File Copy

ADVISORY COMMITTEE ON BANKRUPTCY RULES

San Francisco, California
September 26-27, 1996

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of September 26 - 27, 1996
San Francisco, California

Agenda

Introductory Matters

1. Approval of minutes of March 1996 meeting.

2. Report on June 1996 meeting of the Committee on Rules of Practice and Procedure (Standing Committee). [Oral report.]

3. Report on Special Study Conference on the Federal Rules Governing Attorney Conduct held June 18-19, 1996, under the sponsorship of the Committee on Rules of Practice and Procedure. [Oral report.]

Action Items

4. Consideration of amendments to Rule 2004 governing examinations. [Materials: Reporter's Memorandum dated 8/20/96 with attachments, Rules 27 and 30, Fed. R. Civ. P., and Baxter and Schneier, "Rule 2004: A Useful Rule or an Abusive Creditor's Weapon?" 10 BANKR. DEV. J. 451 (1994).]

5. Consideration of request by Committee on the Administration of the Bankruptcy System that Rule 9031 be amended to permit appointment of a special master in a bankruptcy case. [Materials: Reporter's Memorandum dated 8/24/96; Federal Judicial Center memorandum on "Appointment of Special Masters in Bankruptcy Cases and Proceedings"; Fed. R. Civ. P. 53; Fed. R. App. P. 48.]

6. Proposed restyling of Rule 2003(d) concerning the report to the court of the election of a chapter 7 trustee or creditors' committee and any dispute over the election. [Materials: Reporter's Memorandum dated 8/24/96.]

7. Proposed amendments to Rule 1019(6) concerning a request for payment of an administrative expense incurred before conversion to chapter 7. [Materials: Reporter's Memorandum dated 8/23/96 with attachment, In re Pro Set, Inc., 193 B.R. 812 (Bankr. W.D.Tex. 1996); Layden, "Pre-conversion Administrative Expense Claims: Is a Proof of Claim Required?" American Bankruptcy Institute (ABI) Journal (June 1996).]

8. Proposed amendments to Rules 4004(a) and 4007(c) concerning the deadline for filing a complaint objecting to discharge or to determine the dischargeability of a debt. [Materials: Reporter's Memorandum dated 8/22/96.]

9. Proposed amendment to Rule 9006 to provide one additional day for a party to meet any deadline prescribed by statute, rule, or court directive. [Materials: To be distributed later.]

Subcommittee and Liaison Reports

10. Report of Subcommittee on Litigation. [Materials: Draft amendments to Rules 9013 and 9014.]

11. Report of Subcommittee on Rule 7062. [Materials: Draft amendments to Rules 7062, 9014, 1017, 4001, 6004, 6006, 3015, 3020, and 3021.]

12. Report of Subcommittee on Rule 2014 Disclosure Requirements. [Materials: Mr. Smith's Memorandum dated 8/27/96 and draft amendments to Rule 2014.]

13. Report of the Subcommittee on Forms. [Oral Report.] [Draft of Bankruptcy Forms Manual to be sent separately.]

14. Report of Subcommittee on Local Rules. [Oral Report.]

15. Report of Subcommittee on Alternative Dispute Resolution. [Oral Report.]

16. Report of Subcommittee on Technology. [Materials: Mr. Heltzel's letter dated 4/19/96; copy of article concerning electronic filing project in the Maryland state courts from The Federal Judicial Observer.]

17. Report of Subcommittee on Style. [Oral Report.]

18. Report of Liaison to the Advisory Committee on Civil Rules. [Oral Report.]

Transition and Intercommittee Matters

19. Remarks of the Chairman of the Committee on the Administration of the Bankruptcy System.

20. Introduction of new Chairman of the Advisory Committee on Bankruptcy Rules.

Presentation

21. Demonstration of interactive tutorial on the Federal Rules of Bankruptcy Procedure developed by the Federal Judicial Center.

Information Items

22. Proposed amendments to Rules 1017, 1019, 2002, 2003, 4004, and 4007 previously approved by the Advisory Committee.

23. Status chart and list of pending amendments.

24. Memorandum dated 7/29/96 concerning continuation of long-range planning.

25. List of subcommittees and their members.

Next Meeting

26. The next meeting of the Advisory Committee will be held March 13 -14, 1997, in Charleston, South Carolina. (Really, this time.)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
6500 Cherrywood Lane, Room 385A
Greenbelt, Maryland 20770

Area Code 301
344-8047

FAX-301-344-0385

Members:

Honorable Alice M. Batchelder
United States Circuit Judge
807 East Washington Street
Suite 200
Medina, Ohio 44256

Area Code 216
722-8852

FAX-216-723-4410

Honorable Adrian G. Duplantier
United States District Judge
United States Courthouse
500 Camp Street
New Orleans, Louisiana 70130

Area Code 504
589-2795

FAX-504-589-4479

Honorable Eduardo C. Robreno
United States District Judge
3810 United States Courthouse
Philadelphia, Pennsylvania 19106

Area Code 215
597-4073

FAX-215-580-2362

Honorable Jane A. Restani
United States Court of
International Trade
One Federal Plaza
New York, New York 10007

Area Code 212
264-3668

FAX-212-264-8543

Honorable Robert J. Kressel
United States Bankruptcy Judge
United States Bankruptcy Court
600 Towle Building
330 Second Avenue South
Minneapolis, Minnesota 55401

Area Code 612
348-1850

FAX-612-348-1903

Honorable Donald E. Cordova
United States Bankruptcy Judge
United States Bankruptcy Court
U.S. Custom House
721 19th Street
Denver, Colorado 80202-2508

Area Code 303
844-2525

FAX-303-844-0292

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Honorable A. Jay Cristol Chief Judge, United States Bankruptcy Court 51 S.W. First Avenue Chambers, Room 1412 Miami, Florida 33130	Area Code 305 536-4121 FAX-305-536-7499
Professor Charles J. Tabb University of Illinois College of Law 504 East Pennsylvania Avenue Champaign, Illinois 61820	Area Code 217 333-2877 FAX-217-244-1478
* Henry J. Sommer, Esquire 7118 McCallum Street Philadelphia, Pennsylvania 19119-2935	Area Code 215 242-8639 FAX-215-242-2075
Kenneth N. Klee, Esquire 308 Griswold Hall Harvard Law School Cambridge, Massachusetts 02138	Area Code 617 496-4183 FAX-617-495-1110
Gerald K. Smith, Esquire Lewis and Roca 40 North Central Avenue Phoenix, Arizona 85004-4429	Area Code 602 262-5348 FAX-602-262-5747
Leonard M. Rosen, Esquire Wachtell, Lipton, Rosen & Katz 51 West 52 Street New York, New York 10019	Area Code 212 403-1250 FAX-212-403-2000
Neal Batson, Esquire Alston & Bird One Atlantic Center 1201 West Peachtree Street Atlanta, Georgia 30309-3424	Area Code 404 881-7267 FAX-404-881-7777
Director, Commercial Litigation Branch, Civil Division, U.S. Dept. of Justice (ex officio) J. Christopher Kohn, Esquire P.O. Box 875, Ben Franklin Station Washington, D.C. 20044-0875	Area Code 202 514-7450 FAX-202-514-9163

Reporter:

Professor Alan N. Resnick Hofstra University School of Law Hempstead, New York 11550-1090	Area Code 516 463-5930 FAX-516-481-8509

* Revised 3/1/96

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Liaison Member:

* Honorable Thomas S. Ellis, III
United States District Judge
401 Courthouse Square
Alexandria, Virginia 22314

Area Code 703
299-2114

FAX-703-299-2109

Bankruptcy Clerk:

Richard G. Heltzel
Clerk, United States Bankruptcy Court
8038 United States Courthouse
650 Capitol Mall
Sacramento, California 95814

Area Code 916
498-5578

FAX-916-498-5563

Representative from Executive Office for United States Trustees:

Jerry Patchan, Esquire
Director
Executive Office for
United States Trustees
901 E Street, NW, Room 700
Washington, D.C. 20530

Area Code 202
307-1391

FAX-202-307-0672

Secretary:

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Washington, D.C. 20544

Area Code 202
273-1820

FAX-202-273-1826

* Revised 1/31/96

JUDICIAL CONFERENCE RULES COMMITTEES

Chairs

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, California 92701
Area Code 714-836-2055
FAX 714-836-2062

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061
Area Code 913-782-9293
FAX 913-782-9855

Honorable Paul Mannes
Chief Judge, United States
Bankruptcy Court
6500 Cherrywood Lane, Rm. 385A
Greenbelt, Maryland 20770
Area Code 301-344-8047
FAX 301-344-0385

Hon. Patrick E. Higginbotham
United States Circuit Judge
13E1 United States Courthouse
1100 Commerce Street
Dallas, Texas 75242
Area Code 214-767-0793
FAX 214-767-2727

Honorable D. Lowell Jensen
United States District Judge
United States Courthouse
1301 Clay Street, 4th Floor
Oakland, California 94612
Area Code 510-637-3550
FAX 510-637-3555

Honorable Ralph K. Winter, Jr.
United States Circuit Judge
Audubon Court Building
55 Whitney Avenue
New Haven, Connecticut 06511
Area Code 203-782-3682
FAX 203-782-3686

Reporters

Prof. Daniel R. Coquillette
Boston College Law School
885 Centre Street
Newton Centre, MA 02159
Area Code 617-552-8650,4393
FAX-617-576-1933

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556
Area Code 219-631-5866
FAX 219-631-6371

Professor Alan N. Resnick
Hofstra University
School of Law
Hempstead, New York 11550
Area Code 516-463-5930
FAX 516-481-8509

Professor Edward H. Cooper
University of Michigan
Law School
312 Hutchins Hall
Ann Arbor, MI 48109-1215
Area Code 313-764-4347
FAX 313-763-9375

Prof. David A. Schlueter
St. Mary's University of
San Antonio School of Law
One Camino Santa Maria
San Antonio, Texas 78284
Area Code 210-431-2212
FAX 210-436-3717

Prof. Margaret A. Berger
Brooklyn Law School
250 Joralemon Street
Brooklyn, New York 11201
Area Code 718-780-7941
FAX 718-780-0375

Agenda Item I

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 21 - 22, 1996

Memphis, Tennessee

Minutes

The Advisory Committee met in a courtroom of the United States Bankruptcy Court for the Western District of Tennessee. The following members were present:

Bankruptcy Judge Paul Mannes, Chairman
District Judge Adrian G. Duplantier
District Judge Eduardo C. Robreno
Honorable Jane A. Restani, United States Court of International Trade
Bankruptcy Judge Donald E. Cordova
Bankruptcy Judge Robert J. Kressel
Bankruptcy Judge A. Jay Cristol
Professor Charles J. Tabb
R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christopher Kohn, Esquire, United States Department of Justice
Leonard M. Rosen, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire
Professor Alan N. Resnick, Reporter

Circuit Judge Alice M. Batchelder was unable to attend. District Judge Thomas S. Ellis, III, liaison to the Committee from the Committee on Rules of Practice and Procedure ("Standing Committee"), and Richard G. Heltzel, clerk-adviser to the Committee, also were unable to attend.

The following additional persons attended all or part of the meeting: Bankruptcy Judge James W. Meyers, former member of the Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Peter G. McCabe, Assistant Director of the Administrative Office of the United States Courts ("Administrative Office") and Secretary to the Standing Committee; Joseph G. Patchan, Director, Executive Office for United States Trustees; Patricia S. Channon, Bankruptcy Judges Division, Administrative Office; Mark D. Shapiro, Rules Committee Support Office, Administrative Office; and Elizabeth C. Wiggins, Federal Judicial Center.

The following summary of matters discussed at the meeting should be read in conjunction with the various memoranda and other written materials referred to, all of which are on file in the office of the Secretary to the Committee on Rules of Practice and Procedure.

Votes and other action taken by the Advisory Committee and assignments by the Chairman appear in **bold**.

Introductory Items

The Chairman presented a citation from the Judicial Conference to Bankruptcy Judge James W. Meyers. The citation recognizes, and expresses the appreciation of the Judicial Conference for, Judge Meyers' contribution to the administration of justice and commitment to the judiciary while serving on the Committee from October 1989 to October 1995.

The Committee **approved the minutes of the September 1995 meeting** subject to correction of several typographical errors. The Committee also requested that a note be added at the end stating that a decision had been made after the September 1995 meeting to move the March 1996 meeting from Charleston, SC, (the originally announced location), to Memphis, TN.

The Chairman and the Reporter briefed the Committee on actions taken at the January 1996 meeting of the Standing Committee. Professor Resnick reported that the Standing Committee had approved the Committee's recommendation concerning the procedure for amending the official forms when certain dollar amounts stated in the Bankruptcy Code are adjusted under a formula prescribed by Congress in the Bankruptcy Reform Act of 1994. The procedure will permit automatic amendment of those dollar amounts that appear on the official forms without further action by the Standing Committee or the Judicial Conference. [The Judicial Conference approved the procedure at its meeting of March 12, 1996.]

Professor Resnick said the Standing Committee's self-study report generated substantial controversy. Although the Standing Committee received the report on a motion that also mentioned publication, no schedule for publication was discussed and Judge Stotler indicated that further comment could be submitted. The long range planning subcommittee, which drafted the report, was also disbanded at the request of its sole remaining member. Judge Stotler, Chair of the Standing Committee, transferred the long range planning function

to the Standing Committee's Reporter, Professor Coquillette. The comments on committee appointments made by the Advisory Committee in response to the draft reviewed at the September 1995 meeting, although not incorporated into the study report, were summarized orally for the Standing Committee by Judge Stotler. Professor Coquillette added that the Advisory Committee's views on appointments also had been communicated directly to the Chief Justice. He said he thought it was very clear that the self-study report did not reflect the views of the Standing Committee.

Professor Resnick stated that the Standing Committee had approved a recommendation to the Judicial Conference for a uniform local rule numbering system, but that the recommendation required only that a district number its local rules to correspond to the relevant federal rules of procedure. There would be no other required elements. Professor Resnick added that the Judicial Conference had adopted the recommendation, as transmitted by the Standing Committee, on March 12, 1996, and had set April 15, 1997, as the deadline for conversion to the new numbering. The Committee's work product, approved at the September 1995 meeting, will be distributed to the courts as a suggested, or model, numbering system. The Chairman said he had been disappointed by the Standing Committee's action in switching from the concept of detailed, mandatory numbering systems to a general directive. The Committee thanked Ms. Channon for her work in drafting a numbering system for local bankruptcy rules.

The Reporter also stated that the Standing Committee's subcommittee on style now has completely new membership, due to turnover of membership on the Standing Committee. Professor Coquillette informed the Committee that he and Judge Stotler had met with the Chief Justice to discuss the rules re-styling initiative. He said the Chief Justice had approved the idea of publishing for comment the re-styled draft of the appellate rules. The Chief Justice had opposed any re-styling of the evidence rules, because of their substantive nature, and had requested that the re-styling of the other bodies of rules be suspended until the results of the work on the appellate rules could be evaluated.

One member commented that perhaps the bankruptcy rules should not be put off until last, because doing so would increase the pressure on the Committee to conform. The Reporter, however, said he did not think timing would make a difference. He said that uniform conventions likely would come out of the re-styling of the appellate rules and that the Committee would have an opportunity to comment on the appellate draft. Professor Coquillette added that the process appears to have slowed. He said that work on the civil rules has stopped at about the halfway point and that substantive questions raised by the re-styling process have proved very controversial within the civil advisory committee. Professor Coquillette estimated that work on the bankruptcy rules is probably about "a decade" in the future. The sense of the Committee was not to push for re-styling but to continue to wait and monitor the process as it develops with the other bodies of rules.

A Committee member inquired whether the "'shall' vs. 'must'" issue has been resolved. The Reporter responded that the latest draft guidelines from the Standing Committee's style consultant, Bryan Garner, say that "shall" is an acceptable alternative, but that usage should be consistent within the rules.

Professor Coquillette reported on the meeting of the special study group on rules governing attorney conduct that was held on the day preceding the January 1996 meeting of the Standing Committee. Due in part to a blizzard that prevented attendance by some study group members, there will be a further meeting June 18 -19, 1996, in conjunction with the June meeting of the Standing Committee. Professor Coquillette said that the three options under consideration are: 1) a uniform (national) rule that says "always look to the state rule," 2) a small number (five or six) of federal rules covering certain "core" areas such as conflicts, with all other issues remaining subject to state rules, or 3) a model rule for local adoption. He noted that if the concept of "core" rules is chosen, the supersession clause of the Rules Enabling Act would apply, except for bankruptcy rules.

Mr. Smith attended the meeting of the special study group on behalf of the Committee and praised the presentations and the written materials. He said there seems to be little doubt

that a clearer rule is needed and that preliminary research on local bankruptcy rules indicates that few districts address the subject at all. He said it probably will be easier to achieve a rule for civil and criminal practice than in bankruptcy, because traditional litigation rules that work in bilateral situations, such as rules governing conflicts, do not work well in the multi-party setting of a bankruptcy case. Rules on this subject generally provide that a lawyer cannot represent one party in litigation "directly adverse" to another party in the same litigation who is a client in an unrelated matter, yet the automatic stay is in a sense directly adverse to every creditor in a bankruptcy case, he said. If the bankruptcy case is treated like bilateral litigation, Mr. Smith said, this would preclude a lawyer from represent a debtor if the debtor had one or more creditors who were represented by the lawyer in unrelated matters. Another member stated that a bankruptcy case is not a lawsuit but an in rem proceeding within which adversary litigation may occur. Accordingly, he said, the bilateral rule should apply to the litigation, but not the case in chief. Mr. Smith closed by saying that whatever approach is taken toward establishing rules, whether by rule or by statutory amendment, the proposals will be controversial.

The Chairman asked Mr. McCabe to renew the Committee's request to the House Judiciary Committee that it undertake to print an official pamphlet of the Federal Rules of Bankruptcy Procedure as the Judiciary Committee does with the other bodies of federal procedural rules.

Action Items

Comments Received on the Preliminary Draft Amendments

Rule 1020. The Federal Bar Association proposed that the amendments state that a debtor has to qualify as a small business in order to make the election to be so treated and to require that any motion to extend the time to file an election be made and ruled on within the original 60-day period. The Reporter recommended against both suggestions. He said he does not believe there is any ambiguity that a debtor must meet the statutory definition of a small

business in order to make a valid election and noted that the rule as drafted tracks the language of § 1121(e) of the Code. With respect to the time for making the election, the Reporter stated that most of the litigation to which the Federal Bar Association referred involved different formulations than the one used in the draft. He said that Rule 9006 establishes a workable procedure, *i.e.,* a party must either request extension within the original time or (if the time has expired) must show excusable neglect. The Committee took no action on this suggestion.

The Executive Office for United States Trustees offered a "minor suggestion" that the deadline for making the election should be the date of the § 341 meeting. Professor Resnick said he recommended that this change not be made, because the debtor might learn of the availability of the election for the first time during the § 341 meeting. He reminded the Committee also that it had originally considered 100 days "or another date" as the appropriate period. Committee members expressed concern about effectively giving the debtor "permanent exclusivity" and the merits of giving the court discretion to either extend or require a debtor to make a prompt decision. **A motion to amend the published draft by putting a period after the word "relief" on line 6, (cutting off explicit mention of an extension), carried by a vote of 8 - 2.**

Rule 2007.1. The Federal Bar Association had proposed that the United States trustee, after filing a report of a disputed election of a chapter 11 trustee, also be required to file a motion to resolve the dispute. The Reporter disagreed with the suggestion and said he had discussed it with the general counsel of the Executive Office for United States Trustees, who opposed it on the ground that such action properly should be reserved to a party with an economic stake in the case. **The Committee took no action on this suggestion.**

The Executive Office for United States Trustees ("Executive Office") objected to the provision in the draft requiring the United States trustee to appoint the person elected. During the original drafting of the rule, this issue had been debated. The Committee had retained the appointment language in view of the various statutory provisions, such as the termination of

the debtor's period of exclusivity, that are tied to the "appointment" of a trustee. The Executive Office proposed that the rule instead continue to require the United States trustee to file a report of the election together with an application for court approval and that the report itself serve as the appointment of the person elected. That is, rather than the United States trustee making the appointment, the report would constitute the appointment. The Reporter had redrafted the rule to implement the proposals of the Executive Office. He had submitted the new draft to the Executive Office, and obtained a response stating that the new draft satisfied the concerns of the Executive Office.

The Committee discussed when the appointment-by-report would be effective for purposes such as trustee liability and cutting off exclusivity -- when the report is filed or when the court signs the order approving the appointment? One member said that effectiveness should be as of the date the order approving the appointment is entered. Mr. Patchan agreed, noting that trustees are sensitive to the liability aspect and generally will not act prior to obtaining court approval of their appointment. **A motion to approve the redrafted rule with the addition at lines 12 and 42 of the words "as of the date of entry of the order approving the appointment" carried, with one opposed. The Committee also approved style changes to simplify the description of disputed and undisputed elections and amendments to the committee note proposed by the Reporter on the recommendation of the Executive Office to clarify who is eligible to solicit proxies.**

Rule 3014. The Federal Bar Association suggested amending the rule to require that any request for an extension of time to file an election under § 1111(b)(2) of the Code be made before the conclusion of the hearing on the disclosure statement. The proposed amendments that were published for comment concern only the procedure for making a § 1111(b) election when approval of the disclosure statement is combined with the confirmation hearing in a small business case, and the comment, accordingly, was not germane to the proposed amendments. The Reporter asked whether the Committee would want to consider the suggestion as a long term matter. The consensus was that the suggestion should be retained and considered in the future along with a method for permitting a party to change an election

if the plan is modified materially or the original election would be impacted by a subsequent decision on valuation.

Rule 3017.1. This rule is proposed to implement § 1125(f) of the Bankruptcy Code, which was among the new provisions added in 1994 to permit expedited handling of small business cases filed under chapter 11. This proposed new rule sets out the procedure in a small business case for obtaining conditional approval of a disclosure statement and combining final approval with the confirmation hearing. Bankruptcy Judge Geraldine Mund had noted that § 105(d) of the Code, as amended in 1994, also permits a court to order a similar procedure in a chapter 11 case without that authority being restricted to a small business case. Judge Mund had suggested that proposed new rule 3017.1 be broadened to apply to any chapter 11 case. The Reporter said the legislative history of the 1994 amendments made it clear that Congress intended to provide a streamlined procedure for small businesses, but that the commentary provided for the amendments to § 105 fails to indicate any intent to apply the streamlined procedure in a large case. He noted further that there have been no published decisions approving such measures in a large case, and said it seemed to him premature to broaden the rule in the absence of either congressional or judicial direction to do so. **The Committee accepted the Reporter's recommendation to leave the proposed rule unchanged.**

Rules 3017(d), 3018(a), and 3021. James Gadsden, Esq., commented on these amendments that allow the court "for cause" to fix a record date for voting on a plan and permit the record date for distributions to be set in the plan or confirmation order. Mr. Gadsden questioned the amendments as unnecessary. The current rules provide that the record date for voting purposes is the date the order is entered by the clerk, and the record date for distribution purposes is the date on which distributions commence. When the amendments first were proposed with respect to voting, the Reporter said, the primary reason offered was the frequent delays in entering orders on the docket. Ms. Channon, who had researched the typical interval between signing of orders by a judge and their entry on the docket, said that while docketing delays formerly occurred, especially in the Central District of California, the clerk's office there and in other districts she contacted said delays now are rare and almost all

orders are entered within 48 hours of being signed. Mr. Klee said that he had experienced docketing delays in several districts not reported on at the meeting and that such delays are not the only problem the amendments would address. He said that disbursing agents also must complete several steps before the names and addresses of the "record holders" can be established. He distributed copies of a letter describing these from the Fleet National Bank and added that this letter also should allay the concerns expressed by Mr. Gadsden concerning the potential for a chilling effect on trading after a record date is set. **A motion to leave the proposed amendments unchanged carried without opposition.**

Rule 8001. The Federal Bar Association commented that providing for an election to have an appeal heard by a district court seemed "premature" when only one bankruptcy appellate panel service is operating. The Reporter said there is a need for a rule under a statute that provides for all circuits to establish such panels even if only one circuit has done so. Judge Robreno said the proposed subdivision (e) of the rule is not self-contained and is confusing. He suggested changing the heading to "election to have appeal heard by district court and not the bankruptcy appellate panel" and that the text should say "provided there is a bankruptcy appellate panel service." **A motion to adopt these changes failed by a vote of 7 - 3. A second motion to change the heading to "Election to Have Appeal Heard by District Court in Lieu of a Bankruptcy Appellate Panel" carried, with one opposed, subject to review by the style subcommittee.**

There was no objection to the suggestion that the committee note be expanded to include the material that was voted down for inclusion in the text and to point out that subdivision (e) has nothing to do with appeal to the court of appeals. At the March 22 session, the Reporter offered alternative draft additions to the Committee Note. **The Committee approved alternative "A," as amended during discussion, by a 6 - 2 vote.** Accordingly, the following two sentences will be added:

> Subdivision (e) is amended to provide the procedure for electing under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court instead of the

bankruptcy appellate panel service. This subdivision is applicable only if a bankruptcy appellate panel service is authorized under 28 U.S.C. § 158(b) to hear the appeal.

Rule 8002. The Reporter stated that in July 1995, when the Standing Committee considered the Committee's request to publish the preliminary draft, two members of the Standing Committee had made comments concerning the amendments to this rule. One member suggested that the Advisory Committee consider whether the Committee Note should warn the parties that failure to file a notice of appeal prior to the time prescribed in the rule could result in a loss of the right to appeal if the court denies the party's request for an extension of time to file. Another member questioned the Committee's choice to model the amendments after Rule 4(a)(5) of the Federal Rules of Appellate Procedure (which applies in civil cases) rather than after the more definite provisions of Fed. R. App. P. 4(b) (which applies in criminal cases). The Reporter stated he had responded that the Committee believed strongly that a party should not lose a right because of delay by a judge in ruling on a timely filed motion. **The Committee took no action on either comment.**

Rule 9011. Judge Mund commented on a provision in this rule that prohibits a court from ordering sanctions on its own initiative unless the court does so before a voluntary dismissal or settlement of the claims. The Reporter said the provision duplicates a provision in Rule 11 of the Federal Rules of Civil Procedure as that rule was amended in 1993; its purpose is to permit parties to settle without any threat that the court might later impose monetary sanctions. **The Committee made no change to the draft as a result of this comment.**

Bankruptcy Judge James E. Yacos commented that the rule should make it clear that the striking of an unsigned pleading should occur only when a clerk has "inadvertently and through mistake" accepted the document for filing. The Reporter noted that under both Fed. R. Civ. P. 5 and Fed. R. Bankr. P. 5005 a clerk does not have authority to reject a document tendered for filing based on improper form. Rules 11 and 9011 reflect a clear and deliberate policy of the Standing Committee that unsigned papers should be accepted by the clerk, but

may be stricken by the court if not signed after the defect is brought to the attorney's attention. **The Committee made no change to the draft.**

The Reporter stated that in reviewing the preliminary draft he had identified a potential problem arising from a provision in subdivision (b) that was introduced in the process of conforming to Rule 11 of the Federal Rules of Civil Procedure as amended in 1993. Subdivision (a) contains, as it always has, a clause carving out from the requirement of signature by an attorney any list, schedule, or statement; these documents are signed only by the debtor. Subdivision (b) now contains, for the first time, language providing that by presenting a document to the court (by signing, filing, submitting, or later advocating), the attorney is representing that "reasonable" inquiry has been made that the document does not contain improper material. Subdivision (b), however, does not contain language carving out from the attorney's responsibility in the presenting function a list, schedule, or statement that, under subdivision (a), only the debtor is required to sign. The Reporter said he hoped the rule would be interpreted to hold an attorney responsible only for those documents the attorney signed, but he was concerned about the issue. [Reporter's Memorandum dated February 20, 1996.]

The consensus was that sanctioning of an attorney for the contents of a debtor's schedules or statement of financial affairs was unlikely, and the Committee took no action. Some members, however, said the initial sentence of Rule 9011(a) is confusing and could be interpreted to mean that an unrepresented debtor does not have to sign the lists, schedules, and statements. After the March 21 session, a member submitted to the Reporter a proposed revision to clear up any ambiguity about a pro se debtor's obligation to sign all documents. At the March 22 session, the Reporter offered a revised draft which ended the first sentence after the word "name" on line 9 and added, immediately thereafter on lines 9 through 11 an additional sentence as follows: "A party who is not represented by an attorney shall sign all papers." **The Committee accepted this revision, and a motion to approve the amendments to Rule 9011, as redrafted, carried.**

Rule 9015. The Federal Bar Association commented that the phrase "specially designated" does not seem to "comport" with the statute and that a party should be required to consent by using specific language. The Reporter observed that the phrase in question is actually used in the statute and that he saw no need to require special language for consenting to the conducting of the jury trial by the bankruptcy judge. **The Committee made no change to the draft.**

In January 1995, when the Standing Committee considered the draft interim rule on which the current draft was based, a member of the Standing Committee had commented that the Committee might consider adding explicit provisions requiring notice concerning consent to conduct of the jury trial by a bankruptcy judge to any parties who join the action after consents have been given by the original parties. The Committee declined in 1995 to make such additions. In November 1995, Judge Restani, the Committee's liaison to the Advisory Committee on Civil Rules, reported that this suggestion had resulted in a memorandum by Professor Edward H. Cooper, Reporter to the Civil Committee, that suggested these issues could be addressed in Rule 73(b), which governs consent to have a magistrate judge exercise civil trial jurisdiction. The Reporter said he did not think the additions were necessary. [See Reporter's Memorandum dated February 21, 1996.] **The Committee took no action on the suggestion.**

Proposals for Further Amendments

Rules 1017 and 2002(a). At the September 1995 meeting, the Committee approved in principle amending the rules to limit to the debtor and the trustee notice of a motion to dismiss for failure to file schedules and statements. The Reporter had drafted amendments accordingly and also had reorganized Rule 1017. Mr. Sommer said the rule should require "notice and a hearing," not simply notice prior to any dismissal. Mr. Klee said the provision should apply only to a voluntary case and expressed concern about the interaction between a dismissal after limited notice and § 349 of the Code, which revests property in the prepetition owner, unless the court orders otherwise. Judge Kressel said the trustee would receive notice

under the proposed amendments and could alert the judge if any property of the estate had been sold, enabling the judge to tailor the dismissal order accordingly. **A motion was made to approve the draft subject to the Reporter incorporating changes to address the issues raised during discussion, but failed for want of a second.** The Committee requested the Reporter to rework the draft overnight. At the March 22 session, the Committee considered a revised draft. Mr. Klee inquired whether the proposed amendments should apply to dismissal of a chapter 13 case under § 1307(c)(9) and, if so, whether this should be indicated in the heading. **The consensus was that the amendments should include chapter 13 cases and that the provisions governing dismissal for failure to pay the filing fee also should include a reference to chapter 13 cases.**

Rule 2004. At the September 1995 meeting, the Committee approved amendments to Rule 2004(c) to clarify that a bankruptcy court can order an examination outside the district in which the case is pending and that an attorney admitted in the district where the case is pending can sign the subpoena regardless of the place of the examination. The Committee also discussed whether the motion under Rule 2004 should be on notice or whether it can be ex parte. The language of the rule seems to require notice at least to the trustee or debtor in possession, but the original (1983) committee note states that the motion may be heard either ex parte or on notice. The discussion indicated that practice under this rule varies widely, and it also was suggested that examination should be available without the need for any motion or court order. The Committee asked the Reporter to draft alternative proposals for the next meeting. The Reporter presented five alternatives, which are set forth in his memorandum dated February 19, 1996. Initial straw votes indicated substantial support for two approaches: 1) stating in the rule that a notice or an ex parte procedure is authorized, in the court's discretion, or 2) requiring notice in every instance (Proposals 2 and 3).

Judge Robreno expressed concern, however, about where a potential examinee can object. Mr. Smith stated that it can be difficult to persuade a judge to quash a subpoena for an examination that the judge ordered. Judge Cristol said that the judges in his district do not consider their ex parte orders as conferring approval of an examination, and they readily de-

authorize or limit an examination when appropriate. Judge Meyers said that with a 60-day deadline for filing complaints, parties need a way to examine and that, if the debtor were carved out, he thought a procedure requiring only a subpoena (without a prior order) would be acceptable. The Chairman stated there is a sixth option of repealing Rule 2004. Others suggested adapting the procedures prescribed in Rules 27 and 30 of the Federal Rules of Civil Procedure. **A motion to adopt Proposal 5 (examination by subpoena only) failed, but this alternative was added to those under continued consideration. A motion to table the issue until the next meeting carried by a vote of 9 - 4.** The objective is to draft a rule that states clearly the procedural mechanism for obtaining an examination and also states in which court a potential examinee can seek a protective order. The Reporter was instructed to continue to consider Proposals 1, 2, 3, and 5 from the February 19 memorandum, as well as the procedural mechanisms provided in Rules 27 and 30 of the Federal Rules of Civil Procedure. There also was a request for assistance from the Federal Judicial Center in determining the actual practices currently used in the courts.

Rule 9009. Bankruptcy Judge Alan H. W. Shiff proposed amending Rule 9009 to limit alteration of official forms. **The Committee determined not to act on this suggestion.**

Proposal for Amendments to Implement § 110 of the Code. The Chairman stated that Bankruptcy Judge Geraldine Mund, of the Central District of California, had requested the Committee to draft rules for disciplinary proceedings involving bankruptcy petition preparers under § 110 of the Code. He said he had suggested to Judge Mund that the Central District of California take the lead in developing procedures, which might later be prescribed nationally. Shortly before the meeting, Judge Mund forwarded a copy of a general order detailing procedures for actions involving bankruptcy petition preparers that recently had been issued by the district court. The Reporter noted that some parts of § 110 relate to a specific case and some, such as improper advertising, do not. He raised the question of what the procedure should be when the conduct at issue is not linked to a specific case. Under subsection (i) of § 110, for example, if a case is dismissed on account of action or inaction by a bankruptcy petition preparer or if general conduct is at issue, the bankruptcy court must

"certify that fact" to the district court, where someone must make a motion. There is no guidance concerning exactly what should be certified or how, he said, and the matter may be a non-core proceeding, raising jurisdictional issues. Mr. Klee said that 28 U.S.C. § 157(b)(2) states that "[c]ore proceedings include, but are not limited to" those listed. He said he thought improper advertising by a bankruptcy petition preparer could be deemed to be core as a proceeding "arising under title 11" (28 U.S.C. § 157(a)). The Reporter said it might be prudent simply to monitor action by the courts on this issue for the time being. He also said he could study the issue further and prepare material for the Committee to consider, if the Committee so desired. He also suggested that the Federal Judicial Center could ascertain how courts are handling these proceedings now. **A motion to defer action passed unopposed.**

Forwarding of Approved Amendments to Be Delayed. The Committee agreed that the amendments approved for publication at the meeting and at the September 1995 meeting should be held for the time being. The Committee will submit to the Standing Committee at the June 1996 meeting only the final drafts of amendments to the rules published in 1995 and preliminary draft amendments to the official forms [See below.] with a request for publication. Rather than burden the Standing Committee with a few proposed rules amendments, followed by additional proposed amendments in 1997, the consensus was that the Committee should assemble a substantial package of amendments before transmitting. The Reporter said the amendments to Rule 2003 previously approved and awaiting transmittal may need some changes in light of the revisions made at the meeting to Rule 2007.1. If so, a new draft will be considered at the September 1996 meeting.

Official Bankruptcy Forms. The Chairman of the Subcommittee on Forms, Mr. Sommer, presented the proposed amendments to the forms, with descriptions of those written comments from Committee members which the subcommittee had accepted. Concerning Form 1, the Voluntary Petition, and Exhibit "A" to the petition, a member asked whether the filing of Exhibit "A" could be restricted to a publicly-held corporation. **Ms. Channon said she would ask the Securities and Exchange Commission whether it would agree.** A member requested that Form 9 include in the new information provided about the necessity to file a

proof of claim some qualifying statement about jeopardy to a creditor's right to a jury trial after filing a proof of claim. **A motion to add such a statement failed by a vote of 6 - 4.** Some members reiterated their concern about this issue, noted the potential legal consequences under the Langenkamp and Granfinanciera decisions,[1] and reminded the Committee that it is easier to delete material after publication than to add it. The Chairman said he shared the concern and **gave assurance that the Committee would come back to the matter after publication. The Committee approved for publication the proposed amendments and two new forms, including the changes that had been accepted by the subcommittee.** Mr. Sommer also reported that Forms 1, 9, and 10, which are the forms most heavily used by the public, will be reformatted by a graphics design expert to make them more readily understandable. He said the forms package will be recirculated to the members after the reformatting and prior to the June 1996 meeting of the Standing Committee.

Uniform Local Rule Numbering. The Committee discussed a revised draft cover memorandum proposed for transmitting to the courts the Committee's recommended uniform numbering system for local rules. [In January 1996 the Standing Committee approved, and on March 12, 1996, the Judicial Conference adopted, a uniform numbering system that directs only that courts number their local rules to correspond to the relevant federal rules of procedure. See "Introductory Items," above.] Several members expressed dissatisfaction with the recommendation submitted to the Judicial Conference and said they also were unsure about its meaning. Some members wanted the memorandum to be more assertive in discouraging deviations from what the Committee had approved. Mr. McCabe said the letter should avoid being at odds with the Standing Committee's intent. The Committee requested that the memorandum be redrafted to comport with the limited directive adopted by the Standing Committee and the Judicial Conference but also to state more clearly that the Committee's numbering system is the recommended one. At the March 22 session, the Committee considered a redraft prepared by Mr. McCabe with suggestions from Judge

---

[1] Langenkamp v. Culp, 498 U.S. 42, 111 S. Ct. 330, 112 L. Ed. 2d 343 (1990); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989).

Restani. The Committee changed the word "Model" to "Uniform" in the title of the memorandum, deleted the word "model" from the second and third paragraphs, and made stylistic changes in the final paragraph. **The Committee approved the revised memorandum as edited at the meeting.**

Subcommittee and Liaison Reports

Rule 2014 Subcommittee. The chairman of the subcommittee, Mr. Smith, reviewed the history of the subcommittee's mission to revise Rule 2014. The current rule's ex parte procedure and nebulous concept of "connections" to parties in the case has been troublesome for many years, he said. The House of Delegates of the American Bar Association ("ABA") approved a proposed amended Rule 2014 several years ago which contained a listing of relationships to be disclosed and a "safe harbor" for those employed with the approval of the court who had disclosed in good faith, but as to whom it was later determined that a disqualifying relationship or conflict existed. The Committee in 1992 had declined to adopt the ABA's suggestion, because the "safe harbor" would conflict with the authority of the court under § 328(c) of the Code to disallow compensation if a conflict later appears. Mr. Smith said his draft amendments try to clarify what must be disclosed by providing both a list of specifics and an assertion by the applicant for employment that there is "no substantial risk" that the applicants' relationships with others will materially and adversely affect the representation to be undertaken in the case. This approach was based on that used in the *Restatement of the Law Governing Lawyers*, he said. Mr. Smith noted that the draft also provides for immediate or delayed employment and for notice and opportunity to object. Although the draft that was printed in the Committee agenda book did not include a notice provision, he said, he had completed an initial draft. He reported that the subcommittee had met over lunch on March 21 and would continue to exchange comments and complete a draft rule and commentary for the September 1996 meeting. He summarized the subcommittee's goals as being to provide: 1) a clear procedure, 2) notice early on to those who need it, and 3) adequate disclosure. He said a long range project would be to provide Professor Coquillette with draft rules on conflicts, particularly as they arise in bankruptcy cases.

Litigation Subcommittee. The chairman of the subcommittee, Mr. Klee, reported that the subcommittee had met by conference call on January 8, at the Administrative Office of the United States Court in Washington, D.C., on February 9, and would meet immediately following the conclusion of the Committee meeting. He said he expected the subcommittee would need one further meeting in order to have complete drafts ready for the Committee's consideration at the September 1996 meeting. He said the subcommittee had considered the letter sent by Bankruptcy Judge Samuel L. Bufford, recommending that bankruptcy motion practice should follow state court practice, but had rejected his view. The subcommittee is concentrating on motion practice and Rules 9013 and 9014, he said. The subcommittee thinks adversary proceedings are proceeding smoothly under the present rules; the subcommittee may consider adjusting the scope of Rule 7001, but will take that issue up later.

Rule 7062 Subcommittee. The chairman of the subcommittee, Judge Kressel, said first that the subcommittee is misnamed, because at the last meeting the Committee decided to remove from Rule 7062 the exceptions listed, because they pertain to the bankruptcy case rather than to adversary proceedings. The first issue, he said, is whether all orders should be stayed except those listed or whether none should be stayed except those listed -- in other words, which should be the "default" position. The second issue is which orders should be stayed and which not stayed, and the third matter to be addressed is the mechanics of staying an order or its enforcement. Judge Kressel said the subcommittee seems to be developing consensus on all of these and should have a draft to submit for the September 1996 meeting.

Alternative Dispute Resolution (ADR) Subcommittee. Professor Tabb, subcommittee chair, said that the current posture of continuing to monitor local ADR efforts while taking no action to propose any national rule remains appropriate.

Liaison with the Civil Rules Committee. Judge Restani noted that the recently enacted Public Law No. 104-67, which deals with litigation under the Securities Act, contains provisions for sanctions that resemble the former Rule 11 of the Federal Rules of Civil Procedure. She also said that the civil rules committee plans to present amendments to Rule 23 for publication and

comment at the June 1996 meeting of the Standing Committee. So far, she said, there seems to be agreement only that an interlocutory appeal of a class certification decision should be permitted and that the standard for certifying should be raised to some degree. She said that comment is heavy on the protective order amendments to Rule 26, but the amendments probably will not go forward. She said comments are about evenly divided on 12-person juries, and that judges are uniformly against the amendments that would permit attorney voir dire, while attorneys favor it.

Next Meeting

The next meeting of the Committee will be September 26 - 27, 1996, in San Francisco, California.

Respectfully submitted,

Patricia S. Channon

Agenda Item 2-3

Agenda Items 2 and 3 will be oral reports.

Agenda Item 4

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: RULE 2004 EXAMINATIONS

DATE: August 20, 1996

Bankruptcy Rule 2004 provides a procedure for broad discovery in bankruptcy cases. On motion, the court may order the examination of any entity on any subject relating to the debtor's acts, conduct, property, liabilities, financial condition, or discharge, or to the administration of the estate. Rule 2004 examinations are usually unrelated to any pending adversary proceeding or contested matter. Once an adversary proceeding or contested matter is commenced, courts have held that any examination relating thereto must be limited to the traditional discovery rules under Rules 7026-37 (Civil Rules 26-37). See, e.g., In re Blinder, Robinson & Co., 127 B.R. 267 (D. Colo. 1991), aff'd, 962 F2d 969 (10th Cir. 1992). Considering the broad scope of the examination, and the fact that it is usually unrelated to any pending litigation, Rule 2004 examinations are often viewed as "fishing expeditions."

The text of the current Rule 2004 is as follows:

Rule 2004. Examination

(a) EXAMINATION ON MOTION. On motion of any party in interest, the court may order the examination of any entity.

(b) SCOPE OF EXAMINATION. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a

reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE. The attendance of an entity for examination and the production of documentary evidence may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial.

(d) TIME AND PLACE OF EXAMINATION OF DEBTOR. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) MILEAGE. An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

Proposed Amendments Relating to Examinations in Other Districts

Under Rule 2004(a), an examination may not be compelled unless the court orders it. Rule 2004(c) provides that "[t]he attendance of an entity for examination ... may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial." Rule 9016 provides that Civil Rule 45 applies in cases under the Code. Therefore, the provisions of Civil Rule 45 on compelling the attendance of witnesses at a hearing or trial govern the attendance of an entity at a Rule 2004 examination -- but only if the court orders the examination.

At the Advisory Committee meeting in September 1995, the Committee discussed suggestions to amend Rule 2004. The Committee voted, 7-4, to amend Rule 2004(c) for the purpose of clarify that a bankruptcy court could order an examination outside the district in which the case is pending, and that an attorney admitted in the district where the case is pending could sign the subpoena regardless of the place of the examination. In particular, the following amendments were approved in September:

(c) COMPELLING ATTENDANCE AND PRODUCTION OF DOCUMENTARY EVIDENCE. The attendance of an entity for examination and the production of documentary evidence, whether it is to be held within or without the district in which the case is pending, may be compelled in the manner provided in Rule 9016 for the attendance of witnesses at a hearing or trial. An attorney as officer of the court 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 authorized to practice in that court or in the court in which the case is pending.

COMMITTEE NOTE

Subdivision (c) is amended to clarify that an examination ordered pursuant to 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 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, which is to ease the burdens of interdistrict law practice.

Discussions Relating to Rule 2004(a)

At the September 1995 meeting, the Advisory Committee also discussed briefly whether the motion under Rule 2004(a) must be on notice or whether it may be ex parte. The text of the rule merely states that a motion is required, and Rule 9013 requires that a motion be on notice (at least to the trustee or debtor in possession, and other entities as "the court directs"). Therefore, a literal application of the Rules would require, in all cases, that notice of the motion be served (at least on the trustee or debtor in possession). However, the original Committee Note (1983) states that the motion "may be heard ex parte or it may be heard on notice." An informal poll of the judges present at the September 1995 meeting revealed that some judges routinely handle motions for Rule 2004 examinations ex parte while others do not.

The Committee discussed whether Rule 2004(a) should be amended to clarify whether the motion may be ex parte. In addition, a suggestion was made at the meeting that a party should be able to take a Rule 2004 examination without the need for any motion or court order. That is, Rule 2004 examinations should be treated the same way that depositions are treated under the Civil Rules. Civil Rule 30(a) permits a party to depose a

witness without leave of court, and Rule 45 permits an attorney to issue the subpoena on behalf of the court to compel attendance at the deposition.

At the conclusion of the discussion at the September 1995 meeting, the Committee asked me to draft alternative proposals for discussion at the March 1996 meeting in Memphis. My memorandum of February 19, 1996, in which I presented five alternatives for the Committee's consideration, was included in the agenda materials for the meeting.

In March 1996, the Committee discussed the following five alternatives regarding Rule 2004(a):

(1) Do nothing.

(2) Amend the rule to clarify -- consistent with the Committee Note -- that the judge has the discretion to require notice of the motion to the person to be examined, or to entertain the motion ex parte.

(3) Amend the rule to expressly require a motion on notice to the entity to be examined, so that the entity always has an opportunity to challenge the motion and persuade the court that he or she should not be examined.

(4) Amend the rule to provide that the motion always may be made ex parte.

(5) Delete the requirement for any motion or court order, treating Rule 2004 examinations the same way that the Civil Rules treat depositions.

At the March meeting, after the Committee discussed these

five alternatives, it decided to eliminate only alternative No. 4 (motions must be ex parte) and to preserve the other four alternatives for further discussion at the September 1996 meeting in San Francisco.

In addition, the Committee asked me to consider (1) the appropriate court or courts in which a potential examinee can seek a protective order or order quashing a Rule 2004 subpoena; (2) the procedural mechanisms provided in Civil Rules 27 and 30; and (3) whether Rule 2004 should be repealed altogether. I also was asked to provide the Committee with background information regarding the origin of Rule 2004 examinations, as well as the current practices used in obtaining Rule 2004 orders.

Origins of Rule 2004

Rule 2004 is derived from § 21a of the former Bankruptcy Act, which was enacted in 1898. Section § 21a was amended from time to time, and read as follows when the Act was repealed by the Bankruptcy Reform Act of 1978:

> § 21. **Evidence.** a. The court may, upon application of any officer, bankrupt, or creditor, by order require any designated persons, including the bankrupt and his or her spouse, to appear before the court or before the judge of any State court, to be examined concerning the acts, conduct or property of a bankrupt; [special provisions regarding examinations of spouses deleted].

Under § 21a, the order for an examination was obtainable without giving notice. "The order for an examination under § 21a is ordinarily ex parte." Collier on Bankruptcy ¶ 21.18 (14th ed.).

The former Bankruptcy Rules, which became effective in 1973,

contained Rule 205 that was very similar to the present Rule 2004. Most significantly, Rule 205(a) read as follows:

> (a). **Examination on Application.** Upon application of any party in interest, the court may order the examination of any person. The application shall be in writing unless made during a hearing or examination or unless a local rule otherwise provides.

Rule 205 followed the practice of § 21a by permitting ex parte orders for examinations. "Bankruptcy Rule 205(a) provides that the order for examination may be made on the application of any person. There is no requirement of notice." Collier on Bankruptcy ¶ 21.18 (14th ed.).

Former Rule 11-26 provided that former Rule 205 applied in Chapter XI cases, and also provided that the scope of an examination was extended to matters relevant to the debtor's financial condition and the operation of the debtor's business.

When the former Rules were replaced by the current Rules in 1983, Rule 2004 replaced Rules 205 and 11-26. It is interesting to note that the beginning phrase "Upon application" found in former Rule 205(a) was replaced with "Upon motion" in Rule 2004(a), and that Rule 9013 provides that motions shall be on notice.[1] This should lead to the conclusion that Rule 2004(a) changed prior practice by requiring notice before the court grants the order to examine a witness. However, the original Advisory Committee Note to Rule 2004 made it clear that the court

---

[1]The lack of clarity regarding the meaning and procedures for "applications" is the focus of the Subcommittee on Litigation, which will be presenting preliminary drafts of Rule amendments designed to eradicate the use of the term "application" in the Rules.

may grant the order for an examination ex parte. Apparently, the Advisory Committee, despite use of the word "motion," intended to continue the practice of permitting courts to grant orders for examinations ex parte. It is this inconsistency between the Rule and the Committee Note -- and the desire for clarification -- that led to the Advisory Committee's discussion of Rule 2004(a) at the September 1995 meeting.

With respect to the scope of the examination, the breadth and "fishing expedition" quality has not changed much since the enactment of the former Bankruptcy Act in 1898. See In re Foerst, 93 F. 190, 191 (S.D.N.Y. 1899) ("In general, a large latitude of inquiry should be allowed in the examination of persons closely connected with the bankrupt in business dealings, or otherwise, for the purpose of discovering assets and unearthing frauds, upon any reasonable surmise that they have assets of the debtor ... The examination ... is of necessity to a considerable extent a fishing expedition."); In re Wilcher, 56 BR 428, 434 (Bankr. N.D. Ill. 1985) ("Since Rule 2004 allows in effect a 'fishing expedition' in order to allow the trustee to quickly locate assets of the estate, an examination under Rule 2004 need not be limited, as are examinations under the Federal Rules of Civil Procedure, to issues raised with reasonable particularity in a complaint.").

In sum, a review of the origins of Rule 2004 shows that, for almost 100 years, (1) broad "fishing expedition" examinations have been available in bankruptcy cases, and (2) a court order

has been required before conducting such an examination. In addition, under the former Act and former Rules, an order for an examination could be obtained ex parte. Apparently, little has changed.

Current Practice Regarding Rule 2004(a) Motions

Many courts now grant Rule 2004 motions ex parte. Some have local rules providing for such procedures. For example, Local Bankruptcy Rule 204 of the District of Colorado provides that: "(a) An order for examination pursuant to Fed.R.B.P. 2004 may be issued by the court on the ex parte application of a party in interest." Others have acknowledged such procedures in judicial decisions. See, e.g., In re Hickman, 151 B.R. 125, 128 (Bankr. N.D. Ohio 1993) ("The [Rule 2004] motion may be heard ex parte or it may be heard after disseminating notice."); In re Wilcher, 56 BR 428, 434 (Bankr. N.D. Ill. 1985) ("Rule 2004 examination may be ordered ex parte..."). See also, Collier on Bankruptcy, ¶ 2004.03[2] ("The [Rule 2004] motion is filed and usually granted ex parte...").

At the Advisory Committee's request, the Federal Judicial Center ("FJC") is conducting a survey to determine the Rule 2004 procedures now used by courts. The survey is also designed to determine the number of Rule 2004 examinations ordered each year, the frequency and success rate of objections to motions for Rule 2004 examinations when advance notice is given, the frequency and success rate of motions to quash or for protective orders, and the satisfaction level regarding the present Rule 2004. The FJC

is in the process of receiving the survey results and will prepare a report to be circulated prior to the San Francisco meeting. Beth Wiggins of the FJC, who designed the survey, will be present at the meeting. Although many responses have not been received as of the date of this memorandum, the early returns indicate that most courts usually permit ex parte motions for Rule 2004(a) orders, while occasionally requiring notice to the party to be examined before issuing the order. Fewer courts require notice in all cases.

Motions for Protective Orders -- Which Court?

In three of the alternative drafts of amendments to Rule 2004(a) that I presented at the March 1996 meeting, I included the following new language to be added as a second sentence, together with an explanation to be included in the Committee Note:

> On motion of any party in interest or any entity whose examination has been ordered under this rule, the court may quash any subpoena issued, limit the scope of any examination, or order any other appropriate relief.
>
> COMMITTEE NOTE
>
> The second sentence of subdivision (a) is added to clarify that the court, after ordering an examination under this rule, has the discretion to quash any subpoena or to issue any other order appropriate under the circumstances upon a motion filed by a party in interest or the entity whose examination is being sought. Although the court may order relief of the type specified in Rule 26(c) F.R.Civ.P. relating to protective orders in civil litigation, the court's discretion to control the use of Rule 2004 in a particular case is not so limited.

In considering this amendment, I thought about adding a

provision that merely incorporates Civil Rule 26(c) on protective orders (which is in the process of being amended; proposed amendments have been published for comment but have not been forwarded to the Judicial Conference). After further analysis, I thought that Civil Rule 26(c), which applies to traditional litigation and is applicable in adversary proceedings, would not be appropriate where there is no pending litigation. First, Rule 26(c) requires "good cause shown" to obtain a protective order. In view of the "fishing expedition" nature of a Rule 2004 examination, I prefer keeping the burden of persuasion where it is now -- i.e., on the person seeking the examination. In addition, Rule 26(c) is limited to orders "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Although a bankruptcy court may issue such an order in connection with a Rule 2004 examination, I believe that the bankruptcy court should have discretion to go beyond these purposes. For example, if an examiner is appointed to investigate certain matters, or the trustee is investigating a particular matter, the examiner or trustee may ask the court to quash a subpoena or otherwise limit Rule 2004 examinations sought by various other parties if uncontrolled discovery will in some way thwart the investigation.

At the March meeting, I was asked to consider the appropriate forum in which a person to be examined may file a motion to quash a subpoena or for a protective order. This question is of particular significance since the Committee

approved proposed amendments to Rule 2004(c) to clarify that the court may order an examination "whether it is to be held within or without the district in which the case is pending." The bankruptcy court in which the case is pending may order a person to be examined in a location that is not in that district, and the attorney for the examining party may issue a subpoena on behalf of the court in the district in which the examination will be held.

If a bankruptcy court in New York orders the examination of a person located in California, and a subpoena is issued on behalf of the court in California, is it appropriate to require that any motion to quash or motion for a protective order be heard in New York? In California? Should it be the choice of the witness?

If the witness wants to have the Rule 2004(a) order vacated or modified, or wants to limit the scope of the examination, it makes sense for the home court (where the bankruptcy case is pending) to hear the motion. First, the home court is the one that ordered the examination. Should the California court be reviewing the order of the New York court with a view toward vacating or modifying it? Second, the California court has no documents, no file, no information regarding the bankruptcy case, no way of knowing the home court's reasons for granting the order, and no facts that may be relevant in determining whether the examination is appropriate.

On the other hand, if the witness wants to quash a subpoena

because of inconvenience or temporary undue hardship (the witness is ill and a request to delay the examination for a week or so is refused by the examining attorney) -- without challenging the Rule 2004(a) order or the examiner's right to examine at a later time -- it makes sense for the witness to file a motion to quash the subpoena or for a protective order in the district from which the subpoena was issued. If the California court issued the subpoena (either the clerk, or the attorney issuing it on behalf of the court under Rule 45), the California court should have jurisdiction to quash its own subpoena.

There are two Civil Rules that are worthy of mentioning with respect to these issues. Civil Rule 26(c), on protective orders, provides, in part, that

> "[T]he court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, ..."

That is, a person receiving a subpoena for a deposition may file a motion for a protective order either in the home court or in the district in which the deposition is to be taken. An important distinction between Civil Rule 26 and Rule 2004, however, is that a court does not order a deposition in a civil case, whereas Rule 2004 examinations are ordered by the home court. Therefore, when another court hears a motion for a protective order in a district court civil case, it is not being asked, in effect, to vacate or modify an existing order of

another court.

The other relevant Civil Rule is Rule 45, which is made applicable in bankruptcy cases (including Rule 2004 examinations) by Bankruptcy Rule 9016 and Rule 2004(c). Rule 45(c) provides, in part:

> (1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limit to, lost earnings and a reasonable attorney's fee.
>
> ****
>
> (3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
>
> (i) fails to allow reasonable time for compliance;
>
> (ii) requires a person who is not a party or an officer of a party to travel [more than 100 miles]...;
>
> (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or
>
> (iv) subjects a person to undue burden....

In sum, the Civil Rule 45 gives the court issuing a subpoena the power to issue certain protective orders relating to that subpoena, while Civil Rule 26(c) gives the power to issue protective orders relating to depositions to both the court in which the action is pending and the court for the district in which a deposition will take place.

I suggest that the Committee consider resolving this problem by adhering to the following guidelines: The home court that ordered the Rule 2004(a) examination (where the bankruptcy case is pending) should always have authority to vacate or modify its own orders, and to issue a protective order relating to the

examination. In addition, the court on whose behalf the subpoena was issued should have the powers conferred by Civil Rule 45(c), but only to the extent that it is not inconsistent with any order issued by the home court. If the witness wants to vacate the Rule 2004(a) order so as to avoid being examined entirely, that is an issue that should be addressed by the home court. For example, if the bankruptcy court in New York orders a Rule 2004 examination of a witness located in California, the attorney for the examining party issues a subpoena on behalf of the court in California, and the witness wants the order vacated so that he or she will never have to testify (arguing that the examination is not necessary or is only for harassment purposes, or that a Rule 2004 examination is inappropriate in view of pending related litigation), the witness must file a motion for relief in New York. However, if the witness is ill and wants to have the examination delayed, or needs additional time to prepare for the examination, the witness should be able to ask the California court to modify or quash the subpoena as provided in Civil Rule 45(c). The California court should not grant relief, however, that would be inconsistent with the Rule 2004(a) order of the New York court. If the subpoena is quashed because the witness needs additional time to prepare, the attorney for the examining party may issue another subpoena for a later time and place consistent with the Rule 2004(a) order of the New York court and any order of the California court.

I believe that this solution is similar to Civil Rule 26(c)

applicable to depositions (both home court and court where deposition will be taken have protective powers) and Civil Rule 45(c) (court has protective powers regarding subpoena issued on its behalf). The only difference is that, under my suggestion, the court where the examination will be taken may not issue an order that is inconsistent with the Rule 2004(a) order of the home court -- only the home court may do that.

Since Civil Rule 45, in its entirety, is applicable in bankruptcy cases through Rule 9016, and Rule 9016 is applicable to Rule 2004 examinations under Rule 2004(c), a court on behalf of which a subpoena is issued clearly has the authority to vacate or modify its own subpoena issued in connection with a Rule 2004 examination -- and no amendment to the Rules is necessary for that to continue. It also is implicit that the home court that issues the Rule 2004(a) order has the inherent power to vacate or modify its own orders if a witness so requests. Therefore, Rule 2004 probably does not have to be amended to implement any of the above suggestions.

Nonetheless, for the sake of clarity, I recommend that Rule 2004(a) provide that "the court" (which is defined in Rule 9001 to mean the court where the case or proceeding is pending) may issue a protective order or grant other appropriate relief regarding the examination. I included such language in the alternative drafts set forth below.

I also would clarify in the Committee Note that the court issuing the subpoena may vacate or modify the subpoena consistent

with the Rule 2004(a) order, emphasizing that such court should not entertain a motion that would constitute a collateral attack on the order issued under Rule 2004(a). In particular, I suggest adding the following language to the Committee Note:

> "If an examination is to be held outside the district in which the case is pending, and a subpoena is issued on behalf of a court in the district in which the examination is to take place, the court on behalf of which the subpoena was issued may quash or modify the subpoena in accordance with Rule 45 F.R.Civ.P. for the purpose of protecting the witness. For example, if the witness needs additional time to prepare for the examination, the court may modify its subpoena accordingly. But that court should not entertain any motion that would constitute a collateral attack on the order issued under Rule 2004(a) by the court in which the case is pending, and should not issue any order that is inconsistent with the order issued under Rule 2004(a)."

I also prepared a slightly different variation of this note to be used if Rule 2004 is amended to delete the requirement that a court order be obtained before the examination. That variation is included in the draft presented below as alternative #4.

Procedural Mechanism in Civil Rule 27

The Committee asked me to review the procedures contained in Civil Rule 27 (Depositions Before Action or Pending Appeal) and to consider whether such procedures would be appropriate for Rule 2004 examinations. A copy of Rule 27 is attached for your information.

Rule 27(a) provides a mechanism for taking a deposition before an action is commenced. A petition must be filed containing certain information, including facts that the petitioner desires to establish by the proposed testimony and the

reasons for desiring it. At least 20 days before the hearing on the petition, notice must be served with a copy of the petition on those named as expected adverse parties in the expected litigation.

Rule 27(b) provides for a motion to take a deposition to perpetuate testimony pending an appeal. The motion must include the names and addresses of persons to be deposed and the substance of the testimony which the party expects to elicit from each, and the reasons for perpetuating the testimony.

The procedures under Rule 27(a) -- i.e., a petition served on all adverse parties 20-days before a hearing -- do not appear to be appropriate for Rule 2004 examinations. Motion practice (either on notice or ex parte) would be more appropriate than a petition, and a requirement that all adverse parties be served would not be appropriate for a bankruptcy case with numerous parties in interest. The procedure under Rule 27(b) is ordinary motion practice and offers nothing new to the Committee's discussions.

The only aspect of Rule 27 that may be worth considering is the requirement that the moving papers include certain specified information. Rule 2004(a) could be amended to specify the information that must be included in the motion, such as the name and address of the person to be examined, the substance of the testimony expected to be elicited, and the reasons for eliciting it. Although this may be a close question, I think that such an amendment is not necessary. Rule 9013 requires that any motion

"shall state with particularity the grounds therefor, and shall set forth the relief or order sought," and Rule 9011 (as will be amended in 1997) provides that the attorney filing a motion certifies that "it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." In addition, since Rule 2004(a) examinations are fishing expeditions, I question whether the motion should have to state the testimony expected to be elicited. If the motion alleges that there is reason to believe that the witness has information relating to the broad permissible scope of the examination (see Rule 2004(b)), that should be sufficient to request the examination. For example, a motion stating that "the person to be examined may have facts relevant to the acts or financial condition of the debtor, or the administration of the estate," that should be enough. Finally, I am not aware of any problems relating to the contents of Rule 2004(a) motion papers. For these reasons, the alternative drafts of proposed amendments set forth below do not include any requirements regarding the contents of the motion.

Procedural Mechanism in Civil Rule 30

The Committee also asked me to consider the procedural mechanism in Civil Rule 30 (Depositions Upon Oral Examinations), a copy of which is attached for your information. Rule 30 is a lengthy and detailed rule governing several aspects of depositions.

Rule 30(a) provides that, with certain exceptions, a party

may take a deposition without leave of court, and that attendance may be compelled by the issuance of a subpoena under Rule 45. One of my drafts presented at the March 1996 meeting (alternative no. 5) was based on Rule 30(a). The four exceptions in Rule 30 (when a court order is required) include (1) where the witness is imprisoned, (2) when at least 10 depositions had been taken by the parties in the case, (3) when this witness already had been deposed in the case, and (4) when the time for the deposition is earlier than certain time limitations for discovery.

I considered these exceptions when I drafted the alternative that would permit Rule 2004 examinations without leave of court, but I believe that the only exception that should be applicable is the one for imprisoned persons. To limit the total number of Rule 2004 examinations compelled without leave of court, and to require a court order for additional examinations, would not be feasible in a bankruptcy case. Since any creditor, shareholder, committee, or any other party in interest may obtain a Rule 2004 examination, each of these parties may be unaware of the number of Rule 2004 examinations already taken in the case. Parties also may not know whether a particular witness had been examined by another party. Finally, time limits on discovery do not apply to Rule 2004 examinations.

The remainder of Rule 30 does not appear to be appropriate, or I believe is unnecessary, regarding Rule 2004 examinations. Rule 30(b) requires notice of the deposition to all parties to the action (there is no pending action relating to Rule 2004),

governs the recording mechanism, provides for an official to preside, applies Rule 34 to requests for the production of documents, governs the person to be deposed when the deponent is a corporation or other organization, and provides for depositions by telephone or other electronic means. Rule 30(c), which governs the examination and cross-examination, evidence rules, oaths, and recording of testimony, appear to be most appropriate for depositions at which the lawyers for all parties to a lawsuit are present and the testimony is preserved for use in litigation. Rule 30(d) relates to objections to evidence, time limits for depositions by court order or local rule, and court orders terminating examinations alleged to be unreasonable. Rule 30(e) governs reviewing transcripts and Rule 30(f) governs certification and filing of the deposition by an officer. Rule 30(g) provides for expenses and attorney's fees for a party attending a deposition when there is a failure to appear or to serve a subpoena.

Again, since Rule 2004 examinations are fishing expeditions unrelated to any litigation, and other parties usually are neither notified nor in attendance, I do not recommend including the provisions of Civil Rule 30 in Rule 2004.

Repealing Rule 2004

A suggestion was made at the March 1996 meeting that I consider the repeal of Rule 2004. After considering this suggestion, I do not recommend that it be repealed.

First, I think it makes sense for the Bankruptcy Rules to

provide a procedure by which the trustee, a committee, or other party in interest may examine a witness to determine the financial condition, business operations, and other facts relevant to the case -- unrelated to any litigation. I am not ready to suggest the elimination of this discovery device. If Rule 2004 is repealed, there would not be any appropriate rule to fill the void. The Civil Rules on discovery (Rules 26, 30, etc.), which are applicable only in adversary proceedings or contested matters, would not apply to the broad Rule 2004-type discovery. Rule 45 (Subpoena), which arguably could be used to obtain this type of discovery, does not provide any guidance regarding the proper scope of an examination. It also speaks to attendance at hearings, trials, or depositions (referring to the "notice of deposition"). This does not appear to fit the concept of the Rule 2004-type examination. Therefore, I am not including the repeal of Rule 2004 as one of the alternatives set forth below. Of course, this is not intended to preclude any Committee member from raising it for consideration at the meeting.

Alternative Approaches to Rule 2004(a)

I recommend that the Committee consider the following four alternatives regarding Rule 2004(a). Of course, there are many variations of these alternatives (such as deleting the new language regarding protective orders) that also may be discussed at the meeting in San Francisco.

(1) ***Alternative #1 -- Do nothing***. The Committee instructed me to keep this alternative for further consideration. I do not

support this alternative because, if nothing else, the inconsistency between the rule and the committee note as to whether the order may be granted ex parte should be fixed.

The Committee may consider the fact that the Advisory Committee, to the best of my recollection, has not received any letters, within at least the past eight years, complaining about Rule 2004(a). Despite some ambiguity as to whether the motion may be ex parte, this may be an area that is not "broken" and that, in practice, works well. That does not mean that it cannot or should not be improved, but the Committee should take that fact into consideration when considering the necessity of any amendment to Rule 2004(a) -- especially the deletion of the requirement for a court order under Rule 2004(a).

(2) ***Alternative #2 -- Amend the rule to clarify that the judge has the discretion to issue the order ex parte or to require notice of the motion to the person to be examined.*** This approach is consistent with the Committee Note and the common practice today (as well as the practice for the past 100 years). I personally favor this one. I do not think that the current practice of issuing ex parte orders has produced any significant problems that justify changing it.

The following draft is designed to implement this alternative.

Rule 2004. Examinations

(a) EXAMINATIONS ON MOTION. On motion of any party in interest, the court may order the examination of any entity.

The motion may be ex parte unless the court directs otherwise. On motion of any party in interest or any entity whose examination has been ordered under this rule, the court may vacate the order, quash any subpoena issued, limit the scope of any examination, or order any other appropriate relief.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a motion to examine an entity under this subdivision may be ex parte unless the court directs otherwise.

The second sentence of subdivision (a) is added to clarify that the court, after ordering an examination under this rule, has the discretion to vacate its order, quash any subpoena, or to issue any other order appropriate under the circumstances upon a motion filed by a party in interest or the entity whose examination is being sought. Although the court may order relief of the type specified in Rule 26(c) F.R.Civ.P. relating to protective orders in civil litigation, the court's discretion to control the use of Rule 2004 in a particular case is not so limited.

If an examination is to be held outside the district in which the case is pending, and a subpoena is issued on behalf of a court in the district in which the examination is to be held, the court on behalf of which the subpoena was issued may quash or modify the subpoena in accordance with Rule 45 F.R.Civ.P. for the purpose of protecting the witness. For example, if the witness needs additional time to prepare for the examination, the court may modify its subpoena accordingly. But that court should not entertain any motion that would constitute a collateral attack on the order issued under Rule 2004(a) by the court in which the case is pending, and should not issue any order that is inconsistent with the order issued under Rule 2004(a).

(3) ***Amend the rule to expressly require a motion on notice to the entity to be examined.*** This approach would assure that

the entity always has an opportunity to challenge the motion and persuade the court (before the issuance of a subpoena) that he or she should not be examined.

The following draft is designed to implement this alternative.

Rule 2004. Examinations

(a) EXAMINATIONS ON MOTION. On motion of any party in interest, and after notice and a hearing, the court may order the examination of any entity. Notice of the motion shall be served on the entity to be examined and any other entity the court directs. On motion of any party in interest or any entity whose examination has been ordered under this rule, the court may vacate the order, quash any subpoena issued, limit the scope of any examination, or order any other appropriate relief.

COMMITTEE NOTE

Subdivision (a) is amended to prohibit the issuance of an order under this rule ex parte. Any motion for an order under Rule 2004(a) must be on notice to the entity to be examined and any other entity the court directs.

The second sentence of subdivision (a) is added to clarify that the court, after ordering an examination under this rule, has the discretion to vacate the order, quash any subpoena or to issue any other order appropriate under the circumstances upon a motion filed by a party in interest or the entity whose examination is being sought. Although the court may order relief of the type specified in Rule 26(c) F.R.Civ.P. relating to protective orders in civil litigation, the court's discretion to control the use of Rule 2004 in a particular case is not so limited.

If an examination is to be held outside the district in which the case is pending, and a subpoena

> is issued on behalf of a court in the district in which the examination is to be held, the court on behalf of which the subpoena was issued may quash or modify the subpoena in accordance with Rule 45 F.R.Civ.P. for the purpose of protecting the witness. For example, if the witness needs additional time to prepare for the examination, the court may modify its subpoena accordingly. But that court should not entertain any motion that would constitute a collateral attack on the order issued under Rule 2004(a) by the court in which the case is pending, and should not issue any order that is inconsistent with the order issued under Rule 2004(a).

(4) ***Delete the requirement for any motion or court order -- treating Rule 2004 examinations the same way that the Civil Rules treat depositions -- except when the debtor is to be examined.*** This approach would permit a party in interest to issue a subpoena to compel an examination of anyone other than the debtor. The witness may move for a protective order or to quash the subpoena. The examining party would not have to state in a motion or otherwise the basis for the examination and would not be subject to Rule 9011.

If the Committee adopts an amendment that permits the issuance of a subpoena to compel a Rule 2004 examination without a court order, I recommend that this change not be applicable to any examination of the debtor. The current rule has a special provision in subdivision (d) that provides that "for cause shown and on terms as it may impose" the court may order the examination of the debtor. Since the debtor must appear at the meeting of creditors held under § 341 of the Code, and any party in interest may attend and examine the debtor at that time, I

would maintain the current protection that requires a court order and showing of "cause" before such an examination could be compelled. In addition, there is greater potential for abuse of the subpoena power (especially for harassment by angry creditors) if it could be used against a debtor without leave of court. For the Committee's information, I enclose a copy of an article by Bankruptcy Judge Randolph Baxter (N.D. Ohio) and Jamie B. Schneier, "Rule 2004: A Useful Rule or an Abusive Creditor's Weapon," 10 BANKR. DEV. J. 451 (1994), that discusses possible abuse of Rule 2004(a) examinations of consumer debtors by creditors seeking to obtain reaffirmation agreements.

Although it could be argued that ex parte orders are routinely granted and offer no protection, I believe that requiring a motion and court order before permitting a party in interest to engage in a "fishing expedition" unrelated to any pending litigation has some appeal. Bankruptcy cases differ from most civil litigation in that there are numerous parties in interest (sometimes thousands) who have standing to seek an examination of any entity despite the absence of any issue that is joined. A $500 trade creditor in a billion dollar reorganization may seek to examine a shareholder or another creditor regarding its financial relationship to the debtor -- again, unrelated to any litigation. Rule 2004(a) should continue to require any party seeking an examination of another entity to state the reason for the examination in motion papers, signed and subject to sanctions under Rule 9011.

The following draft is designed to implement this alternative:

Rule 2004. Examinations

(a) EXAMINATIONS ~~ON MOTION. On motion of any party in interest, the court may order the examination of any entity.~~ Any party in interest may examine any entity in accordance with this rule without leave of court unless the person to be examined is the debtor or is confined in a prison, or the court otherwise directs. On motion of any party in interest or any entity whose examination is sought under this rule, the court may quash any subpoena issued, limit the scope of any examination, or order any other appropriate relief.

COMMITTEE NOTE

Subdivision (a) is amended to delete the requirement for a court order where a party in interest desires to examine an entity in accordance with this rule, unless the entity to be examined is the debtor or a person confined to a prison. A party may compel an entity to attend an examination by causing a subpoena to be issued in accordance with Rule 45 F.R.Civ.P., which is made applicable by subdivision (c) and Rule 9016.

The debtor may be examined under this rule only if the court so orders in accordance with subdivision (c). The requirement for a court order applicable to persons confined to a prison conforms to Rule 30(a)(2) F.R.Civ.P.

The amendment also clarifies that the court has discretion to order that examinations not be compelled in the absence of a court order obtained before the issuance of a subpoena. This provision is designed to give the court the power to limit the broad discovery process when necessary in the particular case, especially in a complex case in which multiple examinations that may be sought by different parties are inappropriate.

The second sentence of subdivision (a) is added to clarify that the court, even after the issuance of a subpoena, has the discretion to quash the subpoena or to issue any other order appropriate under the circumstances. Although the court may order relief of the type specified in Rule 26(c) F.R.Civ.P. relating to protective orders in civil litigation, the court's discretion to control the use of Rule 2004 in a particular case is not so limited.

If an examination of a witness is to be held outside the district in which the case is pending, and a subpoena is issued on behalf of a court in the district in which the examination is to be held, the court on behalf of which the subpoena was issued may quash or modify the subpoena in accordance with Rule 45 F.R.Civ.P. for the purpose of protecting the witness. For example, if the witness needs additional time to prepare for the examination, that court may modify its subpoena accordingly. But, if the person to be examined is the debtor, that court should not entertain any motion that would constitute a collateral attack on an order issued under Rule 2004(d) by the court in which the case is pending. Alternatively, any witness may file a motion in the court in which the case is pending for a protective order or for any other appropriate relief relating to the examination.

Rule 27. Depositions Before Action or Pending Appeal

(a) BEFORE ACTION.

(1) *Petition.* A person who desires to perpetuate testimony regarding any matter that may be cognizable in any court of the United States may file a verified petition in the United States district court in the district of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a court of the United States but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) *Notice and Service.* The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the district or state in the manner provided in Rule 4(d) for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) *Order and Examination.* If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) *Use of Deposition.* If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a United States district court, in accordance with the provisions of Rule 32(a).

(b) PENDING APPEAL. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) PERPETUATION BY ACTION. This rule does not limit the power of a court to entertain an action to perpetuate testimony.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 1, 1971, eff. July 1, 1971; Mar. 2, 1987, eff. Aug. 1, 1987.)

Rule 30. Depositions Upon Oral Examination

(a) WHEN DEPOSITIONS MAY BE TAKEN; WHEN LEAVE REQUIRED.

(1) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45.

(2) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties,

(A) a proposed deposition would result in more than ten depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by third-party defendants;

(B) the person to be examined already has been deposed in the case; or

(C) a party seeks to take a deposition before the time specified in Rule 26(d) unless the notice contains a certification, with supporting facts, that the person to be examined is expected to leave the United States and be unavailable for examination in this country unless deposed before that time.

(b) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; METHOD OF RECORDING; PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to, or included in, the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition,

the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28(a), 37(a)(1), and 37(b)(1), a deposition taken by such means is taken in the district and at the place where the

(c) EXAMINATION AND CROSS-EXAMINATION; RECORD OF EXAMINATION; OATH; OBJECTIONS. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other method authorized by subdivision (b)(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) SCHEDULE AND DURATION; MOTION TO TERMINATE OR LIMIT EXAMINATION.

(1) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (3).

(2) By order or local rule, the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26(b)(2) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) REVIEW BY WITNESS; CHANGES; SIGNING. If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by subdivision (f)(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

(f) CERTIFICATION AND FILING BY OFFICER; EXHIBITS; COPIES; NOTICE OF FILING.

(1) The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition in an envelope or package indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may (A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then

be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) FAILURE TO ATTEND OR TO SERVE SUBPOENA; EXPENSES.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(As amended Jan. 21, 1963, eff. July 1, 1963; Mar. 30, 1970, eff. July 1, 1970; Mar. 1, 1971, eff. July 1, 1971; Nov. 20, 1972, eff. July 1, 1975; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

Claims & Opinions

RULE 2004: A USEFUL RULE OR AN ABUSIVE CREDITOR'S WEAPON?

by
Judge Randolph Baxter and*
*Jamie B. Schneier***

I. INTRODUCTION

Rule 2004 was developed to facilitate discovery of the debtor's assets: specifically, their extent and location.[1] The scope of such an examination, however, is only limited to information which would affect the administration of the bankruptcy estate.[2] Without checks upon the examination, debtors in bankruptcy may find themselves in a hostile or coercive environment with a creditor's attorney pressuring for a debt reaffirmation or some other relief. Moreover, Rule 2004 examinations apply to all chapters of the Code[3] but are most often employed in chapter 7 where there is

* Honorable Randolph Baxter, U.S. Bankruptcy Judge, N.D. Ohio.

** J.D., Southwestern Univ. School of Law, S.C.A.L.E. Program; former judicial extern to Judge Randolph Baxter.

[1] FED. R. BANKR. P. 2004. The primary purpose of the Rule 2004 examination is to permit the trustee to determine the "extent and location of the [bankruptcy] estate's assets." *In re* Wilcher, 56 B.R. 428, 433 (Bankr. N.D. Ill. 1985) (citation omitted).

[2] *See In re* Cinderella Clothing Indus., Inc., 93 B.R. 373, 378 (Bankr. E.D. Pa. 1988); *In re* Continental Forge Co., Inc., 73 B.R. 1005, 1007 (Bankr. W.D. Pa. 1987) (citations omitted).

[3] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330, *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended

the greatest potential for abuse. This article explores the potential abuse of debtor's examinations, in addition to suggesting some alternatives and safeguards for this process.

Upon the filing of a chapter 7 bankruptcy, several things happen. An automatic stay is imposed, which precludes creditors from taking actions against the debtor or the debtor's property.[4] An interim trustee is then appointed to administer the estate.[5] Then, usually within thirty days, a creditors' meeting occurs.[6] At the creditors' meeting, the trustee and the creditors question the debtor to determine the debtor's intentions and the extent of the debtor's assets.[7] At that meeting, the creditors may also elect a permanent trustee.[8]

The goals of a chapter 7 bankruptcy are to collect and preserve assets for the creditors while, at the same time, giving the honest debtor protection and a fresh start.[9] To accomplish these goals, a trustee must gather the assets belonging to the debtor's estate and distribute them to the creditors according to their status and priority. Debtors, once discharged, are forgiven of all dischargeable debts and given their fresh start. Once that discharge occurs, only nondischargeable debts and debts properly reaffirmed remain with the debtor.[10]

Many times, debtors may prefer to reaffirm some of their debts. Creditors whose claims are dischargeable, however, would almost always prefer to have their claims reaffirmed, rather than discharged. One of the concerns of this article involves the improper use, by creditors' attorneys, of the Rule 2004 examination as a forum for coercing debt reaffirmations.

---

in various sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in various sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in various sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); and, Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in various sections of 28 U.S.C.) [hereinafter Bankruptcy Code or Code].

[4] 11 U.S.C. § 362 (1988).

[5] 11 U.S.C. § 701 (1988); FED. R. BANKR. P. 2001.

[6] 11 U.S.C. § 341(a) (1988); FED. R. BANKR. P. 2002, 2003.

[7] 11 U.S.C. § 343 (1988); FED. R. BANKR. P. 2004.

[8] 11 U.S.C. § 702(b) (1988).

[9] *See* Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) (citation omitted) ("One of the primary purposes of the bankruptcy act is to 'relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh . . . .'").

[10] After discharge, § 524(a)(2) prohibits creditors from bringing any further actions against the debtor or the debtor's property for debts which have been discharged. 11 U.S.C. § 524(a)(2) (1988).

Other concerns addressed by this article involve the use of Rule 2004 examinations where other forms of discovery may be more appropriate.

II. Examinations Under Section 343 And Rule 2004

Section 343 of the Bankruptcy Code requires the debtor to appear and submit to examination under oath at the section 341(a) creditors' meeting.[11] The creditors' meeting is held approximately thirty days from the date of the initial filing. Under this section, creditors, trustees, examiners, or the United States Trustee may examine the debtor. The U.S. Trustee or the U.S. Trustee's appointee presides over this meeting of parties with an interest in the debtor's estate.[12]

A Rule 2004 examination is similar in scope to a section 343 examination. The difference, however, is that a Rule 2004 examination may be held at any time during the pendency of the case;[13] may be conducted upon any entity connected with the bankruptcy;[14] may be ordered by the court upon motion of the requesting party;[15] and is presided over by the requesting party without the presence of the case trustee or the U.S. Trustee.

The legislative history of examinations under section 343 and Rule 2004 shows that the purpose of each examination is to discover assets and determine the dischargeability of debts. More specifically, "the purpose of the examination is to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge."[16]

The trustee and creditors have several alternative means available for discovering assets and gathering information regarding the dischargeability of debts or intentions of the debtor. After filing for bankruptcy, the debtor has certain duties imposed upon her. Section 521(1) requires the debtor to file a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's

---

[11] 11 U.S.C. § 343 (1988).

[12] Fed. R. Bankr. P. 2003(b)(1) provides that "[t]he United States Trustee shall preside at the meeting of creditors." Section 102(9) further provides that the "United States trustee includes a designee of the United States trustee." 11 U.S.C. § 102(9) (1988).

[13] Fed. R. Bankr. P. 2004(d).

[14] Fed. R. Bankr. P. 2004(a).

[15] *Id.*

[16] H.R. Rep. No. 595, 95th Cong., 1st Sess. 332 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5829; S. Rep. No. 989, 95th Cong., 2d Sess. 43 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5829.

financial affairs.[17] These schedules and statements require complete disclosure of the property, accounts, and other assets of the debtor, including the location, current market value, and equity of each.[18] The statement of financial affairs is an in-depth record of the debtor's income, accounts, payments and transfers, as well as other financial affairs and dealings. These schedules and statements become part of the court file and are available to creditors, the trustee, or other interested parties. Section 521(2) further requires the debtor to file, within thirty days of the filing of the petition, a statement of intention with respect to all assets of the estate which are held as collateral for consumer debts.[19] This statement requires the debtor to specify which of these assets will be claimed as exempt, as well as, the debtor's intention to redeem, reaffirm, or abandon the properties.

In addition to the schedules and statements filed with the court, the creditors' attorneys can employ ordinary discovery procedures,[20] including interrogatories,[21] requests for admissions,[22] and production of documents.[23] Of all the tools available, however, the most powerful is the examination. The examination allows the requesting party to use the force of a court order to bring the subject party to the creditors' attorneys office or to some other location requested by the creditors' attorneys. Once there, the attorney has broad discretion to question the examinee about a wide range of information. Furthermore, the examination is conducted solely by the creditors' attorneys, without the scrutiny of the court or the U.S. Trustee.

The reason Rule 2004 examinations are needed, in addition to section 343 examinations, is to give creditors and trustees a full opportunity to question debtors and discover their assets. In *In re Hammond*, the court recognized the fact that creditors rarely have a full opportunity to question the debtor at the creditors' meeting.[24] While a creditor does have an opportunity to question a debtor regarding the debtor's right to dis-

---

[17] 11 U.S.C. § 521(1) (1988).

[18] *See* Official Forms 6, 7.

[19] *See* Official Form 8.

[20] *See* FED. R. BANKR. P. 7026.

[21] *See* FED. R. BANKR. P. 7033.

[22] *See* FED. R. BANKR. P. 7036.

[23] *See* FED. R. BANKR. P. 7034.

[24] *In re* Hammond, 140 B.R. 197, 202-03 (Bankr. S.D. Ohio 1992) (citing 8 COLLIER ON BANKRUPTCY, ¶ 2003.04(c) (15th ed. 1991)). "Because of this need for brevity at the meeting of creditors, the fact that a creditor has had an opportunity to question the debtor at the meeting is normally no substitute for a Rule 2004 examination." *Id.* at 203.

charge at the meeting of creditors, such questioning must necessarily be brief. The *Hammond* court explained the need for brevity as follows:

> A creditor should not abuse the right to examine the debtor [at the meeting of creditors]. [Meetings of creditors] are not to be considered as substitutes for examinations under Rule 2004. A Rule 2004 examination allows a creditor great latitude to examine the debtor at length regarding almost any issue concerning the debtor's case. If a creditor attempts to go into great detail at a meeting of creditors, the result may well be that other creditors will not have adequate opportunities to ask relevant questions and other meetings scheduled on the same docket, for other cases will be unavoidably delayed.[25]

Thus, in such a meeting, either the trustee alone asks questions or each creditor's attorney is given only a short period to question. The *Hammond* court stated that the creditors should avail themselves of the Rule 2004 examination whenever their examination will take more than a few minutes.[26] In addition, new information may arise during the bankruptcy which was unknown at the creditors' meeting.

As an example of a situation where a Rule 2004 examination might be used, consider a claimholder whose claim is secured by the debtor's automobile. This creditor might request a Rule 2004 examination to examine the condition of the automobile and to inspect the debtor's automobile insurance policy. Another creditor, who holds a large unsecured claim, may want to question the debtor to discover any hidden assets.

III. Scope of Examinations

The scope of examinations under section 343 or Rule 2004 is defined by Rule 2004(b):

> The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge.[27]

Section 343 is derived from former section 21(a) of the Bankruptcy

---

[25] *Id.*
[26] *Id.*
[27] Fed. R. Bankr. P. 2004(b).

Act,[28] whereas Rule 2004(b) is derived partially from former Bankruptcy Rule 205(d).[29] The legislature intended that the scope of the examination remain substantially unchanged.[30] In a Rule 2004 examination, the examiners are given broad leeway in questioning the debtor and discovering assets, as long as the examination remains relevant and the examination serves the purposes of the Rule. In discussing the scope of the examination, the court in *In re Wilcher*[31] stated:

> The general rule is that the scope of a Rule 2004 examination is very broad and great latitude of inquiry is ordinarily permitted. The scope of examination allowed under Bankruptcy Rule 2004 is larger than that allowed under the Federal Rules of Civil Procedure and can legitimately be in the nature of a 'fishing expedition.'[32]

In discussing the types of inquiries which are relevant and proper in an examination, the court in *Ulmer v. United States*[33] gave several examples:

> The existence of property rights or interests not scheduled, or rights to defend against apparent claims, or rights of creditors to reclaim property in the hands of the bankrupt, or rights of a bankrupt to discharge—all these are instances of matters properly subject to investigation on such a proceeding.[34]

Although the scope of the examination has been given wide latitude, there are limits. These limits are determined by the relevancy of the examination to discovering the extent and location of the debtor's assets or the dischargeability of debts.[35]

Questions regarding the intention of the debtor to reaffirm a debt are not relevant to the discovery of hidden assets. Although an inquiry which may be related to the dischargeability of debt is permissible, creditors' efforts to persuade a debtor to reaffirm or their threats of repossession post-discharge are certainly outside the scope of the Rule 2004 examina-

---

[28] Bankruptcy Act of 1898, ch. 541, § 21(a), 30 Stat. 544 (repealed 1978) [hereinafter Bankruptcy Act or Act].

[29] *See* FED. R. BANKR. P. 2004 advisory committee's note (1983).

[30] *See id.*

[31] 56 B.R. 428 (Bankr. N.D. Ill. 1985) (citations omitted).

[32] *Id.* at 433.

[33] 219 F. 641 (6th Cir. 1915).

[34] *Id.* at 645.

[35] *See, e.g., In re* Continental Forge Co., 73 B.R. 1005 (Bankr. W.D. Pa. 1987).

tion. Since the automatic stay prohibits the creditor from initiating reaffirmation negotiations outside the examination, the same conduct within an examination setting is also prohibited.[36] For this reason, a creditor's attorney will have only a limited opportunity, at best, to question the debtor regarding a reaffirmation during the creditors' meeting because either the estate trustee or the U.S. Trustee are present. Often, creditors' attorneys circumvent this problem by negotiating with the debtor or the debtor's counsel before the actual meeting.[37] The real potential for abuse is in the Rule 2004 examination because the process occurs in a forum where the debtor is pitted against a creditor's attorney outside of a neutral setting. The potential harm is greater where the debtor is proceeding *pro se*, or is otherwise without the presence of counsel.

IV. Reaffirmations and the Automatic Stay

A reaffirmation of a dischargeable debt occurs when the debtor and the holder of a claim enter into a voluntary agreement wherein the debtor agrees to remain liable for the debt after the discharge of the bankruptcy.[38] Reaffirmations obtained after discharge are not enforceable as they are against public policy.[39] Likewise, *ipso facto* clauses contained in prepetition contracts are unenforceable against the debtor once the bankruptcy petition is filed.[40] The only period of time, therefore, in which a creditor can secure an enforceable reaffirmation agreement from a debtor is between the filing and the discharge of the bankruptcy. During this period, however, the automatic stay shields the debtor from creditor contacts, including requests to reaffirm.[41] One commentator has explained

---

[36] *See* 11 U.S.C. § 362(a)(6) (1988).

[37] *See* Teresa Sullivan et. al., As We Forgive Our Debtors 281 n.12 (1989). The authors found that creditors regularly use the examination setting to influence and initiate contact regarding reaffirmations:

> Most creditors who get reaffirmations ask for them when the debtor shows up for the § 341 hearing. Often the activity out in the halls is much more lively (and will determine more of the debtor's ultimate financial position) than what goes on in the hearing. Here the creditors' attorneys who ask may get their reaffirmations.

Id.

[38] To be enforceable, all reaffirmation agreements must satisfy the requirements of § 524(c) and (d) of the Code. 11 U.S.C. § 524(c), (d) (1988).

[39] 11 U.S.C. § 524(c)(1) (1988).

[40] *See* 2 Robert E. Ginsberg, Bankruptcy: Text, Statutes, Rules § 12.12(d) (2d Supp. 1991). "Such reaffirmation agreement must be obtained after the petition is filed. A prepetition waiver of the discharge in favor of a particular creditor is unenforceable." *Id.* (citing 11 U.S.C. § 524(a)(1) (1988)).

[41] 11 U.S.C. § 362(a)(6) (1988).

that the automatic stay is not limited to judicial or other actions, but applies to requests to reaffirm debts as well:

> The automatic stay is not limited to 'actions' against the debtor or the debtor's property. Instead, it also includes 'any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. . . .' It similarly applies to any act to get or enforce liens against, or to possess, the debtor's property or property of the estate. Thus, the stay technically applies even to a simple request that the debtor voluntarily pay or reaffirm a prepetition debt in whole or in part. In theory, the debtor must initiate negotiations for the reaffirmation of prepetition debts.[42]

The legislative history to the 1984 Bankruptcy Code Amendments clearly provides that contact initiated by the creditor for the purpose of reaffirmation is a violation of the automatic stay. "Creditors can no longer independently contact debtors to encourage them to reaffirm debts because such contact is prohibited by the Code. . . ."[43] Thus, during the pendency of the automatic stay, creditors may not initiate contact with debtors regarding reaffirmation agreements without prior court authorization. Secured creditors may, however, question debtors at section 341 meetings or Rule 2004 debtor examinations regarding their intentions to reaffirm.[44]

The concern is that creditors' attorneys are using Rule 2004 examination settings to pursue reaffirmations, rather than merely asking debtors' intentions as to reaffirming. Once the creditor's attorney obtains the reaffirmation, the court may not be afforded an opportunity to review any improprieties. The 1984 amendments to section 524(c) lessened the court's role in supervising and deterring reaffirmations. Prior to the 1984 amendments, the debtor was required to personally appear in court for a reaffirmation hearing.[45] Although the revised Code extended the time in which a debtor can rescind a reaffirmation, the Code also removed most of the court's involvement. As long as the debtor is represented by counsel and the debtor's counsel submits the proper affidavit, the reaffirmation will be enforced.[46] The court's approval is only necessary in situations where the debtor did not receive representation by counsel and the reaffirmed debt is

---

[42] *See* 1 GINSBERG, *supra*, note 40, at § 3.01(c) (citations omitted).

[43] S. REP. NO. 65, 98th Cong., 1st Sess. 11 (1983).

[44] 1 GINSBERG, *supra*, note 40, at 206 n.41. "Secured creditors, on the other hand, would seem to have a right to know of the debtor's intentions with respect to collateral-whether abandonment, redemption, reaffirmation, etc." *Id.*

[45] 11 U.S.C. § 524(c) (1978), *amended by* 11 U.S.C. § 524(c) (1984).

[46] *See* 11 U.S.C. § 524 (1988).

not a debt secured by real property.[47]

V. Are Creditors' Attorneys Abusing Rule 2004 by Using Examinations in Place of Less Intrusive Discovery Procedures and by Seeking Reaffirmations?

As stated earlier, a Rule 2004 examination is ordered only upon prior motion to the court.[48] The motion, however, is usually granted, often *ex parte*, with no opportunity for the debtor to respond.[49] The debtor may oppose the motion by submitting a motion to quash or a motion to limit the scope of the examination. If the debtor opposes, by submitting a motion to quash, the creditor must establish that the information is relevant to the administration of the estate.[50] If the request is overly burdensome or unrelated, the court should deny the request for an examination. Furthermore, if a creditor has already had a full opportunity to examine the debtor, but failed to do so, the application also should be denied.[51]

In actual practice, Rule 2004 examinations are routinely granted, notwithstanding the debtor's motion to quash. A creditor can claim a need to question the debtor regarding the extent and location of assets, claiming there was not an opportunity to fully examine the debtor at the section 341 meeting. Creditors' attorneys often take advantage of the ease of obtaining a Rule 2004 order. Many times, however, the creditors' attorneys requesting Rule 2004 examinations were not even present at the section 341 meeting.

One concern is that the attorneys are using the examination request as an alternative to other less intrusive forms of discovery.[52] A Rule 2004 application requires much less paperwork on the part of the requesting attorney, compared to other discovery techniques. While the debtor is subjected to the inconvenience and expense of attending the examination, the creditor's attorney avoids preparing interrogatories or requests for produc-

---

[47] 11 U.S.C. § 524(c)(6) (1988); *In re* Reidenbach, 59 B.R. 248 (Bankr. N.D. Ohio 1986).

[48] Fed. R. Bankr. P. 2004(a).

[49] *See* Fed. R. Bankr. P. 2004 advisory committee's note (1983).

[50] "Although a Rule 2004 examination may be ordered *ex parte*, once a motion to quash a subpoena is made, the examiner bears the burden of proving that good cause exists for taking the requested discovery." *In re* Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) (citations omitted).

[51] 2 Collier on Bankruptcy ¶ 343.07 (15th ed. 1992) (citing *In re* Renter, 8 F.2d 112 (W.D. Pa. 1925); *In re* Oppenheim, 297 F. 786 (1st Cir. 1924)).

[52] *See* 2 Ginsberg, *supra* note 40, at § 12.05(b). "Although the bankruptcy court has wide discretion to allow such examination, it should not substitute for normal discovery procedures that are readily available in the context of litigation pending in the bankruptcy court or elsewhere." *Id.* (citation omitted).

tion. Many times the information sought is already available to the requesting attorney from the court's files. Often, attorneys will request the production of documents, pursuant to Rule 2004(c), without filing the accompanying subpoena, as required under Rule 9016.[53]

As mentioned above, neither the estate trustee nor the U.S. Trustee are present at the Rule 2004 examination, a fact which distinguishes that examination from the creditors' meeting. The debtor may or may not be represented by counsel under the Rule 2004 proceeding. These examinations often result in a reaffirmation of the debtor's debt with that particular creditor. This is evidenced by the number of reaffirmation agreements filed in cases where 2004 examinations were held. The real concern here, however, is the possible overreaching of the creditors' attorneys and the voluntariness of the reaffirmations.

Rule 2004 examinations are often used in situations where debtors owe secured debts on consumer goods, and the value of the goods is less than the amount owed. Then, the creditors would rather have the debts reaffirmed than repossess the collateral of lesser value. The debtors, however, might also prefer to reaffirm rather than losing their cars, furniture, or appliances, notwithstanding their negative equity, because they realize they will later experience difficulty securing credit to replace the goods. The debtors may benefit from this situation, but at a high price.

This represents the situation where a Rule 2004 examination poses the greatest opportunity for abuse. The creditors' attorneys can request Rule 2004 examinations, with the intent of presenting the debtors with the choice of reaffirming or losing their cars or furniture. Without the Rule 2004 examination, the creditors' attorneys may not have such an opportunity to avoid the prohibition of the automatic stay or create such a duressful environment.

The debtor does have some protection from a coerced reaffirmation or one against the debtor's interest. In the case of a reaffirmation of a secured consumer debt, subject to a section 522 exemption or abandonment, the debtor can exercise a right of redemption under section 722.[54] This right is not waivable. The redemption allows the debtor the right to redeem certain tangible personal property by paying the lienholder the amount of the allowed secured claim. The debtor must, however, redeem

---

[53] *See* FED. R. BANKR. P. 9016. *See also* 2 COLLIER, *supra* note 48, at ¶ 343.09 ("With regard to the production of documents by the debtor, although previously the referee did not have to issue a subpoena *duces tecum* for that purpose, an examining party under the Code would now have to issue such a subpoena.").

[54] 11 U.S.C. § 722 (1988).

in one lump sum payment. In all reaffirmations, the debtor has at least a sixty day grace period in which to rescind. If the debtor is not represented by counsel and the debt is not secured by real property, the court must approve the agreement. Moreover, even if the debt is secured by real property or the debtor was represented by counsel, the court will still review the reaffirmation, on petition, for adequacy of representation or voluntariness.

VI. Economic Cost to the Debtor

Although the Bankruptcy Code provides some protection to debtors from coercive or unfair reaffirmations, and the debtor may have other available defenses, there are economic costs to the debtor which should be considered. Whenever a creditor is granted a Rule 2004 examination, the debtor must incur the costs of attending.

Whether the debtor is protected against a coercive or unfair reaffirmation, the costs remain. Neither the estate, nor the creditor, reimburse the debtor's expenses other than certain mileage reimbursement. The debtor incurs the expense of transportation to and from the examination, usually held at the offices of the creditors' attorneys, regardless of the distance or inconvenience. Under Rule 2004(e), the debtor is reimbursed for mileage only if the debtor travels more than 100 miles from the debtor's residence.[55] If the debtor's residence, at the time of filing, was within 100 miles of the Rule 2004 examination location, there is no reimbursement regardless of the distance at the time of the examination.

The debtor also incurs the loss of a partial or total day's work. This can be a substantial burden to a debtor and the debtor's family, who are most likely surviving from paycheck to paycheck at the time.[56] The debtor incurs the cost of a personal attorney, unless the debtor has a flat fee arrangement or appears at the examination unrepresented. Time absent from work also places a potential strain on the debtor's employment relationship. Although section 525 protects the debtor from termination or discrimination based solely on the debtor's filing for a bankruptcy,[57] con-

---

[55] Fed. R. Bankr. P. 2004(e).

[56] *See* Sullivan, et al., *supra* note 37, at 151. In a study conducted using data compiled in the Consumer Bankruptcy Project, March 1981 Current Population Survey, the authors found the average family income of males filing for bankruptcy was only $18,073, as compared to the national average family income for males of $26,329. The average family income of females filing for bankruptcy was only $10,638, as compared to the national average family income for females of $14,122. *Id.*

[57] 11 U.S.C. § 525 (1988).

tinued absenteeism may adversely affect the debtors working environment or chances for advancement.

The debtor is expected to incur these costs as part of the privilege of a discharge in bankruptcy. These burdens and economic costs, however, can be substantial, especially when a number of Rule 2004 examinations are requested. Each Rule 2004 examination represents another occasion of work missed, lost compensation, travel expenses, and attorney fees. In other words, although protections and defenses to an improper reaffirmation are available, potentially severe economic costs remain. If the Rule 2004 examination is improper or unnecessary, the debtor should not be subjected to the economic burdens of the examination. Court scrutiny is of vital necessity to ensure the absence of abuse.

VII. ETHICAL CONSIDERATIONS AND SANCTIONS

Several ethical considerations are implicated by the misuse of Rule 2004 examinations, especially when the examinations are used to pursue reaffirmations. When a creditor's attorney misuses a Rule 2004 examination for the sole purpose of pursuing a reaffirmation agreement or harassing or coercing a debtor in any other way, the attorney is abusing the litigation process. An attorney also may be abusing the litigation process when the attorney holds an examination merely to gather information which is readily available by less intrusive means, such as interrogatories or a viewing of the court file.

When an attorney so abuses the litigation process, sanctions may be applicable. Upon signing the request to order a Rule 2004 examination, that attorney certifies that the document was not filed "for any improper purpose, such as to harass, or to cause unnecessary delay, or needless increase in the cost of litigation or administration of the case."[58] The attorney also certifies that pursuant to a reasonable inquiry, the document is well grounded in fact and warranted.[59] On evidence to the contrary, Rule 9011 allows the court to impose sanctions including "reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee."[60]

In addition to a possible abuse of the litigation process, sanctions may be applicable for violating a prior bankruptcy order. Under section 362(a)(6), "any act to collect, assess, or recover a claim against the

---

[58] FED. R. BANKR. P. 9011.
[59] *Id.*
[60] FED. R. BANKR. P. 9011.

debtor" is a violation of the automatic stay.[61] As discussed earlier, an attempt by a creditor's attorney to pursue a reaffirmation agreement is technically a violation of this provision. Section 362(h) states that a creditor's attorney or any other individual can be sanctioned for "any willful violation of a stay provided by this section" in the amount of "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[62] Additionally, the attorney owes a duty, under DR 7-102 of the Code of Professional Responsibility, to represent the interests of the client within the bounds of the law.[63] A deliberate misuse of a Rule 2004 examination, in violation of the automatic stay, would implicate this disciplinary rule.

VIII. Alternatives and Safeguards

Rule 2004 examinations serve as an important and necessary tool for discovering debtors' assets and protecting creditors' interests. The intent of this article is not to suggest a limitation of the scope or availability of this rule. Rather, this article is intended to engender an awareness of the potential and actual abuses of the Rule 2004 examination and to suggest that closer scrutiny by the courts is needed.

The court has discretion to order a Rule 2004 examination. Several precautions can be taken by the court prior to ordering an examination. The court could require more detail on the Rule 2004 application, such as: whether the requesting party was present at the section 341 meeting; the type and purpose of the information sought; or the reason the information sought cannot be obtained through other less intrusive discovery techniques. The court could also use its discretion to require the requesting party to first demonstrate that other less intrusive forms of discovery have been made. Then, if information is still sought, order the Rule 2004 examination.

The court also has discretion to grant reaffirmation or deny reaffirmation requests. Through general or miscellaneous orders, or by local rules, the court could require debtors to submit specific information with their reaffirmation motions. Information such as the value of collateral vis-a-vis the balance reaffirmed on the debt, as well as the debtor's reason for reaffirming, would help the court identify questionable reaffirmations.

A requirement that the requesting party record the Rule 2004 exam-

---

[61] 11 U.S.C. § 362(a)(6) (1988).

[62] 11 U.S.C. § 362(h) (1988).

[63] Model Code of Professional Responsibility DR 7-102 (1980).

ination might further help reduce the potential for abuse. Here, a transcript would be available for court review if a question as to the voluntariness of a reaffirmation or any other untoward conduct later arose.

Other solutions might involve providing more access to information at the section 341 meetings. If the section 341 meetings are not affording adequate time for each creditor to question the debtors, that situation can be remedied by the U.S. Trustee. If the information sought is still not obtained at the section 341 meeting, then the Rule 2004 examination would be available.

IX. CONCLUSION

In conclusion, although Rule 2004 is a powerful and useful tool for protecting the interests of creditors, the examination process is potentially abusive. The ease of obtaining a Rule 2004 order, along with the broad scope of the examination, makes the Rule 2004 examination a desirable tool for creditors' attorneys. Used improperly, however, the examination can be coercive and expensive for the debtor. In order to protect debtors, the examination process needs to be closely scrutinized by the court.

Agenda Item 5

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: SPECIAL MASTERS AND BANKRUPTCY RULE 9031

DATE: AUGUST 24, 1996

Bankruptcy Rule 9031, entitled "Masters Not Authorized," provides that Rule 53 of the Federal Rules of Civil Procedure does not apply in cases under the Code. Rule 53 governs special masters in civil cases (a copy of Rule 53 is attached). As indicated in the committee note to Bankruptcy Rule 9031, "[t]his rule precludes the appointment of masters in cases and proceedings under the [Bankruptcy] Code."

At the request of the Committee on the Administration of the Bankruptcy System ("Bankruptcy Administration Committee"), the Advisory Committee on Bankruptcy Rules at its September 1995 meeting considered a suggestion that there be authorization to appoint special masters in bankruptcy cases and proceedings. In rejecting the suggestion, the consensus of the Advisory Committee, as reported in the minutes of the meeting, was that a special master "is too reminiscent of the former bankruptcy referee and that adequate alternatives exist in the authority to appoint a trustee and an examiner."

At its June 1996 meeting, the Bankruptcy Administration Committee approved the recommendation of its Subcommittee on Long Range Planning that:

> "The Advisory Committee on Bankruptcy Rules be requested to reconsider its earlier decision declining to recommend amendment of Rule 9031 of the Federal Rules of Bankruptcy Procedure to permit the appointment

of special masters in bankruptcy cases and proceedings."

As indicated in a footnote in the Bankruptcy Administration Committee's report to the Judicial Conference, the Federal Judicial Center ("FJC") was asked to study the issue of appointing special masters in bankruptcy cases and proceedings as it relates to the goal of improved case management. As a result of its study, the FJC recommended that "Rule 9031 be amended to eliminate its prohibition on the authority of the district judges and bankruptcy judges to appoint special masters in bankruptcy cases and proceedings and that it instead provide procedures for such appointments in rare and unusually complex cases and proceedings under the Bankruptcy Code akin to the procedures established in Rule 53 of the Federal Rules of Civil Procedure for rare and unusually complex civil litigation in the district court."

The report of the FJC is attached and should be read in its entirety. It provides valuable information and legal analysis regarding special masters. In sum, the report concludes that "there is no compelling reasons why a procedural rule should prohibit the inherent judicial authority to appoint a special master in unusually complex cases and proceedings under the Bankruptcy Code. Therefore, absent an express statutory prohibition, the United States district judges and bankruptcy judges should not be prevented by a procedural rule from appointing special masters in unusually complex bankruptcy cases and proceedings." The report also concludes that "the authority

to appoint a special master would accord with the explicit congressional intent that bankruptcy judges manage their cases and proceedings effectively."

With all due respect for the fine work of the Bankruptcy Administration Committee and the FJC, it is my opinion that Rule 9031 should not be abrogated or amended to permit the appointment of special masters in bankruptcy cases and proceedings. In contrast to the FJC's reasoning, I believe that the appointment of a special master in a bankruptcy case or proceeding -- either by a district judge or a bankruptcy judge -- would be inconsistent with the spirit, if not the letter, of the statutory scheme governing bankruptcy jurisdiction and related policy concerns.

I also base my recommendation, in part, on the absence of any empirical evidence or other indication that there is a demonstrated need for special masters in bankruptcy cases and proceedings. Are there any specific cases in which the system has suffered because of the inability to appoint a special master? What types of issues or proceedings should be referred to a special master? Is there evidence that the bankruptcy system would be improved by the appointment of special masters? Are bankruptcy judges unable to perform the judicial function in complex cases in the absence of special masters? As a practical matter, is something "broken" because of the inability to appoint special masters? The FJC report on special masters provides valuable legal analysis, but does not contain empirical data or

other information regarding these practical questions.

The "Survey on the Federal Rules of Bankruptcy Procedure" conducted by the Federal Judicial Center in connection with the Advisory Committee's Long-Range Planning Subcommittee, and published in 1996, was a comprehensive survey designed to learn the views of judges, practitioners, professors, court personnel, and other participants in the bankruptcy system concerning the Bankruptcy Rules. In particular, recipients were asked questions to determine if there is dissatisfaction with the Rules and to pinpoint those Rules or areas that need reform. As a result of the survey -- based on the 720 responses received from more than 3,000 recipients of the questionnaire -- the Subcommittee identified certain areas of the Rules for possible study, including motion practice and attorney ethics. Most important for this discussion is the fact that Rule 9031's prohibition on special masters was not identified by survey respondents as an area that has caused problems or is in need of change. The silence regarding special masters or Rule 9031 in the FJC's published results of the survey indicates that, in the view of the bench and bar, Rule 9031 is not something that is broken and in need of fixing.

Special Masters and Civil Rule 53

Before discussing the statutory provisions governing bankruptcy courts, I want to mention two features of Civil Rule 53 regarding special masters that may be relevant to this discussion:

(1) Compensation for a special master "shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action."

(2) In an action to be tried without a jury, "the court shall accept the master's findings of fact unless clearly erroneous."

The Statutory Scheme Governing Bankruptcy Jurisdiction

Under 28 U.S.C. § 1334, federal district courts have exclusive jurisdiction of all cases under title 11, as well as non-exclusive jurisdiction of all civil proceedings arising under the Bankruptcy Code, or arising in or related to cases under the Bankruptcy Code. As the FJC report indicates, Congress did not intend district courts to exercise such jurisdiction in most cases; title 28 U.S.C. § 157(a) permits district courts to refer bankruptcy cases and proceedings to the bankruptcy judges in that district. Congress contemplated that bankruptcy cases and proceedings ordinarily would be referred to the bankruptcy court as a specialized court.

Section 157 is specific on the role of the bankruptcy judge when a reference is made by the district court, depending on whether the proceeding is core or noncore. If a proceeding is core, the bankruptcy judge may "hear and determine" the matter subject to traditional appellate review in the district court or bankruptcy appellate panel. If a proceeding is noncore, unless the parties consent otherwise, the bankruptcy judge may "hear" (but not "determine") the matter and submit proposed findings of

fact and conclusions of law to the district court where, if an objection is filed, the district court hears the matter de novo.

For both core and noncore proceedings, there is already an extra layer of litigation in bankruptcy cases -- not found in most other types of cases in federal courts -- that adds to the expense and delay in bankruptcy litigation. Proceedings may be litigated at the bankruptcy court, district court or BAP, court of appeals, and the Supreme Court levels. It is not surprising that suggestions have been made to remove one of the layers of appellate review (such as the district court or BAP).[1] In contrast to the bankruptcy system, other federal litigation involves only three levels: the district court, the court of appeals, and the Supreme Court.

Another significant feature of the Bankruptcy Reform Act of 1978 -- confirmed and implemented nation-wide with the adoption of the permanent United States Trustee Program in 1986 -- is the recognition that bankruptcy judges should not be appointing officials or professionals that are compensated by the estate. The United States trustee, a member of the Executive Branch, appoints trustees and examiners. Moreover, whenever any professional person or official is compensated by the estate, the

---

[1]The National Bankruptcy Review Commission has been considering making a recommendation to Congress that the current system, which provides two appeals as of right from final orders of a bankruptcy judge, be changed to eliminate district court review. In explaining its reasons for the recommendation, the Commission noted that "a bankruptcy litigant has access to more appeals than almost anyone else in the federal system and parties with greater resources have a distinct advantage." 28 Bankr. Ct. Dec. Weekly News & Comment 12 (June 11, 1996).

Code contains provisions dealing with such compensation and the Rules govern the procedural requirements to be followed. See, e.g., Code § 327-330; B. Rule 2016. Neither the Code nor the Rules provide for compensation of special masters by the estate.

Appointment of Special Masters by Bankruptcy Judges

If a proceeding is "core," the bankruptcy judge may "hear and determine" the matter. Does that mean that the bankruptcy judge may refer a core matter to a special master to be heard, giving the special master's factual findings only "clearly erroneous" review? There is no indication that Congress so intended.[2] Moreover, if a special master is appointed by the

---

[2] At least one appellate court has construed the words "hear and determine" narrowly to preclude the judge from delegating that authority. Before the Bankruptcy Reform Act of 1994 explicitly granted bankruptcy judges power to conduct jury trials under certain circumstances, the Court of Appeals for the Tenth Circuit, in In re Kaiser Steel Corp., 911 F2d 380 (10th Cir. 1990), focused on the language "hear and determine" in holding that bankruptcy judges could not preside over jury trials.

> "A literal reading of this language ['hear and determine'] indicates that Congress granted the bankruptcy judges the *personal* power to hear and determine cases. The personal nature of the power to 'hear and determine' cases does not implicitly authorize the bankruptcy judge to delegate his or her duty to make final factual determinations to a jury; in fact, it suggests the impropriety of such delegation."

911 F2d at 391. For other decisions holding that bankruptcy judges did not have statutory authority to conduct jury trials before the 1994 Reform Act, see, i.e., In re Stansbury Popular Place, Inc., 13 F3d 122 (4th Cir. 1993); In re United Missouri Bank of Kansas City, N.A., 901 F2d 1449 (8th Cir. 1990) (bankruptcy judge may not conduct jury trials under governing jurisdictional statutes). Contra, In re Ben Cooper, 896 F2d 1394 (2d Cir. 1990) (bankruptcy court may conduct jury trial in core proceeding). The reasoning of the Tenth Circuit in Kaiser Steel would support the conclusion that a bankruptcy judge's delegation to a special master of the authority to "hear and determine" a core matter -- subject to

bankruptcy judge in a core matter, that would introduce another layer of litigation. A core proceeding would be tried before a special master, then reviewed by a bankruptcy judge on a clearly erroneous standard, then reviewed by the district court, the court of appeals, and possibly the Supreme Court. It is doubtful that Congress intended such a result, or that such a cumbersome multi-level process would result in greater speed and less cost to the parties.

If a proceeding is "noncore", there are additional problems with the appointment of a special master by a bankruptcy judge. The special master hearing the matter would file a report of proposed findings with the bankruptcy judge and, if Rule 53 applies, the bankruptcy judge would consider whether the factual findings are "clearly erroneous." I question whether that is consistent with 28 U.S.C. § 157's requirement that the bankruptcy judge hear the matter and make proposed findings. If the bankruptcy court adopts the special master's findings, they would be submitted to the district court as the bankruptcy judge's findings subject to de novo review at the district court level. In essence, after two hearings (one before the special master, and one before the bankruptcy judge reviewing the special master's findings), the parties could be starting all over again in a de novo hearing before the district court. The time and

---

review by the bankruptcy judge on only a "clearly erroneous" standard as provided in Civil Rule 53 -- would be an invalid delegation.

expense involved in such a procedure would be inconsistent with the goal of securing the "just, speedy and inexpensive determination" of cases and proceedings. B. Rule 1001.

I also question whether it makes sense to permit a special master -- who performs a judicial function that otherwise would be performed by the bankruptcy judge at no expense to the estate -- to be paid by the bankruptcy estate. In contrast to most nonbankruptcy federal litigation, bankruptcy cases involve insolvent estates with limited funds needed for reorganization or distributions to creditors. As mentioned above, the Code is very specific on the officials and professionals entitled to be paid by the estate. See, e.g., Code §§ 327-330, 1103.

In addition, in a chapter 11 case (where most complex proceedings arise), the Code provides for the appointment of an examiner selected by the United States trustee and paid by the estate to investigate the debtor "as is appropriate" and to make findings in a report to the court. Although the appointment of an examiner under § 1104 is limited to chapter 11 cases in which a trustee has not been appointed, and the powers of an examiner may not be the same as those of a special master under Civil Rule 53, in fact examiners have been appointed for the purpose of investigating, deposing witnesses, and making findings on complex issues regarding leveraged buyouts (e.g., Revco) or products liability (e.g., A.H. Robins). I suggest that in most situations in which the complexity of the issues would warrant a special master, the appointment of a examiner -- selected by the United

States trustee in accordance with the statute -- would serve the purpose of assisting the court in a way that is similar to the services of a special master.

Moreover, although the types of issues that would be referred to a special master in bankruptcy proceedings have not been described in the Bankruptcy Administration Committee's report or the FJC report, the use of a special master in connection with the allowance of numerous or complex claims against the estate may not be warranted because of § 502(c) of the Code. That section permits courts to estimate -- rather than finally determine -- contingent or unliquidated claims so as to avoid unduly delaying the administration of the estate.[3] Since bankruptcy courts may hold limited mini-trials or use other abbreviated procedures for the purpose of estimation of claims to avoid delays,[4] is there really a need to refer claims disputes

---

[3] See, e.g., In re Brints Cotton Mktg., Inc., 737 F2d 1338 (5th Cir. 1984) (court of appeals upheld bankruptcy court's estimation of the value of 1,200 unliquidated "on-call" cotton contracts).

[4]For example, see Baldwin-United Corp., 55 BR 885 (Bankr. S.D. Ohio 1985), where brokers who had marketed deferred annuities issued by insurance companies owned by the debtor corporations filed proofs of claim for contribution and indemnity with regard to annuity holders' claims against them. Each claim against the debtors was contingent and unliquidated in that there was no determination that the brokers were liable to annuity holders or that the debtors were liable to the brokers. It was undisputed that a final determination of these claims could not be made for several years, thus unduly delaying the administration of the chapter 11 cases. The bankruptcy court emphasized that "estimation does not require that a bankruptcy judge be a clairvoyant. The court need only arrive at a reasonable estimate of the probable value of the claim." Id. at 898. Because a formal trial on the merits "would eviscerate the purpose underlying § 502(c)," the court ordered procedures for the estimation hearing "generally consistent with

to a special master?

Appointment of Special Master by a District Judge

I also do not believe that the Rules should be amended to permit the appointment of a special master by a district judge in bankruptcy cases and proceedings.

First, the statute specifically provides for the referral of these cases and proceedings to a bankruptcy judge. I do not think that a district court should be able to bypass 28 USC § 157 by referring a complex proceeding -- whether core or noncore -- to a special master.

Second, with respect to a core proceeding referred to the bankruptcy court, the bankruptcy judge "hears and determines" it and the district judge sits as an appellate court applying traditional appellate review standards. I believe it would be inappropriate for the district judge to delegate to a special master the task of sitting as an Article III appellate court to review the bankruptcy judge's orders and judgements.[5] I also think that the district court's delegation to a special master of an appeal would create unnecessary expense and delay in the

---

the concept of a summary jury trial." Id. at 899. The procedures called for no jury, allowed live testimony by one witness per party, set a discovery cutoff date, and allotted two days for the hearing.

[5]It may be useful for the Committee to know that, in 1994, new Rule 48 ("Masters") was added to the Federal Rules of Appellate Procedure to permit the appointment of a special master "to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the [court of appeals]." For your information, I enclose a copy of Appellate Rule 48 and the committee note.

appellate process.

Third, if a complex noncore proceeding were to be referred to a special master by the district judge after the bankruptcy judge hears it and submits proposed findings of fact and conclusions of law to the district court, the district court would not be hearing the matter de novo as required by 28 USC § 157, but would be reviewing a special master's findings on a clearly erroneous standard.

Even if the "clearly erroneous" standard now present in Civil Rule 53 were not applicable in bankruptcy proceedings, the extra layer of litigation introduced by referral of a matter to a special master after it was heard by a bankruptcy judge probably would be an unfortunate increase in delay and expense for all parties.

Personal Injury and Wrongful Death Claims

There is one statutory exception to the usual claims resolution process that is worth discussing separately. Under 28 U.S.C. § 157(b)(2)(B), the liquidation or estimation of personal injury tort and wrongful death claims for purposes of distribution are not core matters. Also, under 28 U.S.C. § 157(b)(5), these claims must be tried in the district court, not the bankruptcy court. It can be argued that, in complex cases, special masters may be warranted for these claims because they may not be referred to the bankruptcy court for trial. However, for the reasons discussed below, I am not yet persuaded that, even for these proceedings, special masters are necessary.

First, 28 U.S.C. § 1411(a) preserves the right to trial by jury for personal injury and wrongful death claims, and Civil Rule 53(b) permits special masters in jury cases only where issues "are complicated." In the vast majority of bankruptcy cases, I believe that such issues are not complicated (slip and fall cases, etc.).

Second, courts have interpreted 28 U.S.C. § 157(b)(5) narrowly. Several courts have held that § 157(b)(5) does not mandate an early trial. Rather, bankruptcy courts may continue to estimate these claims for the purpose of facilitating the formulation of a reorganization plan.[6] If trials become necessary, I do not know of any reason why a district court could not refer these proceedings to a bankruptcy judge for discovery, other pretrial matters, and for the approval of settlements under Rule 9019, thus reducing the burden on district courts.

Third, 28 USC § 1334(c)(1) allows district courts to exercise discretion to abstain from hearing a particular proceeding. Courts have held that this abstention power enables district courts to leave to state courts the trial of personal injury and wrongful death claims that may not be referred to the

---

[6] See In re Johns-Manville Corp., 45 BR 827 (SDNY 1984); In re UNR Indus., Inc., 45 BR 322 (ND Ill. 1984). See also In re Farley, 146 BR 748 (ND Ill. 1992) (bankruptcy court may estimate personal injury claims for the purpose of determining voting rights and plan feasibility in connection with confirmation of a chapter 11 plan); In re Aquaslide 'N' Dive Corp., 85 BR 545 (Bankr. 9th Cir. 1987); In re Poole Funeral Chapel, Inc., 63 BR 527, 533 (ND Ala. 1986) ("[T]he estimation of claims, including the estimation of personal injury tort claims for the purpose of confirming a plan under Chapter 11, is a core proceeding as to which Movants are not entitled to a trial by jury.").

bankruptcy court for trial.[7]

Fourth, I believe that in chapter 11 cases involving mass product liability or toxic tort personal injury and wrongful death claims -- which would be the most likely candidates for the appointment of a special master -- reorganization plans could provide for claims resolution procedures, nonjudicial tribunals, or trust mechanisms that greatly reduce or eliminate the volume of jury trials in district court. In 1994, § 524(g) was added to the Code to expressly permit in asbestos cases the kind of trust mechanism that was used in the Johns-Manville case, and to enforce injunctions against asbestos-related actions against the debtor where claims may be asserted against a trust in accordance with a chapter 11 plan. See § 524(g)(1)(B).

Finally, I am not aware of any particular cases in which a district court has needed the services of a special master to resolve numerous personal injury and wrongful death claims under 28 U.S.C. § 157(b)(5). Unless and until it is demonstrated that there is a need for special masters to assist district courts in the trial of these matters, I would not recommend abrogating or amending Rule 9031.

---

[7] See In re Pan Am. Corp., 950 F2d 839, 844 (2d Cir. 1991) (district court had authority to abstain from hearing wrongful death actions pending in state court and arising out of airplane crash in Scotland; "Despite the apparently mandatory 'shall order', section 157(b)(5) has consistently been construed to recognize discretion in district courts to leave personal injury cases where they are pending."); In re White Motor Credit Corp., 761 F2d 270 (6th Cir. 1985) (suggesting that the district court's power to abstain may be utilized in referring thousands of tort cases to forums other than bankruptcy courts).

Validity of Rule 9031

The FJC report also questions the validity of Rule 9031 in view of the "inherent power" of federal courts to appoint special masters. The report cites U.S. v. National City Bank of New York, 83 F.2d 236, 238 (2d Cir. 1936), (which focused on setoff rights, rather than special masters) for the proposition that "no rule of court, even if so intended, can restrict jurisdiction." Although the quoted language is correct, I do not think that Rule 9031 affects the jurisdiction of the district court or the bankruptcy court.

I also respectfully disagree with the FJC's statement that "[i]f the district court does indeed possess the inherent authority to appoint a special master in the appropriate context, any rule abridging that power would appear to be an abuse of the rule making process." First, it could be argued that if Civil Rule 53 -- which restricts the use of special masters -- is a valid rule, then Rule 9031 may be viewed as merely supplementing Rule 53 by, in essence, saying that a bankruptcy case or proceeding is not the appropriate context in which to appoint a special master. As discussed above, the unique jurisdictional framework in which a specialized bankruptcy court may hear matters referred by the district court justifies a rule that determines that special masters are not necessary for bankruptcy-related matters.

Second, the "inherent power" to appoint a special master is not unlimited. In Ex Parte Peterson, 253 U.S. 300, 312 (1920),

which is cited in the FJC report as "the most often cited case supporting the proposition that the court has the inherent authority to appoint special masters," the Supreme Court, after pointing out that there was no legislation either forbidding or authorizing the court to appoint an auditor, wrote that "Courts have (at least in the absence of legislation to the contrary) inherent power to provide themselves with appropriate instruments required for performance of their duties... This power includes authority to appoint persons unconnected with the court to aid judges in the performance of specific judicial duties, as they may arise in the progress of the case." [emphasis added]. Clearly, the Court's finding of inherent power to appoint the auditor in that case was influenced by the lack of any legislation on that issue. Would the Supreme Court consider Bankruptcy Rule 9031 -- promulgated by the Supreme Court pursuant to the Rules Enabling Act -- to be "legislation to the contrary?" It appears to me that whatever inherent authority courts have to appoint special masters could be limited or eliminated by national rule.

The FJC report also questions whether Rule 9031 applies to "proceedings" as well as "cases." Although the report correctly notes the difference between cases and proceedings, the Advisory Committee Note to the rule clarifies that it is intended to apply to both cases and proceedings. When a Bankruptcy Rule applies or precludes the application of a particular federal rule, it is common for the term "cases" to be used to include "proceedings"

arising in or related to a case. For example, Rule 9017 provides that the Federal Rules of Evidence apply in "cases under the Code," yet there is no doubt that the Federal Rules of Evidence apply in adversary proceedings.

Alternatives for the Committee

There are several alternatives for the Advisory Committee: ***(1) Do Nothing.*** For the reasons discussed above, I recommend that the Committee take no action at this time with respect to Rule 9031 and special masters.

However, if the Committee disagrees with that approach and wishes to amend the Rules to permit the appointment of special masters, there are a number of alternatives that the Committee may wish to consider, including the following:

(2) Amend Rule 9031 to permit the district court to appoint a special master in accordance with Civil Rule 53 only in connection with personal injury and wrongful death claims tried under 28 U.S.C. § 157(b)(5). This alternative would keep the present prohibition on the appointment of special masters, except for the narrow category of claims that may not be referred to the bankruptcy court for purposes of trial. If the Committee decides to permit special masters, I would recommend that this alternative be adopted.

(3) Amend Rule 9031 to permit only district courts (not bankruptcy courts) to appoint a special master in accordance with Civil Rule 53, except when the district court is sitting as an appellate court. This category of proceedings includes, but is

broader than, the category under the prior alternative. The rationale for this alternative is that it would give a district court sitting as a trial court the same power to appoint a special master in bankruptcy proceedings as it has in other cases, but not when it is sitting as an appellate court.

(4) Amend Rule 9031 to permit only district courts (not bankruptcy courts) to appoint a special master in accordance with Civil Rule 53 when exercising original jurisdiction; and adopt a new rule in Part VIII that provides for the appointment of a special master for appeals similar to Appellate Rule 48. This alternative is the same as alternative number 3, except that it conforms to Appellate Rule 48 (copy attached) which provides for special masters "to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the [court of appeals]." This would permit the district court hearing an appeal, or the BAP, to refer ancillary matters to a special master.

(5) Adopt one of the above alternatives, but limit the district court's power to appoint special masters to adversary proceedings (rather than contested matters). Adversary proceedings are designed to conform to traditional district court litigation. Article VII of the Rules (Adversary Proceedings), which incorporates by reference many of the Civil Rules, could be amended to provide that Civil Rule 53 applies in adversary proceedings when it is pending in the district court.

(6) Amend Rule 9031 to expressly permit bankruptcy judges and

district judges to appoint special masters in accordance with Civil Rule 53, and Amend Part VIII to give district courts and BAPs the power to appoint special masters consistent with Appellate Rule 48. This alternative would give bankruptcy courts, district courts, and BAPs the same power to appoint a special master that the district court has (and, when sitting as an appellate court, that the court of appeals has) in other types of federal cases. The Committee should be aware, however, that Civil Rule 53(f) recognizes that a matter may be referred under Civil Rule 53 to a Magistrate Judge. If the Committee favors this alternative, it also should decide whether a bankruptcy judge could or should be authorized to refer a matter to a Magistrate Judge.

AGENDA ITEM B.3
ATTACHMENT A
JUNE 1996

THE FEDERAL JUDICIAL CENTER
THURGOOD MARSHALL FEDERAL JUDICIARY BUILDING
ONE COLUMBUS CIRCLE, N.E.
WASHINGTON, DC 20002-8003

RESEARCH DIVISION

TEL.: 202-273-4070
FAX: 202-273-4021

MEMORANDUM TO THE COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

SUBJECT: Appointment of Special Masters in Bankruptcy Cases and Proceedings

BACKGROUND

Based on the report of its Subcommittee on Long Range Planning, in 1995 the Bankruptcy Committee referred to the Advisory Committee on Bankruptcy Rules a recommendation that Federal Rule of Bankruptcy Procedure 9031 be repealed so that a special master could be appointed in bankruptcy cases and proceedings. (See Recommendations IIIA2c, IIIE2a, and IIIF2e of the Final Report and Recommendations of the Long Range Planning Subcommittee, June 1993).

At its September 1995 meeting the Advisory Committee on Bankruptcy Rules rejected the proposal for special masters in bankruptcy cases and proceedings as being "too reminiscent of the former bankruptcy referee" system and unnecessary in light of existing statutory authority to order the appointment of a trustee or an examiner.

In subsequent recognition of its fact that its recommendations for special masters in bankruptcy cases and proceedings differed in important ways from the traditional concept of a special master, the Bankruptcy Committee thereafter requested the Federal Judicial Center to analyze the relevant statutes and rules, case law, and treatises that would support the use of a traditional special master, with the expectation that the Committe can request that the Advisory Committee consider an amendment to Rule 9031 to provide procedural guidance for the appointment of the more traditional type of special master.

DISCUSSION

The Committee has queried whether it should recommend that FED R. BANKR. P. 9031[1] be amended to eliminate its prohibition on the authority of United States district judges and bankruptcy judges to appoint special masters in rare and unusually complex cases and proceedings under the Bankruptcy Code and that it instead provide procedures for such appointments, akin to the procedures established in FED. R. CIV. P. 53 complex civil litigation in the district court.[2]

---

[1]FED. R. BANKR. P. 9031 is styled "Masters Not Authorized" and provides as follows:

> "Rule 53 FED. R. CIV. P. does not apply in cases under the Code." (emphasis added.)

[2]COMPARE FED. R. CIV. P. 53 which provides in relevant part as follows:

> **"(a) Appointment and Compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules, the word 'master' includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.
>
> **"(b) Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.
>
> **"(c) Powers.** The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury."

Special masters traditionally have been appointed in Federal and State courts in exceptionally complex civil litigation for various reasons to accomplish a number of desired results. For example, under FED. R. CIV. P. 53(b) the United States district court may utilize a special master to determine matters of account and difficult computations of damages. Special masters also have been used effectively by district courts in asbestos litigation and in the discovery process generally, including discovery in a patent litigation context, where the following statement has been made:

> "At the initial conference, the court should ascertain the extent to which discovery will be sought of matters that may be protected by the attorney-client privilege or work product doctrine and, if so, whether disclosure will be resisted. Use of a special master may be warranted if such disputes will be extensive and cannot be resolved by considering a few specimen documents."

MANUAL FOR COMPLEX LITIGATION § 33.64 (3d ed. 1995).

In exceptionally complicated civil litigation, the district court may utilize a special master to conduct settlement conferences and to supervise the discovery process involving voluminous, highly technical, or sensitive discovery requests where no judicial expertise is required.[3] It seems wasteful to require a judge to oversee repeated disputes over discovery requests that could be handled more expeditiously and equally as effectively by a special master. See, *In re "Agent Orange" Product Liability Litigation*, 94 F.R.D. 173 (E.D.N.Y. 1982).

In contrast, a trustee or an examiner under the Bankruptcy Code is not equipped to perform the same functions as a special master. Bankruptcy trustees and chapter 11 examiners are appointed in "cases" and not specific litigated disputes or "proceedings" (discussed more fully, infra.) See, 11 U.S.C. §§ 704, 1104, and 1106; see also 11 U.S.C. §§ 1202 and 1302. By virtue of 11

[3] *See*, Wayne D. Brazil, *Referring Discovery Tasks to Special Masters: Is Rule 53 a Source of Authority and Restrictions?* 1983 AM. B. FOUND. RES. J. 143 (1983).

U.S.C. § 323(a), a bankruptcy trustee is the statutory representative of the estate created by 11 U.S.C. § 541(a) and has broad investigatory and reporting obligations imposed by the Bankruptcy Code.[4]

11 U.S.C. § 1104 governs the appointment of a trustee or an examiner in a chapter 11 case. 11 U.S.C. § 1104(a) provides that, for cause, the bankruptcy court may remove the debtor in possession and order the United States trustee to appoint a trustee to operate or liquidate the debtor's business and perform the statutory duties required by 11 U.S.C. § 1106(a) and 28 U.S.C. § 959(b). 11 U.S.C. § 1104(c) provides that the bankruptcy court may order the United States trustee to appoint a chapter 11 examiner to conduct on behalf of the estate and creditors an "investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former

---

[4] 11 U.S.C. § 704 is styled "Duties of Trustee" and in its entirety sets forth all the statutory duties as follows:

> "The trustee shall -
>
> (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
> (2) be accountable for all property received;
> (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
> (4) investigate the financial affairs of the debtor;
> (5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;
> (6) if advisable, oppose the discharge of the debtor;
> (7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;
> (8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires; and
> (9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee."

11 U.S.C. § 704.

management of the debtor...." See 11 U.S.C. § 1106(b) for the statutory duties of a chapter 11 examiner.

Although the bankruptcy court may, for cause, order the United States trustee to appoint an examiner in a chapter 11 case, it may not do so in a case or proceeding under chapter 7, 9, 12, or 13.[5] The roles, duties, and responsibilities of bankruptcy trustees and examiners are significantly different from those of special masters and are not adequate alternatives to the appointment of special masters (and vice versa). Compare FED. R. CIV. P. 53(c). Unlike the trustee or examiner whose undivided loyalty is to the bankruptcy estate, the special master is a representative of the court, whose conduct is subject to control and supervision of the court. *United States v. Manning*, 215 F. Supp. 272, 293 (W.D. La. 1963). Special masters have "the duties and obligations of a judicial officer." *Id.* (quoting *In re Gilbert*, 276 U.S. 6, 9 (1928)). Accordingly, unlike trustees and examiners who are appointed and supervised by the United States trustee under 28 U.S.C. § 586, it is the court, and not the United States trustee, that should appoint a special master.

That the roles of a special master and a bankruptcy trustee or an examiner are substantially different is especially illuminated by the fact that a special master may be appointed in complicated two-party type lawsuits[6] or class actions[7] to accomplish special and limited results. Bankruptcy trustees and examiners perform more comprehensive acts for the benefit of the

---

[5]That is, the statutory authority under 11 U.S.C. § 1104 for the appointment of an examiner is confined to chapter 11 by virtue of 11 U.S.C. §§ 103 and 901. There are no statutory provisions for the appointment of an examiner in cases or proceedings under chapters 7, 9, 12, and 13 of the Bankruptcy Code.

[6]It is observed, for example, that a bankruptcy trustee or an examiner is not a "party in interest" in two-party litigation under 11 U.S.C. §523(a)(1) - (17). *In re Farmer*, 786 F.2d 618 (4th Cir. 1986). Computation of damages may be a serious problem in a rare proceeding under section 523(a).

[7]FED. R. BANKR. P. 7023 is styled "Class Proceedings" and provides that FED. R. CIV. P. 23 applies in adversary proceedings. By virtue of FED. R. BANKR. P. 9014, the bankruptcy court may direct that Rule 7023 apply in a contested matter. Computation of damages may be a serious problem here as well.

section 541(a) estate and all creditors. In complex commercial cases or proceedings, among others, the use of special masters may conserve substantial judicial resources, thus adding a great deal to effective, sound, and enhanced case management.[8]

It has been suggested that FED. R. CIV. P. 53 is not applicable to pretrial phases of a civil lawsuit and that the district court is free under its inherent powers to appoint a special master, even in the absence of a governing procedural rule (e.g., Rule 53). *Connecticut Importing Co. v. Frankfort Distilleries, Inc., et al,* 42 F. Supp. 225 (D. Conn. 1940). The court's appointment of and referral to a special master is a creature of equity. "It is the general rule applicable in equity that even in the absence of a statute authorizing it, an equity court has inherent power to enter an order of compulsory reference." 27 AM. JUR. 2d *Equity* § 225 (1966).

FED. R. CIV. P. 53 is a modification of former Equity Rule 68 (Appointment and Compensation of Master) and former Equity Rule 59 (Reference to Master-Exception, Not Usual). See the 1937 adoption of the Advisory Committee note accompanying FED. R. CIV. P. 53. The purposefully non-mechanical nature of equity permits Federal judges the case management flexibility under special circumstances to appoint a special master. It should be emphasized that the United States bankruptcy court is a court of equity. See *Bank of Marin v. England,* 385 U.S. 99, 103 (1966). In *Curtis v. Loether,* 415 U.S. 189, 195 (1974), the Supreme Court characterized the bankruptcy court as a "specialized court of equity."

It indeed is peculiar that the bankruptcy court and the district court, as courts of equity, are prohibited by a procedural rule (FED. R. BANKR. P. 9031)

---

[8] See, Wayne D. Brazil, *Special Masters In Complex Cases: Extending The Judiciary Or Reshaping Adjudication?* 53 U. CHI. L. REV. 394 (1986).

from appointing a special master and utilizing one of equity's oldest and most useful case management tools in carrying out their duties and responsibilities and exercising their inherent judicial authority under the Bankruptcy Code. The Supreme Court and the Congress understandably hold bankruptcy judges responsible for managing their dockets so as to promote and achieve the objectives and goals of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure. See *In re Timbers of Inwood Forest Assocs., Ltd.*, 808 F.2d 363, 373-74 (5th Cir. 1987), aff'd on other grounds, 484 U.S. 365 (1988); 11 U.S.C. § 105(d); and FED. R. BANKR. P. 1001. Utilization of a special master in an exceptionally complicated bankruptcy case or proceeding in lieu of a trustee or an examiner may be preferred and warranted as an additional case management tool in order to fulfill this duty.

It should be noted that under the former Bankruptcy Act of 1898 the position of the presiding officer over cases and proceedings under chapters I - VII, XI, XII, and XIII was that of "referee in bankruptcy." The jurisdiction of the "bankruptcy referee" was limited under the former Act. In the rarely filed chapter X corporate reorganization cases the "bankruptcy referee" served as a special master to hear and report generally or upon specified matters to the district judge under section 117 of the former Act, 11 U.S.C. § 517. By virtue of former Bankruptcy Rule 513, FED. R. CIV. P. 53 applied in those instances. After the enactment of the Chandler Act of 1938, the duties and responsibilities of the "referee in bankruptcy" grew dramatically, as did the work load. In 1973 the "referee in bankruptcy" became the "United States bankruptcy judge." See former Bankruptcy Rule 901(7).[9] The enactment of the Bankruptcy Reform Act of 1978 resulted in the pervasive jurisdiction of

[9]Perhaps it additionally should be noted that the far majority of today's bankruptcy bench and bar never presided or practiced under the former bankruptcy referee system; and accordingly, reminiscence, if any, of that archaic system does not warrant further discussion here.

the bankruptcy courts. (Repealed 28 U.S.C. § 1471.)

Due to *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the Congress in 1984 completely redefined and restructured the bankruptcy courts. The 1984 bankruptcy jurisdictional amendments (i.e., Title I of the Bankruptcy Amendments and Federal Judgeship Act of 1984) repealed 28 U.S.C. § 1471 and once again vested in the United States district courts original and exclusive jurisdiction under 28 U.S.C. § 1334(a) of all bankruptcy "cases" and concurrent jurisdiction under 28 U.S.C. § 1334(b) of all civil "proceedings" arising under title 11, or arising in or related to cases under title 11. The district court in which a bankruptcy case is pending has exclusive jurisdiction under the 1978 Code and the 1984 amendments of all of the debtor's property, wherever located, as of the commencement of such case, and of property of the estate. 28 U.S.C. § 1334(e).

The Bankruptcy Reform Act of 1994 explicitly authorizes bankruptcy judges to conduct jury trials under certain circumstances. 28 U.S.C. § 157(e). Fed. R. of Civ. P. 53(b) provides a procedure by which a special master can be appointed by the United States district court to assist the jury in specific civil lawsuits where the issues are highly complicated. This procedure would be equally beneficial in exceptionally complicated bankruptcy jury and bench trials.

The Congress, of course, did not intend in 1978 or 1984 for the United States district courts to exercise original bankruptcy jurisdiction. In accordance with the 1984 amendments, 28 U.S.C. § 157(a), each United States district court may provide that any or all bankruptcy cases and proceedings arising under title 11, or arising in or related to a bankruptcy case shall be referred to the bankruptcy judges for the district. All the district courts have

entered broad orders of reference, subject to the withdrawal provisions of 28 U.S.C. § 157(d). Compare repealed 28 U.S.C. § 1471(c).

Pursuant to the restructuring of the bankruptcy courts in 1984, each bankruptcy judge is a judicial officer of the United States district court established under Article III of the Constitution. 28 U.S.C. §§ 151 and 152(a). Virtually all the original bankruptcy jurisdiction is exercised by United States bankruptcy judges. Bankruptcy judges, as judicial officers of the United States district courts, have authority under their inherent equitable powers and 11 U.S.C. § 105(a) to manage, control, and administer bankruptcy cases and proceedings that have been referred to them.

A procedural rule such as FED. R. BANKR. P. 9031 should not prohibit United States district judges and bankruptcy judges from exercising their inherent judicial authority to use a traditional equitable tool to appoint a special master in exceptionally complicated bankruptcy cases and proceedings instead of being limited to order the United States trustee to appoint a trustee or an examiner, which can have far-reaching and costly results as well as unintended consequences.

Read literally, or adhering to the plain meaning doctrine, FED. R. BANKR. P. 9031 can be read as precluding the appointment of special masters only in "cases under the Code." (emphasis added.) That is, FED. R. BANKR. P. 9031 does not expressly prohibit the appointment of a special master in a bankruptcy proceeding.

In *In re Pioneer Inv. Serv. Co.*, 946 F.2d 445, 448, n.2 (6th Cir. 1991), the Sixth Circuit Court of Appeals stated:

> The term "case" as used in the Code is a term of art and "comprises the Chapter 7, 9, 11 or 13 case that is commenced pursuant to section 301, 302, or 303 of the Bankruptcy Code by the filing of a 'petition,' another word

> of art." King, 38 Vand. L. Rev. at 676-77 (footnote omitted). Disputes that arise during the pendency of a case are referred to as 'proceedings.' Numerous proceedings may occur within a case.

Arguably, the district judges and bankruptcy judges currently have inherent powers to appoint a special master in a bankruptcy "proceeding," since FED. R. BANKR. P. 9031 expressly prohibits such an appointment only in a bankruptcy "case." This seems true despite the fact that the Advisory Committee note expands the prohibition from "cases" to "cases and proceedings". The Federal Rules of Bankruptcy Procedure, like subsections (a) and (b) of 28 U.S.C. § 1334, make clear distinctions between "cases" and "proceedings." See, for example, FED. R. BANKR. P. 1001 and 9002(4).

Assume for discussion that the United States district court withdraws the reference of a bankruptcy case or proceeding under 28 U.S.C. § 157(d) and FED. R. BANKR. P. 5011(a) and further assume that such case or proceeding otherwise clearly warrants the appointment of a special master, but not a trustee or an examiner under the Bankruptcy Code. The district judge, like the bankruptcy judge, is prohibited from appointing a special master because FED. R. BANKR. P. 9031 is tantamount to a blanket prohibition by anyone, district judge or bankruptcy judge, from appointing a special master in a case under the Code. Accordingly, FED. R. BANKR. P. 9031, the successor to former Bankruptcy Rule 513, purports to have taken away the authority of the district court to appoint a special master in a bankruptcy case.[10]

---

[10]Former Bankruptcy Rule 513, the ancestor or predecessor to FED. R. BANKR. P. 9031, governed the procedure when the district court appointed a special master by providing:

> "If a reference is made in a bankruptcy case by a judge to a special master, the Federal Rules of Civil Procedure applicable to masters apply."

The Advisory Committee Note to former Rule 513 stated:

> "The Federal Rules of Civil Procedure applicable to masters include the third sentence of Rule 52(a) and Rule 53. Although references to special masters may be made pursuant to the Federal Rules of Civil Procedure, a reference to 'A master shall be the exception and not the rule.' FED. R. CIV. P. 53(b); 5 Moore ¶ ¶ 53.02, 53.12[6] (1969). This rule does not contemplate that a referee shall ever have occasion to refer any matter to a special master." (emphasis added.)

The Federal Rules of Bankruptcy Procedure apply to bankruptcy cases and proceedings, whether before the district judge or bankruptcy judge. FED. R. CIV. P. 81(a)(1) provides in pertinent part as follows:

> "These rules [Federal Rules of Civil Procedure]... do not apply to proceedings in bankruptcy ... except in so far as they may be made applicable thereto by rules promulgated by the Supreme Court of the United States...."

FED. R. BANKR. P. 1001 states as follows:

> "The Bankruptcy Rules and Forms govern procedure in cases under title 11 of the United States Code. The rules shall be cited as the Federal Rules of Bankruptcy Procedure and the forms as the Official Bankruptcy Forms. These rules shall be construed to secure the just, speedy, and inexpensive determination of every case and proceeding." (emphasis added.)

The Advisory Committee note to the 1987 amendment accompanying FED. R. BANKR. P. 1001 provides in relevant part as follows:

> "Rule 81(a)(1) F. R. CIV. P. provides that the civil rules do not apply to proceedings in bankruptcy, except as they may be made applicable by rules promulgated by the Supreme Court, e.g., Part VII of these rules. This amended Bankruptcy Rule 1001 makes the Bankruptcy Rules applicable to cases and proceedings under title 11, whether before the district judges or the bankruptcy judges of the district."

It is noted that the Congress by statute has expressly prohibited bankruptcy judges from appointing receivers. 11 U.S.C. § 105(b). There is, however, no comparable statutory provision prohibiting the appointment of a special master by a bankruptcy judge or district judge who has withdrawn the reference of a bankruptcy case or proceeding under 28 U.S.C. § 157(d). As noted, it is only procedural FED. R. BANKR. P. 9031 that prohibits such appointment. Even in the absence of FED. R. CIV. P. 53, and despite FED. R.

BANKR. P. 9031, the United States district judges have the inherent equitable authority to appoint a special master in a district court civil action or bankruptcy case or proceeding.

The Eighth Circuit Court of Appeals has held that "[b]eyond the provisions of Rule 53, ... for appointing and making references to Masters, a Federal District Court has 'the inherent power to supply itself with this instrument for the administration of justice when deemed by it essential.'" *Schwimmer v. United States*, 233 F.2d 855 (8th Cir. 1956)(quoting *In re Peterson*, 253 U.S. 300, 312 (1920)).[11] In *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 43 F. Supp. 225 (D. Conn. 1940), the court held "[t]he power of the court so to proceed [to appoint a master] is beyond question. It exists independent of the rule. Rule 53 serves but to outline the procedure to be followed when the power is exercised." *Id.* at 226 (emphasis added) (quoting *In re Peterson, supra*).

Query, does the existence of a procedural rule, such as FED. R. BANKR. P. 9031, impermissibly abridge the United States district court's inherent equitable power to appoint a special master in an appropriate bankruptcy case or proceeding? If FED. R. CIV. P. 53 were amended to provide that the district court could not appoint a special master in civil actions, would such an amendment impermissibly abridge the district court's inherent power to appoint a special master? The power of the court exists independent of rules which serve but to outline the procedure to be followed when the power is exercised. *Connecticut Importing Co., v. Frankfort Distilleries, Inc.*, et al, 42 F.Supp. 225 (D. Conn. 1940) (citations omitted).

[11] *In re Peterson*, 253 U.S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920), is the most often cited case supporting the proposition that the court has the inherent authority to appoint special masters.

In *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 263 U.S. 629, 635-6 (1924), the Supreme Court stated:

> "But no rule of court can enlarge or restrict jurisdiction. Nor can a rule abrogate or modify the substantive law. This is true, whether the court to which the rules apply be one of law, of equity or of admiralty. It is true of rules of practice prescribed by this court for inferior tribunals, as it is of those rules which lower courts make for their own guidance under authority conferred. (footnote omitted.)

In *United States v. National City Bank of New York*, 83 F.2d 236, 238 (2d Cir.) cert. den. 299 U.S. 563 (1936), the Second Circuit Court of Appeals held that '[N]o rule of court, even if so intended, can restrict jurisdiction."[12] (emphasis added) (citing *Washington-Southern Navigation Company v. Baltimore & Philadelphia Steamboat Company*, supra.) If the district court does indeed possess the inherent authority to appoint a special master in the appropriate context, any rule abridging that power would appear to be an abuse of the rule making process.

FED. R. CIV. P. 53, the case law interpreting its language, and legal and equitable considerations all provide sufficient safeguards or protections against overuse or abuse of the judicial authority to appoint special masters. FED. R. CIV. P. 53(b) expressly provides that "[a] reference to a special master shall be the exception and not the rule." FED. R. CIV. P. 53(b).

The United States bankruptcy judges, armed with the derivative authority of the United States district courts and concomitant inherent judicial powers, should be authorized in unusually complex bankruptcy cases and proceedings to appoint a special master similar to the procedure under FED. R. CIV. P. 53. It would foster sound and efficient case management in the

[12]"Jurisdiction" has been defined as the power "to declare the law" by hearing and determining controversies. *Ex parte McCardle*, 74 U.S. 506 (1868). It is the authority, capacity, power or right to act. See *Industrial Addition Ass'n v. Commissioner of Internal Revenue*, 323 U.S. 310, 313 (1945).

bankruptcy system if special masters were allowed to be utilized in appropriate cases and proceedings in order to more fully manage and control the litigation process to achieve the goal described in FED. R. BANKR. P. 1001: "to secure the just, speedy, and inexpensive determination of every [bankruptcy] case and proceeding." This is a realistic recognition of the modern practice of law and effective and sound case management techniques and practices. Moreover, the authority to appoint a special master would accord with the explicit congressional intent that bankruptcy judges manage their cases and proceedings effectively.[13]

SUMMARY

In conclusion, there are no compelling reasons why a procedural rule should prohibit the inherent judicial authority to appoint a special master in unusually complex cases and proceedings under the Bankruptcy Code. Therefore, absent an express statutory prohibition, United States district judges and bankruptcy judges should not be prevented by a procedural rule from appointing special masters in unusually complex bankruptcy cases and proceedings.

---

[13]See the sua sponte powers granted to the bankruptcy courts to issue any order appropriate to carry out the provisions of the Code and the recent statutory amendment permitting them to hold status conferences and to issue scheduling orders. 11 U.S.C. § 105(a) and (d). See also the developing case law regarding the inherent power of the bankruptcy court, e.g., In re Bibo, Inc., 76 F.3d 256 (9th Cir. 1995) (bankruptcy court has sua sponte power to order appointment of trustee in a Chapter 11 case); In re City Equities Anaheim, Ltd. 22 F.3d 954 (9th Cir. 1994) (bankruptcy court, as a court of equity, possesses power to summarily enforce settlements); Hayes v. Production Credit Ass'n of the Midlands, 955 F.2d 49 (Table) 1992 WL 26785 (Text) (10th Cir. 1992) (bankruptcy court may sua sponte dismiss a second petition if debts in pending case are the same); In re Rainbow Magazine, Inc.., 77 F.3d 278 (9th Cir. 1996), In re Courtesy Inns, Ltd., Inc., 40 F.3d 1084 (10th Cir. 1994), and In re TCI Ltd., 769 F.2d 441 (7th Cir. 1985) (bankruptcy court has inherent power to sanction); In re Harrison, 148 B.R. 375 (Bankr. D.R.I. 1992) (bankruptcy court has inherent authority to enter default judgment); In re Crayton, 192 B.R. 970 (9th Cir. BAP 1996), In re Johnson, 921 F.2d 585 (5th Cir. 1991), and D.H. Overmyer Co., Inc. v. Robson, 750 F.2d 31 (6th Cir. 1984) (bankruptcy court has inherent authority to regulate attorneys appearing before court); Paradise Hotel Corp. v. Bank of Nova Scotia, 842 F.2d 47 (3d Cir. 1988) (bankruptcy court has inherent authority to stay proceeding); and In re Parke Imperial Canton, Ltd. 1995 WL 362873 (Bankr. N.D. Ohio 1995) and In re Busy Beaver Bldg. Ctrs., Inc., 19 F.3d 833 (3d Cir. 1994) (bankruptcy court has inherent authority to review professional fee applications).

Rule 53. Masters

(a) APPOINTMENT AND COMPENSATION. The court in which any action is pending may appoint a special master therein. As used in these rules, the word "master" includes a referee, an auditor, an examiner, and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct; provided that this provision for compensation shall not apply when a United States magistrate judge is designated to serve as a master. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it. Upon the consent of the parties, a magistrate judge may be designated to serve as a special master without regard to the provisions of this subdivision.

(c) POWERS. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.

(d) PROCEEDINGS.

(1) *Meetings.* When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make the report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in the master's discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) *Witnesses.* The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) *Statement of Accounts.* When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

(e) REPORT.

(1) *Contents and Filing.* The master shall prepare a report upon the matters submitted to the master by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and serve on all parties notice of the filing. In an action to be tried without a jury, unless otherwise directed by the order of reference, the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits. Unless otherwise directed by the order of reference, the master shall serve a copy of the report on each party.

(2) *In Non-Jury Actions.* In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) *In Jury Actions.* In an action to be tried by a jury the master shall not be directed to report the evidence. The master's findings upon the issues submitted to the master are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report.

(4) *Stipulation as to Findings.* The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) *Draft Report.* Before filing the master's report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

(f) APPLICATION TO MAGISTRATE JUDGE. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge expressly provides that the reference is made under this rule.

(As amended Feb. 28, 1966, eff. July 1, 1966; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993.)

Subdivision (b). The amendment requires a party who files a motion requesting a stay of mandate to file, at the same time, proof of service on all other parties. The old rule required the party to give notice to the other parties; the amendment merely requires the party to provide the court with evidence of having done so.

The amendment also states that the motion must show that a petition for certiorari would present a substantial question and that there is good cause for a stay. The amendment is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., Supreme Court Practice § 17.19 (6th ed. 1986).

~~**Rule 48. Title**~~

~~These rules may be known and cited as the Federal Rules of Appellate Procedure.~~

Rule 48. Masters

A court of appeals may appoint a special master to hold hearings, if necessary, and to make recommendations as to factual findings and disposition in matters ancillary to proceedings in the court. Unless the order referring a matter to a master specifies or limits the master's powers, a master shall have power to regulate all proceedings in every hearing before the master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order including, but not limited to, requiring the production of evidence upon all matters embraced in the reference and putting witnesses and parties on oath and examining them. If the master is not a judge or court employee, the court shall determine the master's compensation and whether the cost will be charged to any of the parties.

Committee Note

The text of the existing Rule 48 concerning the title was moved to Rule 1.

This new Rule 48 authorizes a court of appeals to appoint a special master to make recommendations concerning ancillary matters. The courts of appeals have long used masters in contempt proceedings where the issue is compliance with an

enforcement order. *See Polish National Alliance v. NLRB*, 159 F.2d 38 (7th Cir. 1946); *NLRB v. Arcade-Sunshine Co.*, 132 F.2d 8 (D.C. Cir. 1942); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919 (2d Cir. 1942). There are other instances when the question before a court of appeals requires a factual determination. An application for fees or eligibility for Criminal Justice Act status on appeal are examples.

Ordinarily when a factual issue is unresolved, a court of appeals remands the case to the district court or agency that originally heard the case. It is not the Committee's intent to alter that practice. However, when factual issues arise in the first instance in the court of appeals, such as fees for representation on appeal, it would be useful to have authority to refer such determinations to a master for a recommendation.

○

Agenda Item 6

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: RESTYLING RULE 2003(d)

DATE: August 24, 1996

The amendments to Rule 2007.1 that were proposed by the Advisory Committee to govern elections of chapter 11 trustees have been approved by the Standing Committee and presented to the Judicial Conference for its approval in September 1996. If approved, they will be presented to the Supreme Court for promulgation in 1997.

Rule 2003(d) governs the report of -- and any disputes relating to -- an election of a chapter 7 trustee or chapter 7 creditors' committee. In September 1995, I presented to the Advisory Committee for its consideration (and the Advisory Committee approved) certain amendments to Rule 2003(d) to conform to the published draft of the proposed amendments to Rule 2007.1(b)(3). However, further changes were made to the published draft of Rule 2007.1(b)(3) at the March 1996 meeting in response to comments received from the Executive Office for United States Trustees. Because of these additional changes made in March, it is again necessary to conform Rule 2003(b) to the latest (now final) version of proposed amendments to Rule 2007.1(b)(3).

I enclose the following for your consideration:

(1) A new draft of proposed amendments to Rule 2003(d) that are designed to conform to the final version of Rule 2007.1(b)(3). I recommend that the Advisory Committee approve this draft.

(2) A copy of the proposed amendments to Rule 2003(d) that were approved by the Advisory Committee in September 1995, and

(3) A copy of the proposed amendments to Rule 2007.1(b)(3) that were approved by the Standing Committee and presented to the Judicial Conference.

You will notice that there are several differences between the proposed amendments to Rule 2003(d) (chapter 7 elections), and Rule 2007.1(b)(3) (chapter 11 elections). These are caused by the differences in the Code's treatment of these elections. For example, a person need not be "disinterested" to be elected as a chapter 7 trustee, but does in a chapter 11 case. A chapter 7 trustee does not have to be "appointed" by anybody, but a chapter 11 trustee must be appointed for certain sections of the Code to make sense. We discussed these differences at the last few Advisory Committee meetings.

RECOMMENDED AMENDMENTS TO RULE 2003(d):

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT OF ELECTION AND RESOLUTION OF DISPUTES IN CHAPTER 7 CASE ~~TO THE COURT~~.

(1) *Report of Undisputed Election.* If, in a chapter 7 case, the election of a person as trustee or an entity as a member of a creditors' committee is not disputed, the United States Trustee shall promptly file a report of the election, including the name and address of the person or entity elected and a statement that the election is undisputed.

(2) *Report of Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. Not later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. ~~The presiding officer shall transmit to the court the name and address of any person elected trustee or entity elected a member of a~~

~~creditors' committee. If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files a report of a disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are designed to conform to style of Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

PROPOSED AMENDMENTS TO RULE 2003(d) APPROVED BY THE ADVISORY COMMITTEE IN SEPTEMBER 1995:

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT TO THE COURT. The ~~presiding officer~~ United States trustee shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. ~~If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. Not later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files a

report of the disputed election for trustee, the interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are stylistic and designed to conform to [the proposed amendments to] Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

PROPOSED AMENDMENTS TO RULE 2007.1(b)(3) APPROVED BY THE STANDING COMMITTEE:

Rule 2007.1. Appointment of Trustee or Examiner in a Chapter 11 Reorganization Case

****

(b) ELECTION OF TRUSTEE.

****

(3) *Report of Election and Resolution of Disputes.*

(A) *Report of Undisputed Election.* If the election is not disputed, the United States trustee shall promptly file a report of the election, including the name and address of the person elected and a statement that the election is undisputed. The United States trustee shall file with the report an application for approval of the appointment in accordance with subdivision (c) of this rule. The report constitutes appointment of the elected person to serve as trustee, subject to court approval, as of the date of entry of the order approving the appointment.

(B) *Disputed Election.* If the election is disputed, the United States trustee shall promptly file a report stating that the election is disputed, informing the court of

the nature of the dispute, and listing the name and address of any candidate elected under any alternative presented by the dispute. The report shall be accompanied by a verified statement by each candidate elected under each alternative presented by the dispute, setting forth the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, and any person employed in the office of the United States trustee. Not later than the date on which the report of the disputed election is filed, the United States trustee shall mail a copy of the report and each verified statement to any party in interest that has made a request to convene a meeting under § 1104(b) or to receive a copy of the report, and to any committee appointed under § 1102 of the Code. Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files the report, any person appointed by the United States trustee under § 1104(d) and approved in accordance with subdivision (c) of this rule

shall serve as trustee. If a motion for the resolution of the dispute is timely filed, and the court determines the result of the election and approves the person elected, the report will constitute appointment of the elected person as of the date of entry of the order approving the appointment.

****

Agenda Item 7

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: REQUESTS FOR PAYMENT OF ADMINISTRATIVE EXPENSES INCURRED BEFORE CONVERSION TO CHAPTER 7 -- RULE 1019(6)

DATE: August 23, 1996

When a case is converted to chapter 7 from either chapter 11, chapter 12 or chapter 13, Rule 1019 governs the procedures to be followed. The rule includes provisions relating to, among other matters, the filing of claims. For example, Rule 1019(2) provides for a new time period for filing a proof of claim pursuant to Rule 3002 following conversion. Rule 1019(3) provides that claims actually filed before conversion are deemed filed in the chapter 7 case, so that it is not necessary to file a new claim following conversion if the creditor had already filed one before conversion.

Rule 1019 also contains provisions relating to postpetition/preconversion claims. Rule 1019(5) requires the debtor in possession, debtor, or trustee (depending on the chapter from which the case is converted) to file a "schedule of unpaid debts incurred after the commencement of the case" and before conversion, including the name and address of each holder of a claim. Most relevant to this memorandum is Rule 1019(6), which relates to postpetition/preconversion claims and provides, in part, as follows:

> (6) FILING OF POSTPETITION CLAIMS; NOTICE. On the filing of the schedule of unpaid debts, the clerk, or some other person as the court may direct, shall give notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002....

Rules 3001(a)-(d) and 3002 govern proofs of claim, including the time period for filing a proof of claim. In general, a proof of claim is timely if filed within 90 days after the first date set for the meeting of creditors under § 341.

Many postpetition/preconversion claims are entitled to priority as administrative expenses under § 503(b) and 507(a)(1) of the Code. Virtually all postpetition claims in a typical chapter 11 case are administrative expenses. However, not all postpetition claims are administrative expenses, especially in chapter 12 and chapter 13 cases in which the debtor may incur postpetition obligations that are not necessary to the administration of the estate. The fact that some postpetition/preconversion claims are administrative expenses, and others are not, is recognized by § 348(d) of the Code, which provides as follows:

> (d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. [emphasis added]

The language of Rule 1019(6) could lead the reader to conclude that every holder of a postpetition/preconversion claim -- whether or not it is an administrative expense -- must file a timely proof of claim in accordance with Rules 3001 and 3002. The original committee note, stating that "[Paragraph (6)] requires that claims that arose in the chapter 11 or 13 case be filed within 60 days after entry of the order converting the case to

one under chapter 7," supports that view.[1] It is not surprising that a number of courts have held that a preconversion administrative expense claimant is required to file a timely proof of claim. See, e.g., In re De Vries Grain & Fertilizer, Inc, 12 F3d 101 (7th Cir. 1993); In re Johnson, 901 F2d 513 (6th Cir. 1990); In re Sea Air Shuttle Corp., 168 B.R. 501 (Bankr. D. Puerto Rico, 1994); In re Transouth Truck Equipment, Inc., 87 B.R. 937 (Bankr. E.D. Tenn. 1988).

In a recent case, In re Pro Set, Inc, 193 B.R. 812 (Bankr. N.D. Tex. 1996), Bankruptcy Judge Abramson disagreed with the holding and reasoning of the cases cited above, and concluded that neither Rule 1019(6), nor any other Rule or Code section, requires an administrative expense claimant to file a proof of claim. Judge Abramson's reasoning, which I believe is sound, has caused confusion as to the proper procedure to be followed by preconversion administrative expense claimants. I recommend that the Committee read Judge Abramson's opinion, a copy of which is attached.

After analyzing the relevant Code sections and Rules, I believe that Rule 1019(6) -- if and to the extent that it is applied to preconversion administrative expenses -- is

---

[1]The original rule provided that notice must be given to entities on the schedule of unpaid postpetition debts "that their claims may be filed within 60 days from the entry of the order, pursuant to Rule 3001(a)-(d)." In 1991, Rule 1019(6) was amended to provide that the notice state "that their claims may be filed pursuant to Rules 3001(a)-(d) and 3002" so that the time period for filing such claims conforms to the time period for filing prepetition claims.

inconsistent with the Code and should be amended so that preconversion administrative expense claimants are directed to file "a request for payment of an administrative expense," rather than a proof of claim. I also suggest that the Rule be amended to set a time for filing a request for payment of a preconversion administrative expense for the request to be timely under § 503(a) of the Code.

While analyzing Rule 1019(6), I also think that the last sentence should be deleted as unnecessary and confusing. That sentence states that: "Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(c) and 365(d) of the Code." The original committee note to the Rule indicates that claims "arising from the rejection of an executory contract entered into during the chapter [11 or 13] case may be filed within a time fixed by the court. Pursuant to § 348(c) of the Code, the conversion order is treated as the order for relief to fix the time for the trustee to assume or reject executory contracts under § 365(d)." This sentence does not distinguish between postpetition contracts that give rise to administrative expenses (such as a chapter 11 debtor in possession's postpetition employment agreement with new management) and those that are not (such as a chapter 13 debtor's postpetition agreement with a health spa). If the rule is amended as I suggest below, I do not think that the last sentence is

necessary.

For the purpose of focusing the discussion, I prepared the following draft of suggested amendments to Rule 1019(6):

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

****

(6) ~~FILING OF~~ POSTPETITION CLAIMS; PRECONVERSION ADMINISTRATIVE EXPENSES; NOTICE. A request for payment of an administrative expense incurred before conversion of the case is timely filed under § 503(a) if it is filed before conversion or not later than 90 days after the first date set for the meeting of creditors under § 341 called after conversion of the case. A claim of a kind specified in § 348(d) of the Code may be filed in accordance with Rules 3001(a)-(d) and 3002. On the filing of the schedule of unpaid debts incurred after commencement of the case and before conversion, the clerk, or some other person as the court may direct, shall give to those entities notice of the time for filing a request for payment of an administrative expense and, unless a notice of insufficient assets to pay a dividend is mailed in accordance with Rule 2002(e), the time for filing a claim of a kind specified in § 348(d) of the Code. ~~notice to those entities, including the United States, any state, or any subdivision thereof, that their claims~~ ~~may~~

~~be filed pursuant to Rules 3001(a) (d) and 3002. Unless a notice of insufficient assets to pay a dividend is mailed pursuant to Rule 2002(e), the court shall fix the time for filing claims arising from the rejection of executory contracts or unexpired leases under §§ 348(e) and 365(d) of the Code.~~

COMMITTEE NOTE

Paragraph (6) is amended to provide that a holder of an administrative expense claim incurred after the commencement of the case, but before conversion to chapter 7, is required to file a request for payment under § 503(a) within the specified time, rather than a proof of claim under § 501 and Rules 3001(a)-(d) and 3002. The time for filing a request for payment of an administrative expense may be enlarged as provided in Rule 9006(b), but may not be reduced. See Rule 9006(c)(2). If an administrative expense claimant fails to timely file the request, it may be tardily filed under § 503(a) if permitted by the court for cause.

The final sentence of Rule 1019(6) is deleted because it is unnecessary in view of the other amendments to this paragraph. If a party has entered into a postpetition contract or lease with the trustee or debtor that constitutes an administrative expense, a timely request for payment must be filed in accordance with this paragraph and § 503(b) of the Code. The time for filing a proof of claim in connection with the rejection of any other executory contract or unexpired lease is governed by Rule 3002(c)(4).

The phrase "the United States, any state, or any subdivision thereof" is deleted as unnecessary.

Rule 9006. Time

****

(c) *Reduction.*

****

(2) *Reduction Not Permitted.* The court may not

reduce the time for taking action under Rules 1019(6), ...

COMMITTEE NOTE

Subdivision (c)(2) is amended to add a reference to Rule 1019(6), which fixes the time for filing a request for payment of an administrative expense incurred after the commencement of the case and before conversion of the case to chapter 7.

Discussion: Why Preconversion Administrative Expense Claimants Should Not be Required to File Proofs of Claims

In general, the Code distinguishes between a "creditor" that may file a proof of claim, and the holder of an administrative expense claim that may not file a proof of claim. This distinction is followed in the Rules, except perhaps for the confusion regarding Rule 1019(6).

The word "creditor" is defined in § 101(10) to mean:

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;
>
> (B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h), or 502(i) of this title; or
>
> (C) entity that has a community claim.

Unless a postpetition claim is "of a kind specified in" one of the sections listed in (B) above, a holder of a claim that arises postpetition is not a "creditor." Again, § 348(d) -- which is the only one relevant to this discussion -- provides that:

> (d) A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1208, or 1307 of this title, other than a claim specified in section 503(b)

> of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition. [emphasis added]

Section 503(b) defines administrative expenses. Read together, §§ 101(10)(B), 348(d), and 503(b) clearly lead to the conclusion that a holder of a postpetition/preconversion claim that is not an administrative expense is a "creditor," but the holder of a postpetition/preconversion administrative expense claim is not a "creditor" under the Code.

Under § 501, a "creditor" may file a proof of claim. Section 502(a) provides that a claim, "proof of which is filed under § 501 of this title," is deemed allowed unless a party in interest objects. Section 502(b) lists the grounds for disallowing a claim filed under § 501. But since the word "creditor" does not include an administrative expense claimant, §§ 501 and § 502 (including the right to file a proof of claim and the grounds for disallowance) have no application to administrative expenses.

Section § 503(a) of the Code provides that an administrative expense claimant may file a "request for payment of an administrative expense." It is clear, therefore, that the proper procedure for an administrative expense claimant is to file a "request for payment," rather than a "proof of claim." Accord, e.g., NL Industries, Inc. v. GHR Energy Corp., 940 F2d 957, 966 (5th Cir. 1991).

Consistent with this distinction, Rule 3001(a) defines "proof of claim" as a written statement "setting forth a

creditor's claim." [emphasis added]. Therefore, Rule 3002(c), which governs the time for filing a "proof of claim," does not apply to administrative expenses. Also consistent with this analysis is Official Form No. 10 (Proof of Claim), which contains the following statement:

> Note: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A 'request' for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Unfortunately, Rule 1019(6) blurs the distinction between a proof of claim to be filed by a creditor, and a request for payment of an administrative expense. Read literally, I believe that the current Rule 1019(6) has no application to administrative expenses. Nonetheless, Rule 1019(6) is ambiguous and could lead the reader to believe -- as a number of courts have held -- that a postpetition, preconversion administrative expense claimant must file a proof of claim within the time provided in Rule 3002.

Should Rule 1019 Impose a Time Limit for Filing § 503(a) Requests?

I suggest that Rule 1019(6) be amended to fix a deadline for determining whether a request for payment of a preconversion administrative expense is timely. First, a time limit for such requests facilitates a more orderly and efficient administration of the postconversion chapter 7 case. Second, there is no reason for administrative expense claimants to delay such filing.

Amending Rule 1019(6) to fix the time for filing requests for payment of a preconversion administrative request also is

consistent with the 1994 amendments to § 503(a). The 1994 amendments changed § 503(a) as follows: "An entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." Apparently, Congress intended that, in at least some circumstances, a time limit for filing § 503(a) payment requests should be imposed.

Although a time limit should be imposed, I think that the Rules should not address the consequences of filing a tardy request. I would leave that to the Code. In this connection, I should alert the Committee that there is a glitch in the Code caused by the 1994 Reform Act. Section 726(a)(1) was amended to provide that property shall be distributed in a chapter 7 case "first, in payment of claims of the kind specified in, and in the order specified in, section 507 of this title, proof of which is timely filed under section 501 of this title or tardily filed before the date on which the trustee commences distribution under this section." As discussed above, holders of administrative expense claims (whether or not the case has been converted) are not "creditors" and do not file proofs of claim under § 501. Read literally, administrative expense claims entitled to priority under § 507(a)(1) are not paid first under § 726(a)(1). I have no doubt that this was not the intended result of the 1994 amendment, but I also do not think that the Rules can cure this glitch. Only Congress can do that.

In this case, the debtors have two life insurance policies. A member of the family of the insured is a beneficiary of each policy. The parties agree that the present value of the policies is $19,000. The debtors have scheduled other personal property with a total value of $44,300. According to the schedules, that property is not encumbered by any lien or security interest. Consequently, the debtors exceed the limitation of § 42.001 by $3,300.00. The trustee's objection must be sustained in part. The debtors' exemption of the present value of their life insurance policies must be limited to $15,700. The debtors may comply with this ruling by paying the trustee $3,300 or otherwise agreeing that the bankruptcy estate could retain other property covered by § 42.002 having that value.

Based on the foregoing,

IT IS ORDERED that the objection of Robert Milbank, Jr., trustee of the bankruptcy estate of Gilbert T. Scott and Gloria B. Scott, to the claim of exemption of the annuity contract with the Equitable Life Insurance Company is **OVERRULED** and the exemption is **ALLOWED.**

IT IS FURTHER ORDERED that the objection of Robert Milbank, Jr., to the claim of exemption of the present value of the life insurance policies with Kentucky Central and Northwestern Mutual is **SUSTAINED IN PART** and **OVERRULED IN PART**, and that the exemptions are allowed in the total amount of $15,700. The debtors and the trustee may comply with this order by the alternatives provided in the memorandum opinion.

In re PRO SET, INC., Debtor.

Bankruptcy No. 392–37416–HCA–11.

United States Bankruptcy Court,
N.D. Texas,
Dallas Division.

March 8, 1996.

Comptroller of Public Accounts objected to allowance of trust company's Chapter 11 administrative expense claim after conversion of case to Chapter 7. The Bankruptcy Court, Harold C. Abramson, J., held that: (1) Comptroller was permitted to file objection, and (2) preconversion Chapter 11 administrative expense claimants are not required to file proofs of claim following conversion of case to Chapter 7.

Ordered accordingly.

1. Bankruptcy ⇐2923

Comptroller of Public Accounts, as creditor of bankruptcy estate, is party in interest and may object to claims.

2. Bankruptcy ⇐2923

Comptroller of Public Accounts was permitted to object to claims where Chapter 7 trustee consented to Comptroller's filing of objection and claimant took no position as to Comptroller's authority to file objection to claim. Bankr.Code, 11 U.S.C.A. § 704(5).

3. Bankruptcy ⇐2893

Deadline set for filing proof of claim does not apply to administrative expense claimants because they are not required to file proofs of claim, but rather may file request for payment. Bankr.Code, 11 U.S.C.A. §§ 501, 503.

4. Bankruptcy ⇐2893, 3594

Preconversion Chapter 11 administrative expense claimants are not required to file proofs of claim following conversion of case to Chapter 7 pursuant to rule regarding effects of conversion; better practice is for those claimants to file request for payment or proof of claim to apprise Chapter 7 trustee of what they claim they are owed. Bankr.

Code, 11 U.S.C.A. §§ 348, 501, 503; Fed. Rules Bankr.Proc. Rule 1019, 11 U.S.C.A.

Lynn Hamilton Butler, Assistant Attorney General, Office of the Attorney General of the State of Texas, Collections Division/Bankruptcy Section, Austin, Texas, for the Texas Comptroller of Public Accounts.

Judith Elkin, Haynes & Boone, L.L.P., Dallas, Texas, for Morgan Guaranty Trust Company of New York.

Daniel J. Sherman, Trustee, Sherman & Yaquinto, Dallas, Texas.

MEMORANDUM OPINION

HAROLD C. ABRAMSON, Bankruptcy Judge.

Came before the Court for consideration the Motion for Authority to File Objection to Allowance of Chapter 11 Administrative Expense Claim of Morgan Guaranty Trust Company of New York ("Motion" or "Motion for Authority") filed by the Texas Comptroller of Public Accounts ("Comptroller") and the Objection of Morgan Guaranty Trust Company of New York ("Morgan") to the Motion. With the Motion, the Comptroller requests the Court to grant it authority to file any pleadings necessary to object to Morgan's Chapter 11 administrative expense and to request subordination or disallowance of such expense. Morgan takes no position on whether or not the Comptroller, as an alleged creditor of the Debtor, is required to get Court approval to file these pleadings. Morgan otherwise objects to the relief requested, however, because Morgan contends that no purpose would be served by the filing of the Comptroller's objection.

The Court finds that this is a core proceeding pursuant to 28 U.S.C. § 1334 and § 157(b)(2)(A), –(B), & –(O).

Authority to File Objection

[1, 2] Section 502(a) of Title 11 of the United States Code ("Bankruptcy Code") provides that a claim, proof of which is filed, is deemed allowed unless a party in interest objects. The Comptroller, as a creditor of the bankruptcy estate, is a party in interest and may object to claims. 3 *Collier on Bankruptcy* ¶ 502.01, at 502–13 (Lawrence P. King ed., 15th ed. 1995). The Comptroller requests the Court's permission to object, however, because courts have found that § 704(5) endows a Chapter 7 trustee with the exclusive authority to object to claims. *See, e.g., Kowal v. Malkemus (In re Thompson),* 965 F.2d 1136, 1147 (1st Cir.1992); *Collier on Bankruptcy, supra,* ¶ 502.01, at 502–13 (discussing restrictions on the right of a creditor to object to claims). In this case, the Chapter 7 Trustee has consented to the filing of the objection by the Comptroller, and Morgan does not take a position with regard to whether or not the Comptroller has authority to file an objection to claim. For these reasons, the Court finds that the Comptroller may file an objection to claim in this instance.

The Comptroller's Objection

Although the Comptroller requests only permission to file an objection to claim, the Comptroller briefed its substantive objection to Morgan's administrative expense. Morgan filed an objection in response to the Motion in which its attorneys briefed in even greater detail its legal argument in opposition to the Comptroller's proposed objection to claim. On November 30, 1995, the Comptroller filed a reply to Morgan's objection. The key issues raised by these pleadings are (1) whether or not Morgan was required to file an actual proof of claim form asserting its Chapter 11 administrative expense by the Chapter 7 bar date; and (2) whether Morgan's Chapter 11 administrative expense should be disallowed for its failure to file a proof of claim, or subordinated for filing a late proof of claim.[1] Because of the extensive briefing by the parties on the issues prior to the hearing on the Motion, the Court directed the parties to present oral argument on the issues and told the parties it would then rule on them without requiring the Comptroller to file an additional pleading. The Court will treat the Motion as an objection to claim per Federal Rule of Civil Procedure 8. Following the hearing, the parties

1. At the time the Comptroller filed its Motion for Authority, Morgan had not filed a proof of claim. In the Motion, the Comptroller recognized the possibility that Morgan might file a late claim. Morgan did file a late claim following the filing of the Comptroller's Motion.

filed additional pleadings in which they elaborated on their arguments.[2]

Factual Background

Pro Set, Inc. ("Debtor") filed a petition under Chapter 11 of the Bankruptcy Code on August 20, 1992 ("Petition Date"). Subsequently, the Court authorized the Debtor to incur secured, superpriority administrative indebtedness under § 364(c) & –(d) of the Bankruptcy Code by two orders entered on September 28, 1992, and October 16, 1992 (collectively, the "First Financing Orders"). Morgan is defined as the Lender. (September 28, 1992, Order at 3.) The September 28, 1992, order provides that

> [t]he credit extended by Lender and the indebtedness incurred by the Debtor as provided in this Order are actual and necessary costs and expenses of preserving the estate of Debtor and are allowable as administrative expenses in accordance with the provisions of Sections 503(b)(1) and 507(a)(1) of the Bankruptcy Code.

(September 28, 1992, Order at 4.) The order also provided that "[t]he Lender has agreed to extend credit to Debtor . . . only upon the terms and conditions set forth in this Order, including without limitation the granting of superpriority status under Section 364(c)(1) of the Code . . . ." (September 28, 1992, Order at 4–5.) The Court granted superpriority status to amounts lent by Morgan postpetition. (September 28, 1992, Order at 11–12.) In addition to granting Morgan superpriority administrative status, the Court granted Morgan a security interest in certain property of the Debtor pursuant to 11 U.S.C. §§ 364(c)(2), 364(c)(3), and 364(d)(1). (September 28, 1992, Order at 9–10.)

Morgan's obligation to make advances of funds terminated on December 31, 1992. (September 28, 1992, Order at 7.) The Court entered two additional orders on December 24, 1992, and March 17, 1993, that authorized the Debtor to continue to incur debt under the same terms as the First Financing Orders with some modifications. These orders contain provisions similar or identical to the provisions discussed above. (December 24, 1992, Order at 4–5, 10, 12–13; March 17, 1993, Order at 4, 5, 10, 11, 12.)

Although the Debtor's plan of reorganization was confirmed on June 3, 1994, it was never consummated. The bankruptcy case was converted to a case under Chapter 7 of the Bankruptcy Code by order entered on September 22, 1994. The Clerk for the United States Bankruptcy Court for the Northern District of Texas mailed out a Notice of Commencement of Case Under Bankruptcy Code Chapter 7 about September 28, 1994. The notice indicated that creditors were required to file a proof of claim except as otherwise provided by law and that failure to file a proof of claim could deprive creditors of their property rights in the Debtor's bankruptcy estate. The notice provided that claims were to be filed by January 17, 1995 ("Bar Date"), and that proof of claim forms were available in the Clerk's Office of any United States Bankruptcy Court.

On September 29, 1994, Morgan filed a motion for relief from the automatic stay ("Stay Motion") imposed by 11 U.S.C. § 362 as to certain of its collateral. On November 1, 1994, after notice and hearing, the Court entered an order lifting the automatic stay ("Stay Order") to enable Morgan to take any action appropriate under applicable state law to foreclose, sell, or otherwise dispose of its collateral. Morgan did not file a proof of claim until after the Comptroller filed its Motion for Authority, which was long after the Bar Date.

Discussion

The Comptroller objects to Morgan's Chapter 11 administrative expense because of Morgan's failure to file a proof of claim asserting the expense or any deficiency arising from a foreclosure on its collateral. The Comptroller asserts that Morgan's expense should be disallowed for its failure to file a proof of claim or, in the event that Morgan files a late proof of claim, subordinated. The Court finds, however, that Morgan was not

2. There is some confusion about whether the Court authorized the parties to file supplemental briefs. In its December 20, 1995, reply to Morgan's supplemental objection, the Comptroller stated that it did not understand the Court to indicate that the parties could file supplemental pleadings. Regardless, the Court has considered the pleadings, which have not had significant impact on this Court's ruling.

required to file a proof of claim for its administrative expense.[3] As a result, the Court will not reach the issue of whether or not it should disallow or subordinate Morgan's expense.

The financing orders entered by the Court describe the amounts loaned by Morgan as administrative expenses and provide that such amounts have a "superpriority" under the provisions of § 364(c)(1). (*See, e.g.*, September 28, 1992, Order at 4, 11.) Although the Code[4] does not provide that amounts loaned pursuant to § 364(c)(1) are to be designated as "superpriority," it would seem that the effect of the statutory language is to do so, as such expense is to be paid ahead of other administrative expenses. *See* 11 U.S.C. § 364(c)(1). In addition, although the Code does not characterize amounts loaned pursuant to § 364(c)(1) as an administrative expense, such amounts would be administrative expenses pursuant to 11 U.S.C. § 503(b). Section 503 of the Code is the statutory provision governing the allowance of administrative expense claims.

[3] Section 503 provides that an entity may file a request for payment of an administrative expense which the court shall allow after notice and hearing. 11 U.S.C. § 503.[5] In contrast, the Code directs a creditor to file a proof of claim. 11 U.S.C. § 501; *see NL Industries, Inc. v. GHR Energy Corp.*, 940 F.2d 957, 966 (5th Cir.1991) (noting that administrative expense claimants are to file requests for payment rather than proofs of claim), *cert. denied*, 502 U.S. 1032, 112 S.Ct. 873, 116 L.Ed.2d 778 (1992); *In re Packard Properties, Ltd.*, 118 B.R. 61, 63 (Bankr. N.D.Tex.1990) (McGuire, C.J.) (same). Section 502 governs allowance of claims. Although the Federal Rules of Bankruptcy Procedure ("Rules") provide specific procedures and deadlines for the filing of proofs of claims, neither the Rules nor the Code provide specific procedures for how or when a § 503 request for payment should be made.[6] *In re Transouth Truck Equipment, Inc.*, 87 B.R. 937, 938 (Bankr.E.D.Tenn.1988); *see United States v. Brandt (In re Lissner)*, 119 B.R. 143, 144–45 (N.D.Ill.1990); Fed. R.Bankr.P. 3002–3005 (specifying procedures for filing proofs of claim). Because administrative expense claimants—who it might be more appropriate to refer to as "requestors"—do not file proofs of claim, the deadlines set for filing a proof of claim do not apply to them. *See* William L. Norton, Jr., *Norton Bankruptcy Law and Practice 2d* § 42:14, at 42–73 to 42–74 (1994) (noting that courts have found that the proof of claim provisions of the Code and Rules do not apply to administrative expenses and concluding that administrative expense claimants are apparently not subject to the bar dates for filing claims in Rule 3002).[7] The

3. In this opinion, the Court is only dealing with Morgan's § 364(c)(1) administrative expense claim and not its secured claims.

4. That is, the Bankruptcy Code, 11 U.S.C. §§ 101–1330.

5. Section 503 and other parts of the Bankruptcy Code were amended in 1994. *See* The Bankruptcy Reform Act of 1994, Pub.L. No. 103–394, 108 Stat. 4106. The amendments do not apply to this bankruptcy case. Bankruptcy Reform Act § 702. Thus, the citations in this opinion are to the preamendment Code.

6. In 1994, however, § 503 was amended to provide that requests for payment must be timely filed. Bankruptcy Reform Act § 213(c).

7. The Court considers Norton's discussion of why the proof of claim provisions of the Code and the Rules do not apply to administrative expense claimants to be instructive:

> [A]llowance of unsecured claims is expressly dealt with in § 502. Section 502(a), in turn, mandates the filing of a proof of claim under § 501 as a prerequisite to the allowance of the "claim." . . . [Section] 503 is captioned "allowance of administrative expenses." This appears to suggest that § 503 itself is a separate allowance section, apart from § 502, devoted exclusively to administrative expenses. If so, then § 502 would not apply to the allowance of administrative expenses. The rest of the statute is consistent with this reading. Section 507(a)(1) refers to "administrative expenses allowed under section 503(b)." Note that the reference is to "expenses," rather than "claims," the latter of which is handled under § 502. Also, of course, § 507(a)(1) specifically states that allowance is under § 503(b), implying that § 502 is out of the picture. . . . The courts that have addressed the issue have concluded, consistent with the above analysis, that the proof of claim provisions of the Code and Rules do not apply to administrative expenses. . . .

Norton, *supra*, § 42:14, at 42–72 to 42–74 (footnotes and citations omitted).

Official Proof of Claim Form for the United States Bankruptcy Courts also supports this result in that it provides:

> NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.

Official Bankr.Form 10; 11 U.S.C.

A number of courts have found that the conversion of a case from one pending under Chapter 11 to one pending under Chapter 7 changes the requirements for preconversion administrative expense claimants, such that they are to file proofs of claim by the deadline, or bar date, noticed by the court after the conversion. *See, e.g., In re De Vries Grain & Fertilizer, Inc.*, 12 F.3d 101 (7th Cir.1993); *United States v. Ginley (In re Johnson)*, 901 F.2d 513 (6th Cir.1990); *United States v. Brandt (In re Lissner)*, 119 B.R. 143 (N.D.Ill.1990); *In re Sea Air Shuttle, Corp.*, 168 B.R. 501 (Bankr.D.Puerto Rico 1994); *In re West Johnson Corp.*, 96 B.R. 182 (Bankr.W.D.Wis.1988); *In re Transouth Truck Equipment, Inc.*, 87 B.R. 937 (Bankr. E.D.Tenn.1988). This Court respectfully disagrees with these courts.

Section 348 of the Code stipulates the effects of conversion. Rule 1019 implements § 348. Fed.R.Bankr.P. 1019 advisory committee's note (1983). Rule 1019 provides for a new time period for filing claims, and notes that claims actually filed by a creditor in the superseded case will be deemed filed in the Chapter 7 case. Fed.R.Bankr.P. 1019(2) & –(3). The Rule requires a debtor to file a final report and a schedule of postpetition debts within 15 days after the entry of the order of conversion. Fed.R.Bankr.P. 1019(5). Part six of the Rule requires the clerk of the court to give the following notice:

> *Filing of Postpetition Claims; Notice.* On the filing of the schedule of unpaid debts, the clerk, or some other person as the court may direct, shall give notice to those entities, including the United States, any state, or any subdivision thereof, that their claims may be filed pursuant to Rules 3001(a)–(d) and 3002. * * *

Fed.R.Bankr.P. 1019(6).

Several of the courts holding that administrative expense claimants must file a proof of claim by the bar date following conversion find that Rule 1019(6) [8] *requires* all entities listed on the Rule 1019(5) schedule of debts incurred in the Chapter 11, including administrative expense claimants, to file a proof of claim. *See Johnson*, 901 F.2d at 518–19; *Lissner*, 119 B.R. at 145; *Transouth*, 87 B.R. at 939 (collectively, the "*Transouth* Cases"). The *Transouth* Cases find that Rule 1019(6) does not provide that postpetition, preconversion administrative expense claimants may file *either* a proof of claim *or* a request for administrative expense but *directs* the entities listed on the 1019(5) schedule to file a proof of claim. *Id.* The *Transouth* court explains:

> The drafters of Rule 1019 *apparently concluded* that it is easiest to require everyone with a claim that arose during a chapter 11 case, and which is not governed by Rule 2016, to file a proof of claim regardless of whether the claim might be an administrative expense. 12 Collier on Bankruptcy ¶ 122.12 (14th ed. 1987).

Id. (emphasis added). This Court finds the analysis of the *Transouth* Cases to misread the Rule, however, because Rule 1019(6) does not unequivocally direct the entities on the Rule 1019(5) schedule to file a proof of claim. The plain language of Rule 1019(6) provides that the clerk is to notice these entities that their claims *may* be filed pursuant to Rules 3001(a)–(d) and 3002.[9] Thus, the Rule leaves

8. About 1991, Rule 1019 was renumbered such that 1019(7) was renumbered as Rule 1019(6), and Rule 1019(6) was renumbered as 1019(5). Fed.R.Bankr.P. 1019 advisory committee's note (1991). Some courts rendered opinions prior to the renumbering of the Rule. *See, e.g., Transouth*, 87 B.R. at 939.

9. In *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989), the Supreme Court found that statutory analysis should begin and end with the language of the statute when the statute's language is plain. The Supreme Court has applied this plain meaning analysis to the Bankruptcy Rules. *In re International Diamond Exchange Jewelers, Inc.*, 188 B.R. 386, 390 (Bankr. S.D.Ohio 1995); *see Taylor v. Freeland & Kronz*, 503 U.S. 638, 651, 112 S.Ct. 1644, 1652, 118 L.Ed.2d 280 (1992) (Stevens, J., dissenting) (noting that the majority applied "plain meaning" analysis in disposing of the case).

to the entity the task of ascertaining whether or not it should file a proof of claim. In making this determination, a preconversion administrative expense claimant would justifiably look to § 503, which governs allowance of administrative expenses and which directs the filing of a request for payment. In addition, the Official Proof of Claim Form directs the administrative expense claimant to file a request for payment and not a proof of claim. Section 348 does not indicate that an administrative expense claimant should file a proof of claim form or comply with §§ 501 and 502 following conversion. Section 348 only indicates that administrative expense claimants are still treated differently than nonadministrative claimants. *See* 11 U.S.C. § 348(d).

[4] No language in the Bankruptcy Code or the Official Proof of Claim Form indicates to administrative expense claimants that they should file proofs of claim after conversion instead of a request for payment. This Court concludes that the Rules also do not mandate this procedure following conversion. Although the cases cited above do find that the Rule requires preconversion administrative expense claimants to file proofs of claim, this Court concludes these cases espouse a misreading of Rule 1019(6).[10]

Some cases reach the same result as the *Transouth* Cases using different reasoning. Two cases focus on a different section of Rule 1019 in concluding that preconversion administrative expense claimants must file a proof of claim. *In re De Vries Grain & Fertilizer, Inc.*, 12 F.3d 101 (7th Cir.1993); *In re Sea Air Shuttle Corp.*, 168 B.R. 501 (Bankr.D.Puerto Rico 1994). These courts find that 1019(3) requires preconversion administrative expense claimants to file timely proofs of claim in the Chapter 7 case. *See DeVries Grain*, 12 F.3d at 104 & 103 n. 2; *Sea Air Shuttle*, 168 B.R. at 503. The Court finds this reading of Rule 1019(3) to be over broad. Rule 1019(3) provides that "[a]ll claims actually filed by a creditor in the superseded case shall be deemed filed in the chapter 7 case." It is again too much of a leap to infer this language to require an administrative expense claimant to file a proof of claim by a deadline.

Another case reaches the same result as the *Transouth* and *De Vries* lines of cases without even mentioning Rule 1019. *See In re West Johnson Corp.*, 96 B.R. 182 (Bankr. W.D.Wis.1988). The *West Johnson* court argues that administrative expense claimants are not required to file a proof of claim only because of a *judicial* exception to Rule 3002(a), which rule requires an unsecured creditor to file a proof of claim. *See West Johnson*, 96 B.R. at 183, citing *In re Parker*, 15 B.R. 980 (Bankr.E.D.Tenn.1981), *aff'd* 21 B.R. 692 (E.D.Tenn.1982) and *In re Chicago Pacific Corp.*, 773 F.2d 909, 917 (7th Cir. 1985). The court noted that, "[a]lthough the clear statement of the filing requirement in Rule 3002(a) has been clouded by the court created exception in *Parker*, that exception should be extended only when justified by compelling policy concerns." *West Johnson*, 96 B.R. at 184. The court found no compelling circumstances justifying extension of the "exception" to administrative expenses in converted cases. *See id.* Rather, after conversion, the amount of administrative expenses are no longer indefinite in amount, but may be finally determined. *Id.* at 183–84. In addition, the filing of claims by preconversion administrative expense claimants would promote the policy considerations of certainty and ease of administration by providing the Chapter 7 trustee with fresh information. *Id.* at 184, citing *In re Hof Brau, Inc.*, 73 B.R. 72 (Bankr.D.R.I.1987).

The *West Johnson* court's assertion that the holding in the *Parker* case is a "judicial exception" wholly ignores that § 503 directs administrative expense claimants to file requests for payment rather than proofs of claim. Because administrative expense claimants are not to file a proof of claim per the statute (§ 503), Rule 3002 is not applicable. *See* Norton, *supra*, § 42:14, at 42–73 to 42–74. Courts holding that administrative expense claimants are to file requests for payment rather than proofs of claim are not creating an exception to Rule 3002, but are recognizing the distinction between § 501 and § 503. *See also supra* note 7. Thus, even if good reasons exist for requiring pre-

10. The Court acknowledges that, given the existing case law, the safer and better practice would be for preconversion administrative expense claimants to file a proof of claim by the Chapter 7 bar date.

conversion administrative expense claimants to file proofs of claim, neither the Code nor the Rules require this action or provide notice to the claimants that they must do so. For this reason, the Court rejects the *West Johnson* court's analysis.

The tie that binds all of the cases discussed above is their reliance on a particular policy argument in support of their conclusion. The courts emphasize their concern that the administration of the Chapter 7 case may be hindered because of the difficulties facing the trustee in ascertaining the existence of administrative expenses incurred during the aborted Chapter 11. *See, e.g., De Vries Grain*, 12 F.3d at 104 (noting this difficulty); *Johnson*, 901 F.2d at 519 (stating that the Rule's directive is "[i]n the interest of finality and notice to the Chapter 7 trustee" and helps achieve the goal of the Bankruptcy Rules to secure the just, speedy, and inexpensive determination of cases); *Lissner*, 119 B.R. at 146 (stating similar concerns); *West Johnson*, 96 B.R. at 184 ("The policy considerations of certainty and ease of administration of cases would be served by requiring a holder of an administrative expense claim to file a proof of claim upon conversion."); *Transouth*, 87 B.R. at 939 (noting that "[t]he drafters of Rule 1019 apparently concluded that it is easiest to require everyone with a claim that arose during a chapter 11 case . . . to file a proof of claim . . . ."). The *De Vries* court states that, while the burden on the Chapter 7 trustee to ascertain preconversion administrative expenses is great, it is not much of a burden on an administrative expense claimant to file a proof of claim. 12 F.3d at 104. Thus, such claimants should file proofs of claim. *See id.* The *De Vries* court and the other courts do not seem concerned, however, with the serious consequences of disallowance or subordination facing an administrative expense claimant who does not read the Rules to require it to file a proof of claim. If Rule 1019, or any other Rule, *clearly required* preconversion administrative expense claimants to file a proof of claim following conversion, the Court would not hesitate to reach the issue of whether or not Morgan's administrative expense should be disallowed or subordinated.

Another concern of this Court is based on the practical observations and experience of the Court. Too often, the debtor-in-possession and its attorney fail to comply with Rule 1019(5) and do not file a list of postpetition debts. It is the inattention of the debtor to this duty that creates for the Chapter 7 trustee the huge burden of administering a case without knowledge of the extent of administrative expense claims. An additional consequence of the debtor's failure to comply with the Rule is that administrative expense claimants may not receive notice of the conversion or the proof of claim bar date, and thus may not have the chance to file a timely "claim," if so required by a Rule.[11] These problems result from the fact that, after conversion, the debtor and its attorney could care less about the bankruptcy.

Although the Court finds that Morgan did not need to file a proof of claim by the Chapter 7 Bar Date, the Court also finds that Morgan has yet to file a request for payment pursuant to 11 U.S.C. § 503. Morgan's counsel argues, with scant authority, that the Court has previously allowed Morgan's administrative expense claim with the financing orders previously entered by the Court. These orders did not *allow* Morgan's administrative expense, but provided that amounts owed by Morgan are *allowable* as a § 503 administrative expense. (September 28, 1992, Order at 4; December 24, 1992, Order at 4–5; March 17, 1993, Order at 5). The financing orders authorized the Debtor to borrow from and repay Morgan, but they do not apprise the Court or the Trustee of the amounts actually loaned or the amounts still owing. The orders do provide that the amounts loaned have "superpriority" status. With the Stay Motion, Morgan requested permission to foreclose on its collateral, and not payment of its administrative expense. The Stay Order authorized Morgan to foreclose, but did not determine what amount would be owed to Morgan following any foreclosure sale that might take place. Although

11. The Court does not intend to suggest that this situation existed in this case and notes that Morgan was on the service list of the Notice of Commencement of the Chapter 7 case. The problem often exists, however.

the Court has determined that Morgan did not need to file a proof of claim, Morgan did file an administrative proof of claim after the Bar Date. The Court's decision does not preclude the Comptroller from objecting to this "proof of claim" on other grounds such as laches or estoppel.

Conclusion

For the foregoing reasons, the Court finds that the better view of the Code and the Rules is that preconversion, Chapter 11 administrative expense claimants are not required to file proofs of claim following conversion of the case to Chapter 7. Regardless, they should file something—a request for payment or a proof of claim—to apprise the Chapter 7 Trustee of what they claim they are owed. Because the Court has found that Morgan did not have to file a proof of claim by the Bar Date, the Court does not reach the issue of whether Morgan's administrative expense should be disallowed or subordinated. This conclusion does not preclude the Comptroller from objecting to Morgan's administrative expense on other grounds. An order consistent with this Memorandum Opinion shall be entered.

ORDER

For the reasons given in the Court's Memorandum Opinion signed on March 7, 1996, it is therefore

ORDERED that the Motion for Authority to File Objection to Allowance of Chapter 11 Administrative Expense Claim of Morgan Guaranty Trust Company of New York filed by the Texas Comptroller of Public Accounts ("Comptroller") is **GRANTED;** and further

ORDERED that the Court shall additionally treat the Comptroller's Motion as the operative objection to claim pursuant to Federal Rule of Civil Procedure 8(f); and further

ORDERED that the Comptroller's objection to claim is **DENIED** without prejudice; and further

ORDERED that all other relief not expressly granted is **DENIED.**

In re AMBER'S STORES, INC., Debtor.

Bankruptcy No. 395-35650-HCA-11.

United States Bankruptcy Court,
N.D. Texas,
Dallas Division.

March 13, 1996.

Lessor of nonresidential real property moved to compel payment of postpetition lease obligations of Chapter 11 debtor. Debtor contended that no obligation existed, and if one did, claim had to be analyzed to determine amount actually and necessarily incurred in preserving estate. The Bankruptcy Court, Harold C. Abramson, J., held that: (1) a lessor has administrative expense claim for unpaid postpetition lease obligations that occur before lease is rejected, and need not establish its administrative status under statute governing administrative expense claims; (2) lessor's administrative expense claim for unpaid postpetition, prerejection lease obligations does not acquire superpriority status; (3) debtor's rejection of lease was effective as of date of petition, given order making approval of rejection retroactive due to equities of case; and (4) rejection of debtor's lease only occurs after approval by court.

Motion to compel payment of postpetition lease obligations denied.

1. Statutes ⇐188

When statute's language is plain, sole function of courts is to enforce it according to its terms.

2. Bankruptcy ⇐2876

Lessor of nonresidential real property has administrative expense claim for unpaid postpetition lease obligations that occur before lease is rejected, either by trustee or due to time limitations of statute providing for automatic rejection, and lessor need not establish its claim for administrative status under statute governing administrative expenses. Bankr.Code, 11 U.S.C.A. §§ 365(d)(3), 503(b)(1)(A).

Practice & Procedure Forms Schedules

Pre-conversion Administrative Expense Claims:

Is a Proof of Claim Required?

Contributing Editor:
Angela K. Layden
Dixon Dixon & Jessup Ltd. LLP

A chapter 11 debtor incurs various administrative expenses in the operation of its business. Before these creditors file a request for payment of their administrative claims in accordance with §503(a), the debtor converts its case to chapter 7. You represent one of the pre-conversion administrative creditors in the chapter 7. How do you protect your client's right to distributions?

Angela K. Layden

Courts differ as to the proper procedure for a pre-conversion administrative expense creditor to follow. Some courts hold that conversion from chapter 11 to chapter 7 changes the procedures for pre-conversion administrative claimants. Instead of simply filing a request for payment in accordance with §503(a), these courts require a chapter 11 administrative expense creditor to file a proof of claim in the chapter 7 case to preserve its right to distributions. *See, e.g., In re Transouth Truck Equip. Inc.*, 87 B.R. 937 (Bankr. E.D. Tenn. 1988). Other courts hold that these claimants need not file a proof of claim in the chapter 7 case. These courts conclude that pre-conversion administrative expense claimants may still file a "request for payment" under §503(a) in order to have their claims paid. *See In re Pro Set Inc.*, 193 B.R. 812 (Bankr. N.D. Texas 1996).

These divergent views result from differing interpretations of Fed. R. Bankr. P. 1019. Rule 1019(5)(A) requires the debtor-in-possession or trustee in the chapter 11 case to "file a schedule of unpaid debts incurred after commencement of the superseded case including the name and address of each creditor..." Rule 1019(6), titled Filing of Post-Petition Claims; Notice, states, "On the filing of the schedule of unpaid debts, the clerk...shall give notice to those entities...that their claims may be filed pursuant to Rules 3001 (a)-(d) and 3002."

In *In re Pro Set Inc.*, the bankruptcy court concluded that it was unnecessary for a chapter 11 administrative expense claimant to file a proof of claim in the converted case. The court noted that it is a fundamental rule of bankruptcy law that administrative expense claimants file requests for payment, not proofs of claim. In fact, the Official Proof of Claim form explicitly states that the form "should not be used to make a claim for an administrative expense arising after the commencement of the case. A 'request' for payment of an administrative expense may be filed pursuant to 11 U.S.C. §503." Because administrative expense creditors do not file proofs of claim, the court concluded that the bar dates for filing proofs of claim do not apply to these creditors.

Furthermore, the court noted that Rule 1019(6) does not unequivocally direct an administrative claimant to file a claim in the chapter 7 case. Because both unsecured creditors and administrative claimants are listed on the schedule required by Rule 1019(5), both would receive the notice required by Rule 1019(6). The *Pro Set* court stated that a literal reading of Rule 1019(6) does not require administrative claimants to file a proof of claim. Therefore, administrative claimants receiving the 1019(6) notice from the clerk may disregard the instructions regarding filing a proof of claim.

Although the *Pro Set* court concluded that filing a proof of claim was not required, the court recognized that a pre-conversion, administrative expense creditor must clearly file something, whether it be a request for payment or proof of claim, to notify the chapter 7 trustee of its claim and preserve its right to distributions.

In *In re Transouth Truck Equip. Inc.*, on the other hand, the court concluded that Rule 1019(6) mandates the filing of a proof of claim by a pre-conversion administrative expense claimant. As the court noted, Rule 1019(6) does not say that the clerk should notify creditors to file proofs of claim or requests for payment of administrative expenses. The rule says that creditors are to be directed to file proofs of claim.

The basis for the court's conclusion was the certainty it provided the chapter 7 trustee in the administration of the estate. "The drafters of Rule 1019 apparently concluded that it is easiest to require everyone with a claim that arose during a chapter 11 case...to file a proof of claim regardless of whether the claim might be an administrative expense."

Conclusion

Given the current disagreement among the courts, whether it is necessary to file a proof of claim for pre-conversion administrative claims depends upon the jurisdiction. However, as the *Pro Set* court acknowledges, "given the existing case law, the safer and better practice would be for pre-conversion administrative claimants to file a proof of claim by the chapter 7 bar date." *In re Pro Set*, 193 B.R. at 16 n. 10. ■

Agenda Item 8

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN N. RESNICK, REPORTER

RE: RULES 4004(a) AND 4007(c)

DATE: August 22, 1996

I recommend that the Advisory Committee consider the following amendments to Rules 4004(a) and 4007(c):

Rule 4004. Grant or Denial of Discharge

(a) TIME FOR FILING COMPLAINT OBJECTING TO DISCHARGE; NOTICE OF TIME FIXED. In a chapter 7 liquidation case a complaint objecting to the debtor's discharge under § 727(a) of the Code shall be filed not later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). In a chapter 11 reorganization case, such complaint shall be filed not later than the first date set for the hearing on confirmation. Not less than 25 days notice of the time so fixed shall be given to the United States trustee and all creditors as provided in Rule 2002(f) and (k) and to the trustee and the trustee's attorney.

****

COMMITTEE NOTE

Subdivision (a) is amended to clarify that, in a chapter 7 case, the deadline for filing a complaint objecting to discharge under § 727(a) is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint objecting to discharge in accordance with Rule 4004(b).

Rule 4007. Determination of Dischargeability of a Debt

****

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, AND CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days ~~following~~ after the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

****

COMMITTEE NOTE

Subdivision (c) is amended to clarify that the deadline for filing a complaint to determine the dischargeability of a debt pursuant to § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is held on that date. The time for filing the complaint is not affected by any delay in the commencement or conclusion of the meeting of creditors. This amendment does not affect the right of any party in interest to file a motion for an extension of time to file a complaint to determine the dischargeability of a debt in accordance with this rule.

The majority of courts that have applied the present Rules have held that the 60-day period for filing complaints runs from the first date set for the meeting of creditors, whether or not

the meeting is actually held on that date. See, e.g., In re Gordon, 988 F.2d 1000 (9th. Cir. 1993) (rejecting argument that 60-day period starts running from the date on which the meeting of creditors is actually held); In re Datson, 197 B.R. 1,3 (D. Me. 1996) ("Although the courts are not in complete agreement, the majority position is that the bar date remains the same even if the creditors' meeting is rescheduled.... [t]his court agrees with the majority rule...."); In re Schoofs, 115 B.R. 1,2 (Bankr.D.D.C. 1990) (60 days runs from first date set for the creditors' meeting "regardless of whether the meeting is actually held then or whether the debtor or his representative fails to appear."); In re Hill, 48 B.R. 323 (N.D. Ga. 1985); In re Depalma, 94 B.R. 546, 548 (Bankr. N.D. Ill. 1988) ("It is the first date set for the meeting that is determinative; whether or not the meeting is held or completed on that date is irrelevant.").

This majority view -- which in my opinion is correct -- is consistent with statements made by a leading commentator. "[Rule 4004] is also unambiguous in specifying that the sixty days are counted from the first date set for the meeting of creditors, regardless of whether the meeting is actually held on that date." Collier on Bankruptcy ¶ 4004.03 (15th ed.).

Unfortunately, several courts have disagreed with the majority view, finding that these rules are ambiguous and holding that the 60-day period does not begin to run until the meeting of creditors is actually held. See In re Little, 161 B.R. 164, 168

(Bankr. E.D. La. 1993) ("debtor must be present and subject to examination under oath, as required by Section 343, in order for the sixty day period to commence."); In re Keefe, 48 B.R. 717, 719 (Bankr. D.S.D. 1985); Allegheny Int'l. Credit Corp. v. Bowman, 60 B.R. 423, 425 (S.D. Tex. 1986).

One of the more recent decisions holding that the 60-day period does not begin to run until the creditor's meeting is actually held is In re Miller, 182 B.R. 507, 509-510 (Bankr. S.D. Ohio 1995), where the court wrote:

> "Here the rule under discussion [Rule 4007(c)] is inherently ambiguous. The rule provides that the complaint should be 'filed not later than 60 days following the first date *set* for the meeting of creditors *held* pursuant to § 341(a).' Should the reader of the rule focus on the word 'set' or the word 'held' in attempting to determine on which date begins the running of the 60-day period?... [T]he court holds that the 60-day period within which to file complaints under Rule 4007(c) begins to run on the date the § 341 meeting of creditors is actually 'held.'"

For the sake of clarity, and to avoid litigation and uncertainty regarding these deadlines, I suggest that the word "held" be deleted from these rules and that the committee note clarify the intent of the Committee. These proposed amendments are consistent with the majority view. The other changes to the rule are stylistic.

Agenda Item 9

Materials for Agenda Item 9 will

be distributed later.

Agenda Item 10

9/1/96 DRAFT

Rule 9013. Administrative Motions

(a) Administrative Motion. An administrative motion is a request for an order relating to any of the following matters:

(1) paying the filing fee in installments in accordance with Rule 1006(b);

(2) payment of income to the trustee pursuant to § 1225(c) or 1325(c);

(3) joint administration pursuant to Rule 1015;

(4) conversion of a case pursuant to § 706(a) or § 1112(a);

(5) dismissal of a case pursuant to § 1208(b) or § 1307(b);

(6) approval of the employment of a professional person in accordance with Rule 2014;

(7) service of process by first-class mail on an insured depository institution pursuant to Rule 7004(h)(2);

(8) approval of the appointment of an examiner or trustee in a chapter 11 case in accordance with Rule 2007.1;

(9) enlargement of time pursuant to Rule 9006(b) made before the expiration of the period originally prescribed or as extended by a previous order, other than enlargement of time for taking action under Rule 1017(e), 3015(a), 4003(b), 4004(a),

4007(c), 8002, or 9033;

(10) waiver of a fee under applicable law;

(11) form of, manner of sending, or publication of a notice;

(12) notice pursuant to Rule 9020(b); and

[(13) the examination of an entity pursuant to Rule 2004.]

(b) Filing and Contents of Motion. An administrative motion shall:

(1) be filed, unless made orally at a status conference pursuant to § 105(d), or at a hearing, at which all parties entitled to notice of the motion are present;

(2) state with particularity the relief or order sought and the grounds therefor; and

(3) if the motion is in writing, be accompanied by proof of compliance with subdivision (c) of this rule, and a proposed order for the relief requested.

(c) Notice. Not later than the time when the motion is filed, the movant shall serve copies of the motion, any paper filed with the motion, and the proposed order on the debtor, the attorney for the debtor, the trustee, and any committee elected under § 705 or appointed under § 1102, and any other entity required by federal law or these rules, and shall transmit copies thereof

to the United States trustee. Notice shall be served in the manner provided in Rule 7004 for service of a summons, except that the court by local rule may permit the notice to be served by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States.

(d) No Response; Relief Without a Hearing. No response to the motion is required, and relief may be granted without a hearing.

(e) Order. Rule 9022 applies to any order entered in connection with the motion. A copy of any order entered shall be served on the debtor, the movant, the trustee, any committee elected under § 705 or appointed under § 1102, any other entity as required by these rules or applicable law, or any other entity as the court directs.

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9013 is amended to govern a new category of motions, called "administrative motions." This category consists of enumerated types of motions that, in most instances, are nonsubstantive and noncontroversial. This rule, as amended, is designed to enable parties to obtain court orders relating to administrative matters in a relatively short period of time.

The term "application" -- which was often used in practice to mean an ex parte or expedited request for an order relating to administrative matters -- is

deleted from the Bankruptcy Rules.

The inclusion in subdivision (a) of a request for an order waiving a fee under applicable law is not intended to create or expand any right to waive fees.

The amendments provide more detail relating to motion practice. This change is intended to increase uniformity in motion practice among districts and to reduce the number of local rules governing motions.

Rule 9014. General Motions

(a) General Motion Practice. This rule governs any request for an order, other than a request for relief of the type described in Rule 7001 or 9013(a) or a motion made in an adversary proceeding.

(b) Motion Papers. Every motion shall:

(1) be filed, unless made orally at a status conference pursuant to § 105(d), or at a hearing, at which all parties entitled to notice of the motion are present;

(2) state with particularity the relief or order sought and the grounds therefor;

(3) be accompanied by proof of service, unless the motion is made orally;

(4) be accompanied by a proposed order for the relief requested;

(5) unless the movant is an individual debtor whose debts are primarily consumer debts, be accompanied by:

(A) one or more supporting affidavits;

(B) a memorandum of law;

(C) a statement of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the movant if there is a hearing on the

motion, and a summary of the testimony that the person is likely to give; and

(D) if the value of property is at issue and a valuation report has been prepared, a copy of the valuation report, and the name, address, and telephone number of the person who prepared the valuation report, unless the valuation report will not be introduced as evidence at any hearing on the motion.

(c) Service of the Motion and Notice of Hearing.

(1) Except as provided in subdivision (i)(1), not less than 25 days before the hearing date, the movant shall serve a copy of the motion, a copy of any paper filed with the motion, and notice of the hearing on any entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the attorney for the debtor, the trustee, and 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 pursuant to Rule 1007(d).

(2) Service shall be in accordance with Rule 7004, except that the court by local rule may permit

service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States. The notice of the hearing shall include:

(a) the date, time and place of the hearing;

(b) the time for filing a response; and

(c) a statement that, unless a response opposing the motion is timely filed, the court may grant the motion without a hearing.

(d) Responsive Papers.

(1) Any entity may file a response to the motion not later than 10 days before the hearing date.

(2) Not later than the time when a response is filed, the responding party shall serve a copy of the response on the movant, any other entity against whom relief is sought, any entity that has a lien or other interest in property that is the subject of the motion, the debtor, the trustee, and 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 pursuant to Rule 1007(d). Service of the response shall be in

accordance with Rule 7004, except that the court by local rule may permit service by electronic means, provided such means are consistent with technical standards, if any, established by the Judicial Conference of the United States.

(3) Every response shall be accompanied by proof of service and, unless the respondent is an individual debtor whose debts are primarily consumer debts, by:

(A) a proposed order for the relief requested;

(B) one or more supporting affidavits;

(C) a memorandum of law;

(D) a list of the name and, if known, the address and telephone number of any person who is likely to be called as a witness by the respondent if there is a hearing on the motion, and a summary of the testimony that the person is likely to give; and

(E) if the value of property is at issue, and a valuation report has been prepared and is likely to be introduced by the respondent at any hearing on the motion, a copy of the valuation report and the name, address, and telephone number of the appraiser or evaluator.

(e) Affidavits. Affidavits shall be made on personal

knowledge, set forth only facts that would be admissible in evidence, show affirmatively that the affiant is competent to testify to the matters stated, and be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746.

(f) Hearing. If no response is timely filed, the court shall determine the motion and order appropriate relief without a hearing, unless the court gives notice to the movant, and to any other entity as the court determines, that a hearing will be held. If a timely response is filed, the court may permit oral testimony at the hearing or may determine the motion based on affidavits without oral testimony. The court may determine any motion without a hearing to the extent provided in § 102(1) of the Code.

(g) Discovery.

(1) Unless the court otherwise directs, Rules 26 and 28-37 F.R.Civ.P. apply, except that:

(A) the parties shall not be required to make the disclosures mandated by Rule 26(a)(1)-(3), F.R.Civ.P., other than as provided in Rule 9014(b) and (d), but the information described in Rule 26(a)(1)-(3) F.R.Civ.P. may be obtained by methods of discovery prescribed by Rule 26(a)(5) F.R.Civ.P.;

(B) the parties are not required to meet in

accordance with Rule 26(f) F.R.Civ.P.;

(C) the 30-day time periods provided in Rules 30(e), 33(b)(3), 34(b), and 36(a), F.R.Civ.P. are reduced to ten days or as directed by the court in a pretrial order; and

(D) The movant may commence discovery only after a response is filed or after the respondent commences discovery. The respondent may commence discovery at any time.

(2) A motion relating to contested discovery may not be heard unless the entity requesting judicial resolution of the discovery dispute has attempted to confer with each party to the discovery dispute to resolve their differences, and has filed a statement setting forth the matters upon which they have been unable to agree.

[Note: The Subcommittee is considering requiring automatic disclosures of the type required under Civil Rule 26(a)(1)-(3) within a specified time period for certain time-sensitive motions in chapter 9 and chapter 11 cases. For example, the rule may provide that in certain specified motions, "the parties are required to make the disclosures mandated by Rule 26(a)(1)-(4), F.R.Civ.P., not later than ___ days after service of a response."]

(h) Status Conference.

(1) If a response is filed, the court shall hold a status conference, instead of a hearing, at the time originally set for the hearing, unless:

(A) the motion is for relief under § 362(d) or includes a request for a preliminary hearing as provided in Rule 4001(b)(2) or (c)(2);

(B) the movant or all respondents fail to appear at the time set for the hearing;

(C) the court determines that there are no genuine issues as to any material fact; or

(D) at the request of any party or on its own motion, the court, not less than 5 days before the time set for the hearing, gives the parties notice that a hearing, instead of a status conference, will be held at that time.

(2) The purpose of the status conference is to expedite the disposition of the motion. The court may enter a pretrial order requiring disclosure of information of the type described in Rule 26(a)(1)-(3) F.R.Civ.P, fixing a schedule for pretrial discovery, and including any other provisions as may facilitate the just, speedy, and inexpensive disposition of the motion.

(i) Expedited Relief.

(1) Reduced Notice. The court, for cause, may reduce any time period provided in subdivision (c)(1) and (d)(1). A motion to reduce the time period may not be heard unless the movant has attempted to confer with opposing parties to agree on the reduced time period. A motion to reduce the time period is governed by this rule, except that the movant shall serve and give notice of the motion in accordance with subdivision (c)(1) not less than 2 days before any hearing on the motion to reduce time, and a response may be filed at any time before any hearing on the motion to reduce time. The motion to reduce time shall be a separate motion, but shall be served together with a copy of the related motion for relief. The movant shall take all reasonable steps to provide all parties with the most expeditious service and notice as is feasible and shall file an affidavit specifying the efforts made. If a response is filed, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice as is feasible. The court may approve the reduction of time as reasonable under the circumstances or may issue any other appropriate order, with or without a hearing.

(2) Ex Parte Relief. Ex parte relief may be obtained only in accordance with Rule 4001(a)(2).

(j) Interim Relief. If a request for interim relief is included in the motion, the movant shall take reasonable steps to provide all parties with the most expeditious service and notice of the preliminary hearing as is feasible and shall file an affidavit specifying the efforts made. If a response is filed before the preliminary hearing, the respondent shall take reasonable steps to provide all parties with the most expeditious service and notice as is feasible before the preliminary hearing. At the preliminary hearing, the court shall determine the adequacy of the notice under the circumstances. Interim relief may be obtained in accordance with Rule 4001(b)(2) or Rule 4001(c)(2) only to the extent and under the conditions stated in those rules.

(k) [Service of] Order. [Rule 9022 applies to any order entered in connection with the motion.] A copy of any order entered shall be served on the debtor, the movant, the trustee, any committee elected under § 705 or appointed under § 1102, any other entity as required by these rules or applicable law, or any other entity as the court directs.

[(l) Transmission to United States Trustee. A copy of every paper filed and every order entered in connection with

the motion shall be transmitted to the United States trustee if required by Rule 9034.]

(m) Application of Part VII Rules. Unless the court otherwise directs, the following rules apply to requests for orders under this rule: Rules 7017, 7019-7021, 7025, 7041, 7042, 7052, 7054-7056, 7064, 7069, and 7071.

COMMITTEE NOTE

Rules 9013 and 9014 have been amended to substantially revise the rules governing motion practice in bankruptcy cases.

Rule 9014 has been limited to the category of disputes called "contested matters." Confusion as to whether a particular motion is a contested matter, rather than a different type of motion, has led to the amendment of this rule to include all motions that are not administrative motions governed by Rule 9013 and that are not made in an adversary proceeding governed by Part VII of these rules. An administrative motion is a request for an order on a matter that usually is nonsubstantive and noncontroversial.

The amendments provide more detail relating to motion practice. This change is intended to increase uniformity in motion practice among districts and to reduce the number of local rules governing motions.

The amendments also increase certain time periods relating to motion practice. For example, current Rule 9006(d) provides that the motion and notice of the hearing must be served at least 5 days before the scheduled hearing date, but the amended Rule 9014 provides for service at least 25 days before the date scheduled for the hearing. This time period may be enlarged in accordance with Rules 9006(b) and 9013, or reduced in accordance with Rule 9014(i). The three-day "mail rule" under Rule 9006(f) does not apply with respect to these time periods because the time for timely acting in accordance with this rule is not triggered by service of any notice or other paper.

Subdivision (h) requires the court to hold a status conference to facilitate settlement discussions, to set a discovery schedule, and to formulate any other pretrial order designed to expedite the motion. Subdivision (h) does not preclude the court from ordering a status conference pursuant to Rule 105(d).

The amendments also require automatic disclosures regarding valuation reports when the value of property is at issue. As used in this rule, the term "valuation report" includes a formal appraisal of the property, as well as any less formal written report on the value of the property.

Agenda Item 11

REPORT OF SUBCOMMITTEE ON RULE 7062

PRELIMINARY DRAFT OF PROPOSED AMENDMENTS RELATING TO RULE 7062 AND THE AUTOMATIC STAY OF THE IMPLEMENTATION OF CERTAIN ORDERS ENTERED IN CONTESTED MATTERS

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court otherwise directs. See also the amendments to Rules [1017, 3015, 3020, 3021, 4001, 6004, and 6006] that delay the implementation of certain types of orders for a period of ten days unless the court otherwise directs.

Rule 9014. Contested Matters

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. 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, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062~~, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. 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. To the extent that an order

entered in a contested matter requires a party other than the trustee or debtor in possession to pay money, the enforcement of the order shall be stayed until the expiration of 10 days after entry of the order, unless the court otherwise directs.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter, and Rule 8005 gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. In addition, the amendment to Rule 9014 stays the enforcement of an order entered in a contested matter to the extent that it requires a party other than the trustee or debtor in possession to pay money, unless the court otherwise directs.

Rule 1017. Dismissal or Conversion of Case; Suspension

****

(f) STAY OF ORDER. If the court enters an order converting a case under § 1112(b) or dismissing a case, the case shall not be converted or dismissed until the expiration of 10 days after entry of the order, unless the court otherwise directs.

COMMITTEE NOTE

Subdivision (f) is added to provide sufficient time for a party to request a stay pending appeal of an order granting a motion to convert a case to chapter 7 under § 1112(b) of the Code, or to dismiss a case, before the actual conversion or dismissal. This stay does not affect the time for filing a notice of appeal in accordance with Rule 8002 or the time for taking certain actions after entry of a conversion order in accordance with Rule 1019.

While the dismissal of a case is stayed under subdivision (f), the automatic stay continues to protect the debtor. While the conversion of a case is stayed under subdivision (f), a trustee may not be appointed in the chapter 7 case, the debtor is not required to turn over property of the estate until the stay terminates, and the clerk should not give notice of the conversion order and meeting of creditors under § 341.

The court may, in its discretion, order that subdivision (f) is not applicable, or that the stay under subdivision (f) is for a fixed period that is less than 10 days.

Rule 4001. Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements

(a) RELIEF FROM STAY; PROHIBITING OR CONDITIONING THE USE, SALE, OR LEASE OF PROPERTY

****

(3) STAY OF ORDER. If the court enters an order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1), enforcement or implementation of the order shall be stayed until the expiration of 10 days after entry of the order, unless the court otherwise directs.

COMMITTEE NOTE

Paragraph (a)(3) is added to provide sufficient time for a party to request a stay pending appeal of an order granting relief from an automatic stay before the order is enforced or implemented. The stay under paragraph (a)(3) is not applicable to orders granted ex parte in accordance with Rule 4001(a)(2).

The stay of enforcement and implementation of the order does not affect the time for filing a notice of appeal in accordance with Rule 8002. While the enforcement and implementation of an order granting relief from the automatic stay is temporarily stayed under paragraph (a)(3), the automatic stay continues to protect the debtor and the moving party may not foreclose on collateral or take any other steps that would violate the automatic stay as if the motion has not been granted.

The court may, in its discretion, order that Rule 4001(a)(3) is not applicable so that the prevailing party may immediately enforce and implement the order granting relief from the automatic stay.

Alternatively, the court may order that the stay under Rule 4001(a)(3) is for a fixed period that is less than 10 days.

Rule 6004. Use, Sale, or Lease of Property

****

(g) STAY OF ORDER AUTHORIZING USE, SALE OR LEASE OF PROPERTY. Unless the court otherwise directs, if the court enters an order authorizing the use, sale, or lease of property, other than cash collateral, in accordance with § 363 of the Code, the trustee shall not use, sell, or lease the property as authorized by the court until the expiration of 10 days after entry of the order.

COMMITTEE NOTE

Subdivision (g) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the use, sale, or lease of property under § 363 of the Code before the order is enforced or implemented. The stay does not apply to orders regarding the use of cash collateral. The stay of enforcement and implementation of the order under subdivision (g) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6004(g) is not applicable so that the property may be used, sold, or leased immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6004(g) is for a fixed period that is less than 10 days.

Rule 6006. Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases

****

(d) STAY OF ORDER AUTHORIZING ASSIGNMENT. Unless the court otherwise directs, if the court enters an order authorizing the assignment of an executory contract or unexpired lease under § 365(f), the trustee shall not assign the executory contract or unexpired lease as authorized by the court until the expiration of 10 days after entry of the order.

COMMITTEE NOTE

Subdivision (d) is added to provide sufficient time for a party to request a stay pending appeal of an order authorizing the assignment of an executory contract or unexpired lease under § 365(f) of the Code before the assignment is consummated. The stay under subdivision (d) does not affect the time for filing a notice of appeal in accordance with Rule 8002.

The court may, in its discretion, order that Rule 6006(d) is not applicable so that the executory contract or unexpired lease may be assigned immediately in accordance with the order entered by the court. Alternatively, the court may order that the stay under Rule 6006(d) is for a fixed period that is less than 10 days.

Rule 3020. Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case

****

(e) STAY OF CONSUMMATION OF PLAN. Unless the court otherwise directs, if the court enters an order of confirmation, the plan shall not be implemented until the expiration of 10 days after entry of the order.

COMMITTEE NOTE

Subdivision (e) is added to provide sufficient time for a party to request a stay pending appeal of an order confirming a plan under chapter 9 or chapter 11 of the Code before the plan is implemented and an appeal becomes moot. By staying implementation of the plan, any transfer of assets, issuance of securities, and cash distributions provided for in the plan may not be made before the expiration of the 10-day period. The stay of implementation of the plan under subdivision (e) does not affect the time for filing a notice of appeal from the confirmation order in accordance with Rule 8002.

The court may, in its discretion, order that Rule 3020(e) is not applicable so that the plan may be implemented and distributions may be made immediately. Alternatively, the court may order that the stay under Rule 3020(e) is for a fixed period that is less than 10 days.

Rule 3021. Distribution Under Plan

Except as provided in Rule 3020(e), after ~~After~~ confirmation of a plan, distribution shall be made to creditors whose claims have been allowed, to interest holders of record at the time of commencement of distribution whose claims or equity security interests have not been disallowed, and to indenture trustees who have filed claims pursuant to Rule 3003(c)(5) that have been allowed. For the purpose of this rule, creditors include holders of bonds, debentures, notes, and other debt securities, and interest holders include the holders of stock and other equity securities, of record at the time of commencement of distribution unless a different time is fixed by the plan or the order confirming the plan.

COMMITTEE NOTE

This amendment is to conform to the amendments to Rule 3015 and 3020 regarding the ten-day stay of consummation of a plan under chapter 9, chapter 11, chapter 12, or chapter 13.

Alternative Amendments to the above amendments to Rules 7062, 9014, 1017, 4001, 6004, 6006, 3020, and 3021 (if all provisions delaying enforcement are placed in one rule):

Rule 7062. Stay of Proceedings to Enforce a Judgment

Rule 62 F.R.Civ.P. applies in adversary proceedings. ~~An order granting relief from an automatic stay provided by § 362, § 922, § 1201, or § 1301 of the Code, an order authorizing or prohibiting the use of cash collateral or the use, sale or lease of property of the estate under § 363, an order authorizing the trustee to obtain credit pursuant to § 364, and an order authorizing the assumption or assignment of an executory contract or unexpired lease pursuant to § 365 shall be additional exceptions to Rule 62(a).~~

COMMITTEE NOTE

The additional exceptions to Rule 62(a) consist of orders that are issued in contested matters. These exceptions are deleted from this rule because of the amendment to Rule 9014 that renders this rule inapplicable in contested matters unless the court otherwise directs. See also the amendments to Rule 9014 that delay the implementation of certain types of orders entered in contested matters for a period of ten days, unless the court otherwise directs.

Rule 9014. Contested Matters

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. 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, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, ~~7062~~, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. 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. Unless the court otherwise directs:

(a) To the extent that an order entered in a contested matter requires a party other than the trustee or debtor in possession to pay money, the enforcement of the order shall be stayed until the expiration of 10 days after the entry of the order;

(b) If the court enters an order converting a case under § 1112(b) or dismissing a case, the case shall not be converted or dismissed until the expiration of 10 days after entry of the order;

(c) If the court enters an order granting a motion for relief from an automatic stay made in accordance with Rule 4001(a)(1), enforcement or implementation of the order shall be stayed until the expiration of 10 days after entry of the order;

(d) If the court enters an order authorizing the use, sale, or lease of property, other than cash collateral, in accordance with § 363 of the Code, the trustee shall not use, sell, or lease the property as authorized by the court until the expiration of 10 days after entry of the order;

(e) If the court enters an order authorizing the assignment of an executory contract or unexpired

lease under § 365(f), the trustee shall not assign the executory contract or unexpired lease as authorized by the court until the expiration of 10 days after entry of the order;

(f) If the court enters an order of confirmation in a case under chapter 9 or chapter 11, the plan shall not be implemented until the expiration of 10 days after entry of the order.

COMMITTEE NOTE

This rule is amended to delete Rule 7062 from the list of Part VII rules that automatically apply in a contested matter, and to provide for a temporary stay of the implementation of specified orders to give parties sufficient time to obtain a stay pending appeal before an appeal becomes moot. For example, during the 10-day stay of an order confirming a chapter 11 plan, any transfer or assets, issuance of securities, and distribution of cash shall not be made.

Rule 7062 provides that Rule 62 F.R.Civ.P., which governs stays of proceedings to enforce a judgment, is applicable in adversary proceedings. The provisions of Rule 62, including the ten-day automatic stay of the enforcement of a judgment provided by Rule 62(a) and the stay as a matter of right by posting a supersedeas bond provided in Rule 62(d), are not appropriate for most orders granting or denying motions governed by Rule 9014.

Although Rule 7062 will not apply automatically in contested matters, the amended rule permits the court, in its discretion, to order that Rule 7062 apply in a particular matter. Rule 8005 also gives the court discretion to issue a stay or any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

The addition of subdivisions (a) through (f) are designed to give parties sufficient time to obtain a stay pending appeal from certain types of orders before

an appeal becomes moot by implementation of the order. The new ten-day stay under this rule does not affect the time for filing a notice of appeal from the order in accordance with Rule 8002. An order converting a case to a case under chapter 7 does not affect the time for taking certain action in accordance with Rule 1019.

Agenda Item 12

LEWIS AND ROCA LLP LAWYERS

Memorandum August 27, 1996

To	From	Phoenix
Advisory Committee on Bankruptcy Rules	Gerald K. Smith	

Re: Rules 2014 and 2002

Dear Ladies and Gentlemen:

I have drafted an amendment to Rule 2014 and an amendment to Rule 2002. The amendments are based on the majority vote of the Subcommittee. However, I do not concur. The primary concerns I have with the draft are as follows:

(1) The draft gives no guidance to practitioners and requires reference to the Bankruptcy Code;

(2) The draft provides no mechanism for parties in interest to be heard on employment issues;

(3) The draft preserves the present *ex parte* practice and the difficulty inherent in a court having approved employment in advance of a dispute; and

(4) The rule fails to give those employed a modicum of protection which would be possible if there were notice and hearing before employment. If the Rules Committee concurs with the Subcommittee's approach, I believe serious consideration should be given to leaving Rule 2014 alone.

Gerald K. Smith

GKS:pg

AFF10DD6

DRAFT

RULE 2014 - EMPLOYMENT OF PERSONS PURSUANT TO § 327, § 1103, OR § 1104

(a) Motion for an Order Authorizing Employment. A request for an order authorizing employment pursuant to § 327, § 1103, or § 1114 of the Code shall be made on motion of the trustee, debtor in possession or committee. The motion shall be filed and copies transmitted to the United States trustee, unless the case is a Chapter 9 municipality case, and served on the creditors included on any list required to be filed pursuant to Rule 1007(d), any committee elected pursuant to § 705 or appointed pursuant to § 1102 or § 1114 of the Code or its authorized agent, the trustee or debtor in possession, and on such other entities as the court may direct. The motion 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 movant's knowledge that the person to be employed is eligible for such employment under the Bankruptcy Code and does not hold any interest or have any duty to another client, former client, or other person that might materially and adversely affect the person's representation. The court may authorize employment based on the motion without a hearing or commence a hearing on the motion no earlier than 10 days after service of the motion. Notice of a hearing on a motion to employ shall be given to those persons required to be served with a copy of the motion.

(b) Verified Statement of Professional. A motion for authorization to employ shall be accompanied by a verified statement of the person to be employed (1) stating that the person to be employed is eligible for employment for the purposes set forth in the motion; (2) providing information as to any relationship which might result in a

reasonable person concluding that there is a substantial likelihood that the person's representation will be materially and adversely affected by the person's own interests or duties to another client, former client or third party; (3) setting forth any direct or indirect relationship to, connection with, or interest in, any party in interest and the United States trustee or any person employed in the Office of the United States Trustee; and (4) whether the person has shared or agreed to share any compensation with any other person and, if so, the particulars of any such sharing or agreement to share other than the details of any agreement for the sharing of the compensation with a partner, employee or regular associate of the partnership, corporation or person.

(c) Supplemental Verified Statement. The person employed shall file a supplemental verified statement and transmit copies to the United States trustee, unless the case is a Chapter 9 municipality case, and served on the creditors on any list required to be filed pursuant to Rule 1007(d), any committee elected pursuant to § 705 or appointed pursuant to § 1102 or § 1114 of the Code or its authorized agent, the trustee or debtor in possession, and on such other entities as the court may direct, within 15 days after the person employed learns of or discovers any matter that is required to be disclosed under this rule, which has not been disclosed previously in the initial or any supplemental verified statement.

(d) Services Rendered by Member or Associate of Firm of Employed Professional. If the court authorizes the employment of a partnership, corporation or named person, any partner, member, regular associate or employee may act as the person so employed without further order of the court. If a partnership is employed, no further order of employment is necessary solely because the partnership or corporation has dissolved due to the addition or withdrawal of a partner or member.

DRAFT

RULE 2002

NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, UNITED STATES, AND UNITED STATES TRUSTEE

(a) **Twenty-Day Notices to Parties in Interest.** Except as provided in subdivisions (h), (i) and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (9) names and addresses of persons employed pursuant to § 327, § 1103, or § 1114 of the Code; and (10) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan.

Agenda Items 13 - 15

Agenda Items 13 through 15 will be oral reports.

Agenda Item 16

United States Bankruptcy Court

EASTERN DISTRICT OF CALIFORNIA
OFFICE OF THE CLERK

RICHARD G. HELTZEL
CLERK

April 19, 1996

REPLY TO

☑ 8308 U S. COURTHOUSE
650 CAPITOL MALL
SACRAMENTO, CA 95814
(916) 498-5525

☐ 1130 12TH STREET
SUITE C
MODESTO, CA 95354
(209) 521-5160

☐ 2656 U S COURTHOUSE
1130 O STREET
FRESNO, CA 93721
(209) 498-7217

The Honorable Paul Mannes
Chief Judge, U.S. Bankruptcy Court
451 Hungerford Drive
Rockville, MD 20850

Dear Judge Mannes:

* * * * *

In what I see as a directly related matter, you also sent me a copy of an article from the Federal Judicial Observer (FYI: I'm a recipient of this publication), highlighting various projects involving electronic filing and records retention in state and federal courts. An example cited was the "JusticeLink" project in your neighboring Maryland Circuit Court. It is these advanced technology projects which eventually will raise issues for the Rules Committee to deal with. We set the stage with the changes proposed to FRBP 5005 to permit electronic filing, and in doing so, laid the ground work for a technology revolution in the courts.

As implementation of FRBP 5005 occurs, I foresee several issues which the Committee may eventually have to deal with, including electronic "signatures" (we sort of finessed this for time being by remaining silent in the rule on the technical aspects of what constitutes an electronic signature and including the reference to Judicial Conference guidelines) and public access (something which was already raised as an issue during the debate on 5005).

Frankly, I think the question of public access may prove to be the thorniest of the issues presented by the technology revolution, because that's where the money is. For example, as I understand "JusticeLink", the private firm behind it (a major consulting firm) envisions acting as the data conduit between parties and the court. At no cost to the court, they will provide the equipment necessary to file and store documents electronically (once a court's records are stored electronically, and accessible from any computer anywhere in the world, well, that, as they say, changes everything). "JusticeLink" will also provide the "information superhighway" necessary to transmit all of the data between parties and the courts (we're talking billions and billions of bytes of data). Very nice, but the catch is they'll own that "information superhighway". And it won't be a freeway, either. It will be an electronic

"toll road", with a fee being collected for every piece of data which travels to and from parties and the court. To paraphrase the MasterCharge slogan, imagine the possibilities: every time someone wants to transmit or access information stored in the court's records, a private, for-profit enterprise collects a toll. Wow. I'd like to have a piece of that. I can almost smell the sweet fragrance of M-O-N-E-Y.

As Judge Stotler has already observed, it will become increasingly important that the Rules Committee work closely with the other committees which have a role in implementing or responding to technology. For the time being, I don't think there is anything specific the Rules Committee needs to do, other than stay in touch with the other committees and watch what is happening in the technology arena. I do think we'll be busy in a couple of years, however.

Sincerely,

Richard

Richard G. Heltzel
Clerk, U.S. Bankruptcy Court

cc: Peter McCabe
Pat Channon

Special Technology Issue

State–Federal Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO THE STATE AND FEDERAL JUDICIARY

A publication of the Federal Judicial Center to further state–federal judicial relations • Number 12 • March 199(

Electronic Filing Comes to State and Federal Courts

by James G. Apple

The era of the "paperless" courthouse arrived in both state and federal courts in January 1996.

In the first pilot program of its kind in the federal courts, a complaint in a maritime asbestos case was filed electronically on January 3, 1996, in the U.S. District Court for the Northern District of Ohio in Cleveland. The complaint was filed by a mass tort law firm from Detroit.

On January 17, 1996, in the first pilot program of its kind in a state court, a complaint in a "motor torts" case was electronically filed in the circuit court of Prince George's County, Md. The complaint was filed by a local firm in Upper Marlboro, Md.

Past experiments in electronic filing have been conducted in selected large and complex cases in Delaware state courts, in the U.S. District Court for the Southern District of New York, and elsewhere using the complex litigation automated docket (CLAD) system, developed by LEXIS/NEXIS.

A limited electronic filing system has been in use in the Orange County, Cal., Superior Court since May 1995. The system currently operating there is restricted to filings in paternity cases from the family division of the local district attorney's office. It is not yet open to other lawyers or types of cases. The office of the clerk of the Orange County Superior Court estimates that electronic filing will be open to all attorneys in family law cases in that court within 6 to 12 months.

In Prince George's County, the pilot project is largely the result of efforts of a Maryland circuit court judge, Judge Arthur M. Monty Ahalt. Judge Ahalt is chair of the court technology committee for the courts of that county.

The pilot project in Maryland is a local, public–private partnership in which the county has linked up with a private consulting firm.

The consulting firm, working with Judge Ahalt's committee, developed and implemented a system called JusticeLink and signed up 33 local lawyers for the pilot program. Three judges also participate. The consulting firm provided hardware and software, and trained key personnel in the clerk's office for the first phase of the pilot program, in which electronic filing is limited to two classes of cases: foreclosure suits and motor torts.

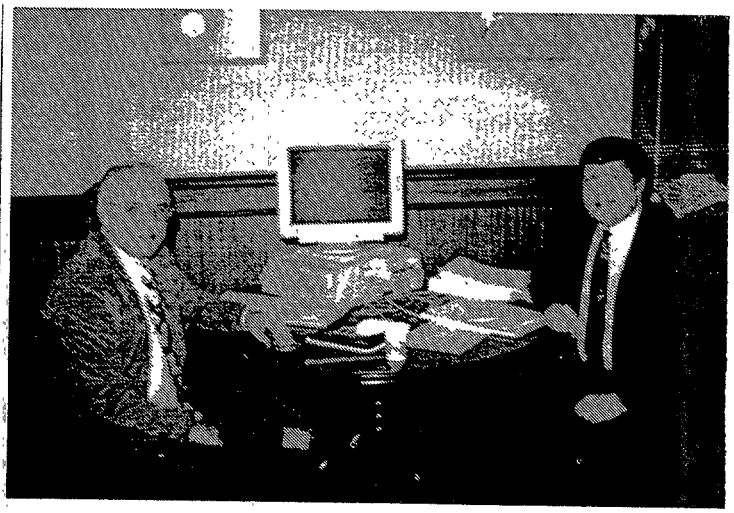
The electronic filing system was installed in a 300,000 square foot, $80 million courthouse addition that was opened in Upper Marlboro, the county seat, in 1992.

The force driving Judge Ahalt and his committee was an excess of paper. The problems in the courts were generated by "the fact that a judge needs paper to decide," Judge Ahalt said. And court files generate a lot of paper.

Studies of the work of the local clerk's office and judges in handling the paper necessary to process the 42,000 cases filed each year through the courts revealed that a case file is moved at least five times from the time of its creation to the time the case becomes final. In one year, court personnel would be actively involved in 210,000 movements of files.

Judge Ahalt cites other statistics to justify the move to electronic filing: The Prince George's County courthouse has 20 circuit judges; the average file contains 40 pages; and in one year court personnel move 1.7 million documents to those judges. Those moves cost an estimated $880,000 yearly in personnel expenditures.

Court estimates suggest that by 2000 the annual number of cases at the courthouse will have grown to 65,000, meaning 325,000 file movements, and the number of pages to be transferred to the 20 judges would increase to 2.6 million. The personnel costs of those movements would escalate to over $1 million.



Maryland Circuit Court Judge Arthur M. Monty Ahalt sits in his chambers in Upper Marlboro, Ma with David R. Perkins, consultant. Judge Ahalt uses his computer for JusticeLink, the ne electronic filing system that started in Prince George's County, Md., in January. The system is th result of Judge Ahalt's leadership in forming a public–private partnership between the courts i his county and a private consulting firm.

JusticeLink changes all of that. Files are contained in computers, and a particular file can be called up by a judge on his or her computer screen at the press of a button. It takes the clerk's office 15 days or more to file and docket a pleading manually. Electronic filing reduces the process to a few minutes, with the computer doing the work

In a typical foreclosure case in the Maryland court, a circuit court clerk analysis revealed 122 steps required from docketing the initial pleading to final judgment. Electronic filing reduced that number to 97, a 20% reduction. Some estimate that reductions in excess of 50% can be achieved on the full implementation of electronic filing

See FILING, page 4

JEDDI Corporation Electronic Filing Workshop and Annual Meeting, March 29–30, 1996

The JEDDI Corporation, a recently formed nonprofit corporation, will host a workshop on electronic filing, as well as its annual meeting, at the end of this month.

11:30	Digital signature update. (Mr. Michael Baum, Mr. Alan Asay)
Noon	Lunch.
1:15 p.m.	Summary of various approaches and

Benefits of Electronic Filing Will Push Courts to Invest in New Technologies

by Rich Goldschmidt & Gary Bockweg
Technology Enhancement Office
Administrative Office of the U.S. Courts

Electronic filing is likely to be an important area of investment for both state and federal courts over the next five years.

The most important potential benefits to the courts that will arise from using electronic case files will be the following:

• space savings:

based on a specification published by private software company. PDF preserves the page layout and formatting of documents from different computers and software. This allows a document to retain its original appearance when printed in a law office or a judge's chambers, regardless of the word-processing or graphics software used by the office.

It is extremely simple to create PDF files using Windows or Macintosh software. PDF

the technology for electronic filing. Perhaps the longest-running experiment is the LEXIS-inspired complex litigation auto-

ministrators, and vendors, now incorporated under the name JEDDI, is providing a forum and vehicle for this effort, which

investments in product development and support.

The guidelines must be sufficiently well defined that vendors can produce products that have the desired attributes with a minimum of further customization for specific courts. If the guidelines are vague or weak they will not support implementable product specifications. If the product cannot be specified until information specific to a particular court is known, there will be no common market.

Suitable guidelines will have to meet the

FILING, from page 1

Prince George's County is also experimenting with a system called CivicLink, which uses electronic means to provide information to lawyers and members of the public about civil case information (parties, attorneys, judgments, appeals); criminal case information (case name, details of case, motions, and other events); attorney and case assignments; and property tax information (tax records, property descriptions, and tax valuations).

With both systems in Prince George's County, there are fees involved. For JusticeLink, a subscribing lawyer must pay an initial fee of $175. Other fees are $15 for filing each document and $.50 per minute for computer time on the system.

After a $100 deposit is made for a user account, CivicLink costs $5 or less per transaction.

The electronic filing system installed in the U.S. District Court in Cleveland is part of a pilot project inaugurated by the Administrative Office of the U.S. Courts. That district court was selected because of the large number of maritime asbestos cases that have been filed there in recent years.

Chris Malumphi, deputy clerk in the Ohio court, said that last year there were over 5,000 maritime asbestos cases filed in his court, or over 400 cases each month, adding to the 18,000 similar cases that had been filed in earlier years. These asbestos cases generate yearly over 500,000 pleadings, or approximately 10,000 pleadings a week.

The manual docketing system created a 13-month backlog in docketing entries.

The electronic filing system for new cases will result in almost instantaneous docketing of each pleading as it arrives at the court clerk's computer terminal.

All of the filings in the Ohio court to date have been maritime asbestos cases, about 500 complaints, and answers from some of the defendants. Each case has approximately 100 defendants, represented by over 400 different law firms. Ninety percent of the law firms representing the primary defendants in the various cases have signed up to participate in the pilot project.

In the federal court in Cleveland, there are no fees levied against the lawyers for the pilot program, although the Administrative Office of the U.S. Courts predicts that some kind of user fees will be installed when electronic filing becomes more universal. Also, there is no private consulting firm involved. The software has been developed by the Administrative Office and adapted from commercially available products.

JusticeLink in Upper Marlboro, Md., has advantages for lawyers, judges, and court clerks. Preliminary studies show that a lawyer can reduce costs through electronic filing by 10–15%. In addition, JusticeLink is available for use 24 hours a day, 7 days a week. Lawyers can file documents, obtain court information, access court legal records, conduct research, communicate with the court and clerk's office, and communicate electronically with other subscribers at any time.

The change to electronic filing in Prince George's County required a change in the Maryland Rules of Civil Procedure. Civil Rule 1217A allows electronic filing pilot projects in Maryland circuit courts when they are approved by the Maryland state court administrator.

For the federal courts, in September 1995 the Judicial Conference of the United States approved amendments to the Federal Rules of Civil Procedure that allow federal district courts to accept electronic filings if they are consistent with technical standards approved by the conference. Similar rules were approved for appellate and bankruptcy courts. The amendments, now pending before the U.S. Supreme Court, are scheduled to become effective on December 1, 1996.

Judge Ahalt said that the first phase of the Maryland pilot project is a "definite success," and the court is ready to proceed to the second phase, which involves enrolling more lawyers and expanding the information in the court files available electronically to the three participating judges.

But he is also looking beyond his own courthouse. "This venture [in Prince George's County] will be an absolutely useless exercise," he said, "if we don't start addressing the interstate problems, the interjurisdictional problems, the regional problems, the inability of our counties in one state to communicate with each other about their legal business."

Further information about the pilot program in Prince George's County can be obtained from Judge Arthur M. Monty Ahalt, Seventh Judicial Circuit of Maryland, P.O. Box 609, Upper Marlboro, MD 20773, phone (301) 952-4520.

Further information about the pilot program in the federal court in Ohio can be obtained from Gary Bockweg, Office of Technology Enhancement, Administrative Office of the U.S. Courts, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002, phone (202) 273-2736. ❑

State–Federal Judicial Observer (#12)
a publication of the Federal Judicial Center

Interjudicial Affairs Office
Federal Judicial Center
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20002-8003

Agenda Item 17-20

Agenda Items 17 through 20 will be oral reports.

Agenda Item 21 will be a demonstration.

Agenda Item 22

AMENDMENTS APPROVED AT THE SEPTEMBER 1995 AND MARCH 1996 MEETINGS OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Rule 1017. Dismissal or Conversion of Case; Suspension

(a) VOLUNTARY DISMISSAL; DISMISSAL FOR WANT OF PROSECUTION OR OTHER CAUSE. Except as provided in §§ 707(a)(3), 707(b), 1208(b), and 1307(b) of the Code, and in Rule 1017(b), (c), and (e), a case shall not be dismissed on motion of the petitioner or for want of prosecution or other cause, or by consent of the parties, prior to a hearing on notice as provided in Rule 2002. For such notice the debtor shall file a list of all creditors with their addresses within the time fixed by the court unless the list was previously filed. If the debtor fails to file the list, the court may order the preparing and filing by the debtor or other entity.

(b) DISMISSAL FOR FAILURE TO PAY FILING FEE.

(1) ~~For failure to pay any installment of the filing fee, the~~ The court may, after a hearing on notice to the debtor and the trustee, dismiss the case pursuant to § 707(a)(2) or § 1307(c)(2) for failure to pay any installment of the the filing fee.

(2) If the case is dismissed or the case closed without full payment of the filing fee, the installments collected shall be distributed in the same manner and proportions as if the filing fee had been paid in full.

~~(3) Notice of dismissal for failure to pay the filing fee shall be given within 30 days after the dismissal to creditors appearing on the list of creditors and to those who have filed claims, in the manner provided in Rule 2002.~~

(c) DISMISSAL OF VOLUNTARY CHAPTER 7 OR CHAPTER 13 CASE FOR FAILURE TO TIMELY FILE LIST OF CREDITORS, SCHEDULES, AND STATEMENT OF FINANCIAL AFFAIRS. The court may, after a hearing on notice served by the United States trustee on the debtor, the trustee, and any other entities as the court directs, dismiss a voluntary case under chapter 7 or chapter 13 pursuant to § 707(a)(3) or § 1307(c)(9).

~~(c)~~ (d) SUSPENSION. A case shall not be dismissed or proceedings suspended pursuant to § 305 of the Code prior to a hearing on notice as provided in Rule 2002(a).

~~(d) PROCEDURE FOR DISMISSAL OR CONVERSION. A proceeding to dismiss a case or convert a case to another chapter, except pursuant to §§706(a), 707(b), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014. Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013. A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of~~

~~applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.~~

(e) DISMISSAL OF INDIVIDUAL DEBTOR'S CHAPTER 7 CASE FOR SUBSTANTIAL ABUSE. An individual debtor's case may be dismissed for substantial abuse pursuant to § 707(b) only on motion by the United States trustee or on the court's own motion and after a hearing on notice to the debtor, the trustee, the United States trustee, and ~~such~~ any other ~~parties in interest~~ entities as the court directs.

(1) A motion by the United States trustee shall be filed not later than 60 days following the first date set for the meeting of creditors held pursuant to § 341(a), unless, before such time has expired, the court for cause extends the time for filing the motion. The motion shall advise the debtor of all matters to be submitted to the court for its consideration at the hearing.

(2) If the hearing is on the court's own motion, notice thereof shall be served on the debtor not later than 60 days following the first date set for the meeting of creditors pursuant to § 341(a). The notice shall advise the debtor of all matters to be considered by the court at the hearing.

(f) PROCEDURE FOR DISMISSAL, CONVERSION, OR SUSPENSION.

(1) A proceeding to dismiss a case, suspend a

case, or convert a case to another chapter, except pursuant to §§706(a), 1112(a), 1208(a) or (b), or 1307(a) or (b) of the Code, is governed by Rule 9014.

(2) Conversion or dismissal pursuant to §§706(a), 1112(a), 1208(b), or 1307(b) shall be on motion filed and served as required by Rule 9013.

(3) A chapter 12 or chapter 13 case shall be converted without court order on the filing by the debtor of a notice of conversion pursuant to §§1208(a) or 1307(a), and the filing date of the notice shall be deemed the date of the conversion order for the purposes of applying §348(c) of the Code and Rule 1019. The clerk shall forthwith transmit to the United States trustee a copy of the notice.

COMMITTEE NOTE

Subdivision (b)(3), which provides that notice of dismissal for failure to pay the filing fee shall be sent to all creditors within 30 days after the dismissal, is deleted as unnecessary. Rule 2002(f) provides for notice to creditors of the dismissal of a case.

Rule 2002(a) and this rule currently requires notice to all creditors of a motion to dismiss a voluntary chapter 7 case or a chapter 13 case for the debtor's failure to file a list of creditors, schedules, and statement of financial affairs within the time provided in § 707(a)(3) or § 1307(c)(9) of the Code. A new subdivision (c) is added to provide that the United States trustee, who is the only entity with standing to file a motion to dismiss under § 707(a)(3) or § 1307(c)(9), is required to serve the motion on only the debtor, the trustee, and any other entities as the court directs. This amendment is for the purpose of avoiding the expense of sending notices of the motion

to all creditors.

New subdivision (f) is the same as current subdivision (d), except that it provides that a motion to suspend all proceedings in a case or to dismiss a case for substantial abuse of chapter 7 pursuant to § 707(b) is a contested matter governed by Rule 9014.

Other amendments to this rule are stylistic or for clarification.

Rule 1019. Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case

When a chapter 11, chapter 12, or chapter 13 case has been converted or reconverted to a chapter 7 case:

(1) *Filing of Lists, Inventories, Schedules, Statements.*

* * * * *

(B) The statement of intention, if required, shall be filed within 30 days following entry of the order of conversion or before the first date set for the meeting of creditors, whichever is earlier. An extension of time may be granted for cause only on written motion filed, or oral request made during a hearing, ~~motion made~~ before the time has expired. Notice of an extension shall be given to the United States trustee and to any committee, trustee, or other party as the court may direct.

* * * * *

COMMITTEE NOTE

Subdivision (1)(B) is amended to clarify that a motion for an extension of time to file a statement of intention must be made by written motion filed before the time expires, or by oral request made at a hearing before the time expires.

Rule 2002. Notices to Creditors, Equity Security Holders, United States, and United States Trustee

(a) TWENTY-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), and (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 20 days' notice by mail of (1) the meeting of creditors under § 341 or § 1104(b) of the Code;

* * * * *

(4) in a chapter 7 liquidation, a chapter 11 reorganization case, and a chapter 12 family farmer debt adjustment case, the hearing on the dismissal of the case or the conversion of the case to another chapter, unless the hearing is pursuant to § 707(a)(3), ~~or~~ § 707(b), or § 1307(c)(9) of the Code or is on dismissal of the case for failure to pay the filing fee~~, or the conversion of the case to another chapter~~

****

(f) OTHER NOTICES. Except as provided in subdivision (l) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, all creditors, and indenture trustees notice by mail of

****

(2) the dismissal or the conversion of the case to

another chapter, or suspension of proceedings pursuant to § 305 of the Code;

****

COMMITTEE NOTE

Paragraph (a)(4) is amended to conform to the amendments to Rule 1017. If the United States trustee files a motion to dismiss a case for the debtor's failure to file the list of creditors, schedules, or the statement of financial affairs within the time specified in § 707(a)(3) or §1307(c)(9), the amendments to this rule and to Rule 1017 eliminate the requirement that all creditors receive notice of the hearing.

Paragraph (a)(4) is amended further to conform to Rule 1017(b) which requires that notice of the hearing on dismissal of a case for failure to pay the filing fee be served on only the debtor and the trustee.

Paragraph (f)(2) is amended to provide for notice of suspension of proceedings in a case pursuant to § 305 of the Code.

Rule 2003. Meeting of Creditors or Equity Security Holders

* * * * *

(d) REPORT TO THE COURT. The ~~presiding officer~~ United States trustee shall transmit to the court the name and address of any person elected trustee or entity elected a member of a creditors' committee. ~~If an election is disputed, the presiding officer shall promptly inform the court in writing that a dispute exists.~~ If it is necessary to resolve a dispute regarding the election, the United States trustee shall promptly file a report informing the court of the dispute. Not later than the date on which the report is filed, the United States trustee shall mail a copy of the report to any party in interest that has made a request to receive a copy of the report. Pending disposition by the court of a disputed election for trustee, the interim trustee shall continue in office. ~~If no motion for the resolution of such election dispute is made to the court within 10 days after the date of the creditors' meeting,~~ Unless a motion for the resolution of the dispute is filed not later than 10 days after the United States trustee files a report of the disputed election for trustee, the

interim trustee shall serve as trustee in the case.

* * * * *

COMMITTEE NOTE

Subdivision (d) is amended to require the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested a copy of it. Also, if the election is for a trustee, the rule as amended will give a party in interest ten days from the filing of the report, rather than from the date of the meeting of creditors, to file a motion to resolve the dispute.

The substitution of "United States trustee" for "presiding officer" is stylistic. Section 341(a) of the Code provides that the United States trustee shall preside at the meeting of creditors. Other amendments are stylistic and designed to conform to [the proposed amendments to] Rule 2007.1(b)(3) regarding the election of a trustee in a chapter 11 case.

Rule 4004. Grant or Denial of Discharge

* * * * *

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may extend for cause the time for filing a complaint objecting to discharge. The motion shall be ~~made~~ filed before such time has expired.

COMMITTEE NOTE

The substitution of the word "filed" for "made" in subdivision (b) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. See, e.g., In re Coggin, 30 F.3d 1443 (11th Cir. 1994). As amended, this rule requires that a motion for an extension of time for filing a complaint objecting to discharge be *filed* before the time has expired.

Rule 4007. Determination of Dischargeability of a Debt

* * * * *

(c) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 7 LIQUIDATION, CHAPTER 11 REORGANIZATION, AND CHAPTER 12 FAMILY FARMER'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors ~~held pursuant to~~ under § 341(a). The court shall give all creditors not less than 30 days notice of the time so fixed in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may extend for cause ~~extend~~ the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

(d) TIME FOR FILING COMPLAINT UNDER § 523(c) IN CHAPTER 13 INDIVIDUAL'S DEBT ADJUSTMENT CASES; NOTICE OF TIME FIXED. On motion by a debtor for a discharge under § 1328(b), the court shall enter an order fixing a time for ~~the~~ filing ~~of~~ a complaint to determine the dischargeability of any debt pursuant to § 523(c) and shall give not less than 30 days notice of the time fixed to all

creditors in the manner provided in Rule 2002. On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be ~~made~~ filed before the time has expired.

* * * * *

COMMITTEE NOTE

The substitution of the word "filed" for "made" in the final sentences of subdivisions (c) and (d) is intended to avoid confusion regarding the time when a motion is "made" for the purpose of applying these rules. See, e.g., In re Coggin, 30 F.3d 1443 (11th Cir. 1994). As amended, these subdivisions require that a motion for an extension of time be *filed* before the time has expired.

Agenda Item 23

STATUS LIST OF BANKRUPTCY RULES AMENDMENTS

September 1996

1. "Class of '96." Prescribed by the Supreme Court and transmitted to Congress April 23, 1996. Projected effective date 12/1/96.

1006(a)
1007(c)
1019(7)
2002(a), (c), (f), (h), (i), (k)
2015(b), (c)
3002(a), (c)
3016
4004(c), (d) - (f)
5005(a)
7004
8008(a)
9006(c)

2. "Class of '97." Approved by Committee on Rules of Practice and Procedure 6/96 and transmitted to Judicial Conference for consideration at session of September 17-18, 1996. If approved, will be transmitted to Supreme Court 10/96. Projected effective date 12/1/97.

1019(3), (5)
1020 [new rule]
2002(a), (n)
2007.1
3014
3017
3017.1 [new rule]
3018(a)
3021
8001(a), (b), (e)
8002(c)
8020 [new rule]
9011
9015
9035

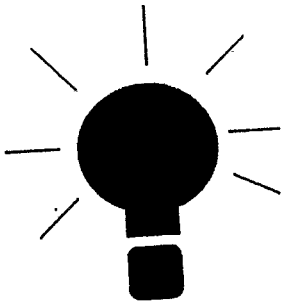
3. Official Bankruptcy Forms. Published for comment 8/15/96; public comment period continues through 2/15/97. Projected effective date 10/1/97.

Amended Forms No. 1, 3, 6 (Schedule F only), 8, 9 (A - I), 10, 14, 17, 18, and new Forms No. 20A and 20B.

4. "Class of '98?" Amendments approved by Advisory Committee September 1995 and March 1996, awaiting assembly of full package and appropriate time to request publication.

1017
1019
2002
2003
4004
4007

THE GESTATION OF AN AMENDMENT



1. Advisory Committee considers proposals for amendments. If approved, prepares draft amendments.
2. This period is of indeterminate length.
3. Proposals come from Committee members, the Reporter, judges clerks, or the public, or result from statutory changes, case law developments, or experience.

Proposed amendments may be at different stages of the process, at the same time, i.e., amendments can be at the Supreme Court while others are in the public comment stage or still being discussed by the Advisory Committee.

YEAR 1

Advisory Committee approves draft of proposed amendments. (January -May)

Presents "preliminary draft" to Standing Committee, usually at the summer meeting, with request to publish. (June)

If approved, preliminary draft amendments are published and comments invited. (October)

YEAR 2

Advisory Committee reviews written comments and holds hearing(s). (January-April)

Public comment period closes. (mid-April)

Advisory Committee completes review of comments, final draft of amendments, draft memorandum to Standing Committee re: comments, also memorandum re: controversies, minority views of Advisory Committee members, etc., (if appropriate). (April-May)

Standing Committee reviews final draft; may 1) approve 2) approve with changes, or 3) send back to Advisory Committee. (June)

Judicial Conference considers amendments submitted by Standing Committee and if approved, forwards to Supreme Court. (September)

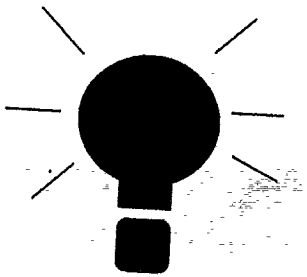
YEAR 3

Supreme Court decides whether to prescribe amendments and, if so, forwards them to Congress. (March or April) (must be by May 1)

Congress can alter or reject during the next 90 days. If Congress does not act, amendments take effect December 1.

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

THE GESTATION OF AN AMENDMENT



YEAR 1

Rules 1017, 1019,
2002, 2003,
4004, 4007

Rules 9013, 9014
7062*
2014
Rules 2004
9031
2003(d)
1019(6)
4004(a)
4007(d)

*Impacts Rules 9014, 1017, 4001, 6004, 6006, 3015, 3020, 3021

Forms
Package -

Forms 1, 3, 6, 8,
9, 10,14,17,18
20A, 20B

YEAR 2

Rules 1019(3), (5), 1020*, 2002(a), (n), 2007.1, 3014, 3017, 3017.1*, 3018(a), 3021, 8001(a), (b), (e), 8002(c), 8020*, 9011, 9015, 9035

*Rules 1020, 3017.1, and 8020 all new rules.

YEAR 3

Rules 1006(a), 1007(a), 1019(7),
2002(a), (c), (f), (h), (i), (k),
2015(b), (c), 3002(a), (c),
3016, 4004(c), (d) - (f),
5005(a), 7004, 8008(a), 9006(c)

PREPARED BY BANKRUPTCY JUDGES DIVISION - AOUSC

Agenda Item 24

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

July 29, 1996

MEMORANDUM TO SELECTED CHAIRS OF COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES (See Attached List)

SUBJECT: Continuation of Long-range Planning (**ACTION REQUESTED**)

I write to update you on recent developments concerning the organization of long-range planning activities in the Judicial Conference and its committees, and to request that you take the action described below to initiate the new planning mechanism.

As you are aware, the Judicial Conference completed the initial phase of its strategic planning efforts last fall when it approved the first *Long Range Plan for the Federal Courts*. In November, I advised all Conference committees that responsibility for implementation of the plan rests with the committees responsible for the respective subject areas. Since that time, the plan has been published and distributed widely inside and outside the judiciary. The relevant Conference committees have considered and, in some cases, taken action to implement certain recommendations in the Plan, including legislative proposals now pending before Congress and other policy matters that have been or will be presented to the Conference.

In March 1995, the Conference resolved that a planning mechanism for identifying and pursuing the strategic goals and objectives of the federal judiciary should be maintained in the Conference organization and at all levels of the judicial branch. Although a long range plan now exists, the current plan does not address the complete range of strategic issues, but instead leaves a number of matters to be addressed for the first time or more fully in ongoing planning efforts. For example, Chapter 11 of that document lists a variety of topics for future consideration.

The Chief Justice met recently with members of the Conference's Executive Committee to discuss how to organize this continued planning process. As a result of their discussion, the Chief Justice determined that long-range planning should be treated as an intrinsic part of each Conference committee's policy-making function, with any subsequent additions or changes in the existing plan to be handled in the ordinary course of business (i.e., through recommendations to the Conference from the appropriate committee(s)). Whenever a more thorough update is

needed (perhaps every five to ten years), the Chief Justice may appoint another long-range planning committee to undertake that effort. In the meantime, the Chief Justice will occasionally appoint one or more ad hoc committees to address issues of major importance (e.g., mass tort litigation) that cut across the jurisdictions of the regular Conference committees.

Absent a separate long-range planning committee, the Executive Committee will be responsible for coordination of planning activities, including referrals of high priority issues for study and report by the appropriate committees. To aid in that task, the chair of each committee with significant long-range planning responsibility will designate a special liaison member to promote and continue planning within the committee. These liaison members may also be called upon collectively to serve as an ad hoc advisory group on matters requiring a broad perspective. Committees may wish to include a discussion of long-range planning activities in their regular reports to the Conference.

The Administrative Office will support the planning efforts of Conference committees by conducting strategic studies and assisting with implementation of the current plan. The AO's Long Range Planning Office, which facilitates and encourages planning throughout the judiciary, will be available to provide technical assistance, research, and analytical support on planning-related matters. With cooperation from the regular committee staffs, the Long Range Planning Office will track implementation of the plan and continued planning by the Conference and its committees. The Office will also work closely with the designated liaison members to aid in coordination of committee planning activities.

At this time, I would ask that you proceed at your earliest opportunity to designate a planning liaison for your committee and then advise me of which committee member will serve initially in that capacity. Once that designation is made, your committee will be ready to carry out its role in the ongoing planning process, perhaps starting at the winter meeting with discussion of a planning agenda for the next three years.

If you have any questions about the *Long Range Plan* or strategic planning in general, please contact Jeffrey Hennemuth, chief of the Long Range Planning Office, at (202) 273-1810.

Leonidas Ralph Mecham

Attachment

cc: AO Senior Staff

ATTACHMENT

Addressee List:

Honorable Gilbert S. Merritt, chair, Executive Committee
Honorable J. Owen Forrester, chair, Committee on Automation and Technology
Honorable Paul A. Magnuson, chair, Committee on the Administration of the Bankruptcy System
Honorable Richard S. Arnold, chair, Committee on the Budget
Honorable Ann C. Williams, chair, Committee on Court Administration and Case Management
Honorable Maryanne Trump Barry, chair, Committee on Criminal Law
Honorable Emmett R. Cox, chair, Committee on Defender Services
Honorable Stephen H. Anderson, chair, Committee on Federal-State Jurisdiction
Honorable Barefoot Sanders, chair, Committee on the Judicial Branch
Honorable Julia S. Gibbons, chair, Committee on Judicial Resources
Honorable Philip M. Pro, chair, Committee on the Administration of the Magistrate Judges System
Honorable Alicemarie H. Stotler, chair, Committee on Rules of Practice and Procedure
Honorable Robert E. Cowen, chair, Committee on Security, Space and Facilities

Agenda Item 25

SUBCOMMITTEES -- ADVISORY COMMITTEE ON BANKRUPTCY RULES

Subcommittee on Forms

Chairman: Henry J. Sommer, Esquire

Members: Judge Robert J. Kressel
Professor Charles J. Tabb
R. Neal Batson, Esquire
Leonard M. Rosen, Esquire
Judge Paul Mannes, ex officio
Prof. Alan N. Resnick, ex officio

Meeting:

Subcommittee on Local Rules

Chairman: Judge Adrian G. Duplantier

Members: Judge Alice M. Batchelder
Judge Eduardo C. Robreno
Judge Donald E. Cordova
Judge A. Jay Cristol
Gerald K. Smith, Esquire
J. Christoper Kohn, Esquire

Meeting:

Subcommittee on Style

Chairman: Judge Alice M. Batchelder

Members: Judge Adrian G. Duplantier
Judge Donald E. Cordova
Professor Alan N.Resnick, ex officio
Peter G. McCabe, ex officio

Meeting:

Subcommittee on Technology

Chairman: Judge A. Jay Cristol

Members: Kenneth N. Klee, Esquire
Henry J. Sommer, Esquire
Richard G. Heltzel, Clerk

Meeting:

Subcommittee on Alternative Dispute Resolution

Chairman: Professor Charles J. Tabb

Members: R. Neal Batson, Esquire
Leonard M. Rosen, Esquire

Meeting:

Subcommittee on Rule 2014 Disclosure Requirements

Chairman: Gerald K. Smith, Esquire

Members: Judge Alice M. Batchelder
Judge Donald E. Cordova
Judge Robert J. Kressel
Kenneth N. Klee, Esquire
Leonard M. Rosen, Esquire

Meeting:

Subcommittee on Litigation

Chairman: Kenneth N. Klee, Esquire

Members: Judge Jane A. Restani
Judge Robert J. Kressel
R. Neal Batson, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire

Meeting:

Subcommittee on Rule 7062

Chairman: Judge Robert J. Kressel

Members: R. Neal Batson, Esquire
Kenneth N. Klee, Esquire
J. Christoper Kohn, Esquire
Gerald K. Smith, Esquire
Henry J. Sommer, Esquire

Meeting:

Agenda Item 26

The next meeting will be March 13 - 14, 1997

at The Mills House Hotel

in Charleston, SC