ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 21 - 22, 1996

Memphis, Tennessee

Minutes

The Advisory Committee met in a courtroom of the United States Bankruptcy Court for the Western District of Tennessee. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman

District Judge Adrian G. Duplantier

District Judge Eduardo C. Robreno

Honorable Jane A. Restani, United States Court

of International Trade

Bankruptcy Judge Donald E. Cordova

Bankruptcy Judge Robert J. Kressel

Bankruptcy Judge A. Jay Cristol

Professor Charles J. Tabb

R. Neal Batson, Esquire

Kenneth N. Klee, Esquire

J. Christopher Kohn, Esquire, United States

Department of Justice

Leonard M. Rosen, Esquire

Gerald K. Smith, Esquire

Henry J. Sommer, Esquire

Professor Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. District Judge Thomas S. Ellis, III, liaison to the Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), and Richard G. Heltzel, clerk-adviser to the Committee, also were unable to attend.

The following additional persons attended all or part of the meeting: Bankruptcy Judge James W. Meyers, former member of the Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee; Joseph G. Patchan, Director, Executive Office for United States Trustees; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins, Federal Judicial Center.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure. Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Introductory Items

The Chairman presented a citation from the Judicial Conference to Bankruptcy Judge James W. Meyers. The citation recognizes, and expresses the appreciation of the Judicial Conference for, Judge Meyers' contribution to the administration of justice and commitment to the judiciary while serving on the Committee from October 1989 to October 1995.

The Committee **approved the minutes of the September 1995 meeting** subject to correction of several typographical errors. The Committee also requested that a note be added at the end stating that a decision had been made after the September 1995 meeting to move the March 1996 meeting from Charleston, SC, (the originally announced location), to Memphis, TN.

The Chairman and the Reporter briefed the Committee on actions taken at the January 1996 meeting of the Standing Committee. Professor Resnick reported that the Standing Committee had approved the Committee's recommendation concerning the procedure for amending the official forms when certain dollar amounts stated in the Bankruptcy Code are adjusted under a formula prescribed by Congress in the Bankruptcy Reform Act of 1994. The procedure will permit automatic amendment of those dollar amounts that appear on the official forms without further action by the Standing Committee or the Judicial Conference. [The Judicial Conference approved the procedure at its meeting of March 12, 1996.]

Professor Resnick said the Standing Committee's self-study report generated substantial controversy. Although the Standing Committee received the report on a motion that also mentioned publication, no schedule for publication was discussed and Judge Stotler indicated that further comment could be

submitted. The long range planning subcommittee, which drafted the report, was also disbanded at the request of its sole remaining member. Judge Stotler, Chair of the Standing Committee, transferred the long range planning function to the Standing Committee's Reporter, Professor Coquillette. The comments on committee appointments made by the Advisory Committee in response to the draft reviewed at the September 1995 meeting, although not incorporated into the study report, were summarized orally for the Standing Committee by Judge Stotler. Professor Coquillette added that the Advisory Committee's views on appointments also had been communicated directly to the Chief Justice. He said he thought it was very clear that the self-study report did not reflect the views of the Standing Committee.

Professor Resnick stated that the Standing Committee had approved a recommendation to the Judicial Conference for a uniform local rule numbering system, but that the recommendation required only that a district number its local rules to correspond to the relevant federal rules of procedure. There would be no other required elements. Professor Resnick added that the Judicial Conference had adopted the recommendation, as transmitted by the Standing Committee, on March 12, 1996, and had set April 15, 1997, as the deadline for conversion to the new numbering. The Committee's work product, approved at the September 1995 meeting, will be distributed to the courts as a suggested, or model, numbering system. The Chairman said he regretted the Standing Committee's change in direction in switching from the concept of detailed, mandatory numbering systems to a general directive. The Committee thanked Ms. Channon for her work in drafting a numbering system for local bankruptcy rules.

The Reporter also stated that the Standing Committee's subcommittee on style now has completely new membership, due to turnover of membership on the Standing Committee. Professor Coquillette informed the Committee that he and Judge Stotler had met with the Chief Justice to discuss the rules re-styling initiative. He said the Chief Justice had approved the idea of publishing for comment the re-styled draft of the appellate rules. The Chief Justice had opposed any re-styling of the evidence rules, because of their substantive nature, and had requested that the re-styling of the other bodies of rules be suspended until the results of the work on the appellate rules could be evaluated.

One member commented that perhaps the bankruptcy rules should not be put off until last, because doing so would increase the pressure on the Committee to conform. The Reporter, however, said he did not think timing would make a difference. He said that uniform conventions likely would come out of the re-styling of the appellate rules and that the Committee would have an opportunity to comment on the appellate draft. Professor Coquillette added that the process appears to have slowed. He said that work on the civil rules has stopped at about the halfway point and that substantive questions raised by the re-styling process have proved very controversial within the civil advisory committee. Professor Coquillette estimated that work on the bankruptcy rules is probably about "a decade" in the future. The sense of the Committee was not to push for re-styling but to continue to wait and monitor the process as it develops with the other bodies of rules.

A Committee member inquired whether the "'shall' vs. 'must'" issue has been resolved. The Reporter responded that the latest draft guidelines from the Standing Committee's style consultant, Bryan Garner, say that "shall" is an acceptable alternative, but that usage should be consistent within the rules.

Professor Coquillette reported on the meeting of the special study group on rules governing attorney conduct that was held on the day preceding the January 1996 meeting of the Standing Committee. Due in part to a blizzard that prevented attendance by some study group members, there will be a further

meeting June 18 -19, 1996, in conjunction with the June meeting of the Standing Committee. Professor Coquillette said that the three options under consideration are: 1) a uniform (national) rule that says "always look to the state rule," 2) a small number (five or six) of federal rules covering certain "core" areas such as conflicts, with all other issues remaining subject to state rules, or 3) a model rule for local adoption. He noted that if the concept of "core" rules is chosen, the supersession clause of the Rules Enabling Act would apply, except for bankruptcy rules.

Mr. Smith attended the meeting of the special study group on behalf of the Committee and praised the presentations and the written materials. He said there seems to be little doubt that a clearer rule is needed and that preliminary research on local bankruptcy rules indicates that few districts address the subject at all. He said it probably will be easier to achieve a rule for civil and criminal practice than in bankruptcy, because traditional litigation rules that work in bilateral situations, such as rules governing conflicts, do not work well in the multi-party setting of a bankruptcy case. Rules on this subject generally provide that a lawyer cannot represent one party in litigation "directly adverse" to another party in the same litigation who is a client in an unrelated matter, yet the automatic stay is in a sense directly adverse to every creditor in a bankruptcy case, he said. If the bankruptcy case is treated like bilateral litigation, Mr. Smith said, this would preclude a lawyer from representing a debtor if the debtor had one or more creditors who were represented by the lawyer in unrelated matters. Another member stated that a bankruptcy case is not a lawsuit but an in rem proceeding within which adversary litigation may occur. Accordingly, he said, the bilateral rule should apply to the litigation, but not the case in chief. Mr. Smith closed by saying that whatever approach is taken toward establishing rules, whether by rule or by statutory amendment, the proposals will be controversial.

The Chairman asked Mr. McCabe to renew the Committee's request to the House Judiciary Committee that it undertake to print an official pamphlet of the Federal Rules of Bankruptcy Procedure as the Judiciary Committee does with the other bodies of federal procedural rules.

Action Items

Comments Received on the Preliminary Draft Amendments

Rule 1020. The Federal Bar Association proposed that the amendments state that a debtor has to qualify as a small business in order to make the election to be so treated and to require that any motion to extend the time to file an election be made and ruled on within the original 60-day period. The Reporter recommended against both suggestions. He said he does not believe there is any ambiguity that a debtor must meet the statutory definition of a small business in order to make a valid election and noted that the rule as drafted tracks the language of § 1121(e) of the Code. With respect to the time for making the election, the Reporter stated that most of the litigation to which the Federal Bar Association referred involved different formulations than the one used in the draft. He said that Rule 9006 establishes a workable procedure, *i.e.,* a party must either request extension within the original time or (if the time has expired) must show excusable neglect. The Committee took no action on this suggestion.

The Executive Office for United States Trustees offered a "minor suggestion" that the deadline for making the election should be the date of the § 341 meeting. Professor Resnick said he recommended

that this change not be made, because the debtor might learn of the availability of the election for the first time during the § 341 meeting. He reminded the Committee also that it had originally considered 100 days "or another date" as the appropriate period. Committee members expressed concern about effectively giving the debtor "permanent exclusivity" and the merits of giving the court discretion to either extend or require a debtor to make a prompt decision. **A motion to amend the published draft by putting a period after the word "relief" on line 6, (cutting off explicit mention of an extension), carried by a vote of 8 - 2.**

Rule 2007.1. The Federal Bar Association had proposed that the United States trustee, after filing a report of a disputed election of a chapter 11 trustee, also be required to file a motion to resolve the dispute. The Reporter disagreed with the suggestion and said he had discussed it with the general counsel of the Executive Office for United States Trustees, who opposed it on the ground that such action properly should be reserved to a party with an economic stake in the case. **The Committee took no action on this suggestion.**

The Executive Office for United States Trustees ("Executive Office") objected to the provision in the draft requiring the United States trustee to appoint the person elected. During the original drafting of the rule, this issue had been debated. The Committee had retained the appointment language in view of the various statutory provisions, such as the termination of the debtor's period of exclusivity, that are tied to the "appointment" of a trustee. The Executive Office proposed that the rule instead continue to require the United States trustee to file a report of the election together with an application for court approval and that the report itself serve as the appointment of the person elected. That is, rather than the United States trustee making the appointment, the report would constitute the appointment. The Reporter had redrafted the rule to implement the proposals of the Executive Office. He had submitted the new draft to the Executive Office, and obtained a response stating that the new draft satisfied the concerns of the Executive Office.

The Committee discussed when the appointment-by-report would be effective for purposes such as trustee liability and cutting off exclusivity -- when the report is filed or when the court signs the order approving the appointment? One member said that effectiveness should be as of the date the order approving the appointment is entered. Mr. Patchan agreed, noting that trustees are sensitive to the liability aspect and generally will not act prior to obtaining court approval of their appointment. **A motion to approve the redrafted rule with the addition at lines 12 and 42 of the words "as of the date of entry of the order approving the appointment" carried, with one opposed. The Committee also approved style changes to simplify the description of disputed and undisputed elections and amendments to the committee note proposed by the Reporter on the recommendation of the Executive Office to clarify who is eligible to solicit proxies.**

Rule 3014. The Federal Bar Association suggested amending the rule to require that any request for an extension of time to file an election under § 1111(b)(2) of the Code be made before the conclusion of the hearing on the disclosure statement. The proposed amendments that were published for comment concern only the procedure for making a § 1111(b) election when approval of the disclosure statement is combined with the confirmation hearing in a small business case, and the comment, accordingly, was not germane to the proposed amendments. The Reporter asked whether the Committee would want to consider the suggestion as a long term matter. The consensus was that the suggestion should be retained and considered in the future along with a method for permitting a party to change an election if the plan is modified materially or the original election would be impacted by a subsequent decision on valuation.

Rule 3017.1. This rule is proposed to implement § 1125(f) of the Bankruptcy Code, which was among the new provisions added in 1994 to permit expedited handling of small business cases filed under chapter 11. This proposed new rule sets out the procedure in a small business case for obtaining conditional approval of a disclosure statement and combining final approval with the confirmation hearing. Bankruptcy Judge Geraldine Mund had noted that § 105(d) of the Code, as amended in 1994, also permits a court to order a similar procedure in a chapter 11 case without that authority being restricted to a small business case. Judge Mund had suggested that proposed new rule 3017.1 be broadened to apply to any chapter 11 case. The Reporter said the legislative history of the 1994 amendments made it clear that Congress intended to provide a streamlined procedure for small businesses, but that the commentary provided for the amendments to § 105 fails to indicate any intent to apply the streamlined procedure in a large case. He noted further that there have been no published decisions approving such measures in a large case, and said it seemed to him premature to broaden the rule in the absence of either congressional or judicial direction to do so. **The Committee accepted the Reporter's recommendation to leave the proposed rule unchanged.**

Rules 3017(d), 3018(a), and 3021. James Gadsden, Esq., commented on these amendments that allow the court "for cause" to fix a record date for voting on a plan and permit the record date for distributions to be set in the plan or confirmation order. Mr. Gadsden questioned the amendments as unnecessary. The current rules provide that the record date for voting purposes is the date the order is entered by the clerk, and the record date for distribution purposes is the date on which distributions commence. When the amendments first were proposed with respect to voting, the Reporter said, the primary reason offered was the frequent delays in entering orders on the docket. Ms. Channon, who had researched the typical interval between signing of orders by a judge and their entry on the docket, said that while docketing delays formerly occurred, especially in the Central District of California, the clerk's office there and in other districts she contacted said delays now are rare and almost all orders are entered within 48 hours of being signed. Mr. Klee said that he had experienced docketing delays in several districts not reported on at the meeting and that such delays are not the only problem the amendments would address. He said that disbursing agents also must complete several steps before the names and addresses of the "record holders" can be established. He distributed copies of a letter describing these from the Fleet National Bank and added that this letter also should allay the concerns expressed by Mr. Gadsden concerning the potential for a chilling effect on trading after a record date is set. **A motion to leave the proposed amendments unchanged carried without opposition.**

Rule 8001. The Federal Bar Association commented that providing for an election to have an appeal heard by a district court seemed "premature" when only one bankruptcy appellate panel service is operating. The Reporter said there is a need for a rule under a statute that provides for all circuits to establish such panels even if only one circuit has done so. Judge Robreno said the proposed subdivision (e) of the rule is not self-contained and is confusing. He suggested changing the heading to "election to have appeal heard by district court and not the bankruptcy appellate panel" and that the text should say "provided there is a bankruptcy appellate panel service." **A motion to adopt these changes failed by a vote of 7 - 3. A second motion to change the heading to "Election to Have Appeal Heard by District Court in Lieu of a Bankruptcy Appellate Panel" carried, with one opposed, subject to review by the style subcommittee.**

There was no objection to the suggestion that the committee note be expanded to include the material that was voted down for inclusion in the text and to point out that subdivision (e) has nothing to do with

appeal to the court of appeals. At the March 22 session, the Reporter offered alternative draft additions to the Committee Note. **The Committee approved alternative "A," as amended during discussion, by a 6 - 2 vote.** Accordingly, the following two sentences will be added:

Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court instead of the bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. § 158(b) to hear the appeal.

Rule 8002. The Reporter stated that in July 1995, when the Standing Committee considered the Committee's request to publish the preliminary draft, two members of the Standing Committee had made comments concerning the amendments to this rule. One member suggested that the Advisory Committee consider whether the Committee Note should warn the parties that failure to file a notice of appeal prior to the time prescribed in the rule could result in a loss of the right to appeal if the court denies the party's request for an extension of time to file. Another member questioned the Committee's choice to model the amendments after Rule 4(a)(5) of the Federal Rules of Appellate Procedure (which applies in civil cases) rather than after the more definite provisions of Fed. R. App. P. 4(b) (which applies in criminal cases). The Reporter stated he had responded that the Committee believed strongly that a party should not lose a right because of delay by a judge in ruling on a timely filed motion. **The Committee took no action on either comment.**

Rule 9011. Judge Mund commented on a provision in this rule that prohibits a court from ordering sanctions on its own initiative unless the court does so before a voluntary dismissal or settlement of the claims. The Reporter said the provision duplicates a provision in Rule 11 of the Federal Rules of Civil Procedure as that rule was amended in 1993; its purpose is to permit parties to settle without any threat that the court might later impose monetary sanctions. **The Committee made no change to the draft as a result of this comment.**

Bankruptcy Judge James E. Yacos commented that the rule should make it clear that the striking of an unsigned pleading should occur only when a clerk has "inadvertently and through mistake" accepted the document for filing. The Reporter noted that under both Fed. R. Civ. P. 5 and Fed. R. Bankr. P. 5005 a clerk does not have authority to reject a document tendered for filing based on improper form. Rules 11 and 9011 reflect a clear and deliberate policy of the Standing Committee that unsigned papers should be accepted by the clerk, but may be stricken by the court if not signed after the defect is brought to the attorney's attention. **The Committee made no change to the draft.**

The Reporter stated that in reviewing the preliminary draft he had identified a potential problem arising from a provision in subdivision (b) that was introduced in the process of conforming to Rule 11 of the Federal Rules of Civil Procedure as amended in 1993. Subdivision (a) contains, as it always has, a clause carving out from the requirement of signature by an attorney any list, schedule, or statement; these documents are signed only by the debtor. Subdivision (b) now contains, for the first time, language providing that by presenting a document to the court (by signing, filing, submitting, or later advocating), the attorney is representing that "reasonable" inquiry has been made that the document does not contain improper material. Subdivision (b), however, does not contain language carving out from the attorney's responsibility in the presenting function a list, schedule, or statement that, under subdivision (a), only the debtor is required to sign. The Reporter said he hoped the rule would be interpreted to hold an attorney responsible only for those documents the attorney signed, but he was concerned about the issue.

[Reporter's Memorandum dated February 20, 1996.]

The consensus was that sanctioning of an attorney for the contents of a debtor's schedules or statement of financial affairs was unlikely, and the Committee took no action. Some members, however, said the initial sentence of Rule 9011(a) is confusing and could be interpreted to mean that an unrepresented debtor does not have to sign the lists, schedules, and statements. After the March 21 session, a member submitted to the Reporter a proposed revision to clear up any ambiguity about a pro se debtor's obligation to sign all documents. At the March 22 session, the Reporter offered a revised draft which ended the first sentence after the word "name" on line 9 and added, immediately thereafter on lines 9 through 11 an additional sentence as follows: "A party who is not represented by an attorney shall sign all papers." **The Committee accepted this revision, and a motion to approve the amendments to Rule 9011, as redrafted, carried.**

Rule 9015. The Federal Bar Association commented that the phrase "specially designated" does not seem to "comport" with the statute and that a party should be required to consent by using specific language. The Reporter observed that the phrase in question is actually used in the statute and that he saw no need to require special language for consenting to the conducting of the jury trial by the bankruptcy judge. **The Committee made no change to the draft.**

In January 1995, when the Standing Committee considered the draft interim rule on which the current draft was based, a member of the Standing Committee had commented that the Committee might consider adding explicit provisions requiring notice concerning consent to conduct of the jury trial by a bankruptcy judge to any parties who join the action after consents have been given by the original parties. The Committee declined in 1995 to make such additions. In November 1995, Judge Restani, the Committee's liaison to the Advisory Committee on Civil Rules, reported that this suggestion had resulted in a memorandum by Professor Edward H. Cooper, Reporter to the Civil Committee, that suggested these issues could be addressed in Rule 73(b), which governs consent to have a magistrate judge exercise civil trial jurisdiction. The Reporter said he did not think the additions were necessary. [See Reporter's Memorandum dated February 21, 1996.] **The Committee took no action on the suggestion.**

Proposals for Further Amendments

Rules 1017 and 2002(a). At the September 1995 meeting, the Committee approved in principle amending the rules to limit to the debtor and the trustee notice of a motion to dismiss for failure to file schedules and statements. The Reporter had drafted amendments accordingly and also had reorganized Rule 1017. Mr. Sommer said the rule should require "notice and a hearing," not simply notice prior to any dismissal. Mr. Klee said the provision should apply only to a voluntary case and expressed concern about the interaction between a dismissal after limited notice and § 349 of the Code, which revests property in the prepetition owner, unless the court orders otherwise. Judge Kressel said the trustee would receive notice under the proposed amendments and could alert the judge if any property of the estate had been sold, enabling the judge to tailor the dismissal order accordingly. **A motion was made to approve the draft subject to the Reporter incorporating changes to address the issues raised during discussion, but failed for want of a second.** The Committee requested the Reporter to rework the draft overnight. At the March 22 session, the Committee considered a revised draft. Mr. Klee inquired whether the proposed amendments should apply to dismissal of a chapter 13 case under § 1307(c)(9) and, if so, whether this should be indicated in the heading. **The consensus was that the amendments should include chapter**

13 cases and that the provisions governing dismissal for failure to pay the filing fee also should include a reference to chapter 13 cases.

Rule 2004. At the September 1995 meeting, the Committee approved amendments to Rule 2004(c) to clarify that a bankruptcy court can order an examination outside the district in which the case is pending and that an attorney admitted in the district where the case is pending can sign the subpoena regardless of the place of the examination. The Committee also discussed whether the motion under Rule 2004 should be on notice or whether it can be ex parte. The language of the rule seems to require notice at least to the trustee or debtor in possession, but the original (1983) committee note states that the motion may be heard either ex parte or on notice. The discussion indicated that practice under this rule varies widely, and it also was suggested that examination should be available without the need for any motion or court order. The Committee asked the Reporter to draft alternative proposals for the next meeting. The Reporter presented five alternatives, which are set forth in his memorandum dated February 19, 1996. Initial straw votes indicated substantial support for two approaches: 1) stating in the rule that a notice or an ex parte procedure is authorized, in the court's discretion, or 2) requiring notice in every instance (Proposals 2 and 3).

Judge Robreno expressed concern, however, about where a potential examinee can object. Mr. Smith stated that it can be difficult to persuade a judge to quash a subpoena for an examination that the judge ordered. Judge Cristol said that the judges in his district do not consider their ex parte orders as conferring approval of an examination, and they readily de-authorize or limit an examination when appropriate. Judge Meyers said that with a 60-day deadline for filing complaints, parties need a way to examine and that, if the debtor were carved out, he thought a procedure requiring only a subpoena (without a prior order) would be acceptable. The Chairman stated there is a sixth option of repealing Rule 2004. Others suggested adapting the procedures prescribed in Rules 27 and 30 of the Federal Rules of Civil Procedure. **A motion to adopt Proposal 5 (examination by subpoena only) failed, but this alternative was added to those under continued consideration. A motion to table the issue until the next meeting carried by a vote of 9 - 4.** The objective is to draft a rule that states clearly the procedural mechanism for obtaining an examination and also states in which court a potential examinee can seek a protective order. The Reporter was instructed to continue to consider Proposals 1, 2, 3, and 5 from the February 19 memorandum, as well as the procedural mechanisms provided in Rules 27 and 30 of the Federal Rules of Civil Procedure. There also was a request for assistance from the Federal Judicial Center in determining the actual practices currently used in the courts.

Rule 9009. Bankruptcy Judge Alan H. W. Shiff proposed amending Rule 9009 to limit alteration of official forms. **The Committee determined not to act on this suggestion.**

Proposal for Amendments to Implement § 110 of the Code. The Chairman stated that Bankruptcy Judge Geraldine Mund, of the Central District of California, had requested the Committee to draft rules for disciplinary proceedings involving bankruptcy petition preparers under § 110 of the Code. He said he had suggested to Judge Mund that the Central District of California take the lead in developing procedures, which might later be prescribed nationally. Shortly before the meeting, Judge Mund forwarded a copy of a general order detailing procedures for actions involving bankruptcy petition preparers that recently had been issued by the district court. The Reporter noted that some parts of § 110 relate to a specific case and some, such as improper advertising, do not. He raised the question of what the procedure should be when the conduct at issue is not linked to a specific case. Under subsection (i) of § 110, for example, if a case is dismissed on account of action or inaction by a bankruptcy petition preparer or if general conduct is at

issue, the bankruptcy court must "certify that fact" to the district court, where someone must make a motion. There is no guidance concerning exactly what should be certified or how, he said, and the matter may be a non-core proceeding, raising jurisdictional issues. Mr. Klee said that 28 U.S.C. § 157(b)(2)

states that "[c]ore proceedings include, but are not limited to" those listed. He said he thought improper advertising by a bankruptcy petition preparer could be deemed to be core as a proceeding "arising under title 11" (28 U.S.C. § 157(a)). The Reporter said it might be prudent simply to monitor action by the courts on this issue for the time being. He also said he could study the issue further and prepare material for the Committee to consider, if the Committee so desired. He also suggested that the Federal Judicial Center could ascertain how courts are handling these proceedings now. **A motion to defer action passed unopposed.**

Forwarding of Approved Amendments to Be Delayed. The Committee agreed that the amendments approved for publication at the meeting and at the September 1995 meeting should be held for the time being. The Committee will submit to the Standing Committee at the June 1996 meeting only the final drafts of amendments to the rules published in 1995 and preliminary draft amendments to the official forms [See below.] with a request for publication. Rather than burden the Standing Committee with a few proposed rules amendments, followed by additional proposed amendments in 1997, the consensus was that the Committee should assemble a substantial package of amendments before transmitting. The Reporter said the amendments to Rule 2003 previously approved and awaiting transmittal may need some changes in light of the revisions made at the meeting to Rule 2007.1. If so, a new draft will be considered at the September 1996 meeting.

Official Bankruptcy Forms. The Chairman of the Subcommittee on Forms, Mr. Sommer, presented the proposed amendments to the forms, with descriptions of those written comments from Committee members which the subcommittee had accepted. Concerning Form 1, the Voluntary Petition, and Exhibit "A" to the petition, a member asked whether the filing of Exhibit "A" could be restricted to a publicly-held corporation. **Ms. Channon said she would ask the Securities and Exchange Commission whether it would agree.** A member requested that Form 9 include in the new information provided about the necessity to file a proof of claim some qualifying statement about jeopardy to a creditor's right to a jury trial after filing a proof of claim. **A motion to add such a statement failed by a vote of 6 - 4.** Some members reiterated their concern about this issue, noted the potential legal consequences under the Langenkamp and Granfinanciera decisions,[(1)] and reminded the Committee that it is easier to delete material after publication than to add it. The Chairman said he shared the concern and **gave assurance that the Committee would come back to the matter after publication. The Committee approved for publication the proposed amendments and two new forms, including the changes that had been accepted by the subcommittee.** Mr. Sommer also reported that Forms 1, 9, and 10, which are the forms most heavily used by the public, will be reformatted by a graphics design expert to make them more readily understandable. He said the forms package will be recirculated to the members after the reformatting and prior to the June 1996 meeting of the Standing Committee.

Uniform Local Rule Numbering. The Committee discussed a revised draft cover memorandum proposed for transmitting to the courts the Committee's recommended uniform numbering system for local rules. [In January 1996 the Standing Committee approved, and on March 12, 1996, the Judicial Conference adopted, a uniform numbering system that directs only that courts number their local rules to correspond to the relevant federal rules of procedure. See "Introductory Items," above.] Several members expressed dissatisfaction with the recommendation submitted to the Judicial Conference and said they also were unsure about its meaning. Some members wanted the memorandum to be more assertive in discouraging

deviations from what the Committee had approved. Mr. McCabe said the letter should avoid being at odds with the Standing Committee's intent. The Committee requested that the memorandum be redrafted to comport with the limited directive adopted by the Standing Committee and the Judicial Conference but also to state more clearly that the Committee's numbering system is the recommended one. At the March 22 session, the Committee considered a redraft prepared by Mr. McCabe with suggestions from Judge Restani. The Committee changed the word "Model" to "Uniform" in the title of the memorandum, deleted the word "model" from the second and third paragraphs, and made stylistic changes in the final paragraph. **The Committee approved the revised memorandum as edited at the meeting.**

Subcommittee and Liaison Reports

Rule 2014 Subcommittee. The chairman of the subcommittee, Mr. Smith, reviewed the history of the subcommittee's mission to revise Rule 2014. The current rule's ex parte procedure and nebulous concept of "connections" to parties in the case has been troublesome for many years, he said. The House of Delegates of the American Bar Association ("ABA") approved a proposed amended Rule 2014 several years ago which contained a listing of relationships to be disclosed and a "safe harbor" for those employed with the approval of the court who had disclosed in good faith, but as to whom it was later determined that a disqualifying relationship or conflict existed. The Committee in 1992 had declined to adopt the ABA's suggestion, because the "safe harbor" would conflict with the authority of the court under § 328(c) of the Code to disallow compensation if a conflict later appears. Mr. Smith said his draft amendments try to clarify what must be disclosed by providing both a list of specifics and an assertion by the applicant for employment that there is "no substantial risk" that the applicants' relationships with others will materially and adversely affect the representation to be undertaken in the case. This approach was based on that used in the *Restatement of the Law Governing Lawyers*, he said. Mr. Smith noted that the draft also provides for immediate or delayed employment and for notice and opportunity to object. Although the draft that was printed in the Committee agenda book did not include a notice provision, he said, he had completed an initial draft. He reported that the subcommittee had met over lunch on March 21 and would continue to exchange comments and complete a draft rule and commentary for the September 1996 meeting. He summarized the subcommittee's goals as being to provide: 1) a clear procedure, 2) notice early on to those who need it, and 3) adequate disclosure. He said a long range project would be to provide Professor Coquillette with draft rules on conflicts, particularly as they arise in bankruptcy cases.

Litigation Subcommittee. The chairman of the subcommittee, Mr. Klee, reported that the subcommittee had met by conference call on January 8, at the Administrative Office of the United States Court in Washington, D.C., on February 9, and would meet immediately following the conclusion of the Committee meeting. He said he expected the subcommittee would need one further meeting in order to have complete drafts ready for the Committee's consideration at the September 1996 meeting. He said the subcommittee had considered the letter sent by Bankruptcy Judge Samuel L. Bufford, recommending that bankruptcy motion practice should follow state court practice, but had rejected his view. The subcommittee is concentrating on motion practice and Rules 9013 and 9014, he said. The subcommittee thinks adversary proceedings are proceeding smoothly under the present rules; the subcommittee may consider adjusting the scope of Rule 7001, but will take that issue up later.

Rule 7062 Subcommittee. The chairman of the subcommittee, Judge Kressel, said first that the subcommittee is misnamed, because at the last meeting the Committee decided to remove from Rule 7062 the exceptions listed, because they pertain to the bankruptcy case rather than to adversary

proceedings. The first issue, he said, is whether all orders should be stayed except those listed or whether none should be stayed except those listed -- in other words, which should be the "default" position. The second issue is which orders should be stayed and which not stayed, and the third matter to be addressed is the mechanics of staying an order or its enforcement. Judge Kressel said the subcommittee seems to be developing consensus on all of these and should have a draft to submit for the September 1996 meeting.

Alternative Dispute Resolution (ADR) Subcommittee. Professor Tabb, subcommittee chair, said that the current posture of continuing to monitor local ADR efforts while taking no action to propose any national rule remains appropriate.

Liaison with the Civil Rules Committee. Judge Restani noted that the recently enacted Public Law No. 104-67, which deals with litigation under the Securities Act, contains provisions for sanctions that resemble the former Rule 11 of the Federal Rules of Civil Procedure. She also said that the civil rules committee plans to present amendments to Rule 23 for publication and comment at the June 1996 meeting of the Standing Committee. So far, she said, there seems to be agreement only that an interlocutory appeal of a class certification decision should be permitted and that the standard for certifying should be raised to some degree. She said that comment is heavy on the protective order amendments to Rule 26, but the amendments probably will not go forward. She said comments are about evenly divided on 12-person juries, and that judges are uniformly against the amendments that would permit attorney voir dire, while attorneys favor it.

Next Meeting

The next meeting of the Committee will be September 26 - 27, 1996,

in San Francisco, California.

Respectfully submitted,

Patricia S. Channon

1. Langenkamp v. Culp, 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).