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

FROM: Honorable A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules

DATE: May 15, 2001

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on March 15-16, 2001, in New Orleans, Louisiana. The Advisory Committee considered public comments regarding proposed amendments to the Bankruptcy Rules that were published in August, 2000.

The proposed amendments published in 2000 include revisions to seven Bankruptcy Rules (Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027). Also proposed were a new rule, Rule 1004.1, and amendments to Official Form 1. The Advisory Committee received twenty-four written comments on the proposals. Several of the comments were offered on behalf of groups, including bankruptcy judges from several districts, the Commercial Law League of America, the National Bankruptcy Conference, the Insolvency Committee of the State Bar of California, Committees of the Association of the Bar of the City of New York, and Bar Association Committees from Detroit and the State of Michigan.

A public hearing was held in Washington, D.C. on January 26, 2001, to consider the proposals. Four witnesses were scheduled to testify at the hearing, but Judith Greenstone-Miller, Esq., was unable

to attend. Judy B. Calton, Esq., testified in place of Ms. Greenstone-Miller. Ms. Calton's testimony was offered on behalf of the Commercial Law League (for Ms. Greenstone-Miller), and on behalf of the Committees of the State Bar of Michigan and the Detroit Metropolitan Bar Association. Robert A. Greenfield, Esq., testified on behalf of the National Bankruptcy Conference. Professor Todd Zywicki of George Mason University School of Law testified in his personal capacity at the public hearing.

At the March 2001 meeting, the Advisory Committee considered the written comments and the testimony presented at the public hearing. The Advisory Committee approved each of the proposed amendments to the rules and will present them to the Standing Committee at its June 2001 meeting for final approval and transmission to the Judicial Conference. The Advisory Committee also will present amendments to Official Forms 1 (Voluntary Petition) and 15 (Order Confirming Plan) to the Standing Committee for final approval and transmission to the Judicial Conference.

The Advisory Committee also approved a preliminary draft of proposed amendments to Bankruptcy Rules 1007, 2003, 2009, 2016, and 7007.1, and will present them to the Standing Committee at its June 2001 meeting with a request that they be published for comment. The Advisory Committee also approved a preliminary draft of proposed amendments to Official Forms 1 (Voluntary Petition), 5 (Involuntary Petition), and 17 (Notice of Appeal), and will present them to the Standing Committee at its June 2001 meeting with a request that they be published for comment.

II. Action Items

A. Proposed Amendments to Bankruptcy Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, Proposed New Rule 1004.1, and Proposed Amendments to Official Forms 1 and 15 Submitted for Final Approval by the Standing Committee and Transmittal to the Judicial Conference.

1. *Public Comment.*

   The preliminary draft of the proposed amendments to the Federal Rules of Bankruptcy Procedure and related committee notes were published for comment by the bench and bar in August 2000, and a public hearing on the preliminary draft was held on January 26, 2001. Three persons testified at the public hearing held in Washington, D.C.

   There were twenty-four written comments received concerning the proposed amendments to the rules. These comments, and the testimony provided at the public hearing are summarized on a rule-by-rule basis following the text of each rule set out below. The Advisory Committee reviewed these comments and the testimony, and made several revisions to the published draft. The post-publication revisions are identified under the heading Changes Made After Publication and Comments.

2. *Synopsis of Proposed Amendments:*

   (a) Rule 1004 is amended to clarify that the rule implements § 303(b)(3)(A) of the Bankruptcy Code and is not intended to establish any substantive standard for the commencement of a voluntary case by a partnership.

   (b) Rule 1004.1 is added to set out the manner in which a case is commenced on behalf of an infant or incompetent person. Rule 1004.1 is derived from Rule 17(c) F.R. Civ. P.

   (c) Rule 2004 is amended to clarify that an examination ordered under that rule may be held outside of the district in which the case is pending. The court where the examination will be held issues the subpoena, and it is served in

the manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016. Moreover, the rule makes clear that an attorney authorized to practice either in the court in which the case is pending or in the court for the district in which the examination will be held may issue and sign the subpoena on behalf of the court for the district in which the examination will be held.

(d) Rule 2014 is rewritten to make the rule conform more closely to the applicable provisions of the Bankruptcy Code and to make stylistic changes. The rule will require the disclosure of all connections that professionals seeking employment have with the debtor. The professionals also must disclose any connection that might cause the court or interested third parties reasonably to question the propriety of the employment. It also sets out service requirements for the application.

(e) Rule 2015(a)(5) is amended to conform to 28 U.S.C. § 1930(a)(6), which was amended in 1996.

(f) Rule 4004(c) is amended to provide that the filing of a motion under § 707 of the Bankruptcy Code to dismiss a case postpones the entry of the discharge. Currently, only motions brought under § 707(b) postpone entry of the discharge.

(g) Rule 9014 is amended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, to the list of Rules applicable in contested matters. It is also amended to permit service of papers, other than the initial motion, under Rule 5(b) F.R.Civ.P. Subdivision (d) is

added to clarify that testimony regarding material disputed factual matters is to be taken in the same manner as in an adversary proceeding. Subdivision (e) is added to address problems of local variation in procedures for the appearance of witnesses by requiring that the court provide a mechanism to enable attorneys to know whether the presence of a witness is necessary for a particular hearing.

(h) Rule 9027(a)(3) is amended to clarify that the time limits for filing a notice of removal of a claim or cause of action apply to any claim or cause of action initiated after the commencement of a bankruptcy case, whether the bankruptcy case is still pending or has been suspended, dismissed, or closed.

(i) Official Form 1 is the form of a voluntary petition, and it is amended to require the debtor to disclose ownership or possession of property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety.

(j) Official Form 15 is the form of an order confirming a plan, and it is amended to conform to amendments to Rule 3020 that will take effect December 1, 2001.

3. *Text of Proposed Amendments to Rules 1004, 2004, 2014, 2015, 4004, 9014, and 9027, and Text of New Rule 1004.1*

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

Rule 1004. ~~Partnership Petition~~ Involuntary Petition Against a Partnership.

~~(a) *VOLUNTARY PETITION.* A voluntary petition may be filed on behalf of a partnership by one or more general partners if all general partners consent to the petition~~

~~(b) *INVOLUNTARY PETITION; NOTICE AND SUMMONS.*~~ After filing of an involuntary petition under § 303(b)(3) of the Code, (1) the petitioning partners or other petitioners shall ~~cause forthwith a copy of the petition to be sent~~ promptly send to or ~~served~~ serve on each general partner who is not a petitioner a copy of the petition; and (2) the clerk shall promptly issue ~~forthwith~~ a summons for service on each general partner who is not a petitioner. Rule 1010 applies to the form and service of the summons.

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*New material is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

Section 303(b)(3)(A) of the Code provides that fewer than all of the general partners in a partnership may commence an involuntary case against the partnership. There is no counterpart provision in the Code setting out the manner in which a partnership commences a voluntary case. The Supreme Court has held in the corporate context that applicable nonbankruptcy law determines whether authority exists for a particular debtor to commence a bankruptcy case. *See Price v. Gurney*, 324 U.S. 100 (1945). The lower courts have followed this rule in the partnership context as well. *See, e.g., Jolly v. Pittore*, 170 B.R. 793 (S.D.N.Y. 1994); *Union Planters National Bank v. Hunters Horn Associates*, 158 B.R. 729 (Bankr. M.D. Tenn. 1993); *In re Channel 64 Joint Venture*, 61 B.R. 255 (Bankr. S.D. Oh. 1986). Rule 1004(a) could be construed as requiring the consent of all of the general partners to the filing of a voluntary petition, even if fewer than all of the general partners would have the authority under applicable nonbankruptcy law to commence a bankruptcy case for the partnership. Since this is a matter of substantive law beyond the scope of these rules, Rule 1004(a) is deleted as is the designation of subdivision (b).

The rule is retitled to reflect that it applies only to involuntary petitions filed against partnerships.

Public Comment on Proposed Amendments to Rule 1004:

1. Patricia L. Meravi (Deputy Clerk, Bankr. D.N.J.) suggested that the Rule be moved to a subdivision of 1003 and that proposed Rule 1004.1 be renumbered Rule 1004 in order to avoid the use of extensions that may be misleading given the use of extensions for local rules.

Changes Made After Publication and Comments. No changes since publication.

Rule 1004.1. Petition for an Infant or Incompetent Person.

If an infant or incompetent person has a representative, including a general guardian, committee, conservator, or similar fiduciary, the representative may file a voluntary petition on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may file a voluntary petition by next friend or guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person who is a debtor and is not otherwise represented or shall make any other order to protect the infant or incompetent debtor.

COMMITTEE NOTE

This rule is derived from Rule 17(c) F.R. Civ. P. It does not address the commencement of a case filed on behalf of a missing person. *See, e.g., In re King*, 234 B.R. 515 (Bankr. D.N.M. 1999).

Public Comment on Proposed Rule 1004.1:

1. Patricia L. Meravi (Deputy Clerk, Bankr. D.N.J.) suggested that the Rule be renumbered as Rule 1004 and that the proposed amendment to current Rule 1004 (set out above) be moved to a subdivision of current Rule 1003 to avoid the use of extensions on the rule numbers that may be misleading given the use of extensions for local rules.

Changes Made After Publication and Comments. No changes were made.

Rule 2004. Examination

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(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTS ~~DOCUMENTARY EVIDENCE~~. The attendance of an entity for examination and for the production of ~~documentary evidence~~ documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled ~~in the manner~~ as provided in Rule 9016 for the attendance of a witness ~~witnesses~~ at a hearing or trial. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

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COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered under Rule 2004(a) may be held outside the district in which the case is pending if the subpoena is issued by the court for the district in which the examination is to be held and is served in the

manner provided in Rule 45 F.R.Civ.P., made applicable by Rule 9016.

The subdivision is amended further to clarify that, in addition to the procedures for the issuance of a subpoena set forth in Rule 45 F.R.Civ.P., an attorney may issue and sign a subpoena on behalf of the court for the district in which a Rule 2004 examination is to be held if the attorney is authorized to practice, even if admitted pro hac vice, either in the court in which the case is pending or in the court for the district in which the examination is to be held. This provision supplements the procedures for the issuance of a subpoena set forth in Rule 45(a)(3)(A) and (B) F.R.Civ.P. and is consistent with one of the purposes of the 1991 amendments to Rule 45, to ease the burdens of interdistrict law practice.

Public Comment on Proposed Amendments to Rule 2004:

1. Professor R. Joseph Kimble offered several suggestions on style matters for the rule.

2. Hon. Paul Mannes noted a typographical error in the published rule.

3. Guy Miller Struve, Esq., on behalf of the Association of the Bar of the City of New York and its Committees on Federal Courts and Bankruptcy and Court Reorganization, expressed general agreement with the amendments to Rule 2004(c).

Changes Made After Publication and Comments. The typographical error was corrected, but no other changes were made.

Rule 2014. Employment of a Professional Person.

~~(a) APPLICATION FOR AN ORDER OF EMPLOYMENT. An order approving the employment of attorneys, accountants, appraisers, auctioneers, agents, or~~

~~other professionals pursuant to § 327, § 1103, or § 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.~~

~~(b) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF ATTORNEYS OR ACCOUNTANTS. If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, or if a named attorney or accountant is employed, any partner, member, or regular associate of the partnership, corporation or individual may act as attorney or accountant so employed, without further order of the court.~~

(a) APPLICATION FOR ORDER APPROVING EMPLOYMENT. An application for an order approving the employment of a professional person under §327, §1103, or §1114 of the Code shall be in writing and may be made only by the trustee or committee. The application shall state:

(1) specific facts showing why the employment is necessary;

(2) the name of the person to be employed and the reasons for the selection;

(3) the professional services to be rendered;

(4) any proposed arrangement for compensation; and

(5) that, to the best of the trustee's or committee's knowledge, the person to be employed is eligible under the Code for employment for the purposes set forth in the application.

(b) STATEMENT OF PROFESSIONAL. The application shall be accompanied by a verified statement of the person to be employed, made according to the best of that person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, which shall state:

(1) that the person is eligible under the Code for employment for the purposes set forth in the application;

(2) any interest that the person holds or represents that is adverse to the estate;

(3) any interest in, relationship to, or connection the person has with the debtor;

(4) any interest, connection, or relationship the person has that may cause the court or a party in interest

reasonably to question whether the person is disinterested under § 101;

(5) any relationship the person has with the United States trustee, or with any employee of the United States trustee, for the region in which the case is pending;

(6) the information required to be disclosed under § 329(a) if the person is an attorney; and

(7) whether the person shared or has agreed to share any compensation with any person, other than a partner, employee, or regular associate of the person to be employed, and if so, the details.

(c) SERVICE AND TRANSMITTAL OF APPLICATION.

(1) The applicant shall serve a copy of the application on:

(A) the trustee;

(B) the debtor and the debtor's attorney;

(C) any committee elected under §705 or appointed under § 1102, or, if the case is a chapter 9 case or a chapter 11 case and no committee of

unsecured creditors has been appointed, on the creditors included on the list filed under Rule 1007(d); and

(D) any other entity as the court may direct.

(2) Unless the case is a chapter 9 case, the applicant shall transmit a copy of the application to the United States trustee.

(d) SERVICES RENDERED BY MEMBER OR ASSOCIATE OF FIRM OF EMPLOYED PROFESSIONAL. If the court approves the employment of an individual, partnership, or corporation, any partner, member, or regular associate of the individual, partnership, or corporation may act as the person so employed, without further order of the court. If a partnership is employed, a further order approving employment is not required if the partnership has dissolved solely because a partner was added or withdrew.

(e) SUPPLEMENTAL STATEMENT OF PROFESSIONAL. Within 15 days after becoming aware of any undisclosed matter that is required to be disclosed under Rule 2014(b), a person employed under this rule shall file a

supplemental statement, serve a copy on each entity listed in Rule 2014(c), and, unless the case is a chapter 9 case, transmit a copy to the United States trustee.

COMMITTEE NOTE

This rule has been rewritten to make stylistic changes and to make it conform more closely to the applicable provisions of the Code. Professionals seeking court approval of their employment must disclose any interest in, relationship with, or connection to the debtor. The professional also must disclose any interests, relationships, or connections that would cause the court or any party in interest reasonably to question whether the person is disinterested. The rule thus requires the professional to evaluate the need to disclose the information from the perspective of the court and other parties in interest. If the information would cause those persons reasonably to question whether the professional is disinterested, it must be disclosed. This permits the United States trustee and other parties in interest an opportunity to evaluate whether to oppose the application.

As with any disclosure requirement, the person obligated to make the disclosure must first determine whether the rule requires disclosure of the particular information in question. The information may be so unrelated to the issue that it is unnecessary to make the disclosure. Or, the information may identify a direct connection with an entity other than the debtor, but the connection may be de minimus. In either instance, the professional must make an initial determination whether to investigate for the existence of these connections, and, if they exist, whether there is a need to disclose the connections. Notwithstanding this initial determination by the professional, the court still makes the ultimate determination as to whether the employment is proper under the circumstances. Moreover, since the United States trustee and other parties in interest can be heard on these issues, a professional must not fail to disclose any known or believed connection that reasonably could place into question the professional's disinterestedness.

The rule also sets out the service requirements for the application for the approval of employment. There is no provision requiring a hearing on the application. In most cases, an order approving the employment will be entered without a hearing. The court may set a hearing sua sponte or on request or may vacate an order issued under the rule upon motion of an interested party.

The rule does not address the standards that courts should apply in ruling on an application for employment of a professional.

Public Comment on Proposed Amendments to Rule 2014:

1. Richard C. Friedman, Esq., Trial Attorney, Office of United States Trustee, asserted that the proposed rule places too much discretion in the professional seeking employment. He prefers the existing language of Rule 2014.

2. Leon S. Forman, Esq., considers the proposal a significant improvement over the existing rule. He also suggested that disclosure requirements be limited to materially adverse interests rather than simply adverse interests. He also called for a mechanism to make the court aware of any supplemental statements filed by the professional.

3. Hon. Paul Mannes (Bankr. D. Md.) suggests that the rule be amended to provide that the Office of the United States Trustee be "served" rather than have documents transmitted to that office.

4. Hon. Carolyn Dineen King (5th Cir.) asserted that the proposed amendments would place undue discretion in the professional to make decisions regarding the relevance and materiality of important information. Furthermore, the complexities of relationships among lenders and advisors, both nationally and internationally, is creating additional potential for conflicts. In her view, the proposed amendments would reduce the amount of information available to the court and third parties to evaluate the potential for conflicts. Therefore, she believes the existing rule is superior.

5. Judith Greenstone-Miller, Esq., on behalf of the Commercial Law League of America, did not state a specific position on the proposal. Nevertheless, her written comments expressed concern about the requirement that professionals undertake an affirmative inquiry to determine the propriety of their employment. She expressed concern that this might create a trap for the unwary who later are found to have conducted an insufficient inquiry. Generally, however, the comments she offered were favorable to the proposal.

6. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, supported adoption of the proposed amendment. He suggested that a potential ambiguity existed in the proposed Rule 2014(d) that would permit the employment of a partner of an employed professional when the partner is not himself or herself a professional.

7. Professor Todd J. Zywicki, George Mason University School of Law, argued that the existing rule is preferable to the proposed amendment. In his view, the amendment places too much discretion in the professional seeking employment. He also argued that the Rules should require greater disclosure than what might be required under the Bankruptcy Code in order to insure the efficient operation of and public confidence in the bankruptcy system.

8. Hon. Edith H. Jones (5th Cir.) stated that the proposed amendments will dilute the current disclosure requirements and unduly hinder both the courts and the United States Trustees in their efforts to monitor and maintain the integrity of the process of the employment of professionals in bankruptcy cases. She asserted that the elimination of the disclosure of all "connections" places the responsibility for determining the existence of adverse interests exclusively in the hands of the professional seeking the employment. Requiring greater disclosure would better enable the court to evaluate the propriety of any particular proposed employment.

9. Louis W. Levitt, Esq., found the preliminary draft to be a marked improvement over the existing rule. He suggested also that the rule be amended to include a statement describing the procedures the professional followed and investigation made in obtaining the

information concerning potential conflicts. He also suggested that the rule be amended to exclude disclosure of relationships with the United States trustee that are inherent in the regular practice of bankruptcy law in a region.

10. Joseph A. Guzinski, Esq., on behalf of the United States Trustee Program, argued that the existing rule is superior to the proposed amendments because it requires more complete disclosure of connections the professional has. Similarly, he argues that the professional should not be in the position to make relevancy determinations that are more properly seeded with the court and the United States trustee. Furthermore, he suggested deleting subdivision (b)(5) of the proposed rule that requires attorneys to disclose information required by Section 329(a) of the Bankruptcy Code.

11. The Insolvency Law Committee of the Business Law Section of the State Bar of California viewed the proposed amendment as generally desirable but suggested the insertion of a "good faith" safe harbor for professionals submitting applications for employment. The Committee found the rule generally acceptable but suggested that a person who conducts a conflict check in good faith and in accordance with customary practice should be protected from an order requiring disgorgement or denial of fees for services rendered under an employment order if subsequent information becomes available that leads to disqualification.

Testimony on Proposed Amendments to Rule 2014:

1. Judith B. Calton, Esq., testified on behalf of the Commercial Law League of America and the State Bar of Michigan Debtor-Creditors Rights Committee and the Detroit Metropolitan Bar Association Debtor/Creditors Section. She spoke generally in favor of the proposed rule. She noted that it is sometimes difficult, if not impossible, to identify all "connections" that a large law firm might have with creditors of the debtor. These "connections" must be disclosed under the current law, but compliance with the requirement is nearly impossible. She supported the proposed amendments to the rule that would narrow those reporting obligations.

2. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, also testified in support of the rule. He expressed surprise that others viewed the proposed amendments as likely to lead to professionals withholding information in order to gain employment when they are not otherwise eligible. In his view, professionals likely would continue to "overdisclose" in order to protect against the risk that a judge would ultimately conclude that the employment was improper and that fees should be returned.

3. Professor Todd J. Zywicki reiterated his position as set out in his written comments. During his testimony, he conceded that a number of "connections" that the current rule technically requires to be disclosed generally are not disclosed. He also agreed that those failures to disclose these connections would not violate the spirit of the rule. He was unable to offer a solution to the problem of drafting language that would require the disclosure of the information necessary for courts and third parties to reach a conclusion as to the propriety of the appointment of a professional in a case.

Changes Made After Publication and Comments.

Several comments on the published proposal included concerns that the disclosure standards would be eased under the new version of the rule. While others commented that the proposal would not operate in that manner, the rule was revised to address that issue. Subdivision (b)(3) in the published version of the rule required that the professional disclose any interest, relationship, or connection that might be relevant to a determination of disinterestedness. That provision is replaced by subdivisions (b)(3) and (4). Subdivision (b)(3) requires the professional to disclose all interests in, connections, or relationships the person has with the debtor. As regards interests, connections, and relationships with persons other than the debtor (or the United States trustee, see subdivision (b)(5)), the disclosure requirement is triggered if the information may cause a court or party in interest reasonably to question the person's disinterestedness.

This change is intended to clarify that the professional making the disclosure must evaluate interests, connections, and relationships from the perspective of the court and other parties in interest. The

disclosure obligation must ensure that interested parties have sufficient information to evaluate whether the person is disinterested, and the court must have the information to determine disinterestedness. Thus, even if professionals do not believe that a particular interest, connection, or relationship affects their disinterestedness, they still must disclose the information if it may cause the court or a third party reasonably to question the professionals' disinterestedness.

Subdivisions (b)(4) through (6) are redesignated as subdivisions (b)(5) through (7).

The Committee Note was amended to reflect the changes made in the text of the rule.

Rule 2015. Duty to Keep Records, Make Reports and Give Notice of Case

(a) TRUSTEE OR DEBTOR IN POSSESSION. A trustee or debtor in possession shall

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(5) in a chapter 11 reorganization case, on or before the last day of the month after each calendar quarter during which there is a duty to pay fees under 28 U.S.C. § 1930(a)(6), ~~until a plan is confirmed or the case is converted or dismissed,~~ file and transmit to the United States trustee a statement of ~~the~~ any disbursements made during ~~such calendar~~ that quarter and ~~a statement of the amount~~ of ~~the~~ any fees payable under ~~required pursuant~~

~~to~~ 28 U.S.C. § 1930(a)(6) ~~that has been paid~~ for ~~such~~ ~~calendar~~ that quarter.

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COMMITTEE NOTE

Subdivision (a)(5) is amended to provide that the duty to file quarterly disbursement reports continues only so long as there is an obligation to make quarterly payments to the United States trustee under 28 U.S.C. § 1930(a)(6).

Other amendments are stylistic.

Public Comment on Proposed Amendments to Rule 2015: There were no comments on the proposed amendments to Rule 2015.

Changes Made After Publication and Comments. No changes were made.

Rule 4004. Grant or Denial of Discharge.

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(c) GRANT OF DISCHARGE

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

(A) the debtor is not an individual,

(B) a complaint objecting to the discharge has been filed,

(C) the debtor has filed a waiver under § 727(a)(10),

(D) a motion to dismiss the case under ~~Rule 1017(c)~~ § 707 is pending,

(E) a motion to extend the time for filing a complaint objecting to the discharge is pending,

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending, or

(G) the debtor has not paid in full the filing fee prescribed by 28 U.S.C. § 1930(a) and any other fee prescribed by the Judicial Conference of the United States under 28 U.S.C. § 1930(b) that is payable to the clerk upon the commencement of a case under the Code.

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COMMITTEE NOTE

Subdivision (c)(1)(D) is amended to provide that the filing of a motion to dismiss under § 707 of the Bankruptcy Code postpones the

entry of the discharge. Under the present version of the rule, only motions to dismiss brought under § 707(b) cause the postponement of the discharge. This amendment would change the result in cases such as *In re Tanenbaum*, 210 B.R. 182 (Bankr. D. Colo. 1997).

Public Comment on Proposed Amendments to Rule 4004:

There were no comments on proposed amendments to Rule 4004.

Changes Made After Publication and Comments. No changes were made.

Rule 9014. Contested Matters

(a) MOTION. In a contested matter ~~in a case under the Code~~ not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court ~~orders an answer to a motion~~ directs otherwise.

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. ~~and, unless the court otherwise directs,~~ Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R. Civ.P.

(c) APPLICATION OF PART VII RULES. Unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order. ~~An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.~~

(d) TESTIMONY OF WITNESSES. Testimony of witnesses with respect to disputed material factual issues shall be taken in the same manner as testimony in an adversary proceeding.

(e) ATTENDANCE OF WITNESSES. The court shall provide procedures that enable parties to ascertain at a reasonable time before any scheduled hearing whether the hearing will be an evidentiary hearing at which witnesses may testify.

COMMITTEE NOTE

The list of Part VII rules that are applicable in a contested matter is extended to include Rule 7009 on pleading special matters, and Rule 7017 on real parties in interest, infants and incompetent persons, and capacity. The discovery rules made applicable in adversary proceedings apply in contested matters unless the court directs otherwise.

Subdivision (b) is amended to permit parties to serve papers, other than the original motion, in the manner provided in Rule 5(b) F.R. Civ.P. When the court requires a response to the motion, this amendment will permit service of the response in the same manner as an answer is served in an adversary proceeding.

Subdivision (d) is added to clarify that if the motion cannot be decided without resolving a disputed material issue of fact, an evidentiary hearing must be held at which testimony of witnesses is taken in the same manner as testimony is taken in an adversary proceeding or at a trial in a district court civil case. Rule 43(a), rather than Rule 43(e), F.R. Civ.P. would govern the evidentiary hearing on the factual dispute. Under Rule 9017, the Federal Rules of Evidence

also apply in a contested matter. Nothing in the rule prohibits a court from resolving any matter that is submitted on affidavits by agreement of the parties.

Subdivision (e). Local procedures for hearings and other court appearances in a contested matter vary from district to district. In some bankruptcy courts, an evidentiary hearing at which witnesses may testify usually is held at the first court appearance in the contested matter. In other courts, it is customary for the court to delay the evidentiary hearing on disputed factual issues until some time after the initial hearing date. In order to avoid unnecessary expense and inconvenience, it is important for attorneys to know whether they should bring witnesses to a court appearance. The purpose of the final sentence of this rule is to require that the court provide a mechanism that will enable attorneys to know at a reasonable time before a scheduled hearing whether it will be necessary for witnesses to appear in court on that particular date.

Other amendments to this rule are stylistic.

Public Comment on Proposed Amendments to Rule 9014:

1. Hon. Kathleen P. March (Bankr. C.D. Cal.) opposes the proposed amendment to Rule 9014 to the extent that it would change the practice in the Ninth Circuit that permits the submission of testimony by declaration rather than live testimony of a witness. Judge March also suggested that the rule be clarified to state more clearly what evidentiary hearings would be governed by the scope of the rule.

2. Hon. Paul Mannes (Bankr. D. Md.) stated that the proposed amendment to Rule 9014(e) would create confusion. He views the rule as unnecessary because persons practicing in a particular court would be aware of the court's regular procedures regarding the attendance of witnesses at hearings.

3. Judith Greenstone-Miller, Esq., on behalf of the Commercial Law League of America, expressed concern that the proposed amendment to Rule 9014 would lead to evidentiary hearings whenever a disputed issue of fact arises. She would limit those hearings to situations in which "material" facts are at issue.

4. Judy B. Calton, Esq., on behalf of the State Bar of Michigan Debtors/Creditors Rights Committee and the Detroit Metropolitan Bar Association Debtor/Creditors Section, argued that Rule 9014(d) should be limited to disputes involving material issues of fact rather than all disputed factual issues. She also urged that the bankruptcy judges be allowed to use their discretion to determine whether live testimony is necessary in particular matters.

5. Robert A. Greenfield, Esq., on behalf of the National Bankruptcy Conference, also argued that the language of Rule 9014(d) be limited to disputes over material facts. Additionally, he argued that discretion be retained in the bankruptcy judges to determine whether live testimony or testimony by declaration be employed in a particular hearing.

6. Hon. Albert E. Radcliffe (Bankr. D.Ore.), on behalf of the Conference of Chief Bankruptcy Judges of the Ninth Circuit, opposed the apparent elimination of a court's discretion to permit direct testimony by affidavit or declarations. The Conference urged that the rule be retained in its current form to continue that discretion as well as to reduce the expense to litigants in matters where the amounts in controversy are fairly small.

7. Hon. Wesley W. Steen (Bankr. S.D. Tex.) suggested that the language of proposed Rule 9014(d) be clarified to require live testimony only in the face of a "bonafide" dispute. He also suggested that the language be changed to clarify that the restriction on testimony by affidavit or declaration is limited to matters in dispute, and matters not in dispute could still be resolved by declaration or affidavit. Judge Steen also expressed concern that proposed Rule 9014(e) could be used strategically by parties to avoid their obligations to be fully prepared for hearings.

8. Hon. Philip H. Brandt (Bankr. W.D. Wash.) indicated that proposed Rule 9014(d) should be limited to disputed material factual issues. He noted especially the burden that would be placed on parties involved in matters with limited amounts at stake.

9. Thomas R. Phinney, Esq., on behalf of the Sacramental County Bar Association Bankruptcy & Commercial Law Section, opposed the proposed amendment to Rule 9014(d). He asserted that the current practice which permits court discretion in the allowance of testimony by affidavit or declaration is superior to the practice that would ensue under the proposed amendment. He asserted as well that the current practice is more economically efficient and appropriate given the limited amount at stake in much litigation covered by the rule.

10. Hon. Samuel L. Bufford (Bankr. C.D. Cal.) opposed the proposed amendment to Rule 9014(d). He asserted that F.R. Civ. P. 43(e) should govern motions in bankruptcy matters just as it does in litigation in the district courts. He suggests that this consistency in the application of the rules is both warranted and preferable.

11. Hon. Robin L. Riblet (Bankr. C.D. Cal.), on behalf of the Rules Committee of the United States Bankruptcy Court for the Central District of California and the Bankruptcy Judges of the Central District of California, opposed the proposed amendment to Rule 9014(d) because it would remove the court's discretion to take testimonial evidence by affidavit or declaration under F.R. Civ. P. 43(e). She asserted that the current practice under Ninth Circuit authority should continue, and that the proposed amendments to the rule would prohibit that method for taking evidence.

12. Carolyn B. Buffington, Esq., (Law Clerk to the Hon. Vincent J. Aug, Bankr. S.D. Oh.) opposed the proposed amendment to Rule 9014(d). She argued that constraints of time or money make the use of affidavits the most appropriate way in which to present certain forms of evidence. The bankruptcy judges, in her view, should be given the discretion to accept testimony in this form.

13. Guy Miller Struve, Esq., on behalf of the Federal Courts and Bankruptcy and Court Reorganization Committees of the

Association of the Bar of the City of New York, supported the proposed amendment to Bankruptcy Rule 9014(d). The Committee found that it serves the salutary purpose of increasing uniformity between the practice in the district and bankruptcy courts.

14. The Insolvency Law Committee of the Business Law Section of the State Bar of California opposed the proposed amendment to Rule 9014(d). It asserted that the existing practice in the Ninth Circuit was proper in that it permits the courts discretion to allow testimony by affidavit or declaration. The Committee noted that the amounts in controversy often make it unrealistic to present evidence by live testimony.

Changes Made After Publication and Comments:

The Advisory Committee made two changes to subdivision (d) after considering the comments received addressing the proposed rule. First, the word "material" is inserted to make explicit that which was implied in the published version of the proposed rule. Second, the reference to F.R.Civ.P. 43(a) was removed. The purpose of proposed subdivision (d) was to recognize that testimony should be taken in the same manner in both contested matters and adversary proceedings. The revision to the published rule states this more directly.

The Committee Note was amended to reflect the changes made in the text of the rule.

Rule 9027. Removal

(a) NOTICE OF REMOVAL.

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(3) *Time for filing; civil action initiated after commencement of the case under the Code.* ~~If a case under the Code is pending when a claim or cause of~~

~~action is asserted in another court,~~ If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

* * * * *

COMMITTEE NOTE

Subdivision (a)(3) is amended to clarify that if a claim or cause of action is initiated after the commencement of a bankruptcy case, the time limits for filing a notice of removal of the claim or cause of action apply whether the case is still pending or has been suspended, dismissed, or closed.

Public Comment on Proposed Amendments to Rule 9027(a):

1. Hon. Robin L. Riblet (Bankr. C.D. Cal.), on behalf of the bankruptcy judges of the Central District of California, expressed concern that the amendment would permit removal of state court actions to the bankruptcy court when the underlying bankruptcy case has been dismissed or closed for some time. Judge Riblet expressed concern that the parties would institute frivolous removal actions for

strategic purposes. She asserted also that existing procedures adequately protect parties who need to obtain relief in the Bankruptcy Court when conflicting state actions are pending.

Changes Made After Publication and Comments: No changes were made.

AMENDMENTS TO OFFICIAL FORMS 1 and 15

In addition to requesting approval of the amendments to these forms and transmittal to the Judicial Conference, the Advisory Committee requests that the amendments be effective as of December 1, 2001, rather than upon their adoption by the Judicial Conference. The delay in the effective date of these amendments is necessary for two reasons. First, the amendment to Official Form 15 conforms it to the proposed amendments to Rule 3020 that the Supreme Court promulgated on April 23, 2001. The amendments to the rule will become effective on December 1, 2001, if Congress takes no action to the contrary. Therefore, delaying the effective date of the form will coincide with the effective date of the rule amendment that the form implements.

Official Form 1 is the form of a voluntary petition. It is used in the vast majority of bankruptcy cases. The public and the bar rely heavily on commercial publishers for copies of the forms for use in their cases. The Administrative Office cannot provide copies of the form prior to its adoption by the Judicial Conference. Therefore, it is appropriate to set a delayed effective date for the form. This will provide an opportunity for court personnel to familiarize themselves with the form and will permit publishers and software vendors to distribute the new form to their customers in a timely fashion. Since December 1 is the date on which rules amendments generally become effective, it is appropriate to use that date for the effective date of these amendments to the Official Forms.

COMMITTEE NOTE

The form has been amended to require the debtor to disclose whether the debtor owns or had possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety. If any such property exists, the debtor must complete and attach Exhibit "C" describing the property, its location, and the potential danger it poses. Exhibit "C" will alert the United States trustee and any person selected as trustee that immediate precautionary action may be necessary.

COMMITTEE NOTE

The form is amended to conform to the December 1, 2001, amendments to Rule 3020.