MINUTES OF THE JUNE 1965 MEETING OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The eighth meeting of the Advisory Committee on Bankruptcy Rules convened in the Supreme Court Building on June 17, 1965, at 9:30 a.m.

The following members were present during the session:

Phillip Forman, Chairman
Edwin L. Covey
Edward T. Gignoux
G. Stanley Joslin
Norman H. Nachman
Charles Seligson
Roy M. Shelbourne
Estes Snedecor
George M. Treister
Elmore Whitehurst
Frank R. Kennedy, Reporter
Morris G. Shanker, Associate Reporter

Professor Stefan A. Riesenfeld was unable to attend the meeting.

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professors James W. Moore and Charles A. Wright, members of the standing Committee on Rules of Practice and Procedure; William E. Foley, Royal E. Jackson, and Joseph F. Spaniol, Jr., of the Administrative Office.

Judge Forman opened the meeting by welcoming the members and guests and introduced Professor Shanker who was attending for the first time. He further announced the Subcommittee on Style had met in March. The following matters were placed before the Committee for consideration:

Agenda Item No. 1 - Publication of an Interim Set of Rules and Forms

Professor Kennedy presented a list of 66 items which are on the shelf and stated that in his opinion only very few were of the nature which he considered urgent enough to be sent to the standing Committee at this time in the event the Committee decided to send forth a packet. He stated that the Subcommittee on Urgent Matters, consisting of Referees Whitehurst and Snedecor, appointed at the November meeting to decide from the referees' standpoint the urgency of matters on the shelf, would report.

Referee Whitehurst stated that in his opinion the matters placed upon the shelf were not of great urgency, but he thought it would be well to pass them along to the standing Committee rather than hold them until a

final set of rules could be presented. However, he stated he would be perfectly willing to hold off on the presentation to the standing Committee if it were the consensus of the Committee to do so as he realized the present rules were still working very well. He further suggested to the Committee that both he and Referee Snedecor would find it helpful if they could discuss the proposed rules with other referees in bankruptcy to get their opinions on the workability of some of the more controversial issues. However, he stated that he had not discussed the substance of any rule with anyone inasmuch as the material was considered confidential until released by the standing Committee. Referee Snedecor stated that he did not feel there was any urgency about releasing the matters on the shelf and thought the purpose would be better served by waiting until a full set of rules were ready. He felt that in light of the new legislation the Committee should not feel obliged to submit rules at this time, particularly inasmuch as the topic of merging with the Federal Rules of Civil Procedure was on the

present agenda.

After consideration of Referee Whitehurst's suggestion for permission to discuss the substance of the rules with other referees, the Committee decided that this was permissible insofar as general substance was concerned, but that no particular rule in its ~~xxxxxx~~ drafted form should be disclosed. The Committee further decided, subject to any later decision made during the present meeting, not to send the rules on the shelf to the standing Committee at this time but to continue its work with the prime objective of presenting to the Supreme Court a set of comprehensive rules.

Item 1-B - Drafts for the Shelf

Professor Kennedy stated there were a couple minor matters which had to be discussed in the drafts for the shelf. The first item being that of Form No. 1 E, Schedule A - Statement of All Debts of Bankrupt or Debtor. Professor Kennedy called attention to Item b (1) where the Committee had added "Bankrupt's or debtor's social security or employer identification number," in response to a request from the Director of the Collection

Division of the Internal Revenue Service. The Director of the Collection Division had further suggested that two blank lines, rather than one, were necessary as some people have both a social security number and an employer's identification number. Professor Moore suggested that consideration be given to the housewife who would have neither a social security number nor an employer's identification number. After discussion, the Committee decided that Item b(1) should read as follows:

> To the United States.
> Bankrupt's or debtor's social security
> or tax identification number .....

Professor Kennedy also stated that on the partnership petition there is a partnership's identification number, making possible two numbers for each partner. He plans to add to the first paragraph of the Official Form for Joint Petition of Partnership the employer's identification number and to word it in such a manner to read as follows:

> The employer's identification number and
> social security or tax identification number
> of each partner is as follows .....
> .....

Professor Kennedy was asked to take care of the matter.

Referee Snedecor brought up a matter concerning Form No. 2, Statement of Affairs for an Individual, where Item 7(a) requests information on what proceeding had been brought by or against the individual within a period of 6 years. Referee Snedecor pointed out that this should not be limited to 6 years. After discussion, the Committee agreed with Referee Snedecor's suggestion and approved the following terminology for Item 7(a):

> "What proceedings under the Bankruptcy Act have previously been brought by or against you? ..... (State ..... the location of the bankruptcy court, the nature and number ..... of each proceeding, the date when it was filed, and whether ..... a discharge was granted or refused, or whether the ..... proceeding was dismissed, or whether a composition, ... arrangement or plan was confirmed.)

It was noted that the change should also apply to Item 9.

At this point Professor Seligson asked for clarification on a point of order, as to whether the items, after having been placed on the shelf, could be recalled for further consideration if deemed advisable. The Chairman replied affirmatively that this could be done.

There being no further discussion of the matters for the shelf as itemized in the Reporter's Memorandum, dated May 24, 1965, and entitled Drafts for the Shelf (Fourth Packet), they were ordered to the shelf.

Item 1-C - Solicitation and Voting of Proxies

Professor Kennedy stated this rule had been approved by the Subcommittee on Style but there were several matters for consideration of the full Committee before it could be placed upon the shelf. The first being the definition of "solicitation" in paragraph 1(b) which had been revised to exclude the request for a proxy made by an attorney to the owner of a claim who originally sought the services of the attorney. The second matter was a recommendation that a provision be added in paragraph (3)(b) for solicitation of acceptances to take care of the deletion of paragraph (2)(c) ordered by the Committee at its November meeting. After discussion, the Committee approved the Reporter's suggestions concerning

the definition of "solicitation" and the addition to paragraph (3)(b).

Professor Kennedy also presented a draft for Solicitation of Acceptances and explained it is a revision of Section 176 and that the Note for this rule would have a reference to this. He further stated that the rule on Solicitation of Acceptances will not apply to the solicitation of any proxy to accept a plan or arrangement.

Judge Gignoux inquired whether by the fact that the rule states affirmatively that a debtor may solicit acceptances it is also implying that no one else can. Professor Kennedy felt that the draft clearly states this rule shall not apply to solicitation of any proxy to accept a plan or arrangement and that therefore the general rule would not apply. Judge Gignoux agreed that the general solicitation rule does not apply but felt it was arguable as to whether the attorney for the debtor could properly solicit acceptance of a plan under Chapter XIII. Mr. Treister suggested that the terminology read "by or on behalf of his attorney." Mr. Nachman suggested that the words "by the debtor" be stricken. Professor Moore

questioned whether the opposite side should be dealt with in solicitation or rejection upon acceptances. Mr. Nachman said this had occurred to him but he had come to the conclusion that it was not necessary to insert a provision to protect objecting creditors. After discussion of the rule, the Committee approved the Reporter's draft in the Deskbook for the meeting entitled Enclosure (2), Solicitation of Acceptances, with the deletion of the words "by the debtor." Professor Seligson inquired whether any consideration had been given to Section 203 with regard to solicitation of acceptances if the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith. Professor Kennedy stated that he had not undertaken to deal with this nor with Section 212. After further discussion of Enclosure (2), the Committee decided that it should remain off the shelf for further consideration subject to the implication of Sections 203 and 212 and whether any parts thereof should apply to Chapter XI and XII.

Professor Kennedy called attention to paragraph (5) of Enclosure (1), Solicitation and Voting of Proxies, and stated that this paragraph does not permit a referee to reject a proxy for any reason without affording

the proxyholder a hearing, regardless of how insufficient the proxy is. He stated that he was troubled about the words "after opportunity for hearing." Mr. Nachman suggested deletion of the words "opportunity for" and to merely indicate that "after hearing the court may reject ....." Mr. Nachman further stated that he was satisfied with the present terminology and his suggestion was just to alleviate the problem of concern. Judge Gignoux suggested the sentence be changed to read "After such hearing as may be appropriate, the court may reject any proxy for cause, vacate any order entered in consequence of the voting of any proxy which should have been rejected, or take any other or further appropriate action." The Committee adopted Judge Gignoux's suggestion by ordering deletion of the words "After opportunity for hearing," and insertion therefor the words "After such hearing as may be appropriate."

Professor Kennedy called attention to the difficulty of commenting in the Note on the provisions of the rule dealing with solicitation by attorneys and by the attorney who is also a creditor. He wondered

if it deals with substantive rights. He stated the rule does not prohibit solicitation by atterneys at law; it simply declares a canon of construction that forbids any reading of the rule to permit such solicitation.

After discussion of this matter, Mr. Nachman moved that the rule be worded in such a manner as to prohibit lawyers from solicitng claims even when they are creditors of the bankrupt or debtor. In effect, to leave paragraph (3)(a)(4) as presently stated. The motion was seconded and carried.

Professor Kennedy called attention to paragraphs (4) (d), (e), and (f) stating that (d) deals with a statement by the proxyholder and any other person, (e) deals with a case where a proxy was lifted by a person other than the proxyholder, and (f) deals with proxy forwarded to holder by person who was neither solicitor nor owner and there would have to be a statement signed and verified by the forwarder about there being no agreement for payment of consideration for the sharing of compensation.

He also stated the word "officer" near the end of each clause is troublesome as the word "officer" as defined in the Bankruptcy Act indicates as trustee. He was dubious as to whether the Committee ought to be undertaking to forbid agreement between the proxyholder and the owner of the claim as to who should be trustee. After discussion, the Committee approved deletion of the words "officer or" in subdivisions (d), (e), and (f).

Attention was called to the disavowals of any agreement for the sharing of compensation required by the same paragraphs of subdivision (4) may run into conflict with the proviso of section 62c. That proviso qualifies the general prohibition of that subdivision on compensation-sharing agreements to give explicit approval to sharing of compensation by an attorney at law with a law partner or a forwarding attorney at law. Professor Kennedy thought it may be necessary to revise the draft to require statements of the facts concerning any compensation-sharing agreements that have been made. He felt the rule is requiring people

to make a statement that there is no agreement, when the agreement may be valid. Judge Shelbourne suggested a statement as to whether there is any agreement and if so the particulars thereof between the proxyholder. Professor Seligson suggested that the provisions of 62c be included but that no specific reference be made to §62c.

Judge Gignoux suggested that a paragraph be added as to whether there is any agreement and if so the particulars thereof between the proxyholder and any other persons for the payment of consideration in connection with voting a proxy, for the sharing of compensation with any other person other than a law partner which may be allowed the trustee or any persons for services rendered in a proceeding or for the employment of any person as attorney, accountant, appraiser, auctioneer, or other employee for the estate with comparable changes to be made in (e) and (f). Judge Gignoux's motion was seconded and carried.

Professor Kennedy pointed out that the Note does not raise or undertake to answer the question whether this rule is one of practice and

procedure or the question of how the solicitation regulated here may differ from the solicitation considered by the court in the Brotherhood of Railway Trainmen v. Virginia ex rel Virginia State Bar and in NAACP v. Button.

Professor Moore inquired whether his assumption taken from the Note was correct that this rule will apply in railroad reorganization cases as he thought some consideration should be given to the Interstate Commerce Commission in this rule. He stated that groups of 25 and under can do a great many things in the way of solicitation whereas there may be a specialized problem with regard to ICC. Professor Kennedy inquired whether Professor Moore thought the Committee should accept Section 77 on this or whether it should try to sell ICC on the idea. Professor Moore thought Section 77 should be accepted and that if there are many railroad reorganization cases there should be a complete overhaul of Section 77 to eliminate the ambiguities and to improve upon the solicitation subdivision. After discussion, the Committee adopted the suggestion that a provision

be added to paragraph 3(b) that this rule does not apply to solicitation of any proxy in proceedings under Section 77. The Reporter was asked to take care of this and to make a reference in the Note explaining why this was being done. The Rule on Solicitation of Proxies was ordered to the shelf subject to the drafting to be done by the Reporter.

Item 4. Payment of Moneys Deposited

The Reporter stated this was considered at the November meeting of the Committee and further considered at the meeting of the Subcommittee on Style. The two drafts presented in the Deskbook are revisions for consideration of the full Committee. Enclosure (1) adheres closely to the draft approved at the November meeting; the principal changes being those required to adapt the rule for application in debtor relief proceedings. Enclosure (2) was approved by the Subcommittee on Style and differs from Enclosure (1) in that it would eliminate the countersignature requirement except that it may be imposed by local rule.

Professor Seligson moved that the countersignatur f the referee be eliminated except as local rule requires. The motion was seconded and approved by a vote of 7 in favor of the motion to 1 opposing it.

The matter of keeping the record was then brought up. The consensus was that the record on the check was outmoded and unnecessary. After discussion several methods of keeping the record, Referee Snedecor stated that inasmuch as the countersignature was done away with that General Order 29 was unnecessary. After discussion of any further usefulness of this General Order, Referee Whitehurst moved that General Order 29 be abrogated, having in mind there will be ultimately a codification of Rule 47. The motion was seconded and carried with one dissenting vote which was cast by Referee Snedecor. His reason as stated was that he felt there may be repercussions from elimination of the countersignature. It was noted that the abrogation of General Order 29 will be placed on the shelf until the rules are sent up to the standing Committee.

Item 2 - The Feasibility of Unifying Bankruptcy and Civil Procedure

Professor Kennedy stated that in regard to the matter of unifying bankruptcy rules with those of Civil Procedure he had hoped to have available for this meeting a complete set of alternative proposals accommodating this objective but that because of the time element he had been unable to complete the work. He had, however, prepared alternatives on many of the rules. It was his thought that the Committee would have to start out with the goal of seeing how far it is practicable and possible to unify the Civil Procedure with their work. If this were attempted he felt the Committee should undertake to make the Federal Rules of Civil Procedure directly and unqualifiedly applicable to bankruptcy procedure as far as possible. He discussed the possibility that as the work progresses the Committee may find this impractical.

After a great part of the discussion of the meeting being centered on the subject of the practicability of unification, the consensus of the Committee was that the best approach to take is to start with a

revision of the bankruptcy rules by writing a separate set of rules first, one section of which shall relate to adversary proceedings and will say in substance that the Federal Rules of Civil Procedure will apply to adversary proceedings. After this is done it will be decided whether this section relative to adversary proceedings can be removed from the separate set of bankruptcy rules and adopted into the Civil Procedure. The Committee thought this approach better than trying to start with the Civil Rules and integrating the bankruptcy rules as several years work could be given to this only to find that integration was not feasible.

It was also pointed out that the problems of bankruptcy practice differ from those of the Admiralty practice, which had successfully been unified with the Rules of Civil Procedure, inasmuch as the greatest percentage of the practice concerns adversary proceedings whereas the greatest percentage of the bankruptcy practice is nonadversary proceedings.

Item 3-B - Housekeeping Rules and Forms to be Prescribed by the Director of the Administrative Office

Professor Kennedy presented a draft rule to give the Director of the Administrative Office authority to prescribe housekeeping or administrative rules and forms under the delegation of authority previously adopted by the Committee. He felt that if the Committee should decide to send up an interim set of rules that this would enable the Director to abrogate several forms which the Committee had acted upon. Several editorial changes were recommended for the proposed draft such as in the third line the words "housekeeping rules" be changed to "administrative and fiscal regulations" and that in subparagraph (1) the words "housekeeping rules" be changed to "regulations." Referee Whitehurst expressed concern about using the term "fiscal" and moved that the Committee not approve this rule but to keep it under advisement.

Professor Moore suggested that it would be fruitful to decide how much of the Bankruptcy Act is to go into the Bankruptcy Rules. Many suggestions were given to the Reporter for guidance along this line.

One suggestion made was to deplete the Bankruptcy Act of all procedural matters that could be included in the rules and to leave only substantive matters, therefore exercising the Committee's powers to the utmost. Judge Maris stated that he thinks this is the golden opportunity for the Committee to embrace to the fullest degree the opportunity Congress has given and that if it is not done at this time it may mean that some authority will have to be given up.

The matter of sending any items up to the standing Committee for its meeting on June 28th was again fully discussed by the Committee and it was the consensus of the Committee that nothing be sent up at this time but that work should continue along the lines of preparing a definitive set of rules to be recommended.

The Committee decided that a resume of the Committee's work will be presented to the standing Committee on June 28, 1965, in a statement, consisting of a few pages, reviewing the work and the plans for the future. There

will be annexed copies of the minutes of the meetings and the four packets of materials which are on the shelf.

The Committee decided upon the date of Wednesday, January 5, 1966, through Saturday noon, January 8, 1966 for the next meeting.

There being no further business, the meeting was adjourned at 2:30 p.m.