ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 21 - 22, 2000
Arden Conference Center
Harriman, New York

Minutes

The following members attended the meeting:

District Judge Adrian G. Duplantier, Chairman
District Judge Robert W. Gettleman
District Judge Ernest G. Torres
District Judge Norman C. Roettger, Jr.
Bankruptcy Judge A. Jay Cristol
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge James D. Walker, Jr.
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Leonard M. Rosen, Esquire
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
J. Christopher Kohn, Esquire

Professor Kenneth N. Klee attended the second day of the meeting. District Judge Bernice B. Donald was unable to attend. Professor Jeffrey W. Morris, Reporter, attended the meeting. Bankruptcy Judge Marcia S. Krieger, a member of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), attended, as did Peter G. McCabe, Secretary to the Committee on Rules of Practice and Procedure ("Standing Committee") and Assistant Director, Administrative Office of the United States Courts ("Administrative Office"). An incoming member of the committee, K. John Shaffer, Esq., also attended, and the incoming chairman, Bankruptcy Judge A. Thomas Small, attended part of the meeting by telephone.

The following additional persons attended the meeting: Kevyn D. Orr, Director of the Executive Office for United States Trustees ("EOUST"); Richard G. Heltzel, Clerk, United States Bankruptcy Court for the Eastern District of the New Jersey; James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office; Patricia S. Ketchum, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center.

Bankruptcy Judge Cecelia G. Morris, and Dean Karsonis and George Angelish, law clerks to Judge Morris, attended parts of the meeting as observers.

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

Introductory Items

The Committee approved the minutes of the March 2000 meeting.

The Chairman noted that his term was ending along with that of several other members -- Judge Kressel, Judge Cordova, Professor Klee, and Mr. Rosen -- and said he had enjoyed both the work of the Committee and the friendships that had developed from it. He welcomed K. John Shaffer, Esq., as an incoming member. The Chairman further noted that Richard G. Heltzel, the clerk of court who had served as adviser since 1988, also would be leaving the Committee and would be replaced by James J. Waldron, whom he welcomed to the meeting. Later, the Committee presented Mr. Heltzel with a certificate of appreciation for his long and exceptional service.

June 2000 Meeting of the Standing Committee. The Chairman reported that he and the Reporter had attended the meeting and that the Standing Committee had approved the amendments proposed by the Committee to Rules 1007, 2002, 3016, 3017, 3020, 9006, 9020, and 9022, and Official Form 7. The Standing Committee agreed to transmit the proposed amendments to the Judicial Conference with a recommendation that they be approved and forwarded to the Supreme Court for its consideration. The Standing Committee similarly had approved the electronic service amendments proposed by the Advisory Committee on Civil Rules to Rules 5, 6, and 77. The Chairman noted that the Committee's recommendation that parties be given three additional days to respond when served electronically had prevailed, as reflected in the proposed amendments to Rule 6. This was one of several aspects in which the relevant advisory committees had worked together to assure consistency among the federal rules. All of these proposed amendments were on the consent calendar for the Judicial Conference session scheduled for September 19. As such, he said, they would have been approved automatically and would be forwarded to the Supreme Court.

The Standing Committee also approved for publication and comment the preliminary draft amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and Official Form 1, that had been submitted by the Committee. The comment period on the proposed amendments will conclude on February 15, 2001.

In addition, he said, the Standing Committee had approved and sent to the Committee on Court Administration and Case Management a recommendation supported by the Committee that individual courts post their local rules on a court website. The recommendation included support for creating a link to each court's website from the Internet web page maintained by the Administrative Office.

June 2000 Meeting of the Bankruptcy Administration Committee.

Professor Resnick, who had represented the Committee at the meeting, noted that the Bankruptcy Administration Committee had discussed at length the issue of individual privacy and public access to bankruptcy case information and had made some specific recommendations that would be discussed later in the meeting. He said the Bankruptcy Administration Committee, at the request of the Committee on Federal-State Relations, also had discussed mass tort cases and whether the Judicial Conference should endorse the recommendations of the National Bankruptcy Review Commission for handling mass torts in the bankruptcy courts. A subcommittee would be studying the matter further, he said. Professor Resnick said he was surprised to learn, during a discussion of whether the United States Court Design Guide should require that jury boxes be installed in bankruptcy courtrooms, that only 15 jury trials had been held in the bankruptcy courts in the two-and-a-half years prior to the meeting. A decision was made not to require jury boxes, he said. Judge Krieger added that the Bankruptcy Administration Committee also had discussed the continuing need for certain judgeships and would be recommending that no authorized position be eliminated even though some circuits were not filling vacancies in districts with low caseloads. With respect to Iowa, which has four judgeships evenly distributed over two districts, she said, the Bankruptcy Committee had recommended that, in the event of a vacancy, the remaining three judges all be authorized to handle cases in both districts.

Action Items

Rule 2016. The Reporter said the proposed new subdivision (c) of the rule arose from a suggestion that Rule 2016, which prescribes the manner and timing of disclosures by attorneys for debtors of compensation paid or agreed to be paid to them should apply also to bankruptcy petition preparers. A member suggested deleting the first sentence of the Reporter's draft as repetitive of the statute and deleting the phrase "or at another time as the court may direct" on lines 5 and 6 to conform the draft to § 110(h)(1) of the Code, which specifies ten days. In response to questions and comments from members, the Reporter stated that the rule would impose on a petition preparer most of the requirements already imposed on attorneys, such as a duty to supplement a declaration previously filed if further compensation is received or an agreement is made to pay further compensation. By requiring a petition preparer to provide the United States trustee's office with a copy of the declaration, the rule would help that office obtain the information necessary to carry out its statutory duty to seek an injunction against any petition preparer who violates the provisions of § 110. On the second day of the meeting, the Reporter presented a redrafted amendment and Committee Note incorporating the comments of the members.

Professor Wiggins noted that § 110(f)(1) states that a petition preparer may not use the word "legal" to advertise or advertise under any category that includes the word "legal," yet Official Form 19 requires disclosure only of the name of the individual who worked on the documents. She suggested that the form should be amended to include the name under which the

petition preparer does business, to assist the United States trustee with enforcement under § 110(f)(1).

On the second day of the meeting, the Reporter presented a redraft of the proposed amendment, with the addition of a re-styling of subdivision (b) to convert its final sentence from the passive to the active voice. After discussion of the style issues raised by subdivision (b) generally, **a motion to leave subdivision (b) of the rule unchanged was unopposed.** After discussion, **the Committee approved the re-draft of subdivision (c) with the following changes: in line 24, insert "of the Code" after "§ 110(h)(1); in line 26, substitute "immediately prior to" for the word "of" in the middle of the line, and change "case" to "petition"; remove the brackets around the sentence beginning with the words "The declaration" on line 27; and add the following new sentence at the end of the subdivision, "The bankruptcy petition preparer shall transmit a copy of the declaration and any supplemental declaration to the United States trustee not later than the date when it is filed.". In the Committee Note, the Committee approved deleting all but the first sentence and adding, at the end of that sentence, the phrase "of the Code."**

Rule 8014. The Reporter introduced a draft of an amended rule that would more closely conform to the equivalent appellate rule, Federal Rule of Appellate Procedure 39. The Committee discussed the terminology used in the draft and several suggested style changes. A member noted that the draft did not include subdivision (c) of Rule 39, which directs each court of appeals to adopt local rules governing the maximum that could be imposed as costs for copies and suggested adding similar language to the draft, for example, "the rate applicable in the circuit under Rule 39(c) unless the district court or bankruptcy appellate panel has adopted a separate rule," On the question of whether to use the term bankruptcy "court" as the place where certain costs are taxed, a usage derived from the Rule 39 reference to the district court, the Committee discussed whether the words "judge" or "clerk" could be used instead. As it is the clerk who taxes costs, and the judge intervenes only when there is an objection, designating the judge to tax costs would not be appropriate. The question then arose concerning whether "bankruptcy clerk" would be proper, as there are consolidated courts where there is no bankruptcy clerk, and some bankruptcy cases that are handled by district court judges. A member then questioned the draft rule's approach of taxing of all costs by the bankruptcy court, even the costs of copies of the brief, which in Rule 39 is taxed by the clerk of the court of appeals. Other members questioned the wisdom of having two clerks tax different costs and suggested that the approach taken by the draft, having one clerk tax all costs, might be preferable. **A motion to table the proposed amendment carried by a vote of 9 to 4.**

Official Form 15. Judge Kressel introduced the proposed amendment, which is intended as a conforming amendment that would implement amendments to Rule 3020 that are due to take effect December 1, 2001. The amendments to Rule 3020 would require the order confirming a plan that includes an injunction against conduct not otherwise enjoined under the Code to include language specifically describing the injunction and the entities subject to the injunction. He said the conforming nature of the amendment would make it eligible for adoption without publication

for comment and that the amended form could take effect simultaneously with the amended rule. At Mr. Rosen's suggestion, the draft amendment was changed to read as follows: "*[If the plan provides for an injunction against conduct not otherwise enjoined under the Code, include the information required by Rule 3020.]* " **There was no objection to approving the proposed amendment as modified and sending it forward without publication.**

Official Forms. Mr. Adelman said Form 15 does not serve a debtor who needs to take a confirmation order to state court. With such a bare bones order, he said, a debtor's attorney has to educate the state court judge on the provisions of the Bankruptcy Code that establish the requirements for confirming a plan. He said he would prefer a form that incorporated the provisions of § 1141 of the Code. Judge Kressel said he would view that as a step backward. He said it is dangerous to add statutory material unless all of it is included. He noted that the trend of the Committee over the last decade had been to eliminate such text, most recently from the discharge order. He added that there probably will be a forms review conducted over the next year or two, and that project would afford an opportunity to reconsider past decisions. The review project had been postponed repeatedly, he said, because the Committee was waiting for congressional action on a bankruptcy reform bill. Ultimately, with respect to the reaffirmation agreement, he said, the Committee decided to proceed with a Director's form that could be modified quickly if Congress enacted different requirements for those agreements. The Committee also had received a number of complaints about the Proof of Claim form since it had last been revised in 1994, he said. Judge Duplantier encouraged Mr. Adelman to contact Judge Small about joining the Forms Subcommittee. Judge Duplantier also noted that, as chairman of the Subcommittee on Privacy and Public Access, Mr. Adelman would be working in coordination with the Forms Subcommittee on a review of the official forms at the request of the Bankruptcy Administration Committee. [See below.]

Subcommittee on Privacy and Public Access. Mr. Adelman described the alternative approaches discussed by the subcommittee during the summer. He said the subcommittee's consensus was to "go slow" and allow the fundamental policy to develop, as rules must follow policy rather than make it. At least five other Judicial Conference committees also are studying the issue, but have not concluded their work, he said. The bankruptcy system is limited in the restraints it can apply, he added, because the Bankruptcy Code itself requires disclosure of a debtor's Social Security number on certain documents. He noted also that the executive branch is conducting a study of the financial privacy of individuals in bankruptcy cases, the report of which is due at the end of the year.

Mr. Orr stated that the EOUST is one of the three executive branch offices conducting the study of privacy in bankruptcy cases and added that the deadline for the public to submit comment had been extended by two weeks to permit more persons to participate. He added that several dozen bills touching on privacy issues had been introduced in the current Congress, indicating a high level of public interest in the subject. Judge Duplantier added that the proposed bankruptcy reform legislation, which contrastingly would require debtors to disclose even more "private" financial information than in the current forms, shows that the issues are far from

settled. Mr. McCabe noted that policies may need to be different for different types of court records. For example, he said, it may be that criminal case records will not be placed on the Internet. He also pointed out that the policy that documents filed with the court are public trumps other policies more protective of privacy, so that information that is confidential while in the custody of the executive branch, particularly the medical records in Social Security disability cases, could be placed on the Internet if the case is appealed to the courts. He said legislation, perhaps authorizing the Judicial Conference to establish policies, may be needed to resolve the problem.

Judge Walker urged the Committee to consider all alternatives. Re-examining the official forms with the intent of eliminating requests for information that is not needed may not prove fruitful, he said. The trustee and other parties in the case need the information. The Bankruptcy Code, however, provides that any document filed with the clerk is a public record, and from that statutory policy follows the widely accepted idea that anything filed ought to be available on the Internet. An alternative, he said, might be to revamp the process of who gets what information in a bankruptcy case. A list of creditors and a reduced amount of other information might be filed with the clerk and the debtor's duty to supply the rest be modeled after civil discovery. Although the disclosures would occur away from the court, he said, there would need to be rules governing the process. The idea might not be a good one, ultimately, but it should be examined, he said.

The chairman asked whether the Committee supported the idea of reviewing the official forms from a privacy standpoint. Professor Resnick said the Bankruptcy Administration Committee had discussed privacy at length at its meeting and made some recommendations, including requests to the Committee for a review of the official forms. Judge Krieger added that the Bankruptcy Administration Committee members had expressed concern not only for the privacy of debtors but also for the privacy of third parties, such as patients in a medical facility, whose names may appear in the information submitted by a debtor. Professor Resnick noted that the Committee had taken the lead in proposing amendments to facilitate electronic filing and is uniquely situated again to lead the search for solutions to the problems created in part by electronic filing. He noted that the Bankruptcy Administration Committee had recommended specifically that the Committee consider altering the forms to require disclosure of only the final four digits of a debtor's Social Security number. He suggested moving without further consideration toward publishing for comment revised official forms that would require disclosure only of the final four digits of a Social Security number, customer number, or account number. Comments provided by interested parties such as creditors, debtor advocates, and persons concerned with privacy issues generally would indicate whether the proposal is a useful one, he said. Other members spoke in support of this proposal.

Judge Walker said he would add that it should be made clear that the full Social Security number must be disclosed to any party in interest upon request. **A motion to 1) publish for comment proposed amendments to the official forms restricting the disclosure of Social Security and customer or other account numbers to the last four digits of the numbers, and 2) directing the relevant subcommittees to review the official forms generally with a view**

toward removing information from automatic disclosure with the understanding that it remains discoverable, passed without opposition. Judge Krieger asked the subcommittees to keep in mind the privacy interests not only of debtors but also of third parties, and a member requested the privacy subcommittee to consider recommending that the Committee officially support the Bankruptcy Administration Committee's proposal to request an amendment to § 107(b) of the Bankruptcy Code to permit a bankruptcy judge to provide protection from disclosure based on privacy concerns.

Proposed Rule 7007.1. The Reporter introduced the proposed amendment and presented the background for it, a request from the Standing Committee and the Committee on Codes of Conduct. The proposed amendment would require any nongovernmental corporate party in an adversary proceeding to file with the party's first pleading a statement disclosing the party's corporate parents and the identity of any publicly held company that owns ten percent or more of the party's stock. A companion amendment to Rule 9014 would extend the disclosure obligation to parties in contested matters. The appellate, civil, and criminal advisory committees already have proposed similar amendments, and the Reporter pointed out the differences between the draft before the Committee, which was offered on behalf of the Subcommittee on Attorney Conduct, Including Rule 2014 Disclosure Requirements, and the proposals of the other advisory committees.

Professor Morris noted that the draft does not require the debtor to file with the petition a statement containing disclosures required of other parties. The subcommittee's rationale, he said, was that the judge does not have to act in a bankruptcy case until some matter actually comes before the judge in the form of a motion or adversary proceeding. The Chairman said he believes the judge should have the information about a debtor's corporate parents and ownership by other publicly held companies at the inception of the case. A member said it also would be more efficient for the debtor to file the disclosure with the petition, as doing so would save having to repeat the procedure each time the debtor is involved in an adversary proceeding or contested matter during the case. **There was a consensus that disclosure by the debtor should be required at the inception of the case.** The Chairman said the Committee should use its best judgment about whether to require more disclosure than recommended by the Committee on Codes of Conduct, so long as there is a good bankruptcy reason for doing so. Mr. McCabe and Mr. Rabiej both observed that, while the Standing Committee seemed to support the idea of permitting courts to expand the scope of required disclosure through local rules, the Committee on Codes of Conduct does not.

Professor Resnick suggested putting any new rule in Part IX of the rules, so that it would apply to all proceedings, and others suggested that the requirement to file the statement with the petition be added to Rule 1007, with the information reported on Exhibit "A" to the petition. Professor Klee asked for the Committee's views on whether the disclosure of holdings should be of all types of stock or only of common. In his opinion, preferred stock is more like debt, he said, and might not need to be disclosed. Judge Duplantier said the value of preferred stock could be affected by rulings in the case, and Mr. Rosen pointed out that preferred stock also can

be converted to common. The purpose of the rule is to disclose whether another company owns part of the debtor. Mr. Rosen said the principle is the same, regardless of the type of stock , and the rule should require disclosure of stock of any class. After further discussion, **the consensus was that the ten percent should apply either to any class or to the aggregate**, in order to ensure that, for example, a debtor or other party would have to disclose the identity of any company that holds five percent of the debtor's or other party's common stock and five percent of the debtor's or other party's preferred stock. **It also was the consensus that disclosure should be required of any company that "directly or indirectly owns" the threshold percentage of stock.**

The draft rule restricts disclosure to ownership interests of "publicly held" companies. Mr. Adelman, however, said that many companies that are not publicly traded but have more than 500 shareholders and must report to the Securities and Exchange Commission as if they were publicly traded. He suggested the disclosure requirements should apply to them. The Committee also discussed whether the debtor or other party also should disclose its ownership interests in subsidiaries. The draft rules being proposed by the other advisory committees require disclosure only of parents. Mr. Rabiej said the reason stated for this narrowing of the scope of disclosure was that most of the problems that have arisen came about because the judge did not have access to the relevant information. Information about corporate parents, he said, does not appear to be readily available, although information about subsidiaries, apparently, is available. The Chairman suggested that the matter of subsidiaries be researched empirically and discussed with the other advisory committees.

Mr. Rabiej said he would send to the Committee members copies of the comments the other advisory committees receive in response to their published drafts. Many members supported the idea of going beyond the scope of the proposals made by the other advisory committees, but the Chairman cautioned that the Committee should not extend the rule without a good reason.

Judge Walker raised the problem of compliance that a small town collection lawyer for a large national bank might face under the draft rule. The local lawyer would not have the information that needed to be disclosed, and, even when the information were available, it would not be economical or efficient to require the same document to be filed in the many tens of motions for relief from stay filed on behalf of a large national creditor by its local counsel. He suggested that the Committee provide for some alternate method of compliance to cover the small town/big bank situation.

The Committee recommitted the matter to the subcommittee with instructions to present a new draft reflecting the above discussion at the March 2001 meeting.

Rule 3015. The Reporter introduced the proposed amendment. The intent of the proposal was to relieve the clerk of the expense of mailing each chapter 13 debtor's plan to creditors or, if the plan is not filed with the petition, of mailing two notices, as well as the plan.

A second rationale was to afford creditors the benefit of the full plan in those jurisdictions that substitute a summary of the plan in the notice of the confirmation hearing, all as part of the initial notice of the filing of the case and meeting of creditors. The summary must be very brief to fit on the notice and rarely provides meaningful information about the terms of the plan. A member commented that the complete plan would be available on the Internet in a court that either accepted filings electronically or scanned all paper documents. Another said there did not appear to be any reason to impose the additional cost of mailing the plan on the debtor. The Reporter indicated that there did not appear to be any demand for the amendment beyond the clerk who had requested it. **A motion to take no action was unopposed.**

Rule 2002(h). The Reporter introduced the proposal, which would permit a court in a chapter 12 or chapter 13 case to cut off notices to any creditor who had not filed a timely proof of claim. Rule 2002(h) already permits the cessation of notice in a chapter 7 case to any creditor who has not filed a timely proof of claim. The proponent of the suggested amendment had noted that the Bankruptcy Code had been amended to add late filing as a ground for disallowance of a claim in a chapter 13 case and advocated an extension of the chapter 7 rule on that basis. The Reporter said the statutory change only made a late-filed claim subject to objection, not disallowed automatically. He said there may be further reasons not to amend the rule, most importantly the likelihood that an event affecting the creditor may occur late in the case, such as conversion to chapter 7. **A motion to leave the rule unchanged was unopposed.**

Fraudulent Service of Pleadings/Altered Bar Coding of Zip Codes. After discussion, the **consensus was that the problem described could not be solved by rule, and the Committee would take no action.**

Information Items

Technology Subcommittee. Judge Cristol reported that he and Judge Donald had conferred by telephone and had concluded that the most important technological issue is the one already discussed by the Committee in another context -- that of individual privacy in the context of bankruptcy case files being available on the Internet. He said the subcommittee members had many questions but no answers on this issue. He added that Judge Donald's law clerk is one of the authors of an article titled "Privacy in the Federal Bankruptcy Courts" published in the current issue of the Notre Dame Journal of Law, Ethics & Public Policy, copies of which he had distributed at the meeting. In addition, he said, the spread to all the courts of the judiciary's new Case Management/Electronic Case Files project would raise for the Committee's consideration many provisions in the rules that might either be amended or reinterpreted in an electronic environment. Judicial Conference approval of a policy, supported by the Committee, to encourage each court to publish its local rules on a website, is a very positive step, he said.

Federal Judicial Center Activities. Mr. Niemic referred the Committee to the update in the agenda book on the FJC's project to collect information about various forms of electronic and digital evidence to assist judges in assessing their admissibility and to evaluate the need for rules

changes to accommodate these new forms of evidence. He noted that, although the project encompasses all federal trial courts, it is being directed by Beth Wiggins, who formerly worked with the Committee, and that a bankruptcy judge is a member of the advisory committee for the project.

In addition, he said, Ms. Wiggins is in the process of updating a table originally developed in 1995 showing how bankruptcy courts had reacted to the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure, in particular, those courts which had opted out of the mandatory disclosure and pre-hearing meeting requirements. On December 1, 2000, he noted, the 1993 authorization for opting out will be withdrawn as new amendments take effect. The updated table was not yet complete, he said, but Ms. Wiggins had provided copies showing as much current information as she had available for the meeting. Copies of the completed table would be mailed to the Committee about one month following the meeting, he said.

A member asked how the amendments to Rule 26 would affect bankruptcy proceedings. Professor Resnick responded that the amended rule would be incorporated by reference as Rule 7026 and would apply in adversary proceedings. With respect to contested matters, he said, Rule 9014 states that Rule 7026 applies in contested matters "unless the court orders otherwise." It is an open question, he said, whether the phrase "unless the court orders otherwise" authorizes a court to adopt a local rule opting out of Rule 7026 in contested matters. The Chairman said those contested matters that resemble civil litigation should be governed by the amended Rule 26, which will bring significant changes also to the many district courts that opted out under the 1993 amendments.

Administrative Matters

Judge Small greeted the Committee by telephone during the September 22 session and said he looked forward to working with the members over the next three years. He expressed regret that he was unable to attend the meeting in person.

Judge Duplantier referred the Committee to the list of subcommittees and their members in the meeting agenda book and noted that many vacancies will occur due to expiring terms. He suggested that members discuss their subcommittee preferences with Judge Small, who would be making the needed appointments.

Judge Duplantier closed the meeting by thanking the Committee members and staff for both their work and their friendship over the years. He said his experiences with the Committee had been among the most pleasurable of his career.

The Committee selected September 13 - 14, 2001, as the dates for its next fall meeting and discussed several West Coast locations as possible meeting sites.

Respectfully submitted,

Patricia S. Ketchum