out of the debtor's future income, so the information on the schedules is of less significance than in chapter 7.[5] Consequently, there is some reason to limit the extent of any change either in the rules or forms to chapter 7 cases. It may also be appropriate to amend the rules or forms to include this otherwise self-executing provision to better educate the debtor's bar regarding this responsibility. One of the goals of the rules and forms is to inform and educate the bar and the public, and including the attorney certification of the schedules on Form 1 or in Rule 9011 would perform that function.

Because the certification is self executing, there does not seem to be any need to amend the rules to restate this effect. Furthermore, amending the Official Forms to insert such a certification would not seem to add anything to the attorney's liability. It may, however, better highlight the attorney's obligation. The Subcommittee did not reach any conclusion as to whether this is a sufficient justification for amending a number of the forms.

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[5] Plans in each of these chapters still must meet the best interest of creditors test, so the value of the debtor's assets is not irrelevant in cases under these chapters. *See* Bankruptcy Code §§ 1129(a)(7), 1225(a)(4), and 1325(a)(4). Nonetheless, the focus is much more likely to be on the debtor's future income in these cases.

05-BR-001

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

August 18, 2005

Chief Justice William H. Rehnquist
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Rehnquist:

As the principal sponsor of the newly-enacted bankruptcy reform law (Pub. Law 109-8), I am writing to express my concern over certain rules which have been proposed by the Judicial Conference to implement this legislation. In my opinion, the Judicial Conference will play a critical role in ensuring that Public Law 109-8 is implemented in a manner that is fully consistent with Congressional intent. The Rules Enabling Act specifically envisions Congressional involvement with the judicial rule-making process. Accordingly, I am communicating these views in that spirit.

First, I am concerned that the proposed rules would require that creditor motions to dismiss be filed "with particularity". This would impose an unnecessary burden on creditors that has no statutory basis in the new bankruptcy law. A fair reading of the statute and its legislative history clearly indicates that Congress wanted to encourage creditor motions, not unduly hamper them, by removing the prior law's absolute bar to section 707(b) creditor motions. In fact, Congress has already statutorily imposed restrictions on such motions in the new bankruptcy law. *See* Public Law 109-8, Section 102(a); 119 Stat. 30-31 (providing for sanctions for abusive creditor motions under section 707(b)). Creating a new, non-statutory hurdle for creditor motions is unwarranted and clearly contrary to Congress' intent in regulating motions practice under section 707(b).

I am also concerned that the proposed rules do not require debtors to file a certificate that they have completed the pre-discharge education course mandated under the new bankruptcy law, thereby creating a possible loophole for dishonest debtors to evade this important educational requirement. *See* Public Law 109-8, Section 106; 119 Stat. 37. This educational requirement is necessary for the public good because debtors need to learn about sound financial management. Reliance on mere assurances from debtors is not

sufficient to ensure that the educational requirement will serve the purpose that Congress intended, because past experience demonstrates that debtor statements are often unreliable. Thus, by failing to require proof of education as a condition for receiving a discharge, the Judicial Conference would significantly weaken this important component of the new law.

Finally, I am deeply troubled that the proposed bankruptcy rules and forms do not require debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements. Congress deliberately chose to impose new responsibilities on debtor's counsel in consumer cases to deal with fraudulent filings and to maintain the integrity of the entire bankruptcy system. *See* Public Law 109-8, Section 102(a); 119 Stat. 30 (the new law provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect"). The absence of any rule specifying how counsel should comply with their new responsibilities is, in my judgment, a serious and substantial oversight that must be corrected.

I understand that Interim Rules and Official Forms may be adopted this month. I believe that the defects that I have outlined above should be corrected before adoption of the Interim Rules in order to appropriately implement the new bankruptcy law.

Thank you for considering my concerns.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

CC: Thomas S. Zilly (Senior Judge)
United States District Court for the Western District of Washington
700 Stewart Street
Suite 15229
Seattle, WA 98101

United States Senate

WASHINGTON, DC 20510

05-BR-033

March 13, 2006

The Honorable Chief Justice John Roberts
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Roberts:

As you may know, PL 109-8 contains extensive revisions to the Bankruptcy Code designed to substantially reform America's bankruptcy process. We were active in moving this important legislation to passage and therefore have a keen interest in ensuring that the intent of Congress is fully effectuated as the new law is implemented.

The Committee on Practice and Procedure of the Judicial Conference is considering significant and comprehensive changes to the Bankruptcy Rules and Official Forms. Specifically, the Committee has developed forms to assist in calculating a debtor's income and to determine whether the presumption of abuse applies under Section 707(b)(2) of the Code. We wish to address a few of the shortcomings in the forms.

Section 707(b)(2)(C) of the Title 11 mandates that the schedule of current income and expenditures must include a statement of each debtor's income and the calculations that determine whether a legal presumption of abuse arises. Importantly, Form B22A directs the debtor not to provide the needs-based calculations if the debtor's income is below the state median income.

Form B22A should be revised to require all debtors to provide income figures. PL 109-8 does not exempt any debtor from the information filing requirement. Congress specifically chose not to create such an exemption. The Senate Judiciary Committee, on which we serve, specifically rejected such an exemption; the Judicial Conference should not create an exemption already rejected by Congress.

In calculating repayment ability, PL 109-8 permits a debtor to deduct the allowances provided in the applicable IRS local standards for housing. Importantly, PL 109-8 also provides that the debtor's expenses in this category may not include any payment for secured debts, such as mortgage payments. Thus, under PL 109-8, a debtor may deduct only the debt payments for mortgage payments actually paid. However, the forms authorize the debtor to deduct the greater of the debtor's mortgage payment or the IRS-specified amount. This clearly contravenes the plain language of the new law and flouts Congressional intent.

PL 109-8 also allows for creditors to move to dismiss a Chapter 7 proceeding if the court finds that granting relief under Chapter 7 would be an abuse of Chapter 7. This new creditor right is a central feature of the new bankruptcy system. Under the guise of protecting debtors from abusive filings, the Interim Rules now impose unnecessary pleading burdens (the so-called

"specificity" requirement) on creditors who wish to file certain motions, burdens not authorized by statute. Congress deliberately chose to protect debtors from abusive motions practice in other ways. Thus, the "specificity" requirement should be dropped.

Finally, PL 109-8 adds § 707(b)(4)(C) and (D) to Title 11. These provisions provide that a signature of an attorney on a pleading constitute a representation by the attorney that the filing is not frivolous and that the debtor has performed a reasonable investigation to determine that the facts provided are accurate. The Committee should amend the rules and forms to ensure that attorneys comply with this requirement.

Thank you for considering our views on this subject. Given our involvement in this legislation's passage, we feel a responsibility to ensure that PL 109-8 is implemented according to the intent of Congress. We look forward to continuing dialogue on this important issue.

Sincerely,

Chuck Grassley

Chuck Grassley
United States Senator

Jeff Sessions
United States Senator

cc: Peter McCabe
Secretary, Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

June 21, 2005

Hon. Thomas S. Zilly
United States District Court
Western District of Washington
Room 410, U.S. Courthouse
1010 Fifth Avenue
Seattle, WA 98104

RE: Pending Emergency Local Rules Recommendations

Dear Judge Zilly and Members of the Advisory Committee on Bankruptcy Rules:

We understand that the Advisory Committee on Local Rules is in the process of developing interim rules proposals in the wake of the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). We are writing to provide you with a recommendation for those interim rules.

Background information about the Task Force and its goals: The American Bar Association Task Force on Attorney Discpline was formed earlier this year by the Ad Hoc Committee on Bankruptcy Court Structure and Court Processes, which is a joint effort of several ABA sections, including the Business Law, Litigation, and General Practice Sections. The Task Force's assignment is to study and propose recommendations for model procedures for the discipline and disbarment of bankruptcy attorneys who are alleged to have engaged in serious misconduct. Our focus is not the individualized sanctions that a court may order in a particular case, but rather issues of discipline, suspension and disbarment affecting an attorney's general privilege to practice before the bankruptcy court. A list of the Task Force Members is attached. This letter is being written in our individual capacities. Neither the ABA nor any of the sections participating in the Ad Hoc Committee has adopted policy on the views expressed in the letter.

With the enactment of the BAPCPA, the Task Force will also be developing a report with guidelines and standards to assist practitioners and courts as they grapple with the implementation of new sections 707(b)(4)(C) and (5) and the conforming amendments to Bankruptcy Rule 9011. Both of these sections impose a new duty of "reasonable investigation" relating to consumer debtors' chapter 7 petitions and motions to dismiss them as "abusive." Section 707(b)(4)(D) additionally imposes a duty of "inquiry" with respect to the information on the consumer debtor's schedules, which by its own terms is not consistent with the inquiry standard under the new section 527(c); neither section 707(b)(4)(D) nor section 527(c) necessarily employs the same standard to which the courts are accustomed under Rule 9011.

The Task Force's Recommendation for the Interim Rules: Because of the volume nature of consumer bankruptcy practice for both debtors' and creditors' representatives, and because of interpretive issues that are inherent in the language of the new law, the Task Force is concerned that the courts' attention and resources will be burdened by collateral litigation about both substantive and technical compliance failures.

This could interfere not only an appropriate review of the merits of the underlying substantive dispute in any given case, but also with the courts' ability to police those errant attorneys whose behavior demonstrates a pattern of noncompliance with the law (under BAPCPA or prior law) and disregard of proper advocacy on behalf of clients.

Accordingly, we urge that the Subcommittee include in the Emergency Rule a suggestion along the following lines:

> Because of the potential for increased litigation involving attorney compliance with the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, each court should review its existing local rules or general orders to ensure that neither the due process rights of the targets of such litigation nor the substantive needs of the debtor and creditor clients are denied or subverted, and to ensure that the court may appropriately deal with errant attorneys whose pattern of misconduct may warrant consideration of the attorney's privilege to practice before the court. If no bankruptcy discipline rules or orders are in effect, each court should consider implementation of an appropriate review and discipline process.

By calling the courts' attention to the increased need for effective court-wide disciplinary procedures, such a recommendation from the Subcommittee will encourage a vitally important discussion about the appropriate way for the courts to respond to the challenges created by these new statutory requirements.

Please contact either Judy Miller (tel. 248-727-1429; email: jmiller@jaffelaw.com) or Lisa Hill Fenning (tel. 213-621-6233; email: lfenning@dbllp.com) if you have any questions or if we can be of any further assistance to the Advisory Committee in its work.

Respectfully submitted,

David W. Allard
James H. Cossitt
Lisa Hill Fenning
Jean K. FitzSimon
David A. Greer
Robert R. Keatinge
Judith Greenstone Miller
Jan Ostrovsky
Dean Nancy B. Rapoport
William H. Schorling
Jeffrey L. Solomon
Marc S. Stern
Paul G. Swanson
Catherine E. Vance

cc: Professor Jeffrey W. Morris
Hon. Eugene Wedoff

AS OF June 21, 2005

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3-B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

RE: JUDGE MANNES' PROPOSAL TO PERMIT NON-ATTORNEYS TO REPRESENT CORPORATE CREDITORS IN LIMITED CIRCUMSTANCES

FROM: JEFF MORRIS, REPORTER

DATE: AUGUST 10, 2006

The Subcommittee on Attorney Conduct considered a proposal submitted by Judge Paul Mannes (Bankr. D. Md.) regarding the representation of corporations other than by an attorney in matters involving less than $5,000. This was a renewed proposal from Judge Mannes in which he noted that many states permit such representation in small claims courts. He had previously raised the matter and the Advisory Committee accepted the Subcommittee's earlier recommendation that no action be taken to amend the Bankruptcy Rules to permit such representation. The Subcommittee reconsidered the matter to determine whether the issue might be addressed either through a national rule allowing such representation, or a national rule that would adopt the relevant provisions of state law for the district where the bankruptcy court was located. If that option was not selected, then the Subcommittee would either recommend that the Committee communicate to Judge Mannes that the issue could be addressed by a local rule to adopt the relevant state law, or that the proposal should not be adopted either in the national rules or by local rule. A copy of my memo to the Subcommittee is attached along with the two proposals submitted by Judge Mannes.

The Subcommittee vote on the matter was split. There were no votes in favor of amending the Bankruptcy Rules to allow such representation, but two members were in favor of

communicating with Judge Mannes that a local rule might be proposed. Three other Subcommittee members voted to oppose any such rule, even a local rule. One of the votes in opposition to either a national or local rule was made in part on the basis that no rule amendment is needed because the actual practice may already reflect the proposal. Thus, the Subcommittee was closely divided but recommends that no national rule be proposed and that no action be taken to suggest that courts adopt a local rule.

MEMORANDUM

TO: SUBCOMMITTEE ON ATTORNEY CONDUCT

RE: JUDGE MANNES' PROPOSAL TO PERMIT NON-ATTORNEYS TO REPRESENT CORPORATE CREDITORS IN LIMITED CIRCUMSTANCES

FROM: JEFF MORRIS, REPORTER

DATE: AUGUST 3, 2006

Judge Paul Mannes, a former Chair of the Committee, has submitted a suggestion to the Committee regarding the representation of corporate creditors in limited circumstances. In comment 06-BK-000, Judge Mannes has proposed that the rules be amended to allow corporate creditors to appear before the court without an attorney in matters in which the amount in controversy is less than $5,000. Judge Mannes had previously suggested that they be allowed to appear without counsel in dischargeability actions on the grounds that requiring the employment of counsel in these circumstances essentially denied these creditors access to the courts. The Advisory Committee accepted the recommendation of this Subcommittee that amendment of the Bankruptcy Rules was not appropriate to permit this representation. The Subcommittee had concluded that the Judge Mannes' proposal went well beyond the 2005 amendment to § 341(c) that permits any creditor holding a consumer debt to appear and participate in the meeting of creditors in a case under Chapter 7 or Chapter 13 without an attorney. There was concern expressed that extending even further the ability of a corporation to appear and participate in bankruptcy cases could even be construed as inconsistent with the amendment to the Code. The Subcommittee also took note of clearly established law that, as a general rule, a corporation may appear in federal court only through an attorney. See Rowland v. California Men's Colony, 506

U.S. 194 at 202 (1993).

Judge Mannes' current proposal is slightly different in that he notes that some states already allow non-attorneys to represent corporations in some circumstances such as in small claims courts. He proposes that the Bankruptcy Rules be amended to permit this practice in the corresponding bankruptcy courts to the extent that it is allowed in the applicable state courts. He asserts that such a rule would not contravene state unauthorized practice rules because they would be consistent with or would adopt those rules. Some states that have allowed non-attorneys to represent corporations in specific circumstances have concluded that the actions being taken do not constitute the unauthorized practice of law in that jurisdiction. See, e.g., Ohio Rev. Code § 1925.47 ("a corporation may, through any bona fide officer or salaried employee, file and present its claim or defense in any action in a small claims division arising from a claim based on a contract to which the corporation is an original party or any other claim to which the corporation is an original claimant, provided such corporation does not, in the absence of representation by an attorney at law, engage in cross-examination, argument, or other acts of advocacy."); Md. Code Ann. Bus. Occ. & Prof. 10-206 (permits corporations to be represented by non-attorneys in small claims cases and subject to additional restrictions); Vernon's Tex. Code Ann. §28.003(e) ("A corporation need not be represented by an attorney in a small claims court.").

Whether such a rule would provide a solution to the problem posed by Judge Mannes (inability of corporations to effectively pursue recoveries in matters with limited amounts at stake) is not the issue. Rather, it is whether the Bankruptcy Rules should be amended to permit such a practice. In my view, such an amendment would not be appropriate for the national rules.

It could create a need for a structure within the rules for admission to practice and perhaps even disciplinary provisions. Those matters have generally been left to local courts rather than the national rules, and adopting a rule in the nature of the one suggested by Judge Mannes could be viewed as initiating such a system. It would also impose on every court a change in its operations that may not fit well with the local culture and needs.

Permitting such a practice by local rule, however, may be possible. A local rule adopting the applicable state law provisions on corporate self-representation arguably would not be inconsistent with the Bankruptcy Rules as required by Rule 9029(a)(1) because nothing in the Bankruptcy Rules addresses the issue of the need for counsel to represent non-individuals in bankruptcy cases. The long standing prohibition on corporate self-representation is federal common law, and it would seem that the courts have the inherent authority to establish requirements for the right to appear before the court. Moreover, if the rules are adopted in a manner consistent with the practice in a particular state, it would seem that allowing this form of representation would not raise objections either by the applicable state supreme court or the state bar. Leaving this authority with each district also would operate to prevent the imposition of an unwanted or unneeded change.

There is another issue that the Subcommittee should consider in determining whether to recommend either an amendment to the Bankruptcy Rules or even to recommend that the Advisory Committee suggest to Judge Mannes that he pursue the matter as a local rule. That is, the recent amendment to § 341(c) provides that any creditor holding a consumer debt may appear and participate in the meeting of creditors in a case under chapter 7 or chapter 13 without an

attorney.[1] But, this provision applies only to creditors holding consumer debts, only to chapter 7 and chapter 13 cases, and only to appearances and participation in meetings of creditors. Judge Mannes' proposal appears to invite the Advisory Committee to develop a rule allowing non-attorney representation that goes beyond that which Congress has approved. While local rules can "go beyond" the Code, Rule 9029 provides that they cannot be inconsistent with the Code. On one hand, as Judge Mannes asserts, a local rule that would adopt applicable state law provisions that allow a corporation to appear in a court proceeding in specific circumstances could be considered consistent with the purpose of allowing more effective participation in bankruptcy cases by corporations as set out in § 341(c). Conversely, one could argue that the enactment of the amendment to § 341(c) is a legislative directive that this is as far as the law should go in permitting corporations to participate in cases without an attorney.

I do not believe that the amendment to § 341(c) represents the view of Congress that the provision is intended to establish an outer limit for creditor participation in bankruptcy proceedings. Stated otherwise, § 341(c) applies only to the meeting of creditors and that provision does not operate to limit any other part of the Code. The section certainly does not provide any affirmative support for the proposition that corporations should be permitted to appear and participate in adversary proceedings or contested matters in bankruptcy cases, but it

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[1] This amendment rendered unnecessary the decisions in the courts holding that non-attorney participation in a § 341 meeting did not constitute the unauthorized practice of law. *See, e.g.,* In re Maloney, 249 B.R. 71(M.D.Pa. 2000); In re Kincaid, 146 B.R. 387 (Bankr. W.D. Tenn. 1992).

also does not establish any bar to such a practice. Thus, it may be that a local rule allowing such representation could be approved without violating Rule 9029.

The Subcommittee has three options with regard to the matter. They are set out below and are also set out in an email ballot.

1. Amend the Bankruptcy Rules to permit the representation of a corporation by a non-attorney to the extent such representation would be allowed under applicable state law. _____

2. No amendment should be made to the Bankruptcy Rules for this purpose, and no local rule to permit such representation should be recommended. _____

3. No amendment should be made to the Bankruptcy Rules for this purpose, but the Advisory Committee should communicate to Judge Mannes that an appropriate local rule might be crafted to permit such representation. _____

PAUL MANNES/MDB/04/USCOURTS
(Bankr Judge)
03/16/2006 11:47 AM

To Peter McCabe/DCA/AO/USCOURTS@USCOURTS
cc
Subject A rule suggestion

Mr. McCabe

This is to follow up on my e-mail of 04/06/2005 that was discussed at the last Advisory Committee meeting. Upon further research, I would like to urge the fallback position that a court may authorize corporations and other entities to appear in cases involving less than $5000 without counsel. This would honor the local culture that either permits or denies access to small claims courts by entities not represented by counsel.

I see the need most often with regard to PA's in the health care area who have been defrauded by the diversion of insurance proceeds in personal injury claims. However as a general rule, we are denying access to court for the holders of such claims, as they must pay a filing fee of $250 and then hire counsel. It just does not work, particularly when recovery is problematic as to a debtor.

A number of states now permit this representation by statute. These include Arizona, D.C., Kentucky, Illinois, Maine, Maryland, Missouri, and New Hampshire. See the Kansas Supreme Court decision in Babe Houser Motor Co. v. Tetrault, 14 P3d 1149 (2000). Other states such as New York bar corporations from filing claims in Small Claims Court. While the Supreme Court held in Osborn v. Bank of the United States, 22 US 738 (1824) that a corporation may only appear by an attorney, I suggest that if that this modification were presented to the Court, it would not find that the holding in Osborn prevents the implementation of this change. Moreover, this suggestion is in the spirit of the amendment to section 341(c) that allows corporations to appear at meetings of creditors without an attorney.

Maryland has had this practice in place for a number of years. See Md Code Ann. Bus. Occ.& Prof. 10-206. Note that this section bars using full-time employees for this work, bars disbarred lawyers and bars such representation where the claim has been assigned to the entity.

Paul Mannes

05-BK-A

PAUL MANNES/MDB/04/USCOURTS
(Bankr Judge)
04/06/2005 12:06 PM

To Peter McCabe/DCA/AO/USCOURTS@USCOURTS
cc resnial@ffhsj.com
bcc
Subject A rule

Peter

I would like to suggest a new rule regarding representation of corporations in "small claims" cases. This thought was triggered by a corporate creditor with a bona fide § 523(a)(2) case involving $850. To make that corporate creditor obtain counsel works to deny the creditor relief. I therefore suggest that a rule of procedure be promulgated that either authorizes parties other than individuals to appear without counsel where the amount in controversy is less than a given figure. As a fallback position, I would suggest a rule that courts could authorize such a procedure, if there is a feeling that certain local custom and usages would be unduly offended by permitting corporations to show without counsel.

Paul

3-C

JAMES C. DUFF
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 28, 2006

Mr. Armando Lasa-Ferrer
Office of the Secretary
American Bar Association
321 N. Clark Street
Chicago, IL 60610-4714

Dear Mr. Lasa-Ferrer:

I am writing to respond to your letter of April 17, 2006, which was sent to several of the judiciary's circuit executives, transmitting a resolution regarding electronic case filing and training. More specifically, the American Bar Association recommends "that the United States bankruptcy courts in each federal district permit attorneys who have received electronic case filing (ECF) training in any district to file documents electronically in bankruptcy cases in any other district," provided that other requirements are satisfied.

As you know, the Administrative Office (AO) developed the Case Management/Electronic Case Files (CM/ECF) product and continues to manage the initiative. We appreciate the time and attention expended by your organization to identify ways in which you believe CM/ECF can be improved from the attorney's perspective.

In managing CM/ECF for the bankruptcy courts, the AO relies on a court group, known as the Bankruptcy CM/ECF Working Group, for advice and counsel. This group consists of judges, clerks, and deputy clerks and is in an ideal position to provide input to the AO on the ABA resolution. Therefore, I have asked AO staff to work with the Bankruptcy CM/ECF Working Group to assess your proposal. I will let you know of any further developments when that process is completed.

If you have any questions or would like to offer additional input, please do not hesitate to contact Glen Palman, Chief, Bankruptcy Court Administration Division, at (202) 502-1540.

Thank you, again, for your interest.

Sincerely,

James C. Duff
Director

cc: Circuit Executives
Bankruptcy CM/ECF Working Group

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Defending Liberty
Pursuing Justice

April 17, 2006

RECEIVED
APR 2[illegible]
CIRCUIT EXECUTIVE OFFICE
ST. LOUIS, MISSOURI

Ms. Millie B. Adams
Circuit Executive
U.S. Court of Appeals for the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse, Ste.24.327
111 S. Tenth Street
St. Louis, MO 63102

RE: Electronic Bankruptcy Court Filing

Dear Ms. Adams:

At the meeting of the House of Delegates of the American Bar Association held February 13, 2006, the enclosed resolution was adopted upon recommendation of the General Practice, Solo and Small Firm Division, Section of Business Law, Bar Association of the District of Columbia and the Pennsylvania Bar Association. Thus, this resolution now states the official policy of the Association.

We are transmitting it for your information and whatever action you think appropriate. Please advise if you need any further information, have any questions or if we can be of any assistance. Such inquiries should be directed to the Chicago office.

Sincerely yours,

Armando Lasa-Ferrer

ALF/nmr
enclosure

cc:

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Keith E. Brown
Alexa M. Giacomini
Alvin W. Thompson
Don S. De Amicis
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Robert D. Ingram
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Roderick B. Mathews
William P. Carlucci
Barry Michael Simpson
Michael Haywood Reed
Robert D. Evans
Roseanne Theis Lucianek

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AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
February 13, 2006

Recommendation

RESOLVED, that the American Bar Association recommends that the United States Bankruptcy Courts in each federal district permit attorneys who have received electronic case filing (ECF) training in any district to file documents electronically in bankruptcy cases in any other district, provided that the attorney satisfies any and all other requirements for the filing of documents in bankruptcy cases in that district.

REPORT

LOCAL RULES FOR ELECTRONIC CASE FILING IN THE BANKRUPTCY COURTS

I. INTRODUCTION AND SCOPE OF PROJECT

A Working Group on Local Rules for Electronic Case Filing in the Bankruptcy Courts was appointed in the Spring of 2005 to the Ad Hoc Committee on Bankruptcy Court Structure of the American Bar Association Business Law Section.[1] The Working Group's mission is to propose a model local rule regarding an attorney's ability to file documents[2] in bankruptcy courts using that court's electronic case filing (ECF) system. The purpose of this model rule will be to remove barriers to electronic filing and thus to treat paper filing and electronic filing equally. It is not our intention to change any existing local counsel or *pro hac vice* rules; rather, our goal is to enable a lawyer who can file a paper document in a bankruptcy court to file a document in the same court electronically.

Our proposed rule, which is set forth at the end of this Report, would allow attorneys who have received ECF training in any district to file documents electronically in bankruptcy cases in any other district, *provided that* they satisfy all of the other requirements for filing documents in bankruptcy cases in that district.

II. THE PROBLEM

Today, 87 bankruptcy courts have electronic case filing systems and 53 *require* that all documents filed in all cases be filed electronically.[3] Many of the courts with ECF systems require that attorneys attend ECF training in the applicable district before receiving the password that will enable them to submit documents electronically. This requirement that an attorney attend local training places additional barriers in the way of a lawyer's ability to practice law because an attorney admitted to practice before three different courts might not be permitted to use the ECF system in those courts unless she attends local training.

Of the 87 bankruptcy courts that have ECF systems, 73 require that an attorney receive local training before receiving an ECF password. Of those courts, 23 do not waive this requirement in any circumstances and 50 waive the requirement if the attorney is also filing electronically in

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[1] The Working Group members are Mitchell Seider, Chair, Juliet Moringiello, Reporter, Warren Agin, Larry Feinstein, Christina Houston, Christoper Kaup, Hon. Cecelia Morris, and William Schorling, Chair of the Ad Hoc Committee on Bankruptcy Court Structure. We would like to thank Jessica Mercy, Widener University School of Law Class of 2007, for all of her help in collecting the information necessary to compile this report.

[2] Although "record" is the term commonly used to refer to both paper and electronic documents, *see, e.g.*, Electronic Signatures in National and Global Commerce Act, 11 U.S.C.A. § 7001 *et. seq.*; UNIFORM COMMERCIAL CODE § 9-102(69), we use the term "document" to conform with Fed. R. Bankr. P. 5005(2), which, in authorizing courts to permit electronic filing, refers to electronic documents as "documents

[3] We include available information from bankruptcy courts in the 50 states and the District of Columbia. This information is available on the web sites of the individual bankruptcy courts. *See, e.g.,* United States Bankruptcy Court for the Eastern District of New York, http://www.nyeb.uscourts.gov.

another district. Six courts require no training at all.[4] The waiver conditions vary. One court will waive local training if the filer is located in a geographical area in which training is not easily accessible.[5] Two will waive local training for attorneys who have successfully used ECF in any bankruptcy court within the preceding six months.[6] Other courts will waive the local training if the attorney is currently using the ECF system in the bankruptcy court in another District in the same state.[7] A small number of courts waive the local training requirement if the lawyer successfully completes an online training tutorial.[8] Most of these courts require that lawyers be admitted to practice before the court in question as a prerequisite to obtaining an ECF password.[9]

These requirements often make the electronic filing requirements more onerous than the paper filing requirements because lawyers can file some paper documents (for instance proofs of claim) in bankruptcy courts without being admitted to practice before those courts. The onerous nature of these requirements seems to conflict with the very purpose of electronic case filing: to allow a lawyer to file documents in a court from her office computer.

This problem is particularly acute in bankruptcy practice for several reasons. Bankruptcy cases involve a large number of parties and a large number of proceedings. Because many debtors, particularly business debtors, have creditors located in several jurisdictions, lawyers in jurisdictions other than that in which a bankruptcy case is pending are routinely involved in bankruptcy cases. While ECF can, in theory, reduce the costs involved in bankruptcy litigation, the requirement that all attorneys wishing to use the ECF system receive local training can increase such costs because a non-local lawyer will be required to either hire local counsel or obtain *pro hac vice* admission to the court in order to receive such training (in districts that allow passwords to be issued only to lawyers admitted to practice before the court in question).

As noted in the Introduction to this Report, we do not intend to change any rules regarding admission to practice before any court. Accordingly, we wish to make it clear that obtaining a password is not equivalent to *pro hac vice* admission and that the use of a password to file anything that requires admission will subject the filing attorney to discipline if that attorney is not properly admitted.

Respectfully submitted by,

Dwight L. Smith, Chair
General Practice, Solo and Small Firm Division

February 2006

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[4] District of Arizona, Central District of California, District of Connecticut, District of Delaware, Middle District of Georgia, Middle District of Tennessee.

[5] Eastern District of California. To be eligible for the waiver, the attorney must have been trained to use the ECF system in another bankruptcy court. http://www.caeb.uscourts.gov/data/formpubs/EDC.002-305.pdf

[6] Northern District of California, District of Idaho.

[7] Western District of Louisiana, Eastern District of Washington.

[8] The U.S. Bankruptcy Courts in the following districts do this: Southern District of New York, Northern District of Ohio, and Western District of Tennessee.

[9] Courts with this requirement include attorneys admitted *pro hac vice*.

III. THE PROPOSED RULE

ATTORNEY PASSWORDS

To file documents in bankruptcy cases using the electronic case filing (ECF) system, an attorney shall obtain a password from this court. To obtain a password, an attorney shall submit an application to the court in the form set forth in this Rule.

PERSONS ELIGIBLE TO OBTAIN ECF PASSWORDS

The following persons are eligible to receive an ECF password from this court:

1) All attorneys who have completed a Bankruptcy Court-sponsored ECF training class in this District;

2) All attorneys who have completed an ECF training class sponsored by any other United States Bankruptcy Court.

3) For the purposes of this Rule, an "attorney" is any individual admitted to practice law before any federal court in the United States.

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United States Bankruptcy Court

_____ District of _____

ELECTRONIC CASE FILING

FILER REGISTRATION FORM

WITH APPLICATION FOR PASSWORD
WAIVER OF NOTICE AND SERVICE BY MAIL AND
CONSENT TO ELECTRONIC NOTICE AND SERVICE

Name: _____
Last First Middle

ATTORNEY BAR ID NUMBER(S)
AND STATE(S) OF LICENSING: _____

FIRM NAME (if any): _____

MAILING ADDRESS: _____

_____

VOICE PHONE: _____ FAX PHONE: _____

E-MAIL ADDRESS
FOR ALL ECF PURPOSES: _____

I declare, under penalty of perjury:

1. I am admitted to practice law before **[name of United States federal court]**.

2. I will immediately notify the bankruptcy court of any change in the information on this registration form.

3. I will take all reasonable steps to protect the confidentiality of the password obtained by this registration.

4. I agree that use of my password to file a document in the bankruptcy court ECF system constitutes my signature on that document for all purposes. I understand that use of my password to file any document (except a list, schedule, statement or amendment thereto) constitutes my signature for purposes of Bankruptcy Rule 9011.

5. Upon receipt of a password, I waive the right to receive notice or service by any of the conventional delivery means described in Bankruptcy Rules 2002, 7004 or 7005. I agree to accept a notice of electronic filing by hand, facsimile, first class mail or authorized e-mail in lieu of conventional service and I will endeavor to use the automatic e-mail notification feature of the ECF system whenever feasible.

6. I agree to read and follow the Administrative Procedures for Electronic Case Filing promulgated by the United States Bankruptcy Court for the _____ District of _____.

7. I will be responsible for the prompt payment of all filing fees for any document I file using ECF.

8. I have been trained in the use of ECF by the Clerk of Bankruptcy Court for the _____ District of _____ or I represent the court that I have completed the ECF training class sponsored by the United States Bankruptcy Court for the _____ District of _____. (If you are a filing user in another bankruptcy court's ECF system, please provide a screen shot of your "Maintain Your ECF Account" screen from that court's system as verification of your completion of that court's ECF training).

_____ _____

Signature of Applicant Date

Please return this form to: **[insert name and address of court]**

Your password will be e-mailed to the e-mail address supplied above as a test of the ECF e-mail notification system.

4-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: JUDGE BUFFORD'S PROPOSED RULES AMENDMENTS

DATE: JULY 31, 2006

The Subcommittee on Technology and Cross Border Insolvencies met by teleconference to consider the recommendations of Bankruptcy Judge Samuel A. Bufford (C.D. Cal.) for the addition of a number of new rules to apply in chapter 15 cases. A copy o f Judge Bufford's proposals is attached. Judge Bufford had previously submitted a recommendation for chapter 15 rules, and the Advisory Committee considered these recommendations at the meeting in Chapel Hill in March 2006. At that time, the Committee concluded that no amendments should be made to the Interim Rules and Official Forms to address the chapter 15 matters raised in Judge Bufford's initial proposal. In part, that decision was based on the view that these matters were not immediately required in the same way as the other Interim Rules and Official Forms being proposed. Judge Bufford's second communication to the Committee on the issue presents a more expanded set of suggested rules amendments for the Committee's consideration. The Subcommittee thus reviewed Judge Bufford's latest proposal as a recommendation for amendments to improve the rules as they apply in chapter 15 cases rather than as changes that are essential to administer any chapter 15 case.

The 2005 amendments added chapter 15 to the Bankruptcy Code. That chapter governs Ancillary and Other Cross-Border Cases, and it replaces former § 304 of the Code. Chapter 15 incorporates the Model Law on Cross-Border Insolvency and is intended to improve the

administration of bankruptcy cases that are pending simultaneously in more than one nation. *See generally* Bankruptcy Code § 1501.

A case under chapter 15 is commenced by the filing of a petition for recognition of a foreign proceeding under § 1504, and Official Form 1 contains a check box for identifying the petition as a chapter 15 petition for recognition of either a foreign main proceeding or a foreign nonmain proceeding. Under § 1515, a foreign representative files a petition for recognition along with other documents or evidence demonstrating the representative's authority to commence the case and identifying all other foreign proceedings of the debtor. Unlike the filing of a petition under the other operative chapters of the Code, the filing of a petition for recognition does not constitute an order for relief under chapter 15. Rather, the court will enter an order recognizing the foreign proceeding if the court finds that certain minimal requirements are met. *See* Bankruptcy Code § 1517(a). This decision is to be made "at the earliest possible time." Bankruptcy Code § 1517(c).

In reviewing chapter 15 for the purpose of determining whether interim amendments were necessary to the Bankruptcy Rules, the Advisory Committee adopted a relatively minimalist approach for two reasons. First, we expected there to be a small number of cases filed under the chapter. This prediction has proven correct. Only six cases were filed from the effective date of the chapter, October 17, 2005, until March 31, 2006. Second, the Committee assumed that the cases filed under chapter 15 would most likely involve sophisticated parties represented by counsel experienced in cross-border cases. The Committee concluded that leaving the procedural dimensions of the cases relatively open would allow the courts and parties to adopt appropriate protocols to implement the provisions of chapter 15 in a manner best suited to the pending

matter.

The Interim Rules that apply specifically in chapter 15 cases include Rules 1007(a)(4), 1010, 1011, 2002(p), 2002(q), 2015(d), 3002(c)(6), and 5012. The amendments to Rules 1010 and 1011 are merely technical to reflect the repeal of § 304 and its replacement by chapter 15. Rule 1007(a)(4) requires the foreign representative to file a list of all entities that will be notified of the filing of the petition for recognition, and Rule 2002(q) requires that those entities be notified of the filing of the petition as well as of the court's intention to communicate with a foreign court or foreign representative. Rule 2002(p) implements § 1514(d) by providing additional time for creditors with foreign addresses to be given notices and to file claims. Rule 3002(c)(6) also provides additional time for creditors with a foreign address to file a proof of claim. Rule 2015(d) establishes a deadline for the foreign representative to file notices required by § 1518. Finally, Rule 5012 implements § 1525 of the Code by setting the deadlines for notices of an intention to communicate with a foreign court or representative and an intention by others to participate in the communication. It also describes the contents of the notice.

Judge Bufford's submission includes 15 rules along with a brief comment on each of the rules. The Subcommittee concluded that a number of Judge Bufford's proposals were more appropriate as possible local rules, or could be adopted by the courts in particular cases to aid in the administration of the chapter 15 case. The Subcommittee believes that many of these issues are best left to the court hearing the matter rather than being directed through the national rules. The Subcommittee then considered in more detail several of the proposed rules.

Proposed Rule 15001 is intended to take the place of Judge Bufford's proposed Rule 15014. Proposed Rule 15002 is intended to take the place of Judge Bufford's proposed Rule

15009. The Subcommittee was split over whether there is a need for this rule. Rule 7001 sets out the scope of the Part VII rules, and nothing in that rule, or in chapter 15 suggests that the adversary rules would not apply in a chapter 15 case. Furthermore, explicitly directing that the Part VII Rules apply in chapter 15 cases could have the unintended effect of suggesting that those rules might not apply in cases under the other chapters. This seems unlikely, however, since chapter 15 is so different from the other chapters. Proposed Rule 15003 is intended to take the place of Judge Bufford's proposed Rule 15013. The Committee Note to proposed Rule 15003 includes a specific reference to the ALI guidelines for court-to-court communications. This is in lieu of Judge Bufford's proposed Rule 15017 which more directly incorporates many of those provisions.

RULE 15001. Ancillary or Other Cross-Border Cases[1]

(a) CENTER OF MAIN INTEREST DESIGNATION. A petition commencing a case under chapter 15 of the Code shall state whether the case pending in another country is a foreign main proceeding or a foreign nonmain proceeding. The petition also shall state the country where the debtor has the center of its main interests.

(b) MOTION. The United States trustee or a party in interest

[1]In addition to the adoption of Rule 15001, Official Form 1 would be amended to include a line on the form where the foreign representative indicates the county of the debtor's center of main interests. This would be set out either immediately under or next to the check boxes identifying whether the case is a foreign main case or a foreign nonmain case, or it could be included in box that has the signature of the foreign representative. My preference would be for the former position.

may file a motion for a determination of the debtor's center of main interests. The motion shall be filed not later than 60 days after notice of the petition for recognition has been given to the movant under Rule 2002(q)(1). The motion shall be transmitted to the United States trustee and served on the debtor, all administrators in foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct.

COMMITTEE NOTE

This rule is new. Subdivision (a) directs any entity that files a petition for recognition of a case under chapter 15 of the Code to state on the petition whether the case for which recognition is sought is a foreign main case or a foreign nonmain case. The petition must also identify the country of the center of the debtor's main interests.

Subdivision (b) sets a deadline for filing a motion to challenge the statement in the petition as to the country in which the debtor's center of main interest is located. The movant has 60 days from the time that notice is given to the creditor of the petition for recognition. The deadline provides an opportunity for parties in interest to challenge the statement in the petition, and it also provides repose for the court, the debtor, and parties in interest once the deadline passes that a fundamental aspect of the case is settled.

RULE 15002. Adversary Proceedings

Rule 7001 applies to adversary proceedings under chapter 15 of the Code.

COMMITTEE NOTE

This rule is new. It clarifies that Rule 7001 and Part VII of the rules govern adversary proceedings filed in a chapter 15 case.

RULE 15003. Protocols

A party in interest seeking approval of the form of a protocol concerning the coordination of the case with an ancillary or cross-border case shall seek such approval by motion. The movant shall attach to the motion a copy of the proposed protocol and, unless the court directs otherwise, give at least 10 days notice of any hearing on the motion by transmitting the motion to the United States trustee, and serving it on the debtor, all administrators in foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct.

COMMITTEE NOTE

This rule is new. In chapter 15 cases, parties in interest may seek approval of a protocol that will assist the court, foreign courts, and all parties in interest with the conduct of the case. The needs of the courts and the parties may vary greatly from case to case, so the rule does not attempt to limit the form or scope of a protocol.

Rather, the rule simply requires any party in interest that wants the court to approve a particular protocol to give notice of the hearing on approval of the proposed protocol. These guidelines, or protocols drafted entirely by parties in interest in the case, can provide valuable assistance to the courts in the management of the case.

RULE 5009. Closing Chapter 7 Liquidation, Chapter 12 Family Farmer's Debt Adjustment, ~~and~~ Chapter 13 Individual's Debt Adjustment, and Chapter 15 Ancillary and Cross-Border Cases

(a) CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

(b) CASES UNDER CHAPTER 15. A foreign representative who has been recognized under § 1517 of the Code shall file a final report when the purpose of the representative's appearance in the court is completed. The report shall describe the nature and results of the representative's activities in the United States court.

COMMITTEE NOTE

The rule is amended to redesignate the former rule as subdivision (a) and adding a new subdivision (b) to the rule. Subdivision (b) requires a foreign representative in a chapter 15 case to file with the court a final report setting out the foreign representative's actions and results obtained in the United States

case.

INTERIM RULE 1010

Dan Glosband was a principal drafter of the Model Law that became chapter 15, and he has assisted the Subcommittee and the Advisory Committee in the past with issues under chapter 15. He has raised an issue regarding Interim Rule 1010. As you may recall, that rule as initially drafted applied to all cases under chapter 15. In the course of the Advisory Committee's consideration of the Interim Rules, the Committee concluded that the rule did not need to include specific service of a petition for recognition of a foreign main proceeding on the specified list of parties because those parties were all subject to the automatic stay by virtue of § 1520 of the Code. Since these parties were already subject to the automatic stay, the notice they would receive under Rule 2002(q)(1) would provide a notice to them comparable to the notice of the § 341 meeting of creditors given under Rule 2002(a)(1). *See* Official Form 9.

Dan has suggested that this distinction between foreign main proceedings and foreign nonmain proceedings is insufficient to justify different treatment. He contends that the notice provided under Rule 2002(q)(1) is sufficient. Therefore, in his judgment, there is no need to require service of the petition for recognition of a foreign nonmain proceeding. These comments should be included in those that we consider in March at the conclusion of the comment period. If we conclude that the rule should be amended to remove any reference to chapter 15 cases, it could be revised from the published version in the manner set out below. The changes would be to delete from the Interim Rule the limitation of the rule to foreign non-main proceedings only, and to have the summons and petition for recognition in all chapter 15 cases served instead on

the debtor and any other entities as the court may direct.

Rule 1010. Service of Involuntary Petition and Summons; Service of Petition for Recognition of Foreign Proceeding and Summons ~~Commencing Ancillary Case~~

(a) SERVICE OF PETITION AND SUMMONS. On the filing of an involuntary petition or a petition for recognition of a foreign proceeding ~~commencing a case ancillary to a foreign proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. When a petition for recognition of a foreign proceeding is filed, ~~commencing an ancillary case is filed,~~ service shall be made on the debtor ~~parties against whom relief is sought pursuant to § 304(b) of the Code~~ and on any other ~~parties~~ entities as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or

attempted under this rule.

(b) CORPORATE OWNERSHIP STATEMENT. Each petitioner that is a corporation shall file with the involuntary petition a corporate ownership statement containing the information described in Rule 7007.1.

COMMITTEE NOTE

The rule is amended to require service of a summons and the petition in all chapter 15 cases, whether they be a foreign nonmain proceeding or a foreign main proceeding. Service must be made on the debtor and any other entity that the court directs. General notice of the petition for recognition of the foreign proceeding is given to creditors under Rule 2002(q).

INTERIM RULE 2002(p)

Subsequently, I received a communication from Dan Glosband regarding Interim Rule 2002(p) governing notices to foreign creditors. As you may recall, § 1514 of the Code provides that foreign creditors must receive reasonable additional time of deadlines for filing a proof of claim. This applies to cases under all of the chapters, and Interim Rule 2002(p) was proposed to meet this statutory requirement. The Code does not define "foreign creditor" either in §§ 101 or 1502, so the Interim Rule defines them as "a creditor with a foreign address to which notices under these rules are mailed." Dan has proposed to Susan Jensen, Counsel to the Judiciary Committee, that the Code should be amended to include a definition of "foreign creditor." He proposes an amendment to § 1502 that would define a foreign creditor as "a creditor whose mailing address is not in the United States." If that were to occur, the rules should be amended to adopt the definition. Of course, such action is only necessary if Congress amends the Code.

He also recommends that Interim Rule 2002(p) be amended to refer specifically to Rule 2002(g) governing the addresses of notices. That subdivision provides generally that the address to which notices should be sent to a creditor is the address that the entity "has directed in its last request filed in a particular case." This rule gives creditors the ability to set the address for receiving notices. Dan suggests that this power could be abused by creditors who have an address in the United States but who also have foreign addresses. The creditor could direct that the foreign address be used in the case and thereby obtain more notice than other similarly situated creditors. To prevent that strategic behavior, he suggests that a new subparagraph (3) be added to Rule 2002(p) that would allow the court to override the creditor's address designation when cause is shown.

This is suggestion is in the nature of a comment on the published rules, and it will be included in the compilation of comments on the rules that we will consider at the March meeting of the Advisory Committee.

RULE 2002. Notices to Creditors, Equity Security Holders, <u>Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases,</u> United States, and United States Trustee

* * * * *

<u>(p) NOTICE TO A FOREIGN CREDITOR</u>

* * * * *

<u>(3) Unless the court for cause orders otherwise, the mailing address of a foreign creditor shall be determined under Rule 2002(g).</u>

COMMITTEE NOTE

The rule is amended by adding subparagraph (3) to subdivision (p). The new subparagraph provides that the court may, for cause, override a creditor's designation of a foreign address under Rule 2002(g). For example, if a party in interest believes that a creditor has wrongfully designated a foreign address to obtain additional time when it has a significant presence in the United States, the party can ask the court to order that notices to that creditor be sent to an address other than the one designated by the foreign creditor.

Chambers of the
HONORABLE SAMUEL L. BUFFORD
United States Bankruptcy Judge

DATE: January 20, 2006

TO: Advisory Committee on Bankruptcy Rules

FROM: Judge Samuel L. Bufford

RE: Proposed Bankruptcy Rules for Chapter 15 – Notes

Rule 15001 provides generally for the service of motions under chapter 15. Because chapter 15 is normally invoked only when a foreign proceeding (or several foreign proceedings) is pending, there are international administrators, creditors and other parties in interest who should be notified of a motion under chapter 15 for such notice. Typically § 1505 will be invoked in a domestic bankruptcy case where the trustee or another entity seeks to take action abroad for the benefit of the domestic estate. In such cases, notice to domestic creditors typically will be sufficient, because any action abroad will have to meet the procedural requirements of the applicable country. However, if there is a related proceeding pending abroad, whether a main proceeding or a nonmain proceeding, Rule 15001 recognizes that the debtor, trustee and creditors in any such foreign proceeding are also entitled to receive appropriate notice of an application under § 1505. This rule specifies who should be given notice in chapter 15 cases and in other matters arising under chapter 15.

Rule 15002 recognizes that international and foreign sources may not be readily available to a United States court. In consequence, it requires a party citing international or foreign source in papers filed with the court to provide a copy of the material, and a translation into English. Sections 1508 and 1501 contemplate that cases under chapter 15 and other United States bankruptcy cases with foreign dimensions may require the consideration of foreign laws, including statutes and case law.

Rule 15003 provides a procedure for a trustee or other entity to be authorized to act in a foreign country under § 1505 on behalf of an estate created under § 541. Such an estate exists in a case commenced under chapter 7, chapter 9, chapter 11, chapter 12 or chapter 13. However, a petition filed under chapter 15 does not create such an estate.

Rule 15004 provides for a request for comity or cooperation under §1509(b)(3).

Such a motion may be made after a court grants recognition under § 1517 of a foreign main proceeding or a foreign non-main proceeding.

Rule 15005 provides for a foreign representative to advise a United States court that the foreign representative intends to commence a case under another chapter of the U.S. Bankruptcy Code. Section 1511(b) requires such notice to a court that has granted recognition to a foreign main or non-main proceeding before a foreign representative files such a domestic case in the United States.

Rule 15006 provides for an expanded period of time for filing a claim or interest, pursuant to § 1514(d). In addition, the rule provides that, absent a court order to the contrary, the notice be given in the same way that court notices are traditionally given in that country. Finally, the rule also requires that the notice be given in the local language of that country.

Rule 15007 provides a procedure for an application for recognition of a foreign case as a foreign main case or a foreign non-main case. This is one of the most important functions of chapter 15. It is very important to respect the due process rights of foreign administrators, foreign creditors and foreign debtors in making this application. At the same time, § 1517(c) requires that a court make a decision on such an application "at the earliest possible time." Rule 15007 provides a procedure to make such a decision promptly while respecting the due process rights of foreign parties in interest.

Rule 15008 invokes the applicable domestic provisions in Rule 4001 for relief from stay, prohibiting or conditioning the use, sale, or least of property, which § 1520(a) makes applicable after the recognition of a foreign main proceeding. This rule makes the applicable domestic rules available and applicable in such circumstances.

Rule 15009 provides generally that Rule 7001 and the rules in part VII apply to adversary proceedings under chapter 15. In addition to those proceedings listed in Rule 7001, it provides that the following proceedings unique to a chapter 15 case are governed by the part VII rules: A proceeding to obtain an injunction under § 1519; a request for relief under § 1521(a)(1)(2)(3) or (6); and a proceeding to recover money or property under § 549 or 552 by a foreign representative. Furthermore, § 1519(e) provides that the standards, procedures, and limitations applicable to an injunction shall apply to relief sought under § 1519. Pursuant to this provision, such relief must be sought by an adversary proceeding under Rule 7001.

Rule 15010 provides that any request for security or bond in connection with relief under § 1522(b) must be made by a motion pursuant to Rule 15001. Section 1522(b), which authorizes a court to entrust the distribution of some or all of the debtor's assets located in the United States to the foreign representative or another person, provided that the court has satisfied the interest of creditors in the United States are sufficiently protected. Such protection is typically provided by an appropriate bond.

Rule 15011 provides generally for the intervention in a domestic U.S. case by a foreign representative, pursuant to § 1524. Such intervention may be sought in any federal or state court in the United States. Rule 15011 makes it clear that the foreign representative must comply with the local rules of any such court where the foreign representative seeks to intervene.

Rule 15012 provides the procedure for an application for cooperation and direct communication between a trustee or debtor in possession and foreign courts. Such authorization is to be sought by application. Compliance with the notice provisions of Rule 15001 is not required.

Rule 15013 recognizes that chapter 15 does not cover all of the procedures that may be required for the coordination of specific multinational cases. This rule recognizes that specific procedures may be as provided by the use of Protocol, under practice that has previously developed. This rule provides that approval for a Protocol shall be sought by motion in compliance with Rule 15001.

Rule 15014 recognizes that a party in interest, typically a debtor, may seek a ruling by a domestic court that a case filed under another chapter of the Bankruptcy Code qualifies as a main proceeding for international purposes under foreign countries' versions of the Model Law or other appropriate authority. A similar practice has developed in the European Union under EU Regulation 1346/2000. Debtors or trustees in the United States may seek a similar domestic order, in the hopes that it will be applied by foreign courts.

Rule 15015 provides generally for court-to-court communications pursuant to § 1525-1527. The International Insolvency Institute and the American Law Institute have developed guidelines applicable to court-to-court communications in cross-border cases. This rule incorporates those guidelines as United States procedure.

DRAFT PART 15 – ANCILLARY AND OTHER CROSS-BORDER CASES

Rule 15001. Chapter 15 Motions: Form and Service.

A motion under chapter 15 shall comply with Rule 9013. In addition, the motion shall be served on the 20 largest unsecured creditors located in the United States, the administrator appointed in any foreign proceeding with respect to the debtor or a member of the same corporate group as the debtor, the 20 largest unsecured creditors in each such foreign proceeding, all United States secured creditors, all secured creditors in foreign countries who are known to the movant, and the United States Trustee. Furthermore, every such motion other than one which may be considered ex parte shall be served by the moving party on the trustee, if the motion arises in a case filed under chapter 7, 9, 11, 12 or 13.

Rule 15002. Foreign Authorities.

Any paper filed with the court that cites a foreign or international authority in a case under title 11, shall attach a copy of the international foreign authority, with a translation into English.

Rule 15003. Authorization to Act in Foreign Country.

Authorization to act in a foreign country pursuant to § 1505 shall be made on motion of the trustee or other entity seeking such authorization. The motion shall be made in compliance with Rule 9013, and shall be served as provided in Rule 15001. An order pursuant to this provision may be granted after notice and a hearing.

Rule 15004. Motion for Comity or Cooperation.

A request for comity or cooperation under § 1509(b)(3) shall be made by motion pursuant to Rule 15001.

Rule 15005. Advice of Foreign Representative's Intent to Commence a Case Under § 1511.

Any foreign representative who intends to commence a case under § 1511(a) shall file a notice of intent to commence a domestic bankruptcy case with the court that has granted a petition for recognition under § 1515. Such a notice shall be served as provided

by Rule 15001.

Rule 15006. Filing Proof of Claim or Equity Security Interest by Foreign Creditor or Equity Security Holder in Chapter 9 Municipality or Chapter 11 Reorganization case.

(a) Applicability of rule

This rule applies in chapter 9 and 11 cases to foreign creditors and foreign equity security holders.

(b) The filing of a claim or statement of interest under Rule 3003 by a foreign creditor or security interest holder shall be made as provided by Rule 3003.

(c) Notice to a foreign creditor or security interest holder shall be given at least 90 days before the deadline for filing a claim or notice of interest, unless otherwise ordered by the court.

(d) Notice of a deadline to file a claim or security interest under Rule 3003 shall be given in the official language of the country to which the notice is directed. In addition, the notice shall be delivered by the same means that domestic notices and legal proceedings are delivered in that country, unless the court orders otherwise.

Rule 15007. Application for Recognition.

(a) A foreign representative's petition for recognition shall be filed with the court. In addition, it shall be set for hearing pursuant to Rule 15001 upon 15 days notice, or such notice as is provided by the local rules of the court.

(b) A petition for recognition shall be served pursuant to Rule 15001.

(c) If a petition for recognition requests the recognition of a foreign proceeding as a foreign main proceeding, the petition shall be accompanied by evidence of the location of the debtor's registered office, or the habitual residence in the case of an individual. All such documents shall be translated into English pursuant to § 1515(d).

(d) A party contending that a foreign proceeding is not a foreign main proceeding shall file evidence complying with Rule 7056 in support of the party's contention.

(e) A party seeking to rebut the presumption of § 1516(c), that the debtor's registered office or habitual residence is the center of the debtor's main interest, shall file evidence complying with Rule 7056 in opposition to such a determination. Should it appear

from the affidavits of such a party that the party cannot for reasons stated present evidence essential to justify the party's opposition, the court may order a continuance to permit evidence to be obtained or discovery to be had or may make such other order as is just. When a motion for recognition of a foreign main proceeding is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, supported by admissible evidence, must set forth specific facts showing that there is a genuine issue for trial.

(f) If the court finds that there is a genuine issue for trial on the recognition of a foreign main proceeding, the court shall conduct an evidentiary hearing at the earliest possible time, consistent with § 1517(c).

Rule 15008. Relief from Automatic Stay: Prohibiting or Conditioning Use, Sale, or Lease of Property; Use of Cash Collateral.

(a) A motion for relief from stay, prohibiting or conditioning the use, sale, or lease of property shall be made pursuant to Rule 4001(a). A motion for use of cash collateral shall be made pursuant to Rule 4001(b). A motion pursuant to this rule shall be served pursuant to Rule 15001.

(b) A motion for relief from the automatic stay of §§ 361 and 362, as provided by § 1520, shall be made pursuant to Rule 4001(a).

Rule 15009. Adversary Proceedings Under Rule 7001.

(a) Rule 7001 applies to adversary proceedings under chapter 15.

(b) In addition to those proceedings listed in Rule 7001, the following proceedings in a chapter 15 case are adversary proceedings governed by the rules of Part VII:

(1) A proceeding to recover money or property under § 549 or 552;

(2) A proceeding to obtain an injunction or other equitable relief under § 1519;

(3) a request for relief under § 1521(a)(1), (2), (3) or (6);

(4) An action initiated by a foreign representative pursuant to § 1523.

Rule 15010. Protection of Creditors and Other Interested Persons.

Any request for security or bond sought in connection with relief under § 1522(b) or

(c) shall be made by motion pursuant to Rule 15001.

Rule 15011. Intervention by a Foreign Representative.

Intervention in any proceedings in a state or federal court in the United States by a foreign representative shall be pursuant to the rules applicable to that court.

Rule 15012. Cooperation and Direct Communication Between the Trustee and Foreign Courts.

A trustee or other person, including an examiner, authorized by the court shall obtain authorization from the court to communicate directly with a foreign judge. Such authorization may be requested by application after notice and a hearing.

Rule 15013. Protocols.

A party seeking approval in the form of a protocol of an agreement concerning the coordination of proceedings shall seek such approval by motion pursuant to Rule 15001.

Rule 15014. Recognition of Domestic Case as a Main or Non-Main Proceeding.

(a) A party in interest may request that the court designate a case under chapter 7, 9, 11, 12 or 13 as a main proceeding or a non-main proceeding. Such a request shall be made by motion, and shall comply with the requirements of Rule 15001.

(b) A motion for designation of a case as a main proceeding pursuant to paragraph (a) shall be supported by evidence that the center of the debtor's main interests is located in the United States.

(c) A motion for designation of a case as a non-main proceeding pursuant to paragraph (a) shall be supported by evidence that the debtor has an establishment in the United States.

Rule 15015. Court-to-Court Communication.

(a) A court may communicate with a foreign court in connection with matters relating to proceedings before it for the purposes of coordinating and harmonizing proceedings before it with those in the other State.

(b) A court may communicate with an administrator in a foreign State or an authorized representative of the court in that State in connection with the coordination and harmonization of the proceedings before it with the proceedings in the other State.

(c) A court may permit a duly authorized administrator to communicate with a foreign court directly, subject to the approval of the foreign court, or through an administrator in the other jurisdiction or through an authorized representative of the foreign court on such terms as the court considers appropriate.

(d) A court may receive communications from a foreign court or from an authorized representative of the foreign court or from a foreign administrator. The court may respond directly if the communication is from a foreign court (subject to paragraph (f) of this rule) in the case of two-way communications and may respond directly or through an authorized representative of the court or through a duly authorized administrator if the communication is from a foreign administrator.

(e) Communications from a court to a foreign court may take place by or through:

(1) Sending or transmitting copies of formal orders, judgments, opinions, reasons for decision, endorsements, transcripts of proceedings, or other documents directly to the foreign court and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(2) Directing counsel, a foreign administrator or a trustee to transmit or deliver copies of documents, pleadings, affidavits, factums, briefs, or other documents that are filed or to be filed with the court to the foreign court in such fashion as may be appropriate and providing advance notice to counsel for affected parties in such manner as the court considers appropriate;

(3) Participating in two-way communications with the foreign court by telephone or video conference call or other electronic means, subject to paragraph (f).

(f) In the event of communications between the courts in accordance with paragraphs (a) and (d) by means of telephone or video conference call or other electronic means, unless otherwise directed by either of the two courts:

(1) Counsel for all affected parties may participate in person during the communication. Advance notice of the communication shall be given to all parties in accordance with the rules of procedure applicable in each court;

(2) The communication between the courts shall be on the record;

(3) The courts and judges in each court may communicate fully with each other to establish appropriate arrangements for the communication without the

necessity for participation by counsel unless otherwise ordered by either of the courts.

(g) In the event of communications between the court and an authorized representative of the foreign court or a foreign administrator in accordance with paragraphs (b) and (d) by means of telephone or video conference call or other electronic means, unless otherwise directed by the court:

(1) Counsel for all affected parties may participate in person during the communication. Advance notice of the communication shall be given to all parties in accordance with the rules of procedure applicable in each court;

(2) The communication shall be on the record;

(3) Judges in each court may communicate fully with the authorized representative of the foreign court or the foreign administrator to establish appropriate arrangements for the communication without the necessity for participation by counsel unless otherwise ordered by the court.

(h) A court may conduct a joint hearing with another court. In connection with any such joint hearing, the following applies, unless otherwise ordered or unless otherwise provided in any previously approved Protocol applicable to such joint hearing:

(1) Each court shall be able to simultaneously hear the proceedings in the other court;

(2) Evidentiary or written materials filed or to be filed in one court shall be transmitted to the other court or made available electronically in a publicly accessible system in advance of the hearing. Transmittal of such material to the other court or its public availability in an electronic system shall not be subject the party filing the material in one court to the jurisdiction of the other court;

(3) Submissions or applications by the representative of any party should be made only to the court in which the representative making the submissions is appearing unless the representative is specifically given permission by the other court to make submissions to it;

(4) Subject to paragraph (f)(2), the court may communicate with the foreign court in advance of a joint hearing, with or without counsel being present, to establish guidelines for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative, or preliminary matters relating to the joint hearing;

(5) Subject to paragraph (f)(2), the court, subsequent to the joint hearing, may

communicate with the foreign court, with or without counsel present, for the purpose of determining whether coordinated orders could be made by both courts and to coordinate and resolve any procedural or nonsubstantive matters relating to the joint hearing.

(l) The court may, except upon proper objection on valid grounds and then only to the extent of such objection, recognize and accept as authentic the provisions of statutes, statutory or administrative regulations, and rules of court of general application applicable to the proceedings in the foreign jurisdiction without the need for further proof or exemplification thereof.

(j) The court may, except upon proper objection on valid grounds and then only to the extent of such objection, accept that orders made in the proceedings in the other jurisdiction were duly and properly made or entered on or about their respective dates and accept that such orders require no further proof or exemplification for purposes of the proceedings before it, subject to all such proper reservations as in the opinion of the court are appropriate regarding proceedings by way of appeal or review that are actually pending in respect of any such orders.

(k) The court may coordinate proceedings before it with proceedings in another State by establishing a service list that may include parties that are entitled to receive notice of proceedings before the court in the other State ("non-resident parties"). All notices, applications, motions, and other materials served for purposes of the proceedings before the court may be ordered to also be provided to or served on the non-resident parties by making such materials available electronically in a publicly accessible system or by facsimile transmission, certified or registered mail or delivery by courier, or in such other manner as may be directed by the court.

(l) The foreign administrator or a representative of creditors in the proceedings in the other State or an authorized representative of the court in the other State may appear and be heard by the court without thereby becoming subject to the jurisdiction of the court.

(m) The court may direct that any stay of proceedings affecting the parties before it shall, subject to further order of the court, not apply to applications or motions brought by such parties before the other court or that relief be granted to permit such parties to bring such applications or motions before the other court on such terms and conditions as it considers appropriate. Court-to-court communications in accordance with paragraphs (e) and (f) hereof may take place if an application or motion brought before the court affects or might affect issues or proceedings in the court in the other State.

(n) A court may communicate with a foreign court or with an authorized representative of such court in the manner prescribed by this rule for purposes of coordinating and harmonizing proceedings before it with proceedings in the other jurisdiction regardless of the form of the proceedings before it or before the foreign court wherever there is commonality among the issues and/or the parties in the proceedings.

(o) Directions issued by the court under this rule are subject to such amendments, modifications, and extensions as may be appropriate for the purposes described in this rule and to reflect the changes and developments from time to time in the proceedings before it and before the foreign court. Any directions may be supplemented, modified, and restated from time to time and such modifications, amendments, and restatements should become effective upon being accepted by both courts. If either court intends to supplement, change, or abrogate directions issued under this rule in the absence of joint approval by both courts, the court shall give the foreign courts involved reasonable notice of its intention to do so.

(p) Arrangements contemplated under this rule do not constitute a compromise or waiver by the court of any powers, responsibilities, or authority and do not constitute a substantive determination of any matter in controversy before the court or before the foreign court nor a waiver by any of the parties of any of their substantive rights and claims or a diminution of the effect of any of the orders made by the court or the foreign court.

4-B

08/09/2006 10:58 AM

Subject Fw: Data enabled forms

>>Outlook Object<<
Subject: Status of Data Tags

Judge Zilly-Since the Santa Fe meeting, the AO and the USTP have taken a number of significant steps to try to implement widespread use of data enabled forms, but because data enabled forms are not mandatory, the standards have not been adopted by the software providers.

A voluntary data enabled forms standard for bankruptcy petitions, schedules, statement of financial affairs and the current monthly income statement was released in September 2005. As of the beginning of February 2006, only approximately 30 data enabled forms of which only 5 were the new B22a current monthly income form have been filed. It appears only one vendor, Puritas Springs, has incorporated the new standard in its software package. It did so only because it believed the standard was mandatory. The other vendors have floated a few "test" forms through the process, but none appear to be actively integrating the new standard.

The AO and the USTP reached out to the software vendor community to assist them with implementing the new standard. A vendor fair was held at the AO on December 16, 2005. About 30 individuals attended in person with another 20 connecting via teleconference. Meeting minutes of the Vendor Fair are posted to the Program's website (http://www.usdoj.gov/ust/eo/bapcpa/defs/index.htm), and an email group was set up to better communicate with the software vendors. Future vendor fairs are being considered by the AO to continue the dialogue with the software vendor community.

While substantial progress in a relatively short period of time has been made, it is woefully insufficient to meet the new data intensive demands of the BAPCPA. Unless a new data enabled forms standard is implemented by the major software vendors immediately, there will be an inability to accurately collect data required under BAPCPA. Specifically, the USTP will be unable to identify the target audits required under BAPCPA to be implemented by October 2006 or be able to access the income and expense data for the IRS expense guidelines study. Data enabled forms could also be utilized in the study of the definition of household goods. Additionally, the forms sub-committee will be recommending changes to the petition and schedules designed to assist the AO in data collection. Without a mandatory data enable forms standard, extraction of this information will be difficult.

While we greatly appreciate the AO's effort in developing the data enabled form standard, voluntary implementation is not successful. Rule 5005 permits the Judicial Conference to adopt mandatory technical standards. We seek the assistance of the Rules Committee in recommending a course of action which will achieve this goal. Thank you.

PAGES 146-148 INTENTIONALLY OMITTED

5-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: SEPARATE DOCUMENT REQUIREMENT UNDER RULES 9021 AND 5003

DATE: AUGUST 10, 2006

The Subcommittee on Privacy, Public Access and Appeals met by teleconference to consider whether to recommend amendments to the Bankruptcy Rules that require a separate document for every judgment in a contested matter or adversary proceeding. The matter has been discussed by the Subcommittee in several teleconferences over the past three years, and the issue was on the agenda for the March 2005 meeting of the Committee in Sarasota. The Committee did not reach a resolution of the matter at that time, and the minutes reflect that by a 5-3 vote, the Committee believed that the separate document requirement should not apply to contested matters. The issue was on the agenda for the meeting in Santa Fe in October of last year, but the necessary focus on the Interim Rules and the Official Forms required to implement the 2005 Act prevented full consideration of the matter. Nonetheless, the brief discussion again identified significant opposing positions on the matter.

The separate document requirement is contained in Civil Rule 58 which states in part that "every judgment and amended judgment must be set forth on a separate document." The Rule does not say what the document must be separate from, but the Seventh Circuit has described the concept by stating that a"judgment should be a self-contained document, saying who has won and what relief has been awarded, but omitting the reasons for this disposition, which should appear in the court's opinion." Otis v. City of Chicago, 29 F.3d 1159, 1163 (7th Cir. 1994)(cited

and quoted in 12 Moore's Federal Practice 58-22 to 58-23 (3d Ed. 2006)). The treatise continues by noting that "[t]he requirement of a separate document means that the judgment itself must be entirely separate from any order, opinion, or memorandum." Id. at 58-23. Thus, at least for Civil Rule 58 purposes, it seems that the separate document requirement intends to separate the judgment from the court's findings as they would be set out under Civil Rule 52.

In bankruptcy cases, Rule 9021 provides that every such judgment "shall be set forth on a separate document" and that Rule 58 of the Civil Rules applies to cases under the Code, "except as otherwise provided" in Bankruptcy Rule 9021. Rule 9021 also provides that judgments are effective "when they are entered as provided in Rule 5003." This series of statements arguably presents several ambiguities that may justify amending the rule. For example, the rule adopts Civil Rule 58, "except as otherwise provided" in Rule 9021. The second sentence of Rule 9021 provides that "every" judgment in adversary proceedings and contested matters must be set forth on a separate document. This is even more restrictive than Civil Rule 58 which provides for exceptions in subdivision (a)(1) from the separate document requirement for a limited set of judgments or orders for which no separate document is necessary.[1] It seems unlikely that Rule 9021 is intended to require a separate document in these situations when no such document is required in a civil case generally, but the plain language of the Bankruptcy Rule seems to establish that requirement. Rule 9021 would seem to be ripe for amendment to resolve any confusion that might arise from the conflicting instructions between the Civil and Bankruptcy

[1] Under Civil Rule 58(a)(1), a separate document is not required for orders disposing of a motion for judgment under Rule 50(b), a motion to amend or make additional findings of fact under Rule 52(b), a motion for attorney fees under Rule 54(d), a motion to alter or amend a judgment under Rule 59, or a motion for relief from judgment under Rule 60.

Rules.

A recent amendment to Civil Rule 58 also provides some justification for considering amendments to Rule 9021. In 2002, Civil Rule 58 was amended to resolve a finality problem that existed whenever an order or judgment was entered but was not set forth on a separate document. The courts of appeals had held that the absence of a separate document for the judgment essentially operated to toll the time to appeal[2], so the Appellate and Civil Rules Committees each studied the issue to identify a solution to the problem. The solution was an amendment to Civil Rule 58 which now provides that an appeal of an order or judgment that is not set out in a separate document is timely only if it is filed not later than 150 days after the docketing of the judgment or order being appealed. Thus, the previously unlimited appeal time is reduced to a maximum of 150 days.

The amendment of Civil Rule 58 raises the issue of whether the 150-day appeal period applies to orders or judgments in adversary proceedings and contested matters in bankruptcy cases. On its face, the change to Rule 58 would seem to extend the appeal time in the absence of a separate document from the 10 day appeal time of Rule 8002(a) to 150 days under Civil Rule 58 made applicable in bankruptcy cases by Rule 9021. One argument to the contrary is that the directive in Rule 9021 that Civil Rule 58 applies in bankruptcy cases is limited to the extent that Rule 9021 otherwise provides. The third sentence of Rule 9021 states that "A judgment is

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[2] See, e.g., *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), vacated on other grounds 143 F.3d 263 (6th Cir. 1998)(en banc). The failure of a party to raise the absence of a separate document, however, could constitute a waiver of the right to have the judgment entered on the civil docket. *Fiore v. Washington County Community Mental Health Center*, 960 F.2d 229, 226 (1st Cir. 1992)(en banc).

effective when entered as provided in Rule 5003." Rule 5003(a), in turn, provides that the clerk "shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case...[and] the entry of a judgment or order in a docket shall show the date the entry is made." Thus, under this provision an argument can be made that the clerk's entry of an order on the docket is effective (as stated in the third sentence of Rule 9021) even in the absence of a separate document setting forth the court's judgment in the matter.

In any event, it is clear that the "separate document rule" for judgments applies in bankruptcy cases. *In re Schimmels*, 85 F.3d 416 (9th Cir. 1996); *In re Seiscom Delta, Inc.*, 857 F.2d 279 (5th Cir. 1988). In *Dynamic Changes Hypnosis Center, Inc., v. PCH Holding LLC*, 306 B.R. 800 (E.D. Va. 2004), the District Court recognized that the separate document requirement applies in bankruptcy cases and concluded that the appellant had "waived its right to have the Bankruptcy Court's judgment entered on a separate document." Id. at 808. The Court in *Dynamic Changes* noted the amendment to Civil Rule 58 and specifically mentioned that Bankruptcy Rule 9021 has not been amended since the change to Civil Rule 58. In footnote 10 to the opinion, the Court stated that the lack of any amendment to Bankruptcy Rule 9021 means that the judgment is effective when it is entered under Rule 5003, and that "the proper procedure for the Bankruptcy Court to follow is to set forth each final order on a separate document on the day the order was rendered, and for the Clerk to note the entry of that order on the publicly available bankruptcy docket." Id. at 807, n.10. Thus, the District Court seems to have interpreted Bankruptcy Rule 9021 as providing that docketing under Rule 5003 determines the time for filing a notice of appeal and concluded that the Bankruptcy Rules do not incorporate the change to Civil Rule 58. I have been unable to find any other decisions rendered under

Bankruptcy Rule 9021 applying the 2002 amendment to Civil Rule 58.

In *Garland v. Estate of Moloney (In re Garland)*, 295 B.R. 347 (9th Cir. BAD 2003), a case arising under the former version of Civil Rule 58, the court held that a judgment not set forth on a separate document did not become effective under Bankruptcy Rule 9021 and Civil Rule 58 as incorporated into the Bankruptcy Rules. The bankruptcy court subsequently entered a judgment denying the debtor's request for relief from the earlier order, and it was this subsequent order prepared by the court (counsel had prepared the initial order) that was final and presented an appealable order to the BAD. Judge Klein, writing for the court, noted that Bankruptcy Rule 9021 and Civil Rule 58 establish the same requirements for judgments, and he also noted that the revised version of Civil Rule 58 will apply in bankruptcy cases to set an outside date of 150 days after entry in the civil docket as the latest date on which the judgment will become effective.

Contested Matters and the Separate Document Requirement

Practice seems to vary throughout the country as to compliance with the separate document requirement of Rule 9021 in contested matters. In many courts, no separate document is entered in contested matters including stay relief, asset sales, and assumption or rejection of executory contracts. In many instances, that may the be result of counsel preparing the document and being unaware of the requirements of Rule 9021. That seems to have occurred in both the *Dynamic Changes Hypnosis Center* and *Garland* cases.

It seems that the courts generally do issue a separate document for judgments in adversary cases, and the Subcommittee unanimously agreed that the requirement of a separate document for judgments in adversary proceedings should continue. The Subcommittee also discussed whether the language of Rule 9021 contained some ambiguity even as to the scope of its application to

adversary proceedings. Thus, if Rule 9021 is to continue to apply, at least some amendment of it seems appropriate to alleviate any confusion that could result from a strict reading of the second sentence of the rule.

The Subcommittee was split over whether to except contested matters from the separate document requirement. On the one hand, a majority of the Subcommittee asserted that the practice in the bankruptcy courts should mirror as closely as possible the practice in civil matters before the district courts. It was also urged that the failure of some or even many courts to follow the strict requirements of Rule 9021 is an insufficient reason to make that practice national. Many courts do follow the separate document rule, and the rule should reflect this better practice rather than revert to the practices of those courts that do not set out judgments in contested matters on a separate document. The rationale of the separate document requirement applies just as well to contested matters as to adversary proceedings. Furthermore, there may not be as many instances in which the separate document requirement is not being followed as it may appear, because the requirement does not apply to consent orders under which many contested matters are resolved.

Other Subcommittee members argued that there is a widespread practice of not following the separate judgment rule in contested matters of all types and sizes. Sale orders under § 363 of millions of dollars of assets, as well stay relief and adequate protection orders for an individual debtor's automobile often are set out in documents that include many findings of fact and conclusions of law along with statements in the nature of decrees about the property or the obligations of the parties. Nonetheless, the parties all treat these orders as appealable even in the absence of a separate document setting forth the court's judgment in the matter. There are a great

many more contested matters than adversary proceedings, and enforcing the separate document requirement in these matters will increase significantly the volume of docket entries when considered on a system-wide basis.

While there was a majority in the Subcommittee in favor of retaining the separate document requirement for contested matters, there was no consensus developed within the Subcommittee. Consequently, alternative solutions are offered below.

The Subcommittee discussed several options to resolve the matter. One solution is to add a new Rule 7058 to the Part VII rules and to amend Rule 9014 to incorporate new Rule 7058 into contested matters in the same way that many of the other Part VII rules are incorporated. This solution would appear to render existing Rule 9021 moot and make it eligible for abrogation. However, this would leave Civil Rule 58 inapplicable to matters that fall outside of the scope of contested matters and adversary proceedings. These matters include such proceedings as contested involuntary petitions and applications for the employment of professional persons. Existing Rule 9021 covers these matters, and if the Committee wishes the rule to continue to do so, the first and last sentence of the existing rule should be retained. The necessary amendments to accomplish this revision follow. Rule 9021 is first shown with a deletion of only the second and third sentences followed by a version that abrogates the rule in its entirety.

RULE 7058. Entry of Judgment

Rule 58, F. R. Civ. P. applies in adversary proceedings. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

This rule is added in connection with the amendments to Rule 9021. Previously, Civil Rule 58 was made applicable to adversary proceedings and contested matters through Rule 9021. That rule no longer includes that directive. Adversary proceedings are analogous to civil cases, and the Part VII rules make many of the Civil Rules directly applicable in adversary proceedings. Rule 58 is not added to that group of rules.

RULE 9014. Contested Matters

* * * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7058, 7064, 7069, and 7071. The following subdivisions of ~~Fed.~~ F. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony), ~~and~~ 26(a)3 (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall

apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

* * * * *

COMMITTEE NOTE

The rule is amended to include the incorporation of Rule 7058 into contested matters. Rule 7058 is new, and it replaces in part Rule 9021 which previously governed the entry of judgment.

Other changes are stylistic.

Rule 9021. Entry of Judgment

Except as otherwise provided herein, Rule 58 F. R. Civ. P. applies in cases under the Code. ~~Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003.~~ The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended to delete the second sentence of the rule as unnecessary and potentially misleading. The rule makes Civil Rule 58, which requires nearly all judgments to be set forth on a separate document, applicable in all bankruptcy cases. Therefore, there is no need to restate its applicability in adversary proceedings and contested matters. Moreover, Rule 58(a)(1) sets out several exceptions to the separate document requirement, and by deleting

the second sentence of this rule which requires a separate document for every judgment, those exceptions are carried forward into the bankruptcy rules.

The third sentence of the rule is deleted because Civil Rule 58(b) states when a judgment is entered and effective.

~~**Rule 9021. Entry of Judgment**~~

~~Except as otherwise provided herein, Rule 58 F. R. Civ. P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.~~

COMMITTEE NOTE

The rule is abrogated. The addition of Rule 7058 to Part VII of the Rules and the amendment to Rule 9014(c) make Rule 7058 applicable in contested matters renders this rule unnecessary.

If the Committee concludes that contested matters should be excepted from the separate document requirement, then the rules could be amended by introducing Rule 7058 as previously set forth, and by amending Rule 9021 to exclude contested matters from its reach. Abrogating Rule 9021 would accomplish this goal, but that may go too far by making Civil Rule 58 inapplicable to matters that fall outside of the scope of adversary proceedings and contested matters. So, that rule is set out below with the alternative of amending the rule and abrogating

the rule. Rule 9014 is also amended to include a provision that sets out the triggering mechanism for the appeal ability of judgments, orders, and decrees in contested matters.

RULE 7058. Entry of Judgment

Rule 58 F. R. Civ. P. applies in adversary proceedings. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

This rule is added in connection with the amendments to Rule 9021. Previously, Civil Rule 58 was made applicable to adversary proceedings and contested matters through Rule 9021. That rule no longer includes that directive. Adversary proceedings are analogous to civil cases, and the Part VII rules make many of the Civil Rules directly applicable in adversary proceedings. Rule 58 is not added to that group of rules.

Rule 9021. Entry of Judgment

Except as otherwise provided herein, Rule 58 F. R. Civ. P. applies in cases under the Code. ~~Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003.~~ Rule 58 F. R. Civ. P. does not apply in contested matters. The reference in Rule 58 F. R. Civ. P. to Rule 79(a) F. R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended to delete the second sentence of the rule as unnecessary and potentially misleading. The Rule makes Civil Rule 58, which requires nearly all judgements to be set forth on a separate document, applicable in all bankruptcy cases. Therefore, there is no need to restate its applicability in adversary proceedings and contested matters. Moreover, Rule 58(a)(1) sets out several exceptions to the separate document requirement, and by deleting the second sentence of this rule which requires a separate document for every judgment, those exceptions are carried forward into the bankruptcy rules. The third sentence of the rule is deleted because Civil Rule 58(b) states when a judgment is entered and effective.

The rule is also amended by providing that Civil Rule 58 is not applicable in contested matters. The entry of judgment for contested matters is governed by a companion amendment to Rule 9014 which sets out the manner of the entry of judgment in contested matters.

Rule 9014. Contested Matters

* * * * *

(f) ENTRY OF JUDGMENT IN CONTESTED MATTERS.

(1) Rule 58(a)(2) F. R. Civ. P applies in contested matters.

(2) A judgment is entered when the clerk enters it on the docket under Rule 5003.

COMMITTEE NOTE

The rule is amended to state when a judgment, as defined in Rules 9001(7) and 9002(5), is entered in a contested matter. The companion amendment to Rule 9021 makes Civil Rule 58 no longer applicable to contested matters. This amendment makes only Rule 58(a)(2) applicable to contested matters. Most importantly, this amendment has the effect of excepting contested matters from the separate document requirement contained in Civil Rule 58 and former Rule 9021. It also renders the extended appeal period of 150 days contained in Civil Rule 58(b) inapplicable to

contested matters. Under this amendment, the entry on the docket of a judgment by the clerk under Rule 5003 will commence the appeal time even if the judgment is not set forth on a separate document as would be the case in an adversary proceeding which is governed by Civil Rule 58 by its incorporation into those proceedings under Rule 7058.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 9021 AND THE SEPARATE DOCUMENT RULE

DATE: FEBRUARY 10, 2005

The Subcommittee on Privacy, Public Access, and Appeals met by teleconference to consider whether to propose any amendment to Rule 9021 that would address the impact of the recent revisions to Civil Rule 58 that are incorporated by reference under Rule 9021. After a vigorous discussion, the Subcommittee could not reach a consensus on the matter. Instead, the Subcommittee recommends that the issue be reconsidered by the full Committee with that consideration focused on four alternatives. The alternatives are set out at the end of this memo following a presentation of the issues.

The Incorporation of Civil Rule 58 into the Bankruptcy Rules

Bankruptcy Rule 9021 generally incorporates by reference Rule 58 of the Federal Rules of Civil Procedure. One exception to that incorporation, however, is that the reference to Civil Rule 79(a) in Civil Rule 58 is read as a reference to Bankruptcy Rule 5003. Bankruptcy Rule 5003 requires the Clerk to maintain a docket in each case and to enter judgments on that docket showing the date when the entry was made. Bankruptcy Rule 5003(a). This cross-reference to Bankruptcy Rule 5003 in lieu of Civil Rule 79(a) has very little impact. Under either rule, the Clerk maintains a docket and must enter judgments showing the date of those judgments on the docket.

The incorporation of Civil Rule 58, however, recently has taken on a potentially more

significant meaning. Civil Rule 58 was amended effective December 1, 2002. The former Rule 58 provided that judgments are effective only when they are set forth on a separate document and entered as provided in Rule 79(a) of the Civil Rules. The Committee Note to the 2002 revision to Civil Rule 58 indicated that the separate document requirement was frequently ignored. The consequence of ignoring this requirement was that the time to appeal under Appellate Rule 4 did not begin to run. See, e.g., *United States v. Haynes*, 158 F.3d 1327, 1331 (D.C. Cir. 1998); *Hammack v. Baroid Corp.*, 142 F.3d 266, 269-70 (5th Cir. 1998); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), vacated on other grounds 143 F.3d 263 (6th Cir. 1998)(en banc). The failure of a party to raise the absence of a separate document, however, could constitute a waiver of the right to have the judgment entered on the civil docket. *Fiore v. Washington County Community Mental Health Center*, 960 F.2d 229, 226 (1st Cir. 1992)(en banc). In any event, the consequence of the failure to set out judgments on a separate document led the Civil and Appellate Rules Committees to recommend the changes to Rule 58 that became effective on December 1, 2002. Under the new version of Rule 58(b), when a separate document is required, judgment is *deemed* entered when the judgment is entered on the civil docket under Rule 79(a) and when it is either set forth on a separate document or when 150 days have run from the entry of the judgment on the civil docket under Rule 79(a), whichever is earlier. The purpose of the new definition of the time when a judgment becomes effective is to establish a final date on which orders become appealable, even in the absence of the judgment being entered on a separate document.

The incorporation of Civil Rule 58 under Bankruptcy Rule 9021 may be susceptible to two conflicting readings. The rule could be construed as incorporating nearly all of Civil Rule

58, except only that portion of Rule 58 that refers to Civil Rule 79(a). If the remainder of Civil Rule 58 is incorporated, then the provision of subdivision (b)(2) of that rule would apply in bankruptcy proceedings, and it would appear to extend the time for filing an appeal to 150 days after its inclusion on the docket in the absence of a separate document setting forth the order or judgment.

On the other hand, Bankruptcy Rule 9021 only incorporates Civil Rule 58 to the extent not otherwise provided in Rule 9021. Rule 9021 states that "a judgment is effective when entered as provided in Rule 5003." The rule thus arguably "provides otherwise" if Rule 5003 establishes an effective date for judgments that is inconsistent with Civil Rule 58. Under Bankruptcy Rule 9021, the time of the entry of the judgment is defined entirely by Rule 5003. Bankruptcy Rule 5003(a) simply states that "the entry of a judgment or order in a docket shall show the date the entry is made." Entry of a judgment is made in the manner prescribed by the Director of the Administrative office of the United States Courts. This procedure would seem to override the process set out in Civil Rule 58(b)(2).

It is clear that the "separate document rule" for judgments applies in bankruptcy cases. In re *Schimmels*, 85 F.3d 416 (9th Cir. 1996); *In re Seiscom Delta, Inc.*, 857 F.2d 279 (5th Cir. 1988). In *Dynamic Changes Hypnosis Center, Inc., v. PCH Holding LLC*, 306 B.R. 800 (E.D. Va. 2004), the District Court recognized that the separate document requirement applies in bankruptcy cases and concluded that the appellant had "waived its right to have the Bankruptcy Court's judgment entered on a separate document." Id. at 808. The Court in *Dynamic Changes* noted the amendment to Civil Rule 58 and specifically mentioned that Bankruptcy Rule 9021 has not been amended since the change to Civil Rule 58. In footnote 10 to the opinion, the Court

stated that the lack of any amendment to Bankruptcy Rule 9021 means that "the proper procedure for the Bankruptcy Court to follow is to set forth each final order on a separate document on the day the order was rendered, and for the Clerk to note the entry of that order on the publicly available bankruptcy docket." Id. at 807, n.10. Thus, the District Court seems to have interpreted Bankruptcy Rule 9021 as not incorporating the change to Civil Rule 58 into the Bankruptcy Rules. I have been unable to find any other decisions rendered under Bankruptcy Rule 9021applying the 2002 amendment to Civil Rule 58.

In *Garland v. Estate of Moloney (In re Garland)*, 295 B.R. 347 (9th Cir. BAP 203), the court held that a judgment not set forth on a separate document did not become effective under Bankruptcy Rule 9021 and Civil Rule 58 as incorporated into the Bankruptcy Rules. The bankruptcy court subsequent entered a judgment denying the debtor's request for relief from the earlier order, and it was this subsequent order prepared by the court (counsel had prepared the initial order) that was final and presented an appealable order to the BAP. Judge Klein, writing for the court, noted that Bankruptcy Rule 9021 and Civil Rule 58 establish the same requirements for judgments, and he also noted that the revised version of Civil Rule 58 will apply in bankruptcy cases to set an outside date of 150 days after entry in the civil docket as the latest date on which the judgment will become effective.

While it is clear that the separate document requirement applies under both the Bankruptcy Rules and the Civil Rules, the definition of "entry" of a judgment may be different depending on the extent to which Civil Rule 58 is incorporated into Bankruptcy Rule 9021. Since Civil Rule 58(b)(2) now defines entry of a judgment in such a manner that it establishes a definite cut-off date for the entry of a judgment even in the absence of a separate document, the

question arises whether the bankruptcy rules should follow suit. While the *Garland* court construed existing Rule 9021 as fully incorporating Civil Rule 58(b)(2), the court in *Dynamic Changes* indicated that the rule does not include that new definition of entry of a judgment into the Bankruptcy Rules.

The Advisory Committee may conclude that the bankruptcy system is better served by leaving the Rule unchanged. Amending the Rule at this time would highlight the fact that some judgments are not properly entered when the court did not include the judgment on a separate document. In that instance, the circuit decisions under former Civil Rule 58 that held that the absence of a separate document caused the appeal time not to commence would continue to apply to bankruptcy court judgments for which no separate document was filed. This could cause parties to reopen appeals on matters long since resolved, if they realize that the judgment was not set out on a separate document..

The bankruptcy rules and the civil rules generally are intended to be consistent to the greatest extent possible. In the absence of some bankruptcy policy making a different rule necessary or appropriate, the same treatment typically applies in adversary proceedings in bankruptcy cases as compared to general civil cases. While there may be a justification for expediting appeals in bankruptcy cases because resolution of a particular appeal can have an impact on many otherwise unrelated matters in the case (e.g., if we win, we sell the division and reorganize the rest of the business; if we lose, we convert to chapter 7), that may not justify inconsistency between the Civil and Bankruptcy Rules. Therefore, it may be prudent to consider amending the Bankruptcy Rule 9021 to ensure that consistent treatment is available under both the Civil Rules and the Bankruptcy Rules.

In addition to the possibility of taking no action to amend Rule 9021, the following proposals are offered for the Committee's consideration. Alternative 1 is intended to make the appealability of final judgments and orders in bankruptcy adversary proceedings and contested matters consistent with the appealability of final judgments and orders in cases governed by the Civil Rules. This would further the goal of consistency between the sets of rules, and it provides a broader source of decisional law on the operation of the rule. On the other hand, this solution results in the extension of the time to appeal if the court does not comply with the separate document requirement for judgments. In that event, an aggrieved party would have 150 days from the time of the entry of the judgment on the docket to commence an appeal of the judgment.

Alternative 2 is similar to the first alternative, except that it would call for the deletion of only the third sentence of the rule. The result of this edit is that the bankruptcy rules would continue to have a specific and direct requirement of a separate document for judgments, and the rule would otherwise defer to the civil rules. The deletion of the third sentence would arguably prevent the argument that "entry" of a judgment is somehow established under Rule 5003 as asserted by the court in *Dynamic Changes*.

Alternative 3 would set the bankruptcy courts on a course separate from the district courts as regards the entry of judgments. It would delete the requirement that there be a separate document for a judgment to become effective.

ALTERNATIVE 1 – General Adoption of Civil Rule 58

Rule 9021. Entry of Judgment.

Except as otherwise provided herein, Rule 58 F.R.Civ.P.

applies in cases under the Code. ~~Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in rule 5003.~~ The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended to incorporate Rule 58 F.R.Civ.P. into the Bankruptcy Rules in its entirety except for references in Civil Rule 58 to Civil Rule 79(a). Those references are deemed to be references to Bankruptcy Rule 5003 instead of references to Civil Rule 70(a). Consequently, a judgment that must be entered on a separate document is considered entered when it is entered on the bankruptcy docket and when it is either (1) set forth on a separate document or (2) when 150 days passes from the entry on the bankruptcy docket, whichever is earlier.

ALTERNATIVE 2 – Retention of Separate Document Requirement in Rule 9021

Rule 9021. Entry of Judgment.

Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. ~~A judgment is effective when entered as~~

~~provided in rule 5003.~~ The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended by deleting that portion of the rule that attempted to define the effective date of a judgment. The deletion of the statement extends the incorporation of Rule 58 F. R. Civ. P. into the Bankruptcy Rules to include the provisions of that Civil Rule 58 that define the entry of a judgment whether or not a separate document setting forth the judgment exists. Under that rule, if the court issues a separate document setting forth the judgment, the judgment is entered at the later of the time of the issuance of the separate document or the docketing of that judgment by the clerk. If the court does not issue a separate document setting forth the judgment, then the judgment is deemed entered 150 days after the clerk enters the judgment on the docket. This will resolve matters relating to the timeliness of appeals when no separate document is issued.

Alternative 3 – A Separate "Entry of Judgment Rule" for Bankruptcy Cases

If the Committee believes that the bankruptcy rules should not have the same definition of "entry of judgment" as set out in Civil Rule 58, then it may be prudent to consider being even more specific in Rule 5003. To accomplish that goal, the rule might be amended to eliminate the separate document requirement. In many instances, orders are entered that include more than a simple entry of judgment. This is particularly true in contested matters as compared to adversary proceedings. Thus, eliminating the separate document requirement will follow some current practices. There would be no need to amend Bankruptcy Rule 9021 if the Advisory Committee

selects this option. Of course, such a solution could present problems by making it unclear whether particular orders are final and appealable. This could lead to parties filing notices of appeals in order to protect against a waiver if they are unclear as to whether a particular order is final and appealable. This problem already exists, to some extent, but a rule that would expand the concept of the entry of a final judgment would seem likely to make this an even more frequent occurrence. Of course, is this is what is happening in the courts already (and particularly in matters that are not adversary proceedings), then perhaps the rule should be amended to recognize this practice.

Rule 5003. Records Kept By the Clerk

(a) Bankruptcy dockets

The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made. Entry of the judgment is effective notwithstanding the failure of the court to issue a separate document as required under Rule 9021.

* * * * *

COMMITTEE NOTE

The rule is amended to clarify that the entry of a judgment dates from its being entered on the docket and is not postponed by the absence of a separate document setting forth the judgment. The

availability of notice of the docket entry by electronic means reduces the likelihood that parties will be unaware of the entry of the judgment, so delaying the effective date of the judgment for the issuance of a separate document is unnecessary. Unlike litigation under the Federal Rules of Civil Procedure, appeals in bankruptcy cases are treated on a more expedited basis with the notice of appeal due within ten days of its entry. This interest in expediting review would be overridden if the extended period of appeal available under Fed. R. Civ. P. 58(b)(2) were to apply in bankruptcy cases. This amendment makes clear that the appeal time begins to run from the time the judgment is docketed rather than from some later time when a separate document setting out the judgment is issued, or even a later point in time under Civil Rule 58(b)(2).

5-B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: DISCLOSURE STATEMENTS AND MODIFIED PLANS UNDER RULE 3019

DATE: August 7, 2006

Chapter 11 plans can be confirmed only after creditors have had an opportunity to vote on the plan. Generally speaking, the plan must be accepted by the requisite majority of creditors in each of the classes impaired under the plan. Prior to voting on the plan, creditors have a right to receive a disclosure statement that includes adequate information on which to base their decision whether to accept or reject the plan.

In many instances, the plan that is finally confirmed in a chapter 11 case is not the first plan submitted by the plan proponent. Rather, amendments are made to the plan over time. Under § 1127 of the Code, a plan proponent may modify the plan "at any time before confirmation." Rule 3019 also recognizes that the plan proponent may file a modification of the plan prior to its confirmation. That rule further provides that a modification can be filed even after a particular plan has been accepted. If the modification is filed after acceptance has already occurred, however, Rule 3019 goes on to provide that "if the court finds ... that the proposed modification does not adversely change the treatment of the claim of any creditor ... who has not accepted in writing the modification, it shall be deemed accepted by all creditors ... who have previously accepted the plan." This portion of the rule permits the court to confirm or modify the plan without undue delay if the modification has no adverse impact on the creditors who have

already accepted the prior version of the plan.

In In re Mosley, Case No. 05-41279-H2-11 (unpublished decision of Judge Steen which is attached hereto), the debtors proposed a modification to a plan and sought confirmation based on the prior acceptances filed by creditors in the case. The bankruptcy court noted that such procedure is available under Rule 3019, but expressed concern that the language of the rule "is problematic because it does not explicitly require a creditor who is adversely affected to have received 'adequate information' before the creditor accepts the modification in writing." Judge Steen's opinion notes that there may be a need for a new disclosure statement if the plan as modified renders the previously distributed disclosure statement inadequate. As he correctly notes, § 1127(c) of the Code requires that creditor votes be based on adequate information in a disclosure statement. If the modified plan renders the disclosure statement inadequate, there cannot be voting on the modified plan.

Judge Steen's opinion also suggests that the phrase "treatment of the claim" in the rule is ambiguous. He suggests that it might be construed as meaning only a reduction in the payment of creditor's claim under the plan. The opinion even offers proposed language to amend the rule.

I am not convinced that the problems that Judge Steen identifies in the rule are as significant as he suggests. First, the portion of the rule he is focused on specifically provides that the court must find that the modification "does not adversely change the treatment of the claim of any creditor." While he suggests that this phrase can be read rather narrowly to apply only when there is a reduction in the amount to be paid to a claim under the plan, I think the more common reading would be a more expansive understanding of that language. Any change in the plan that would have the potential of reducing the amount or the prospect of payment for any creditor, or

extending the time for the payment or otherwise increasing the creditor's risk of repayment would be an adverse change. Under Rule 3019, the creditor's earlier vote accepting the plan would not be deemed an acceptance of the modification. On the other hand, if the court finds that the treatment of the claim is not adverse (that is, neither the amount nor the prospect for payment is reduced), then there is no reason to require a second round of voting which could result in gamesmanship and unnecessary disruption in the plan process.

Similarly, if the court finds that the modification does adversely affect the treatment of some creditor claims, the court in all likelihood would order the plan proponent to obtain approval of a new disclosure statement so that it contains adequate information about the plan as modified. In fact, § 1127(c) specifically provides that "the proponent of a modification [of a plan] shall comply with § 1125 of this Title with respect to the plan as modified." The courts generally will still evaluate the proponent's original disclosure statement to determine whether it continues to provide adequate information as required under § 1125. Only if the disclosure statement remains adequate, will the court allow voting on the modified plan without a new disclosure statement. *See, e.g.,* In re American Solar King Corp., 90 B.R. 808 (Bankr. W. D. Tex. 1988). The court might also dispense with a second disclosure statement if the parties adversely affected by the modified plan either have taken a particularly active role in the plan process or are otherwise adequately informed about the plan. *See, e.g.,* In re Cajun Electric Power Co-Op, Inc., 230 B.R. 715 (Bankr. M.D. La. 1999); In re Temple Zion, 125 B.R. 910 (Bankr. E.D. Pa. 1991).

While Rule 3019 is not as explicit as it might be regarding the need for an additional disclosure statement in a particular case, the rule does seem adequate to perform its function.

The rule is intended to authorize a process that streamlines the voting process for modified plans. It simply identifies those creditors and equity security holders who do not have a right to cast new votes on the modified plan. The courts have not been mislead into thinking that the rule dispenses with the need for adequate information and disclosure statements for those modified plans. Section 1127(c) and Rule 3019 are consistent.

If the Advisory Committee believes that the rule should be made more explicit to avoid potential misunderstandings, then a draft of an amended Rule 3019 to accomplish this is set out below. This is essentially the solution suggested in Judge Steen's opinion in Mosley.

RULE 3019. Modification of Accepted Plan Before or After Confirmation in a Chapter 9 Municipality or Chapter 11 Reorganization Case[1]

(a) In a chapter 9 or chapter 11 case, after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that disclosure made under § 1125 prior to the modification provided adequate information about the plan as modified, then no further disclosure is necessary. If the court finds that modifications to the plan cause the information in the prior disclosure to be inadequate under § 1125, then the court shall require additional disclosure and solicitation to those creditors and equity security holders whose treatment under

[1] This version of Rule 3019 is taken from the Interim Rules.

the plan as modified is adversely affected. If the court finds after hearing on notice to the trustee, any committee appointed under the Code, and any other entity designated by the court that the proposed modification does not adversely change the treatment of the claim of any creditor or the interest of any equity security holder who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

* * * * *

COMMITTEE NOTE

The rule is amended to provide that the court must consider whether to require the plan proponent to file a new disclosure statement whenever a plan is modified. The modification can occur after an initially approved disclosure statement was filed and sent to all interested parties, and the nature of the modification could be that the information provided in the initial disclosure statement is no longer sufficient to provide the recipients of the statement to make an informed judgment about the plan. In that event, the court should require the plan proponent to file a new disclosure statement that can be provided to all parties in interest whose treatment under the plan is adversely affected by the modification.

Rather than amend Rule 3019, it might be more appropriate to amend Rule 3016. That rule governs the filing of plans and disclosure statements. Subdivision (a) of the rule requires the plan proponent to identify each plan, so plans are often referred to a the Second Amended Plan of Reorganization of Acme, Inc., and the like. Subdivision (b) governs disclosure statements, and it could be revised to address the issue of disclosure statements when plan proponents file

modifications to plans. Such a proposal follows.

RULE 3016. Filing of Plan and Disclosure Statement in a Chapter 9 Municipality or Chapter 11 Reorganization Case[2]

* * * * *

(b) DISCLOSURE STATEMENT. In a chapter 9 or 11 case, a disclosure statement under § 1125 or evidence showing compliance with § 1126(b) shall be filed with the plan and any modification thereof or within a time fixed by the court, unless the plan is intended to provide adequate information under § 1125(f)(1). If the plan is intended to provide adequate information under § 1125(f)(1), it shall be so designated and Rule 3017.1 shall apply as if the plan is a disclosure statement.

* * * * *

COMMITTEE NOTE

Subdivision (b) of the rule is amended to state explicitly that a disclosure statement must be filed with modifications to plans. If the modification does not have any adverse impact on the claims of creditors or the interests of equity security holders, the court could find that the existing disclosure statement provides adequate information under § 1125, and no additional disclosure would be required. If the modification to the plan affects only some parties

[2] This version of Rule 3016 is taken from the Interim Rules.

in interest in the case, the court can direct that any new disclosure that is required be served on ly on those parties whose claims or interests are adversely affected.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	CASE NO. 05-41279-H2-11
ADRIAN D. MOSLEY	§	
ANISSA F. MOSLEY	§	

ORDER DENYING MOTION TO ALLOW MODIFICATION OF CHAPTER 11 PLAN WITHOUT FURTHER DISCLOSURE AND SOLICITATION (doc # 194)

In docket # 194, Debtors ask the Court to confirm their Third Amended chapter 11 plan without any disclosure or solicitation of votes supplementary to what has already been provided for the Second Amended Plan. The Third Amended Plan was filed after the conclusion of the hearing on confirmation of the Second Amended Plan and just a few hours prior to the time that the Court had set for announcement of its decision. Even though the changes in the Third Amended plan do not reduce the amount that Debtors propose to pay on any specific claim, the Court concludes that additional disclosure and solicitation are necessary to comply with Bankruptcy Code § 1125. Therefore, Debtors' motion to allow modification without additional disclosure and solicitation is denied and the Court has issued a separate order for further disclosure and solicitation and for case management and conclusion of this case.

BACKGROUND

Debtors' chapter 11 plan, filed on February 17, 2006, was set for confirmation hearing on April 18. A number of creditors objected to confirmation. On April 11, Debtors filed a modified plan. When the case was called for the confirmation hearing on April 18, Debtors announced settlement with several creditors and represented that the settlements would require further plan modification. Debtors filed their Second Amended Plan and Disclosure Statement on May 10; The disclosure statement was approved and the disclosure statement and plan were distributed to creditors for them to vote on the plan. The Court set June 6 for the confirmation hearing on the Second Amended Plan.

When the case was called for hearing on June 6, not all objections had been resolved. The Court commenced the confirmation hearing. During a recess, Debtors reached agreement with World Bank. At the conclusion of the confirmation hearing, Debtors announced that they were close to agreement with the sole remaining objecting creditor ("McIngvale"), a creditor holding a disputed, unsecured, allegedly nondischargeable claim. Debtors asked for a continuance of the confirmation hearing to continue settlement negotiations. Because the case had already been pending for almost a year without confirmation of a plan, the Court denied that request, closed evidence on the Second Amended Plan, but deferred announcement of its decision on plan confirmation to June 19. When the case was called

on June 19, Debtors announced that they had reached an agreement with McIngvale. The agreement was reflected in the Third Amended Plan that had been filed a few hours before the hearing.

The settlement purports to affect only McIngvale. Prior to the settlement, Debtors had objected to McIngvale's claim, McIngvale had filed an adversary proceeding alleging that the claim was valid and nondischargeable, and the Second Amended Plan provided for inclusion of the McIngvale claim (if allowed) as a general unsecured claim in class 5.1. In general, claims in class 5.1 are paid pro rata from a sum that is (i) 25% of the amount of unsecured claims in class 5.1, plus (ii) 50% of net recovery, if any, from a lawsuit that Debtors might file and prosecute against another creditor. The settlement between Debtors and McIngvale would withdraw the objection to the McIngvale claim, would separately classify the McIngvale claim from the claims of other unsecured creditors, and would pay 100% of the McIngvale claim, with most of the payments being made prior to payments to class 5.1.

DOCKET # 194–MOTION TO ALLOW MODIFICATION

In docket # 194 Debtors request that the Court allow them " ... to modify their chapter 11 plan pursuant to § 1127 with no further disclosure or solicitation..." Debtors allege that the Third Amended Plan does not adversely affect the treatment of any creditor's claim. Debtors contend that the amount payable to general unsecured creditors might increase by separate classification of McIngvale's claim because then McIngvale would not participate in distributions from the fund available for class 5.1 creditors.

COURT PERMISSION TO MODIFY THE PLAN IS NOT NECESSARY

Debtors do not need Court permission to modify their plan prior to confirmation, and therefore the Court need not give permission for the modification.

Bankruptcy Code § 1127(c) provides:

> The proponent of a plan may modify such plan at any time before confirmation.

The issue that the Court must decide is whether additional disclosure and solicitation of creditors' votes is required.

STATUTORY STRUCTURE–DISCLOSURE AND SOLICITATION

In chapter 11, after a party in interest proposes a plan[1] the plan proponent must provide "adequate information" about the plan before votes are solicited,[2] creditors and interest holders who are impaired[3] are allowed to vote on the plan,[4] and the court confirms the plan if it is accepted by creditors and if it otherwise complies with the statutory requirements.[5] Disclosure of adequate information is central and crucial to the voting process.[6]

AUTHORITY CONCERNING DISCLOSURE AFTER MODIFICATION

Bankruptcy Code § 1127, which allows a plan proponent to modify a plan prior to confirmation, provides:

> The proponent of a modification shall comply with section 1125 of this title with respect to the plan as modified.

"Adequate information" is an important, defined term. Bankruptcy Code § 1125(a) provides:

> "[A]dequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable ... that would enable a hypothetical investor ... of the relevant class to make an informed judgment about the plan ...
>
> An acceptance or rejection of a plan may not be solicited ... unless, at the time of or before such solicitation, there is transmitted to such holder the plan or a summary of the plan, and a written disclosure statement approved, after notice and a hearing, by the court as containing adequate information.

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[1] Bankruptcy Code § 1121.

[2] Bankruptcy Code § 1125.

[3] Bankruptcy Code § 1124.

[4] Bankruptcy Code § 1126.

[5] Bankruptcy Code § 1129.

[6] Bankruptcy Code §§ 1125(b), 1126(b), 1127(c), 1129(a)(2).

But Federal Rules of Bankruptcy Procedure (FRBP) 3019 provides:

> ...[A]fter a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds ... that the proposed modification does not adversely change the treatment of the claim of any creditor ... who has not accepted in writing the modification, it shall be deemed accepted by all creditors and equity security holders who have previously accepted the plan.

Rule 3019 is designed for the salutary purpose of avoiding unnecessary expense and delay of solicitation and disclosure when there is a plan amendment that is immaterial and does not adversely affect a creditor who has already received disclosure and has voted to accept the plan. The rule further promotes efficiency by indicating that a creditor who is adversely affected may accept the modification in writing. But the rule is problematic because it does not explicitly require a creditor who is adversely affected to have received "adequate information" before the creditor accepts the modification in writing. The rule seems to assume that the disclosure statement provided prior to the modification is adequate information for the modification, but that may or may not be correct. Bankruptcy Code § 1125 requires a proponent of a plan modification to provide adequate information before soliciting votes to accept the plan; presumably the statute requires adequate information before written acceptance of a modification, which would be equivalent to a vote. Bankruptcy Code § 1127(c) requires compliance with § 1125, nothing less.

The language of the rule is also problematic because it uses the phrase "adversely change the treatment of the claim." [Emphasis supplied.] The meaning of "treatment" is not entirely clear; would it include the relative treatment of similar classes or is it narrowly limited to the proposal for payment of claims in a single class.[7] And the phrase "treatment of the claim" is not entirely clear; would it include a massive change in the plan that would affect the feasibility of the plan or would it be narrowly limited to refer only to the amount that the plan proposes to pay the claimant?[8] The rule might be interpreted to imply that a creditor is not entitled to adequate information about a plan modification and is not entitled to change its vote on the plan unless the modification calls for a reduced payment on that creditor's claim. Such an interpretation would ignore the fact that a creditor might be seriously adversely affected by a plan modification even though the amount that the plan proposes to pay to the creditor is not reduced. Or, the creditor might want to change its vote merely because the bargain it struck when it voted for the plan depended on the relative treatment of its claim with the treatment of other claims. If the language were narrowly interpreted, then the rule would conflict with § 1127(c), which requires

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[7] For example, if two classes have similar rights, would enhanced "treatment" of one class be considered adverse treatment of another class because their relative treatment is affected?

[8] Although the Court has an independent and particular duty not to confirm a plan if the plan is not feasible, *see Collier on Bankruptcy, 15th Ed.* ¶ 1129.02[5], creditors nevertheless have the right to consider feasibility in determining how they vote on the plan.

compliance with § 1125, which in turn requires disclosure of "adequate information" to allow creditors to make an "informed judgment" about the plan.

Chapter 11 plans are intended to be agreements reached after negotiation. There are any number of factors that a creditor might consider in voting for or against a plan. Those factors are set out in the multitude of cases that attempt to define what information a disclosure statement must include. Reasonable creditors in this case might consider whether they still want to vote for the plan in light of the special treatment given the McIngvale claim and might also consider whether the payments to McIngvale affect the feasibility of the plan, and thus their vote.[9]

There are other factors that a reasonable creditor might consider in this case. The point is that § 1125 requires disclosure of "adequate information" about the plan, not just information about the treatment of their claim, as FRBP 3019 might be interpreted to suggest. To read §§ 1125, 1127, and FRBP 3019 in harmony, one must read the language of the rule to require additional disclosure whenever the Court concludes that the modification is sufficiently material that disclosure of the change and its potential consequences might reasonably affect votes on the plan. To that end, it might be useful for the rules committee to consider revision of the language of the rule to read something like this:

> ... after a plan has been accepted and before its confirmation, the proponent may file a modification of the plan. If the court finds ... that disclosure made under § 1125 prior to the modification provided adequate information about the plan as modified, then no further disclosure and solicitation is necessary and acceptances received prior to the modification shall be effective notwithstanding the modification. If the Court finds that the modification is sufficiently material that prior disclosure under § 1125 does not provide adequate information about the modified plan, then the court may require additional disclosure and solicitation to creditors and interest holders whom the court concludes are entitled to it.

The Court finds that the Third Amended Plan materially changes the Second Amended Plan in this case and that all parties entitled to vote on the plan are entitled to adequate information about the settlement(s) reached after the prior disclosure,[10] about the separate classifications of claims and modified payment requirements that are the consequences of those settlements, and about the effects of those changes on plan feasibility. The Court concludes that to comply with Bankruptcy

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[9] In the docket # 194, Debtors acknowledge that financial information provided in support of plan confirmation leaves substantial doubt about whether Debtors can make payments to McIngvale. Debtors allege that they may have to obtain loans or other financial assistance from relatives post confirmation to make those payments.

[10] Both World Bank and McIngvale are settlement reached after the dissemination of the Second Amended Disclosure Statement.

Code §§ 1127(c) and 1125, the proponent of the modification (Debtors) must provide this information to creditors and that the creditors who might be affected cannot be "deemed" by FRBP 3019 to have accepted the modification unless they have received adequate information about the plan as modified and unless they have had an opportunity to exercise their right to accept or to reject the plan based on their evaluation of that adequate information.

FRBP 3019 requires adversely affected creditors to accept the modification in writing. But as noted, it is difficult to determine from the rule which creditors are adversely affected, within the meaning of the rule. Therefore, since the plan has been materially modified, the Court will simply require reballoting based on the material modification of the plan. Neither prior acceptances nor prior rejections will be deemed to carry over.

Therefore, the motion to allow modification without additional disclosure and solicitation is denied. The Court has this date issued an order setting deadlines and otherwise providing for case management.

SIGNED June 23, 2006

/s/
WESLEY W. STEEN
UNITED STATES BANKRUPTCY JUDGE

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: FORMS SUBCOMMITTEE ACTIONS

DATE: AUGUST 9, 2006

The Forms Subcommittee met by teleconference to consider possible amendments to Official Forms 10, 19A, and 19B. The Subcommittee also considered whether to recommend that Director's Form 240, the reaffirmation form and related forms, be revised and promulgated as an official form. Memoranda on these issues are attached.

The Subcommittee concluded that Official Form 10, the proof of claim form, should not be amended to include any specific identification of claims as being asserted under the last part of § 1325(a)(9), the so-called hanging paragraph or "910 day" provision. Under that section, purchase money security interests created in certain motor vehicles within 910 days of the commencement of the case are not subject to the valuation provisions of the Code. Other purchase money security interests obtained in other collateral within one year of the commencement of the case are also excepted from the operation of § 506. There is some disagreement among the courts as to the proper interpretation of that section, but the Subcommittee concluded that Form 10 should not be changed at this time for several reasons. First, the claimant should be setting out the actual value of the property because that valuation is important for many reasons outside of § 1325, including stay relief and the treatment of the claim in chapters other than chapter 13 if the case is converted.

The Subcommittee recommends that Official Forms 19A and 19B be consolidated and

amended. These forms largely overlapped, and the Subcommittee concluded that a single form that closely resembles Official Form 19B is sufficient. Having a single form should also reduce any confusion about the forms. The single form is still sufficient to meet the statutory directives in § 110 of the Code governing the obligations of bankruptcy petition preparers. The initial memorandum to the Subcommittee is included in the Agenda Book as is the final version of proposed Official Form 19 as recommended by the Forms Subcommittee.

Finally, the Subcommittee addressed whether Director's Form 240, the form reaffirmation agreement, should be made an Official Form. The Subcommittee also considered whether there should be one form for debtors who are not represented by an attorney during the course of negotiating the reaffirmation agreement, and another for those debtors who are represented. The Subcommittee concluded that a single form is appropriate, and also decided that the form should continue to be a Director's Form. The Subcommittee recommended several changes to Form 240. In particular, there were changes recommended to the directions on page one of the form regarding the completion of portions of the document when the debtor is not represented by counsel, the requests for relief set out in the motion were expanded, and the form of the order approving the reaffirmation was clarified to permit the courts to tailor the order to the particular subsection of § 524 under which the debtor was seeking relief.

6-A

MEMORANDUM

DATE: August 7, 2006

TO: Advisory Committee on Bankruptcy Rules

FROM: Patricia S. Ketchum, Esq., Consultant, and
Jim Wannamaker, Staff Attorney

SUBJECT: Reaffirmation Agreement Form: Should It Be an Official Form?

Form 240 is a Director's Form for a reaffirmation agreement between a bankruptcy debtor and a creditor. The current form contains the following parts: Part A, disclosures, a notice, instructions, and information to the debtor about the effect of reaffirming an otherwise dischargeable debt; Part B, the actual agreement between the creditor and the debtor reaffirming the debt; Parts C and D, statements in support by the debtor's attorney (if any) and the debtor; and Part E, a motion for approval and proposed order to be filed by any debtor not represented by an attorney in negotiating the agreement. Much of the text of the form is dictated by Congress in § 524(k) of the Bankruptcy Code, as amended in 2005.

Development History

The Form 240 reaffirmation agreement form was drafted by taking the statutory language from § 524(k) and formatting it to create a form that could be used by the parties, their attorneys, and the courts. The drafting process included adding elements such as caption for the proposed order to be used by *pro se* debtors and providing directions and additional information where needed. The form was issued in October 2005 in conjunction with the interim Official Forms which implement the 2005 amendments to the Code.

Within a few weeks, the Administrative Office began to receive feedback from the courts and parties concerning the form. In response to these comments, the form was revised in November 2005 and in August 2006. A box was added on the first page where the debtor indicates whether the terms of the reaffirmation agreement, when considered in light of the debtor's financial situation, create a presumption of undue hardship. Lines for stating the creditor's name were added to the front of the form and to page 6, where the actual agreement is located. In addition, several provisions were revised to more closely track the statutory language and formatting changes were made to improve clarity.

Should the Form Be an Official Form?

At the March 2006 meeting, the Advisory Committee considered a comment letter from Philip S. Corwin, Esq., on behalf of several associations and groups representing the credit industry. Mr. Corwin also attended the meeting as an observer. The letter acknowledged that the form follows § 524 and utilizes the statutory language. The letter noted, however, that "some

judges have been devising their own variations to the statutory . . . language," and urged the Advisory Committee to take some action to ensure conformity with the statute.

Since then, two courts also have suggested that the form be made an official form in the interest of promoting uniformity. Clerks offices generally prefer uniformity, as it makes it easier to find the information needed for docketing and processing. Although a court which desires uniformity can require the use of the Director's Form in its local rules, national creditors seem to prefer using the same form in all districts rather than being required to maintain an inventory of different forms that meet varied local specifications.

On the other hand, in this form, all the substantive language has been dictated by Congress in the statute. If the statute requires this language to be used, what need is there for the form to be an official form? Why should the Judicial Conference prescribe what already has been prescribed by a statute? There are elements of the Director's Form, such as the "presumption of hardship" checkbox at the top of the first page and the stating of the creditor's name, that do not come from the statute, but the bulk of the form is not within the authority of the Judicial Conference either to prescribe or to amend.

Several provisions of the 2005 Act directed the Judicial Conference, under Rule 9009, to develop and issue an official form, such as the small business plan and disclosure statement forms approved by the Advisory Committee for publication in August. The fact that Congress did not leave the reaffirmation agreement form to the Judicial Conference would seem to have preempted that process, leaving no meaningful role for the Judicial Conference with respect to this form.

With respect to rules, the rules committees all make it their policy not to repeat a statute. While some repetition, quoting, or restating of one or more provisions of the Bankruptcy Code may be unavoidable in a form that will be used by the public, the Advisory Committee always has kept these instances to a minimum. To make the reaffirmation agreement form an official form would be a clear break with this policy and would seem to be justified only if the benefit to be obtained were clearly to outweigh the detriment to the authority conferred on the Judicial Conference by Rule 9009.

There also is a practical reason to retain the reaffirmation agreement as a Director's Form. Director's Forms can be revised more quickly than Official Forms, which are prescribed by the Judicial Conference. Director's Forms are issued and amended as needed by the Director of the Administrative Office with input and suggestions from the Advisory Committee. The reaffirmation agreement has been revised three times in the last year and additional changes have been suggested by the Subcommittee on Forms. Amending an Official Form generally takes at least two years.

During a conference call on August 4, 2006, the Subcommittee on Forms considered whether the reaffirmation agreement should be designated as an Official Form. For the reasons stated above, the Subcommittee recommends that the form continue to be designated as a Director's Form.

Copies of the Form

Copies of the current, August 1, 2006, version of Director's Form 240 Reaffirmation Agreement and a version incorporating the changes suggested by the Subcommittee on Forms are attached to the following Agenda Item 6B for your reference.

6-B

MEMORANDUM

DATE: August 7, 2006

TO: Advisory Committee on Bankruptcy Rules

FROM: Patricia S. Ketchum, Esq., Consultant, and
Jim Wannamaker, Staff Attorney

SUBJECT: Proposed Revision of the Reaffirmation Agreement Form

Form 240 is a Director's Form for a reaffirmation agreement between a bankruptcy debtor and a creditor. The current form contains the following parts: Part A, disclosures, a notice, instructions, and information to the debtor about the effect of reaffirming an otherwise dischargeable debt; Part B, the actual agreement between the creditor and the debtor reaffirming the debt; Parts C and D, statements in support by the debtor's attorney (if any) and the debtor; and Part E, a motion for approval and proposed order to be filed by any debtor not represented by an attorney in negotiating the agreement. Much of the text of the form is dictated by Congress in § 524(k) of the Bankruptcy Code, as amended in 2005.

Development History

The current Form 240 reaffirmation agreement form was drafted by taking the statutory language from § 524(k) and formatting it to create a form that could be used by the parties, their attorneys, and the courts. The drafting process included adding elements such as a caption for the proposed order to be used by *pro se* debtors and providing directions and additional information where needed. The form was issued by the Director of the Administrative Office in October 2005 in conjunction with the interim Official Forms which implement the 2005 amendments to the Code.

Within a few weeks, the Administrative Office began to receive feedback from the courts and parties concerning the form. In response to these comments, the form was revised in November 2005 and in August 2006. A box was added on the first page where the debtor indicates whether the terms of the reaffirmation agreement, when considered in light of the debtor's financial situation, create a presumption of undue hardship. If the presumption arises, the court must review the agreement; accordingly, the clerk's office needs to know immediately whether to refer the agreement to the judge.

As dictated by Congress, moreover, the form would require only the name of the person signing the agreement for the creditor; not the actual name of the creditor, *e.g.*, Ford Motor Credit Corporation. A line for stating the creditor's name was added to page 6 which contains the actual agreement. These changes were described to the Advisory Committee at its March 2006 meeting, and a copy of the revised form was in the agenda book for the meeting.

Since the March 2006 meeting, in response to further comments, several additional changes have been made. The name of the creditor now appears on the first page of the form, as well as on page 6. The creditor's address also has been added on page 6, a change that is described more fully below. The section of the first page where the various parts of the form are listed together with checkboxes for indicating the parts being filed has been redesigned. Courts were receiving Part E, the motion and proposed order, even when they the debtor was represented by an attorney, rendering the motion and proposed order unnecessary. The checkboxes have been rearranged and directions added to make it clear that Part E should not be completed when the debtor was represented in making the agreement. Lastly, the directions on page 1 and in Parts D and E have been revised to make it clear that if a debtor has an attorney when the case is filed, but that attorney does not represent the debtor in negotiating the reaffirmation agreement, the debtor must file a motion seeking court approval of the agreement. These changes also align the language of the form more closely with that of the statute.

At the March meeting, the Advisory Committee approved for publication an amendment to Rule 4008 that would require the debtor to explain any discrepancies between the income and expense information reported on the debtor's Schedules I and J and that reported in the debtor's statement in support of the reaffirmation agreement (Part D of the form). This change has not been made on Form 240, as the proposed amendment to the rule would not take effect until December 2008.

The changes discussed at the March meeting and the additional changes suggested after the meeting were incorporated in the reaffirmation agreement form and the revised form was issued by the Director of the Administrative Office on August 1, 2006, along with three other new or revised Director's Forms. The Subcommittee on Forms discussed the revised form during a conference call on August 4, 2006, and recommended three additional changes.

Separate Form for Proposed Order

In an effort to further clarify that debtors represented by counsel during the course of negotiating the reaffirmation agreement need not complete the Motion for Court Approval of Reaffirmation Agreement and the proposed order, the Subcommittee on Forms recommended that the proposed order be a separate Director's Form 240B and that the instructions on page 1 of the reaffirmation agreement (which would become Form 240A) be revised and reformatted. In order to reduce confusion on the part of pro se debtors and attorneys who do not regularly practice in the bankruptcy court, the Note would be revised and moved below the checkboxes. The checkbox for filing the proposed order would be replaced with a Note to complete and file the proposed order, Form 240B, only if the debtor completes Part E, the Motion for Court Approval.

The subcommittee also recommended that the proposed order form be revised to include several alternative provisions including ones based on the language of §§ 524(c)(6)(A), 524(k)(8), and 524(m) of the Bankruptcy Code and a provision not approving the agreement. The alternatives would accommodate both approving the reaffirmation agreement generally under § 524(k)(8), and making more limited findings under § 524(c)(6) in order to approve the

agreement as not imposing an undue hardship on the debtor or a dependent of the debtor and as being in the best interest of the debtor.

Creditor Name and Address

Kelly J. Sweeney, the chief deputy clerk of the bankruptcy court in Colorado, has requested, on behalf of the clerk's office staff, a modification of the reaffirmation agreement form "so that the printed name and address of the creditor . . . is easily located in one designated location." In response, the form has been revised to display the name of the creditor on page 1 and to add to the statement of the name of the creditor on page 6 (the actual agreement) the creditor's address. Ms. Sweeney was informed that this change would be made in a letter from Peter G. McCabe dated May 16, 2006.

There does not appear to be any need to state the creditor's address on page 1 for several reasons. First, the creditor's address is not needed for docketing the agreement. If the court schedules a hearing and needs to notify the creditor of the date and time, the creditor's address normally will already be in the court's records of the case. In the CM/ECF environment, designating the creditor (by name) to receive notice should automatically retrieve the address. The bankruptcy noticing contractor also will have the creditor's address information. If the creditor is an ECF filer with the court, electronic notice will be sent to the creditor automatically as well.

A creditor with whom the debtor enters into a reaffirmation agreement usually is an important one to the debtor and unlikely to have been left off the list of creditors filed when the case was commenced. Accordingly, having only the name of the creditor on page 1 of the form will be sufficient in 90 percent or more of all reaffirmation agreements filed. In those few agreements where the creditor is new to the case, the clerk may have to go to page 6 of the form to obtain the creditor's address. For those few occasions, however, it does not seem necessary to further clutter page 1 of the form with information that is not necessary in the overwhelming majority of reaffirmation agreements filed.

As of now, the creditor's name and address appear in one designated location, on page 6 of the form. In addition, the creditor's name appears on page 1. This approach would seem to satisfy the needs of the clerk's office and to impose only a small burden in those few situations where the creditor's address is not in the court's database.

Copies of the Form

Copies the version of the Director's Form 240 Reaffirmation Agreement issued on August 1, 2006, and a proposed draft of a two-part form incorporating the changes recommended by the Subcommittee on Forms are attached for your reference.

Attachments

Form 240 - Reaffirmation Agreement (08/06)

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

UNITED STATES BANKRUPTCY COURT

_____ District of _____

In re _____, Debtor

Case No._____
Chapter_____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (Pages 1 - 5)
☐ Part B: Reaffirmation Agreement
☐ Part C: Certification by Debtor's Attorney
☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

[File Part E only if debtor was not represented by an attorney during the course of negotiating this agreement.]

☐ Part E: Motion for Court Approval
☐ Proposed Order Approving Reaffirmation

Name of Creditor:_____
☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT
This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $_____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (I) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

— And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

— And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:
$_____@_____%;
$_____@_____%;
$_____@_____%.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

> The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item	Original Purchase Price or Original Amount of Loan

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of $_____ is due on _____(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

---Or---

Your payment schedule will be: _____(number) payments in the amount of $_____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

---Or---

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A "lien" is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

NOTE: When this disclosure refers to what a creditor "may" do, it does not use the word "may" to give the creditor specific permission. The word "may" is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

_____

(Print Name)

_____

(Signature)

Date: _____

Co-borrower, if also reaffirming these debts:

_____

(Print Name)

_____

(Signature)

Date: _____

Accepted by creditor:

_____

(Printed Name of Creditor)

_____

(Address of Creditor)

_____

(Signature)

_____

(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

_____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor in negotiating the reaffirmation agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

[Read and complete numbered paragraphs 1 and 2, OR, if the creditor is a Credit Union and the debtor is represented by an attorney, read the un-numbered paragraph below. Sign the appropriate signature line(s) and date your signature. If you complete paragraphs 1 and 2 and your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL

[To be completed and filed only if the debtor is not represented by an attorney in negotiating the reaffirmation agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

United States Bankruptcy Court
_____District of _____

In re _____, Debtor
Case No._____
Chapter _____

ORDER APPROVING REAFFIRMATION AGREEMENT

The debtor(s) _____ have filed a motion for approval of the
(Name(s) of debtor(s))

reaffirmation agreement dated _____ made between the debtor(s) and
(Date of agreement)
_____. The court held the hearing required by 11 U.S.C. § 524(d)
(Name of creditor)
on notice to the debtor(s) and the creditor on _____.
(Date)

COURT ORDER: The court grants the debtor's motion and approves the reaffirmation agreement described above.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

Form 240A - Reaffirmation Agreement (10/06)

– DRAFT –

☐ **Presumption of Undue Hardship**
☐ **No Presumption of Undue Hardship**
(Check box as directed in Part D: Debtor's Statement in Support of Reaffirmation Agreement.)

UNITED STATES BANKRUPTCY COURT

_____District of_____

In re _____, Debtor

Case No._____
Chapter_____

REAFFIRMATION AGREEMENT

[Indicate all documents included in this filing by checking each applicable box.]

☐ Part A: Disclosures, Instructions, and Notice to Debtor (pages 1 - 5)

☐ Part B: Reaffirmation Agreement

☐ Part C: Certification by Debtor's Attorney

☐ Part D: Debtor's Statement in Support of Reaffirmation Agreement

☐ Part E: Motion for Court Approval

*[**Note:** Complete Part E only if debtor was not represented by an attorney during the the course of negotiating this agreement. **Note also:** If you complete Part E, you must prepare and file Form 240B - Order on Reaffirmation Agreement.]*

Name of Creditor:_____

☐ *[Check this box if]* Creditor is a Credit Union as defined in §19(b)(1)(a)(iv) of the Federal Reserve Act

PART A: DISCLOSURE STATEMENT, INSTRUCTIONS AND NOTICE TO DEBTOR

1. DISCLOSURE STATEMENT

Before Agreeing to Reaffirm a Debt, Review These Important Disclosures:

SUMMARY OF REAFFIRMATION AGREEMENT

This Summary is made pursuant to the requirements of the Bankruptcy Code.

AMOUNT REAFFIRMED

The amount of debt you have agreed to reaffirm: $_____

The amount of debt you have agreed to reaffirm includes all fees and costs (if any) that have accrued as of the date of this disclosure. Your credit agreement may obligate you to pay additional amounts which may come due after the date of this disclosure. Consult your credit agreement.

ANNUAL PERCENTAGE RATE

[The annual percentage rate can be disclosed in different ways, depending on the type of debt.]

a. If the debt is an extension of "credit" under an "open end credit plan," as those terms are defined in § 103 of the Truth in Lending Act, such as a credit card, the creditor may disclose the annual percentage rate shown in (i) below or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate disclosed, or that would have been disclosed, to the debtor in the most recent periodic statement prior to entering into the reaffirmation agreement described in Part B below or, if no such periodic statement was given to the debtor during the prior six months, the annual percentage rate as it would have been so disclosed at the time of the disclosure statement: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed, the amount of each balance and the rate applicable to it are:

$_____@_____%;
$_____@_____%;
$_____@_____%.

b. If the debt is an extension of credit other than under than an open end credit plan, the creditor may disclose the annual percentage rate shown in (I) below, or, to the extent this rate is not readily available or not applicable, the simple interest rate shown in (ii) below, or both.

(i) The Annual Percentage Rate under §128(a)(4) of the Truth in Lending Act, as disclosed to the debtor in the most recent disclosure statement given to the debtor prior to entering into the reaffirmation agreement with respect to the debt or, if no such disclosure statement was given to the debtor, the annual percentage rate as it would have been so disclosed: _____%.

--- And/Or ---

(ii) The simple interest rate applicable to the amount reaffirmed as of the date this disclosure statement is given to the debtor: _____%. If different simple interest rates apply to different balances included in the amount reaffirmed,

the amount of each balance and the rate applicable to it are:
$ _____@_____%;
$ _____@_____%;
$ _____@_____%.

c. If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:

The interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower.

d. If the reaffirmed debt is secured by a security interest or lien, which has not been waived or determined to be void by a final order of the court, the following items or types of items of the debtor's goods or property remain subject to such security interest or lien in connection with the debt or debts being reaffirmed in the reaffirmation agreement described in Part B.

Item or Type of Item	Original Purchase Price or Original Amount of Loan

Optional---At the election of the creditor, a repayment schedule using one or a combination of the following may be provided:

Repayment Schedule:

Your first payment in the amount of $_____ is due on _____(date), but the future payment amount may be different. Consult your reaffirmation agreement or credit agreement, as applicable.

— Or —

Your payment schedule will be: _____(number) payments in the amount of $_____ each, payable (monthly, annually, weekly, etc.) on the _____ (day) of each _____ (week, month, etc.), unless altered later by mutual agreement in writing.

— Or —

A reasonably specific description of the debtor's repayment obligations to the extent known by the creditor or creditor's representative.

2. INSTRUCTIONS AND NOTICE TO DEBTOR

Reaffirming a debt is a serious financial decision. The law requires you to take certain steps to make sure the decision is in your best interest. If these steps are not completed, the reaffirmation agreement is not effective, even though you have signed it.

1. Read the disclosures in this Part A carefully. Consider the decision to reaffirm carefully. Then, if you want to reaffirm, sign the reaffirmation agreement in Part B (or you may use a separate agreement you and your creditor agree on).

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

5. The original of this disclosure must be filed with the court by you or your creditor. If a separate reaffirmation agreement (other than the one in Part B) has been signed, it must be attached.

6. If the creditor is not a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court unless the reaffirmation is presumed to be an undue hardship as explained in Part D. If the creditor is a Credit Union and you were represented by an attorney during the negotiation of your reaffirmation agreement, your reaffirmation agreement becomes effective upon filing with the court.

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you and the creditor of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests, except that no court approval is required if your reaffirmation agreement is for a consumer debt secured by a mortgage, deed of trust, security deed, or other lien on your real property, like your home.

YOUR RIGHT TO RESCIND (CANCEL) YOUR REAFFIRMATION AGREEMENT

You may rescind (cancel) your reaffirmation agreement at any time before the bankruptcy court enters a discharge order, or before the expiration of the 60-day period that begins on the date your reaffirmation agreement is filed with the court, whichever occurs later. To rescind (cancel) your reaffirmation agreement, you must notify the creditor that your reaffirmation agreement is rescinded (or canceled).

Frequently Asked Questions:

What are your obligations if you reaffirm the debt? A reaffirmed debt remains your personal legal obligation. It is not discharged in your bankruptcy case. That means that if you default on your reaffirmed debt after your bankruptcy case is over, your creditor may be able to take your property or your wages. Otherwise, your obligations will be determined by the reaffirmation agreement which may have changed the terms of the original agreement. For example, if you are reaffirming an open end credit agreement, the creditor may be permitted by that agreement or applicable law to change the terms of that agreement in the future under certain conditions.

Are you required to enter into a reaffirmation agreement by any law? No, you are not required to reaffirm a debt by any law. Only agree to reaffirm a debt if it is in your best interest. Be sure you can afford the payments you agree to make.

What if your creditor has a security interest or lien? Your bankruptcy discharge does not eliminate any lien on your property. A ''lien'' is often referred to as a security interest, deed of trust, mortgage or security deed. Even if you do not reaffirm and your personal liability on the debt is discharged, because of the lien your creditor may still have the right to take the security property if you do not pay the debt or default on it. If the lien is on an item of personal property that is exempt under your State's law or that the trustee has abandoned, you may be able to redeem the item rather than reaffirm the debt. To redeem, you make a single payment to the creditor equal to the current value of the security property, as agreed by the parties or determined by the court.

> **NOTE:** When this disclosure refers to what a creditor ''may'' do, it does not use the word "may'' to give the creditor specific permission. The word ''may'' is used to tell you what might occur if the law permits the creditor to take the action. If you have questions about your reaffirming a debt or what the law requires, consult with the attorney who helped you negotiate this agreement reaffirming a debt. If you don't have an attorney helping you, the judge will explain the effect of your reaffirming a debt when the hearing on the reaffirmation agreement is held.

PART B: REAFFIRMATION AGREEMENT.

I (we) agree to reaffirm the debts arising under the credit agreement described below.

1. Brief description of credit agreement:

2. Description of any changes to the credit agreement made as part of this reaffirmation agreement:

SIGNATURE(S):

Borrower:

_____

(Print Name)

_____

(Signature)

Date: _____

Co-borrower, if also reaffirming these debts:

_____

(Print Name)

_____

(Signature)

Date: _____

Accepted by creditor:

_____

(Printed Name of Creditor)

_____

(Address of Creditor)

_____

(Signature)

_____

(Printed Name and Title of Individual Signing for Creditor)

Date of creditor acceptance:

_____

PART C: CERTIFICATION BY DEBTOR'S ATTORNEY (IF ANY).

[To be filed only if the attorney represented the debtor during the course of negotiating this agreement.]

I hereby certify that (1) this agreement represents a fully informed and voluntary agreement by the debtor; (2) this agreement does not impose an undue hardship on the debtor or any dependent of the debtor; and (3) I have fully advised the debtor of the legal effect and consequences of this agreement and any default under this agreement.

☐ *[Check box, if applicable and the creditor is not a Credit Union.]* A presumption of undue hardship has been established with respect to this agreement. In my opinion, however, the debtor is able to make the required payment.

Printed Name of Debtor's Attorney: _____

Signature of Debtor's Attorney: _____

Date: _____

PART D: DEBTOR'S STATEMENT IN SUPPORT OF REAFFIRMATION AGREEMENT

[Read and complete numbered paragraphs 1 and 2, OR, if the creditor is a Credit Union and the debtor is represented by an attorney, read the unnumbered paragraph below. Sign the appropriate signature line(s) and date your signature. If you complete paragraphs 1 and 2 and your income less monthly expenses does not leave enough to make the payments under this reaffirmation agreement, check the box at the top of page 1 indicating "Presumption of Undue Hardship." Otherwise, check the box at the top of page 1 indicating "No Presumption of Undue Hardship"]

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is $_____, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total $_____, leaving $_____ to make the required payments on this reaffirmed debt. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However, this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: _____.

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

— Or —

[If the creditor is a Credit Union and the debtor is represented by an attorney]

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: _____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

PART E: MOTION FOR COURT APPROVAL
[To be completed and filed only if the debtor is not represented by an attorney during the course of negotiating this agreement.]

MOTION FOR COURT APPROVAL OF REAFFIRMATION AGREEMENT

I (we), the debtor(s), affirm the following to be true and correct:

I am not represented by an attorney in connection with this reaffirmation agreement.

I believe this reaffirmation agreement is in my best interest based on the income and expenses I have disclosed in my Statement in Support of this reaffirmation agreement, and because (provide any additional relevant reasons the court should consider):

Therefore, I ask the court for an order approving this reaffirmation agreement under the following provisions (*check all applicable boxes)*:

☐ 11 U.S.C. § 524(c)(6) (debtor is not represented by an attorney during the course of the negotiation of the reaffirmation agreement)

☐ 11 U.S.C. § 524(m) (presumption of undue hardship has arisen because monthly expenses exceed monthly income)

Signed:_____
(Debtor)

_____
(Joint Debtor, if any)

Date: _____

Form 240B - Order on Reaffirmation Agreement (10/06) – DRAFT –

United States Bankruptcy Court

_____ District of _____

In re _____, Debtor

Case No._____

Chapter _____

ORDER ON REAFFIRMATION AGREEMENT

The debtor(s) _____ (Name(s) of debtor(s)) has (have) filed a motion for approval of the reaffirmation agreement dated _____ (Date of agreement) made between the debtor(s) and _____ (Name of creditor). The court held the hearing required by 11 U.S.C. § 524(d) on notice to the debtor(s) and the creditor on _____ (Date).

COURT ORDER:

☐ The court grants the debtor's motion under 11 U.S.C. § 524(c)(6)(A) and approves the reaffirmation agreement described above as not imposing an undue hardship on the debtor(s) or a dependent of the debtor(s) and as being in the best interest of the debtor(s).

☐ The court grants the debtor's motion under 11 U.S.C. § 524(k)(8) and approves the reaffirmation agreement described above.

☐ The court does not disapprove the reaffirmation agreement under 11 U.S.C. § 524(m).

☐ The court disapproves the reaffirmation agreement under 11 U.S.C. § 524(m).

☐ The court does not approve the reaffirmation agreement.

BY THE COURT

Date: _____

_____
United States Bankruptcy Judge

6-C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: PROOF OF CLAIM FORM AND PURCHASE MONEY SECURITY INTERESTS IN MOTOR VEHICLES AND OTHER PROPERTY

DATE: AUGUST 8, 2006

The 2005 amendments to the Code included an addition to § 1325(a) governing claims by the debtor within 910 days of the commencement of the case that are secured by a purchase money security interest in a motor vehicle. This provision is located at the end of § 1325(a)(9), but it is not a part of that subparagraph. Consequently, it has been referred to as a "hanging" paragraph. The Subcommittee on Forms met by teleconference to consider whether this amendment to the Code requires that an amendment be made to Official Form 10 (Proof of Claim) to prevent confusion regarding the value to be stated for property subject to such claims.

The hanging paragraph provides that § 506 does not apply to these purchase money secured claims. The courts have generally held that the provision means that these claims cannot be bifurcated and must be treated as fully secured claims. *See, e.g.,* In re Johnson, 337 B.R. 269 (Bankr. M.D.N.C. 2006); In re Robinson, 338 B.R. 70 (Bankr. W. D. Mo. 2006); In re Horn, 338 B.R. 110 (Bankr. M.D. Ala. 2006), In re Ezell, 338 B.R. 330 (Bankr. E.D. Tenn. 2006); In re Fleming, 339 B.R. 716 (Bankr. E.D. Mo. 2006); In re Jackson, 338 B.R. 923 (Bankr. M.D. Ga. 2006). *Contra* In re Carver, 338 B.R. 521, 526-27 (Bankr. S.D. Ga. 2006) (holding that a 910-day vehicle claim is neither an unsecured claim nor an allowed secured claim).

The different treatment provided to these claims as compared to other secured claims

creates a potential problem with Official Form 10, the proof of claim form. That form contains a box that requires the person completing the form to indicate whether the claim is secured, and, if so, to provide a description of the collateral and to state the value of the collateral. The recent decision in In re Montoya, 341 B.R. 41 (Bankr. D. Utah 2006) illustrates the problem. In *Montoya*, the debtor purchased a motor vehicle within 910 days of the commencement of her chapter 13 case. Recognizing that the hanging paragraph rendered § 506 inapplicable, the debtor's plan instead provided that the claim would be reduced to the fair market value of the vehicle, and that the creditor's failure to object to the plan would constitute acceptance of the plan under§ 1325(a)(5)(A). The debtor then hoped that the creditor would not object to the plan and that confirmation of the plan would permit the payoff of the claim only up to the value of the motor vehicle as opposed to the full amount of the outstanding debt.

The court rejected the argument that the creditor's failure to object to the plan constitutes an acceptance of the plan under § 1325(a)(5)(A). The court further noted that the plan could not even be confirmed in its present form because the treatment proposed for the purchase money motor vehicle claim was inconsistent with the hanging paragraph and would violate § 1325(a)(1). That section provides that the plan must comply with the provisions of chapter 13.

At the end of the opinion in *Montoya*, the court noted that the 2005 introduction of the hanging paragraph could create problems when a proof of claim is filed for a claim governed by that provision if the form includes a "bifurcation" of the claim. That is, if the proof of claim form sets out the debt as $10,000 and states that the value of the collateral is $7,500, would that constitute an acceptance of a plan that also bifurcates the claim? Official Form 10, including its instructions, directs the person completing the form to state the value of the property. If the

value of the motor vehicle is actually $7,500, one would expect the person completing the form to include that value on the form. The form reminds the person completing the form that presentation of a false claim is a criminal act. So, one would expect that the value stated on the form should be accurate.

An argument can be made that the person completing the form should indicate that the value of the motor vehicle in the hypothetical is $10,000 and not $7,500 because the hanging paragraph makes it worth the amount of the debt. There are several flaws in that argument. First, the hanging paragraph actually says nothing about the value of a claim. It only states that § 506 does not apply to the claim. Second, the proof of claim filed in the case would continue to be effective under Rule 1019(3) if the case is converted to chapter 7. In that event, the claim would become subject to § 506, and the value of the vehicle would be important. Similarly, even in a chapter 13 case, issues of valuation of the vehicle could arise. For example, the debtor may seek to surrender the vehicle to the creditor, and the trustee or other creditors might object if the vehicle is worth more than the debt. The value of the vehicle might also be an important issue to resolve in the context of a stay relief motion. Some of these issues arise outside of the context of a plan confirmation, so § 1325 would not apply. Section 506 would clearly be applicable in those circumstances. Even in the case of the surrender of a vehicle that exceeds the value of the claim, it would seem that the court would have to consider the value of the collateral to prevent the debtor from preferring one creditor over others. Take, for example, the situation of a debtor who has $5,000 which he uses for a down payment on an automobile worth $10,000. He borrows an additional $5,000 from a friend who obtains a purchase money security interest in the vehicle. If valuation is not allowed, the debtor could surrender the vehicle to the friend in

satisfaction of the debt. The friend would have a $10,000 car in payment of a $5,000 debt. The debtor's other creditors would rightfully object to this proposal, and I expect that every court would prevent such a maneuver. Certainly, the debtor could not do the same thing with any other type of collateral that is subject to a security interest, purchase money or otherwise.

It would seem that Official Form 10 should require the person completing the form to state their opinion of the actual value of the collateral, including motor vehicles. Doing so, however, creates the potential for confusion or the unwitting relinquishment of the protection of the hanging paragraph for a specific category of holders of secured claims. The potential for confusion could be alleviated if the form were amended to include a check box within the "Secured Claim" box that allows a creditor to state that it holds a purchase money security interest in a motor vehicle where the debt was incurred within the 910 days preceding the filing of the petition. The form could then require the person completing the form to state to the best of their knowledge the actual value of the collateral. There may be other ways to amend Form 10 to take account of the hanging paragraph. The first issue that the Subcommittee considered was whether there is a sufficient need to take on the problem at this time. There has been only one case that to my knowledge that has raised the question of the propriety of the form although several courts have noted that the hanging paragraph includes the seeds for mischief if creditors are not vigilant and if debtors are creative in their plan drafting. The Subcommittee concluded that there is no need to amend Official Form 10 at this time. Parties completing the proof of claim form should set out their best estimate of the actual value of the collateral notwithstanding the language of the hanging paragraph in § 1325. If further developments arise in the case law, the Committee can reconsider the matter. In the meantime, the Subcommittee recommends that

no action be taken to amend Official Form 10.

6-D

MEMORANDUM

TO: SUBCOMMITTEE ON FORMS

FROM: JEFF MORRIS, REPORTER

RE: OFFICIAL FORMS 19A AND 19B

DATE: JULY 22, 2006

Section 110(b) of the Code requires bankruptcy petition preparers to sign the documents they prepare for filing in bankruptcy cases and to list their name and address on the document as well. Official Form 19A was promulgated to meet that statutory directive. As the Committee Note points out, this form is not just a stand alone form, but it is also "incorporated into the official forms of the voluntary petition, the schedules, the statement of financial affairs, and other official forms that typically would be prepared for a debtor by a bankruptcy petition preparer." For example, page 3 of the voluntary petition (Official Form 1) includes the signature box for a petition preparer that sets out the information required under § 110(b).

Section 110(b)(2) also requires the petition preparer to give the debtor a written notice regarding the scope of advice that the preparer may give. The statute provides that the notice must be in the form prescribed by the Official Forms, and Form 19B was promulgated in October 2005 to meet that need. Under the statute,

> Before preparing *any* document for filing or accepting any fees from a debtor, the bankruptcy petition preparer shall provide to the debtor a written notice which shall be on an official form prescribed by the Judicial Conference of the United States in accordance with rule 9009 of the Federal Rules of Bankruptcy Procedure.

11 U.S.C. § 110(b)(2)(A). Emphasis added. Section 110(b)(2)(B)(iii)(II) requires that the written notice "be filed with any document for filing." Subsection (b)(2)(A) could be interpreted

to allow a single written notice given to the debtor during an initial meeting with a petition preparer to satisfy the obligation for the duration of the case. Under that interpretation, the notice would have been given "before" the petition preparer had filed any document in the case. Subsection (b)(2)(B)(iii)(II), however, requires that the preparer file a copy of the notice "with any document for filing." This section seems to anticipate that the petition preparer must file the notice with each and every document that it files in the case.

The Administrative Office has received an inquiry about the need to have both Official Form 19A and Official Form 19B. The question arises because the petition preparer must file Official Form 19B along with any document it files in the case, and Form 19B includes all of the information set out in Form 19A. If the statute is read to require the filing of the notice in each instance and Form 19A is included in Form 19B, then Form 19A could be abrogated and Form 19B could be redesignated as Form 19.

Section 110(b)(2)(B)(iii)(II) seems to require the filing of the written notice along with every document the petition preparer files in the case. The reason for this repetitive filing obligation is unclear. This subsection requires the filing of the notice (a notice intended for the benefit of the debtor) with every document that the petition preparer files, but § 110(b)(2)(A), on the other hand, could be read to require the providing of the notice to the debtor only once (prior to filing any document in the case). The purpose of the statute seems to be to protect debtors by reminding them of the limitations on the services that petition preparers can provide in a case. Presumably, this is accomplished by giving the notice to the debtor during the first meeting between the debtor and the petition preparer. If the statute is construed to mean that the petition preparer need only provide the notice to the debtor once, it seems inconsistent to then require the

petition preparer to file a copy of the notice with every document it files in the case. The petition preparer would be filing a document about a notice to a debtor that was given some time previously. If §110(b)(2)(A) is construed to mean that the petition preparer must provide the notice to the debtor repeatedly throughout the case, then another question is raised. That is, must the debtor actually receive the notice prior to the filing of the document by the petition preparer? It is logical to assume that this would be required so that the notice could have some actual affect. Official Form 19B also anticipates this by requiring the debtor's signature on the form. (I can envision a package of "pre-signed" 19B forms in the bundle of documents that debtors are asked to sign during an initial meeting with a petition preparer[1].)

The issue for the Subcommittee is whether to recommend that Official Form 19A be abrogated as unnecessary. If petition preparers must file Form 19B with every document they file in a case, then Form 19A arguably is unnecessary. If the Subcommittee concludes that Form 19A is unnecessary, it may be appropriate to consider whether to amend Forms 1, 2, 6, 7 and 8 to delete the signature blocks for petition preparers on the grounds that this information is set out in Form 19B that must be filed with the document. Those Official Forms could be amended by substituting for the signature block an instruction directing the petition preparer to complete and file Form 19B with the document. (For example, the signature boxes for petition preparers could simply state in bold print, **"Bankruptcy Petition Preparers must complete and file Official Form 19 along with this document." or "Official Form 19 must be completed and filed with this document.")**

---

[1] Section 110(d) of the Code requires the petition preparer to provide the debtor with a copy of any document the petition preparer intends to file with the court before making the filing.

There may be other documents that a petition preparer might file in a case that will not or do not specifically refer to the need for a petition preparer to file a Form 19B. For example, the debtor might want to appeal an adverse decision of the bankruptcy court on the availability of a particular exemption. Official Form 17 is the form for a notice of appeal, but it contains no reference either on the Official Form, in the Committee Note, or in the instructions for the use of the form directing that petition preparers file a Form 19B. The same is true for Forms 20A (Notice of Motion or Objection) and 21 (Statement of Social Security Number), both of which might be filed on the debtor's behalf by a petition preparer. The Committee Note to Official Form 19B states that "[t]he notice must be signed by the debtor and by the bankruptcy petition preparer and filed with any document for filing prepared by the bankruptcy petition preparer." It might be appropriate to add this admonition to the text of the Official Form itself. At the end of the form, the boldface warning regarding the consequences of failing to comply with the Code and Rules could be expanded by adding the following to the beginning of the warning:

> **This Form must be completed and filed with any document filed in this case that is prepared by a bankruptcy petition preparer.**

This warning on the face of Official Form 19B may also reduce the need for the separate Form 19A. Its function would be performed by 19B. Adopting such a proposal means that the Subcommittee has concluded that § 110(b)(2)(B) requires the filing of the notice to the debtor repeatedly throughout the case. This certainly can be seen as unnecessarily clogging the court's files, but it is a legitimate reading of the Code. In any event, it is a decision that the Subcommittee must reach to resolve whether any amendments should be made either to Form 19A or 19B. If the Subcommittee recommends that the Forms be amended, it must then address

the actual form of the amendments.

Official Form 19 (12/08) **DRAFT**

United States Bankruptcy Court

_____ District Of _____

In re _____, Debtor

Case No. _____

Chapter _____

DECLARATION AND SIGNATURE OF NON-ATTORNEY BANKRUPTCY PETITION PREPARER (*See* 11 U.S.C. § 110)

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared the accompanying document(s) listed below for compensation and have provided the debtor with a copy of the document(s) and the attached notice as required by 11 U.S.C. §§ 110(b), 110(h), and 342(b); and (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required by that section.

Accompanying documents:

_____

_____

_____

_____

_____

Printed or Typed Name and Title, if any, of Bankruptcy Petition Preparer:

_____

Social-Security No. of Bankruptcy Petition Preparer (Required by 11 U.S.C. § 110):

_____

If the bankruptcy petition preparer is not an individual, state the name, title (if any), address, and social-security number of the officer, principal, responsible person, or partner who signs this document.

_____

_____

Address

X _____ _____

Signature of Bankruptcy Petition Preparer Date

Names and social-security numbers of all other individuals who prepared or assisted in preparing this document, unless the bankruptcy petition preparer is not an individual:

If more than one person prepared this document, attach additional signed sheets conforming to the appropriate Official Form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

NOTICE TO DEBTOR BY NON-ATTORNEY BANKRUPTCY PETITION PREPARER

[Must be filed with any document(s) prepared by a bankruptcy petition preparer.]

I am a bankruptcy petition preparer. I am not an attorney and may not practice law or give legal advice. Before preparing any document for filing as defined in § 110(a)(2) of the Bankruptcy Code or accepting any fees, I am required by law to provide you with this notice concerning bankruptcy petition preparers. Under the law, § 110 of the Bankruptcy Code (11 U.S.C. § 110), I am forbidden to offer you any legal advice, including advice about any of the following:

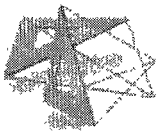
- whether to file a petition under the Bankruptcy Code (11 U.S.C. § 101 et seq.);
- whether commencing a case under chapter 7, 11, 12, or 13 is appropriate;
- whether your debts will be eliminated or discharged in a case under the Bankruptcy Code;
- whether you will be able to retain your home, car, or other property after commencing a case under the Bankruptcy Code;
- the tax consequences of a case brought under the Bankruptcy Code;
- the dischargeability of tax claims;
- whether you may or should promise to repay debts to a creditor or enter into a reaffirmation agreement with a creditor to reaffirm a debt;
- how to characterize the nature of your interests in property or your debts; or
- bankruptcy procedures and rights.

[The notice may provide additional examples of legal advice that a bankruptcy petition preparer is not authorized to give.]

In addition, under 11 U.S.C. § 110(h), the Supreme Court or the Judicial Conference of the United States may promulgate rules or guidelines setting a maximum allowable fee chargeable by a bankruptcy petition preparer. As required by law, I have notified you of this maximum allowable fee, if any, before preparing any document for filing or accepting any fee from you.

Signature of Debtor	Date	Joint Debtor (if any)	Date

[In a joint case, both spouses must sign.]



Thomas Zilly/WAWD/09/USCOURTS (Dist Judge)
08/09/2006 11:41 AM

To Christopher Klein/CAEB/09/USCOURTS@USCOURTS, "Jeff Morris" <Jeff.Morris@notes.udayton.edu>
cc "James Walker" <jdwalkerjr@aol.com>, Eugene Wedoff/ILNB/07/USCOURTS, Jim Waldron/NJB/03/USCOURTS, James Wannamaker/DCA/AO/USCOURTS, Stephen Myers/DCA/AO/USCOURTS, James Ishida/DCA/AO/USCOURTS, John Rabiej/DCA/AO/USCOURTS, Peter McCabe/DCA/AO/USCOURTS, "David Levi" <DLevi@caed.uscourts.gov>
Subject Re: Glitch in Interim Rule1007(c)

I am out of office and do not have the benefit of everything I would want to fully respond.

Your memo does suggest a problem. I am concerned this is the only interim rule we are asking to change as an interim rule this year. If it needs to be changed our September meeting may be too late. Can we wait until after comment period and fix it next year? That would be a fix for the final rule but not solve it on an interim basis. As practical matter, how many of these problems will be likely to occur? Could we add some warning to first meeting of creditors notice or send some type of notice in specific case saying case will be dismissed and you will not receive discharge unless certificate filed within certain time? In district court we often send such a notice if complaint does not pass initial review. What I am really asking is how serious is the problem and are there other ways to minimize problem. One last question - if statute does not require and debtor has done everything to get the discharge could/should a court dismiss without prejudice with leave to file the certificate and receive the discharge?

Christopher Klein

From: Christopher Klein
Sent: 08/08/2006 05:31 PM
To: Jeff.Morris@notes.udayton.edu
Cc: jdwalkerjr@aol.com
Subject: Glitch in Interim Rule1007(c)

Here is an Interim Rules problem that we might discuss at our September meeting.

During the small-group break-out session on rules at the FJC Bankruptcy Judge Education Program in San Diego last week attention was called to a potential glitch in the way Interim Rule 1007(c) interacts with Interim Rule 1007(b)(7). I noted it at the time to Jeff Morris and to Judges Walker and Wedoff.

Interim Rule 1007(b)(7) requires that an individual chapter 7 or 13 debtor file a "statement" regarding completion of a course in personal financial management as prescribed by the appropriate Official Form. This rule implements Bankruptcy Code §§ 727(a)(11) and 1328(g), which condition grant of discharge on completion of an instructional course in personal financial management (as described in § 111) after filing

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the petition but which do not provide a mechanism for determining whether such a course has been completed.

Interim Rule 1007(c) provides that "The statement required by subdivision (b)(7) shall be filed by the debtor within 45 days after the first date set for the meeting of creditors under § 341 of the Code in a chapter 7 case and no later than the last payment made by the debtor as required by the plan or the filing of a motion for entry of a discharge under § 1328(b) ["hardship" discharge] in a chapter 13 case."

The glitch arises later in Interim Rule 1007(c), which requires a motion and finding of cause for extending the time for filing the 1007(b)(7) statement: "Except as provided in § 1116(3) of the Code, any extension of time for the filing of the schedules, statements, and other documents may be granted only on motion for cause shown and on notice to the United States trustee and to any committee elected under § 705 or appointed under § 1102, trustee, examiner, or other party as the court may direct. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct."

Some judges are reading this as requiring their permission, based on "cause," to file a late 1007(b)(7) statement. The problem is that some of these judges are saying that they are having a difficult time finding "cause" when the reason for not filing the statement is, as usually in the case, some combination of sloth and stupidity. Thus, in the form of either striking or forbidding the filing of untimely statements of completion of the financial management course, they are raising the specter of de facto denying discharge to debtors who otherwise have done everything required to obtain their chapter 7 or 13 discharges.

I do not recall that the Committee contemplated that there should be some artificial hurdle to filing the statement of completion of a financial management course. We, in the rules, were intending to address some administrative management issues that the statute created for the clerk when we created the requirement of making a statement to fill the gap in the statute created by its silence regarding how one would ascertain whether the debtor completed the course required by §727(a)(11) and 1328(g), adjusted Rule 4004(c) regarding grant of discharge to incorporate the statutory requirement, adjusted Rule 4006 to recognize that a case might have been closed "without the entry of a discharge" (but without discharge having been denied or revoked) due to omission to have filed the 1007(b)(7) statement, and contemplated that a closed case could be reopened as of right under 350(b) "to accord relief to the debtor" such that the debtor could receive a belated discharge by filing a 1007(b)(7) statement.

We rejected the alternative of merely letting a case languish in an open status indefinitely where the 1007(b)(7) statement had not yet been filed. Not only did such a situation pose administrative difficulties, but allowing the case to remain open without entry of discharge would correlatively operate to extend the automatic stay for the duration of the delay in a manner that could upset usual bankruptcy expectations by allowing a sly debtor artificially to extend an automatic stay by the stratagem of not completing the financial management course. (Under § 362(c)(2), the stay of any act against the debtor or property of the debtor: "continues until the earliest of — (A) the time the case is closed; (B) the time the case is dismissed; or (C) if the case is a chase under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.")

It appears, however, that the administrative issue we thought we were resolving has morphed into a potentially substantive consequence and that the creation of a deadline in Rule 1007(c) for filing Rule 1007(b)(7) statements may operate perversely to erect a barrier to discharge that is not in the statute. If a debtor "after filing the petition" (the statutory language) completes an instructional course in personal financial management, the debtor is entitled to discharge. The statute, other than requiring that the course be completed "after filing the petition," does not address time and does not use the term "timely" or "during the pendency of the case" or any similar term; it does not even mandate that a statement be made. The rules create the deadline and the requirement of a statement for reasons of practical judicial administration, which the rules also should confine to their appropriate administrative boundaries so that they do not have unintended substantive consequences.

We should consider some alternative, such as eliminating the deadline and authorizing the clerk to close

the case if the 1007(b)(7) statement is not filed within *x* days after the completion of all requirements for discharge other than the filing of the statement required by Rule 1007(b)(7).

cmk

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: TIME COMPUTATION RULE

DATE: AUGUST 4, 2006

The Standing Committee created a time-computation subcommittee which is chaired by Judge Mark Kravitz. The Subcommittee has representatives from each of the Advisory Committees (Judge Klein and I are the representatives from the Bankruptcy Rules Committee) and has met by teleconference on several occasions. The task of the Subcommittee was to simplify the time-computation rules and to create a template that all of the rules could follow. The rule is not intended to establish deadlines, but instead is intended to direct how a deadline is to be computed. The creation of the time-computation rule template is just the first part of the process. Once the template is in place and agreed upon by the Advisory Committees, each committee is to review all of the relevant materials that include deadlines to determine whether any changes need to be made to those rules.[1]

A copy of the latest iteration of the time-computation rule template is attached at the end of this memo. It is denominated as Rule 6, but it would take the place of Bankruptcy Rule 9006. The first thing you might notice is that there is no provision in that rule excluding intervening or

[1]The template provides that the computation provision governs time periods in "these rules or in any local rule, court order, or statute." This is consistent with current Bankruptcy Rule 9006. Although I am currently surveying the entire Bankruptcy Code and Rules to identify all of the deadlines contained therein, we can obviously only change the deadlines set out in the Rules. Nonetheless, that collection of deadlines will give us a better idea of the extent of the impact of a new time-computation rule.

intermediate Saturdays, Sundays and legal holidays. Instead, when computing a period stated in days, intermediate Saturdays, Sundays, and legal holidays are counted. Rule 6(a)(1)(B). Consequently, deadlines of less than eight days would be shortened under the template. For example, a five-day period commencing on a Wednesday would end on the following Wednesday under current Rule 9006. You exclude the first Wednesday, then include Thursday and Friday, exclude Saturday and Sunday, then include Monday, Tuesday, and Wednesday to complete the five-day period. For the Civil and Criminal Rules, the impact is even greater because under Civil Rule 6(a) and Criminal Rule 45(a)(2), intermediate Saturdays, Sundays, and legal holidays are excluded when the deadline is less than eleven (11) days. For example, adoption of the time-computation rule template would result in no change to the number of days for filing a notice of appeal under Rule 8002(a), but it would effectively shorten a ten-day period that might be applicable under the Civil Rules. Under Civil Rule 6(a), ten-day periods currently are effectively at least fourteen (14) day periods because they exclude the intermediate weekends and holidays.

Since the proposed template would effectively shorten those periods, the time-computation Subcommittee is also suggesting that in considering deadlines established by the rules, the Advisory Committees review all affected deadlines. The Subcommittee is also recommending that in setting deadlines under the rules, the Advisory Committees select multiples of seven days for the deadlines in the rules. Stating deadlines in multiples of seven is likely to reduce the incidence of deadlines falling on days when the court is not open. If the deadline is set from a weekday, multiples of seven insure that the deadline will not fall on a weekend. Occasional problems can arise with holidays (both as to Mondays for most holidays,

and other days for holidays such as July 4, Thanksgiving, Christmas and New Year's). Still under discussion is the extent to which the multiples of seven will apply, and there is some support for the notion that deadlines greater than twenty-eight (28) days be no longer limited by the multiple of seven rule. Much of this will depend upon the views of the Advisory Committees when they consider the deadlines included in their rules.

Another change to the time counting rule that is included in the proposed template is the deletion of any reference to state holidays as "legal holidays" under the rule. The Subcommittee concluded that the federal courts are generally open on these days (which are apparently quite numerous in some states), so there is no need to include those days among the legal holidays. The Subcommittee also decided not to include any "virtual holidays" in the rule. These are days like the Friday after Thanksgiving, New Year's Eve, and July 3, 2006, which was the Monday before the Fourth of July, where many courts are "virtually" closed.

It seems likely that the impact of a time-computation rule will be greater in bankruptcy practice than it will be in the other areas. In addition to the numerous deadlines contained in our rules, the Bankruptcy Code is rife with deadlines. Some are as short as five days, *see e.g.*, Bankruptcy Code § 322(a) (five-day deadline for a trustee to file a bond). Furthermore, it seems likely that many more statutory deadlines arise in bankruptcy cases from state law and federal statutes outside of Title 11. It is not realistic to attempt to collect all of the statutory deadlines that might apply in a bankruptcy case, but collecting the deadlines set out in the Bankruptcy Code will give us some idea of the extent to which an amendment to Rule 9006 that would adopt the time-computation rule template would have.

Please let me know if you have any questions or concerns regarding the time-computation

rule so that we can make sure these concerns are expressed to the appropriate subcommittee. It is also likely that the Bankruptcy Rules Committee will need to study the deadlines in the Bankruptcy Rules to determine the extent to which they should be altered as a part of the time-computation rule adoption process. That is, should ten-day periods become seven-day periods or fourteen-day periods, should thirty-day periods become twenty-eight-day periods, and the like? It would seem that breaking the task up into parcels similar to the manner in which we studied the Civil Rules restyling package would provide the best process for reviewing the Bankruptcy Rules. The entire Committee can have a list of the Bankruptcy Code and Rules provisions that include deadlines, but each subgroup would be responsible to recommend new deadlines only for its assigned rules. The recommendations can then be compiled and the full Committee can vote on those recommendations and resolve any inconsistencies among the small group recommendations.

Rule 6. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules or in any local rule, court order, or statute.

(1) ***Period Stated in Days or Longer Unit.*** When the period is stated in days or a longer unit of time,

(A) exclude the day of the ~~act,~~ event~~, or default~~ that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period unless it is a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a day on which the clerk's office is inaccessible. When the last day is excluded, the period continues to run until the end of the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(2) ***Period Stated in Hours.*** When the period is stated in hours,

(A) begin counting immediately on the occurrence of the ~~act,~~ event~~, or default~~ that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end ~~at a time~~ on a Saturday, Sunday, legal holiday, or — if the act to be done is a filing in court — a time when ~~day on which~~ the clerk's office is inaccessible, then continue the period until the same time on the next day that is not a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible.

(3) *"Next Day" Defined.* The "next day" for purposes of (a)(1)(C) and (a)(2)(C) is determined by continuing to count forward when the period is measured after an event and backward when the period is measured before an event.

(4) ***"Last Day" Defined.*** The last day concludes:

(A) (i) for electronic filing, at midnight in the court's time zone; and (ii) for filing by other means, at the closing of the clerk's office or the time designated by local rule, unless

(B) (i) the court by order in the case sets a different concluding time; or (ii) a paper filing made after the closing of the clerk's office is personally delivered prior to midnight to an appropriate court official.

(5) ***"Legal Holiday" Defined.*** "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(B) any other day declared a holiday by the President, Congress, or the state where the district court is located.

Committee Note

Subdivision (a). Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in a Federal Rule of Civil Procedure, a local rule, a court order, or a statute. A local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a). See Rule 83(a)(1).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. If, for example, a ~~rule or order requires that a~~ filing is required to be made "no later than November 1, 2007," then the filing is

due on November 1, 2007. But if a ~~rule or order requires that a~~ filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. ~~(~~It also applies to time periods that are stated in weeks, months, or years. See, e.g., Rule 60(b).~~)~~

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days ~~10 days or less~~. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day — and, not infrequently, the 10-day period actually ended later than the 14-day period. See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685, 686 (6th Cir. 2005).

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the ~~act,~~ event~~, or default~~ that triggers the deadline is not counted. ~~Every~~ All other days — including intermediate Saturdays, Sundays, and legal holidays — ~~is~~ are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below, in the discussion of subdivision (a)(3). Where present subdivision (a) refers to the "act, event, or default" that triggers the deadline, new subdivisions (a)(1), (a)(2) and (a)(3) refer simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days ~~10 days or less~~ will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. See, e.g., [CITE].

When the act to be done is a filing in court, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office, and the deletion from the text is not meant to suggest otherwise.

Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under new subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the ~~act,~~ event~~, or default~~ that triggers the deadline. The deadline generally ends

when the time expires. If, however, the deadline ends at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. ~~[~~Periods stated in hours are not to be "rounded up" to the next whole hour.~~]~~ ~~(Again, w~~When the act to be done is a filing in court, and inaccessibility of the clerk's office occurs on the day the deadline ends and prior to the time the deadline ends, that day ~~a day on which the clerk's office is not accessible because of the weather or another reason~~ is treated like a Saturday, Sunday, or legal holiday.~~)~~

Subdivision (a)(3). New subdivision (a)(3) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an ~~act~~, event~~, or default~~. See, e.g., Rule 59(b) (motion for new trial "shall be filed no later than 10 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an ~~act~~, event~~, or default~~. See, e.g., Rule 56(c) (summary judgment motion "shall be served at least 10 days before the time fixed for the hearing"). In determining what is the "next" day for purposes of subdivision (a)(1)(C) (as well as for purposes of subdivision (a)(2)(C)), one should continue counting in the same direction — that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 10 days *after* an event, and the tenth day falls on Saturday, September 1, 2007, then the filing is due on Tuesday, September 4, 2007 (Monday, September 3, is Labor Day). But if a filing is due 10 days *before* an event, and the tenth day falls on Saturday, September 1, then the filing is due on Friday, August 31.

Subdivision (a)(4)~~(3)~~. New subdivision (a)(4)~~(3)~~ defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4)~~(3)~~ does not apply to the computation of periods stated in hours under subdivision (a)(2).

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Courts have held that these provisions permit after-hours filing so long as the filing is made by locating an appropriate official and handing the papers to that official. *See, e.g., Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (after-hours filer "may seek out the clerk or deputy clerk, or perhaps the judge"). Subdivision (a)(4)(B)(ii) carries forward that view. Some courts have also held after-hours filing to be effective when, for example, the filing is time-stamped and placed in an depository maintained by the clerk's office. *See, e.g., Greenwood v. State of N.Y., Office of Mental Health*, 842 F.2d 636, 639 (2d Cir. 1988). Under subdivision (a)(4)(A)(ii), methods such as time-stamped placement in a depository will be effective if a local rule so provides. Such local rules should take into account the difficulties that can arise if a drop box lacks a device to record the date and time when a filing is deposited. *See, e.g.*, In re Bryan, 261 B.R. 240, 242 (9th Cir. BAP 2001).

Subdivision (a)(5)~~(4)~~. New subdivision (a)(5)~~(4)~~ defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivisions (a)(1) and (a)(2).

Title	Section Titlen	Subsection	NaturNature of deadlinee of deadline			Type gth - Unit	Length - Number	Issues Len	Comments
2	8	(b)(4)(B)(i)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member	Time to seek judicial review	Y	Day	2	yellow flag on Westlaw	
2	8	(b)(4)(B)(iii)	(4) Extraordinary circumstances (A) In general In this subsection, "extraordinary circumstances" occur when the Speaker of the House of Representatives announces that vacancies in the representation from the States in the House exceed 100. (B) Judicial review If any action is brought for declaratory or injunctive relief to challenge an announcement made under subparagraph (A), the following rules shall apply: (i) Not later than 2 days after the announcement, the action shall be filed in the United States District Court having jurisdiction in the district of the Member of the House of Representatives whose seat has been announced to be vacant and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code. (ii) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives. (iii) A final decision in the action shall be made within 3 days of the filing of such action and shall not be reviewable. (iv) The executive authority of the State that contains the district of the Member	Time for court to act	Y	Day	3	yellow flag on Westlaw	

11	109	(h)(3)	(h)(1) Subject to paragraphs (2) and (3), and notwithstanding any other provision of this section, an individual may not be a debtor under this title unless such individual has, during the 180-day period preceding the date of filing of the petition by such individual, received from an approved nonprofit budget and credit counseling agency * * * an individual or group briefing * * * that outlined the opportunities for available credit counseling and assisted such individual in performing a related budget analysis. * * * (3)(A) Subject to subparagraph (B), the requirements of paragraph (1) shall not apply with respect to a debtor who submits to the court a certification that-- (i) describes exigent circumstances that merit a waiver of the requirements of paragraph (1); (ii) states that the debtor requested credit counseling services from an approved nonprofit budget and credit counseling agency, but was unable to obtain the services referred to in paragraph (1) during the 5-day period beginning on the date on which the debtor made that request; and	Time for bankruptcy participant to act		Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	322	(a)	(a) Except as provided in subsection (b)(1), a person selected under section 701, 702, 703, 1104, 1163, 1202, or 1302 of this title to serve as trustee in a case under this title qualifies if before five days after such selection, and before beginning official duties, such person has filed with the court a bond in favor of the United States conditioned on the faithful performance of such official duties.	Time for bankruptcy participant to act		Day	5		
11	332	(a)	(a) If a hearing is required under section 363(b)(1)(B), the court shall order the United States trustee to appoint, not later than 5 days before the commencement of the hearing, 1 disinterested person (other than the United States trustee) to serve as the consumer privacy ombudsman in the case and shall require that notice of such hearing be timely given to such ombudsman.	Time for bankruptcy participant to act		Day	5		

11	342	(e)(2)	(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.	Time for bankruptcy participant to act		Day	5		
11	521	(e)(2)(A)	(e)(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor. (2)(A) The debtor shall provide-- (i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return was filed; and (ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.	Time for bankruptcy participant to act		Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	521	(e)(3)	(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan-- (A) at a reasonable cost; and (B) not later than 5 days after such request is filed.	Time for court to act		Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	
11	521	(i)(2)	(i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition. (2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 5 days after such request. (3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing. (4) Notwithstanding any other provision of this subsection, on the motion of the	Presumptive time for court to act		Day	5	yellow flag on Westlaw -- apparently due to proposed legislation	

11	704	(b)(1)	(b)(1) With respect to a debtor who is an individual in a case under this chapter-- (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and (B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.	Time for court to act		Day	5		
11	749	(b)	(b) Notwithstanding sections 544, 545, 547, 548, and 549 of this title, the trustee may not avoid a transfer made before five days after the order for relief if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is-- (1) a transfer of a securities contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, security, or other property margining or securing such securities contract; or (2) the liquidation of a securities contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Day	5		
11	764	(b)	(b) Notwithstanding sections 544, 545, 547, 548, 549, and 724(a) of this title, the trustee may not avoid a transfer made before five days after the order for relief, if such transfer is approved by the Commission by rule or order, either before or after such transfer, and if such transfer is-- (1) a transfer of a commodity contract entered into or carried by or through the debtor on behalf of a customer, and of any cash, securities, or other property margining or securing such commodity contract; or (2) the liquidation of a commodity contract entered into or carried by or through the debtor on behalf of a customer.	Time for bankruptcy participant to act		Day	5		
11	1113	(d)(1)	(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.	Presumptive time for court to act		Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	
11	1114	(k)(1)	(k)(1) Upon the filing of an application for modifying retiree benefits, the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and the	Presumptive time for court to act		Day	7	yellow flag on Westlaw -- apparently due to proposed legislation	

11	1116		In a small business case, a trustee or the debtor in possession, in addition to the duties provided in this title and as otherwise required by law, shall-- (1) append to the voluntary petition or, in an involuntary case, file not later than 7 days after the date of the order for relief-- (A) its most recent balance sheet, statement of operations, cash-flow statement, and Federal income tax return; or (B) a statement made under penalty of perjury that no balance sheet, statement of operations, or cash-flow statement has been prepared and no Federal tax return has been filed;	Time for bankruptcy participant to act		Day	7		
11	1308	(a)	(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.	Time for bankruptcy participant to act		Day	1	yellow flag on Westlaw -- apparently due to proposed legislation	

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Item 9 will be an oral report.

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Item 10 will be an oral report.

11

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
POST OFFICE BOX 64
MACON, GEORGIA 31202

JAMES D. WALKER, JR
JUDGE

OFFICE
433 CHERRY STREET
MACON, GA 31201

TELEPHONE 752-8293
AREA CODE 478
TELECOPIER 752-3588

May 24, 2006

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

Dear Peter:

With my tenure on the Advisory Committee on Bankruptcy Rules coming to an end after our meeting in September, it seems a good time to share with you a concern drawn from my years as chairman of the forms subcommittee. I believe the time has come for the committee to undertake a fundamental review and modernization of the bankruptcy forms. Pat Ketchum, the committee's consultant on forms, agrees and supports these suggestions.

You are as familiar as anyone with the format of the forms that serve as the backbone to the bankruptcy system as we have known it. These forms, as they now exist and as we continue to revise them, reflect a business process that is being rendered essentially archaic by the advent of CM/ECF and other electronic methods of transacting business, including court business. While our data management and processing systems are moving ahead, unfortunately, the format for presenting these data continues to be firmly rooted in the past.

Our committee and its predecessors have anguished over the process of creating and revising forms that were designed to be completed on manual typewriters. Now, computers have automated the collection of the data from the debtor into a form that can be electronically presented to the court by their lawyers. We have one more step to take, and it is that step I urge that the committee now begin to formally study.

The deficiency of our system of paper forms is highlighted by the recent request by the U.S. Trustee urging the Bankruptcy Rules Committee adopt a system of mandatory embedded data into our forms. Their proposal would require the filing of our forms electronically in a way that would permit the data to be programed into the forms as a PDF document that could thereafter be readily extracted by the U.S. Trustee and anyone else who might want to make use of the data such as the bankruptcy clerk and the AO.

The idea is an excellent one and would be an essential component of any electronic form system we might adopt. The Bankruptcy Rules Committee, however, has been resistant to this requirement, not because it is a bad requirement, but instead because the committee believes it is not appropriate for our committee to adopt a rule compelling a particular electronic format for the presentation of information.

Currently, our forms specify with careful precision the information our committee believes a debtor or creditor should provide in the prosecution of a bankruptcy matter. Unfortunately, because of our ties with the past and the paper forms, we must in addition also adopt an official format for the presentation of that information. That latter step has been rendered essentially unnecessary by the electronic revolution.

As the chairman of the forms subcommittee, with Pat Ketchum's assistance and with the invaluable input from other members of the subcommittee and full committee, I have participated in the adoption of a new generation of forms to implement BAPCPA. In this effort we have all struggled with the constraints of WordPerfect, Page Maker and Microsoft Word in trying to fit the requirements for content into a piece of paper that will look like something that can be prepared manually but which will in fact in most cases never be prepared manually. Without the constraints of this paper-based format, I believe we could be much more precise in our requirements and provide a more thorough picture of the facts in a case.

The commercial bankruptcy petition preparation programs have mastered the task of gathering the information from debtors and presenting the information in the required PDF format. It is that last step I wish to urge that we consider and study for a more efficient alternative. Rather than trying to outline my vision of how this might work to you, I assume that you are well acquainted with this proposition and already have ideas of your own. The purpose of the letter is to urge that you, as Secretary to the Committee on Rules of Practice and Procedure, consider initiating a formal study of this subject towards the end that the study might make recommendations which can be proposed for adoption. Based on her experience with the last major overhaul of the forms in 1991, Pat Ketchum estimates such a project to require about five years of the committee's time.

Thank you in advance for considering this proposal and for taking such steps you believe to be appropriate. Always, I am glad to provide any help you might determine to be useful. I am a tremendous fan of your office and in particular the work you have done in your position as secretary and steward for all the rules committees. I hope you will find a way to take this next step in the evolution of the administration of the bankruptcy law in this country.

Yours truly,

James D. Walker, Jr.

James D. Walker, Jr. with permission /cls

JDWjr/cs

cc: Hon. Thomas S. Zilly
Prof. Jeffrey W. Morris
Patricia S. Ketchum, Esq.
John K. Rabiej

12

Bankruptcy Rules Tracking Docket (By Rule Number) 8/16/06

Approved Items – Pending Congressional action (if any)

Suggestion	Effective Date
Rule 1009 Requires debtor to submit corrected social security number	12/1/06
Rule 5005(a)(2) Authorizes bankruptcy courts to require electronic filing by local rule	12/1/06
Rule 5005(c) Adds BAP clerk and district judges to list of officers required to transmit erroneously delivered papers to bankruptcy clerk of court	12/1/06
Rule 7004(b)(9),(g) Clarifies that debtor's attorney must be served with a copy of any summons and complaint filed against the debtor without regard to how the summons and complaint are served on the debtor	12/1/06

Active Items

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1005 Include all names used by debtor for 8 years in caption; redact an individual's taxpayer ID number	Committee proposal and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)	3/05 - Committee considered, referred to Subcommittee on Privacy, Public Access & Appeals 9/05 - Referred to Forms Subcomt. 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1006 Installment payments, waiver of filing fee	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1007(a),(b),(c) Required documents	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1007(b)(7),(c) Required documents	Interim Rule to implement BAPCPA	3/06 - Committee approved changes in Interim Rule for adoption in 2006 6/06 - Standing Committee approved as amendment to Suggested Interim Rule	10/1/06
Rule 1009(b) Amended Statement of Intention	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1010 Service of petition for recognition	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rules 1010(b) Rule 7007.1 applied in involuntary cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1011(a) Who may contest petition for recognition of a foreign proceeding.	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1011(f) Rule 7007.1 applied to responses to involuntary and chapter 15 cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1014 Clarifies that court may act *sua sponte* to dismiss or transfer a case	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Approved by Joint Subcommittee 9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07
Rule 1015(b) Cross reference to § 522(b)	Committee proposal (technical amendment) to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1017(e) Dismissal or conversion for abuse	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rules 1019(2) New filing periods in converted case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1020 Small business chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 1021 (new) Health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2002(a),(b),(c), (f),(g),(p),(q) Additional notice requirements	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2002(g)(5) Notice under § 342(g)(1)	National Bankruptcy Conference to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2002(k) Notice to U.S. trustee of petition for recognition	Committee Proposal to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2003(a) Meeting of creditors not convened	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2007.1 Election of trustee in chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2007.2 (new) Appointment of patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2015 Notice by foreign representative	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2015(a)(6) Periodic financial reports by small business debtor	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2015.1 (new) Patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2015.2 (new) Patient transfer in health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 2015.3 (new) Periodic reports on related entities	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3002(c)(5) Timing issues for notice of newly discovered assets	04-BK-E Judge Dana L. Rasure for Bankruptcy Judges Advisory Group 11/15/04	3/05 - Committee considered, referred to Privacy Subcommittee 9/05 - Deferred pending further study of time periods 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 3002(c) Time for governmental unit and creditor with foreign address to file proof of claim	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3003(c) Time for creditor with foreign address to file proof of claim	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3007(b) Procedure for objection to claim - no affirmative relief at same time	Committee Proposal	9/04 - Committee approved for publication 1/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 3007(c)-(f) Omnibus objections to claims	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcommittee 9/04 - Approved in principle by Committee 1/05 - Revised by Joint Subcommittee. 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07
Rule 3007 Service of objections to claims	Judge Christopher M. Klein	9/05 - Referred to Business Subcommittee 3/06 - Committee took no action	
Rule 3016(b) Combined plan and disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 3016(d) Forms for plan and disclosure statement	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3017.1 Conditional approval of form disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3019 Modification of confirmed plan	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 3019 Confirmation of modified plan	06-BK-C Judge Wesley Steen	6/06 - Sent to Chair & Reporter 9/06 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4001 Requirements for cash collateral motions, obtaining credit, and approval of certain agreements	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee. 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4002 Debtor's obligation to provide tax returns, personal identification, and other documents	03-BK-D Lawrence A. Friedman 8/1/03 Interim Rule to implement BAPCPA	8/03 - Sent to chair and reporter 9/03 - Committee considered, referred to Consumer Subcomt. 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approval (as modified) 4/05 - Committee deferred action 8/05 - Included in Interim Rules 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 4003(b) Changes deadlines for objections to exemptions.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Committee considered, referred to Consumer Subcomt. 11/04 - Approved by Subcommittee 3/05 - Committee approved in part, referred to Consumer Subcomt. for further study 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4003(b) Objection to exemption based on § 522(q)	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 4003(d) Lien holder's objection to avoidance notwithstanding the 30-day limit	04-BK-B Judge Eugene R. Wedoff 2/17/04	9/04 - Committee considered as part of Rule 4003(b) amendment, referred to Consumer Subcommittee 3/05 - Committee considered, referred to Consumer Subcomt. 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 4004(c) Requirements for discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4006 Notice that case closed without discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 4007 Time to file dischargeability action	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4008 Filing deadline for reaffirmation agreement	01-BK-E Bankruptcy Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered, referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approval 6/04 - Standing Committee approval 9/04 - Judicial Conference approval 4/05 -Withdrawn from Supreme Court at request of Committee and Executive Committee due to conflicting BAPCPA provisions 3/06 - Committee approved revised draft for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 4008 Debtor's § 524(k) statement in support of reaffirmation	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 5001(b) Holding court outside the district in an emergency	Committee Proposal	9/03 - Committee approved in principle; further action deferred 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 5003 Mailing addresses of certain tax authorities	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 5008 (new) Notice regarding presumption of abuse	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 5012 (new) Communications with foreign courts	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 6003 (new) First day orders	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/04 - Discussed by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment 3/06 - Committee approval with changes 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07
Rule 6004(g) Sale of personally identifiable information	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 6006 Omnibus motions for assumption, rejection, or assignment	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Considered by Joint Subcommittee 9/04 - Approved in principle by Committee 1/05 - Approved by Joint Subcommittee 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for Public Comment 3/06 - Committee approval with changes 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07
Rule 6011 (new) Disposal of patient records	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 7007.1 Corporate ownership statement with initial filing	Committee proposal	9/04 - Committee approval as technical amendment without publication 1/05 - Standing Committee approved publication 8/05 - Published for Public Comment 3/06 - Committee approval 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 8001 Direct appeals	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 8002(a) Extending the time for appeal	Committee proposal	9/04 - Committee considered, referred to Technology and Cross Border Insolvency Subcommittee 1/05 – Subcommittee recommended taking no action 3/05 - Referred to Technology and Cross Border Insolvency Subcomt. 9/05 - Committee deferred action pending study of time periods in all federal rules	
Rule 8003(d) Authorization of direct appeal as leave to appeal	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9005.1 (new) 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 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed Rule 5.1 1/05 - Standing Committee approved proposed Rule 5.1 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval 6/06 - Standing Committee approved 9/06 - Judicial Conference	12/1/07
Rule 9006 Enlargement and reduction of time	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 9009 References to Interim Rules in Official Forms	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 12/08 - Expires when Interim Rules become national rules	10/17/05

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9009 Use of form plan and disclosure statement not mandatory	Business Subcommittee to implement BAPCPA	3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Rule 9011 Attorney conduct	05-BR-33 Senators Charles E. Grassley and Jeff Sessions 3/13/06	3/06 - Referred to Attorney Conduct and Health Care Subcommittee 6/06 - Subcommittee discussed alternative approaches 9/06 - Committee agenda	
Rule 9021 Separate Document Requirement	04-BK- Judge David Adams	8/04 - Referred to Committee 9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Privacy, Public Access and Appeals Subcommittee 9/05 - Referred to Privacy, Public Access and Appeals Subcommittee 3/06 - Referred to Privacy, Public Access and Appeals Subcommittee, report in Sept. 7/06 - Subcommittee discussed 9/06 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9037 (new) Template privacy rule	E-Government Act § 205(c)(3)	9/04 - Committee considered and referred to Reporter, Judge Swain 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Committee approval with changes 6/06 - Standing Committee approved with changes 9/06 - Judicial Conference	12/1/07
New Rules Chapter 15	05-BK-B Judge Samuel Bufford	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency, report in September 5/06 - Subcommittee discussed 6/06 - Subcommittee discussed 9/06 - Committee agenda	
New Rule Representation of corporations when less than $5,000 at issue	06-BK-A (see also 05-BK-A, 00-BK-D, 98-BK-A) Judge Paul Mannes 3/16/06	7/06 - Referred to Subcommittee on Attorney Conduct and Health Care 6/06 - Subcommittee discussed 9/06 - Committee agenda	
New Rule Require electronic filers to use data-enabled forms	Donald Walton for EOUST	3/06 - Sent to chair and reporter 6/06 - Discussed by chair, reporter, Forms Subcommittee chair, and Mr. Walton 9/06 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Forms 1, 1-Exh. D, 3A, 3B, 4, 5, 6-Summary, 6A-J, 6-Declaration, 7, 8, 9A-I, 10, 16A, 18, 19A, 19B, 22A, 22B, 22C, 23, 24 Implement BAPCPA	Forms Subcommittee to implement BAPCPA	8/05 - Approved by Committee 8/05 - Approved by Standing Committee and Executive Committee as Official Forms 9/05 - Official Forms 1, 22A, and 22C amended by Committee 10/05 - Amended Official Forms approved by Standing Committee and Executive Committee 3/06 - Committee approved for publication with changes as permanent forms 5/06 - Committee approved (by email) publication of new Exh. D to Official Form 1 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Official Forms 1, 1-Exh. D, 5, 6-Summary, 6D, 6E, 6F, 6I, 6J, 6-Declaration, 9G, 9H, 9I, 22A, 22C, 23 Statistics, practice under BAPCPA	Forms Subcommittee to implement BAPCPA	3/06 - Committee approved "immediate" changes in several 10/05 forms 5/06 - Committee approved (by email) new Exh. D as "immediate change" to Official Form 1 6/06 - Standing Committee approved 9/06 - Judicial Conference	10/1/06

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 10 Revised to clarify requirements for attachments	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair and Forms Subcommittee 9/04 - Discussed by Committee, referred to Forms Subcommittee 12/05 - Approved by Subcommittee 3/05 - Committee approved for publication 6/05 - Committee deferred action 9/05 - Referred to Forms Subcomt. 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Official Form 10 Revise in light of 11 U.S.C. § 1325	Committee proposal	8/06- Referred to Forms Subcommittee 8/06 - Subcommittee discussed 9/06 - Committee agenda	
Official Form 19A Form 19A not needed if petition preparers must use Form 19B	Debbie Lewis, deputy clerk FL-S bankruptcy court 4/06	8/06 - Referred to Forms Subcommittee 8/06 - Subcommittee discussed 9/06 - Committee agenda	
Official Form 21 Implement privacy rule	Forms Subcommittee	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Forms 25A, 25B (new) Form plan and disclosure statement	Business Subcommittee to implement BAPCPA	9/05 - Model plan approved in principle 9/05 - Model plan and disclosure statement referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Official Form 25C (new) Periodic financial report by small business debtor	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Official Form 26 (new) Periodic report on related entities	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment	12/1/08
Director's Forms 18J, 18JO, 18F, 18FH, 18W, 18WH, 200, 201, 240, 280	Forms Subcommittee to implement BAPCPA	9/05 - Reviewed by Committee 10/05 - Issued by Director of Administrative Office	10/17/05

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Director's Form 104 Adversary Proceeding Cover Sheet	Bankruptcy Administration Committee statistics initiative	9/06 - Information item on committee agenda	10/1/06
Director's Form 240 Reaffirmation agreement	Forms Subcommittee to implement BAPCPA 06-BK-B Kelly Sweeney, CDC, CO bankruptcy court	9/05 - Referred to Forms Subcommittee 10/05 - Amended form issued by Director of AO 8/06 - Amended form issued by Director of AO 8/06 - subcommittee discussed 9/06 - Committee agenda	
Director's Form 240 Should it be an Official Form?	Committee proposal	3/06 - Referred to Forms Subcommittee 8/06 - Subcommittee discussed 9/06 - Committee agenda	
Director's Form 281 Appearance of Child Support Creditor	Staff suggestion to implement privacy policy	8/06 - Amended form issued by Director of AO 9/06 - Information item on committee agenda	

Inactive Items / Historical Information

Suggestion	Docket No., Source & Date	Status
Rule 2002(g)(1) Address for notices	05-BK- D Judge Robert D. Martin Clerk Marcia M. Anderson 10/25/05	10/05 - Sent to chair and reporter 11/05 - Sent to CM/ECF staff

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2021 Large chapter 11 case management and teleconferences	Joint Subcommittee on Venue and Chapter 11 Matters	8/04 - Discussed by Joint Subcommittee 9/05 - Referred to Joint Subcommittee	
Rule 3001 Procedure for filing excerpts supporting proof of claim	04-BK-A Glen K. Palman for Claims Subcomt. of CM/ECF Working Group 2/19/04	9/04 - Committee considered, referred to Subcommittee on Forms 3/05 - Committee approved for publication 6/05 - Standing Committee approved for publication 8/05 - Published for public comment 3/06 - Withdrawn by Committee 6/06 - Withdrawal approved by Standing Committee	
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK-005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee 9/04 - Committee deferred action **FURTHER ACTION MAY BE APPROPRIATE**	
New Rule Representation of corporations in small claims matters	05-BK-A (see also 06-BK-A, 00-BK-D, 98-BK-A) Judge Paul Mannes	9/05 - Referred to Attorney Conduct and Health Care Subcommittee 1/06 - Subcommittee discussed 3/06 - Committee took no action	
Local Rules Due process for attorneys accused of misconduct	ABA Task Force on Attorney Discipline	9/05 - Referred to Subcommittee on Attorney Conduct and Health Care 3/06 - Committee decided to take no action	

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Item 13 will be an oral report.

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MEMORANDUM

DATE: August 14, 2006

TO: Advisory Committee on Bankruptcy Rules

FROM: Jim Wannamaker, Staff Attorney

SUBJECT: Bankruptcy Committee Action on Posting "Fillable" Forms

At its meeting in June 2006, the Bankruptcy Administration Committee endorsed a proposal that the Administrative Office make "fillable" versions of the bankruptcy forms available to the courts and the public. In addition, the Committee instructed its automation subcommittee to consider the feasibility and advisability of the potential use of data-enabled "smart" forms or any other methodology to accomplish the same purposes as "smart" forms. A copy of an agenda item prepared for the Bankruptcy Administration Committee which explains the technology and the issues in more detail is attached.

Attachment

Bankruptcy Committee
Meeting of
June 8-9, 2006
Agenda Item B.8
Action Item

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

SUBJECT: Fillable and Smart Forms

This agenda item addresses issues related to the provision of fillable and/or smart forms by the bankruptcy courts.

Background

The terms "fillable" forms, "smart" forms (or "data-enabled") forms are sometimes used in casual discussions without sufficient attention to their differences. Like the famous nesting Russian dolls, fillable forms are a subset of forms, and smart forms are a subset of fillable forms. However, it is important to be aware of the basic differences when considering policy questions related to the provision and use of such technology in the courts.

Fillable Forms

A paper form that is converted into or created as a usable, electronic file that can be downloaded and completed offline or completed on-line is known as a fillable form. The most common type of fillable form is completed by the user on-line or downloaded and completed with free software such as Adobe Acrobat Reader, then printed out and

submitted. It is not possible to save such forms once they have had information filled in, nor is it possible to transmit the form electronically such as by e-mail.

A second type of fillable form does permit the user to save the completed (or partially completed) form, recall it and edit the data previously entered on the form, and to transmit the completed form via e-mail or by storing the completed form on removable media such as a CD, floppy disk, or mini-drive. This technology is of limited use and not widely employed, having been overshadowed by data-enabled or smart forms.

Smart Forms or Data-enabled Forms

Smart forms, also referred to as "intelligent" documents, are essentially storable fillable forms that use programming code (primarily XML) to "tag" the data entered in the form.

The use of XML provides an automated mechanism for retrieving data and updating applications. It provides the ability to import data in recognizable file formats from document management systems and other databases, as well as to export data in file formats to document management systems and other databases. Smart forms can also be designed so that an image or PDF file is generated and automatically stored in a pre-defined location for records retention purposes.

Issues

Making Fillable Forms Available from the AO

Historically, the AO has posted blank forms on the web and made them available to publishers. This was done in an effort to get accurate versions of the forms into the hands of the publishers and the public, but with the intent that the public would simply print out the forms, complete them manually and file them with the court.

The increasing number of pro se filers combined with improvements in the software necessary to prepare fillable forms has led to widespread demand for posting of fillable forms on the courts' websites. Local courts have asked the AO to make the forms available to them in both original format (Microsoft Word, Wordperfect, or Pagemaker) and in fillable PDF versions so that they can, in some cases, make local modifications, then post fillable forms on their local web sites. The judiciary has historically eschewed development of fillable forms on the theory that it represented competition with the private sector, and may cost jobs.

There is also a significant demand for fillable forms in the court community and among the general public. The AO Office of Public Affairs has requested that the AO make available on the web fillable versions of the bankruptcy forms. Independently, the Bankruptcy Court Administration Division has reported that in various working groups the bankruptcy courts have expressed a desire to have fillable forms made available to

them. A number of courts have gone through the effort of developing fillable versions of the major bankruptcy forms in-house.

Since the demand is widespread, efficiency and accuracy concerns would suggest that the AO should prepare a set of fillable bankruptcy forms and make them available to the courts. This would avoid the need for 90 bankruptcy courts separately to prepare their own forms, and would allow the AO to ensure that the forms conform to the approved format.

On the other hand, non-storable fillable forms are of limited use to the courts since they do not provide for electronic transmission of the data contained on the form and, thus, require manual data entry at the receiving office. However, as compared to manually completed paper forms, fillable forms offer the data entry clerk a neater, more legible source document from which to enter the required data, reducing the likelihood of errors introduced from illegible form fields.

The Executive Office for U.S. Trustees (EOUST) has requested that the AO encourage all bankruptcy courts to link to the website for the U.S. Trustee Program where fillable forms can be downloaded (http://www.usdoj.gov/ust/eo/bapcpa/defs/index.htm#samp). Their rationale is that this ensures users have the most current version of the forms.

If this suggestion is followed, the AO will avoid having to do the work involved in developing fillable versions of the forms as well as of additional or amended forms

introduced from time to time. On the other hand, it should be recognized that AO staff are responsible for preparing the original versions of the forms and, thus, would be able to develop fillable versions of forms at least as early and probably earlier that the UST program. Further, reliance on the UST means reliance on their judgment as to which forms are to be made available in fillable format.

Making Smart Forms Available from the AO

The adoption of electronic case filing (the ECF in CM/ECF) adds further impetus to the issue of fillable forms, making the widespread adoption of smart forms an avenue to greater economy in the processing of case filings by automating the capture of petition information. With smart forms containing tagged data fields prepared in a suitable framework, it is now possible for attorneys who are not e-filers to submit bankruptcy petitions that require little or no intervention in the clerk's office in order to capture and channel information to the docket or to the trustee. If and when the issues of signature and security are resolved, it may also soon be possible for pro se filers to electronically submit smart form petitions that similarly relieve data entry burdens in the clerks' offices.

The standard for smart or data enabled forms adopted by the AO is Adobe PDF/A (version 1.4). This was adopted for at least two reasons: (1) it will facilitate archiving of digital data and (2) there are a significant number of open source and commercial tools available to manipulate tags within PDF documents conforming to the standard.

Many vendors supplying the software used by CM/ECF filers have or are in the process of providing data-enabled forms as an integral part of their software packages. This capability will not replace the current case upload feature employed by software vendors to automate case opening in CM/ECF. However, providing comprehensive data-enabled forms data will enhance flexibility in the system and reduce the average cost to the court system of processing a bankruptcy filing. A major impetus for this push toward vendor adoption of smart forms came from the EOUST which early on recognized the cost-saving potential of data-enabled or smart forms in processing the financial and other data required by the case trustees.

There are two basic questions to be answered in order to make an informed decision on whether the AO should provide data-enabled or smart fillable forms:

Who is to be served by providing these smart forms?

What are the costs associated with providing smart forms?

The first question goes to the market for such forms. In districts with mandatory electronic filing, the market is essentially limited to pro se filers since attorneys will be filing electronically and, eventually, using smart form technology embodied in their CM/ECF filing software. In districts without mandatory electronic filing, the market for court-provided fillable forms would be expanded to include some portion of the bar that does not file electronically through CM/ECF.

There are a number of factors to be considered in estimating the costs of providing data-enabled forms for court use. The initial version of the each form is prepared by the AO in native format (Wordperfect, Word or Pagemaker, generally). Conversion to non-fillable PDF format is generally straightforward, and can often be done automatically by software. Converting the PDF version to a fillable version can be tedious but is not particularly difficult. However, transforming the fillable version to a data-enabled version can be more complex and time-consuming, requiring a high level of technical ability on the part of the designer. Nevertheless, the total cost of production should be fairly low.

Significant costs may arise in making the form available to the courts and usable by the typical external customer. If, as has been represented, a substantial number of courts are interested in modifying forms to include local enhancements and customization, then system-wide production costs could rise significantly. Further, the end-user, who is assumed to be using the free Adobe Acrobat Reader software, will be unable to save and transmit a completed form. In order to provide this capability, the form itself will need certain Adobe extensions to enable the capabilities of saving, editing and e-mailing the form with its data. Discussions with AO staff indicate that this is feasible but may involve significant costs. Each form would require licensing of the add-ins on a per-form basis at a cost of up to $7,000. To the extent a form is modified by a local court, a separate license will be required at up to $7,000 per form per court. Thus,

the out-of-pocket costs of providing a full set of bankruptcy forms in a data-enabled format potentially could be quite large.

RECOMMENDATIONS:

(1) That the Committee consider and determine whether the AO should make fillable versions of the official bankruptcy forms available to the individual courts;

(2) That the Committee instruct its automation subcommittee to consider and report back to the Committee on

(a) the feasability and advisability of preparing smart or data-enabled versions of bankruptcy forms for the use of the courts,

(b) the potential for use of smart forms.

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James Wannamaker/DCA/AO/USCOURTS

08/11/2006 09:14 AM

To Thomas Zilly/WAWD/09/USCOURTS, Jeff Morris

cc Beth Wiggins/FJC/AO/USCOURTS, Stephen Myers/DCA/AO/USCOURTS, Amanda Anderson/DCA/AO/USCOURTS

bcc

Subject Update on Filing fee Increase

Judge, Jeff, Beth -- Congress is still considering increasing the chapter 7 trustee fee by $40 (to $100 a case) and the chapter 7 filing fee to $300. HR 5585 actually would increase the statutory fee $55 but $15 of that used to be part of the Bankruptcy Court Miscellaneous Fee Schedule. As part of the deal, the Judiciary would drop the $15 trustee fee in the miscellaneous fee schedule since the $15 would be included in the $300 filing fee. The $15 would still go to the trustee. The increase would be effective in 60 days.

To make the deal an easier sale, an IFP provision for the $40 increase in the statutory and miscellaneous filing fees is being circulated on Capitol Hill. Under the proposal, the $40 waiver would apply if the debtor's income falls between the existing family income ceiling (150 percent of the official poverty line for the debtor's family size) and 175 percent of the poverty line. The requirement that the debtor be unable to pay the fee in installments would be carried over to the $40 waiver.

If this passes with the $40 IFP, we would need to (1) update the references to the chapter 7 filing fees on the forms and (2) adjust Form 3B to cover the $40 waiver or create a new Official Form. (The existing language of Interim Rule 1006(c) requires an Official Form for a fee waiver under the relevant statute -- 28 U.S.C. sec. 1930(f).) Many debtors might apply for both waivers and the same information from the debtor would be needed for a waiver of the entire $300 chapter 7 filing fee or of just the extra $40. So, it might be best to just revise Form 3B. It might not require more than a few adjustments in the cover sheet and the application and the addition of a new checkbox for a $40 waiver on the form order.

We also might need to revise Interim Rule 1006(c) to specifically include a partial waiver.

The $40 IFP amendment that is being circulating has a 120-day effective date for both the $300 filing fee and the $40 waiver. Earlier drafts had two different effective dates, which probably would have required changing the forms in two steps. First would have be the automatic adjustment in the filing fee on Forms 3B, 200, 201, and the instructions for the voluntary petition to reflect the change in the statutory filing fee. Then would have come the substantive changes for the $40 waiver.

Jim

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109TH CONGRESS
2D SESSION

H. R. 5585

To improve the netting process for financial contracts, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 2006

Mr. MCHENRY (for himself and Ms. WASSERMAN SCHULTZ) introduced the following bill; which was referred to the Committee on Financial Services, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To improve the netting process for financial contracts, 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.

This Act may be cited as the "Financial Netting Improvements Act of 2006".

SEC. 2. TREATMENT OF CERTAIN AGREEMENTS BY CONSERVATORS OR RECEIVERS OF DEPOSITORY INSTITUTIONS.

(a) DEFINITION OF SECURITIES CONTRACT.—

liquidating agent of such credit union, and not as a result of a party's exercise of any right to offset, setoff, or net obligations that exist under the contract, any other contract between those parties, or applicable law.".

SEC. 7. COMPENSATION OF CHAPTER 7 TRUSTEES; CHAPTER 7 FILING FEES.

(a) AMENDMENTS TO TITLE 11 OF THE UNITED STATES CODE.—

(1) COMPENSATION OF CHAPTER 7 TRUSTEES.—Section 330(b)(1) of title 11, United States Code, is amended by striking "$45" and inserting "$100".

(2) RELATED AMENDMENTS.—Section 330(b) of title 11, United States Code, is amended—

(A) by striking "(1)", and

(B) by striking paragraph (2).

(b) AMENDMENTS TO TITLE 28 OF THE UNITED STATES CODE.—

(1) CHAPTER 7 FILING FEE.—Section 1930(a)(1)(A) of title 28 of the United States Code, as amended by section 10101 of Public Law 109–171, is amended by striking "$245" and inserting "$300", and

(2) UNITED STATES TRUSTEE FUND.—Section 589a(b)(1)(A) of title 28, United States Code, is amended by striking "40.46" and inserting "29.67".

(c) RELATED AMENDMENT REGARDING COLLECTIONS AND DEPOSITS OF MISCELLANEOUS BANKRUPTCY FEES.—Section 406(b) of the Judiciary Appropriations Act, 1990 (28 U.S.C. 1931 note) is amended by striking "28.87" and inserting "21.17".

(d) CONFORMING AMENDMENT.—Section 10101(a) of Public Law 109–171 is amended by striking paragraph (2).

(e) EFFECTIVE DATE; APPLICATION OF AMENDMENTS.—The amendments made by this section shall take effect 60 days after the date of the enactment of this Act and shall not apply with respect to cases commenced under title 11 of the United States Code before the date such amendments take effect.

SEC. 8. SCOPE OF APPLICATION.

Subject to section 7(e), the amendments made by this Act shall not apply to any cases commenced under title 11, United States Code, or appointments made under any Federal or State law, before the date of the enactment of this Act.

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MEMORANDUM

DATE: August 10, 2006

TO: Advisory Committee on Bankruptcy Rules

FROM: Jim Wannamaker, Staff Attorney

SUBJECT: Revision of Director's Forms 104 and 281

Form 104, Adversary Proceeding Cover Sheet

Form 104, Adversary Proceeding Cover Sheet, is a Director's Form which is filed with the initial complaint in an adversary proceeding. In the past, the information on the cover sheet was used by deputy clerks to prepare the initial docket sheet for the proceeding and to compile statistical information for the Administrative Office. With electronic filing, attorneys enter the information requested on the cover sheet as part of the process of filing the complaint on the CM/ECF system. Attorneys who file electronically no longer submit the paper form, but the Director's Form is still used by parties who file complaints on paper and the form serves as the basis for programming the case-opening screens for an adversary proceeding in CM/ECF.

Form 104 has been revised to capture more detailed information on the nature of the suit. The information is being collected as part of the statistics initiative undertaken by the Bankruptcy Administration Committee and the Administrative Office. The information and more robust statistics will enable the courts, the committee, and the AO to manage the bankruptcy system better. The information also will enable the judiciary to respond more fully to inquiries from the Congress, researchers, and others.

The Nature of Suit choices on the revised form are grouped according to the subdivisions of Rule 7001, which lists the types of adversary proceedings. Filers will be asked to number up to five choices, starting with the lead cause of action. On the existing form, which was last revised in February 1992, filers are asked to select the most appropriate cause of action. The new Nature of Suit choices have been incorporated in Revision 3.1 of the Bankruptcy CM/ECF system and the changes are expected to take effect in October 2006.

Copies of the current form and the proposed revision are attached for your information.

Form 281, Appearance of Child Support Creditor* or Representative

Form 281, Appearance of Child Support Creditor* or Representative, has been revised to include a warning that the attached itemized statement of account should not include the name of the child, or the child's full birth date or social security number. This is consistent with section 112 of the Code, as added by the Bankruptcy Abuse Protection and Consumer Protection Act of 2005 and the Judiciary's privacy policy.

The revised Form 281 was issued effective August 1, 2006. A copy is attached for your information.

Attachments

B 104
(Rev. 2/92)

ADVERSARY PROCEEDING COVER SHEET
(Instructions on Reverse)

ADVERSARY PROCEEDING NUMBER
(Court Use Only)

PLAINTIFFS	DEFENDANTS
ATTORNEYS (Firm Name, Address, and Telephone No.)	ATTORNEYS (If Known)

PARTY (Check one box only) ☐ 1 U.S. PLAINTIFF ☐ 2 U.S. DEFENDANT ☐ 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

NATURE OF SUIT
(Check the one most appropriate box only.)

- ☐ 454 To Recover Money or Property
- ☐ 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property
- ☐ 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property
- ☐ 424 To object or to revoke a discharge 11 U.S.C. § 727.
- ☐ 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan
- ☐ 426 To determine the dischargeability of a debt 11 U.S.C. § 523
- ☐ 434 To obtain an injunction or other equitable relief
- ☐ 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan
- ☐ 456 To obtain a declaratory judgment relating to any of foregoing causes of action
- ☐ 459 To determine a claim or cause of action removed to a bankruptcy court
- ☐ 498 Other (specify)

ORIGIN OF PROCEEDINGS (Check one box only.) ☐ 1 Original Proceeding ☐ 2 Removed Proceeding ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another Bankruptcy Court

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND $	OTHER RELIEF SOUGHT	☐ JURY DEMAND Check only if demanded in complaint

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES

NAME OF DEBTOR	BANKRUPTCY CASE NO.	
DISTRICT IN WHICH CASE IS PENDING	DIVISIONAL OFFICE	NAME OF JUDGE

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT	DIVISIONAL OFFICE	NAME OF JUDGE

FILING FEE (Check one box only.) ☐ FEE ATTACHED ☐ FEE NOT REQUIRED ☐ FEE IS DEFERRED

DATE	PRINT NAME	SIGNATURE OF ATTORNEY (OR PLAINTIFF)

B 104

ADVERSARY PROCEEDING COVER SHEET (Reverse Side)

This cover sheet must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney) and submitted to the clerk of the court upon the filing of a complaint initiating an adversary proceeding.

The cover sheet and the information contained on it *do not* replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. This form is required for the use of the clerk of the court to initiate the docket sheet and to prepare necessary indices and statistical records. A separate cover sheet must be submitted to the clerk of the court for each complaint filed. The form is largely self explanatory.

Parties. Give the names of the parties to the adversary proceeding *exactly* as they appear on the complaint. Give the names and addresses of the attorneys if known. Following the heading "Party," check the appropriate box indicating whether the United States is a party named in the complaint.

Cause of Action. Give a brief description of the cause of action including all federal statutes involved. For example, "Complaint by trustee to avoid a transfer of property by the debtor, 11 U.S.C. § 544."

Nature of Suit. Place an "X" in the appropriate box. Only one box should be checked. If the cause of action fits more than one category of suit, select the most definitive.

Origin of Proceedings. Check the appropriate box to indicate the origin of the case:

1. Original Proceeding.
2. Removed from a State or District Court.
4. Reinstated or Reopened.
5. Transferred from Another Bankruptcy Court.

Class Action. Place an "X" in this box if you are filing a class action under Rule 23, Fed. R. Civ. P., as made applicable by Rule 7023, Fed. R. Bankr. P.

Demand. In this space enter the dollar amount being demanded in the complaint. If no monetary demand is made, enter "XXXX." If the plaintiff is seeking non-monetary relief, state the relief sought, such as injunction or foreclosure of a mortgage.

Jury Demand. Check the box only if a jury trial is demanded in the complaint.

Bankruptcy Case in Which This Adversary Proceeding Arises. Enter the name of the debtor and the docket number of the bankruptcy case from which the proceeding now being filed arose. Beneath, enter the district and divisional office where the case was filed, and the name of the presiding judge.

Related Adversary Proceedings. State the names of the parties and the six digit adversary proceeding number from any adversary proceeding concerning the same two parties or the same property currently pending in any bankruptcy court. On the next line, enter the district where the related case is pending, and the name of the presiding judge.

Filing Fee. Check one box. The fee must be paid upon filing unless the plaintiff meets one of the following exceptions. The fee is not required if the plaintiff is the United States government or the debtor. If the plaintiff is the trustee or a debtor in possession, and there are no liquid funds in the estate, the filing fee may be deferred until there are funds in the estate. (In the event no funds are ever recovered for the estate, there will be no fee.) There is no fee for adding a party after the adversary proceeding has been commenced.

Signature. This cover sheet must be signed by the attorney of record in the box on the right of the last line of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is *pro se*, that is, not presented by an attorney, the plaintiff must sign.

The name of the signatory must be printed in the box to the left of the signature. The date of the signing must be indicated in the box on the far left of the last line.

FORM 104 (10/06)

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)	ADVERSARY PROCEEDING NUMBER (Court Use Only)

PLAINTIFFS	DEFENDANTS
ATTORNEYS (Firm Name, Address, and Telephone No.)	**ATTORNEYS** (If Known)
PARTY (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee	**PARTY** (Check One Box Only) ☐ Debtor ☐ U.S. Trustee/Bankruptcy Admin ☐ Creditor ☐ Other ☐ Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

NATURE OF SUIT

(Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

FRBP 7001(1) – Recovery of Money/Property
- ☐ 11-Recovery of money/property - §542 turnover of property
- ☐ 12-Recovery of money/property - §547 preference
- ☐ 13-Recovery of money/property - §548 fraudulent transfer
- ☐ 14-Recovery of money/property - other

FRBP 7001(2) – Validity, Priority or Extent of Lien
- ☐ 21-Validity, priority or extent of lien or other interest in property

FRBP 7001(3) – Approval of Sale of Property
- ☐ 31-Approval of sale of property of estate and of a co-owner - §363(h)

FRBP 7001(4) – Objection/Revocation of Discharge
- ☐ 41-Objection / revocation of discharge - §727(c),(d),(e)

FRBP 7001(5) – Revocation of Confirmation
- ☐ 51-Revocation of confirmation

FRBP 7001(6) – Dischargeability
- ☐ 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims
- ☐ 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud
- ☐ 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny

(continued next column)

FRBP 7001(6) – Dischargeability (continued)
- ☐ 61-Dischargeability - §523(a)(5), domestic support
- ☐ 68-Dischargeability - §523(a)(6), willful and malicious injury
- ☐ 63-Dischargeability - §523(a)(8), student loan
- ☐ 64-Dischargeability - §523(a)(15), divorce/sep property settlement/decree
- ☐ 65-Dischargeability - other

FRBP 7001(7) – Injunctive Relief
- ☐ 71-Injunctive relief – reinstatement of stay
- ☐ 72-Injunctive relief – other

FRBP 7001(8) Subordination of Claim or Interest
- ☐ 81-Subordination of claim or interest

FRBP 7001(9) Declaratory Judgment
- ☐ 91-Declaratory judgment

FRBP 7001(10) Determination of Removed Action
- ☐ 01-Determination of removed claim or cause

Other
- ☐ SS-SIPA Case – 15 U.S.C. §§78aaa *et.seq.*
- ☐ 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

☐ Check if this case involves a substantive issue of state law	☐ Check if this is asserted to be a class action under FRCP 23
☐ Check if a jury trial is demanded in complaint	Demand $
Other Relief Sought	

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR		BANKRUPTCY CASE NO.
DISTRICT IN WHICH CASE IS PENDING	DIVISIONAL OFFICE	NAME OF JUDGE
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISIONAL OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)		
DATE	PRINT NAME OF ATTORNEY (OR PLAINTIFF)	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Files system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Parties. Give the names of the parties to the adversary proceeding exactly as they appear on the complaint. Give the names and addresses of the attorneys if known.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not presented by an attorney, the plaintiff must sign.

Form 281 (08/06)

United States Bankruptcy Court

_____ District Of _____

In re _____, Case No. _____
Debtor(s)

APPEARANCE OF CHILD SUPPORT CREDITOR* OR REPRESENTATIVE

I certify under penalty of perjury that I am a child support creditor* of the above-named debtor, or the authorized representative of such child support creditor, with respect to the child support obligation which is set out below.

Name:
Organization:
Address:

Telephone Number:

_____ X _____
Date Child Support Creditor* or Authorized Representative

Summary of Child Support Obligation

Amount in arrears:

$ _____

Amount currently due per week or per month: on a continuing basis:

$ _____
(per week) (per month)

If Child Support has been assigned:

Amount of Support which is owed under assignments:

$ _____

Amount owed primary child support creditor (balance not assigned):

$ _____

Attach an itemized statement of account. Do not disclose the name of a minor child. See 11 U.S.C. § 112. If a social security number or a taxpayer identification number is included, set out only the last four digits of the number. Judicial Conference Privacy Policy (09/01).

* Child support creditor includes both creditor to whom the debtor has a primary obligation to pay child support as well as any entity to whom such support has been assigned, if pursuant to Section 402(a)(26) of the Social Security Act or if such debt has been assigned to the Federal Government or to any State or political subdivision of a State.

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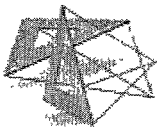

Thomas Zilly/WAWD/09/USCOURTS (Dist Judge)
08/15/2006 01:31 PM

To James_Wannamaker@ao.uscourts.gov
cc
bcc
Subject Fw: Bankruptcy Rule 1006

----- Forwarded by Thomas Zilly/WAWD/09/USCOURTS on 08/15/2006 10:31 AM -----

Geraldine Mund/CACB/09/USCOURTS
08/14/2006 09:46 AM

To Thomas Zilly/WAWD/09/USCOURTS@USCOURTS
cc
Subject Bankruptcy Rule 1006

Judge Zilly:

One issue on the rules and IFP is that as people are finding out about IFP, so are petition preparers. So we have more and more IFP applicants who have paid up to $200 to a petition preparer (BPP) to fill out all those forms for them, but won't be paying anything to the trustee or the government for the work that we have to do processing their case. And there is no loophole in the rules to deny the petition if they paid a BPP. This is tricky, since we don't want to reject a debtor who needs to file just because s/he went to someone to type up that mass of forms. But I don't think Congress intended the BPP to get paid, while the trustee doesn't. Perhaps the Rules Committee could look at this.

Geraldine Mund
Bankruptcy Judge
Central District of CA

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Position Paper Submitted to the
Judicial Conference of the United States Advisory Committee Rules on Bankruptcy
by the Commercial Law League of America and its Bankruptcy Section

Technical Issues Regarding the Interim Rules for the
Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Commercial Law League of America ("CLLA"), founded in 1895, is the nation's oldest organization of attorneys and other experts in credit and finance actively engaged in the field of commercial law, bankruptcy and insolvency. Its membership exceeds 3,100 individuals. The CLLA has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable and efficient administration of bankruptcy cases for all parties in interest.

The Bankruptcy Section of the CLLA is made up of approximately 1,450 bankruptcy lawyers and bankruptcy judges from virtually every state in the United States. Its members include practitioners with both small and large practices, who represent divergent interests in bankruptcy cases. The CLLA has testified on numerous occasions before Congress as experts in the bankruptcy and reorganization fields.

The purpose of this Position Paper is to address technical defects in the Interim Rules for the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

Rule 1007

As drafted, this Rule refers to "all administrators in foreign proceedings" regarding a Chapter 15 case. Since "administrator[s]" is not a defined term in the revised Code (see Section 101(24)), it would be better to mirror the relevant language of 101(24): "all persons or bodies authorized to administer foreign proceedings of the debtor". The Rule should read as follows.

Lists, Schedules, Statements, and Other Documents; Time Limits

(a) LIST OF CREDITORS AND EQUITY SECURITY HOLDERS, AND CORPORATE OWNERSHIP STATEMENT.

(4) Chapter 15 Case. Unless the court orders otherwise, a foreign representative filing a petition for recognition under chapter 15 shall file with the petition a list containing the name and address of all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and all entities against whom provisional relief is being sought under § 1519 of the Code.

Rule 1010

Service should also be made on all "persons or bodies authorized to administer foreign proceedings of the debtor other than that the person or body petitioning for recognition". In furtherance of the policy purpose of trying to coordinate cross border proceedings and cooperation among them, it is vital that the administrators of those other proceedings have notice and have a chance to appear and be heard if necessary. The Rule should read as follows.

Service of Involuntary Petition and Summons; Petition For Recognition of a Foreign Nonmain Proceeding

On the filing of an involuntary petition or a petition for recognition of a foreign nonmain proceeding the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor and all persons persons or bodies authorized to administer foreign proceedings of the debtor. When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, all persons persons or bodies authorized to administer foreign proceedings of the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other parties as the court may direct. The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b), provided, however, that service upon a foreign corporation, association or individual may be made in accordance with Rules 4(f) and 4(h) F.R.Civ.P. If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule 7004 (e) and Rule 4 (l) F.R.Civ.P. apply when service is made or attempted under this rule.

Rule 1011

See comment to Rule 1010. The Rule should read as follows.

Responsive Pleading or Motion in Involuntary and Cross-Border Cases

(a) WHO MAY CONTEST PETITION. The debtor named in an involuntary petition, all persons persons or bodies authorized to administer foreign proceedings of the debtor, or a party in interest to a petition for recognition of a foreign proceeding may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

Rules 2002(p)(1) and (p)(2)

This additional accommodation for service on overseas parties should be extended to foreign administrators. The Rule should read as follows.

(p) NOTICE TO A FOREIGN CREDITOR OR FOREIGN ADMINISTRATOR.

(1) If, at the request of a party in interest or the United States trustee, or on its own initiative, the court finds that a notice mailed within the time prescribed by these rules would not be sufficient to give a creditor or a person or body authorized to administer foreign proceedings of the debtor with a foreign address to which notices under these rules are mailed reasonable notice under the circumstances, the court may order that the notice be supplemented with notice by other means or that the time prescribed for the notice by mail be enlarged.

(2) Unless the court for cause orders otherwise, a creditor or a person or body authorized to administer foreign proceedings of the debtor with a foreign address to which notices under this rule are mailed shall be given at least 30 days' notice of the time fixed for filing a proof of claim under Rule 3002(c) or Rule 3003(c).

Rule 2002(q)(1) (q)(2)

Notice should be expanded not only to creditors, but "persons or bodies authorized to administer foreign proceedings of the debtor". See also the comment to Rule 1007. The Rule should read as follows.

Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross- Border Cases, United States, and United States Trustee

(q) NOTICE OF PETITION FOR RECOGNITION OF FOREIGN PROCEEDING AND OF COURT'S INTENTION TO COMMUNICATE WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES.

(1) Notice of Petition for Recognition. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and such other entities as the court may direct, at least 20 days' notice by mail of the hearing on the petition for recognition of a foreign proceeding. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding.

(2) Notice of Court's Intention to Communicate with Foreign Courts and Foreign Representatives. The clerk, or some other person as the court may direct, shall give the debtor, all ~~administrators in~~ persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under § 1519 of the Code, all parties to any litigation in which the debtor is a party and that is pending in the United States at the time of the filing of the petition, and such other entities as the court may direct, notice by mail of the court's intention to communicate with a foreign court or foreign representative as prescribed by Rule 5012.

Rule 6004

The Rule states in subdivision (1) that a "motion for authority to sell or lease personally identifiable information under § 363(b)(1)(B) shall..." The statutory reference should be to "§ 363(b)(1)." Subparagraph (B) concerns court approval of the sale or lease after the appointment of the ombudsman and considerations the court is to take into account, which presumably include the recommendations of the ombudsman.

The Rule may be more restrictive than the statute intends or what is necessary to implement the statute. It's not clear why the debtor should include a "request" for the appointment of an ombudsman because, if there's a hearing on the sale motion, then the court "shall" make the appointment. Accordingly, it may be more appropriate to require a separate notice, rather than a motion, when a sale or lease of personally identifiable information under the new statute is sought.

Rule 8001

8001(f)(2)(B) provides an Official Form that can be used when the appellants and appellees, if any acting jointly, seek such certification. The Rule does not provide if the request is being made by one party or if the request is being made by a majority of the appellants and the majority of the appellees. The Form should be revised accordingly.

8001(f)(3)(B) indicates that the Notice of Filing of the request for certification shall be served in the manner required for service of a Notice of Appeal under FBRP 8004. Rule 8004 speaks of serving all parties of record except for the "appellant". It is possible that certification could be filed before an appeal is filed, therefore the reference to "appellant" should be expanded to the "party requesting certification".

8001(f)(4)(B) is unnecessary, in that a party may file a supplementary short statement of the basis for certification within ten (10) days after the certification. This supplemental short statement adds nothing, as the request for certification already contains the information required in 8001(f)(3)(C). This section to the Rule should be deleted.

Conclusion

The CLLA and its Bankruptcy Section appreciate your consideration of the concerns expressed herein. We would be happy to respond to any additional inquiries or concerns that you may have with respect to achieving meaningful bankruptcy reform legislation.

Respectfully submitted,

Jerry T. Myers
President
Commercial Law League of America

Cathy S. Pike
Chair, Bankruptcy Section
Commercial Law League of America

Randy T. Slovin
Co-Chair, Governmental Affairs Committee
Commercial Law League of America

Peter C. Califano
Co-Chair, Governmental Affairs Committee
Chair, Legislative Committee
Bankruptcy Section
Commercial Law League of America

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
THOMAS F. EAGLETON U.S. COURTHOUSE
111 SOUTH TENTH STREET, FOURTH FLOOR
ST. LOUIS, MISSOURI 63102
www.moeb.uscourts.gov

DANA C. MCWAY
CLERK OF COURT

DIANA DURKEE AUGUST
CHIEF DEPUTY CLERK

(314) 244-4500
VCIS (314) 244-4999
FAX (314) 244-4990
PACER (314) 244-4998

August 17, 2006

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

Dear Mr. McCabe:

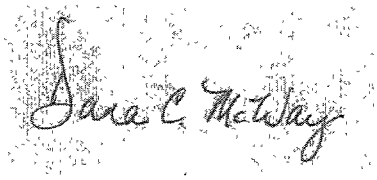
On behalf of the Bankruptcy Case Management/Electronic Case Filing (CM/ECF) Working Group, I write to you in your capacity as Secretary to the Committee on Rules of Practice and Procedure to ask that consideration be given to an issue currently addressed in the Federal Rules, namely, preparation and transmittal of the record on appeal.

As you are well aware, Federal Rules of Bankruptcy Procedure 8006 and 8007 address the actions to be taken by parties to an appeal in designating the record on appeal and how that record is prepared and transmitted by the bankruptcy courts to the district court or the bankruptcy appellate panel. These Rules impose duties upon Bankruptcy Clerk's offices and were written when the filing environment consisted of parties filing paper pleadings with the court and courts transmitting those paper pleadings between each other. With the advent of the CM/ECF system and the sophisticated applications developed at both the national and local levels addressing designation of the record and preparation and transmittal of the record on appeal, these Rules do not reflect the reality of how records are prepared and transmitted in an electronic world. The reality is that the Clerk's duties are now often satisfied through electronic transmission using CM/ECF and not through paper means. For that reason, we believe that it would be appropriate for the Bankruptcy Rules Committee to examine these Rules and consider how they may be modified to reflect the widespread practices in the federal courts now that they have entered the electronic world. While our request relates to Bankruptcy Rules 8006 and 8007, we are aware that similar Rules exist at other levels of the Judiciary and that these Rules may influence any consideration you give to this request.

Should you have questions or concerns regarding this request, please contact me directly at (314) 244-4600 or email me at dana_mcway@ca8.uscourts.gov. Alternatively, any of the members of

the CM/ECF Working Group are available to assist you. Their names and e-mail addresses are listed below. Thank you for considering this request.

Sincerely,



Dana C. McWay
Clerk of Court

cc: Jim Waldron, Clerk, USBC- NJ
Glen Palman, Chief, BCAD
Judge Arthur Federman - abf@mow.uscourts.gov
Judge Leslie Tchaikovsky - leslie_tchaikovsky@canb.uscourts.gov
Ken Hirz - ken_hirz@ohnb.uscourts.gov
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Jon Sheldon - jon_sheldon@cacb.uscourts.gov
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The Next Meeting of the Committee
Will take Place

March 29-30, 2007
at
Marco Island, Florida