ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 26 - 27, 1996

San Francisco, California

Minutes

The following members were present at the meeting:

Bankruptcy Judge Paul Mannes, Chairman

Circuit Judge Alice M. Batchelder

District Judge Adrian G. Duplantier

District Judge Eduardo C. Robreno

Honorable Jane A. Restani, United States Court of International Trade

Bankruptcy Judge Robert J. Kressel

Bankruptcy Judge Donald E. Cordova

Bankruptcy Judge A. Jay Cristol

Professor Charles J. Tabb

R. Neal Batson, Esquire

Kenneth N. Klee, Esquire

J. Christopher Kohn, Esquire, United States Department of Justice

Leonard M. Rosen, Esquire

Gerald K. Smith, Esquire

Henry J. Sommer, Esquire

Professor Alan N. Resnick, Reporter

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

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

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

Introductory Items

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

The Committee approved the minutes of the March 1996 meeting.

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

The Reporter reminded the Committee that Form 1, the Voluntary Petition, had undergone further change after the March 1996 meeting, at the request of the Bankruptcy Administration Committee. The Bankruptcy Administration Committee, at its June 1996 meeting, had requested the Committee to consider two changes designed to improve the statistical information about large chapter 11 cases and to include them in the form when it was published for comment. One change was to add an additional statistical category to the part of the form on which a debtor reports its total assets and total liabilities and the other was to add a question to the form asking the debtor to state whether the assets and liabilities being reported were for an aggregate of affiliated debtors or for only the debtor listed in the particular petition. By mail ballot, he said, the Committee had approved the inclusion of the additional statistical category. The question concerning whether assets and liabilities for more than one debtor were being aggregated, he reported, had drawn a tie vote. The Chairman had broken the tie by voting against the proposal, and the Standing Committee then had approved the forms for publication with the additional statistical category, he said.

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

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

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

Mr. Smith reported on the second session of the Special Study Conference on Federal Rules Governing Attorney Conduct held in June 1996 and organized by Professor Daniel R. Coquillette, reporter to the Standing Committee. Mr. Smith praised the written materials which detailed the great diversity of ethical

standards that exists today among the various states. He said this diversity is further complicated by the fact that some federal courts also have adopted the underlying American Bar Association ("ABA") Code or, in some cases, the old ABA Canons of Professional Responsibility. He said the ideal would be to have one rule, but that would appear to be impossible. Mr. Smith said it is possible that bankruptcy practice presents a sufficiently special situation that a national rule may be needed. At the end, the symposium authorized Professor Coquillette to draft a model interim rule for future consideration, but all decision-making was postponed.

Professor Resnick reported that he and Judge Mannes also had attended a session of a working group of the National Bankruptcy Review Commission. He was informed that the Commission had discussed the absence of a supersession clause for bankruptcy rules in the Rules Enabling Act, but that the Commission does not seem to support change in that area. He said he believes it likely that any suggestions for rules changes ultimately recommended by the Commission would be addressed to the Committee (rather than to Congress). Judge Mannes added that Bankruptcy Judge Robert Ginsberg, a member of the Commission, has expressed a desire to brief the Committee about the Commission's work at the spring 1997 meeting.

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

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

Action Items

Rule 2004. At its September 1995 meeting, the Committee had approved amendments to Rule 2004 to make it clear that the court in which a case is pending can order an examination that will take place outside the district in which that court is located and that an attorney admitted to practice in the district where the case is pending can issue the subpoena for an examination to be held in a "distant" district. These proposed amendments, however, had given rise to a discussion of whether the request for an examination could or should be considered by the court ex parte. The Committee had requested the FJC to conduct a study to determine the existing practices under Rule 2004, which requires a motion to be filed. The Committee Note states that the motion may be heard either ex parte or on notice. The Committee had asked the FJC also to survey the courts concerning the dispositions of the motions and whether it would be advisable to adopt a procedure similar to that for taking depositions under the civil rules. The FJC study showed that the bankruptcy bench is about equally divided between judges who consider the motions ex parte and those who consider them on notice, with few objections being filed (or granted) under either practice. The Reporter had prepared a memorandum presenting several alternatives

for the Committee's consideration.

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

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

Judge Robreno, noting that the Reporter's memorandum seemed to indicate that the special master concept might be at odds with several provisions of the Bankruptcy Code, asked whether it is appropriate for the Committee to decide these underlying policy issues. Mr. Klee noted that, prior to the enactment of the 1978 Code, there had been a history of patronage in bankruptcy and that receivers (which are prohibited in the Code) and special masters were part of that patronage. Even today, he said, bankruptcy judges are appointing mediators in cases. Judge Ellis suggested that the Committee should hear from Judges Merhige and Shelley in Richmond, who had managed the "Dalkon Shield" case with the help of an examiner (an officer specifically authorized by the Code). Mr. Rosen said he thought the idea of special masters might be workable if limited to appointment by a district judge when the reference has been withdrawn. Professor Tabb said he thought Alternative No. 6, which contains the fewest restrictions on an appointment, was acceptable. He said he has confidence in both bankruptcy judges and district judges and added that judges already make such appointments under the name "examiner." Judge Kressel said he thinks the Bankruptcy Administration Committee's proposal seems acceptable and that he would like to have the tool, even though in 14 years he could think of only one case in which he might have considered using it.

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

Judge Cordova said he has never needed a special master, but favors removal of the prohibition. Judge Cristol said he had experienced coordinating with a special master who was appointed in a criminal case. Judge Small said he sees no harm in adding suitably limited authority for special masters. Mr. Rosen said

he sees appointments of examiners or fee experts because judges are frustrated when a case does not move; then, he said, the parties are frustrated at having a person in the case that they don't want.

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

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

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

The proposed amendments would expressly require an administrative expense claimant to file a request for payment and would set the same 90-day deadline that already is in place for a creditor to file a proof of claim. Professor Tabb noted that the Committee might have to change the § 341 Notice forms to include mention of a request for payment of an administrative expense. Mr. Kohn requested that the government be given 180 days to file. **A motion directing the Reporter to redraft the amendments to provide for a 180-day filing period for a government entity carried with none opposed. A motion to approve the Reporter's draft amendment to Rule 9006 to protect against shortening of the time also carried unopposed.** Upon considering the recommendations of the Standing Committee's style subcommittee, **the Committee approved adding on line 15 after the word "entities" the phrase "listed on the schedule of unpaid debts" and referred the amendments to both Rule 1019(6) and Rule 9006 to the Committee's own style subcommittee for further review.**

Rules 4004(a) and 4007(c). The Reporter said that several recent decisions described in his memorandum had ruled that the 60-day deadlines for filing a complaint objecting to the debtor's discharge or to determine the dischargeability of a debt under

§ 523(c) of the Code are to be counted from the date the meeting of creditors is held rather than from the first date set for the meeting, as stated in the rule. The Reporter said the language of these rules includes the word "held," which apparently was used to support the recent decisions. Accordingly, he had drafted amendments deleting the word "held" from both rules. Professor Resnick added that the Committee already had voted at a prior meeting to delete the word "held" from Rule 4007(c) for style reasons at the

time it approved the substantive change to "filed" from "made." The text of the previously-approved amendments to Rule 4007(c) appears at Tab 22 of the agenda book. The Reporter suggested expanding the previously approved Committee Note to Rule 4007(c) to explain the substantive effect of the amendment. **A motion to approve the Reporter's draft carried unopposed.**

Rule 2003(d). In September 1995 the Committee approved amendments to conform Rule 2003(d) to amendments being proposed to Rule 2007.1, in furtherance of the amendments to the Bankruptcy Code made by the Bankruptcy Reform Act of 1994. Both rules concern the election of a trustee in a bankruptcy case. In March 1996, the Committee approved changes to the published draft of Rule 2007.1, in response to comments from the Executive Office for United States Trustees. The Reporter explained that the proposed changes to Rule 2003(b) would conform the rule to the revisions made to Rule 2007.1. **By consensus, the words "Report of" were deleted from the title of subdivision (2) of the proposed rule.** The Committee then reviewed the markup forwarded by the Standing Committee's style subcommittee. **The Committee approved changing the introductory phrase in subdivision (1) to "In a chapter 7 case, if . . . " and to add a reference to chapter 7 in subdivision (2), but rejected the other style suggestions. A motion to approve the amendments and refer further consideration of style to the Committee's style subcommittee carried with none opposed.**

Presentation

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

Subcommittee Reports

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

Judge Robreno said the question is how broadly a national rule should mandate specific procedures each judge should use in all types of cases and in all courts, some urban and some not. He cautioned that

changes on the scale proposed may invite the law of unintended consequences. He said he is not sure the Committee should sweep aside local practices on such matters as the number of days to answer and mandated status conferences. He said he thinks the draft [general motions] rule is an excellent local rule; he questioned only whether it should be imposed on everyone. Mr. Klee responded that there is a tension in the system between natural preferences for local practices and the fact that the Bankruptcy Code is a national law under which there is a national practice.

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

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

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

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

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

Mr. Kohn suggested circulating the subcommittee's drafts to obtain more feedback, possibly as an attachment to an FJC questionnaire. Professor Resnick explained that, if the material is to be circulated to

the bar, it needs to go through the Standing Committee, which means it has to be a finished product rather than a work in progress. He also noted a lot of other rules would have to be changed because they would be affected, meaning that much work would be required. Judge Ellis said he doubted a survey would reveal more than the reaction in the meeting room.

Judge Duplantier said that he would like the Committee to use the adversary proceeding rules wherever possible. Mr. Sommer said the subcommittee's draft Rule 9014 has moved the bankruptcy rules in the direction of the civil rules to the extent that perhaps contested motions should be conducted under the adversary proceeding rules. The motion with attachments, he noted, closely resembles a motion for summary judgment. Judge Restani said she formerly agreed with Judge Duplantier's view, but changed her mind because she realized it isn't possible, often due to provisions in the Bankruptcy Code.

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

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

Judge Mannes suggested thinking about how a motion to assume and assign an executory contract would be handled under the subcommittee's draft Rule 9014. Since the matter is not on the administrative motions list, he said, it would be a general motion. The subcommittee's draft Rule 9014 would direct the movant to file the motion, stating the relief sought, and to attach an affidavit supporting the motion. The draft rule also would advise the movant of the requirement to file proofs of service indicating that the movant had served the person or persons against whom relief is sought, the attorney for the debtor, and the creditors committee, and had transmitted a copy of the motion to the United States trustee. Opposers of the motion would be required to respond. If there were no response, the judge would dispose of the motion. If one or more responses were filed, the judge would hold a status conference to set discovery and schedule the "trial" [hearing]. Under the current Rule 6006, there is not much guidance, and an attorney must obtain a district's local rule to know how to proceed.

Mr. Klee compared the process under proposed Rule 9014 to an adversary proceeding in which the plaintiff serves the defendant with a summons. Under the rules applicable in an adversary proceeding, any compulsory counterclaim the defendant may have must be asserted or waived. Thus, a "counterclaimant" must submit to bankruptcy court jurisdiction or waive its counterclaim, a procedural requirement that effectively expands the bankruptcy court's jurisdiction, he said. Judge Restani added that

any rule that applies the adversary proceeding rules to contested motions would have to eliminate the requirement to file a compulsory counterclaim and provide a separate rule for service. Mr. Smith said the subcommittee tried to follow the civil rules, but ended up adopting the substance of the draft proposed by the subcommittee. Mr. Batson said he thinks the existing Rule 9014 also evolved from an attempt to apply the civil rules and that today's Rule 9014 was the best they could do. He said the bankruptcy community still needs the subcommittee's draft Rule 9013 (administrative motions), however.

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

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

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

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

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

On the second day of the meeting, Mr. Klee resumed the discussion by suggesting that the subcommittee continue its deliberations and return in March 1997 with new drafts that would include a breakdown into more categories of motions than the two presented in the drafts submitted to the meeting. Mr. Klee identified six categories: 1) administrative motions (limited to routine matters), 2) administrative proceedings (major litigation but not an adversary proceeding), 3) expedited motions (as set forth in subdivision (i) of the draft of Rule 9014), 4) motions within motions, 5) motions in adversary proceedings, and 6) an intermediate category that would be handled on a "negative notice" basis "after notice and a hearing." He inquired whether the Committee agreed about the number and types of the categories.

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

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

The Reporter suggested moving the notice and service requirements for installment payments to Rule 1006, which contains provisions concerning the number and timing of installment payments. Ms. Wiggins said the survey that prompted the creation of the litigation subcommittee had shown strong preference by practitioners for having all the directions in one place and suggested that the Committee refrain from sprinkling around to other rules too many of the items in draft Rule 9013. Judge Restani also cautioned against too much proliferation, but the consensus was that placement in Rule 1006 would work for a motion to pay the filing fee in installments.

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

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

move notice/service requirements on installment payments to Rule 1006;

bracket [] item (5) on dismissal under §§ 1208(b) and 1307(b), to reflect the 5-5 tie vote by the Committee on moving this item to the negative notice category;

move a motion/order to enlarge the time for filing schedules and statements to Rule 1007, and add that matter to the list of those excepted from Rule 9013 treatment in item (9);

combine item (10), waiver of a filing fee, with item (1), installment payments, and add it to Rule 1006 and possibly other rules;

carve out chapter 9 and chapter 11 cases from item (11), (form of, manner of sending, or publication of a notice), and require negative notice for this motion in those cases.

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

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

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

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

Mr. Smith summarized the differences between the subcommittee's draft Rule 2014 and the current rule. He began by noting that the draft states who files the motion and who is to be served, that the draft requires the movant to aver concerning the professional's eligibility and uses some specifics (*e.g.,* "duty to another client") taken from the Restatement of the Law Governing Lawyers, although without any intent to lessen the movant's obligation to employ only someone eligible. The draft authorizes an immediate order, he said, but allows for a hearing on ten days' notice at the court's discretion, a timing that might need to be reconciled with the 20-day notice period provided in the subcommittee's companion draft amendment to Rule 2002. In addition, the draft would require a verified statement by the professional to be employed that discloses any relationship which might cause a "reasonable person" to conclude there is an adverse interest, in language borrowed from both the Restatement and § 101(14), and which is, therefore, more expansive than the current rule. He noted also the addition of a requirement for a supplemental statement and the addition of language covering changes in membership of a partnership during the course of the representation.

It was noted that the Bankruptcy Code addresses the issues of conflict and potential conflict in several places and that the standards differ from section to section. For example,

§ 101(14) describes when a person is not disinterested and includes in that description the having of "an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an an investment banker . . . or for any other reason"; § 327(a) requires a professional employed by a "trustee" to be disinterested with no adverse interest; § 328(c) authorizes a court to deny compensation to anyone who is found not to have lived up to the "disinterested with no adverse interest" standard required for employment; but § 327(c) permits employment by the "trustee" of a professional who also represents a creditor, subject to disapproval of the employment if an actual conflict is shown. It also was noted that the National Bankruptcy Review Commission is examining these issues.

Judge Cordova moved to adopt the subcommittee's draft amendments to Rules 2014 and 2002. Mr. Rosen questioned the expansion in draft Rule 2014, subdivision (b), clause (3), to include "connections" to any party in interest. Mr. Klee said the Committee should adhere to the statute by limiting disclosure of connections to those with the debtor and investment bankers and should use adverse interest as the standard for creditors. Judge Kressel said he would prefer to have a hearing before authorizing employment, but was concerned about the resulting delay in signing an order and how to approve payment for prior work. Professor Resnick suggested that "negative notice" could work for authorizing employment, but Judge Kressel said there would still be a problem of waiting for the objection period to run. Mr. Sommer suggested using an interim order that would ripen into a final order if no objection were filed. Professor Resnick suggested instead that a regular order followed by notice, with no stated period for objecting, would still allow a party in interest to object. Mr. Sommer also said he thinks that subdivision (b) clause (2) (the reasonable person test) creates a new standard with new uncertainties. Judge Robreno observed that the drafts lack Committee Notes and that there seem to be both technical and conceptual problems with the proposed amendments. Mr. Klee offered **an amendment to the motion to adopt the subcommittee's draft Rule 2014 that would revise subdivision (b) by striking clause (2) and requiring instead the disclosure of any adverse interest and representation of any adverse interest, and by striking the language after the third comma in clause (3) and inserting "the debtor or an investment banker" as set forth in § 101(14). The motion as amended carried with none opposed.** Professor Tabb offered a further **amendment to prescribe an interim employment order, followed by notice, with the order to ripen into a final order if no objection is filed. The amendment carried with none opposed.** The Reporter asked **whether the Committee wanted him to conform lines 15 through 19 of subdivision (a) to the changes approved in subdivision (b), to which the response was, by consensus, affirmative. A motion to table further consideration until the March 1997 meeting and request the Reporter to prepare new drafts and Committee Notes carried without opposition.** Judge Robreno requested that the Reporter also prepare **a memorandum providing the Committee with information and background, discussing the meaning of "disinterested," and the present condition of the law.**

Subcommittee on Rule 7062. Judge Kressel reviewed for the Committee the history of the proposed amendments. The project began, he said, with the Committee's instructions to delete from Rule 7062 the list of "additional exceptions" to the ten-day stay of enforcement of a judgment. The reasons were that the exceptions are contested matters and not adversary proceedings and that the list kept growing. The first task for the subcommittee was to identify those matters in which there should be time to appeal before the parties take action based on a court order. The choices are to 1) stay none, 2) stay all except those specified, or 3) stay none except those specified. The subcommittee chose the third option. This option would have the effect of changing the "default" mode for the selected items from immediate

implementation to delayed implementation, unless the court orders otherwise in a particular matter.

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

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

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

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

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

Mr. Klee said that in all of these amendments the phrase "if an order is entered" or similar language

should be used instead of the wording in the drafts which uses "if the court enters an order." Judge Duplantier suggested revising all the amendments uniformly to characterize the court's action as "entry" of the order concerned.

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

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

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

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

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

Respectfully submitted,

Patricia S. Channon