TO: Honorable Anthony J. Scirica, Chair
Committee on Rules of Practice
and Procedure

FROM: Honorable Adrian G. Duplantier, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 3, 1998

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on October 8-9, 1998, in Andover, Massachusetts.

II. Action Items

The Advisory Committee on Bankruptcy Rules will not be presenting any matters for action at the Standing Committee's meeting in Marco Island, Florida, on January 7-8, 1999.

III. Information Items

A. Publication of Proposed Rule Amendments. At its June 1998 meeting, the Standing Committee authorized the publication of a preliminary draft of proposed amendments to the Bankruptcy Rules. The preliminary draft is divided into two parts, the "Litigation Package" consisting of proposed amendments to 27 rules, and "Other Amendments" consisting of miscellaneous proposed amendments to six rules.

The preliminary draft was published in August 1998 for comment by the bench and bar. The deadline for submitting comments is January 1, 1999, and a public hearing is scheduled for January 28, 1999, in Washington, D.C.[1]

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[1]At the time of this report, one request has been received for a personal appearance at the scheduled hearing.

The "Litigation Package" of proposed amendments would substantially revise and make more uniform the procedures governing litigation other than adversary proceedings. The published *Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice*, which summarizes and explains the reasons for these proposed amendments, is attached to this report as Appendix A.

In an effort to inform the bench of these important changes to litigation practice in bankruptcy court, and to solicit comments, the reporter met with the Administrative Office Bankruptcy Judges Advisory Group, consisting of one bankruptcy judge from each circuit, on November 5th in Washington, D.C. The reporter also met with a group of approximately 25 bankruptcy judges, most of whom were from districts in California, at the National Conference of Bankruptcy Judges in Dallas on October 23rd. The reporter also made a presentation on the proposed amendments, and solicited written comments, at the National Bankruptcy Conference (consisting of lawyers, judges, and professors) on October 15th in Washington, D.C.

At the time of this report, 28 written comments have been received. The Advisory Committee will consider all comments at its next meeting to be held on March 18-19, 1999, and it is expected that proposed amendments will be presented for approval by the Standing Committee at its June 1999 meeting.

C. Bankruptcy "Reform" Legislation. Several comprehensive bankruptcy bills were considered by Congress in 1998. Both the Senate and the House of Representatives passed bills dealing with both consumer and business bankruptcy cases. But significant differences between the Senate and House bills required a Congressional conference that produced a compromise bill during the final days of the 105th Congress. The conference bill passed the House, but not the Senate. It is likely that comprehensive bankruptcy bills will be introduced early in the 106th Congress.

The Advisory Committee monitored legislative developments closely during 1998 and will continue to do so in 1999. Both the House and Senate bills in 1998 would have amended the Bankruptcy Code and title 28 of the United States Code in ways that would have required substantial amendments to the Bankruptcy Rules and Official Bankruptcy Forms. Several provisions of these bills were expressly directed to the Advisory Committee. For your information, a list of the provisions of the conference bill that passed the House on October 8, 1998 (H.R.3150), and that were expressly directed to the Advisory Committee, is attached to this report as Appendix B.

D. Rules on Attorney Conduct. At the Advisory Committee's request, the Federal Judicial Center is conducting a survey of bankruptcy judges and lawyers to

identify areas regarding attorney conduct that have caused significant problems in bankruptcy cases and proceedings. The survey results should be useful in determining the need for (and possibly the formulation of) new or amended Bankruptcy Rules governing attorney conduct. The survey should be useful to Professor Coquillette's project on rules governing attorney conduct in federal courts.

Attachments:

Appendix A - Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

Appendix B - Selected Provisions of H.R. 3150 As Modified By the House/Senate Conference and Passed by the House Of Representatives on October 8, 1998

Draft of minutes of the Advisory Committee meeting of October 8-9, 1998.

Appendix A

Introduction to Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure Relating to Litigation and Motion Practice

At the request of the Advisory Committee on Bankruptcy Rules, in 1995 the Federal Judicial Center conducted an extensive survey of bankruptcy judges, lawyers, trustees, clerks and other participants in the bankruptcy system to determine their satisfaction or dissatisfaction with the Federal Rules of Bankruptcy Procedure. The Advisory Committee requested the survey in connection with the work of its Long-Range Planning Subcommittee and for the purpose of identifying areas that are in need of improvement. The survey results indicated general satisfaction with the Rules, but identified motion practice and litigation as areas of significant dissatisfaction.

The Bankruptcy Rules in Part VII govern an adversary proceeding, which is a form of litigation in bankruptcy court conducted in a manner that is similar to a civil action in district court. For example, an adversary proceeding is commenced by filing a complaint followed by service of a summons. Most Part VII Rules incorporate by reference specific Federal Rules of Civil Procedure. The Advisory Committee believes, and the Federal Judicial Center survey confirms, that the Rules governing adversary proceedings are working well.

But most requests for court orders and litigated disputes in bankruptcy court are not adversary proceedings; they are governed by some form of motion practice unrelated to any adversary proceeding. There has been confusion and criticism regarding procedures that govern these matters, and these are the troublesome areas identified in the Federal Judicial Center survey.

One significant difference between a typical motion filed in a civil action in the district court and a typical motion filed in bankruptcy court is that the motion in district court relates to a pending lawsuit. For example, a defendant may file a motion to dismiss a complaint or for summary judgment. In contrast, a motion filed in bankruptcy court usually commences new litigation that is unrelated to any pending lawsuit. For example, a creditor may file a motion for the appointment of a trustee in a chapter 11 case or for relief from the automatic stay, or a trustee may file a motion to assume or reject an executory contract. Each of these motions commences litigation by or against specified parties who may not be parties in any pending litigation. Although these motions are made within a bankruptcy case, the bankruptcy case is not, in and of itself, litigation involving a legal dispute in the traditional sense. Under section 301 of the Bankruptcy Code, the mere filing of a voluntary bankruptcy petition constitutes an order for relief.

A serious criticism of the Bankruptcy Rules is that there is a lack of national uniformity and insufficient guidance regarding procedures governing the resolution of these important

substantive disputes. Motions relating to a pending adversary proceeding — such as a motion relating to discovery in an adversary proceeding seeking to recover a preferential payment to a creditor — may be subject to minor local variation consistent with the flexibility present in district court motion practice. The local variations in procedure addressed by these proposed amendments are of much greater consequence.

Although such motions that are unrelated to pending litigation may involve millions of dollars to the litigants, the current Rules provide little specificity or uniformity as to the procedure governing them. Current Rule 9014 provides that relief is obtained by motion served in the manner provided for service of a summons, that reasonable notice and opportunity to be heard must be afforded, and that a response is not required unless the court orders otherwise. In the absence of a contrary order, certain listed Part VII rules applicable to adversary proceedings — most relating to discovery or summary judgment — apply to the motion, and the court may order that other Part VII rules shall apply. Rule 9006(d), which applies to motions generally, provides that, unless the court orders otherwise, at least five days' notice of a hearing must be given and, if the motion is supported by affidavit, the affidavit must be served at least one day before the hearing. These general provisions are often varied or supplemented with greater detail by local rule or court order. The result is that practice varies from district to district or from court to court. The Advisory Committee believes that greater specificity and national uniformity, as well as improvements to the current procedures, are desirable for such motions that are unrelated to any pending litigation.

Another criticism addressed by the Advisory Committee is confusion resulting from terminology used in the Bankruptcy Rules. For example, Rule 9014 governs "contested matters," such as a motion to reject an executory contract or a motion to obtain court approval of a sale of assets. In many instances, "contested matters" are, in fact, uncontested. Other proceedings, such as an "application" for approval of professional fees, are not "contested matters" under the Rules, despite the fact that they are often contested by parties in interest.

The Advisory Committee has spent more than two years studying the Rules relating to litigation in bankruptcy courts and formulating proposed amendments designed to improve procedures for obtaining court orders and resolving disputes. As mentioned above, the Advisory Committee is satisfied that the rules governing adversary proceedings under Part VII are working well. But the Advisory Committee is proposing amendments that would substantially revise other procedures for obtaining court orders unrelated to pending litigation, both for routine administrative matters and for more complex disputes that require greater procedural safeguards.

The most important and fundamental changes would be made to Rules 9013 (Motions; Form and Service) and 9014 (Contested Matters), although 25 other Rules will have to be revised to conform to the new procedures. In general, the proposed amendments would increase national uniformity and provide more detailed procedural guidance when a party requests relief unrelated to pending litigation; these amendments should reduce substantially the number of local rules.

The highlights of the preliminary draft of the proposed amendments are as follows:

(1) Rule 9013 would be replaced with a new rule on "applications." This rule would govern specific types of relief in areas that are routine, nonsubstantive, and rarely contested. For example, Rule 9013 would govern the procedure for obtaining a court order to jointly administer two or more cases, or for an order reopening a closed case. The procedures would be streamlined so as to avoid unnecessary costs or delay.

* The application and a proposed order would be served on specified entities at any time before, or even at, the time when the application is filed with the court; advance notice is not required.

* Although service by first class mail is available, the court by local rule may permit the application and accompanying papers to be served by electronic means.

* A response to the application would not be required and the court may order relief without a hearing.

(2) Rule 9014 would govern motions that are related to the administration of the bankruptcy case or the estate, but are usually unrelated to any other pending litigation. These motions are often contested and may affect significant substantive rights of the parties. For example, a motion asking the court to order the appointment of a trustee in a chapter 11 case, requesting relief from the automatic stay, requesting authorization for a debtor in possession to obtain credit, or seeking an order terminating the exclusive period in which only the debtor may file a plan of reorganization, would be an administrative proceeding governed by Rule 9014. Certain types of proceedings, such as a chapter 11 confirmation hearing governed by Rule 3020, would be expressly excluded from the scope of the rule so that more appropriate tailor-made procedures could govern. The title of Rule 9014 would be changed from "Contested Matters" to "Administrative Proceedings."

The significant features of an administrative proceeding under the preliminary draft of the proposed amendments to Rule 9014 include the following:

* The proceeding would be commenced by filing and serving a motion.

* The rule would specify the papers that must accompany the motion. A proposed order and, unless the movant is a consumer debtor, one or more supporting affidavits must be included. In certain situations, a copy of a

valuation report must be included with the motion papers.

* The motion papers, including notice of the hearing, must be served on specified entities at least 20 days before the hearing date. The court by local rule may permit the papers to be served by electronic means.

* Interim relief, if appropriate, may be ordered on an expedited basis.

* A response to the motion may be served and filed, but no later than five days before the scheduled hearing date. If no timely response is filed, the court may rule on the matter without a hearing or may give notice to the movant that a hearing will be held notwithstanding the absence of a response.

* Discovery methods applicable in adversary proceedings would be available, except that mandatory disclosures required under Civil Rule 26(a)(1)-(3) and the discovery meeting required under Rule 26(f) would not apply. Certain 30-day time periods in the Civil Rules relating to discovery would be reduced to ten days consistent with the expedited nature of administrative proceedings.

* If a timely response is filed, the court would hold a hearing to determine whether there is a genuine issue as to any material fact and, if not, whether any party is entitled to relief as a matter of law. Except for certain types of motions or if the parties otherwise consent, no testimony would be taken at the hearing. Therefore, attorneys and unrepresented parties would not have to bring witnesses to the hearing in most situations. If there is no genuine issue as to any material fact, the court may grant the appropriate relief. If the court finds that there is a genuine issue of material fact, the court would conduct a status conference for the purpose of expediting the disposition of the proceeding and scheduling the evidentiary hearing. Alternatively, on reasonable notice to the parties, the court may order that an evidentiary hearing at which witnesses may testify will be held on the originally scheduled hearing date.

* Rule 43(e) of the Federal Rules of Civil Procedure provides that where a motion is based on facts not appearing of record the court may hear the motion on affidavits presented by the parties. The Advisory Committee believes, however, that the assessment of witness credibility is as important at an evidentiary hearing on an administrative motion as it is at a trial in an adversary proceeding. Accordingly, the proposed amendments to Rule 9014 provide that Civil Rule 43(e) does not apply at an evidentiary hearing on an administrative motion. When there is a genuine issue of

material fact, this provision would require that witnesses appear and testify, rather than give testimony by affidavit.

* To provide flexibility where needed, the court for cause may order that any procedural requirement under Rule 9014 will not apply or will be amended in a particular proceeding. But the requirements of Rule 9014 may not be abrogated by local rule or general order. In accordance with Rule 9006, the court also may extend or reduce any time period set forth in Rule 9014.

It would be desirable to divide all proceedings arising in, or related to, a bankruptcy case into only three categories: applications under Rule 9013, administrative proceedings under Rule 9014, and adversary proceedings under Part VII. But there are some proceedings that do not fit well into any of these three categories. These excluded proceedings, which are listed in the proposed amendments to Rule 9014(a), would be governed by other specified rules.

Although the proposed amendments to Rules 9013 and 9014 would provide greater guidance and national uniformity, they would not govern motions that are made within a pending adversary proceeding, pending administrative proceeding, or other pending litigation. For example, Rules 9013 and 9014 would not govern a motion dealing with a discovery dispute in an adversary proceeding. Motions that are related to pending litigation in bankruptcy court — which are similar to typical motions made in a civil action in the district court — would continue to be guided by other national rules, such as Rule 7007 or 9006, and by local rules and practice.

Appendix B

SELECTED PROVISIONS OF H.R. 3150 AS MODIFIED BY THE HOUSE/SENATE CONFERENCE AND AS PASSED BY THE HOUSE OF REPRESENTATIVES ON OCTOBER 8, 1998

Section 403. Standard Form Disclosure Statement and Plan.

The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall, within a reasonable period of time after the date of the enactment of this Act, propose for adoption standard form disclosure statements and plans of reorganization for small business debtors (as defined in section 101 of title 11, United States Code, as amended by this Act), designed to achieve a practical balance between--

(1) the reasonable needs of the courts, the United States trustee, creditors, and other parties in interest for reasonably complete information; and

(2) economy and simplicity for debtors.

Section 404. Uniform National Reporting Requirements.

(a) Reporting Requirements.-- (1) Title 11 of the United States Code is amended by inserting after section 307 the following.

Sec. 308. Debtor reporting requirements

"A small business debtor shall file periodic financial and other reports containing information including --

(1) the debtor's profitability, that is, approximately how much money the debtor has been earning or losing during current and recent fiscal periods;

(2) reasonable approximations of the debtor's projected cash receipts and cash disbursements over a reasonable period;

(3) comparisons of actual cash receipts and disbursements with projections in prior years;

(4) whether the debtor is --

(A) in compliance in all material respects with postpetition requirements imposed by this title and the Federal Rules of Bankruptcy Procedure; and

(B) timely filing tax returns and paying taxes and other administrative claims when due, and, if not, what the failures are and how, at what cost, and when the debtor intends to remedy such failures; and

(5) such other matters as are in the best interests of the debtor and creditors, and in the public interest in fair and efficient procedures under chapter 11 of this title."

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(b) Effective Date.-- The amendments made by subsection (a) shall take effect 60 days after the date on which rules are prescribed pursuant to section 2075, title 28, United States Code to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a).

Section 405. Uniform Reporting Rules and Forms for Small Business Cases.

(a) Proposed Rules and Forms.-- The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall propose for adoption amended Federal Rules of Bankruptcy Procedure and Official Bankruptcy Forms to be used by small business debtors to file periodic financial and other reports containing information, including information relating to--

(1) the debtor's profitability;

(2) the debtor's cash receipts and disbursements; and

(3) whether the debtor is timely filing tax returns and paying taxes and other administrative claims when due.

(b) Purpose.-- The rules and forms proposed under subsection (a) shall be designed to achieve a practical balance between--

(1) the reasonable needs of the bankruptcy court, the United States trustee, creditors, and other parties in interest for reasonably complete information;

(2) the small business debtor's interest that required reports be easy and inexpensive to complete; and

(3) the interest of all parties that the required reports help the small business debtor to understand its financial condition and plan its future.

Section 607. Sense of Congress Regarding Expansion of Rule 9011 of the Federal Rules of Bankruptcy Procedure

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

Section 802. Effective Notice to Government

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(b) Adoption of Rules Providing Notice.-- The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States shall, within a reasonable period of time after the date of the enactment of this Act, proposed for adoption enhanced rules for providing notice to State, Federal, and local government units that have regulatory authority over the debtor or which may be creditors in the debtor's case. Such rules shall be reasonably calculated to ensure that notice will reach the representatives of the

governmental unit, or subdivision thereof, who will be the proper persons authorized to act upon the notice. At a minimum, the rules should require that the debtor--

(1) identify in the schedules and the notice, the subdivision, agency, or entity in respect of which such notice should be received;

(2) provide sufficient information (such as case captions, permit numbers, taxpayer identification numbers, or similar identifying information) to permit the governmental unit or subdivision thereof, entitled to receive such notice, to identify the debtor or the person or entity on behalf of which the debtor is providing notice where the debtor may be a successor in interest or may not be the same as the person or entity which incurred the debt or obligation; and

(3) identify, in appropriate schedules, served together with the notice, the property in respect of which the claim or regulatory obligation may have arisen, if any, the nature of such claim or regulatory obligation and the purpose for which notice is being given.