ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Half Moon Bay, CA
September 9-10, 2004

with a demand for relief of the kind specified in Rule 7001, as recommended by the Subcommittee on Attorney Conduct and Health Care.

8. Recommendation by the Subcommittee on Business Issues not to amend Rule 7023 or Rule 7054 to correct a discrepancy with Civil Rule 23 as amended effective December 1, 2003. Copies of the December 2003 version of Rule 23 and the Reporter's memorandum for the April 2004 meeting are included.

9. Recommendation by the Subcommittee on Privacy, Public Access, and Appeals not to amend Rule 7026 to limit, in certain types of adversary proceedings, the application of the mandatory disclosures required by Civil Rule 26.

10. Report by the Joint Subcommittee on Venue and Mega Cases, including recommendations to amend Rules 1014, 3007, and 6006 and other matters considered by the Joint Subcommittee. The Reporter's separate memorandum on the proposed amendment to Rule 1014 is included.

11. Judge Wedoff's suggestion that the Advisory Committee consider amending Rule 4003(b) to give the court flexibility to grant retroactive extensions of the time to file objections to exemptions.

12. Judge Adams' suggestion that the Advisory Committee consider amending Rule 9021 based on the opinion in Dynamic Changes Hypnosis Center, Inc. v. PCH Holding, LLC (In re PCH Holding, LLC), 306 B.R. 800 (E.D. Va. 2004). A copy of the opinion is included.

13. Request by Attorney R. Bradford Leggett to amend Rule 1019(5)(A) to eliminate the requirement that a former debtor in possession prepare and file a final report and schedule of post petition debts after the chapter 11 case has been converted to chapter 7.

14. Technical amendment to Rule 7007.1(b) to correct the reference to the first pleading in an adversary proceeding.

15. Request by the Committee on Court Administration and Case Management to amend Rule 5005(a)(2) to authorize courts to "require" the use of electronic filing.

Information Items

16. Suggestion by Judges McFeeley and Teel and Clerk Ellen Johanson that the 10-day period for filing a notice of appeal provided by Rule 8002(a) be expanded because orders served by the Bankruptcy Noticing Center are often delayed.

17. Discussion of when the Advisory Committee should consider proposing comprehensive rules for electronic filing. Copies of the Judicial Conference's Model Local Bankruptcy

Court Rules for Electronic Case Filing and a report on the implementation of the CM/ECF (Case Management/Electronic Case Files) system are included.

18. Discussion of an amendment to Rule 9006(b)(3) to change a cross reference from Rule 4004(a) to Rule 4004(b) or to add a cross reference to Rule 4004(b).

19. Judge Feeney's suggestion that the Advisory Committee consider whether there should be national rules to implement the Servicemembers' Civil Relief Act of 2003, Pub. L. 108-189. A copy of an overview of the Act distributed to bankruptcy judges on February 17, 2004, is included.

20. Judge Lynn's suggestion to amend Rule 9006 to limit after-the-fact extensions of time to file proofs of claim under Rules 3004 and 3005 based on excusable neglect.

21. Proposed amendment to Director's Procedural Form B271 to reflect the use of blanket bonds by trustees.

22. *Bull Pen*: There are no amendments pending in the "bull pen."

23. List and progress chart of proposed amendments.

24. Rules Docket

Administrative Matters

25. Next meeting reminder: *March 10 - 11, 2005, Hyatt Sarasota, Sarasota, FL*

26. Discussion of date and location for fall 2005 meeting.

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Professor Alan N. Resnick, Chair
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			Start Date	End Date
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Ransey Guy Cole, Jr.	C	Sixth Circuit	2003	2006
Eric L. Frank	ESQ	Pennsylvania	1998	2004
Irene M. Keeley	D	West Virginia (Northern)	2002	2005
Christopher M. Klein	B	California (Eastern)	2000	2006
J. Christopher Kohn*	DOJ	Washington, DC	—	Open
Mark B. McFeeley	B	New Mexico	2001	2004
Alan N. Resnick	ACAD	New York	1999	2005
Richard A. Schell	D	Texas (Eastern)	2003	2006
K. John Shaffer	ESQ	California	2000	2006
Laura Taylor Swain	D	New York (Southern)	2002	2005
Ernest C. Torres	D	Rhode Island	1999	2005
James D. Walker, Jr.	B	Georgia (Middle)	1999	2005
Mary Jo Wiggins	ACAD	California	1998	2004
Thomas S. Zilly	D	Washington (Western)	2000	2006
Jeffrey W. Morris Reporter	ACAD	Ohio	1998	Open

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 25-26, 2004
Amelia Island, Florida

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge A. Thomas Small, Chairman
Circuit Judge R. Guy Cole, Jr.
District Judge Ernest C. Torres
District Judge Thomas S. Zilly
District Judge Laura Taylor Swain
District Judge Irene M. Keeley
District Judge Richard A. Schell
Bankruptcy Judge James D. Walker, Jr.
Bankruptcy Judge Christopher M. Klein
Bankruptcy Judge Mark B. McFeeley
Professor Mary Jo Wiggins
Professor Alan N. Resnick
Eric L. Frank, Esquire
Howard L. Adelman, Esquire
K. John Shaffer, Esquire
J. Christopher Kohn, Esquire

Professor Jeffrey W. Morris, Reporter, and Ms. Patricia S. Ketchum, advisor to the Committee, attended the meeting.

Circuit Judge Marjorie O. Rendell, chair of the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee); Bankruptcy Judge Dennis Montali, liaison from the Bankruptcy Administration Committee; Peter G. McCabe, secretary of the Committee on Rules of Practice and Procedure (Standing Committee); Lawrence A. Friedman, Director, Executive Office for United States Trustees (EOUST); Martha L. Davis, Principal Deputy Director, EOUST; Circuit Judge Harris L. Hartz, liaison from the Standing Committee; and Professor Daniel R. Coquillette, reporter of the Standing Committee, attended. District Judge David S. Levi, chair of the Standing Committee, was unable to attend.

The following additional persons attended the meeting: James J. Waldron, Clerk, United States Bankruptcy Court for the District of New Jersey; John K. Rabiej, Chief, Rules Committee Support Office, Administrative Office of the United States Courts (Administrative Office); James Ishida, Rules Committee Support Office; James H. Wannamaker, Bankruptcy Judges Division, Administrative Office; and Robert Niemic, Research Division, Federal Judicial Center

(FJC).

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

Introductory Matters

The Chairman welcomed all the members, liaisons, advisers, and guests to the meeting. The Chairman recognized Judge Cole and Judge Schell, the new members of the Committee; Judge Hartz, the new liaison from the Standing Committee; and Judge Rendell, the new chair of the Bankruptcy Administration Committee.

The Committee approved the minutes of the September 2003 meeting.

The Chairman briefed the Committee on the January 2004 meeting of the Standing Committee. The Standing Committee approved the Committee's recommendation to publish proposed amendments to Rules 5005(c) and 9036 for public comment. The proposed amendments will be published in August. The Standing Committee also approved the publication of style revisions of Civil Rules 16 - 37 and 45. At its meeting in June 2003, the Standing Committee approved for publication style revisions of Civil Rules 1 - 15. Mr. Rabiej stated that the Standing Committee has decided to publish all of the restyled Civil Rules for comment at the same time.

Judge Rendell and Judge Montali reported on the January 2004 meeting of the Bankruptcy Administration Committee. Judge Rendell discussed several recent initiatives by the Bankruptcy Administration Committee, including the law clerk assistance program, which utilizes the JNET to post information on where assistance is needed; the email judges' newsletter Core Proceedings; and bankruptcy judges' efforts to educate the public about debt. Judge Montali stated that the Judicial Conference had approved the Bankruptcy Administration Committee's recommendation that section 104(a) of the Bankruptcy Code be repealed and that a bankruptcy judge be invited to attend Judicial Conference sessions in a non-voting capacity. Judge Montali stated that the Bankruptcy Administration Committee will conduct a study this year of the continuing need for existing bankruptcy judgeships and will study the need for additional judgeships next year. He said the Bankruptcy Administration Committee is preparing to conduct a study of case weights, which should be completed by 2006.

Action Items

Venue and Large Chapter 11 Cases. Judge Montali said that the FJC's conference on

large chapter 11 cases had resulted in a number of proposals by the Bankruptcy Administration Committee's Subcommittee on Venue-Related Matters, including a request that this Committee consider several areas of bankruptcy practice which might benefit from the adoption of new or revised rules. These include first day orders for matters such as critical vendors and payment of prepetition wages and benefits; financing orders; omnibus objections to claims; use of the Official Bankruptcy Forms; and, if 28 U.S.C. § 1412 is not amended, venue. One committee member said the rules should slow down consideration of first day and retention of counsel orders because the debtor and a few creditors have negotiated many of the issues before the case is filed. As a result, the member said, creditors don't have time to analyze the issues and the creditors' committee often starts the case at a disadvantage.

In response to the recommendation by the Bankruptcy Administration Committee, the Chairman stated that an ad hoc committee will be formed to address the venue issues and other chapter 11 concerns raised in the report of the chapter 11 conference and in Judge Montali's letter of March 11. Mr. Shaffer will chair the ad hoc committee, which will include Judge Cole, Judge Klein, and Mr. Adleman as representatives of this Committee. The ad hoc committee may have recommendations for consideration at the September meeting.

Comments on Preliminary Draft Amendments to Rules 1007, 3004, 3005, 4008, 7004, and 9006. The Chairman stated that the public hearing tentatively scheduled for January 30, 2004, was cancelled because no one asked to testify. He said there were no specific comments on the proposed amendments to Rules 1007 and 7004. **A motion to recommend that the Standing Committee give its final approval to the proposed amendments to Rules 1007 and 7004 as published carried without dissent.**

Mark Van Allsburg, the clerk of the bankruptcy court in Hawaii, suggested that Rule 3004 should not continue the current requirement that the clerk mail notice to the creditor, the debtor, and the trustee when the trustee or the debtor files a claim on behalf of the creditor. The Committee discussed whether it is better to require the filer to notice the claim (and file a certificate of service) or for the clerk to give the notice. Mr. Waldron said it is difficult for the clerk's office to identify claims filed by the trustee or the debtor. **The Chairman stated that Mr. Van Allsburg's comment is beyond the scope of the proposed amendment as published, but could be considered at the September meeting if any Committee member desires to do so.** Judge Dennis Michael Lynn commented that the proposed amendment to Rule 3005 is not consistent with the wording of the proposed amendment to Rule 3004. The Reporter stated that the amendments kept the structure of the original rules. The Chairman stated that the Style Subcommittee could make the two rules parallel without making a substantive change. **A motion to recommend final approval of the proposed amendments to Rules 3004 and 3005 as published, subject to review by the Style Subcommittee, carried without dissent.**

The Chairman stated that the idea of setting a deadline for filing reaffirmation agreements has proved to be popular but not the specific deadline included in the proposed

amendment to Rule 4008 – 30 days after the entry of the discharge. Three written comments suggested that the agreements be filed by the date of the discharge. The Chairman said others have suggested that reaffirmation agreements be filed within a short time (such as 10 days) after the discharge. He said the parties generally receive notice of the discharge within five days. The Committee discussed whether the court would have to keep cases open until the deadline for filing reaffirmation agreements has passed and the impact that would have on the court's case processing statistics. One Committee member stated that courts which want to close cases quickly could do so. Another member said 10 days seems a bit short since creditors and debtors might not be sure when the discharge will be issued. **Judge Walker's motion to recommend final approval of the proposed amendment to Rule 4008 as published carried without dissent.**

The Chairman stated that several comments had been received on the proposed amendments to Rule 9006 and the comparable amendment to Civil Rule 6, which were intended to clarify the method of counting the number of days to respond after certain kinds of service. He said the Advisory Committee on Civil Rules (the Civil Rules Committee) is unlikely to revise the published version of its proposed amendment at its April meeting except possibly to add the word "calendar " to the amendment or to add more examples in the Committee Note. The Reporter noted that the Committee Note to the proposed amendment to the Bankruptcy Rule already includes several examples and that adding the word "calendar" to proposed amendment would not change the examples. **A motion to recommend final approval of the proposed amendment to Rule 9006 as published, subject to reconsideration if the Civil Rules Committee revises the proposed amendment to Civil Rule 6, carried without dissent.** Several speakers said there is no reason the Bankruptcy Rule should be different from the Civil Rule on counting. **A motion to authorize Judge Walker, the liaison to the Civil Rules Committee, to recommend that the Civil Rules Committee add the word "calendar" and to inform the Civil Rules Committee that this Committee will follow suit if it does so carried without dissent.** The Chairman stated that a revised amendment to Rule 9006 could be considered immediately by email ballot, if needed, to track revised language in the Civil Rule.

Rule 2002(g) — National Creditor Registry. The Bankruptcy Noticing Working Group had previously requested that the Committee consider amending Rule 2002(g) to permit creditors to receive notices on a national or regional basis. Section 315 of the Bankruptcy Reform Act of 2003, H.R. 975, as passed by the House of Representatives, includes a similar provision. At the September meeting, the committee approved the proposal in principle and the Chairman asked the Reporter to prepare alternative drafts of the proposed amendment. One draft would allow a creditor to notify a clerk's office of its preferred address and the other would allow a creditor and an approved Notice Provider (as defined in Rule 9001) to make their own arrangements. The proposal was referred to the Technology Subcommittee, which is chaired by Judge Zilly.

While the matter was under review, the Director of the Administrative Office announced the National Creditor Registration Service for electronic noticing through the Bankruptcy Noticing Center (BNC). Judge Zilly said the new, enhanced service does essentially the same

thing for electronic notices as the proposed amendment; it allows the creditor and the BNC to agree where the notice will be sent. After a lengthy discussion, the Subcommittee was split as to whether a rules amendment is currently necessary but strongly recommended that, if an amendment is adopted, creditors be permitted to make arrangements directly with approved notice providers. In consultation with the contractor which operates the BNC, the Administrative Office estimated that the proposed amendment could result in an annual postage savings of approximately $1.9 million by increasing batched mail transmitted to preferred mailing addresses identified by creditors.

The Reporter stated that, contrary to his earlier assumption, some national creditors do not want electronic notices. Some either prefer paper notices or would have difficulty using electronic notices. In addition, he said, the Committee could monitor the performance of the new National Creditor Registration Service and the acceptance of a national creditor registry while the proposed amendment is pending. Mr. Shaffer said he is inclined to go forward with an amendment despite his earlier misgivings about the proposal. He said he had been concerned because of the pendency of the legislation, the possibility of mistakes in the registry system, the application of the registry to notices given by debtors and trustees, and the possibility that software changes would make the rule outdated. Judge McFeeley stated that a trustee would be covered if the trustee was approved as a notice provider. The Committee discussed how the creditor registry would treat the entry of appearance and request for service filed by the attorney for a creditor. One member stated that the attorney and the creditor would both get notices because the attorney's name and address would not match the creditor's in the registry.

Judge Torres suggested changing "the proper address" to "a proper address" in line 9. Committee members suggested making the new provision paragraph (g)(4), instead of paragraph (g)(1); substituting the phrase "paragraphs 1 - 3" for the phrase "subparts (2) - (3);" and striking the phrase "for purposes of this subdivision." Mr. Frank suggested that the proposal be extended to chapter 11 cases. Mr. Adelman said chapter 11 claims agents who qualify as Notice Providers should have the option of using the national creditor registry. Judge McFeeley said his court uses the BNC to provide notices in chapter 11 cases. **A motion to approve the proposed amendments to Rules 2002(g) and 9001 for publication with the suggested revisions carried without dissent. The Chairman asked Mr. Wannamaker to check whether including chapter 11 cases would cause problems for the Administrative Office.**

Rule 9014 — Electronic Service. Mr. Waldron had stated at the September meeting that several electronic filers in his court have complained that Rule 9014 requires them to serve the motion initiating a contested matter in the manner provided for the service of a summons and complaint in Rule 7004 even if the contested matter is initiated electronically. Mr. Waldron provided the Technology Subcommittee with informally collected data which demonstrated that many practitioners failed to follow the existing requirements of Rule 9014. The Subcommittee concluded that electronic service of the initial motion should suffice as to counsel to a party in the proceeding if the attorney is a participant in the CM/ECF program. CM/ECF participants agree to accept electronic service.

The Subcommittee offered two draft amendments. The first draft would authorize electronic service on any entity that is participating in the CM/ECF program, as well as the debtor's attorney. The debtor would be entitled to be served with a paper copy. The other draft would require paper service on the debtor and any other party to the contested matter, but would permit attorneys to be served electronically if they are CM/ECF participants. The Committee discussed the distinction between service on a creditor and service on the creditor's attorney, who may have entered the case on an unrelated matter. One member said the nature of the attorney's representation in the case is important. Another member stated that an attorney's entrance of appearance in the case is an implicit or explicit agreement to accept service in all matters.

Professor Resnick asked why the rule should be changed for service on an attorney if service must be made on a party, but not the party's attorney. He suggested amending Rule 7004(b)(9) instead of Rule 9014. The Chairman stated that an amendment to Rule 7004(b)(9) would apply to both adversary proceedings and contested matters. Professor Resnick said Rule 7004(b)(9) is intended to protect the debtor by requiring service on both the debtor and the debtor's attorney. One member said the debtor's attorney may have authority to accept service for the debtor. The Chairman asked whether service on an attorney who has entered an appearance in the case should be recognized as service on the attorney's client. One member agreed. Another Committee member asked why contested matters within the bankruptcy case are treated as separate litigation when counterclaims and cross-claims in a civil action can be served on an attorney. Professor Resnick said the counterclaims and cross-claims in a civil action all relate to the original complaint whereas the contested matters may be unrelated.

The Committee agreed to amend Rule 7004(b)(9) to permit service on the debtor's attorney in the manner provided in Civil Rule 5(b)(2)(D). The Committee discussed deleting the phrase "or statement of affairs" from Rule 7004(b)(9) because the debtor's residence is no longer listed in the Statement of Financial Affairs. Judge Swain stated that service on the debtor's attorney is required by Rule 7004(b), which provides for service by first class mail on a permissive basis. Thus, she stated, if personal service is made on the debtor under Rule 7004(a), there is no requirement to serve the debtor's attorney. **After a brief discussion, the Committee agreed to delete the phrase "or statement of affairs," to delete the remainder of Rule 7004(b)(9) after the phrase "in a filed writing," and to provide in a new Rule 7004(g) for service on the debtor's attorney in the manner provided in Rule 7005. The Chairman asked the Reporter to circulate a draft of the proposed amendment for approval after the meeting.**

Rule 4002 — Debtor's Production of Documents. The Director of the EOUST had submitted a proposal for amendments to Rules 2003, 4002, 2016, and 7001 as well as an amendment to Schedule I of Official Form 6 and the issuance of a new Official Form to implement some of the changes in Rule 2016. The Committee discussed the proposals at its meeting in September 2003, approved the proposed amendment to Schedule I, and sent the remainder of the proposal to the Subcommittee on Consumer Issues for further consideration.

The Subcommittee invited written comments from interested individuals and groups and conducted a focus group meeting in Washington, D.C. Representatives of the EOUST, trustees, and debtors' attorneys presented their views at the focus group meeting. Although the vast majority of the written comments received by the Subcommittee were opposed to requiring the debtor to produce a specific list of materials as unnecessarily burdensome, the proposal did have some supporters. The chapter 7 and chapter 13 trustees who spoke at the focus group meeting indicated that requiring the debtor to bring additional materials to the meeting of creditors would enhance their ability to perform their duties and favored the proposal with some reservations. The representative of the National Association of Consumer Bankruptcy Attorneys argued that the cost of compiling and delivering many of the documents would be prohibitive for some debtors; that the information would actually be used by the trustee in only 20 - 30 percent of their cases, either because the dollar amounts are too low or because the trustee believes further investigation is not necessary; that handling and keeping the materials would be burdensome for trustees; and that the EOUST proposal failed to address privacy concerns raised by producing documents such as tax returns.

After considering the written comments and presentations, the Subcommittee found that it would be appropriate to expand the existing list of the debtor's duties in Rule 4002 but that there is no need to insert new duties in Rule 2003. The Subcommittee concluded that the rule should require the debtor to present appropriate personal identification at the meeting of creditors and provide certain financial documents to the trustee on request, rather than mandating that the debtor produce specific documents in every case. Mr. Frank, the chair of the Subcommittee, said the group found that document production should be done on a case-by-case basis, that — even without a rule — trustees generally get the information they need from debtors, and that any new rule should be as flexible as possible. He said most trustees have the experience which allows them to identify the small percentage of cases in which they need additional items.

Mr. Friedman stated that his effort to get more accurate information from debtors grew out of his experiences as a trustee in Detroit and a study by Bankruptcy Judge Steven Rhodes. In addition, he said that recent test audits of 1,270 debtors' schedules disclosed hundreds of material misstatements of assets. Mr. Friedman stated that the vast majority of the bankruptcy judges and United States Trustee program staff with whom he has discussed the proposal support it. He said the two major trustee organizations, the National Association of Chapter 13 Trustees and the National Association of Bankruptcy Trustees, formally endorsed the EOUST proposal after the focus group meeting. Mr. Friedman said there is a significant problem with the accuracy of debtors' schedules and that the bankruptcy community has to recognize that problem and deal with it.

Mr. Friedman stated that the Subcommittee's revised amendment would be burdensome for trustees and the courts because trustees would be required to make written requests for financial information and the courts would have to hear objections to the requests. He said the discretionary provisions conflicted with the requirements in section 521 of the Bankruptcy Code that the debtor cooperate with the trustee and surrender property of the estate to the trustee,

including books, documents, records, and papers. Mr. Friedman said the statute does not require that the trustee request the documents or that the documents be reasonably necessary for the administration of the case. He said a third of the bankruptcy courts already have local rules, general orders, or standing orders requiring the production of financial documents and that the EOUST's proposed amendment would promote uniformity.

The Reporter asked whether there was a difference in the audit results between districts with a local rule or general order for production and those which do not have such a requirement. Mr. Friedman said that was not part of the study. Professor Coquillette asked whether the study addressed how many debtors file bankruptcy without an attorney. Judge Torres asked how requiring the debtor to produce this information would help since the schedules already ask that it be listed. Mr. Friedman stated that requiring debtors to bring the information to the meeting of creditors would educate debtors about what has to be reported on the schedules and it would protect the integrity of the system.

Judge Schell said bankruptcy is for the debtor's benefit, so why shouldn't the debtor have to bring documents to the meeting of creditors. Judge Swain stated that it is a matter of balancing the trustees' need for more documentation in a small percentage of their cases against the transaction cost of production in every case and forcing people out of the system. She stated that debtors would pay for copies and that trustees would bear the cost of handling the documents and protecting the debtor's privacy. Judge Klein suggested that the EOUST analyze the data on recoveries and payments to creditors by district. Judge Hartz stated that the Subcommittee on Consumer Issues should work with the EOUST to address the questions on the data in the audit study, including any correlation between local rules on production and debtors' material misstatements about assets. Mr. Friedman stated that outsiders are not allowed to participate in the deliberative process of the Department of Justice. He said he would try to get the data, but that there is a six-month delay. Mr. Niemic offered to pursue getting assistance from the FJC, if needed, to review the data.

The Committee discussed whether producing and reviewing financial documents at the meeting of creditors would disrupt and delay the meeting. Judge Montali said he has been told that the trustees are not burdened and the meetings are not disrupted in the 30 districts which have local rules for production. Mr. Frank said the original EOUST proposal to require production of 18 types of documents in every case was particularly burdensome, but that it would be a different matter to require conscientious attorneys to review the documents in preparing the debtor's schedules. Mr. Friedman suggested publishing a draft amendment which requires debtors to produce picture IDs, pay stubs, certificates of title, 1040 tax forms, and one bank statement for each account. Judge Montali suggested requiring a government-issued photo identification. Mr. Frank said it may be more sensible to require debtors to produce a short list of mandatory items such as a picture ID and proof of Social Security number, the debtor's most recent pay stub, the debtor's most recent tax return, title instruments, and a statement from each financial institution. Mr. Friedman said the proposed amendment should not bar more stringent local rules. Professor Resnick said that he was concerned that, if the proposed amendment

includes a statement that local rules can require additional documents, the statement might prompt a plethora of local rules. Professor Wiggins suggested deleting the phrase "setting forth" in line 27.

The Chairman asked the Reporter to consult with Mr. Friedman and Mr. Frank and prepare a revised draft of the proposed amendment to Rule 4002. After consulting with Mr. Friedman and Mr. Frank, the Reporter presented a revised draft which required the debtor to present picture identification, proof of Social Security number, and financial information including evidence of current income such as the debtor's most recent pay stub, the debtor's most recently filed federal income tax return, and statements for depository accounts. Two members suggested requiring government-issued picture identification. Two other members stated that there are other ways of proving the debtor's identity such as a birth certificate and a photo identification. One member stated that he is reluctant to specify picture identification prescribed by the United States trustee. The Committee discussed requiring picture identification issued by a "governmental unit" since that phrase is defined in section 101(27) of the Code.

Professor Resnick suggested revising lines 19 - 21 of the draft to state "An individual debtor shall bring to the meeting of creditors under section 341 of the Code picture identification issued by a governmental unit and . . ." He suggested that section (b)(2) be titled "Debtor's Duty to Provide Financial Documents." Judge McFeeley suggested inserting "or copies thereof" after the word "documents" in line 27 and adding brokerage accounts to section (b)(2)(C). Mr. Friedman suggested adding investment accounts to section (b)(2)(C). Professor Resnick suggested doing so by inserting "and investment" after the word "depository" in line 35. Professor Resnick suggested adding mutual funds and brokerage accounts to the same section. Mr. Adelman stated that the debtor may have received a W-2 form for the most recent tax year but either has not yet filed an income tax return or may not file a return for the year. He suggested dividing section (b)(2)(B) and requiring both the debtor's most recently filed federal income tax return and all Federal Tax Forms W-2 and 1099 for the most recent tax year.

Judge Montali stated that the draft is ambiguous on whether the debtor must bring the documents to the meeting of creditors for review or whether the debtor must produce the original documents or copies for the trustee. Mr. Friedman said he wanted to permit the debtor either to bring the documents for the trustee to review at the meeting or to bring copies for the trustee. If needed, the trustee could keep the originals long enough to make copies and note that on the record of the meeting. Mr. Frank said the parties will work it out if the rule does not specify.

Several Committee members questioned who could review the documents, which may include sensitive information, at the meeting of creditors. Mr. Friedman said debtors have been producing documents at the meeting for years but that the EOUST could issue guidance on the implementation of the new requirement. Professor Resnick noted that creditors may examine the debtor at the meeting. He asked whether, if the documents are produced at the meeting, creditors can question the debtor about the documents. Judge Swain suggested specifying that debtors bring the documents to the meeting "for examination by the trustee." Mr. Frank suggested that

debtors bring the documents to the meeting of creditors "and deliver them to the trustee." Judge Klein noted that the trustee is required to furnish information and documents to parties in interest. Judge Walker stated that the amendment should avoid ambiguity since the safeguards for a Rule 2004 examination are not in effect. He suggested that the amendment state that creditors may question the debtor but may not see the documents. One member stated that, if creditors can resolve a question at the start of the case, it is better for them to do that without resorting to a Rule 2004 examination.

Mr. Friedman stated that the rule should not micromanage the meeting of creditors, which the trustee conducts for the benefit of creditors. He said creditors' representatives attend the meeting to determine if the creditors should pursue dischargeability actions. Professor Resnick said debtors' tax returns are confidential and may include medical expenses, charitable deductions, children's Social Security numbers, and other sensitive information. In order to ensure that the documents are not sitting around the meeting room, he suggested specifying that the production is "for confidential review by the trustee." Mr. Friedman said the restriction could be included in the Committee Note.

The Chairman suggested adding "or bankruptcy administrator" after the word "trustee" in line 25. Judge Swain suggested inserting "for examination by the trustee" after the word "creditors" in line 28. The Chairman suggested that the proposed amendment be published for comment. He stated that the proposed amendment is not perfect but could be refined later. **The Chairman directed the Reporter to revise the draft and circulate it for consideration by the Committee.**

Rule 1009 - Amended Statement of Social Security Number. The EOUST's proposal included an amendment to Rule 4002 which stated that, if the debtor used an incorrect Social Security number in connection with the bankruptcy filing, the debtor must take steps to correct the bankruptcy court record and notify credit reporting agencies. One member stated that the impact of the debtor's use of an incorrect Social Security number may be worse for the person whose number is used than for the court. Judge McFeeley stated that the major credit bureaus get lists of debtors and their numbers daily but do not get updates unless somebody tells them.

Mr. Friedman stated that the United States Trustee Program tallied 8,006 improper Social Security numbers in bankruptcy cases last year. He said the debtor bar did not object to this part of the proposal because correcting the number is a simple process. He said the three largest national credit bureaus all have central addresses for such notices. Professor Resnick stated that he agrees with the EOUST's concern but has a problem with putting a social regulation in the procedural rules. He said the proposal is a good idea but that it is ambiguous and does not belong in the rules. One member stated that the proposal would require the debtor to correct a problem that came from the bankruptcy records. Mr. Waldron stated that the amendment should be more specific than requiring that the debtor "take steps to correct the bankruptcy court record." Mr. Frank suggested that the debtor be required to "submit an amended Statement of Social Security Number."

The Reporter suggested that the amendment be included in Rule 1009 instead of Rule 4002(a)(6). One member stated that most of Rule 1009 provides for permissive amendments but that the Amended Statement of Social Security Number would be mandatory and that the proposal would require notifying the credit bureaus. The Committee discussed whether the proposed amendment should be included in Rule 1007(f) or in Rule 1009 and whether the amendment should include a deadline for filing the amended statement. Professor Resnick moved to amend either Rule 1007 or Rule 1009 and to require that the debtor promptly notify creditors in the case. **The motion carried with two dissenting votes.** Judge McFeeley said he is not sure that the credit bureaus will get the change unless there is a provision to notify them.

The Reporter presented alternative draft amendments to Rules 1007 and 1009. He stated that an amendment to Rule 1009 would be more appropriate because that rule is about amendments and provides for notice. Judge Klein stated that subdivision (d) of the proposed amendment should include a reference to the new subdivision (c) as well as subsections (a) and (b) of the rule. Mr. Adelman asked about the use of the phrase "an amended verified statement" in light of the provision in Rule 1008 that all statements shall be verified. The Reporter stated that Rule 1007(f) refers to a "verified statement that sets out the debtor's social security number" and that the reference to a "verified statement" emphasizes the requirement. Professor Resnick suggested substituting "If the" for "Any" in line 3 and substituting "entities listed on the statement filed under Rule 1007(a)(1) or (2)" for "creditors" in line 7. Mr. Frank suggested substituting "only notice to creditors" for "sole notice to creditors" and striking "especially" in the penultimate sentence of the Committee Note. **The Chairman directed the Reporter to circulate a revised draft within two weeks and that Committee members email their comments to him and to the Reporter. Then the final version of the proposed amendment and the comments will be submitted for a vote.**

Rule 2016 Disclosure of Compensation. The EOUST had proposed that Rule 2016(b) be amended to require that the attorney for the debtor disclose all fees paid by or on behalf of the debtor in the year prior to the filing of the bankruptcy case, that the attorney disclose the details of the legal services to be provided in the bankruptcy case, and that both the attorney and the debtor sign the Rule 2016 disclosure. Mr. Frank stated that the Subcommittee on Consumer Issues initially agreed to recommend the amendment, but reversed its decision after further discussion. He said the Subcommittee concluded that the proposal presented a number of unresolved issues, including matters of attorney/client privilege and privacy.

Ms. Davis stated that the EOUST has learned that some attorneys mischaracterize or fail to disclose some of the payments they receive from the debtor. She said some attorneys have argued that part of their payments were for providing a medical power of attorney, a will, or some other legal services unrelated to the bankruptcy case, and, as a result, do not have to be disclosed. She said requiring the debtor to sign the disclosure will protect the debtor, who may be in a desperate situation. One member stated that the proposed amendment is based on the premise that lawyers lie and cheat but that a dishonest attorney would get around the disclosure requirement and lie. Professor Resnick said the proposal is inconsistent with the statute, which

only covers payments for services rendered or to be rendered in contemplation of or in connection with the bankruptcy case. He said there did not appear to be a compelling need for the disclosure, which might cause embarrassment, violate the debtor's privacy, or violate the attorney-client privilege.

Professor Coquillette stated that the states regulate the attorney-client privilege and that there is concern any time the Standing Committee considers a rule affecting attorney conduct. He stated that the EOUST proposal has wide-ranging ramifications. One member stated that debtors are already required to disclose payments to law firms concerning debt consolidation or bankruptcy in the one year prior to the bankruptcy filing in the Statement of Financial Affairs. He said it is easier for the attorney who gets the case to disclose all payments rather than trying to characterize them one way or another. Another member described the proposal as a means of protecting the debtor and said that he did not see a conflict with section 329 of the Code. He said the fact of a fee or representation generally is not a matter of privilege although there might be a privacy question. The Reporter stated that any fee recovered from the attorney would generally go to the bankruptcy estate, so the protection of the debtor against an overcharge is a side benefit.

One member stated that since the goal is to ferret out facts, maybe it would be better to ask the question at the meeting of creditors. Ms. Davis said the gist of the proposal is to make the standard for disclosure more objective so that attorneys know what to disclose. She said the attorney should not be the sole arbiter of whether the disclosure is required. **A motion to table the proposed amendment carried with one dissenting vote.**

Rule 7001 and Objections to Discharge. In 2003 the EOUST proposed that Rule 7001(4) be amended to permit a proceeding to object to or revoke the debtor's discharge under the provisions of section 727(a)(8) or section 727(a)(9) of the Code to be brought by motion. The proposal was discussed at the September 2003 meeting and was referred to the Subcommittee on Consumer Issues, which recommended that the Committee take no action on the matter. Mr. Friedman said the proposal stemmed from an effort to streamline the process. If the debtor is not entitled to a discharge, he asked, why should the rules require an adversary proceeding, a discovery conference, and, ultimately, a motion for summary judgment?

The Reporter stated that an objection under section 727(a)(8) based on a previous chapter 7 or chapter 11 discharge is an easy matter but that a section 727(a)(9) objection based on a previous discharge in chapter 12 or chapter 13 is more complicated. He stated that receiving a summons and complaint has a greater impact on the debtor than receiving a motion. A member suggested that the clerk would know if the debtor is not entitled to a discharge because of repeat filings. Another member said the debtor might not be the same person as the debtor in the earlier case. If the debtor is the same person, he said, the adversary proceeding should not be complicated. A third member said that, if no one objected to the discharge of a repeat filer, Rule 4004(c) would appear to require that the clerk issue the discharge. **Judge Walker's motion to make no change in the rule carried without dissent.**

Schedule I. The EOUST also had proposed that Schedule I of Official Form 6 be amended to include the income of non-filing spouses in chapter 7 cases, as is already the case in chapter 12 and chapter 13 cases. The Committee approved the request at its September 2003 meeting but did not approve a Committee Note for the proposed amendment. Ms. Ketchum stated that many questions on the Statement of Financial Affairs also ask for information about a non-filing spouse of a married debtor in chapter 12 or chapter 13. She asked the Committee to consider whether information about the non-filing spouse of a chapter 7 debtor should be requested on Schedule I but not on the Statement of Financial Affairs and why the information should be requested in chapter 7 cases but not in chapter 11 cases.

Professor Resnick stated that the EOUST just asked for help in determining whether to file a section 707(b) motion. Mr. Friedman said the parties in a chapter 11 case are more litigious and request more information, so there is less need to require the information on the schedule. He said Schedule I is the one place to look for section 707(b) information, so there is no need to ask the question on the Statement of Affairs. Ms. Davis said Schedule I is used as a red flag where the United States trustee starts its inquiry. Judge Klein suggested that the Committee consider revising the Statement of Financial Affairs. **The Chairman said revision of the Statement of Financial Affairs would be included on the agenda for the September meeting.** The Chairman said the last sentence of the proposed Committee Note should be deleted because the proposed amendment to Schedule I only covers chapter 7 cases.

Professor Resnick suggested revising the Committee Note to state that the information would help the United States trustee in jurisdictions where a non-filing spouse's income is considered relevant to determination of a section 707(b) motion. Ms. Davis said the information also could be used to determine the dischargeability of a student loan in a hardship case. Mr. Shaffer suggested that the Committee Note state that the relevancy of the information for section 707(b) litigation is beyond the scope of these rules.

The Reporter submitted a revised draft of the proposed Committee Note which stated that the information may be relevant to section 707(b) of the Code or other financial determinations, but that the relevance of any particular information is a matter of substantive law and is beyond the scope of the rules. **After striking "of any particular information," creating two sentences from the proposed single sentence, and inserting "to 707(b) or other determinations" in the new final sentence, the Committee approved the proposed Committee Note for publication.**

Rule 3007 Objections to Claims. Rule 3007 governs objections to claims. In most instances, a party in interest files an objection to claim, and the matter proceeds as a contested matter under Rule 9014. If, however, an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, Rule 3007 provides that the matter becomes an adversary proceeding. The rule does not, however, provide any direction as to the consequences of this transformation. Judge Klein told the Committee at the September 2003 meeting that there is confusion in the courts as to whether a separate adversary proceeding must be filed. The Committee directed the Reporter to draft an amendment to clarify the provision. The Reporter

presented a draft amendment which provided that if an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, the action becomes an adversary proceeding, the objection is deemed to be a complaint, and all of the 7000 rules apply. The Reporter said this would allow the action to go forward under the appropriate set of rules rather then requiring a new start.

Judge Klein recommended not going forward with the proposed amendment because it might change the status quo, particularly as to issue preclusion and claims preclusion. He stated that, if the trustee does not object to a claim, the trustee might be precluded from filing an adversary proceeding concerning the claim. A member suggested providing that if an objection includes a demand for relief of the kind specified in Rule 7001, it must be brought as an adversary proceeding. The Reporter stated that there has been concern that the court would go through the entire process of considering an objection to claim and then a party would assert that the court should start over because the objection should have been an adversary proceeding. A member said the party may have waived the issue by waiting so long to raise it.

Judge Montali suggested that an objection to claim could be viewed as a counterclaim since it is a response to the claim. The Reporter said a problem often arises when the trustee objects to a claim without filing a complaint, and the creditor defaults. Judge Klein said objections to claim are often filed in bulk and many are resolved by default. A member said the problem is who stands up and says this is an adversary proceeding. Another member said he did not like the proposed draft because the party responding to the objection to claim shouldn't have to raise the adversary proceeding issue.

One member suggested stating that a demand for relief of the kind specified in Rule 7001, must be brought as an adversary proceeding. Others suggested separating the objection to claim and the Rule 7001 relief, and treating them as two proceedings. Judge Walker said sloppy drafting might result in an unopposed objection to claim being denied because it should have been brought as an adversary proceeding. **The Committee agreed to refer the proposal for further study. The Chairman referred the matter to the Subcommittee on Attorney Conduct and Health Care.**

Rules 7054 and 7023, Costs and Class Proceedings. Rule 7054 incorporates the provisions of Civil Rule 54(a) - (c). The provisions of Civil Rule 54(d) are not included because Rule 7054(b) has its own provisions for costs. Effective December 1, 2003, however, Civil Rule 23 was amended to add new subdivisions (g) and (h). Rule 23(h) provides for the award of attorney fees in class actions, including Rule 54(d)(2) motions and references to a special master or magistrate judge under Rule 54(d)(2)(D). Because Rule 7023 incorporates all of Rule 23, the new Rule 23(h) seems to apply to the award of fees in adversary proceedings, including the two provisions of Rule 54(d).

The Reporter presented drafts of two proposed amendments. The draft amendment to Rule 7054 provided that, except as provided in Rule 7023, Civil Rule 54(d) does not apply in an

adversary proceeding. The draft amendment to Rule 7023 provided that Civil Rule 23 applies in adversary proceedings with the exception of subdivision (h)(4) of the Civil Rule. That subdivision provides for referring attorney fee awards to a magistrate judge or a special master, which is prohibited by Rule 9031. Professor Resnick said he preferred the latter approach because it would not authorize the reference of bankruptcy matters to a special master or magistrate judge but would incorporate the other provisions for costs and attorney fees. The Committee discussed either excluding all of the provisions of Rule 23(h) or excluding the provisions of Rule 23(h)(4) and providing that costs cannot be taxed to the estate. **The Chairman referred the matter to the Subcommittee on Business Matters for a recommendation at the September meeting.** The Chairman stated that the proposed amendment might be a technical one which would not require publication.

Rule 7005.1 Certification of Constitutional Questions. Civil Rule 24(c) currently sets the procedure when a party challenges the constitutionality of a federal or state statute. The provisions of Rule 24 are incorporated by Rule 7024. A proposed new Civil Rule 5.1 which would replace a portion of Rule 24(c) was published for comment in August 2003. The Reporter stated that the reference to Rule 24(c) would no longer work and that the new provision also should apply to contested matters.

The Reporter presented a draft of a new Rule 7005.1, which provided that the court shall set a time of not less than 35 days from the Rule 5.1(b) certification for intervention by the Attorney General or the State Attorney General. Mr. Kohn stated that the federal government needs a minimum of 60 days to intervene because of the need to work with counsel for the affected agency, to get internal authorization to participate in the case, and to brief the issues. He said state governments might need even more time to intervene in out-of-state cases. The Committee discussed the court's discretion to give the government additional time to intervene, what would happen if the court proceeded without government intervention, and whether the government would be precluded from intervening later. Mr. Kohn said the Attorney General sometimes writes the court, declining to intervene, and citing case law that the constitutional challenge is frivolous.

The Committee agreed to delete paragraph (b) of the Reporter's proposed amendment, which provided that the government has not less than 35 days to intervene. The Committee discussed whether the proposed rule should apply in contested matters. Professor Resnick stated that the proposed amendment could be considered a technical amendment which does not require publication if, like the existing rule, it does not automatically apply in contested matters. The Chairman stated that the court has a duty under 28 U.S.C. § 2403 to certify constitutional challenges to the Attorney General of the United States or the attorney general of the state. **Professor Resnick's motion to approve a new Rule 7005.1 which incorporates all of proposed Civil Rule 5.1 and applies only in adversary proceedings carried without dissent. The Committee agreed that this would be a technical amendment which would not require publication and could take effect on December 1, 2005, the same time as the proposed Civil Rule.**

Revision of Form 10. The Administrative Office's Bankruptcy CM/ECF Working Group has proposed revising Official Bankruptcy Form 10, Proof of Claim, and creating a new Director's Procedural Form, Notice of Transfer of Claim. The Working Group's Claims Processing Subcommittee prepared the proposal with help from trustees, large creditors, clerks, and judges in an effort to define electronic claims information; facilitate electronic filing of claims by national, high volume creditors; and make it easier for creditors, the courts, and trustees to process claims electronically. The claims group indicated that, in the future, large creditors would file their claims as a stream of electronic data transmitted to the court or to a contractor functioning as a national portal which would process the information for the court.

Several Committee members questioned whether a proof of claim filed without documentation constitutes prima facie evidence of the validity and amount of the claim, as specified in Rule 3001(f). One member noted that the documentation could be scanned and filed as an attachment to a claim filed electronically. Another member expressed concern about the statement in box 7 that redacted pages from security documents should be attached to the claim because the revised form did not specify how the redaction should be made. The Committee discussed the deletion of the question "Date debt was incurred" from box 2 on the existing form.

Director's Procedural Forms do not require approval by the Committee but Ms. Ketchum said the Administrative Office would welcome the Committee's input on the proposed notice form. Judge McFeeley stated that the claims group developed the Director's Form to make it easier for clerks to notify alleged claims transferors, as required by Rule 3001(e)(2). The alleged transferee would submit a partially completed notice along with evidence of the transfer. Then the clerk would transmit the completed notice to the alleged transferor.

Mr. Waldron stated that the clerk should use the transferor's address in the court's computer system rather than relying on the transferee to provide the address in the notice, which could facilitate fraud. Professor Resnick stated that the reference to the unconditional sale and transfer of the claim should be deleted from the first paragraph of the proposed form because Rule 3001(e) is not limited to unconditional transfers. Mr. Frank suggested that the title of the form include "Deadline for Objections" in large type. **The proposed amendment to Official Form 10 and new procedural form were referred to the Subcommittee on Forms for review. The Subcommittee also will review proposed changes to the Instructions, the policy issue of how much information should be attached to the Proof of Claim, and the impact of the E-Government Act.**

An attorney in the Bankruptcy Judges Division, newly hired from private practice, has suggested amending page 2 of Official Form 10 to help eliminate confusion over what is meant by the words "replace" and "amends" in connection with a previously filed claim. **Because one of the recommendations by the CM/ECF Working Group would affect the same section of the Official Form, this suggestion was referred to the Subcommittee on Forms for review in conjunction with the other recommendations.**

Privacy Amendments to Forms 10, 16D, and 17. Ms. Ketchum stated that since the privacy-related amendments took effect on December 1, 2003, it has come to her attention that there are three Official Forms that require conforming amendments. The three forms are Form 10, Proof of Claim; Form 16D, Caption for Use in Adversary Proceeding Other than for a Complaint Filed by a Debtor; and Form 17, Notice of Appeal.

As amended in December 2003, Form 10 provides that a wage claimant disclose only the last four digits of the claimant's Social Security number. Court personnel, however, have pointed out that there is not a similar limitation on the "Account or other number by which creditor identifies debtor." With the abrogation of Form 16C, Caption of Complaint in Adversary Proceeding Filed by a Debtor, in December 2003, it is not appropriate to continue to use the phrase "other than for a complaint filed by a debtor." In addition, the cross-reference in the note should be changed from the abrogated Form 16C to Form 16A. The cross-reference to Form 16C also should be removed from the directions on the caption to use for Form 17.

Mr. Adelman suggested revising the instructions for Form 16D to require the last four digits of the debtor's Social Security number, instead of the full number. Judge Klein suggested deleting the reference to section 158(b) from Form 17. As all of the amendments are conforming ones, the proposals could be forwarded to the Standing Committee and the Judicial Conference without publication for comment. **A motion to approve the recommended changes carried without objection. The proposed amendments to Forms 16D and 17 will be submitted to Standing Committee for approval at its June meeting. The proposed amendment to Form 10 will be submitted to the Standing Committee after the Subcommittee on Forms has reviewed the other proposed changes in the Proof of Claim.**

Information Items

Bankruptcy Abuse Prevention and Consumer Protection Act of 2004. Mr. Rabiej reported that the bill, which passed the House of Representatives on January 28, 2004, is still pending in the Senate.

Restyling the Civil Rules. Professor Resnick stated that he had made a quick review of the proposed revisions and that the only ones which would affect the Bankruptcy Rules appeared to be changes in section numbers and subsection numbers. He stated that these changes would be technical amendments and that he saw no reason not to incorporate the revisions in the Bankruptcy Rules.

E-Government Act. The Reporter discussed the first meeting of the Standing Committee's E-Government Subcommittee, which is coordinating the efforts the various advisory committees with respect to the requirement in the E-Government Act of 2002, Pub. L. 107-347, for rules protecting privacy and security concerns. A rules template has been prepared which will form the basis of the Civil Rule. The Reporter stated that the only real question about

using the same rule in bankruptcy is the requirement that only the city and state be specified for home addresses. The Committee discussed the use of the debtor's home address in bankruptcy cases, including motions for relief from the automatic stay. One member stated that any materials filed with the court, including checks and correspondence, would have to be redacted in order to protect home addresses.

The Chairman stated that the current plan is for this Committee to adopt a rule that incorporates the Civil Rule, with modifications reflecting the special needs of the bankruptcy system. **The Chairman stated that he would communicate this to the chair of the Civil Rules Committee, which meets in April, and that this Committee could discuss any action taken by the Civil Rules Committee at its meeting in September.** Mr. Rabiej suggested that Committee members consider the template as a concept and that they give their comments to the Reporter for discussion at the spring meeting.

FJC Study of Mandatory Disclosure under Civil Rule 26. Mr. Niemic discussed the results of the FJC study of whether certain types of adversary proceedings should be exempted by rule from the mandatory disclosure provisions of Rule 7026 and Civil Rule 26. Mr. Niemic stated that the judges' responses to the survey suggested that the Committee may wish to consider the presumptive exemption (with exceptions) of several types of adversary proceedings including proceedings to obtain approval for the sale of property of the estate and a co-owner, to compel the turnover of property of the estate, to obtain injunctive relief or to reinstate the automatic stay, and to determine the dischargeability of debts for support and alimony. **The Chairman referred the study to the Subcommittee on Privacy, Public Access, and Appeals and asked that the Subcommittee make a report with recommendations at the September meeting.**

Electronic Discovery Conference. Professor Resnick and Judge McFeeley reported on the conference on electronic discovery sponsored by the Civil Rules Committee on February 20-21, 2004, at Fordham University School of Law. Professor Resnick said it is amazing what is retained on computers and how difficult it is to delete the information without destroying the machine. Judge McFeeley said the discussion was fascinating and that many of the problems raised will be very difficult to solve. He said big companies are sued almost daily and, as a result, must preserve electronic information at a high cost.

Other Information Matters. The other Information Items are set out in the agenda materials for the meeting.

Administrative Matters

The Committee's next scheduled meeting will be at the Ritz-Carlton Hotel, Half-Moon Bay, CA, on September 9-10, 2004. The Committee discussed several locations as possible sites of the spring 2005, meeting, including Savannah, GA, Point Clear, AL, Ft. Myers, FL, and South

Florida generally. March 10-11 are the most likely dates. The Chairman asked Committee members to send him their ideas.

Respectfully submitted,

James H. Wannamaker, III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 17-18, 2004
Washington, D.C.
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 17-18, 2004. All the members were present:

Judge David F. Levi, Chair
David J. Beck, Esquire
David M. Bernick, Esquire
Charles J. Cooper, Esquire
Judge Sidney A. Fitzwater
Judge Harris L Hartz
Dean Mary Kay Kane
Judge Mark R. Kravitz
Associate Attorney General Robert D. McCallum
Patrick F. McCartan, Esquire
Judge J. Garvan Murtha
Judge Thomas W. Thrash, Jr.
Justice Charles Talley Wells

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee and Assistant Director of the Administrative Office of the U.S. Courts; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office; James N. Ishida and Robert P. Deyling, senior attorneys in the Office of Judges Programs of the Administrative Office; Professor Steven Gensler, Supreme Court Fellow with the Administrative Office; Brooke D. Coleman, law clerk to Judge Levi; Joe Cecil of the Research Division of the Federal Judicial Center; and Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr., consultants to the committee.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Samuel A. Alito, Jr., Chair
Professor Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge A. Thomas Small, Chair
Professor Jeffrey W. Morris, Reporter
Advisory Committee on Civil Rules —
Judge Lee H. Rosenthal, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Edward E. Carnes, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Jerry E. Smith, Chair
Professor Daniel J. Capra, Reporter

Also taking part in the meeting on behalf of the Department of Justice was John S. Davis, Associate Deputy Attorney General.

INTRODUCTORY REMARKS

Judge Levi reported that no major amendments to the rules were scheduled to take effect on December 1, 2004. He noted that the Supreme Court had recommitted the proposed amendment to FED. R. EVID. 804(b)(3) — governing the hearsay exception for statements against penal interest — in light of its recent decision in *Crawford v. Washington.* In *Crawford,* the Court substantially revised its Confrontation Clause jurisprudence, thus making the proposed rule amendment inappropriate. He added that the Advisory Committee on Evidence Rules had decided to defer consideration of any

hearsay exception amendments until adequate case law develops to determine the meaning and implications of the *Crawford* case.

Judge Levi pointed out that the federal courts were facing a severe budget crisis that could result in substantial layoffs and furloughs of court staff. He explained that it was important for the committee to consider its rules decisions in the light of their impact on the resources of the courts. He noted that amendments have been proposed to the bankruptcy rules that could save the courts more than a million dollars in postage and handling costs by facilitating electronic notices and use of the national Bankruptcy Noticing Center. He explained that the committee would be asked to expedite the rulemaking process to achieve the anticipated savings earlier.

Judge Levi said that the project to restyle the civil rules was achieving excellent progress. The Style Subcommittee, he noted, had now reached the landmark of having completed a first draft of all 86 rules.

Judge Levi reported that the E-Government Subcommittee had met the day before the committee meeting to refine the guidance that it would provide the advisory committees in drafting rules amendments to implement the E-Government Act of 2002. The statute requires that rules be promulgated under the Rules Enabling Act to protect privacy and security concerns implicated by posting court case files on the Internet.

Judge Levi noted that the Court Administration and Case Management Committee had been working diligently on privacy and security issues for three years and had offered constructive comments on the latest proposed guidance to the advisory committee. He added that the E-Government Subcommittee had made a great deal of progress at its meeting in addressing a number of difficult policy and practical questions raised when court documents that had been practically obscure in the past are now posted on the Internet. He observed that there will likely have to be some differences in detail among the amendments proposed by the advisory committees. The bankruptcy rules, he noted, will be the most affected by privacy concerns because of the heavy use of social security numbers in bankruptcy cases.

Judge Levi reported that he attends most of the meetings of the advisory committees. Each committee, he observed, has a different personality, reflecting in part the style of its chair and reporter and the role of the Department of Justice. He emphasized that the rules process is blessed with great chairs and reporters, and the work product of the committees is truly outstanding.

Judge Levi noted that the Chief Justice had extended Judge Alito's term as chair of the Advisory Committee on Appellate Rules for an additional year. He also reported that Judge Susan Bucklew had been selected to replace Judge Carnes as chair of the Advisory Committee on Criminal Rules and Judge Thomas Zilly had been selected to replace Judge

Small as chair of the Advisory Committee on Bankruptcy Rules. He said that Judge Carnes and Judge Small had been outstanding and successful committee chairs, and they would be sorely missed. He also reported that the Standing Committee would greatly miss the important contributions of two of its distinguished lawyer members whose terms are about to expire — Charles Cooper and Patrick McCartan. Finally, Judge Levi emphasized that one of the highlights of his legal career had been to work closely with Professor Cooper as reporter to the Advisory Committee on Civil Rules.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 15-16, 2004.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported that the Administrative Office was monitoring 34 bills introduced in the 108th Congress that would affect the federal rules.

He noted that legislation was still pending, proposed by the bail bond industry, that would directly amend the Federal Rules of Criminal Procedure and limit the authority of a judge to forfeit a bond. He said that the bill had been reported out by the House Judiciary Committee, but was opposed by the Judicial Conference. The legislation, he said, had not reached the House floor, thanks to efforts by the Administrative Office and the Department of Justice. He added that: (1) there had been recent communications with representatives of the bail bond industry, but the industry had not changed its essential position; and (2) there has been no action on the bill in the Senate.

Mr. Rabiej noted that legislation sponsored jointly by the Judicial Conference and the Department of Justice should be be enacted shortly to amend the E-Government Act. Under the present law, a party has the right to file an unredacted version of a document under seal with the court. In accordance with the revised E-Government Act, the public file would contain only a redacted version of the document or a reference list identifying redacted information accessible only to the parties and the court. He added that the E-Government Subcommittee and the advisory committees are now implementing the rulemaking requirements of the Act.

Mr. Rabiej reported that the Class Action Fairness Act was expected to be brought to the Senate floor for debate sometime in June.

He noted that comprehensive crime victims' rights legislation had passed the Senate in April 2004 on a 96-1 vote. It would give criminal victims a broad array of rights in such areas as protection against the accused, notice of proceedings, being heard at court proceedings, conferring with prosecutors, and receiving restitution. He added that the legislation was expected to pass the House of Representatives, but the chair of the House Judiciary Committee appeared to be holding up the legislation for tactical reasons.

Mr. Rabiej said that the crime victims legislation will have an impact on the criminal rules. He explained that the Advisory Committee on Criminal Rules had a separate proposal ready for final approval that would amend FED. R. CRIM. P. 32 to extend the right of allocution to victims of all crimes, not just victims of violence or sexual abuse.

Mr. Rabiej reported that two more bills had been introduced in the preceeding week that appeared to be moving quickly through the legislative process. First, he said, a hearing would be held within a week on H.R. 4547, a bill designed to protect children from drug violence. He noted that it would directly amend FED. R. CRIM. P. 11 to impose additional conditions on a court before it may accept a plea agreement. The second new bill (H.R. 4571), designed to limit "frivolous filings," would directly amend FED. R. CIV. P. 11 by mandating that a judge impose sanctions for a violation of the rule.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil pointed out that the agenda book for the committee meeting contained a status report on the educational and research projects of the Federal Judicial Center. (Agenda Item 4)

He reported that the Center was completing work on developing a new weighted caseload formula for the district courts. He explained that the study had been completed without requiring judges to keep detailed diaries of their daily activities.

Mr. Cecil noted that the Center had also completed a report comparing class actions in the federal and state courts. Among other things, the report addresses why attorneys bring cases in one court system rather than the other and finds few differences between federal and state judges and cases. Finally, he pointed to a new Center report on sealed court settlements. One of the findings of the report is that only 1 of every 227 civil cases in the federal courts contains a sealed settlement.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Alito and Professor Schiltz presented the report of the advisory committee, as set forth in Judge Alito's memorandum and attachments of May 14, 2004. (Agenda Item 6)

Amendments for Final Approval

FED. R. APP. P. 4(a)(6)

Judge Alito said that the proposed amendments to Rule 4(a)(6) (reopening the time to file an appeal) provides an avenue of relief for parties who fail to file a timely appeal because they have not received notice of the entry of judgment against them. The amendment allows a court to reopen the time to appeal if certain conditions are met. First, the court must find that the party did not receive notice of the judgment within 21 days after entry. Second, the party must move to reopen the time to appeal within 7 days after receiving notice of the entry of judgment. And third, the party must move to reopen within 180 after entry of the judgment.

Judge Alito pointed out that use of the word "notice," appearing twice in the rule, has been unclear. Most courts have interpreted the existing rule as requiring that the type of notice required to trigger the 7-day period to reopen be written notice. Others, though, have included other types of communications. The proposed amendment, he said, offers a clear solution by specifying that notice must be the formal clerk's office notice required under FED. R. CIV. P. 77(d).

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 26(a)(4) and 45(a)(2)

Judge Alito stated that the proposed amendments to Rule 26 (computing time) and 45 (when court is open) would replace the incorrect phrase "President' Day" with "Washington Birthday," the official, statutory name of the holiday.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 27(d)(1)(E)

Judge Alito explained that Rule 32 (form of briefs) sets out typeface and type-style requirements. But Rule 27, which specifies the requirements for motions, does not. The proposed amendment would add a new Subdivision (E) to Rule 27(d)(1) to make it clear

that the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) apply to motions papers.

Judge Alito said that the proposed amendment had received support during the public comment period, although one comment suggested increasing the number of words allowed in motions. He said that there was also some sentiment to express the length limits in terms of words, rather than pages. But, he explained, clerks of court favor a page limit because it is much easier to verify.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. APP. P. 28(c) & (h), 28.1, 32(a)(7)(C), and 34(d)

Judge Alito reported that the current rules say very little about briefing in cases involving cross-appeals. As a result, local rules fill in the gaps with procedural guidance. The advisory committee, he said, recommended moving the few provisions in the current national rules addressing cross-appeals into a new Rule 28.1 and adding several new provisions to fill the gaps in the existing rules. The new Rule 28.1 (cross-appeals) would parallel Rule 28 (briefs). In addition, conforming amendments would be made to Rule 28(c) (briefs), 32(a)(7)(C) (certificate of compliance), and 34(d) (oral argument).

The provisions of the new rule, he said, follow the local rules of every circuit save one. They would authorize four briefs and specify their lengths and colors. (1) The appellant's principal brief would be limited to 14,000 words. (2) The appellee's combined response brief and cross-appeal principal brief would be limited to 16,500 words. (3) The appellant's response and reply brief would be limited to 14,000 words. (4) Finally, the appellees's reply brief would be limited to 7,000 words.

Judge Alito said that the lawyers who had commented on the proposal uniformly had recommended higher word limits, while the judges who had commented wanted fewer words. Professor Schiltz added that the local rules of the circuits generally prescribe word limits of 14,000, 14,000, 14,000, and 7,000 for the four briefs. The advisory committee, he said, had decided to increase the second brief to 16,500 words because it serves two functions — responding to the appellant's principal brief and initiating the principal brief in the cross-appeal.

Several members said that the advisory committee's proposal to authorize an additional 2,500 words for the second brief was a sound compromise that should accommodate most cases and result in fewer motions by attorneys seeking word extensions.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. APP. P. 32.1

Judge Alito reported that the the proposed new Rule 32.1 (citing judicial dispositions) had attracted more than 500 public comments.

He noted that the proposed rule enjoyed the support of the major bar associations. It would equalize the treatment of unpublished opinions with other types of non-precedential materials presented to the courts of appeals. The rule, he emphasized, would merely prevent a court of appeals from prohibiting the citation of unpublished opinions. It would not require a court to give unpublished opinions any weight or precedential value, or even to pay any attention to them. It would just allow the parties to cite them. He said that prohibiting the citation of court opinions undermines confidence in the courts of appeals and the judiciary. It implies that there is something second-class about unpublished opinions. The practice, he said, is very difficult to explain to lay people and most practitioners.

On the other hand, he pointed out, opponents of the rule claim that it will have an adverse impact on judges because they will have to spend more of their limited time on crafting unpublished opinions. This, it is claimed, would both detract from the quality of judges' published opinions and lead to the issuance of more one-sentence orders. He noted, too, that opponents of the rule assert that it will inevitably require lawyers to take the time to read unpublished opinions and increase expenses for their clients.

Judge Alito emphasized that the advisory committee had taken the adverse comments very seriously, but it had concluded that there is simply no empirical support for them. He noted that a number of the federal circuits currently permit citation of unpublished opinions. The committee, he said, had not received any comments from judges on the courts allowing citation that the practice has increased their work. Moreover, he added, the trend at both the federal and state levels is moving away from non-citation rules.

Judge Alito said that, as a result of the public comments, the advisory committee had deleted from the proposed rule a clause that would have prohibited a court of appeals from prohibiting or restricting citation of unpublished opinions "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispostions."

Judge Levi observed that the sheer size of the body of comments was daunting, even though many of the comments seemed to copy each other. He congratulated Professor Schiltz for a superb job in summarizing the comments.

One of the members suggested that the key issue was not citation, but the status of unpublished opinions. He pointed out that the committee note refers to unpublished opinions as "official actions" of the court. But, he noted, they are commonly crafted by law clerks and only endorsed by judges. They do not receive the same scrutiny as published opinions and clearly do not represent the views of the full court. The proposed rule, he said, would elevate unpublished opinions into actions of the court and give them a status that they do not presently have. He recommended that the proposal be deferred and the circuits be given time to issue their own rules addressing the contents and effect of unpublished opinions. He added that this approach would promote transparency, for the circuits would articulate what they are doing with regard to unpublished opinions.

One lawyer-member suggested that local non-citation rules pose a serious perception problem for the courts of appeals. He said that it is difficult to explain to a client that a court has decided a similar case in the recent past, but the case cannot be cited to the same court. He added that, regardless of precedential value, an unpublished opinion is in fact an official disposition by a government body.

Two members pointed out that the proposed rule had given rise to concern among state-court leadership as to the use by the federal courts of unpublished state-court opinions. For example, a federal court applying the doctrine in *Erie R.R. Co. v. Tompkins* might cite an unpublished state-court opinion as establishing binding state law in a way that the opinion was not intended to be used. Judge Alito responded that the advisory committee's deliberations had focused on citing a federal circuit court's own decisions, not on citing state-court opinions. Moreover, he said, the rule does not address what weight is to be given to unpublished opinions. He added, though, that he would not object to amending the rule to limit its application specifically to federal opinions.

One participant pointed out that unpublished opinions are widely available today, and the circuits are free to give them precedence or not, as they see fit. He argued that lawyers should be free to call a court's attention to cases decided by their colleagues that have similar facts and issues. Other panels of the court, he said, should be made aware of what one panel has done with a similar pattern of facts, particularly in sentencing guideline cases. He added that it would be beneficial for courts to look at their unpublished opinions as part of their efforts to achieve consistency and reliability in circuit case law.

One member observed that there are very strong arguments on both sides of the issue, but on balance he favored allowing the courts of appeals to continue their non-

citation policies. He said that the adverse consequences predicted by opponents of the rule might well come to pass. He emphasized the vital need for courts to have a two-tiered opinion system because some cases simply do not deserve the same time and attention as others. He also said that he was not convinced that it is appropriate to compare unpublished opinions of a court of appeals with other types of nonprecedential materials cited to the court. Unpublished opinions, he said, inevitably carry far more weight with the lawyers and the court because they have been signed off on by three judges of the deciding court.

One member noted that he had been struck by how strongly a number of judges feel about the issue. He said that the arguments on both sides appear to be empirical in nature, but they are essentially not provable at this point. He stressed the need for empirical research and suggested that the committee not be put in the position of accepting one side of the argument and rejecting the other without further data. He argued that appropriate research would focus on the practices and results in those circuits that allow citation of unpublished opinions. He conjectured that it should be possible to obtain good empirical data because several circuits now allow citation.

Judge Levi said that he agreed and had spoken with the Federal Judicial Center about what shape an empirical study might take. He emphasized that the proposed rule was very controversial. And in dealing with controversial matters, he said, the rules committees have consistently sought strong empirical support for proposed amendments. In this case, he noted, nine circuits now allow citation of unpublished opinions, and four do not. Researchers, for example, could examine the courts that allow citation to see whether disposition times have lengthened or the number of judgment orders has increased. In addition, judges and lawyers might be surveyed to examine the practical impact of citation policy on their work. Lawyers might be surveyed to examine whether citation policy affects the costs of legal practice. Attention might also be directed to the four circuits that prohibit citation to see whether there are any special conditions in those circuits that make them different.

Judge Levi added that it would be seek to proceed to the Judicial Conference's approval at this time of the proposed new rule without appropriate empirical data. Obtaining the data would better inform the committee and take much of the passion out of the debate. If the data turn out to support the proposed rule, he said, the committee would be in a much better position to secure Conference approval.

Several participants endorsed Judge Levi's approach, citing the great sensitivity of the issue among circuit judges, the need for a period of reflection, and the value of gathering whatever empirical data can be produced. One member added that there were powerful arguments in favor of the proposed amendment, but it would be a mistake institutionally to go forward with a rule that has generated so much opposition. He said

that, as a matter of basic policy, the committee should proceed with a controversial proposal only if: (1) there is a compelling need for the rule; and (2) the committee is convinced that the opposition is clearly wrong. Other participants endorsed this analysis, emphasizing the need for empirical information and institutional restraint. They added that a year's delay for study would not cause any harm and may even lead some opponents to reassess their positions.

Judge Alito agreed that a study would be helpful, especially since opposition to the rule was based largely on empirical observations. Mr. Cecil added that the Research Division of the Federal Judicial Center was prepared to conduct the research. He cautioned, however, that the results of the study may not in fact solve the committee's problems. The key issue, he said, is how judges perform their work in chambers. That, he said, is a matter of utmost sensitivity.

Judge Kravitz moved to have the committee take no action on the proposed new Rule 32.1 and return it to the advisory committee, with the expectation that the advisory committee will work with the Federal Judicial Center to conduct appropriate empirical studies. The studies, for example, would explore the practical experience in the circuits that have adopted local rules allowing citation of unpublished opinions. The advisory committee would then have the discretion to make a fresh decision on the matter and return to the standing committee with a proposal, or not.

One member asked that the record reflect that the committee's discussion of the matter and its returning the rule to the advisory committee did not reflect a judgment by the Standing Committee on the merits of the proposal. Rather, he said, the committee's concerns were directed purely to instutional values and the rulemaking process. Judge Kravitz agreed to the clarification.

One member added that the advisory committee should take advantage of the delay to explore the impact of the rule on citing unpublished state-court opinions.

The committee without objection approved Judge Kravitz's motion by voice vote. Therefore, it decided to take no action on the proposed new Rule 32.1, return it to the advisory committee, and recommend that appropriate empirical study be undertaken.

FED. R. APP. P. 35(a)

Judge Alito reported that Rule 35(a) (en banc determination) and 28 U.S.C. § 46(c) both specify that "a majority of the circuit judges who are in regular active service" may order that an appeal or other proceeding be heard or reheard en banc. Although the standard applies to all the courts of appeals, he said, the circuits are divided in

interpreting the provision when one or more active judges are disqualified in a particular case. Seven circuits follow the "absolute majority" approach, counting disqualified judges in the base to calculate a majority. Six circuits follow the "case majority" approach, requiring a majority only of the active judges who are not recused.

Judge Alito emphasized that the advisory committee believes that whatever the rule means, it should mean the same all across the country. There is no principled basis, he said, for having different interpretations of the same rule. The primary objective of the proposed amendment, thus, was to promote national uniformity. The advisory committee, he said, believed that the better interpretation is the case majority approach because it is most consistent with what Congress must have intended in enacting the statute. He noted that 28 U.S.C. § 46(c) uses the phrase "circuit judges . . . in regular active service" twice. In the second sentence, the phrase clearly does not include disqualified judges, since disqualified judges obviously cannot participate in a case heard en banc. The proposed amendment to Rule 35(a), he added, was not meant to alter or affect the quorum requirement of 28 U.S.C. § 46(d).

The committee without objection approved the proposed amendment for final approval by voice vote.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Small and Professor Morris presented the report of the advisory committee, as set forth in Judge Small's memorandum and attachments of May 17, 2004. (Agenda Item 7)

Amendments for Final Approval

FED. R. BANKR. P. 1007

Judge Small reported that the proposed amendment to Rule 1007 (lists, schedules, and statements) would require a debtor to file a mailing matrix with the court, a practice now required universally by local court rules. The matrix must include the names and addresses of all entities listed on Schedules D-H, including holders of executory contracts and unexpired leases.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 3004 and 3005

Judge Small explained that the proposed amendments to Rules 3004 (filing of claims by a debtor or trustee) and 3005 (filing of a claim, acceptance, or rejection by codebtor) deal with the situation where an entity other than the creditor files a proof of claim. The amendments to Rule 3004 make it clear that the third party may not file a proof of claim until the exclusive time has expired for the creditor to file its own proof of claim. In addition, FED. R. BANKR. P. 3005 would no longer permit the creditor to file a proof of claim to supersede the claim filed by the debtor or trustee. Instead, the creditor could amend the proof of claim filed by the debtor or trustee. The changes would make the rules consistent with § 501(c) of the Bankruptcy Code.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. BANKR. P. 4008

Judge Small reported that Rule 4008 (reaffirmation agreement) would be amended to establish a deadline of 30 days after entry of the order of discharge to file a reaffirmation agreement with the court. He said that some public comments had recommended a shorter period, and the advisory committee had considered a deadline of 10 days following discharge. But, he explained, the shorter time limit would not be practical because it takes several days for the the noticing center to process and distribute discharge notices.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 7004

Judge Small reported that the proposed amendment to Rule 7004 (process and service) would authorize the clerk of court to sign, seal, and issue a summons electronically. He noted that the rule does not address the service requirements for a summons, which are set out elsewhere in Rule 7004.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. BANKR. P. 9006

Judge Small stated that Rule 9006 (time) would be amended to remove any doubt that the additional three-day period given a responding party to act when service is made

on the party by specified means — by mail, by leaving it with the clerk, by electronic means, or by other means consented to by the party served — are added after a rule's prescribed period to act expires.

The committee considered and approved the proposed amendment to Rule 9006 in conjunction with a proposed parallel amendment to FED. R. CIV. P. 6(e).

The committee without objection approved the proposed amendment for final approval by voice vote.

OFFICIAL FORMS 6-G, 16-D, and 17

Judge Small reported that the proposed amendments to the forms had not been published because they were technical in nature. The change to Form 6-G is required to conform the form to the proposed amendment to Rule 1007, and the revisions to Forms 16-D and 17 reflect the abrogation of Official Form 16-C in 2003. He asked that: (1) the changes to Form 16-D and 17 take effect on December 1, 2004; and (2) the change to Form 6-G take effect on December 1, 2005, to coincide with the effective date of the proposed amendments to Rule 1007.

The committee without objection approved the proposed amendments to the forms for final approval by voice vote.

Amendments for Publication

FED. R. BANKR. P. 1009, 4002, and OFFICIAL FORM 6-I

Judge Small pointed out that the proposed amendments to Rule 1009 (amendments to schedules and statements), Rule 4002 (debtor's duties), and Form 6-I (schedule of debtors' current income) had been proposed by the Executive Office for United States Trustees. He noted that the amendment to Rule 4002 was controversial.

The U.S. trustee organization had asked the committee for a rule that would require debtors to bring a substantial number of documents with them to the meeting of creditors under § 341 of the Code. The proposal, he said, had attracted the attention and strong opposition of the debtors' bar. The advisory committee had received more than 80 letters from attorneys opposing the proposal, even though the committee had not approved or published it.

Judge Small noted that the advisory committee's consumer subcommittee had met in Washington to consider the proposal, and it had invited several knowledgeable trustees and attorneys to participate, along with representatives of the U.S. trustee organization. At the meeting, the subcommittee decided that the most of the proposed changes were not needed.

The full committee, however, decided to adopt a compromise amendment to Rule 4002 that would require debtors to bring with them to the § 341 meeting a government-issued picture identification, evidence of their social security number, evidence of their current income (such as a pay stub), their most recent federal income tax return, and statements for each of their depository accounts. That, he said, was the proposal that the advisory committee sought authority to publish.

Judge Small said that the proposed amendment to Rule 1009 specifies that if the debtor files an incorrect social security number, he or she must correct it and notify all those who received notice of the incorrect number.

The proposed change to Form 6-I would extend to Chapter 7 cases the requirement that a debtor divulge a non-filing spouse's income. The form's mandate to divulge currently applies only to Chapter 12 and 13 cases.

The committee without objection approved the proposed rule amendments for publication by voice vote. It also approved without objection the proposed amendment to the Official Form by voice vote.

FED. R. BANKR. P. 7004

Judge Small explained that under the current Rule 7004 (process and service), the debtor's attorney must be served only if the summons and complaint are served on the debtor by mail. The proposed amendment would make it clear that the debtor's attorney must be served with a copy of any summons and complaint against the debtor, regardless of the manner of service on the debtor. The rule would also allow the attorney to request that service be made electronically.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. BANKR. P. 2002(g) and 9001

Judge Small reported that the changes to Rule 2002 (notices) and 9001 (general definitions) were designed in large part to facilitate noticing national creditors. The proposed amendment to Rule 2002(g) would allow creditors to make arrangements with a

"notice provider" to have notices sent to them at a preferred address or addresses. Notices would normally be sent electronically, but the rule also covers the sending of paper notices to central addresses. The amendment to Rule 9001 would define a "notice provider" as any entity approved by the Administrative Office to give notice to creditors at a preferred address or addresses under the proposed amendment to Rule 2002(g).

Judge Small explained that the amendments could result in significant financial benefits to the judiciary and taxpayers because more creditors would sign up for electronic service of court notices. In light of the potential cost savings, the advisory committee had decided to pursue "fast track" promulgation of these two amendments — as well as the amendment to Rule 9036 approved by the Standing Committee in January 2004, which specifies that notice by electronic means is complete on transmission.

Under the fast track proposal, the rules would become effective on December 1, 2005, rather than December 1, 2006. They would be published for public comment in August 2004. Comments would be due by mid-February 2005. The advisory committee and Standing Committee could approve them by mail ballot and submit them to the Judicial Conference for approval at its March 2005 session. They would then be sent immediately to the Supreme Court, which could act on them before May 1, 2005. Mr. Rabiej added that the Court would be given copies of the amendments well in advance of the March 2005 Conference session to give the justices time to review them carefully.

Judge Small said that the advisory committee had carefully considered the rules at three meetings, and he did not anticipate any controversy over them. Professor Morris added that even though the primary thrust of the rules was to facilitate electronic notice, there would also be savings in processing paper notices under the rules because notice providers will be able to bundle notices to creditors and save postage costs.

The committee without objection approved the proposed amendments for publication by voice vote.

The committee also approved expediting approval of the amendments, together with the proposed amendment to Rule 9036 approved by the Standing Committee in January 2004.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Rosenthal and Professor Cooper presented the report of the advisory committee, as set forth in Judge Rosenthal's memorandum and attachments of May 17, 2004. (Agenda Item 8)

Amendments for Final Approval

FED. R. CIV. P. 6(e)

Judge Rosenthal reported that the proposed change to Rule 6(e) (additional time allowed following certain kinds of service) had been referred by the Advisory Committee on Appellate Rules, which was considering parallel changes to FED. R. APP. P. 26(c). Under the existing Rule 6(e), there is some uncertainty in calculating the three additional days given a party to act when service is made on the party by mail, leaving it with the clerk of court, electronic means, or other means consented to by the party served.

The proposed clarifying amendment would specify that the three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and holidays would be included in counting the additional three days, but the last day cannot be a Saturday, Sunday, or holiday. Judge Rosenthal added that the committee note sets forth a number of practical examples calculating the time period.

One member asked why the advisory committee had not used the term "calendar days," as used in the appellate rules. Judge Rosenthal responded that the committee had considered that option, but had decided not to use "calendar days" because it is not found anywhere else in the civil rules.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 27(a)(2)

Judge Rosenthal said that the proposed change in Rule 27 (deposition before action or pending appeal) would merely correct an outdated reference in the rule to former Rule 4(d), which deals with serving a copy of the petition and a notice stating the time and place of a deposition hearing. The corrected reference makes clear that all forms of service under Rule 4 can be used to serve a petition to perpetuate testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

FED. R. CIV. P. 45(a)

Judge Rosenthal reported that the proposed amendment to Rule 45 (subpoena) would close a small gap in the rule by requiring that a deposition subpoena state the method for recording testimony.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE B(1)(a)

Judge Rosenthal stated that the proposed amendment to Supplemental Rule B (attachment and garnishment) would bring the rule into conformity with case law. The amendment specifies that the time for determining whether a defendant is "found" in a district is the time the verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed.

The committee without objection approved the proposed amendment for final approval by voice vote.

SUPPLEMENTAL RULE C(6)(b)

Judge Rosenthal reported that the proposed amendment to Supplemental Rule C(6) (responsive pleadings and interrogatories) would correct an oversight made during the course of the 2000 amendments to the rule. It would delete the rule's reference to a time 10 days after completed publication under Rule C(4). That rule requires publication of notice only if the property is not released within 10 days after execution of process. Execution of process will always be earlier than publication.

The committee without objection approved the proposed amendment for final approval by voice vote.

Amendments for Publication

SUPPLEMENTAL RULE G

Professor Cooper explained that civil forfeiture proceedings have long been governed by the Supplementary Rules for Certain Admiralty and Maritime Claims because of tradition, the in rem nature of forfeiture proceedings, and many forfeiture statutes expressly invoking the supplemental rules. But, he said, the relationship had come under considerable strain because of an explosion in the number of civil forfeiture proceedings. In particular, court interpretations of the supplemental rules by the courts in forfeiture cases have been cited by the admiralty bar as creating problems for maritime practice.

Professor Cooper noted that the supplemental rules had been amended in 2000 to draw some distinctions between forfeiture and admiralty practice. At about the same time, Congress enacted the Civil Asset Forfeiture Reform Act, which required a number

of other changes in the rules as they apply to civil forfeiture proceedings. Soon after enactment of the legislation, the Department of Justice approached the Advisory Committee on Civil Rules, suggesting that it was time to consolidate all the civil forfeiture procedures into a single supplemental rule that would be consistent with the new statute.

Professor Cooper said that the advisory committee had appointed a subcommittee that produced a proposed new Rule G after several conference calls, a meeting in December 2003, and substantial input from the Department of Justice and the National Association of Criminal Defense Lawyers. The new rule, he said, was ready for publication, together with conforming amendments to SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E).

Professor Cooper pointed out that the advisory committee had devoted a great deal of attention to a proposal by the Department of Justice to define in the rule what "standing" is needed to assert a claim to property once the government initiates a civil forfeiture action. The Department had proposed that the rule limit standing to a person qualifying as an "owner" within the statutory definition of the innocent-owner defense. The committee, however, concluded that defining standing to file a claim should be left to developing case law, not the rules. Instead, proposed Rule G(8) only sets forth the procedural framework for determining a claimant's standing and deciding a claimant's motion to dismiss.

In the same vein, Professor Cooper reported that the advisory committee had not included a provision in the new rule barring the use FED. R. CRIM. P. 41(g) to accomplish the return of property outside Rule G. This issue, too, would be left to case law development.

Professor Cooper proceeded to describe the provisions of the new rule. He noted that subdivision (1) specifies that Rule G governs in rem forfeiture actions arising from federal statutes. It also states that Supplemental Rules C and E and the Federal Rules of Civil Procedure apply to the extent that Rule G does not address an issue.

Subdivision (2) would replace the particularized pleading in the existing rule with a statement of sufficiently detailed facts to support a reasonable belief that the government will be able to meets its burden of proof at a trial.

Subdivision (3), dealing with arrest warrants, would provide that only the court, on a finding of probable cause, may issue a warrant to arrest property not in the government's possession or not subject to a judicial restraining order. The existing rule allows issuance of a summons and warrant by the clerk without a probable-cause finding. In addition, the proposed rule would require the warrant and any supplemental service to

be served as soon as practicable, unless the court orders a different time. Professor Cooper noted that the National Association of Criminal Defense Lawyers had expressed concern that the change would encourage courts to permit more filings under seal. But, he added, the rule does not address when it is appropriate to file under seal. It merely reflects the consequences for execution when sealing or a stay is ordered.

Professor Cooper noted that subdivision (4), the basic notice requirement, reflects the traditional practice of publishing notice of an in rem action. For the first time, the rule would recognize publication on an official government-created Internet forfeiture site to provide a single, easily identified means of notice. He pointed out that there is no such site now, but if the government were to establish one, it would provide more effective notice than newspaper publication.

In addition, proposed paragraph (4)(b) would require the government to send individual notice of the action and a copy of the complaint to any person who reasonably appears to be a potential claimant, based on the facts known to the government. Although the National Association of Defense Lawyers had asked for formal service of the summons in the manner required by FED. R. CIV. P. 4, the proposed rule does not require that level of service. Rather, due process requirements are satisfied by practical means reasonably calculated to accomplish actual notice.

The proposed rule also specifies that the notice must be sent by means reasonably calculated to reach the potential claimant. Notice may be sent to the attorney if the potential claimant has an attorney, and that this may be the most effective notice in many cases. Notice to an incarcerated person must be sent to the place of incarceration. The rule, however, does not attempt to deal with the due process problems implicated by *Dusenbery v. United States,* 534 U.S. 161 (2002), where a particular prison has deficient procedures for delivering notice to prisoners.

The proposed paragraph also sets out deadlines for filing claims and motions. Professor Cooper pointed out that the provision dealing with filing an answer or motion under FED. R. CIV. P. 12 had generated advisory committee discussion. Contrary to an ordinary civil action, where Rule 12 suspends the time to answer, the proposed rule requires that an answer or motion be filed no later than 20 days after a claim is filed.

Professor Cooper pointed out that under subdivision (5), a claim must identify the claimant and state the claimant's interest in the property. If the claim is filed by a person asserting an interest in the property as a bailee, it must identify the bailor.

Subdivision (6) would allow the government to serve special interrogatories under FED. R. CIV. P. 33 limited to the claimant's identity and relationship to the property. The purpose, he said, is to elicit information promptly so the government can move to dismiss

for lack of standing. The government need not respond to a claimant's motion to dismiss until 20 days after the claimant has answered the interrogatories.

Professor Cooper noted that subdivision (7) would allow property to be sold on an interlocutory basis. The court could order the property sold, for example, if it were perishable or at risk of diminution of value. Likewise, it could be ordered sold if the expense of keeping the property is excessive, or if the court finds other good cause.

Professor Cooper pointed out that subdivision (8) govern motions. He noted that paragraph (8)(A) states that a party with standing to contest the lawfulness of the seizure of property may move to suppress use of the property as evidence. He explained that the advisory committee had deleted a reference in the proposed rule to constitutional standing under the Fourth Amendment. Likewise, a party who establishes standing to contest forfeiture may move to dismiss the action under FED. R. CIV. P. 12(b). At any time before trial, the government may also move to dismiss because the claimant lacks standing. Professor Cooper pointed out that the court must decide the government's motion before any motion by the claimant to dismiss the action. The claimant has the burden of establishing standing based on a preponderance of the evidence.

Professor Cooper stated that paragraph (8)(d) deals with a petition to release property under the Civil Asset Forfeiture Reform Act. The venue provision in the rule had been inserted at the request of the Department of Justice. It is derived from the statute and serves as a guide to practitioners. It makes clear that the status of a civil forfeiture action is a "civil action" eligible for transfer under 28 U.S.C. § 1404. Finally, Professor Cooper noted that the rule contains a provision allowing a claimant to seek to mitigate a forfeiture under the Excessive Fines Clause of the Eighth Amendment.

Judge Rosenthal reported that the Style Subcommittee had reviewed the proposed rule and had suggested a few improvements in language. She asked for and received permission to adopt the Style Subcommittee suggestions without having to return to the Standing Committee before publication.

Judge Rosenthal added that the advisory committee anticipated that a significant number of comments would be received during the publication period, but from a narrow section of the bar. Judge Levi and Professor Cooper pointed out that the committee had benefitted greatly as a result of excellent suggestions and input from the Department of Justice and the National Association of Criminal Defense Lawyers.

The committee without objection approved the proposed new rule for publication by voice vote.

SUPPLEMENTAL RULES A, C, and E and FED. R. CIV. P. 26(a)(1)(E)

Professor Cooper reported that the proposed changes to Supplemental Rules A, C, and E and FED. R. CIV. P. 26(a)(1)(E) were conforming amendments to account for the consolidation of civil forfeiture provisions into the new Rule G. He noted that the amendment to Rule 26(a)(1)(E) (initial disclosures) would add civil forfeiture actions to the list of cases exempted from the initial disclosure requirements.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CIV. P. 50(b)

Judge Rosenthal reported that the proposed amendments to Rule 50(b) would remove a trap that occurs when a party moves for judgment as a matter of law under Rule 50(a) before the close of all the evidence and then fails to renew the motion at the close of all the evidence. The revised rule, she said, would delete the requirement that a renewal motion be made at the close of all the evidence. It responds to court decisions that have begun to move away from a strict interpretation of the current rule requiring a motion for judgment as a matter of law at the literal close of all the evidence. Professor Cooper added that the amendments are fully consistent with the Seventh Amendment.

In addition, the rule would be amended to add a time limit of 10 days after discharge of the jury for a party to make a post-trial motion when a trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict.

The committee without objection approved the proposed amendments for publication by voice vote.

ELECTRONIC DISCOVERY
FED. R. CIV. P. 16, 26, 33, 34, 37, and 45 and FORM 35

Judge Rosenthal reported that the package of "electronic discovery" amendments was the product of a lengthy and thorough examination by the advisory committee into whether the current rules are adequate to regulate discovery of electronically stored information. She pointed out that the committee had enjoyed invaluable cooperation and input from the bar on the project, and it had conducted three productive conferences with lawyers, judges, and law professors on electronic discovery. She thanked Professor Capra and Fordham Law School for hosting the most recent conference, held in New York in February 2004. She also thanked Kenneth Withers of the Federal Judicial Center for his major assistance and wise counsel.

Judge Rosenthal explained that the advisory committee had initiated the electronic discovery project with a good deal of skepticism regarding the need for rule changes. But as the project progressed and lawyers articulated their experiences, she said, the committee moved to a consensus that the existing discovery rules do not fit current practice as well as they should. The committee, she emphasized, had reached the conclusion that the national rules needed to be amended and the amendments were needed now.

Judge Rosenthal pointed out that the materials in the committee's agenda book demonstrate that there are many real differences between electronic discovery and other types of discovery. For one thing, computer-stored information is dynamic and often changes without active human intervention. Unlike paper information, moreover, computer information may be incomprehensible without the machine and software that created it.

She said that the bar had informed the committee that discovery had become more difficult, burdensome, and costly because the current rules — even though they are very flexible — are simply not specific enough with regard to electronic discovery. She pointed out that some federal district courts now have local rules in place governing electronic discovery, and pertinent case law is beginning to develop. In addition, state court systems have issued or are considering rules to deal with electronic discovery. She concluded that if the advisory committee were to wait too long to propose amendments to the national rules, it would run the risk of having local rules proliferate and wide variations develop in federal practice.

Judge Rosenthal summarized the advisory committee's key proposals, pointing out that they would: (1) require parties and the court early in a case to discuss issues relating to electronicaly stored information and privilege waiver; (2) clarify and modernize the definition of discoverable electronic information; (3) address the form in which electronically stored information must be produced; and (4) provide a procedure for handling inadvertent privilege waivers.

She explained that the committee had heard repeatedly from lawyers that privilege review of discovery materials is very time consuming and expensive. Electronically stored information, moreover, presents special problems because privileged information, though not readily visible, may be embedded in electronic documents or found in metadata. She emphasized that the proposed amendments respect the Rules Enabling Act and avoid dealing with the substance of privilege law. Rather, they only set forth a procedure for retrieving inadvertently produced privileged information.

FED. R. CIV. P. 26(f) and FORM 35

Professor Cooper said that the proposed amendments to FED. R. CIV. P. 26(f) (conference of the parties) were non-controversial. They would require the parties at the 26(f) conference to discuss any issues relating to preserving discoverable information and to include in their discovery plan: (1) any issues relating to disclosure or discovery of electronically stored information, including the form in which it should be produced; and (2) whether, on agreement of the parties, the court should enter an order protecting the right to assert privilege after production of privileged information. He noted that the latter item was a response to concerns expressed to the committee by members of the bar regarding the enormous burden imposed by having to screen voluminous documents for privilege.

He said that it was generally accepted that the discovery process moves much more quickly and efficiently when the parties in a case agree on how to deal with privilege issues. He said that the proposed amendment contemplates that the parties will enter an agreement. The court order will enhance the status of the agreement and may well affect future waiver litigation. In addition, Form 35 would be amended to include a new section dealing with disclosure of electronic information and privilege protection.

FED. R. CIV. P. 16(b)

Professor Cooper reported that the proposed amendments to FED. R. CIV. P. 16(b) (scheduling and planning) would alert the court to the need, early in the litigation, to address the handling of discovery of electronically stored information and to consider adopting the parties' agreement for protection against privilege waiver.

FED. R. CIV. P. 26(b)(5)

Professor Cooper explained that the proposed amendment to FED. R. CIV. P. 26(b)(5) (claims of privilege or protection of trial preparation materials) specifies that when a party produces information without intending to waive a claim of privilege, it may, within a reasonable time, notify any party receiving the information that it claims a privilege. The receiving party must then promptly return or destroy the specified information and any copies. Professor Cooper added that the committee note specifies that the amendment does not address the controversial question of whether there has in fact been a privilege waiver. It merely provides a procedure for addressing privilege issues.

One member said that the proposed waiver provision would not make a real difference in practice. Parties, he said, will still have to review all documents in order to avoid the danger that a state court may find a waiver of privilege. He urged the

committee to publish a much more ambitious proposal that would address the waiver issue itself. He suggested that this would be a great opportunity for the committee to make a major improvement in practice.

Judge Rosenthal responded that the advisory committee was very sympathetic to that approach, but it had opted for a more cautious amendment because of concerns over the limits of the Rules Enabling Act. The statute specifies that any rule "creating, abolishing, or modifying an evidentiary privilege shall have no force or effect unless approved by Act of Congress." (28 U.S.C. § 2074) Another participant added that privilege issues implicate fundamental questions of federalism that rules committees should approach with hesitancy.

Other participants countered, though, that a bolder waiver proposal to protect parties against inadvertent waiver of privilege would in fact be consistent with the Rules Enabling Act. They asserted that a federal rules provision could specify that an inadvertent turnover of privileged material through the federal discovery process does not constitute a waiver of privilege. The provision, they said, would be procedural in nature, not substantive. It would not address the scope of the privilege itself. Instead, it would merely address the procedural consequences arising as a result of the mandatory federal discovery process. In other words, if a court requires a party to produce materials through the federal discovery rules, those rules can prescribe the character of the privilege waiver without modifying the content of the privilege itself.

One member pointed out that the advisory committee's proposed amendment may put a court in an awkward position because its order may not effectively bind third parties or prevail in a later proceeding before another court. He noted that there is a split in state law as to whether third parties are bound.

One member pointed out, though, that the proposed amendment would still be a valuable change because — despite uncertainty as to the scope of the privilege protection — parties are in a much better position with a court order than without one. Judge Rosenthal added that the pertinent committee note addresses the issue in general terms by stating that a court order adopting the parties' agreement "advances enforcement of the agreement betweeen the parties and adds protection againt nonparty assertions that privilege has been waived."

Another member noted that the proposed new Rule 26(b)(5)(B) states that a party receiving privileged information must promptly return or destroy it upon being notified by the producing party that it intends to assert a claim of privilege. He suggested that the rule might be amended to require the receiving party to certify that they have in fact destroyed the information in question.

FED. R. CIV. P. 26(b)

Judge Rosenthal reported that the proposed new Rule 26(b)(2)(C) (discovery scope and limits) would establish a two-tiered approach to electronic discovery. A producing party would automatically have to turn over requested information that is "reasonably accessible." Even if it makes a showing that the information sought is not "reasonably accessible," the requesting party may then ask the court to order discovery of the information "for good cause." She pointed out that this approach is similar to the two-tiered approach embodied in the 2000 amendments to Rule 26(b)(1), under which parties may obtain discovery automatically as to matters "relevant to the claim or defense of any party," but they may ask the court for good cause to order discovery of any matter "relevant to the subject matter involved in the action."

One member pointed out that there is no provision in the proposed amendments explicitly addressing the sharing of discovery costs. He noted that judges already have general authority under Rule 26 to shift discovery costs, but recommended that the proposed amendments themselves, or the accompanying committee notes, specify that a judge may assess part or all of the costs of certain discovery requests on the requesting party. One member suggested that language covering cost sharing be added to the proposed amendment to Rule 26(b)(2)(C). Judge Rosenthal responded that it might be preferable to include such language in the committee note, rather than the rule.

Professor Cooper pointed out that the committee note in fact quotes the *Manual for Complex Litigation*, instructing that certain forms of production be conditioned upon a showing of need or the sharing of expenses. He pointed out, however, that the Standing Committee has been very sensitive to cost sharing or cost bearing, and it is a controversial concept for many members of the bar. Mr. Rabiej added that language regarding cost-shifting had been proposed by the Advisory Committee on Civil Rules in the 2000 amendments to Rule 26, but it had been removed by the Standing Committee.

Judge Kravitz moved to add language at the end of the proposed amendment to Rule 26(b)(2)(C) to specify that if a responding party shows that requested information is not reasonably accessible, the court may order discovery of the information "on such terms as the court may determine." He added that no explicit language as to cost sharing should be included in the text of the rule itself, but a reference to costs could be included in the committee note.

The committee without objection approved Judge Kravitz's motion by voice vote.

FED. R. CIV. P. 33

Judge Rosenthal noted that the proposed amendment to Rule 33(d) (option to produce business records in response to interrogatories) makes it clear that a party may respond to interrogatories by using electronically stored information.

FED. R. CIV. P. 34

Judge Rosenthal explained that the proposed amendments to Rule 34(a) (production of documents and inspection of tangible things) draw a new distinction between "electronically stored information" and "documents." The word "document" in the current rule, she said, is simply not adequate to capture all the types of information stored on computers. The proposed rule, thus, would acknowledge explicitly the expanded importance and variety of electronically stored information subject to discovery. She also pointed out that under the amendment copying, testing, and sampling would apply explicitly both to electronically stored information and tangible things.

She noted that the proposed amendments to Rule 34(b) permit a party to specify the form in which it wants electronically stored information to be produced. If no request is made as to form, or if there is no agreement by the parties, the producing party may turn over the information in the form in which it is ordinarily maintained or in an electronically searchable form. One member suggested that the term "electronically accessible" might be more appropriate than "electronically searchable."

FED. R. CIV. P. 45

Judge Rosenthal reported that Rule 45 (subpoenas) would be amended to conform it to the various changes proposed in the discovery rules to address electronically stored information.

The committee without objection approved the proposed amendments to Rules 16, 26, 33, 34, and 45 and Form 35 for publication by voice vote.

FED. R. CIV. P. 37

Judge Rosenthal reported that the committee had approved a limited "safe harbor" provision in Rule 37 (sanctions for failure to cooperate in discovery) that would give a party protection when information that it is asked to produce has been destroyed or lost through the routine business operation of its computer systems. The loss would occur, for example, when information is destroyed as a result of recycling back-up tapes or automatically overwriting deleted information. She reported that this was the only provision among the proposed amendments in which there had been any disagreement

within the advisory committee. She pointed out, though, that the disagreement had been only as to the actual language of the proposed amendment, and not as to the need for including a limited safe harbor provision in the rules.

As a consequence, she explained, the advisory committee had decided to present the Standing Committee with two alternative versions of a safe harbor provision in FED. R. CIV. P. 37(f). She added that the committee clearly preferred Alternative 1, but several members also wanted to publish Alternative 2 for public comment. Both alternatives, she said, are very narrow. The essential difference between them concerns the standard of culpability applicable to the producing party. Alternative 1 would establish a reasonableness standard, while Alternative 2 would require intentional or reckless conduct. She reported that one member of the advisory committee strongly opposed publishing the second alternative because it would inappropriately limit a court's discretion.

Judge Rosenthal said that whether or not both alternate versions are published, it should be made clear in the publication that the committee is continuing to consider both culpability standards and would like to generate public comment specifically directed to them.

One participant emphasized that Rule 37 deals with sanctions for violation of discovery obligations. But, he said, spoliation issues are generally governed by a separate body of law. He pointed out that what occurs before a case is filed in the district court is not, and cannot be, covered by the rules. Thus, he said, the rules committees should focus on a party's obligation under applicable discovery law, not on spoliation. He suggested that the committee note state explicitly that spoliation is governed by a different body of law, even though discovery and spoliation issues often tend to blend in practice.

He added that the culpability standard under discovery law is negligence, including intentional neglect. But, he said, the key problem is not so much the applicable standard as the boundary of obligations arising before a case is filed and discovery obligations that attach after a case has been filed. Other members pointed out that lawyers' legal and ethical obligations before filing are clearly established by existing law.

One member said that even though the bar had made a compelling case for a safe harbor at the recent Fordham conference, it appeared that any effective protective provision would lie outside the scope of the rules. He suggested that it would take legislation to achieve the sort of protection that the bar seeks. Other members responded, though, that an effective safe harbor provision could indeed be crafted with some additional work.

In light of the difficult competing considerations and the committee discussions, Judge Rosenthal agreed to craft some additional language to address the concerns expressed by the participants. She emphasized the need to include a safe harbor provision together with the rest of the proposed electronic discovery amendments because all the amendments fit together as part of a single, interrelated package.

On the second day of the meeting, Judge Rosenthal presented the committee with revised language for both the text of the proposed Rule 37 amendments and the accompanying committee note. She noted that the proposed revisions would make it clear that the rule does not address the actions of a party before a case is filed.

Judge Rosenthal said that the recommendation of the advisory committee was to publish only one alternative for public comment. But, she said, that version would include appropriate brackets and footnotes to draw the attention of the public to the fact that the committee would continue to study what standard of fault must be met to take a party out of the safe harbor protection.

Dean Kane moved to approve publication of the proposed amendment, together with appropriate cover language —— to be drafted by the advisory committee — directing the public's attention to the committee's desire to receive public comment on the applicable culpability standard and the other issues identified by the committee. The motion was approved without objection by voice vote.

Amendments for Delayed Publication

1. Pure Style Revisions

FED. R. CIV. P. 38-63, except FED. R. CIV. P. 45

Judge Rosenthal reported that the advisory committee was planning to publish the complete set of restyled civil rules as a single package in February 2005. She noted that the Standing Committee at earlier meetings had approved publication of restyled Rules 1-37. She asked for authority to publish the current batch of proposed amendments — Rules 38-63, except Rule 45 — subject to further refinement before publication. And she reported that the remaining civil rules, Rules 64-86, would be presented to the Standing Committee at its January 2005 meeting.

Judge Rosenthal said that the advisory committee, in partnership with the Style Subcommittee of the Standing Committee and its consultants, would continue to make refinements in the language of the rules. It would also resolve a series of "global" style

issues and present a completed style package of all the civil rules at the January 2005 meeting.

The committee without objection authorized delayed publication of the proposed amendments by voice vote.

2. "Style-Substance" Amendments

FED. R. CIV. P. 4, 8, 9, 11, 14, 16, 26, 30, 31, 36, 40

Judge Rosenthal reported that the goal of the restyling project was very narrow — simply to restate the present language of the civil rules as clearly as possible in consistent English without any change in meaning. Nevertheless, she said, as part of the restyling effort, the advisory committee had approved a limited number of minor, non-controversial improvements in language that are arguably more than purely stylistic in nature. She pointed out that the proposed changes, although possibly substantive, reflect sound common sense, universal current practice, or the likely intention of the drafters. Accordingly, she said, the advisory committee would like authority to publish in tandem with the style package a separate track of proposed "style-substance" changes to Rules 4(k), 8(a) & (d), 9(h), 11(a), 14(b), 16(c)(1), 26(g), 30(b), 31(c), 36(b), and 40. She added that a few additional minor "style-substance" changes might be presented to the Standing Committee at the January 2005 meeting.

One member spoke against the proposed deletion of Rule 8(d)(1) as part of the "style-substance" package. Although the proposed committee note suggested that the current rule is redundant and no longer needed, the member said that it might be helpful to retain it. Judge Rosenthal responded that it was important to restrict the "style-substance" package to purely non-controversial items. Thus, in light of the objection expressed, the advisory committee would drop the proposal from the list of proposed amendments.

The committee without objection approved the proposed "style-substance" amendments for deferred publication by voice vote.

Informational Item

Judge Rosenthal reported that the advisory committee had published a proposed new FED. R. CIV. P. 5.1 (constitutional challenge to a statute) to implement 28 U.S.C. § 2403 and replace the final three sentences of FED. R. CIV. P. 24(c). The statute and current rule require a court to certify to the attorney general of the United States or a state when a federal or state statute has been drawn into question. In addition, the rule requires

a party challenging the constitutionality of a statute to call the court's attention to its duty to certify.

Judge Rosenthal pointed out that the reporting obligation is routinely — and unintentionally — violated, perhaps because it is buried in Rule 24. Thus, the advisory committee had proposed moving the reporting requirements from Rule 24 to the proposed new Rule 5.1 in order to attract attention to the reporting obligations by locating them next to the rules that require notice by service and pleading.

In addition, the new rule would have added a requirement that a party drawing into question the constitutionality of a statute serve the pertinent attorney general by mail with a Notice of Constitutional Question and a copy of the underlying court pleading or motion. The advisory committee had thought that the additional requirement would impose only a slight burden on the challenging party.

Judge Rosenthal pointed out that there had been few public comments on the rule. But, she said, concerns emerged in the advisory committee that the new notice and mailing obligation was unwise and should be reexamined. Accordingly, the committee decided to defer the proposed new rule and not present it at this time to the Standing Committee for final approval.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Carnes and Professor Schlueter presented the report of the advisory committee, as set forth in Judge Carnes's memorandum and attachment of May 18, 2004. (Agenda Item 9)

Amendments for Final Approval

FED. R. CRIM. P. 12.2(d)

Judge Carnes reported that the proposed amendment to Rule 12.2(d) (failure to comply with the requirement to give notice of an insanity defense or submit to a mental examination) would fill a gap created in the 2002 amendments to the rule. The current rule provides no sanction when the defendant does not comply with the requirement to disclose the results and reports of an expert examination. He pointed out that a comment had been received from the defense bar that the proposed amendment goes too far. But, he noted that the decision to impose a sanction is discretionary with the court.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 29(c), 33(b), 34(b), and 45(b)

Judge Carnes explained that the proposed amendments to Rule 29 (motion for a judgment of acquittal), Rule 33 (motion for a new trial), Rule 34 (motion to arrest judgment), and Rule 45 (computing time) would remove the requirement that the court rule on a post-trial motion within seven days after a guilty verdict or after the court discharges the jury.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32(i)(4)

Judge Carnes said that the proposed amendment to Rule 32(i)(4) (opportunity to speak at sentencing) would extend the right of allocution — which currently applies only to victims of crimes of violence or sexual abuse — to victims in all felony cases. The rule, he said, allows the victim either to speak at sentencing or submit a written statement to the judge. If a crime involves multiple victims, the rule gives the court discretion to limit the number of victims who will address the court.

Judge Carnes added that Congress was likely to pass comprehensive legislation in the near future dealing with victims' rights. He said that the legislation, among other things, would give a wide array of rights to victims of all offenses, including victims of petty offenses and other misdemeanors. He stated that if the pending legislation were enacted, the committee should ask to withdraw the rule.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 32.1(b) and (c)

Judge Carnes reported that the proposed amendments to Rule 32.1 (revoking or modifying probation or supervised relief) would address an oversight in the rules by giving the defendant the right to allocution at a revocation or modification hearing.

The committee without objection approved the proposed amendments for final approval by voice vote.

FED. R. CRIM. P. 59

Judge Carnes reported that the proposed new Rule 59 (matters before a magistrate judge) would set forth the procedures for a district judge to review the decision of a

magistrate judge. He explained that the rule is derived in part from FED. R. CIV. P. 72. It distinguishes between "dispositive" and "nondispositive" matters, but does not attempt to define the terms, which are widely used in case law.

Judge Carnes pointed out that on a nondispositive matter, the district judge must consider any timely objections to the magistrate judge's order and set aside any part of the order that is contrary to law or clearly erroneous. But if a party fails to object within 10 days after being served with a copy of the magistrate judge's order, it waives its right to review.

As for dispositive matters, the district judge must decide de novo any recommendation of the magistrate judge to which an objection has been filed. A party's failure to object within 10 days after being served with a copy of the magistrate judge's recommended disposition waives its right to review. There is no need for the district judge to review de novo any matter to which there has not been a timely objection. Nevertheless, despite the waiver provision, the district judge retains authority to review any decision or recommendation of the magistrate judge, whether or not objections are timely filed.

One member said that he supported the rule, but he had a general problem with the way time is computed under this and some other rules. The proposed rule, he pointed out, states that a party must file an objection "within 10 days after being served with a copy" of the magistrate judge's order or recommendation. He pointed out that judges have no way of telling when a party has actually been served with a copy of a particular document. He suggested that consideration be given at a future committee meeting to addressing this uncertainty in computing time.

The committee without objection approved the proposed new rule for final approval by voice vote.

Amendments for Publication

FED. R. CRIM. P. 5(c)

Judge Carnes reported that two amendments were proposed to Rule 5(c)(3) (initial appearance in a district other than the one where the offense was committed). First, the amendment to Rule 5(c)(3)(C) would remove a reference to Rule 58(b)(2)(G). That rule, in turn, would be amended to eliminate a conflict with Rule 5.1(a) regarding the defendant's right to a preliminary examination. Second, the amendment to Rule 5(c)(3)(D) would take account of advances in technolgy and permit a magistrate judge to accept a warrant by any "reliable electronic means," rather than just by "facsimile."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 32.1(a)(5)

Judge Carnes explained that the proposed change to Rule 32.1 (revoking or modifying probation or supervised release) was similar to that proposed for Rule 5(c). It would authorize a magistrate judge to accept a copy of a judgment, warrant, or warrant application by "reliable electronic means."

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 40(a) and (e)

Judge Carnes said that the proposed revision of Rule 40(a) (arrest for failing to appear in another district) would fill a gap in the rules by giving a magistrate judge explicit authority to set conditions of release for a defendant who has been arrested only for violation of conditions of release set in another district. He pointed out that the current rule refers only to a defendant who has been arrested for failure to appear altogether, and not to one who has only violated conditions of release.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 41

Judge Carnes reported that the proposed amendment to Rule 41(e) (issuing a search warrant) would permit a magistrate judge to use "reliable electronic means" to issue warrants. In that respect, it parallels the proposed amendments to Rules 5 and 32.1.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. CRIM. P. 58(b)

Judge Carnes explained that the proposed amendment to Rule 58(b)(2)(G) (initial appearance in a petty offense or other misdemeanor case) would remove a conflict between that rule and Rule 5.1 (preliminary examination) and clarify the advice that must be given to a defendant during an initial appearance.

The committee without objection approved the proposed amendments for publication by voice vote.

Informational Items

FED. R. CRIM. P. 29

Associate Attorney General McCallum expressed the concerns of the Department of Justice regarding the May 2004 decision of the Advisory Committee on Criminal Rules to reject the Department's proposed amendments to Rule 29 (motion for a judgment of acquittal). The proposal would have required a judge to defer ruling on a motion for a judgment of acquittal until after the jury has returned a verdict. The current rule gives a judge discretion to rule on an acquittal motion either before or after verdict.

Mr. McCallum pointed out that a district judge's granting of an acquittal motion before a jury verdict is a non-appealable action due to the Double Jeopardy clause of the U. S. Constitution. It is the only area, he said, in which the government has no right to correct an improper action of a trial judge. An appeal does lie, however, when a judge grants a motion for acquittal after a jury verdict.

He emphasized that United States attorneys are deeply troubled by the current rule and certain specific experiences that they have had under it. He noted that the original proposal of the Department had been to amend the rule to require a district judge to defer a ruling on an acquittal motion until after the jury returns a verdict. The aim, he said, was not to limit judicial discretion, but to address the timing of the judge's action, which has important constitutional consequences.

He explained that members had expressed concerns at the October 2003 advisory committee meeting that the Department's proposal might be too broad. They suggested that it is entirely appropriate for a judge to grant a dismissal before judgment in certain circumstances — particularly in the case of a hung jury or a multiple-defendant or multiple-count case. The advisory committee, he said, had asked the Department to consider crafting modifications to its proposal to address these two situations.

Mr. McCallum reported that the Criminal Division had prepared an amendment to deal with hung juries, but it was unable to devise a satisfactory amendment to address the problems of multiple defendants and multiple counts. But, he said, Judge Levi developed a very helpful, alternate proposal that would allow a judge to grant a dismissal before verdict conditioned upon the defendant waiving double-jeopardy rights and permitting an appeal by the government.

He said that because of the importance of this matter, the Department would like to present additional written materials and make a case for amending Rule 29 to the Standing Committee at its next meeting. If the Standing Committee were then to agree with the Department's recommendation — or with Judge Levi's alternate proposal or some other variation — it might propose an amendment itself. But, he noted, a more likely result would be for the Standing Committee to remand the matter back to the advisory committee with a direction to explore every possible alternative to achieve the result of preserving the government's right to appeal. He added that the Department would provide a comprehensive constitutional-law analysis of the Double Jeopardy clause and craft appropriate devices to avoid procedural traps. In short, he emphasized, the Department would like to work cooperatively with the Standing Committee to figure out a way to meet the government's concerns.

Judge Carnes reported that Administrative Office staff had prepared statistics on how often pre-verdict dismissals are granted in the federal courts. In the Fiscal Year 2002, for example, more than 80,000 felony defendants were disposed of in the district courts. Of that total, 3,000 were tried before a jury, and Rule 29 motions were granted in only 37 cases. He warned that the numbers may not be exact because of reporting difficulties in trying to pinpoint pre-verdict acquittals. Neverthless, he said, the number of dismissals under Rule 29 is extremely small. This, he explained, was a primary reason why the majority of the advisory committee were persuaded that there was no compelling case to amend the rule. He pointed out, though, that several members of the advisory committee were very much concerned that when a judge grants a pre-verdict dismissal mistakenly or in questionable circumstances, it reflects badly on the judicial system. In that regard, he noted that the Department had presented the committee with some anecdotes of district judges arguably abusing the process.

Judge Carnes further explained that several members of the advisory committee were concerned that certain prosecutors overcharge. Thus, judges should be able to winnow out groundless charges before a case is submitted to the jury. For that reason, he said, the advisory committee had asked the Department to consider amending its proposal to retain the authority of a trial judge to dismiss specific counts in a multiple-count case or certain defendants in a multi-defendant case. But, he explained, neither the Department nor the advisory committee could fashion a satisfactory proposal addressing those situations.

Judge Carnes said that the issues had been thoroughly explored by the advisory committee, including Judge Levi's alternate solution. If the matter were referred back to the advisory committee, he said, the same result would prevail again. Judge Levi agreed with this assessment, but he added that the Department should have a further opportunity to make a case. He pointed out that the Department has a vital role in the Rules Enabling Act process, and it has been supportive of the process. Therefore, he said, if the

Department concludes that a matter is very important to the government and it asks the Standing Committee to take a second look, the committee should accommodate the request.

Judge Levi pointed out that it is very common in rulemaking for empirical data to show that a particular problem is statistically insignificant. But the rejoinder by proponents of an amendment is always that the small number of problem occurrences in fact represents important matters. He recommended that the committee allow the Department to make its case at the January 2005 meeting. He suggested that the Department consider producing additional information, focusing particularly on the character of the actual cases in which it believes a pre-verdict dismissal was improperly granted and the government denied its right to appeal. He added that the Standing Committee might decide to return the proposal to the advisory committee with instructions.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith and Professor Capra presented the report of the advisory committee, as set forth in Judge Smith's memorandum and attachment of May 15, 2004. (Agenda Item 5)

Judge Smith explained that it is the policy of the advisory committee for proposed amendments to evidence rules generally to be limited to resolving case law conflicts in the courts. The committee's presumption, thus, is strongly against amending the rules. The four rules amendments recommended for publication, he said, would resolve serious conflicts in the courts.

Amendments for Publication

FED. R. EVID. 404(a)

Judge Smith reported that the proposed amendments to Rule 404(a) (admissibility of character evidence) would resolve a case law conflict regarding the admissibility in a civil case of character evidence offered as circumstantial proof of conduct. He noted that courts routinely admit such information into evidence in criminal cases. A minority of courts have also permitted its use in civil cases. The proposed amendment would allow the evidence only in criminal cases.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 408

Judge Smith reported that the proposed amendments to Rule 408 (compromise and offers to compromise) would resolve three important conflicts in the case law as to the admissibility of statements and offers made in settlement negotiations. He added that the proposals had been substantially debated and reworked by the advisory committee.

Judge Smith pointed out that the first amendment would resolve the split in the case law regarding the admissibility in later criminal prosecutions of statements and offers made in civil settlement negotiations. He pointed out that the Department of Justice strongly supported allowing the use in criminal cases of admissions made earlier during settlement negotiations, noting that they can be critical evidence to establish guilt in certain cases. After much debate, he said, the advisory committee agreed to present an amendment that would authorize the use of admissions of fault in later criminal prosecutions, but not allow admission of the fact that there has been a civil settlement or negotiations. He emphasized that the committee had worked hard to reach the proper balance between protecting settlement negotiations and allowing critical evidence to be used in criminal cases.

Second, Judge Smith reported that the proposed amendments would resolve a conflict in case law by prohibiting the use of statements made in settlement negotiations when offered to impeach a witness through a prior inconsistent statement or through contradiction. He noted that the proposal reinforces the main purposes of the rule — to promote unfettered settlement discussions.

Third, the proposed amendments would resolve a conflict over whether offers of compromise may be admitted in favor of the party who made the offer. The proposal would bar a party from introducing its own statements and offers when offered to prove the validity, invalidity, or amount of the claim. Judge Smith said that the advisory committee was of the view that a party should not be able to waive unilaterally the protections of the rule because introduction of the evidence would show implicitly that the opposing party had also entered into a settlement agreement. Exclusion of such evidence would not be required, though, when offered for other purposes, such as to prove the bias or prejudice of a witness.

The committee without objection approved the proposed amendments for publication by voice vote.

FED. R. EVID. 606(b)

Judge Smith reported that the proposed amendment to Rule 606(b) (juror as a witness) would limit the testimony of a juror regarding the validity of a verdict to whether

there has been a clerical mistake in reporting the verdict. He explained that some courts have also allowed juror tetimony on a broader basis, such as to explore whether the jury understood the court's instructions or the impact of their actions. He added that the proposed amendment is very narrowly designed to protect jury deliberations and prevent invasions of the jury process. He pointed out, however, that testimony could still be allowed from a juror as to fraud or outside influence.

The committee without objection approved the proposed amendment for publication by voice vote.

FED. R. EVID. 609(a)(2)

Judge Smith reported that Rule 609(a)(2) (impeachment by evidence of conviction of a crime) provides for automatic impeachment of a witness with evidence that the witness has been convicted of a crime that "involved dishonesty or false statement." The problem, he said, is in determining which crimes involve dishonesty or false statement.

Most prior convictions, he noted, occur in other jurisdictions, especially state courts. The issue for the federal court is to determine the extent to which it may look behind the prior conviction to determine whether it involved dishonesty or false statement. Some courts, he said, make the determination by looking only at the actual elements of the crime for which the witness was found guilty. Other courts, though, allow a more detailed inquiry into the facts of the case.

Judge Smith explained that the proposed amendment takes a middle position. It would allow automatic impeachment of a witness if an underlying act of dishonesty or false statement can be "readily determined." Judges, thus, would have discretion to look behind the elements of the crime to the facts of the case. But it is contemplated that their review would be to make a quick determination, such as by reviewing the charging documents, that a crime involved dishonesty or false statement. The court, though, should not conduct a minitrial on the issue. He added that a similar problem exists under the Sentencing Guidelines, where district judges may have to look behind the elements of a crime to determine whether a prior conviction of the defendant had been for a crime of violence. Professor Capra added that the committee note sets forth some examples of key documents that could be used by judges to make the determination of dishonesty or false statement.

The committee without objection approved the proposed amendment for publication by voice vote.

Informational Items

Professor Capra explained that these four proposals complete a package of amendments that the advisory committee had been considering for several meetings. He said that the advisory committee did not have plans to bring forward to the Standing Committee in the near future other potential amendments that it had under consideration. In addition, he said, the advisory committee would continue to examine the hearsay exceptions, but it will not propose any amendments until the full impact of *Crawford v. Washington* has been determined.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Judge Fitzwater presented the report of the Technology Subcommittee. (Agenda Item 10)

He reported that the E-Government Act of 2002 requires all federal courts to post on the Internet all case documents filed electronically or filed in paper and converted to electronic form. The Act also mandates the promulgation under the Rules Enabling Act of new federal rules addressing security and privacy concerns raised by electronic posting of case documents. The Standing Committee, he noted, had created the E-Government Subcommittee to coordinate the task of drafting appropriate revisions to the rules, and it asked representatives of other Judicial Conference committees to serve on the subcommittee.

He explained that the subcommittee had asked Professor Capra to develop a template that each advisory committee could use to develop appropriate amendments to their own rules. He pointed out that each of the advisory committees had reviewed the template and had raised a number of policy issues. In addition, the Department of Justice and other interested parties had offered practical and helpful comments on the template.

Judge Fitzwater reported that the E-Government Subcommittee met just before the Standing Committee meeting and revised the template in several respects. He emphasized that in making policy choices, the subcommittee had worked from the Judicial Conference's recent privacy policy statements and the assumptions made by the Court Administration and Case Management Committee. The revised template, he said, would now be sent back to the advisory committees for further consideration at their autumn meetings.

NEXT COMMITTEE MEETING

The next committee meeting was scheduled for Thursday and Friday, January 13-14, 2005.

Respectfully submitted,

Peter G. McCabe
Secretary

Judge Montali will report orally on the June 2004 meeting of the Bankruptcy Committee.

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **"FAST TRACK" CONSIDERATION OF AMENDMENTS TO RULES 2002(g) (NATIONAL CREDITOR NOTICING), 9001 (NOTICE PROVIDERS), AND 9036 (DELETION OF CONFIRMATION OF RECEIPT OF ELECTRONIC NOTICES)**

DATE: **AUGUST 19, 2004**

This month, the Administrative Office published proposed amendments to Bankruptcy Rules 2002(g) and 9001 to permit creditors and notice providers to establish their own processes for the delivery of notices. Also proposed was an amendment to Rule 9036 to delete the requirement that the sender of an electronic communication receive confirmation of receipt of the notice in order for the notice to be considered complete. The proposed amendments to Rules 2002(g) and 9001 are related, but the Rule 9036 amendment is independent of those other proposals. Although they are independent, each of the proposals should produce savings to the judiciary by increasing the use of electronic communications thus reducing postal fees and other handling costs.

In the interest of expediting the consideration and promulgation of these rules amendments to create these cost savings as quickly as possible, the Standing Committee and the Judicial Conference have agreed to consider the proposals on a "fast track" for recommendation for promulgation by the Supreme Court. The process will require the Advisory Committee to consider the public comments on the proposals and vote to recommend their adoption by the Standing Committee very shortly after the close of the public comment period on February 15,

2005. This consideration and vote will take place telephonically so that the Standing Committee can likewise act quickly to make its recommendation of the proposals to the Judicial Conference. The Judicial Conference can then act on the proposals at its meeting in March, and the Supreme Court has been made aware of this expedited consideration and is willing to include the proposals (if recommended by the Standing Committee and Judicial Conference) in its order promulgating rules amendments by May 1, 2005. That would result in the amendments to Bankruptcy Rules 2002, 9001, and 9036 becoming effective on December 1, 2005. This is one year faster than normal for these amendments.

[redacted]

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **PRIVACY RULE TEMPLATE**

DATE: **AUGUST 16, 2004**

The E-Government Act of 2002 requires the promulgation of rules to protect the privacy of persons identified in court filings and to govern the availability of those documents when they are filed electronically. The Act applies to all government agencies, but the rules promulgation requirement obviously applies only to the courts. The E-Government Committee, chaired by the Hon. Sidney Fitzwater (N.D. Tex.) met on two occasions to consider drafts of a template of a privacy rule that could be adopted by the Advisory Committees. Prof. Dan Capra, the Reporter to the Advisory Committee on the Rules of Evidence, served as the Reporter for the E-Government Committee.

The E-Government Committee met most recently in June 2004, and the result of that meeting is the Revised Privacy Template attached to this memorandum as Exhibit A (the "template Rule"). Subdivision (a) of the Template Rule sets out the limitations on the disclosure of certain information in the materials filed with the court. Disclosure of a person's social security number and date of birth are limited as are references to a minor's name and any financial account numbers that might be included in the filings. The rule permits a party to file an unredacted copy of the document under seal at the same time that they file a copy of the document properly redacted as required by the rule. Consistent with recently-enacted legislation to amend the E-Government Act, the rule provides in subdivision (c) that a party may file a

reference list for use in identifying the otherwise redacted items in a particular document. Attached to this memo is a report on the amendment. The proposed rule also includes actions that are exempt from the redaction requirements (see subdivision (d)) and includes a significant restriction on electronic access to files in actions for benefits under the Social Security Act. The Template Rule also provides that a party can waive the privacy protection of subdivision (a) of the Rule by using his or her own personal identifier without redacting the relevant information.

The Template Rule also includes a provision in subdivision (f) that authorizes the court to order a greater limit or restriction on "remote electronic access" by non-parties to the electronically filed documents. The rule states that the court must be satisfied that the protection of the information provided by subdivision (a) of the rule is insufficient before it orders additional protection of the information under subdivision (f). The E-Government Committee is especially interested in receiving the comments of the Advisory Committees as to the propriety of this subdivision of the rule. The subdivision arguably may be unnecessary because the courts already have the power to seal records, and including this in the rule would simply create a cottage industry in applications for such orders.

The Advisory Committee on Civil Rules is considering the Template Rule (as are the Criminal and Appellate Rules Committees), and the expectation is that the rule as adopted by the Advisory Committees will be as uniform as possible. In fact, the E-Government Act of 2002 includes such a directive, with the proviso that the uniformity be as great as is reasonably practicable. To that end, Judges Small and Swain and I have been active participants in the work of the E-Government Committee and have considered how to best incorporate the rule into the Bankruptcy Rules. In keeping with the spirit of the E-Government Act and the directives of

Judge Fitzwater's Committee, we suggest that the Bankruptcy Rules incorporate the Civil Rule version of the Privacy Template Rule into the rules governing adversary proceedings and that the rule be added to the list of rules that apply in contested matters under Rule 9014. There is a need for one distinction between the Civil Rule and the Bankruptcy Rule. That is, the Civil Rule (we assume) will include a limitation that only the initials of a minor's name be included in the document. This will create a problem if the minor is the debtor in the case. Since the rule would apply only in adversary proceedings and contested matters, the limitation would not apply either to a voluntary or involuntary petition. (Our recent amendment to Rule 1005, for example, calls for the partial redaction of a debtor's social security number but does not require the use of only a minor's initials on the petition. Official Forms 1 and 4, the voluntary and involuntary petitions, likewise include the limit on the publication of the full social security number.) After consideration, we believe that a minor debtor's full name should be required on the petitions to ensure that creditors are receiving appropriate notice in the case. Since the full name will be on the petition, that name will appear again in the caption of the adversary proceedings and contested matters in the case. We are therefore proposing a modification of that provision of the Template Rule, to exempt the name of a minor who is the debtor from the redaction requirement in adversary proceedings and contested matters.

RULE 70XX[1] Privacy in Court Filings.

Except as provided in this rule, Rule XX F. R. Civ. P. applies in adversary proceedings. Subdivision (a)(2) of Rule XX F. R.

[1] The number will correspond to the number of the Civil Rule in the same manner as other rules in Part VII of the Bankruptcy Rules.

Civ. P. does not apply if the minor being identified is the debtor in the case.

COMMITTEE NOTE

This rule makes Civil Rule XX applicable in adversary proceedings with the exception of the limitation in that rule on the publication of a minor's name. Under the Civil Rule, only a minor's initials may be included in the filed document, and this rule carries that limitation forward if the minor is not the debtor in the case. If the debtor is a minor, the debtor's full name will be included on the petition (whether it be a voluntary or involuntary petition) as well as on all of the filings in adversary proceedings and contested matters. See Bankruptcy Rules 7010 and 9004(b).

RULE 9014 Contested Matters.

* * * *

(c) APPLICATION OF PART VII RULES. Except as otherwise provided in this rule, and unless the court directs otherwise, the following rules shall apply: 7009, 7017, 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7064, 7069, 70XX and 7071. The following subdivisions of Fed. R. Civ. P. 26, as incorporated by Rule 7026, shall not apply in a contested matter unless the court directs otherwise: 26(a)(1) (mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony) and 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan). An entity that desires to perpetuate testimony may proceed in the same

manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. The court shall give the parties notice of any order issued under this paragraph to afford them a reasonable opportunity to comply with the procedures prescribed by the order.

COMMITTEE NOTE

The rule is amended to include Rule 70XX in the list of Part VII rules that automatically apply in contested matters. That rule largely incorporates Rule XX F. R. Civ. P. with the exception that Rule XX's limitation on the use of a minor's full name is made inapplicable where the minor is the debtor in the case.

EXHIBIT A

Revised Privacy Template

Date: June 16, 2004.

Rule [ ] Privacy in Court Filings

(a) Limits on Disclosing Identifiers. If an electronic or paper filing made with the court includes any of the following identifiers,[2] only these elements may be disclosed, unless the court orders otherwise,[3]

(1) the last four digits of a person's social security number and tax identification number[4];

(2) the initials of a minor's name[5];

(3) the year of a person's date of birth; and

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[2] The subcommittee rejected an option that would apply the redaction requirement only to filings made by parties: "If a party includes any of the following identifiers in an electronic or paper filing with the court, the party is limited to disclosing:"]

[3] The subcommittee determined that flexibility should be added to the rule by allowing the court to excuse the redaction requirements in a particular case.

[4] The subcommittee determined that tax identification numbers raise the same privacy concerns as social security numbers; for many individuals, those numbers are the same.

[5] The subcommittee rejected an exception to the redaction requirement for actions in which the minor is a party; it also resolved to inquire of CACM as to how it determined that a child's name should be a protected identifier.

(4) the last four digits of a financial account[6] number.[7]

(b) Unredacted Filing Under Seal. A party that makes a redacted filing under subdivision (a) may also file an unredacted copy under seal. The unredacted copy must be retained by the court as part of the record.[8]

(c) Reference List. A filing that contains redacted identifiers may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item of redacted information listed. The reference list must be filed under seal and may be amended as of right. All references in the case to the identifiers included in the reference list will be construed to refer to the corresponding item of information.[9]

(d) Exemptions. The redaction requirement of subdivision (a) does not apply to the

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[6] The subcommittee rejected language that would limit the protection of financial accounts to those accounts that were personal; to active accounts; and to asset accounts. The subcommittee concluded that the risk of identity theft was significant with respect to *any* financial account number available over the internet.

[7] The subcommittee deleted home address as a protected identifier. It determined that a full home address was often necessary, especially in bankruptcy cases. The subcommittee requests the Criminal Rules Committee to consider whether home address should be a protected identifier in criminal cases. CACM supports the protection of home addresses in criminal cases. The subcommittee also requests the Criminal Rules Committee to consider whether it is necessary to protect home addresses in habeas cases.

[8] The subcommittee rejected the following language that was proposed by the Justice Department:

> Where a document is filed under seal solely to comply with this rule, the seal does not prohibit the disclosure of the document to the parties, their counsel, their agents, law enforcement officers, and triers of fact, nor the disclosure by those persons when appropriate to the performance of their official duties.

[9] This language is intended to track proposed legislation that would amend the E-Government Act to permit the filing of a registry list as an alternative to an unredacted document under seal. The subcommittee directed the Lead Reporter to monitor the legislation and to make any changes to the revised template to accord with the legislation as adopted.

following: [10]

(1) in a civil or criminal forfeiture proceeding, financial account numbers that identify the property alleged to be subject to forfeiture;

(2) records of an administrative agency proceeding;

(3) official records of a state court proceeding in an action removed to federal court; and

(4) the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally filed.[12]

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[10] The subcommittee requests the Criminal Rules Committee to consider the following possible exemptions to the redaction requirement, as proposed by the Justice Department for criminal cases:

(1) filings in any court in relation to a criminal matter or investigation that are prepared before the filing of a criminal charge or that are not filed as part of any docketed criminal case;

(2) arrest warrants;

(3) charging documents—including indictments, informations, and criminal complaints—and affidavits filed in support of those documents;

(4) criminal case cover sheets.

The subcommittee also requests the Criminal Rules Committee to consider whether similar exemptions are necessary for civil cases.

[11] The subcommittee rejected an exception for "a certified copy of a document filed with the court." The subcommittee determined that a redaction could be indicated on a certified copy where necessary to protect an identifier.

[12] Some subcommittee members suggested that the exemption apply to "the records of a court or tribunal whose decision is being reviewed, if those records were not subject to subdivision (a) of this rule when originally ***created.***"

(e) Social Security Appeals; Access to Electronic Files. In an action for benefits under the Social Security Act,[13] access to an electronic file is authorized as follows, unless the court orders otherwise:

(1) the parties and their attorneys may have electronic access to any part of the case file, including the administrative record;

(2) all other persons may have remote[14] electronic access only to:

(A) the docket maintained under Rule [relevant civil or appellate rule]; and

(B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.[15]

(f) Court Orders. In addition to the redaction requirement of subdivision (a), a court may by order limit or prohibit remote electronic access by non-parties to a document filed with the court. The court must be satisfied that a limitation on remote electronic access is necessary to protect against widespread disclosure of private or sensitive information that is not otherwise protected

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[13] The subcommittee considered whether limited public access, as provided for Social Security cases, should be extended to other sets of cases, such as immigration, Black Lung, ADA cases, etc. The subcommittee deferred to the determination of CACM, made after extensive study, that Social Security cases are sui generis because of the sensitive information presented and the voluminous filings made. The Subcommittee concluded that in light of CACM's considered determination, the burden would be on those seeking exclusion of other sets of cases to show that public access must be limited in order to protect privacy interests. It is possible that such a showing will be made before or during the comment period.

[14] The revised template contemplates that members of the public may obtain electronic access at the courthouse.

[15] The subcommittee rejected a sentence at the end of the subdivision that would have provided: "The parties are not required to redact personal identifiers from a transcript filed in an action for benefits under the Social Security Act." The subcommittee found this language to be unnecessary.

under subdivision (a).[16]

(g) Waiver of Protection of Identifiers. A party waives the protection of subdivision (a) as to the party's own identifier by filing that identifier without redaction.

Revised Template Committee Note

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in protecting personal identifiers, as it applies to paper as well as electronic filings. Paper filings in most districts are scanned by the clerk and made part of the electronic case file. As such they are as available to the public over the internet as are electronic filings, and therefore raise the same privacy and security concerns when filed with the court.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. See http://www.privacy.uscourts.gov/Policy.htm The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

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[16] This subdivision is referred to the Advisory Committees to determine whether it is useful to clarify that the court may by order provide protection for information not covered by the redaction requirement, on the ground that it is sensitive information that should not be accessible to non-parties over the internet. CACM's position is that courts already have this power, and to include it in this rule would provide an open invitation to parties to seek court orders.

Subdivision (b) allows parties to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. [Subdivision ©) allows parties to file a register of redacted information. This provision is derived from section 205(c)(3)(iv) of the E-Government Act, as amended in 2004.]

In accordance with the E-Government Act, the rule refers to "redacted identifiers". The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the parties.

Subdivision (f) provides for limited public access in Social Security cases. Under Judicial Conference policy, Social Security cases are *sui generis* in the pervasiveness of sensitive information and the volume of filings. Remote electronic access by non-parties is limited to the docket and the written dispositions of the court. The rule contemplates, however, that non-parties can obtain full access to the Social Security case file at the courthouse.

Subdivision (g) allows a party to waive the protections of the rule as to its own personal identifier by filing it in unredacted form. A party may wish to waive the protection if it determines that the costs of redaction outweigh the benefits to privacy. If a party files an unredacted identifier by mistake, it may seek relief from the court.[17]

[17] The subcommittee rejected language in the Committee Note that would have provided: "This rule does not apply to trial exhibits as they are not filed within the meaning of the rule." It was determined that exhibits are indeed filed in some courts, and that if exhibits are filed, they should be treated the same as any other court filing.

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

August 6, 2004

MEMORANDUM TO CHIEF JUDGES, UNITED STATES COURTS

SUBJECT: AMENDMENT TO E-GOVERNMENT ACT OF 2002 TO PROVIDE FOR REFERENCE LIST OF REDACTED INFORMATION (ACTION REQUESTED)

When the E-Government Act of 2002, Pub. L. No. 107-347, was adopted in December of 2002, Section 205(c)(3) specified that if federal rules relating to the electronic filing of documents (interim or final) provided for the redaction of certain personal data identifiers, they also had to allow a party wishing to file a document containing such information to file an unredacted copy of the document under seal, which the court must retain as part of the record. Pursuant to the law, the court retained the discretion to require a party to file a redacted copy of the same document for placement in the public file.

These new statutory procedures were inconsistent with the redaction contemplated by the Judicial Conference policy on privacy and public access to electronic case files (JCUS-SEP/OCT 01, pp. 48-50) in that courts were no longer allowed to require parties to file redacted versions only. Moreover, they required the courts to keep a duplicate set of files for cases, one public file with redacted copies of documents and another file with sealed unredacted copies of the same documents. I noted in my memorandum of March 5, 2003, which discussed the legislation, that efforts were under way to achieve an amendment that would change these provisions. I am happy to report that on August 2, 2004, the President signed into law H.R.1303, which amends section 205(c)(3) of the Act to provide an additional method of dealing with redacted documents. The text of H.R.1303 is included as Attachment 1.

H.R.1303 provides for a rule which would permit the filing of a "reference list" with the court that would include the complete version of each personal data identifier and a corresponding partially redacted version of each identifier. This redacted version would be used in lieu of, and be construed to refer to, the complete identifier in subsequent filings in the case. The list is intended to serve as a type of `key.' For example, if an individual's full Social Security Number is 123-45-6789, the list would include the complete number with the corresponding partially redacted number of XXX-XX-6789, which would be used in future filings. This listing would be maintained under seal and could be amended by a party as a matter of right.

This is beneficial to the court and the clerk's office because it eliminates the filing of two versions of a document--one unredacted (and automatically under seal) and one redacted. It allows the implementation of the Judicial Conference privacy policy by providing public access to redacted electronic case files. This satisfies the Department of Justice's needs as well by permitting filing of unredacted identifiers in those circumstances it deems necessary to establish the elements of a criminal case. The listing can be filed in civil, criminal, or bankruptcy cases.

Proposed revisions to the Model Notice of Electronic Availability of Case File Information and Guideline for a Local Court Rule to implement these procedures are included as Attachment 2. If you have any questions about this new provision of the E-Government Act, please contact your regional administrator in the appropriate court administration division. If you have questions about the CM/ECF project or PACER, please contact Susan Del Monte, Attorney Advisor, Electronic Public Access Program at 202-502-1500 or *Susan Del Monte/DCA/AO/USCOURTS.*

Leonidas Ralph Mecham

cc: Circuit Executives
District Court Executives
Clerks, United States Courts of Appeals
Clerks, United States District Courts
Clerk, United States Court of Federal Claims
Clerks, United States Bankruptcy Courts
Clerks, Bankruptcy Appellate Panels

Attachment 1

SECTION 1. RULEMAKING AUTHORITY OF JUDICIAL CONFERENCE.

1. Section 205(c) of the E-Government Act of 2002 (Public Law 107-347; 44 U.S.C. 3501 note) is amended by striking paragraph (3) and inserting the following:

`(3) PRIVACY AND SECURITY CONCERNS-

`(A)(i) The Supreme Court shall prescribe rules, in accordance with Sections 2072 and 2075 of Title 28, United States Code, to protect privacy and security concerns relating to electronic filing of documents and the public availability under this subsection of documents filed electronically or converted to electronic form.

`(ii) Such rules shall provide to the extent practicable for uniform treatment of privacy and security issues throughout the Federal courts.

`(iii) Such rules shall take into consideration best practices in Federal and State courts to protect private information or otherwise maintain necessary information security.

`(iv) Except as provided in clause (v), to the extent that such rules provide for the redaction of certain categories of information in order to protect privacy and security concerns, such rules shall provide that a party that wishes to file an otherwise proper document containing such protected information may file an unredacted document under seal, which shall be retained by the court as part of the record, and which, at the discretion of the court and subject to any applicable rules issued in accordance with Chapter 131 of Title 28, United States Code, shall be either in lieu of, or in addition to, a redacted copy in the public file.

`(v) Such rules may require the use of appropriate redacted identifiers in lieu of protected information described in Clause (iv) in any pleading, motion, or other paper filed with the court (except with respect to a paper that is an exhibit or other evidentiary matter, or with respect to a reference list described in this subclause), or in any written discovery response--

`(I) by authorizing the filing under seal, and permitting the amendment as of right under seal, of a reference list that–

`(aa) identifies each item of unredacted protected information that the attorney or, if there is no attorney, the party, certifies is relevant to the case; and

`(bb) specifies an appropriate redacted identifier that uniquely corresponds to each item of unredacted protected information listed; and

`(II) by providing that all references in the case to the redacted identifiers in such reference list shall be construed, without more, to refer to the corresponding unredacted item of protected information.

`(B)(i) Subject to Clause (ii), the Judicial Conference of the United States may issue interim rules, and interpretive statements relating to the application of such rules, which conform to the requirements of this paragraph and which shall cease to have effect upon the effective date of the rules required under Subparagraph (A).

`(ii) Pending issuance of the rules required under Subparagraph (A), any rule or order of any court, or of the Judicial Conference, providing for the redaction of certain categories of information in order to protect privacy and security concerns arising from electronic filing or electronic conversion shall comply with, and be construed in conformity with, Subparagraph (A)(iv).

`(C) Not later than 1 year after the rules prescribed under subparagraph (A) take effect, and every 2 years thereafter, the Judicial Conference shall submit to Congress a report on the adequacy of those rules to protect privacy and security.

Attachment 2

Proposed Model Notice of Electronic Availability of Case File Information
AMENDED TO COMPLY WITH THE AUGUST 2, 2004 AMENDMENTS TO THE E-GOVERNMENT ACT OF 2002
(New material underscored; deleted material struck through)

For WebPACER/RACER Imaging Courts

The Office of the Clerk is now imaging pleadings for posting to WebPACER/RACER, through the court's Internet website. Any subscriber to WebPACER will be able to read, download, store and print the full content of imaged documents. The clerk's office is not imaging or posting documents sealed or otherwise restricted by court order.

For CM/ECF Courts

The Office of the Clerk is now accepting electronically filed pleadings and making the content of these pleadings available on the court's Internet website via WebPACER. Any subscriber to WebPACER will be able to read, download, store and print the full content of electronically filed documents. The clerk's office will not make electronically available documents that have been sealed or otherwise restricted by court order.

For all courts

You should not include sensitive information in any document filed with the court unless such inclusion is necessary and relevant to the case. You must remember that any personal information not otherwise protected will be made available over the Internet via WebPACER. If sensitive information must be included, certain personal data identifiers must be partially redacted from the pleading, whether it is filed traditionally or electronically: Social Security numbers, financial account numbers, dates of birth and the names of minor children. (See *Proposed Guideline for a Local Rule for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*)

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers specified above may

(a) file an unredacted document under seal. This document shall be retained by the court as part of the record. Or

(b) file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete identifier. The reference list must be filed under seal, and may be amended as of right. It shall be retained by the court as part of the record.

The court may, however, still require the party to file a redacted copy for the public file.

In addition, exercise caution when filing documents that contain the following:

1) Personal identifying number, such as driver's license number;
2) medical records, treatment and diagnosis;
3) employment history;
4) individual financial information; and
5) proprietary or trade secret information.

Counsel is strongly urged to share this notice with all clients so that an informed decision about the inclusion of certain materials may be made. **If a redacted document is filed, it is the sole responsibility of counsel and the parties to be sure that all pleadings comply with the rules of this court requiring redaction of personal data identifiers.** (See *Proposed Guideline for a Local Rule for United States District Courts Addressing Judicial Conference Privacy Policy Regarding Public Access to Electronic Case Files.*) **The clerk will not review each pleading for redaction.**

Proposed Guideline for a Local Rule for United States District Courts
Addressing Judicial Conference Privacy Policy
Regarding Public Access to Electronic Case Files

AMENDED TO COMPLY WITH THE AUGUST 2, 2004 AMENDMENTS TO THE E-GOVERNMENT ACT OF 2002
(New material underscored; deleted material struck through)

To be inserted into the local rules of the district that address general rules of pleading in civil cases:

In compliance with the policy of the Judicial Conference of the United States, and the E-Government Act of 2002, and in order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all
pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the Court.

a. **Social Security numbers.** If an individual's Social Security number must be included in a pleading, only the last four digits of that number should be used.

b. **Names of minor children.** If the involvement of a minor child must be mentioned, only the initials of that child should be used.

c. **Dates of birth.** If an individual's date of birth must be included in a pleading, only the year should be used.

d. **Financial account numbers.** If financial account numbers are relevant, only the last four digits of these numbers should be used.

In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may

a. file an unredacted version of the document under seal, or

b. file a reference list under seal. The reference list shall contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.

~~This~~ The unredacted version of the document or the reference list ~~document~~ shall be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file.

The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The Clerk will not review each pleading for compliance with this rule.

MEMORANDUM

DATE: August 20, 2004

FROM: Subcommittee on Forms

SUBJECT: Proposals for Amending Official Form 10, the Proof of Claim

TO: Advisory Committee on Bankruptcy Rules

At the March 2004 meeting the Committee considered a proposal for amending Official Form 10, the Proof of Claim, that had been submitted by the CM/ECF Working Group's claims subgroup. The subgroup consisted of several judges and clerks and consulted with selected trustees to develop a proposed form that would facilitate the electronic filing and examining of claims. Judge McFeeley served as liaison from the Committee to the group.

The Committee was sympathetic to goals of the CM/ECF Working Group, but identified several proposed revisions that members believed would conflict with the Bankruptcy Code. The Committee referred the proposals to the Subcommittee on Forms, with instructions to attempt to develop a consensus form that could be published for comment.

The subcommittee discussed the proposals in detail during a series of conference calls, and Mrs. Ketchum and Mr. Wannamaker met with the CM/ECF Working Group and conferred with group members and trustees individually. There were two areas of concern for both groups. One was the limitation of attachments and the other was the matter whether the sum of the secured, priority, and unsecured nonpriority components of a claim could exceed the designated "total" amount of the claim.

The subcommittee is proposing a draft that would not use the word "total," but would, in numbered paragraph 1, request simply the amount of the claim. Paragraph 1 then offers the creditor two blanks in which the creditor can designate a breakdown into secured and unsecured amounts. The creditor then is directed to provide further information if all or part of the claim is either secured or entitled to priority. The form thus would sidestep the issue of "total," but if completed correctly would provide the trustees, in the majority of cases, with most of the benefits the CM/ECF Working Group was seeking through forcing a partly secured or partly priority

claim to "add up" to a "total."

With respect to attachments, the CM/ECF Working Group asked that the form list specifically the kinds of documents that should be submitted to support a claim, e.g., a certificate of title. The group also seemed very concerned to have the 10-page limit complied with. The subcommittee, while supporting both specificity in the list of documents and the concept of limits on the size of attachments, does not favor including in the 10 pages either the statement of interest or other charges required in numbered paragraph 1 or any power of attorney under which the person signing the form is filing the proof of claim.

Also at the March 2004 meeting, the Committee reviewed a suggestion from Mark Van Allsburg, the bankruptcy clerk in Hawaii, that Rule 3004 be amended to relieve the clerk of the duty to provide notice to the creditor of the filing by the debtor or trustee of the creditor's claim. Mr. Van Allsburg said it is difficult for the clerk's office to recognize that a particular claim has been filed by the debtor or trustee and suggested that this duty should be delegated to the filing party. The subcommittee has included in the amended form a checkbox to indicate that the claim is being filed by the debtor or trustee. This checkbox would flag the claim for the clerk to send the notice, making the task a simple one, and making an amendment to Rule 3004 unnecessary. The subcommittee believes that delegating this notice to the filing party would not be in the best interest of the bankruptcy system.

The attached draft of an amended form has been circulated to the members of the CM/ECF Working Group and to a group of judges who attended Chairman Small's rules roundtable discussion at the Federal Judicial Center's August 2004 National Workshop for Bankruptcy Judges. The issue of how to address the amount of the claim appears to be resolved, and the subcommittee will consider all comments on the draft and the treatment of limitations on attachments on the afternoon of September 8. The subcommittee may present at the September 9 -10 Committee meeting a marked up version of the attached draft showing any changes approved at the September 8 subcommittee meeting.

Attachments

FORM B10 (Official Form 10) (DRAFT)

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

PROOF OF CLAIM

Name of Debtor:

Case Number:

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.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

☐ Check this box to indicate that this claim amends a previously filed claim

Court Claim Number:_____
(If known)

Filed on:_____

Name and address where notices should be sent:

Telephone number:

Debtor may have scheduled account as:

Name and address where payment should be sent (if different from above):

Telephone number:

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Time Case Filed: $_____

$** _____ (Secured) **$_____ (Unsecured)

If all or part of your claim is secured, complete item 3 below.
If all or part of your claim is entitled to priority, complete item 4.

☐ Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of all interest or additional charges.

2. Basis for Claim: _____
(See instructions on Reverse Side)

2a. Last four digits of account or other number by which creditor identifies debtor: _____

3. Secured Claim

☐ Check this box if your claim is secured by a lien on property or a right of setoff.

Describe property or right of setoff:

Real Estate: **Motor Vehicle:** **Other:**

Value of Property: $_____ **Annual Interest Rate:**____**%**

Amount of arrearage and other charges as of time case filed included in secured claim, if any: $_____

Amount of Secured Claim: $_____ **Amount Unsecured: $**_____

4. Amount of Claim Entitled to Priority under 11 U.S.C. §507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim.

☐ Wages, salaries, or commissions (up to $4,650*) earned within 90 days before filing of the bankrupty petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. §507(a)(3).

☐ Contributions to an employee benefit plan - 11 U.S.C. §507(a)(4).

☐ Up to $2,100* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. §507(a)(6).

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child - 11 U.S.C. §507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. §507(a)(8).

☐ Other - Specify applicable paragraph of 11 U.S.C. §507(a)(_____).

Amount entitled to priority:

$_____

**Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

5. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

6. Documents: Attach redacted copies of documents that evidence the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, and evidence of perfection of lien.

DO NOT SEND ORIGINAL DOCUMENTS. If documents exceed 10 pages, attach relevant excerpts and a summary. *DO NOT ATTACH MORE THAN 10 PAGES, INCLUDING ANY SUMMARY OF DOCUMENTS EVIDENCING THE CLAIM*

If the documents are not available, explain:

Date:

Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from notice address above. Attach copy of power of attorney, if any.

FOR COURT USE ONLY

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both 18 U.S.C. §§152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

DEFINITIONS

Debtor
The person, corporation, or other entity that has filed a bankruptcy case is called the debtor.

Creditor
A creditor is any person, corporation, or other entity to whom the debtor owed a debt on the date that the bankruptcy case was filed.

Proof of Claim
A proof of claim is a form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Secured Claim under 11 U.S.C. §506(a)
A claim is a secured claim to the extent that the creditor has a lien on property of the debtor that gives the creditor the right to be paid from that property before creditors who do not have liens on the property. The amount of a secured claim may not exceed the value of the property. Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other item of property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claim may be a secured claim. (See also Unsecured Claim.)

Unsecured Claim
If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Claim Entitled to Priority under 11 U.S.C. §507(a)
Certain types of claims are given priority, so they are to be paid in bankruptcy cases before most other claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form.

Redacted
A redacted page of a document is one where the person filing it has masked, concealed, or omitted some words, numerals or other information. A creditor should redact all but the last four digits of any social security, tax identification, or financial account number, all but the initials of a minor's name, and all but the year of a person's date of birth.

Relevant Excerpts
Those parts of a larger document that bear directly on the matter to be examined by the trustee or determined by the court. Excerpts with respect to a claim should provide information about the amount and validity of the creditor's claim: names of the parties, date signed, amount of the debt, and evidence of perfection of the creditor's interest, if any. Evidence of perfection may include a mortgage, lien, certificate of title, financing statement, other document or part thereof, showing when and where it was filed or recorded. The restriction of attachments to 10 pages is imposed without prejudice to the creditor's right to file additional documentation at a later date.

INFORMATION

Date Stamped Copy
To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of this proof of claim. Date stamped copies can also be downloaded from the court's Electronic Case Filing web site.

Offers to Purchase a Claim
Certain entities are in the business of purchasing claims held by creditors against a debtor for an amount that is less than the face amount of the claims. One or more of these entities may contact you and offer to purchase your claim against the debtor. Some of the written communications from these entities may be easily confused with official court documentation or communications from the debtor. These entities do not represent the bankruptcy court or the debtor. You have no obligation to sell your claim to these entities. In the event you do decide to sell your claim, any transfer of such claim is subject to Federal Rule of Bankruptcy Procedure 3001(e), any applicable provisions of the Bankruptcy Code, and any applicable orders of the bankruptcy court.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case from the court, all of this information is near the top of the notice.

Information about Creditor:
In addition to providing the information requested on the front of this form, a creditor has an obligation to maintain the currency of the creditor's address with the bankruptcy court. See Rule 2002(g).

1. **Amount of Claim at Time Case Filed:**
   This is the total amount of the claim at the time of case filing
2. **Basis for Claim:**
   State the type of debt. Examples: goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, credit card, or others that you may specify.
3. **Secured Claim:**
   Check the appropriate place if the claim is a secured claim. You must state the type and value of property that secures the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).
4. **Amount of Claim Entitled to Priority under 11 U.S.C. §507(a).** If any portion of your claim falls in one of the listed categories, check the box to specify the type of priority and state the amount: (See DEFINITIONS, above.) A claim may be partly priority and partly non-priority if, for example, the claim is for more than the amount given priority by the law.
5. **Credits:**
   By signing this proof of claim, you are stating, subject to criminal penalties, that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor.
6. **Documents:**
   You must attach to this proof of claim form, redacted copies of documents that show the debtor owes the debt claimed or, if the documents exceed 10 pages, relevant excerpts of the documents and a summary. If documents are not available, you must attach an explanation of why they are not available. DO NOT SEND ORIGINAL DOCUMENTS AND DO NOT ATTACH MORE THAN 10 PAGES INCLUDING ANY SUMMARY.

Signature:
The person filing this proof of claim must sign it. Rule 9001. If the claim is filed electronically, Rule 5005 (a)(2) authorizes courts to establish local rules specifying what constitutes a signature. Print the name and title, if any, of the creditor or other person authorized to file this claim and state the filer's address and telephone number if different from the notice address given on the reverse side. Attach a complete copy of any power of attorney.

COMMITTEE NOTE (2006)

The form is amended in several respects based on the experiences of creditors and trustees in using it and on the technological changes that have occurred in the courts' processing of claims. A definition of the word "redacted" has been added in furtherance of the privacy policy of the Judicial Conference of the United States.

The creditor now has a space in which to provide a separate payment address if that is different from the creditor's address for receiving notices in the case. The checkboxes for indicating that the creditor's address provided on the proof of claim is a new address, and that the creditor never received any notices from the court in the case have been deleted. The computer systems now used by the courts make it unnecessary for a creditor to "flag" a new address or call attention to the fact that the creditor is making its first appearance in the case. In place of the deleted items is a new checkbox to be used when a debtor or trustee files a proof of claim for a creditor, which will alert the clerk to send the notice required by Rule 3004. The box for indicating whether the claim replaces a previously filed claim also has been deleted as no longer necessary in light of the 2005 amendments to Rule 3004 and Rule 3005. The creditor simply will amend the claim filed by the other party.

Requests for the creditor to state the date on which the debt was incurred and the date on which any court judgment concerning the debt was obtained have been deleted, based on reports from trustees that they rely on the documents supporting the claim for this information. The checkboxes for stating the basis for the creditor's claim have been replaced with a blank in which the creditor is to provide this information. Examples of the most common categories, based on the former checkboxes, can be found in the instructions on the reverse side of the form. The request to state the account number by which the creditor identifies the debtor has been moved here, to paragraph 2 of the form, and revised to request only the last four digits of the number, in furtherance of the privacy policy of the Judicial Conference.

The adjective "total" has been deleted from the sections of the form where the creditor states the amount of the claim and the creditor now simply reports the amount of the claim. If the claim is a general unsecured claim, no further details are stated on the form, although a creditor still must provide a copy of any writing on which the claim is based, as required by Rule 3001(c), and must attach a statement itemizing any interest or other charges (in addition to the principal) that are included in the claim. If the claim or any part of it is secured or entitled to

priority under § 507(a) of the Code, the creditor is directed to provide details in the appropriate sections of the form. The creditor now states the amount to be afforded priority only once, in the section of the form designated for describing the specific priority being asserted. The introductory language in the section where the creditor describes any priority to which it is entitled has been revised for clarity. The word "collateral" has been replaced with the less colloquial and more accurate phrase "lien on property" throughout the form.

The directions concerning documents to be attached have been revised to specify that these are to be redacted, in light of the privacy policy of the Judicial Conference, and that only relevant excerpts of up to ten pages, including any summary of the documents, are to be filed with the proof of claim. The "definitions" section on the reverse side of the form explains the terms "redacted" and "relevant excerpts." The restriction of attachments to ten pages is imposed without prejudice to the trustee's right to request, or the creditor's right to file, additional documentation at a later date.

Information about obtaining from the court a date-stamped copy of the proof of claim has been moved to a new section called "Information" on the reverse side of the form. This new section also alerts a creditor to the possibility that it may be approached about selling its claim, advises that the court has no role in any such solicitations, and states that a creditor is under no obligation to accept any offer to purchase its claim. In addition, the definitions and instructions on the reverse side of the form have been amended generally to reflect the deletions and other changes on the front of the form. The creditor also is reminded to keep the court informed of any changes in the creditor's address.

Finally, a new instruction has been added concerning the signature on the form. These instructions include information and citations to Rules 9011 and 5005(a)(2) concerning signature requirements in an electronic filing environment.

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF _____

Complete this form and electronically file at (xxx ecf location) or if unable to electronically file mail a copy of this form to (court address)

PROOF OF CLAIM (Form B10)

COURT ID:_____

Name of Debtor(s)	Case Number (Chapter e.g. 7,9,11 or 13)

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.

Name of Creditor (The person or other entity to whom the debtor owes money or property):

☐ Check this box to indicate that this claim amends a previously filed claim:

Court Claim Number: _____ filed on _____

Name and Address where notices should be sent:

Telephone Number:

Debtor may have scheduled account as:

Telephone Number:

Name and address where payments should be sent (if different from above):

Telephone Number:

Account or other number by which creditor identifies debtor:

1. Total amount of Claim at case filing:

$_____

2. Basis for claim:

_____

3. Secured Claim

☐ Check this box if your claim is secured by collateral (including a right of setoff).

Brief Description of Collateral:

☐ Real Estate ☐ Motor Vehicle ☐ Other: _____

Value of Collateral: $_____ Annual Interest Rate: _____ %

Amount of arrearage and other charges at time case filed included in secured claim, if any $_____

Total Amount of Secured Claim: $_____ (may not exceed value of collateral)_____

4. Unsecured Claim Entitled to Priority under 11 U.S.C. § 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.

Specify the priority of the claim

☐ Wages, salaries, or commissions (up to $4,650), earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3).

☐ Contributions to an employee benefit plan - 11 U.S.C. § 507(a) (4).

☐ Up to $2,100 of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a) (6).

☐ Alimony, maintenance, or support owed to a spouse, former spouse, or child -11 U.S.C. § 507(a) (7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a) (8).

☐ Other - Specify applicable paragraph of 11 U.S.C. § 507(a) (_____).

Amount Entitled to Priority $_____.

5. SUMMARY OF PROOF OF CLAIM:

TOTAL AMOUNT OF CLAIM $_____ (From section 1)

Secured: $_____ (From Section 3)

Priority: $_____ (From Section 4)

Unsecured: $_____ (Total Claim Less Secured Less Priority)

6. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.

pporting Documents: Attach a summary of claim and how it is computed. If secured, attach redacted pages fromsecurity uments showing parties, collateral, description, signatures, and evidence of perfection of lien. Provide name, address, phone number, and email address of person, if different than person signing below, who could provide complete documents porting claim.

DO NOT SEND ORIGINAL DOCUMENTS AND DO NOT ATTACH MORE THAN 10 PAGES OR THE ELECTRONIC EQUIVALENT THEREOF.

FOR COURT USE ONLY

Date:	The person filing this claim must sign it, unless the person is filing this claim electronically using the bankruptcy court electronic case filing system. Print name and title, if any, and state address, email address and telephone number if different from notice address above. Attach a copy of power of attorney, if any.

PENALTY FOR PRESENTING FRAUDULENT CLAIMS: FINE OF UP TO $500,000 OR IMPRISONMENT FOR UP TO 5 YEARS OR BOTH. (18 U.S.C. § 152 AND § 3571).

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In particular types of cases or circumstances, such as bankruptcy cases that are not filed voluntarily by a debtor, there may be exceptions to these general rules.

----- DEFINITIONS -----

Debtor
The person, corporation, or other entitythat has filed a bankruptcy case is called the debtor.

Creditor
A creditor is any person, corporation, or other entity to whom the debtor owes money or property at the time bankruptcy case was filed or that has a claim listed in 11 U.S.C. § 101(10).

Proof of Claim
A form telling the bankruptcy court how much the debtor owed a creditor at the time the bankruptcy case was filed (the amount of the creditor's claim). This form must be filed with the clerk of the bankruptcy court where the bankruptcy case was filed.

Unsecured Claim
If a claim is not a secured claim it is an unsecured claim. A claim may be partly secured and partly unsecured if the property on which a creditor has a lien is not worth enough to pay the creditor in full.

Unsecured Claim Entitled to Priority under 11 U.S.C. 507(a)
Certain types of unsecured claims are given priority, so they are to be paid in bankruptcy cases before most other unsecured claims (if there is sufficient money or property available to pay these claims). The most common types of priority claims are listed on the proof of claim form. Unsecured claims that are not specifically given priority status by the bankruptcy laws are classified as Unsecured Non-priorityClaims.

Account may also be scheduled as:
The name, address, and account number of the person, corporation, or other entity whom the debtor may have listed in the schedules as the holder of the claim.

Secured Claim under 11 U.S.C. 506(a)
A claim is a secured claim to the extent that the creditor has a lien against the propertyof the debtor ("collateral"), provided that the amount of the secured claim may not exceed the value of the debtor's interest in the collateral, less the aggregate amount (senior liens) against the debtors interest in that collateral.

Examples of liens are a mortgage on real estate and a security interest in a car, truck, boat, television set, or other itemof property. A lien may have been obtained through a court proceeding before the bankruptcy case began; in some states a court judgment is a lien. In addition, to the extent a creditor also owes money to the debtor (has a right of setoff), the creditor's claimmay be a secured claim. (See also Unsecured Claim)

----INFORMATION----

Offers to Purchase Claims
Certain entities are in the business of purchasing claims held by creditor against a debtor for an amount that is less than the face amount of the claims. One or more of these entities may contact you and offer to purchase your claim against the Debtor. Some of the written communications from these entities may be easily confused with official Court documentation or communications from the Debtor. These entities do not represent the Bankruptcy Court or the Debtor. Therefore, you have no obligation to sell your claim to these entities. In the event you do decide to sell your claim, any transfer of such claim is subjec to Federal Rule of Bankruptcy Procedure 3001(e), any applicable provisions of the Bankruptcy Code, and any applicable orders o the Bankruptcy Court.

Date Stamped Copy
To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and a copy of this proof of claim. Date stamped copies can also be downloaded from the Courts Electronic Case Filing Web site.

Items to be completed in Proof of Claim form (if not already filled in)

Court , Name of Debtor, and Case Number:
Fill in the name of the federal judicial district where the bankruptcy case was filed (for example, Central District of California), the name of the debtor in the bankruptcy case, and the bankruptcy case number. If you received a notice of the case fromthe court, all of this information is near the top of the notice.

Information about Creditor:
Complete the section giving the name, address, and telephone number of the creditor to whom the debtor owes money or property, and the debtor's account number, if any. If anyone else has already filed a proof of claim relating to this debt, if you never received notices fromthe bankruptcy court about this case, if your address differs fromthat to which the court sent notice, or if this proof of
claim replaces or changes a proof of claimthat was already filed, check the appropriate box on the form.

1. Total Amount of Claim at Time Case Filed:

This is the total amount of the claim at the time of case filing. The amount listed in this section should not exceed the sum of the total amount of the secured claim, unsecured priority claim, and unsecured claim totals.

2. Basis for Claim:
This is the type of debt. Examples: goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, credit card, or others that you may specify.

3. Secured Claim:
Check the appropriate place if the claimis a secured claim. You must state the value and type of property that is collateral for the claim, attach copies of the documentation of your lien, and state the amount past due on the claim as of the date the bankruptcy case was filed. A claim may be partly secured and partly unsecured. (See DEFINITIONS, above).

4. Unsecured Claim Entitled to Priority under 11 U.S.C. 507(a). If any portion of your claim falls in one of the following categories, checkthe box and state the amount. Check the appropriate place if you have an unsecured priorityclaim, and state the amount entitled to priority. (See DEFINITIONS, above). A claim may be partly priority and partly non-priority if, for example, the claim is for more than the amount given priority by the law. Check the appropriate place to specifythe type of priority claim.

5. Summary of Proof of Claim
Total amount of claim should match the total amount of claim from Section 1. The secured line should match the total amount of the Secured Claim from Section 3. The priority line should match the total amount of the Amount Entitled to Priority from Section 4. The unsecured amount should be the total amount of the claim less secured and priority from sections 3 and 4. If the claim is fully Unsecured, the total amount of the claim from Section 1 and total amount of claim in Section 5 should match this line.

6. Credits:
By signing this proof of claim, you are stating under oath that in calculating the amount of your claim you have given the debtor credit for all payments received from the debtor

7. Supporting Documents:
You must attach to this proof of claimform copies of documents that show the debtor owes the debt claimed or, if the documents are too lengthy, a summary of those documents. If documents are not available, you must attach an explanation of why they are not available. *DO NOT SEND ORIGINAL DOCUMENTS AND DO NOT ATTACH MORE THAN 10 PAGES OR THE ELECTRONIC EQUIVALENT THEREOF.*

Mark Van Allsburg
12/11/2003 07:07 PM

To: Rules_Support@ao.uscourts.gov
cc:
Subject: Comment on Proposed FRBP 3004

03-BK-004

Dear Committee Members:

The proposed rule provides that the Clerk provide notice to the trustee, the debtor and to the creditor when the trustee or the debtor files a claim on behalf of a creditor. The current rule has the same provision.

This is a real problem for the clerk's office. It is often very difficult to recognize that a claim has been filed by the trustee or by the debtor. Often the only clue is the signature on the bottom of the claim and the court staff does not pay much attention to this when docketing the claim.

Unless there is something in the **Code** which requires that notice be sent by the Clerk, then this rule should be written to require that the Clerk, or some other person as the court directs, shall send the notice. Or, and better yet, the rule could provide that the filing party serve copies of the claim to the creditor and trustee or debtor and then file a proof of service.

The wording of this section suggests that this duty cannot be delegated to another party which only makes sense if there is a Code provision which requires this. I don't see one -- although I could be wrong. Unless there is some good policy consideration this duty should be one which can be delegated.

Mark Van Allsburg
Clerk, USBC Hawaii

MEMORANDUM

DATE: August 19, 2004

FROM: Subcommittee on Forms

SUBJECT: Proposed Director's Form B 210, Notice of Transfer of Claim

TO: Advisory Committee on Bankruptcy Rules

At the March 2004 meeting, the Committee considered a proposed new Director's form titled "Notice of Transfer of Claim" submitted by the CM/ECF Working Group's claims subgroup. The subgroup consisted of several judges and clerks and consulted with selected trustees and mass claims purchasers to develop a proposed form that would streamline the procedure for recording the transfer of a claim and, ultimately, facilitate the electronic filing, recording, and noticing of these transfers.

The Committee was sympathetic to the goals of the CM/ECF Working Group, although several members pointed out difficulties they saw with the form as proposed. After discussion, the Committee referred the proposed form to the Forms Subcommittee with instructions to work with the CM/ECF Working Group to develop a mutually acceptable form for consideration by the Committee at its September meeting.

In response to the concerns stated at the March meeting about the use of the phrase "unconditional sale," the subcommittee deleted most of the language concerning the transaction between the transferee and the transferor, limiting it to a statement that there has been a transfer which is referenced in the notice. The subcommittee also rearranged the columns on the form to make sure all information about the transferor is in one column and all information about the transferee is in the other column, without any switching back and forth. The subcommittee deleted the request for the amount of the claim, as this information is not needed and may result in difficulties if the amount stated differs from what is on the original claim. The subcommittee deleted the request that the transferee filing the notice provide the claim number assigned by the

court on the basis that the transferee may not have that information. The subcommittee also clarified the language about "Court Number" and "Trustee Number," and Mr. Waldron provided notes that explain how the court would provide the transferee's address and that the notice would be sent to multiple addresses.

On May 19, Ms. Ketchum and Mr. Wannamaker met with the CM/ECF Working Group and discussed with the group the subcommittee's revisions to the original proposal. Overall, the subcommittee's changes were well-received by CM/ECF Working Group. The group asked that the request for the claim number be restored and were agreeable to the addition of "if known" to the request. Group members stated that many claims transferees will have obtained the claim number from either the transferor or the court's claims register, while those who do not have access to the number will not be prevented or deterred from filing the notice for lack of it. In a subsequent conference call, the subcommittee agreed to restore the request for the claim number.

One issue that the subcommittee raised in its own deliberations was how to conform to the requirement of Rule 3001(e)(2) that the transferee of a claim file "evidence of the transfer." The attached draft resolves this issue by stating, under "Deadline to Object" near the bottom of the form, that the notice filing of the notice serves "as evidence of the transfer."

As the proposed form would be a Director's Form, there is no Committee Note. Ms Ketchum has drafted proposed instructions to be posted on the U.S. Courts website with the form. These draft instructions also are attached. They follow the format used by the Administrative Office for the Bankruptcy Forms Manual. That format results in some redundancy, but that may be helpful, especially for lay users.

Attachments

UNITED STATES BANKRUPTCY COURT__ _____ DISTRICT OF _____
COURT ID (Court Use Only) _____

NOTICE OF TRANSFER OF CLAIM OTHER THAN FOR SECURITY

Name of Debtor | Case Number

A CLAIM HAS BEEN FILED IN THIS CASE. Transferee hereby gives notice pursuant to Rule 3001(e)(2), Fed. R. Bankr. P., of the transfer, other than for security, of the claim referenced in this notice.

Name of Transferee | Name of Transferor

Name and Address where notices to transferee should be sent

Court Record Address of Transferor (Court Use Only)

Notice will be generated automatically from CM/ECF creditor data.

Phone: _____
Last Four Digits of Acct #: _____

Last Four Digits of Acct. #: _____

Name and Address where transferee payments should be sent (if different from above)

Current Address of Transferor

If these two addresses for the transferor differ, court will send notices automatically to both.

Phone: _____
Last Four Digits of Acct #: _____

Phone: _____
Last Four Digits of Acct. #: _____

Court Claim # (if known): _____
Date Claim Filed: _____

I declare under penalty of perjury that the information provided in this notice is true and correct to the best of my knowledge and belief.

By: _____ Date: _____
Transferee/Transferee's Agent

Penalty for making a false statement: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 & 3571.

~~DEADLINE TO OBJECT~~

The transferor of claim named above is advised that this Notice of Transfer of Claim Other Than for Security has been filed in the clerk's office of this court as evidence of the transfer. Objections to this transfer must be filed with the court within twenty (20) days of the mailing of this notice. If no objection to transfer is timely received by the court, the transferee will be substituted as the original claimant without further order of the court.

Date: _____

CLERK OF THE COURT

_____

NOTICE OF TRANSFER OF CLAIM OTHER THAN FOR SECURITY

Applicable Law and Rules

1. Section 502(a) of the Bankruptcy Code (11 U.S.C. § 502(a)) states that a claim, proof of which has been filed, "is deemed allowed, unless a party in interest . . . objects."

2. Bankruptcy Rule 3001(f) provides that [a] proof of claim executed and filed in accordance with [the Bankruptcy Rules] shall constitute *prima facie* evidence of the validity and amount of the claim."

3. Bankruptcy Rule 5003(b) requires the clerk to keep a claims register in every case in which in appears there will be a distribution to unsecured creditors. The claims register is a list of the claims filed, showing the creditor's name and the number assigned to the claim by the court, and may contain other information, such as the amount claimed, at the discretion of the court.

4. Bankruptcy Rule 3001(e)(2) governs the procedure to be followed when a creditor that has filed a proof of claim in a case sells or otherwise transfers its claim to another entity. Rule 3001(e)(2) requires the transferee to file evidence of the transfer and further requires the clerk "immediately" to notify the alleged transferor by mail of the filing of the evidence of transfer. The notice sent by the clerk also must state that any objection must be filed within 20 days from the date the notice is mailed.

5. The B 210 notice is intended to serve two purposes, that of a notice and also as evidence of the transfer of the claim. Accordingly, the notice must be verified; that is, the transferee must sign it under penalty of perjury. Bankruptcy Rule 5005(a)(2) allows the court by local rule to permit documents to be filed, signed, or verified electronically, and Rule 9036 permits notices to be sent electronically if certain conditions have been met.

If the alleged transferor files a timely objection, the court must schedule a hearing to determine the matter. If no objection is filed, the clerk will substitute the transferee for the transferor in the claims register and other records of the court.

Form B 210 is designed for the transferee to complete partially and file and for the clerk to mail to the alleged transferor. The transferee will provide all of the information on the notice except the "Court ID," the clerk's signature and date of signature, and the "Court Record Address of Transferee," which will be supplied by the court from the court's CM/ECF or other electronic database. If the transferor's address supplied by the transferee in the "Current Address of Transferor" section of the form differs from the address in the court's records, the clerk will send the notice to both addresses.

Instructions

Caption

1. Identify the Judicial District in which the bankruptcy case was filed by filling in the blanks. Example: "Eastern" [DISTRICT OF] "California." The transferee (the entity that has purchased or otherwise acquired the claim and is filing the notice) should not write anything in the blank labeled "COURT ID."

2. Insert the Name of [the] Debtor and the Case Number as they appear in the Notice of Chapter __ Bankruptcy Case, Meeting of Creditors & Deadlines" sent to creditors at the beginning of the bankruptcy case.

3. "Name of Transferee" : Insert the name of the entity that purchased or otherwise acquired the claim. This should be same entity that files the notice and that signs or whose agent signs the notice.

4. "Name of Transferor": Insert the name of the creditor that sold or otherwise relinquished the claim.

5. "Name and Address where notices to transferee should be sent": Insert the name and address of the entity that has acquired the claim and is filing the notice. This is the address the court and parties in interest will use when they send notices and other documents in the case. Include a telephone number and the last four digits of any account number assigned by the transferee to the debt that is the basis for the claim.

6. "Court Record Address of Transferor (Court Use Only)": The court will insert the name and address of the creditor that sold or otherwise relinquished the claim from the records on file in the case. The transferee filing the notice should not write anything on this part of the form.

7. "Name and Address where transferee payments should be sent (if different from above)": If payments on the claim should be sent to an address different from the one to which notices will be sent, the transferee should provide the payment address in this section of the form. Include a telephone number and the last four digits of any account number assigned by the transferee to the debt that is the basis for the claim.

8. "Current Address of Transferor": Insert the address of the creditor that sold or otherwise relinquished the claim. Include a telephone number and the last four

digits of the any account number used by the transferor to identify the debt that is the basis for the claim. If this address differs from the address in the court's records, the court will send notice automatically to both.

9. "Court Claim # (if known):": If the transferee filing the notice knows the claim number assigned by the court to the claim purchased or otherwise acquired by the transferee, insert that number here. The transferee can review the claims register in the case to obtain the claim number.

10. "Date Claim Filed:": Insert the date the claim was filed with the court by the transferor. The transferee filing the notice can review the claims register in the case to ascertain the date.

11. Signature and Date: The transferee filing the notice, if the transferee is an individual, or the transferee's agent, if the transferee is not an individual, must sign the notice under penalty of perjury. If an agent signs, the agent should type or print the agent's name and title or other authority, in addition to signing. The individual signing the notice also should date it. Rule 5005(a)(2) permits a court by local rule to authorize the filing, signing, and verifying of documents electronically. Generally, this requirement can be satisfied by typing "s/(name of individual signing or verifying)." Consult the court in which the notice is to be filed for specific requirements if the document is to be signed and verified electronically.

12. The clerk will sign the notice and insert the date it is mailed.

General Information for the Clerk

Whenever a claim is transferred under terms specified in Rule 3001(e)(2), that is, other than for security and after a proof of claim has been filed, the purchaser/transferee must file evidence of the transfer. Rule 3001(e)(2) also requires the clerk "immediately" to give notice of the alleged transfer to the seller/transferor. The notice must state further that any objection must be filed within 20 days of the date the notice is mailed. This form is designed to serve both as evidence of the transfer and as the notice the clerk sends to the transferor of the claim.

The transferee completes most of the sections of the form where information must be provided and signs it under penalty of perjury. The clerk inserts the court record address of the transferor from the creditor list or other record such as the proof of claim in the case and dates and signs the form for mailing as a notice. If the address of the transferor as provided by the transferee differs from the transferor's address in the court's records, the notice must be sent to both addresses.

If the transferor files a timely objection, either within 20 days of the mailing of the notice or within any extension of the deadline granted by the judge, the court will schedule a hearing to determine the matter. If no objection is timely filed, the clerk substitutes the transferee for the transferor in the claims register and other records of the court without the necessity of an order.

MEMORANDUM

DATE: August 17, 2004

FROM: Subcommittee on Forms

SUBJECT: Proposed Revisions to the Official Form 7, Statement of Financial Affairs

TO: Advisory Committee on Bankruptcy Rules

At the Committee's September 2003 meeting, the Committee approved an amendment to Schedule I (Official Form 6-I) that would require disclosure of a non-filing spouse's current monthly income in a chapter 7 case filed by a married debtor. Schedule I, as currently in effect, requires disclosure of a non-filing spouse's current monthly income only in a case filed under chapter 12 or chapter 13. The proposed amended Schedule I has been published for comment.

At the March 2004 meeting, the Committee considered briefly whether to amend similarly Official Form 7, the Statement of Financial Affairs, the other official form where income and other information about a non-filing spouse must be disclosed in a chapter 12 or chapter 13 case. The Committee referred the question to the Forms Subcommittee.

The subcommittee considered the Statement of Financial Affairs in detail and discussed whether it should be amended during a May 14 conference call. The subcommittee recognized that a good argument could be made for a chapter 7 trustee's interest with respect to a non-filing spouse in all of the information requested in the statement, and particularly the spouse's annual income. Yet the subcommittee also recognized that the non-filing spouse is not seeking relief under the Bankruptcy Code, is not under the jurisdiction of the court, and may not have been married to the debtor when the debts arose, all factors that raise major privacy concerns. The subcommitte also noted that the trustees had not requested any amendments to the Statement of Financial Affairs. Accordingly, the subcommittee concluded that trustees, generally, have little need for the information and can request an examination under Rule 2004 in those few cases in which they do need it.

RECOMMENDATION: The subcommittee recommends that Official Form 7, the Statement of Financial Affairs not be amended at this time.

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

[redacted]

consolidation of the adversary proceeding and the contested matter, the court can issue any necessary orders to administer the consolidated action. In the meantime, the defendant in the adversary proceeding would have been served with a summons and complaint and would not be misled as to the significance of the action as might be possible if the matter were commenced simply by the filing and service of an objection to a claim. The claimant may be willing to permit the court to sustain an objection to its claim, but it may wish to contest any request for affirmative relief such as might be sought in an adversary proceeding. The rule, as amended, bars the joinder by a party in interest of these two forms of actions. If a party joins a request for the type of relief set out in Rule 7001 with an objection to a claim, the request is ineffective. The claim holder could move to dismiss the request for the Rule 7001 relief, and the court could also act on its own motion to dismiss that portion of the movant's request. Even in the absence of any objection, the request would be invalid as it is not permitted under the rules.

The Subcommittee considered several versions of amendments to Rule 3007. Among the drafts were those that included language that addressed the possible consolidation of the contested matter and adversary proceeding. The Subcommittee concluded that the rule is better served by a simpler and more direct textual statement with reference to the potential for consolidation better left to the Committee Note.

Rule 3007 Objections to Claims

(a) An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered to the claimant, the debtor

or debtor in possession and the trustee at least 30 days prior to the hearing. ~~If an objection to a claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.~~

(b) A party in interest shall not join a demand for relief of a kind specified in Rule 7001 to an objection to a claim.

COMMITTEE NOTE

The rule is amended to prohibit parties in interest from joining a request for relief that is available in an adversary matter to a claims objection. An objection to a claim initiates a contested matter. Unlike an adversary proceeding, the commencement of a contested matter does not require the service of a summons and complaint. A party served with a motion may not appreciate the potential for an affirmative recovery as would be possible if an objection to a claim were joined with an action to recover money from the claimant. Thus, the rule is amended to require that these actions be filed separately.

A request for relief of the kind specified in Rule 7001 that is joined with an objection to a claim is ineffective. The claimant can move to dismiss the request, and the court also could act on its own motion to dismiss that portion of the motion that seeks the improper relief.

Nothing in the rule prevents the court from consolidating an objection to a claim with an adversary proceeding under Rule 7042 which applies in both adversary proceedings and contested matters.

[redacted]

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ALAN RESNICK, CHAIR, SUBCOMMITTEE ON BUSINESS ISSUES

RE: 2003 AMENDMENTS TO CIVIL RULE 23

DATE: AUGUST 16, 2004

Before the March 2004 meeting of the Advisory Committee, I raised with Judge Small and Jeff Morris an issue for consideration by the Committee which relates to a recent amendment of the Civil Rules. Currently, Bankruptcy Rule 7054(a) provides that Rule 54(a)-(c) apply in adversary proceedings. Rule 54(d), however, does not apply in adversary proceedings. That subdivision governs the award of costs and attorney fees in the absence of some other statutory directive. In bankruptcy cases, the award of costs are governed by Rule 7054(b), not by Civil Rule 54(d).

Effective December 1, 2003, Rule 23 F. R. Civ. P. was amended to add new subdivisions (g) and (h). A copy of the rule is set out immediately after this memorandum. Rule 23(h) establishes new procedures for the award of attorney fees in class actions. Bankruptcy Rule 7023 provides that all of Rule 23 applies in adversary proceedings. Therefore, it appears that the new Rule 23(h) applies in adversary proceedings. Rule 23(h) provides that Rule 54(d) applies to awards of attorney fees in class actions. Thus, Bankruptcy Rule 7054 excludes Civil Rule 54(d) from adversary proceedings, while Rule 7023 (through the incorporation of all of Rule 23) makes Civil Rule 54(d)(2) applicable in adversary proceedings that are class actions. This raises the question of how these rules would or should be interpreted by a court in a class action adversary proceeding. Is Civil Rule 54(d)(2) applicable or not?

Jeff Morris, in his memorandum to the Advisory Committee (Tab #10 of the agenda book for the March 2004 Amelia Island meeting), presented this issue to the Committee. A copy of Jeff's memorandum is attached for your convenience. The issue presented to the Committee was whether Rule 7023 or Rule 7054 should be amended to clarify that Civil Rule 54(d) (governing the award of costs and attorneys fees) is not applicable in class action adversary proceedings (which was clearly the law before December 1, 2003). Another issue raised is whether the Rules should be amended to exclude application of Civil Rule 23(h)(4), which provides that the court may refer issues regarding attorneys' fee awards to a special master (Rule 9031 prohibits special masters in bankruptcy cases) or to a magistrate judge.

At the Amelia Island meeting, the Committee discussed the alternatives presented in Jeff's memorandum, including possible amendments to Rule 7023 and Rule 7054, but without resolution. Judge Small then referred the issue to the Subcommittee on Business Issues with a request that the Subcommittee report back at the September 2004 meeting.

After considering this issue, the Subcommittee voted (5-1) to recommend that no changes be made to the Rules at this time with respect to the application of Civil Rule 54(d) in class action adversary proceedings. Though different members of the Subcommittee may have emphasized different reasons for concluding that no change should be made, the reasons articulated include the following:

(1) Class action adversary proceedings are extremely rare and, therefore, it is not worth amending the Rules at this time only to clarify the procedural aspects of awarding costs and attorneys' fees in such proceedings. Rather, the Committee should not do anything on this issue unless and until it becomes a real problem. If and when the issue arises,

courts will interpret the Rules to resolve it. In that regard, Judge Small has expressed his opinion that a Rule change is not necessary in view of his own analysis of how the existing Rules would resolve this issue. Judge Small would not find any inconsistency in the Rules and can harmonize the existing Rules to reach a result. If courts eventually interpret these Rules in a way that is not undesirable, it may never become necessary to amend them. If, in the future, it appears that courts are reaching inconsistent or undesirable results, we can change the Rules at that time to fix the problem.

(2) There is a concern that raising issues relating to the use of special masters and magistrate judges in bankruptcy proceedings, even if limited to class action proceedings, would open up, once again, very controversial and complex issues regarding the use of special masters and magistrate judges in bankruptcy cases in general. The Committee has dealt with these issues in the past, especially regarding special masters, and it has caused significant controversy. Questions as to the statutory authority, or lack thereof, for bankruptcy judges to refer matters to magistrate judges also arise. Given the rarity of class action proceedings in bankruptcy, and the fact that we are focusing on only one narrow aspect of class action proceedings (i.e., costs and attorneys' fees), members of the Subcommittee did not believe that raising these larger sensitive issues is warranted at this time.

(3) There is a "bigger picture" issue, i.e., whether the award of attorneys' fees should be different in bankruptcy cases than it is in non-bankruptcy civil litigation. This is a complex issue. In general, the procedures for awarding attorneys fees are different in bankruptcy cases (which is why Civil Rule 54(d) is not applicable under Rule 7054). If

that issue is to be addressed by the Committee, it should not be done in the context of class actions only, and there is no calling or need to deal with that "bigger picture" issue now.

In sum, five members of the Subcommittee have voted to recommend that no action be taken at this time by the Advisory Committee regarding Bankruptcy Rules 7023 or 7054. One member favored amending Rule 7054 to cure any ambiguity caused by the 2003 amendments to Civil Rule 23.

Note to Subdivision (b). This is derived from *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r.r. 1 and 5.

1966 Amendment

See the amendment of Rule 18(a) and the Advisory Committee's Note thereto. It has been thought that a lack of clarity in the antecedent of the word "them," as it appeared in two places in Rule 20(a), contributed to the view, taken by some courts, that this rule limited the joinder of claims in certain situations of permissive party joinder. Although the amendment of Rule 18(a) should make clear that this view is untenable, it has been considered advisable to amend Rule 20(a) to eliminate any ambiguity. See 2 Barron & Holtzoff, *Federal Practice & Procedure* 202 (Wright Ed. 1961).

A basic purpose of unification of admiralty and civil procedure is to reduce barriers to joinder; hence the reference to "any vessel," etc.

1987 Amendment

The amendments are technical. No substantive change is intended.

Rule 21. Misjoinder and Non-Joinder of Parties

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

ADVISORY COMMITTEE NOTES

1937 Adoption

See *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 16, r. 11. See also [former] Equity Rules 43 (Defect of Parties—Resisting Objection) and 44 (Defect of Parties—Tardy Objection).

For separate trials see Rules 13(i) (Counterclaims and Cross-Claims: Separate Trials; Separate Judgments), 20(b) (Permissive Joinder of Parties: Separate Trials), and 42(b) (Separate Trials, generally) and the note to the latter rule.

Rule 22. Interpleader

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

ADVISORY COMMITTEE NOTES

1937 Adoption

The first paragraph provides for interpleader relief along the newer and more liberal lines of joinder in the alternative. It avoids the confusion and restrictions that developed around actions of strict interpleader and actions in the nature of interpleader. Compare *John Hancock Mutual Life Insurance Co. v. Kegan et al.*, 22 F.Supp. 326 (D.C.Md.1938). It does not change the rules on service of process, jurisdiction, and venue, as established by judicial decision.

The second paragraph allows an action to be brought under the recent interpleader statute when applicable. By this paragraph all remedies under the statute are continued, but the manner of obtaining them is in accordance with these rules. For temporary restraining orders and preliminary injunctions under this statute, see Rule 65(e).

This rule substantially continues such statutory provisions as U.S.C., Title 38, § 445 [now 784] (Actions on claims; jurisdiction; parties; procedure; limitation; witnesses; definitions) (actions upon veterans' contracts of insurance with the United States), providing for interpleader by the United States where it acknowledges indebtedness under a contract of insurance with the United States; U.S.C., Title 49, § 97 (Interpleader of conflicting claimants) (by carrier which has issued bill of lading). See Chaffee, *The Federal Interpleader Act of 1936: I and II* (1936), 45 Yale L.J. 963, 1161.

1948 Amendment

The amendment effective October 20, 1949, substituted the reference to "Title 28, U.S.C., §§ 1335, 1397, and 2361," at the end of the first sentence of paragraph (2), for the reference to "Section 24(26) of the Judicial Code, as amended, U.S.C., Title 28, § 41(26)." The amendment also substituted the words "those provisions" in the second sentence of paragraph (2) for the words "that section."

1987 Amendment

The amendment is technical. No substantive change is intended.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determining by Order Whether to Certify a Class Action; Appointing Class Counsel; Notice and Membership in Class; Judgment; Multiple Classes and Subclasses.

(1)(A) When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.

(B) An order certifying a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) An order under Rule 23(c)(1) may be altered or amended before final judgment.

(2)(A) For any class certified under Rule 23(b)(1) or (2), the court may direct appropriate notice to the class.

(B) For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must concisely and clearly state in plain, easily understood language:

- the nature of the action,
- the definition of the class certified,
- the class claims, issues, or defenses,
- that a class member may enter an appearance through counsel if the member so desires,
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and
- the binding effect of a class judgment on class members under Rule 23(c)(3).

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined

with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Settlement, Voluntary Dismissal, or Compromise.

(1)(A) The court must approve any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a certified class.

(B) The court must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement, voluntary dismissal, or compromise.

(C) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.

(2) The parties seeking approval of a settlement, voluntary dismissal, or compromise under Rule 23(e)(1) must file a statement identifying any agreement made in connection with the proposed settlement, voluntary dismissal, or compromise.

(3) In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(4)(A) Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).

(B) An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court's approval.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) Class Counsel.

(1) Appointing Class Counsel.

(A) Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.

(B) An attorney appointed to serve as class counsel must fairly and adequately represent the interests of the class.

(C) In appointing class counsel, the court

(i) must consider:

- the work counsel has done in identifying or investigating potential claims in the action,
- counsel's experience in handling class actions, other complex litigation, and claims of the type asserted in the action,
- counsel's knowledge of the applicable law, and
- the resources counsel will commit to representing the class;

(ii) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(iii) may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs; and

(iv) may make further orders in connection with the appointment.

(2) Appointment Procedure.

(A) The court may designate interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

(B) When there is one applicant for appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1)(B) and (C). If more than one adequate applicant seeks appointment as class counsel, the court must appoint the applicant best able to represent the interests of the class.

(C) The order appointing class counsel may include provisions about the award of attorney fees or nontaxable costs under Rule 23(h).

(h) Attorney Fees Award. In an action certified as a class action, the court may award reasonable attorney fees and nontaxable costs authorized by law or by agreement of the parties as follows:

(1) Motion for Award of Attorney Fees. A claim for an award of attorney fees and nontaxable costs must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision, at a time set by the court. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) Objections to Motion. A class member, or a party from whom payment is sought, may object to the motion.

(3) Hearing and Findings. The court may hold a hearing and must find the facts and state its conclusions of law on the motion under Rule 52(a).

(4) Reference to Special Master or Magistrate Judge. The court may refer issues related to the amount of the award to a special master or to a magistrate judge as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003.)

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 7054 AMENDMENT TO CONFORM TO AMENDMENTS TO CIVIL RULES 7023 AND 7054

Professor Resnick raised an issue for consideration of the Committee due to a recent amendment of the Civil Rules. Currently, Bankruptcy Rule 7054(a) provides that Rule 54(a)-(c) apply in adversary proceedings. Rule 54(d), however, does not apply in adversary proceedings. That subdivision governs the award of costs and attorney fees in the absence of some other statutory directive. In class actions in bankruptcy cases, on the other hand, the award of costs are governed by Rule 7054(b).

Effective December 1, 2003, Rule 23 F. R. Civ. P. was amended to add new subdivisions (g) and (h). A copy of the revised portions of the rule is set out immediately after this memorandum. Rule 23(h) establishes new procedures for the award of attorney fees in class actions. Bankruptcy Rule 7023 provides that all of Rule 23 applies in adversary proceedings. Therefore, the new Rule 23(h) seems to apply in adversary proceedings. This new subdivision in Rule 23(h) provides that Rule 54(d) applies to awards of attorney fees in class actions. Thus, the Bankruptcy Rules exclude Civil Rule 54(d) from adversary proceedings, but Rule 7023 would reintroduce Civil Rule 54(d)(2) into adversary proceedings through the cross reference contained in new Civil Rule 23(h).

The revisions of Civil Rule 23 that became effective on December 1, 2003, were promulgated after long study and significant debate. Therefore, adoption of the process created

by those amendments seems most proper when limited to application in class actions. That requires an amendment to Bankruptcy Rule 7054 to allow Civil Rule 54(d) to apply in class actions. The absence of such an amendment leaves the Bankruptcy Rules inconsistent in that Rule 7054 states that Rule 54(d) does not apply in adversary proceedings, but Rule 7023 would incorporate Rule 54(d) by its wholesale adoption of Rule 23. Therefore, I would suggest that the Committee recommend to the Standing Committee that Rule 7054 be amended to provide explicitly that Civil Rule 54(d)(2) applies in adversary proceedings that are class actions. This would have the effect of treating these issues identically in class actions whether they are proceeding in a bankruptcy court or a district court. The amendment to Rule 7054 to accomplish this result is set out below.

Rule 7054. Judgments; Costs

(a) JUDGMENTS. Rule 54(a)–(c) F. R. Civ. P. applies in adversary proceedings. Except as provided in Rule 7023, Rule 54(d) F. R. Civ. P. does not apply in adversary proceedings.

* * * * * *

COMMITTEE NOTE

The promulgation of the amendments including Rule 23(h) F. R. Civ. P. makes amendment of Bankruptcy Rule 7054(a) necessary. Rule 23 is applicable in its entirety in adversary proceedings by virtue of its incorporation by Rule 7023. That incorporation includes the cross reference in Rule 23(h) to Rule 54(d)(2). In the absence of an amendment to Rule 7054(a), ambiguity would exist as to whether Rule 54(d) through its cross reference in Rule 23(h) would apply in adversary proceedings or whether the exclusion of that portion of Rule 54 set out in

> Bankruptcy Rule 7054 would prohibit application of that subdivision of the civil rule. This amendment provides that Rule 54(d) applies only in the case of a class action proceeding under Rule 7023. Thus, Rule 54(d) still is not applicable generally to adversary proceedings, but this general rule is overridden in the case of a class action pending in the bankruptcy court.

This amendment is proposed to make the Bankruptcy Rules conform to changes in the civil rules. It is necessary because the amendments to Rule 23 created a conflict between Bankruptcy Rules 7023 and 7054 where none had previously existed. Since this is an amendment that is intended only to resolve the conflict created by the civil rules amendments and is not intended to have any substantive impact otherwise, the Committee may wish to propose the amendment to the Standing Committee for its adoption without the need for publication and comment. This will shorten the approval process by one year and will expedite the change necessary to make the bankruptcy and civil rules consistent.

The other alternative to amending Rule 7054 would be to propose an amendment to Rule 7023 to provide that Rule 23(h) does not apply in adversary proceedings. This would obviate the need to amend Rule 7054 because Civil Rule 54(d) would not be imported into Rule 7023 if subdivision (h) of Rule 23 were specifically excluded from applying in adversary proceedings. Amending the rule in this fashion would create a distinction in class actions in bankruptcy courts as compared to district courts creating the potential for forum shopping. As a result, I would not recommend this option for the Committee.

The promulgation of Rule 23(h) creates another potential conflict with the Bankruptcy Rules, though one that is not so immediately apparent or direct. Rule 23(h)(4) authorizes the court to refer matters to special masters and magistrate judges. Bankruptcy Rule 9031 specifically

provides that Rule 53 F. R. Civ. P. that govern the appointment of special masters does not apply in bankruptcy cases. In fact, the Committee has recently reiterated its view that Rule 53 should not be incorporated into the Bankruptcy Rules. Therefore, it seems appropriate to amend rule 7023 to clarify that Rule 23(d)(4) does not apply in adversary proceedings. An amendment to accomplish that objective follows.

Rule 7023. Class Proceedings

With the exception of subdivision (h)(4), Rule 23 F. R. Civ. P. applies in adversary proceedings.

COMMITTEE NOTE

This amendment excludes Rule 23(h)(4) from adversary proceedings. That provision authorizes a court to refer to a special master or magistrate judge the issue of the proper amount of an attorney fee award in a class action. Bankruptcy Rule 9031 specifically provides that Rule 53 F. R. Civ. P. does not apply in bankruptcy cases thus effectively prohibiting the appointment of a special master. By making Rule 23(h)(4) inapplicable in adversary proceedings, Rule 7023 follows the policy of Rule 9031 to bar the appointment of a special master.

The amendment is not intended to have any other affect on the application of Rule 23 F. R. Civ. P. in adversary proceedings, and all of the remaining provisions of that rule will apply.

As with the proposed amendment to Rule 7054, this amendment can be viewed as a conforming amendment necessitated by the promulgation of the amendments to Civil Rule 23. If the Committee considers this amendment to be technical and conforming, there may be no need to publish the proposed amendment for comment, and the proposal could be recommended to the

Standing Committee for its adoption and recommendation to the Judicial Conference for its transmission to the Supreme Court.

Attachment

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **LIMITATIONS ON APPLICABILITY OF RULE 7026 IN ADVERSARY PROCEEDINGS**

DATE: **AUGUST 18, 2004**

The Supreme Court has promulgated the amendment to Rule 9014 exempting contested matters from the operation of the mandatory disclosure provisions of Civil Rule 26. That amendment will become effective on December 1, 2004, in the absence of congressional action to the contrary. We have had no indication that Congress will act to prevent the amendment to Rule 9014 becoming effective on December 1, 2004. The Advisory Committee also has discussed the possibility of exempting specific categories of adversary proceedings from these same discovery provisions. As a result of those discussions, Robert J. Niemic of the Federal Judicial Center conducted a "Survey on Use of Rule 7026 Mandatory Disclosure Requirements in Adversary Proceedings", March 2004 (hereinafter "Survey of Bankruptcy Judges"). The survey was a continuation of a study that the FJC had undertaken after the issue was raised at the October 2002 meeting of the Advisory Committee. The initial study attempted to ascertain data that would identify categories of adversary proceedings that routinely concluded in a time frame that made application of the mandatory disclosure rules unnecessary. The initial study attempted to mine that information from electronic docket entries, but that research method proved to be inadequate. See FJC Report: "Should Certain Types of Adversary Proceedings be Exempt, Under the Bankruptcy Rules, from Civil Rule 26 Mandatory Disclosure Requirements?",

September 15, 2003. Consequently, the Report suggested a second study in the form of a survey to bankruptcy judges to obtain their views as to the propriety of an exemption from the Rule 26 mandatory disclosure requirements for some, all, or any adversary proceedings. The results of that survey were provided to the Advisory Committee at the March 2004 meeting at Amelia Island.

The FJC Survey of Bankruptcy Judges demonstrated that the views of the bankruptcy judges were quite mixed. There were three categories of adversary proceedings that a significant percentage of the judges believed would be appropriate for exemption from the mandatory discovery rules. Fifty-six and fifty-seven percent of the judges, respectively, responded that turnover of property actions under § 542 and actions for the approval of the sale of the debtor's and a co-owner's interest in property under § 363(h) should be exempted from the mandatory discovery rules. The next most favorable response for exemption from those rules was the 45% response by the judges in favor of exempting actions for injunctive relief. Approximately one-third of the judges responding to the survey favored exempting dischargeability actions under § 523(a)(5), while 23% of the judges would exempt dischargeability cases under § 523(a)(2) (credit card and fraud/false pretenses) and § 523(a)(15) (property settlement claims). These numbers were somewhat higher when the judges were asked whether these categories should be presumptively exempted from the mandatory disclosure rules.

The survey also provides some support for the conclusion that the parties in many of the adversary proceedings do not follow the directives of Rule 26 made applicable to the actions by Bankruptcy Rule 7026. For example, Question 5 of the survey asked the judges whether the mandatory disclosure requirements are "honored in the breach" by the parties and by the courts,

and the judges indicated that the rule is not followed in approximately 40% of the cases in which it applies. This provided some confirmation of the view expressed during the Advisory Committee discussion of the issue that the mandatory discovery rules frequently are ignored in adversary proceedings. The failure of many participants in the process to operate within the rules was one of the reasons for excluding contested matters from the mandatory disclosure rules, and it appears that the same argument can be made for many adversary proceedings. Nevertheless, it is also clear that there is no consensus about the categories of adversary proceedings that should be exempted from these rules.

Another reason to leave the rules in tact is that the mandatory discovery rules themselves permit the parties to stipulate that they do not apply in a particular case. Civil Rule 26(a) provides that both the parties can stipulate that the rules do not apply, and the court can direct otherwise by specific order. The default, however, is that the rules apply. This ability to stipulate out of the operation of the mandatory discovery rules might be an appropriate answer to the call for exemption from the rules for certain adversary proceedings, but it will simply leave the rule as it is, and parties will continue to ignore its application. To the extent that parties want to insist on the application of the rule, the general noncompliance with the rule perhaps because of the attorneys being unfamiliar with the requirement may make imposition of the mandatory discovery rules more difficult than it should be. Exempting certain categories of adversary proceedings from the requirements not only identifies those actions as not being in need of the mandatory discovery rules, but also draws attention to the fact that the parties must engage in discovery in the manner set out by Rule 26 for those categories of adversary proceedings not exempted.

This issue was also discussed at the roundtable meeting of bankruptcy judges held in Seattle in conjunction with an FJC sponsored meeting for the judges. Approximately twenty judges met with several members of the Advisory Committee to discuss pending and future rules issues, including the potential for a rule to exclude certain categories of adversary proceedings from the mandatory disclosure provisions of Civil Rule 26. The clear consensus among the judges was that the system was working in its current form and should not be changed. They indicated that they very rarely hear of problems, and that they are confident that if a dispute might arise that it can be resolved without much difficulty. Another sentiment expressed was that an amendment to the rule at this time would only serve to highlight that the current practice arguably is inconsistent with the rule (although the parties can always stipulate that the provisions do not apply in the matter) and could create more problems than the very few that seem to arise currently.

Given the limited consensus on the categories of adversary proceedings for which the judges surveyed believed the exemption is appropriate, the following draft of Rule 7026 would exempt only three categories of adversary proceedings from the mandatory discovery rules to the same extent as contested matters are exempted. Additional categories of exempted actions can be added, and one or more of the proposed categories can be deleted as the Advisory Committee sees fit.

RULE 7026. General Provisions Governing Discovery

(a) Except as provided in subdivision (b), Rule 26 F. R. Civ. P. applies in adversary proceedings.

(b) Unless the court directs otherwise, subdivisions 26(a)(1)

(mandatory disclosure), 26(a)(2) (disclosures regarding expert testimony), 26(a)(3) (additional pre-trial disclosure), and 26(f) (mandatory meeting before scheduling conference/discovery plan) shall not apply in any adversary proceeding to obtain the turnover of property under section 542 of the Code, or commenced under Rule 7001(3) or (7).

COMMITTEE NOTE

The rule is amended to exempt certain adversary proceedings from the mandatory discovery rules set out in Rule 26 F. R. Civ. P. The mandatory discovery rules were intended to expedite the discovery process in civil actions and to limit the need for intervention by the courts in discovery disputes. The expeditious resolution of contested matters led to the exemption of those matters from the mandatory discovery rules. For the same reasons, some adversary proceedings appropriately can be exempted from the rules.

The exempted adversary proceedings, turnover actions under section 542 of the Code, proceedings to obtain approval of a sale under section 363(h) of the Code, and a proceeding to obtain an injunction, generally are resolved quickly in the bankruptcy courts. Thus, a primary purpose of the mandatory discovery rules in Civil Rule 26 is met without the need for the parties to follow each directive of that rule.

The exemption of only three types of adversary proceedings underscores the continued application of the mandatory discovery provisions of Rule 26 F. R. Civ. P. as made applicable by Rule 7026(a).

[redacted]

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **RECOMMENDATIONS OF THE JOINT SUBCOMMITTEE ON VENUE**

DATE: **AUGUST 17, 2004**

The Joint Subcommittee on Venue, chaired by John Shaffer, is composed of members of the Advisory Committee on Bankruptcy Rules and the Bankruptcy Administration Committee. The Subcommittee met in Seattle, Washington, on August 12, and recommends amendments to three Bankruptcy Rules. The Subcommittee proposes that Rule 1014 be amended to state explicitly that the court has the authority to act sua sponte to change the venue of cases. The Subcommittee also recommended that Rules 3007 and 6006 be amended to address omnibus objections to claims and omnibus motions to assume, assign, or reject executory contracts and unexpired leases.

Attached to this memo is the memo I prepared for the Venue Subcommittee proposing an amendment to Rule 1014. The Subcommittee adopted this version of the rule and recommends that the Advisory Committee consider the proposal.

The amendments to Rules 3007 and 6006 also are attached to this memorandum. Please note that the amendment to Rule 3007 does not include any portion of the amendment to Rule 3007 that is under separate consideration at the Half Moon Bay meeting. That proposal, forwarded by the Subcommittee on Attorney Conduct and Health Care, would break current Rule 3007 into Rule 3007(a) and (b). If that proposal is adopted, then the proposed amendments set out in Rule 3007 to permit omnibus objections to claims would be reconfigured as subdivisions

(c) thru (h) rather than subdivisions (b) thru (g) as set on the attached draft.

With respect to omnibus objections to claims and omnibus motions to reject executory contracts and unexpired leases, the Subcommittee concluded that significant efficiencies can be obtained by permitting this form of objection or motion. The subcommittee recognized the potential for abuse of these motions and objections, so it included significant restrictions on the ability of parties to employ these forms. The general rule is that omnibus objections are not allowed unless authorized by the court or if they fall within specified categories. Assumption and assignment of executory contracts and unexpired leases may not be combined in an omnibus motion unless authorized by the court, but motions to reject executory contracts and unexpired leases may be combined. No more than one hundred claims or contracts, as the case may be, may be included in an omnibus motion or objection. (The selection of one hundred as the maximum number of claims/contracts is admittedly arbitrary, and the more significant concept is the idea that the total number of claimants can be limited to permit a greater likelihood of actual notice being received by the adverse parties.)

The rules also require that the claimants or non-debtor parties to the contracts be listed alphabetically and that there be appropriate cross-references within the omnibus filing designed to provide the greatest notice to the recipients of the motions or objections. The Subcommittee believes that the restrictions built into these rules will provide effective protection of the due process rights of those parties. Moreover, as regards objections to claims, the only grounds permitted for omnibus objections, if not specifically authorized by the court, are those set out in subdivision (c) of the proposal. These objections are typically ministerial in the larger sense. They include objections on the grounds of the claim being a duplicate, being filed in the wrong

case, lacking necessary supporting documentation, or being late, among other things. The rule, as drafted, would not permit omnibus objections on any basis other than those specifically set out in subdivision (c) or as authorized by the court.

Both the omnibus objections to claims and the omnibus rejections of executory contracts and unexpired leases present a potential problem of finality for appeal purposes. That is, if the trustee objects to one hundred claims in an omnibus objection to claims, a question could arise whether the denial or sustaining of the objection on one claim is a final order when ninety-nine other claims objections remain to be resolved under that omnibus objection. A similar argument exists with respect to omnibus motions to assume, assign, or reject executory contracts and unexpired leases. Consequently, each rule includes a subdivision stating that the determination of an individual claim objection or motion to assume, assign, or reject an executory contract is final even if other claims or executory contract disputes remain outstanding. These provisions could go further to state that the omnibus objection to claims, for example, initiates one hundred separate contested matters and an order sustaining or denying the objection as to that claim is final. As drafted, the rules simply indicate that the ruling is final and do not specifically identify the actions within the claims objection or motion to reject executory contracts as separate contested matters. The Advisory Committee might consider whether that addition to the relevant subdivisions is appropriate.

Rule 3007. Objections to Claims

(a) OBJECTIONS TO CLAIMS. An objection to the allowance of a claim shall be in writing and filed. A copy of the objection with notice of the hearing thereon shall be mailed or

otherwise delivered to the claimant, the debtor or debtor in possession and the trustee at least 30 days prior to the hearing. If an objection to claim is joined with a demand for relief of the kind specified in Rule 7001, it becomes an adversary proceeding.

(b) LIMITATIONS. Unless otherwise ordered by the court, or permitted by subdivision (c) of this rule, objections to claims held by more than one claimant shall not be combined in one objection.

(c) PERMITTED OMNIBUS OBJECTIONS. Subject to subdivision (d) of this rule, objections to claims held by more than one claimant may be combined in an omnibus objection if the objections are based on the following grounds:

(1) duplicate claims;

(2) claims filed in the wrong case;

(3) amended or superceded claims;

(4) claims that are assigned to another;

(5) late-filed claims;

(6) claims that have been paid;

(7) claims without necessary supporting documents;

(8) claims by equity security holders incorrectly designated as claims rather than interests; and

(9) priority claims that exceed the statutory dollar limits

established by the Code.

(d) REQUIREMENTS FOR OMNIBUS OBJECTIONS. Unless otherwise ordered by the court, an omnibus objection to claims held by more than one claimant, shall:

(1) State in a conspicuous place that claimants receiving the omnibus objection should locate their names and claims listed in the objection.

(2) State in the title of the objection the types of objections.

(3) Group similar objections together.

(4) List claimants alphabetically and provide a cross reference to claim numbers, and if the objection is based on more than one ground, include a cross reference to each ground.

(5) Be numbered consecutively with other omnibus objections.

(6) State the basis of the objection for each individual claim.

(7) Be limited to no more than 100 claims.

(e) FINALITY OF OBJECTION. Notwithstanding Rule 54(b) F.R. Civ. P., a determination of an objection to a claim or interest contained in an omnibus objection is final even though

other objections in the omnibus objection have not been determined.

COMMITTEE NOTE

The rule is amended to address the filing of an omnibus objection to claims. These filings present significant opportunity for the efficient administration of the case, and the rule includes restrictions on the use of these objections to ensure the protection of the due process right of the claimants. Absent specific court authority, omnibus objections may be based only on the grounds set out in subdivision (c) of the rule, and the form of the objection must comply with subdivision (d).

Subdivision (e) makes clear that a court determination of an objection to any of the claims listed in an omnibus objection is final. A party seeking to appeal any such order need not await the court's resolution of all of the other claims objections listed in the omnibus objection to obtain appellate review of the order sustaining or denying the objection.

Rule 6006. Assumption, Rejection or Assignment of an Executory Contract or Unexpired Lease.

* * * * *

(e) LIMITATIONS. Unless otherwise ordered by the court, motions to assume or assign executory contracts or unexpired leases held by more than one party shall not be combined in an motion. Motions to reject executory contracts and unexpired leases may, subject to subdivision (f) of this rule, be combined in one omnibus motion.

(f) OMNIBUS MOTIONS. Unless otherwise ordered by the court, an omnibus motion to assume, assign, assume and assign, or

reject executory contracts or unexpired leases held by more than one party shall:

(1) State in a conspicuous place that parties receiving the omnibus motion should locate their names listed in the motion.

(2) Group similar motions together.

(3) List parties alphabetically.

(4) Be numbered consecutively with other omnibus motions to assume, assign, assume and assign or reject executory contracts and unexpired leases.

(5) Specify the terms, including the curing of defaults, for each requested assumption.

(6) Identify the assignee for each requested assignment.

(7) Be limited to no more than 100 executory contacts and unexpired leases.

(g) FINALITY OF DETERMINATION. Notwithstanding Rule 54(b), F.R.Civ.P., a determination of a motion under subdivision (f) with respect to any executory contract or unexpired lease is final even though other the court has not made a determination of the motion with respect to other executory contracts or unexpired leases.

COMMITTEE NOTE

The rule is amended to authorize the use of omnibus motions to reject executory contracts and unexpired leases. In some cases there may be numerous executory contracts and unexpired leases, and this rule permits the combining of up to one hundred of these contracts and leases in a single motion to initiate the contested matter. The rule establishes requirements for the form of the motion to ensure that the non-debtor parties to the contracts and leases receive effective notice of the motion.

The court also may authorize the filing of an omnibus motion to assume, assign, or to assume and assign executory contracts and unexpired leases. In that event, the motion would be subject to the limitations on its form as set out in subdivision (f) of the rule.

Subdivision (g) of the rule provides that the court's determination of the motion with respect to each contract or lease is a final order even if there are other contracts and leases set out in the motion for which the court has not ruled. A party wishing to appeal the court's order either granting or denying the motion as to the contract or lease at issue should be allowed to appeal that ruling without awaiting the court's decision on other contracts or leases listed in the motion. The rule permits the listing of multiple contracts or leases for convenience, and that convenience should not impede a party's ability to obtain a timely review of the court's decision.

Other Issues Considered by the Venue Subcommittee

The Subcommittee considered a number of other issues at its meeting in Seattle. Among other things, the Subcommittee considered the need for a national rule to address pro hac vice admission of attorneys. There was strong support for that concept, and it is under further consideration at this time. Among the issues remaining are the feasibility of such rule in the face of potential objection by state supreme courts and attorney disciplinary committees, among others. Such a rule also would need to be mindful of the role of CM/ECF in these admissions. That is, admission may also require the court to permit the attorney being admitted to obtain a

password for participation in the court's CM/ECF program.

Other related matters include the use by courts of videoconferencing and telephonic participation in hearings by parties located in places other than the court room. The Subcommittee also considered the propriety of rules to support or require courts' efforts to post relevant information on web sites accessible to all parties and counsel in a case. Websites could contain a wide variety of information, including a synopsis of the case, case management orders, calendars of events, notice lists, and the like. A number of potential problems exist with respect to this system (such as, how to deal with late updates of information and potential conflicts with the Court's docket), but the Subcommittee will be continuing to discuss these issues.

The Subcommittee also considered issues relating to first day orders. Concern was expressed about the impact of some of these orders on the conduct of the entire case, and the problem of limited notice and opportunity for participation in the case by creditors committees, individual creditors, and others. Concerns were expressed as well for the court's ability to review and digest all of the information that might be quite voluminous under very short deadlines. The Subcommittee will continue to consider these matters, and may recommend amendments to the rules to limit the impact of first day orders in a manner comparable to the limits set out in Bankruptcy Rule 4001(b)(2) or Civil Rule 65(b).

Working groups of the Subcommittee may have reports available for consideration by the Advisory Committee at our meeting at Half Moon Bay. To the extent these are available, they will be forwarded under separate cover or made available at the meeting.

MEMORANDUM

TO: **Joint Subcommittee on Chapter 11 Venue Issues**

FROM: **Jeff Morris, Reporter**

RE: **Amendment to Rule 1014 to Permit Sua Sponte Dismissal and Transfer of Cases**

DATE: **August 5, 2004**

As you know from John Shaffer's agenda memo for the meeting next week in Seattle, he has proposed that Rule 1014 be amended to state explicitly in the rule that the courts may dismiss or transfer cases on venue grounds on their own motion. The current rule suggests that there must be a motion by a party in interest before the court can act, and the 1983 Committee Note to the rule stated that "[t]here is no provision for the court to act on its own initiative." The case law since that time, however, is uniformly in opposition to that statement in the Committee Note. As John noted, the discussion of the issue in In re B.L. of Miami, Inc., 294 B.R. 325, 329-30 (Bankr. D. Nev. 2003), is excellent. Judge Zive cites and discusses the most significant cases on the topic and concludes that the court can raise the change of venue issue on its own motion. The authority granted to the courts under § 105(a) of the Bankruptcy Code is more than ample to permit the sua sponte action. That section provides in relevant part that "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." While an argument can be made that this grant applies only to matters governed by Title 11 of the United States Code, the courts have not limited § 105(a) in that manner.

A draft of an amended version of Rule 1014(a) follows.

RULE 1014. DISMISSAL AND CHANGE OF VENUE

(a) Dismissal and Transfer of Cases

(1) Cases filed in proper district.

If a petition is filed in the proper district, the court on its own motion, or on the timely motion of a party in interest, and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may transfer the case ~~may be transferred~~ to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

(2) Cases filed in improper district.

If a petition is filed in an improper district, the court on its own motion, or on the timely motion of a party in interest and after hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court, may dismiss the case or transfer it ~~the case may be dismissed or transferred~~ to any other district if the court determines that the transfer is in the interest of justice or for the convenience of the parties.

* * * * *

COMMITTEE NOTE

The rule is amended to provide that the court may act sua sponte to dismiss or transfer cases that are filed in the wrong venue, and to transfer cases filed in the proper venue. The rule has

been silent on the power of the court to act on its own motion in these matters, but the courts have generally held that section 105(a) of the Bankruptcy Code provides sufficient authority for the courts to dismiss or transfer cases. In re B.L. of Miami, Inc., 294 B.R. 325 (Bankr. D. Nev. 2003); In re Langston, 291 B.R. 872 (Bankr. N.D. Ala. 2003).

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **RETROACTIVE EXTENSION OF DEADLINES TO OBJECT TO EXEMPTIONS UNDER RULE 4003(b)**

DATE: **AUGUST 9, 2004**

The Bankruptcy Judge Eugene R. Wedoff (Bankr. N.D. Ill.) has requested that the Advisory Committee consider an amendment to Rule 4003(b) to allow a retroactive extension of the deadline for objections to claims of exemption in certain circumstances. In particular, he suggests that the rule should be amended to permit otherwise late objections to exemptions when the debtor's claim of exemption has no good faith basis, and for secured creditors to raise objections when the debtor files a lien avoidance motion under § 522(f)(1) of the Bankruptcy Code. A copy of Judge Wedoff's letter is attached.

Retroactive Extension of Deadline to Object to Exemptions

Rule 4003(b) provides that parties in interest have thirty days after the § 341 meeting of creditors to file an objection to property that the debtor claims is exempt. If the debtor amends the schedules to include exempt property, parties in interest have thirty days from that time within which to object to the exemption. In 1992, the Supreme Court held in Taylor v. Freeland & Kronz, 503 U.S. 638 (1992), that a trustee who failed to object timely to the debtor's claim of exemption was barred from raising the issue outside of that deadline. The Court noted, however, that it had not considered an argument that § 105(a) of the Bankruptcy Code might provide some relief for the trustee in similar situations. Nevertheless, the Court's decision states rather strongly that "deadlines may lead to unwelcome results, but they prompt parties to act and they

produce finality." Id. at 645. Thus, the Court seems quite adamant that the deadlines set up in the Bankruptcy Rules to implement the exemption provisions of the Code are to be followed.

In Taylor, the debtor claimed a cause of action for employment discrimination as exempt. The schedules set the value of the asset as "unknown". The debtor's attorneys informed the trustee of their estimate of the likely result in an employment discrimination action the debtor held as of the commencement of the case. The trustee inquired further about the matter but concluded that no objection to the exemption was warranted. He indicated that his prior experience suggested that debtors overstate the value of such claims and that the case may not lead to any recovery for the debtor at all. Subsequently, however, the debtor settled the action for a payment in excess of $100,000, and the trustee sought to recover the legal fees paid to the debtor's attorneys from the proceeds of that settlement. The Supreme Court was understandably unpersuaded that the trustee needed relief in the case.

In the case presented by Judge Wedoff, on the other hand, the trustee apparently had no indication that the claim of exemption made by the debtor was not supportable in fact. The trustee did not learn that the debtor did not reside at the homestead until several months after the deadline for objecting to the exemption. Under the applicable law, the debtor must reside at the home to be entitled to a homestead exemption for that property. The trustee's failure to object in a timely fashion, however, precluded his challenge of the exemption at the later date.

Judge Wedoff suggests that Rule 4003(b) include a provision authorizing the court to permit an otherwise late objection to the claim of exemption if that exemption claim was not made in good faith. Such a rule would discourage debtors from listing property as exempt when there is no good faith basis for making such a claim. It would also protect the interests of

creditors by allowing the trustee to make a later objection to that exemption if the trustee becomes aware of the improper claim after the Rule 4003(b) deadline is passed.

There may be some countervailing arguments for such rule, both as to the example offered by Judge Wedoff and generally. In the situation posited by Judge Wedoff, the debtor's petition must have included the debtor's street address. See Official Form 1. If that address differed from the address for the homestead, the trustee presumably was on notice that the debtor had no appropriate claim to exempt the property. Furthermore, the trustee did not indicate that the debtor had in any way misled the trustee either through the schedules or at the meeting of creditors. Certainly, the trustee had the opportunity to verify the propriety of the debtor's claim of homestead exemption and he could have brought a timely objection to the exemption under Rule 4003(b).

The issue, most succinctly stated, is whether the deadline for filing objections to exemptions should be retroactively extended when there is no good faith basis for the debtor's exemption claim. The Supreme Court in Taylor certainly recognized the importance of finality in its decision. Furthermore, Rule 4003(b) was amended in 2000 to permit the extension of time for filing objections as long as the party in interest files a request for the extension before the expiration of the thirty-day period. This amendment overruled cases like In re Laurain, 113 F.3d 595 (6th Cir. 1997). Under the rule as amended, only the motion for an extension needs to be made during the thirty-day period. Prior decisions such as Laurain had held that the court must order the extension before the expiration of the thirty-day period. Consequently, the 2000 amendment to Rule 4003(b) already provides some additional relief for trustees or other parties in interest who believe that an objection to a claim of exemption should be made.

I have contacted several trustees who have indicated that they generally request that the debtor, through counsel, agree to an extension of time within which to file an objection to an exemption claim if the trustee has any question about the propriety of that exemption. These extensions are routinely consented to by debtor's counsel, and it is likely that in the absence of consent the trustee would move for an extension under Rule 4003(b) which would in all likelihood be granted.

Under Judge Wedoff's proposal, retroactive extensions would only be available if the debtor's exemption claim was not made in good faith. Including such a provision in Rule 4003(b) might generate significant litigation. This standard would seem comparable to the Rule 9011(b)(2) that the claim of an exemption is "warranted by existing law or by a nonfrivilous argument for the extension, modification, or reversal of existing law or the establishment of new law." While there are relatively few cases in which Bankruptcy Rule 9011(b)(2) is at issue, the frequency of similar decisions under Rule 4003(b) would probably be substantially greater. Exemptions are an issue in nearly every individual debtor case. Furthermore, selecting exemptions is often an integral part of the debtor's bankruptcy planning. This increases the likelihood that disputes might arise over exemption claims, and trustees generally are aware of this practice. As a result, one would expect that trustees would be fairly vigilant regarding these issues.

If the Advisory Committee believes that the rules should be amended to permit the late filing of objections to exemption claims when there is no good faith basis for the debtor claiming the exemption, there are alternative ways in which to accomplish that result. For example, Rule 4003(b) could be amended specifically to provide that the Court may permit a late objection to an

exemption if there is no good faith basis for the claim of exemption. Another solution might be to amend Bankruptcy Rule 9006(b)(3) to delete Rule 4003(b) from the list of rules for which enlargement is limited to the extent allowed in Rule 4003(b). Deleting the reference to Rule 4003(b) from Rule 9006(b)(3) would permit the late objections "where the failure to act was the result of excusable neglect." I believe that this is a superior alternative to an amendment to Rule 4003(b) for several reasons. First, Rule 9006(b)(1) has been interpreted in many cases, and that jurisprudence would provide significant guidance to the courts in addressing the issue of late objections to claims of exemption. Second, using the existing rule avoids the problems that can follow from the introduction of a new concept–lack of a good faith basis for the claim of exemption–that would be the result of an amendment to Rule 4003(b). Finally, making a change in Rule 9006(b)(3) and directing the late party's attention to the excusable neglect standard should be sufficient to protect the interests of trustees and the creditors they represent when the debtor has engaged in some misleading conduct or communication.

The courts also have generally recognized the difficulties faced by trustees who have a short time within which to object to exemptions. For example, the courts have generally held that the language chosen by the debtor to claim an exemption is construed against the debtor when evaluating the running of the time for the trustee to object to the exemption. For example, in In re Hendrickson, 274 B.R. 138 (Bankr. W.D. Pa. 2002), the debtor claimed as exempt the proceeds of a settlement of a wrongful death action. The trustee objected to that exemption claim more than thirty days after the meeting of creditors under § 341(a). The trustee, however, had been in communication with the debtor's attorneys and that led to a subsequent amendment of Schedule C in which the debtors claimed an exemption of $8,700 in a wrongful death lawsuit

under § 522(d)(11)(B) of the Bankruptcy Code. The trustee thereafter contacted the debtor's attorney and asked for more information regarding the exemption. Approximately five days later, the debtor's attorney responded to the trustee's inquiry. The trustee thereafter objected to the exemption more than thirty days after the filing of the amended Schedule C, but less than thirty days after the debtor's attorney had clarified the nature of the exemption claim. The court held that this was a timely objection on Rule 4003(b) because

> [i]f a schedule is insufficient to put the trustee and creditors on notice as to the property a debtor claims as exempt, the period for objecting to the claimed exemption begins to run only upon actual notice to the trustee and to creditors concerning the property debtor seeks to exempt.

274 B.R. at 146. The Court cited a number of cases for this proposition.

A decision of the Eighth Circuit provides another example of the court's willingness to limit the reach of the Supreme Court's decision in Taylor and to permit apparently late objections to exemptions. In In re Wick, 276 F.3d 412 (8th Cir. 2002), the debtor claimed as exempt a "potential right to receive percentage interest in Teaching Temps, Inc. under Employment Agreement." The claim of exemption set the market value of the asset as "unknown". Thus, it is very similar to the facts in Taylor. The trustee obtained a copy of the Employment Agreement under which the debtor had a right to the stock options being claimed as exempt. Eight months later, the trustee wrote to the debtor asking whether she had exercised her stock options. The debtor suggested that she could not exercise those options, but she subsequently received the stock certificates for those options approximately one year after the § 341 meeting of creditors. The debtor thereafter brought a state court action seeking a buyout of her stock by the corporation, and four months later (now approximately seventeen months after the § 341 meeting

of creditors) the trustee sought to reopen the bankruptcy case and demanded the turnover of the balance of the value of the stock in excess of the amount of a statutory exemption. The Eighth Circuit held that Taylor was not controlling because the trustee in Wick did not believe that the asset was worthless and "consistently expressed an interest in the asset." The Court also held that the asset was only partially exempted, that is, it was exempt only up to the amount of the statutory maximum, and so distinguished the case from Taylor on that ground.

I think that the distinctions suggested by the Eighth Circuit in Wick from the Supreme Court's decision in Taylor are questionable. Nevertheless, the result in the case and the Eighth Circuit's analysis provides an excellent example of the courts' hostility to the perceived harshness of Taylor. While the denial of relief for the trustee in the Kooima case presented by Judge Wedoff shows that not all trustees are able to circumvent Taylor, the other cases demonstrate the courts' willingness to read Taylor narrowly and to permit late objections to exemptions. These decisions to protect the availability of objections to exemptions also would seem to support a decision to leave the rule unchanged.

If the Advisory Committee believes that amendment is appropriate, then the following alternatives for amendments to Rules 9006(b)(3) and 4003(b) may be considered.

Rule 9006 Time

* * * * * *

(b) Enlargement

* * * * * *

(3) Enlargement limited

The court may enlarge the time for taking action under

Rules 1006(b)(2), 1017(e), 3002(c), ~~4003(b)~~, 4004(a), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

COMMITTEE NOTE

The rule is amended to delete Rule 4003(b) from the list of rules for which enlargement of time is limited to the extent and conditions stated in those rules. The effect of removing Rule 4003(b) from Rule 9003(b)(3) is to permit the courts to enlarge the time for filing objections to exemptions whenever enlargement would be appropriate under Rule 9006(b)(1).

[Permitting the enlargement of time to object to exemptions if enlargement is available under Rule 9006(b)(1) protects the estate and the interests of creditors in instances where debtors assert exemptions for which there is no good faith basis. Similarly, when debtors mislead the trustee or other parties in interest with regard to the nature and extent of exemptions, the court can enlarge the time for objecting to those exemptions, even if the original time is expired, if the failure to act was the result of excusable neglect on the part of the trustee or other parties in interest.][1]

Rule 4003 Exemptions.

* * * * * *

(b) Objecting to a claim of exemptions.

A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after

[1] The bracketed language is offered as a suggested addition to the Committee note. The note expands the discussion of the topic, but it may go well beyond what normally is included in Committee Notes.

any amendment to the list or supplemental schedules is filed, whichever is later, unless there is no good faith basis for the claim of exemption. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. The court shall permit a party in interest to object to any exemption at any time if there is no good faith basis on which to make the claim of exemption. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.

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COMMITTEE NOTE

The rule is amended to permit objections to exemptions beyond the generally applicable 30-day deadline after the conclusion of the meeting of creditors held under § 341(a). The deadline for objecting to exemptions is relatively brief, and the Supreme Court has held that the deadline is relatively inelastic. Taylor v. Freland & Kronz, 503 U.S. 638 (1992). The short deadline is especially problematic in circumstances where the debtor or other person asserting the exemption has no good faith basis on which to make that claim. Permitting a later objection to an exemption that has no good faith basis serves the purpose of protecting the interests of creditors and the bankruptcy estate. It also is intended to discourage the practice of claiming a greater amount of property than is available under the applicable exemption law.

Lien Avoidance and Objections to Exemptions

Another issue raised by Judge Wedoff is the extension of time under Rule 4003(b) for secured creditors to object to a claim of exemption as to the property that is the subject of their lien. Under

§ 522(f) of the Code, debtors can avoid liens on property to the extent that they impair the exemption of that property. This lien avoidance power is limited to certain kinds of liens and certain kinds of property, but the problem arises whenever the debtor has a right under § 522(f) to avoid a lien. The debtor initially claims an entire asset and all of its value as exempt, and no party in interest objects to that claim of exemption. Thereafter, the debtor seeks to avoid the lien on the property by asserting that the failure of any party to object to the exemption means that the entire property and all of its value is free of all claims. Since the entire asset is exempt, the lien "impairs" that exemption and the debtor seeks to avoid the lien under § 522(f).

Judge Wedoff's letter suggests that this is an improper use of § 522 and proposes that creditors with security interests or liens on property be permitted to raise objections to exemptions in the contested matter where the debtor is seeking to avoid the lien.[2] Judge Wedoff's position that the creditor should be able to object to the debtor's exemption as a part of the lien avoidance action represents the great weight of authority in the courts. See e.g., In re Mason, 254 B.R. 764, 769 (Bankr. D. Id. 2000); In re Canelos, 216 B.R. 159 (Bankr. D. Md. 1997); In re Franklin, 210 B.R. 560, 565-66 (Bankr. N.D. Ill. 1997); In re Maylin, 155 B.R. 605, 612 (Bankr. D. Me. 1993); In re Smith, 119 B.R. 757, 760 (Bankr. E.D. Cal. 1990); but see Great Southern Co. v. Allard, 202 B.R. 938, 941 (N.D. Ill. 1996).

These courts note that an action to avoid a lien proceeds under Rule 4003(d). The creditor's defense to that action may be that the property is not exempt as to that creditor's lien. The claim of exemption under § 522(*l*) and Rule 4003(a) is effective in the absence of an objection. That

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[2]Actions to avoid liens under § 522(f) precedes by a motion as a contested matter. Bankruptcy Rule 4003(d).

action exempts the property from the bankruptcy estate. It does not, however, affect the lien of a creditor on that property.

Given that the courts generally permit the creditor to raise an objection to the debtor's exemption for purposes of a Rule 4003(d) action, there does not appear to be a need to amend the rule to specifically authorize such action. If developments in the case law begin to follow the contrary position as exemplified by the Allard decision, the Committee could reconsider the issue at that time. If the Advisory Committee believes that an amendment would nevertheless be valuable at this time, the rule could be amended as follows:

Rule 4003. Exemptions.

* * * * * *

(b) Objecting to a claim of exemptions except as provided in subdivision (d), ~~A~~ a party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension. Copies of the objections shall be delivered or mailed to the trustee, the person filing the list, and the attorney for that person.

* * * * * *

(d) Avoidance by debtor of transfers of exempt property.

A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be by motion in accordance with Rule 9014. A lienholder may object to a debtor's claim of exemption of the property subject to the lien.

COMMITTEE NOTE

The rule is amended to clarify that a creditor with a lien on property that the debtor is attempting to avoid may raise in defense to the lien avoidance action any objection to the debtor's claimed exemption. The right to object is limited to an objection to the exemption of the property subject to the lien. The creditor may not object to other exemption claims made by the debtor. Those objections, if any, are governed by Rule 4003(b).

[redacted]

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **BANKRUPTCY RULE 9021 AND THE SEPARATE DOCUMENT REQUIREMENT FOR JUDGMENTS**

DATE: **AUGUST 10, 2004**

Rule 9021 contains the "separate document" requirement for judgments. Specifically, the rule provides in relevant part that "every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." This is comparable to the text of Rule 58 of the Federal Rules of Civil Procedure. That rule, amended in 2002, also provides that every judgment must be set forth on a separate document. That rule, however, was revised to provide in subdivision (b)(2) that if a separate document is required, then judgment is entered when the separate document "is entered in the civil docket under Rule 79(a) and when the earlier of these events occurs: (A) when it is set forth on a separate document, or (B) when 150 days have run from entry in the civil docket under Rule 79(a)." This amendment was made to resolve problems presented in determining when the time for appeal of judgments had run. The courts of appeals had faced a number of problems with that issue, so Civil Rule 58 and Appellate Rule 4(a)(7) were amended effective December 1, 2002 to resolve the matter. The rules work in tandem to establish a deadline for an appeal in a civil case. They set that appeal time based on the date when a separate document with the judgment is entered, and in the absence of a separate document being docketed, they require appeal not later than 150 days after the judgment is noted on the clerk's docket. Under Bankruptcy Rule 9032, these amendments to the Federal Rules of Civil Procedure are effective in bankruptcy cases to the extent that those rules are incorporated

by reference. Since Rule 9021 incorporates Civil Rule 58, it includes in the current Bankruptcy Rules the newly amended version of Civil Rule 58.

The significance of including the December 1, 2002, version of Rule 58 is that it creates a new and more reliable deadline for determining the time within which a notice of appeal may be filed. Bankruptcy Rule 9021 continues to require a separate document for each judgment. However, by incorporating Rule 58 to the extent that it is not otherwise provided in Rule 9021, the possibility of confusion still exists. For example, Bankruptcy 9021 provides that "A judgment is effective when entered as provided in Rule 5003." Rule 5003(a) in turn provides that the clerk is to keep a docket and enter judgments thereon. Furthermore, that rule provides that "the entry of a judgment or order in a docket shall show the date the entry is made." By way of contrast, Civil Rule 58(b) goes beyond the simple requirement of a separate document to set out in detail when a judgment is entered. Entry of the judgment requires both entry on the civil docket under Rule 79(a) of the Civil Rules, as well as the creation either of a separate document or the expiration of 150 days from the entry in the civil docket under Civil Rule 79(a).

Bankruptcy Rule 9021 specifically supersedes Civil Rule 58 to the extent of the language of Rule 9021. Thus, an argument can be made that judgments in bankruptcy cases are effective as soon as they are entered as provided in Rule 5003(a). All that is required for the judgment to be effective is that it be included on the docket and show the date that the entry is made. This is in direct contrast to Civil Rule 58(b) which postpones the effectiveness of a docket entry of a type described in Bankruptcy Rule 5003 for an additional 150 days.

The Advisory Committee thus must first determine whether it believes the separate document requirement for judgments is more important than the expeditious resolution of these

matters. If the separate document requirement is considered of greater importance than the running of appeal time from the date of the entry of the judgment, then the rules should be clarified to incorporate Civil Rule 58(b) into the Bankruptcy Rules. Conversely, if the requirement of a separate document is of secondary importance as compared to the importance of commencing the appeal time running upon the docketing of a judgment, then Bankruptcy Rule 9021 could be amended to make it clear that Civil Rule 58(b) does not apply in bankruptcy cases.

The courts generally have recognized that the separate document rule applies in bankruptcy proceedings. See, e.g. In re Schimmels, 85 F.3d 416 (9th Cir. 1996); (the separate document rule of Bankruptcy Rule 9021 and Civil Rule 58 are identical); In re Seiscom Delta, Inc., 857 F. 2d 279 (5th Cir. 1988) (absent waiver, an appellant can insist on the entry of a judgment by a separate document). Of course, if the parties treat the order or judgment as entered and proceed on appeal, they will be deemed to have waived the requirement of a separate document. In re Colley, 818 F.2d 443 (5th Cir. 1987). The cases recognize that parties need to be able to determine when the time to appeal begins to run. That is particularly important in bankruptcy cases where the time to appeal is so short. Bankruptcy Rule 8012 extends only ten days from the date of the entry of a judgment for a notice of appeal to be filed. While this relatively short appeal time arguably creates a need to protect the interests of potential appellants whose rights can be cut off relatively quickly, it also evidences the need for expeditious resolution of appeals in bankruptcy cases. Given the range of matters that the bankruptcy courts must hear and determine, extended delays of the effectiveness of orders due to potential appeals could have a crippling affect on many cases. On balance, therefore, it would seem that the specifically short period for appeal is the paramount policy choice that the bankruptcy rules have

made. That policy choice continues to seem both reasonable and necessary.

The court in Dynamic Changes Hypnosis Center, Inc. v. PCH Holding, LLC, 306 B.R. 800 (E.D. Va. 2004) recognized this problem. The court noted the requirement of a separate document under Bankruptcy Rule 9021 and stated that the "Bankruptcy Court failed to follow Bankruptcy Rule 9024's (sic) 'separate document requirement' by issuing a final order from the bench but not setting it forth in a separate docketed document." 306 B.R. at 807. The court noted that the party challenging the bankruptcy court's order could have succeeded by asking the court to enter the order on the docket by a separate document. Having failed to do so, however, the district court found that the appellant waived its right to require the bankruptcy court to comply with the separate document requirement.

Dynamic Changes highlights a problem brought to the attention of the Advisory Committee by Judge David Adams (Bankr. E.D. Va.). The concern is that the standard practice of most bankruptcy courts does not include the creation of a separate document for each judgment. For example, relief from the stay is often granted by oral rulings from the bench which are then noted on the court's docket along with the date of the entry of the order. The court in Dynamic Changes clearly indicates that this practice is insufficient under the rules. I believe that this is a correct interpretation of Rule 9021. The separate document requirement is set out clearly in Rule 9021 as is the direction that the judgment is effective when it is entered as provided in Rule 5003. If all that were required is the entry of the judgment under 5003, then one sentence of Bankruptcy Rule 9021 would be superfluous. Consequently, the district court in Dynamic Changes found that the separate document applies.

Reliance on the cases finding a waiver by parties of the separate document rule does not

seem to be the best solution to the problem. The Advisory Committee must determine whether it believes the separate document rule is important enough to retain and enforce. The confusion that led to the amendment of Civil Rule 58 and Appellate Rule 4 can occur as well in bankruptcy appeals. Furthermore, the recent amendment of those rules certainly indicates that the Supreme Court considers the separate document requirement important in helping to resolve conflicts as to the timing of appeals when no separate document exists. It would seem likely that the Standing Committee, Judicial Conference, and the Supreme Court would prefer that the Bankruptcy Rules be consistent with the Civil Rules in this circumstance. As a result, Rule 9021 could be amended as follows:

Rule 9021. Entry of Judgment.

Except as otherwise provided herein, Rule 58 F.R. Civ. P. applies in cases under the Code. ~~Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003.~~ The reference in Rule 58 F.R. Civ. P. to Rule 79(a) F.R. Civ. P. shall be as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

The rule is amended by more directly and completely cross-referencing to Rule 58 F.R. Civ. P. That rule requires that judgments be set forth on a separate document, and, since December 1, 2003, also has defined what constitutes entry of a judgment. While Bankruptcy Rule 5003 directs the clerk to enter judgments on a docket, it does not itself define entry of a judgment. Civil Rule 58(b) does contain such a definition which is

incorporated by reference in Bankruptcy 9021.

> By incorporating all of Rule 58 F.R. Civ. P., the appeal time for judgments in bankruptcy cases begins to run at the earlier of the creation of a judgment in a separate document along with its entry on the clerk's docket, or the passage of 150 days after the entry on the clerk's docket if no separate document containing the judgment is prepared.

If the Advisory Committee believes that wholesale adoption of Civil Rule 58(b) will create crippling delays in bankruptcy cases, then Rule 9021 could be amended to make clear that the potential for extending the appeal time for an additional 150 days as is possible under Civil Rule 58 does not apply in bankruptcy cases. Such an amendment to Rule 9021 follows:

Rule 9021. Entry of Judgment.

Except as otherwise provided herein, Rule 58 (a), (c), and (d) applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in Rule 5003. The reference in Rule 58 F.R. Civ. P. to Rule 79(a) F.R. Civ. P. shall be read as a reference to Rule 5003 of these rules.

COMMITTEE NOTE

> The rule is amended to clarify that entry of a judgment on the Court's docket commences the appeal time in bankruptcy cases. While Rule 9021 continues to require the entry of a judgment or order by a separate document, the entry of the order on the Court's docket will commence the appeal time even in the absence of the separate document for the judgment. The importance of the expeditious resolution of appeals in bankruptcy cases is amply demonstrated by the very short appeal time provided

in Rule 8002. Consistent with that need for finality, Rule 9021 now makes clear that the appeal time runs even in the absence of a judgment being set out on a separate document.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

DYNAMIC CHANGES HYPNOSIS CENTER, INC.,

Appellant,

v.

ACTION NO. 2:03cv791

PCH HOLDING, LLC, a/k/a Positive Changes Hypnosis Corporation, a/k/a Positive Changes, a/k/a Positive Changes Distribution Corporation, a/k/a Hampton Roads Hypnosis, LLC;

LIFESTYLE IMPROVEMENT CENTERS, LLC;

and

W. CLARKSON McDOW, JR., United States Trustee,

Appellees.

MEMORANDUM OPINION AND ORDER

This matter is before the court on appeal, pursuant to 28 U.S.C. § 158(a), from a decision of the United States Bankruptcy Court for the Eastern District of Virginia. On September 25, 2003, the bankruptcy court entered a Memorandum Opinion and Order denying appellant Dynamic Changes Hypnosis Center, Inc., relief under Federal Rule of Bankruptcy Procedure 9024 from an Order entered June 2, 2003. For the reasons set forth below, the bankruptcy court's September 25, 2003 Order is **AFFIRMED**.

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I. Factual and Procedural History

Debtor-appellee PCH Holding, LLC, ("Positive Changes"), a Virginia company with its principal place of business in Virginia Beach, developed and owned the intellectual property rights to the "Positive Changes Hypnosis Practice-Builder Program."[1] The Practice-Builder Program is a system for opening, operating, advertising, and managing individual hypnosis centers.

On September 13, 1999, Positive Changes and appellant Dynamic Changes Hypnosis Center, Inc., entered into a Master License Agreement for New York City ("Licensing Agreement"), under which Positive Changes sold to appellant an exclusive license to use and sublicense the Practice-Builder Program in the New York City area. Appellant thereafter operated its own hypnosis centers in the New York City area, but did not sublicense the Practice-Builder Program. (Mem. Op. and Order, Sept. 25, 2003, at 3.) The Licensing Agreement was appellant's "single largest and most valuable asset," according to the company's principal owner, Richard Schefren ("Schefren"). (Id. at 3-4.) Schefren also testified that appellant's income rose from approximately $750,000 in 1999 to approximately $7,700,000 in 2002. (Id. at 4.)

On February 7, 2003, Positive Changes filed a voluntary Chapter 11 bankruptcy petition. On April 8, 2003, pursuant to 11

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[1] On April 10, 2003, appellee Lifestyle Improvement Centers, LLC ("Lifestyle"), purchased all of Positive Changes operating assets, including its intellectual property.

U.S.C. § 365(a),[2] Positive Changes filed a Motion to Reject Certain Executory Contracts and Unexpired Leases.[3] The motion requested that the bankruptcy court order all licensees that desired to retain their rights under valid intellectual property licenses pursuant to 11 U.S.C. § 365(n)(1)(B)[4] do so in writing no later

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[2] Title 11 U.S.C. § 365(a) provides that "[e]xcept as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C.A. § 365(a) (1993). Appellee W. Clarkson McDow, Jr., the United States Trustee, did not take an active interest in Positive Changes' bankruptcy until late May, 2003. Nevertheless, it is well-established that a Chapter 11 debtor-in-possession has the same rights as a trustee under § 365(a). See, e.g., In re TechDyn Sys. Corp., 235 B.R. 857, 860 (Bankr. E.D. Va. 1999); In re Constant Care Cmty. Health Ctr., Inc., 99 B.R. 697, 701 (Bankr. D. Md. (1989).

[3] Because Lifestyle purchased debtor's operating assets on April 10, 2003, it ultimately received the benefit of debtor's April 7, 2003 motion to reject the Licensing Agreement. See supra note 1.

[4] That code section provides:

> If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for

than May 23, 2003. (Mot. to Reject Certain Executory Contracts and Unexpired Leases, at 5.) A copy of the motion was mailed to and received by appellant. (Mem. Op. and Order, September 25, 2003, at 3.) On April 15, 2003, an attorney for Positive Changes filed with the bankruptcy court and mailed to appellant a Notice of Hearing on the motion to reject, informing appellant that the bankruptcy court would hold a hearing on the motion on May 7, 2003. The bankruptcy court found that appellant received notice of this hearing. (Id. at 9.) Nevertheless, unlike some of the other parties holding licenses that Positive Changes was seeking to reject, appellant did not send a representative to the May 7, 2003 hearing.

The bankruptcy judge granted Positive Changes' motion at the May 7, 2003 hearing, and, consistent with the proposal in Positive Changes' motion, set the date of May 23, 2003, for appellant and others to retain their rights under the licensing agreements. The bankruptcy judge requested that the attorney for Positive Changes draft a written order memorializing the May 7, 2003 bench order. An entry on the docket indicates that Positive Changes' motion was granted as to appellant at the hearing. However, no separate docket entry noting an order was made on that date.

On or before May 13, 2003, appellant contacted a bankruptcy

(i) the duration of the contract; and (ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

11 U.S.C.A. § 365(n)(1)(B) (West. Supp. 2003).

attorney with the firm of Reisman, Perez & Reisman in New York City, to discuss Positive Changes' motion to reject. (Stip. of Fact, at 2.) That attorney contacted counsel for Positive Changes on May 14, 2003, to discuss the rejection motion, but did not take any further action on behalf of appellant. (Id.) On May 16, 2003, Positive Changes mailed a copy of the proposed written order setting forth the May 7, 2003 bench ruling to appellant. The bankruptcy court found that the proposed order was received by appellant on May 20, 2003.[5] (Mem. Op. and Order, Sept. 25, 2003, at 3.) Appellant does not contest this finding.

In the meantime, dissatisfied with the advice he was receiving from Reisman, Perez & Reisman, Schefren fired the firm and set out to find new counsel. (Mem. Op. and Order, Sept. 25, 2003, at 4.) On May 28, 2003, five days after the election date set by the bankruptcy judge, Schefren retained new counsel to represent appellant. (Id.) On May 29, 2003, that attorney sent a letter to the bankruptcy judge indicating that appellant wished to retain its rights under the Licensing Agreement. Despite this letter, the bankruptcy judge signed the proposed written order on May 30, 2003, and it was entered on June 2, 2003. Also on June 2, 2003, ten days after the election deadline, appellant filed a Notice of Election

[5] It is not clear from the record when the bankruptcy court received the proposed order. However, the date of receipt by the bankruptcy court of the proposed written order is not dispositive of the issues on appeal.

pursuant to 11 U.S.C. § 365(n)(1)(B). Appellant did not note a timely appeal from the bankruptcy court's June 2, 2003 Order.

Instead, on June 23, 2003, appellant filed in the bankruptcy court a motion to reconsider the Order entered June 2, 2003, pursuant to Federal Rule of Bankruptcy Procedure 9024, or, in the alternative, to grant appellant an extension of time in which to note an appeal from that Order pursuant to Federal Rules of Bankruptcy Procedure 8002(c)(1) and (2). Appellant's motion was fully briefed and the bankruptcy court held a hearing on the motion on September 2, 2003. Schefren and others testified and argument was heard from counsel for appellant and for appellees, Positive Changes and Lifestyle. On September 25, 2003, by written Memorandum Opinion and Order, the bankruptcy judge denied appellant's motion to reconsider, finding that appellant's failure to comply with the May 23, 2003, deadline was not the result of excusable neglect and that the Order entered June 2, 2003, did not violate appellant's due process rights. (Mem. Op. and Order, Sept. 25, 2003, at 8-10.) Further, finding that appellant's failure to note a timely appeal was not the result of excusable neglect, the bankruptcy court denied the motion for an extension of time to file an appeal. (Id. at 10-11.)

On October 3, 2003, appellant noted an appeal of the bankruptcy court's September 25, 2003 Order denying relief under Bankruptcy Rule 9024. Appellant does not appeal the bankruptcy

court's denial of its motion to extend the time in which to appeal the June 2, 2003 Order. The parties have fully briefed the issues and no hearing is necessary for the resolution of this matter. The Bankruptcy Court's September 25, 2003 Order is ripe for review.

II. Standard of Review

On appeal, this court reviews the bankruptcy court's factual findings for clear error and its legal conclusions de novo. Finnie v. First Nat'l Bank, 275 B.R. 743, 745 (E.D. Va. 2002). Federal Rule of Bankruptcy Procedure 9024, "Relief from Judgment or Order," states that, subject to a few exceptions not relevant here, Rule 60 of the Federal Rules of Civil Procedure applies in bankruptcy cases. Rule 60(b) provides in relevant part that

> [o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b) (2003). Orders issued under Rule 60(b) are generally reviewed under an abuse of discretion standard. Eberhardt v. Integrated Design & Const. Co., 167 F.3d 861, 869 (4th Cir. 1999). However, review under Rule 60(b)(4) is de novo because the question of a judgment's validity is purely legal. Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998), cert. denied, 525 U.S. 1041 (1998).

III. Analysis

The parties have set forth five issues for the court to decide on this appeal, but none has been consistent in specifying the procedural basis for each of these challenges to the bankruptcy court's order.[6] Appellant is appealing the bankruptcy court's denial of a motion brought under Rule 60(b)(1), (4), and (6). Therefore, from the court's perspective, there are only three issues: (1) whether the bankruptcy judge abused his discretion in determining that appellant's failure to comply with the May 23,

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[6] For example, in appellant's "Statement of Issues to be Decided Upon [sic] Appeal" states the following five issues:

> (1) Whether the Bankruptcy Court erred in holding that, as a matter of law, Dynamic Changes failed to timely avail itself of its rights in connection with its license agreement under the Bankruptcy Code;
> (2) Whether the Bankruptcy Court erred in holding that, as a matter of law, the deadline suggested in the Debtor's Motion to Reject Certain Executory Contracts bound Dynamic Changes to make an election with respect to its licensing rights before the Bankruptcy Court entered an Order requiring Dynamic Changes to make such election;
> (3) Whether the Bankruptcy Court erred in holiding that, as a matter of law, Dynamic Changes' due process rights were not violated;
> (4) Whether the Bankruptcy Court erred in holding that, as a matter of law, Dynamic Changes' ability to make an election with respect to its licensing rights expired before the right of election accrued under the Bankruptcy Code; and
> (5) Whether the Bankruptcy Court erred in basing its denial of Dynamic Changes' Motion for Relief upon evidence not relevant to the timeliness of Dynamic Changes' election under the Bankruptcy Code.

(Dynamic Changes' Statement of Issues to be Decided Upon Appeal, at 1-2 (numbering added).)

2003, election deadline was not the result of mistake, inadvertence, surprise, or excusable neglect under Rule 60(b)(1); (2) whether the bankruptcy court's order setting the election deadline is void under Rule 60(b)(4) based upon this court's de novo review of that order; and (3) whether the bankruptcy judge's determination that there was not any "other reason justifying relief from the operation of the judgment" was an abuse of discretion under Rule 60(b)(6).[7] Each issue will be considered in turn. First, however, it is useful to review some relevant bankruptcy procedures and to acknowledge the procedural error made in the bankruptcy court which gave rise to the Bankruptcy Rule 9024 motion and to this appeal.

Federal Rule of Bankruptcy Procedure 9021 provides:

> [E]xcept as otherwise provided herein, Rule 58 [of the Federal Rules of Civil Procedure] applies in cases under the [Bankruptcy] Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. A judgment is effective when entered as provided in rule 5003. The reference in [Federal Rule of Civil Procedure] 58 to Rule 79(a) [of the Federal Rules of Civil Procedure] shall be read as a reference to Rule 5003 of these rules.

Fed. R. Bankr. P. 9021. Federal Rule of Civil Procedure 54(a) provides that "'[j]udgment' as used in these rules includes a

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[7] Appellant cannot use this appeal from the bankruptcy court's Rule 60(b) decision to obtain complete review of the merits of the June 2, 2003 Order. See infra note 11. To the extent that the "Issues Presented" by appellant on appeal could be viewed as appeals on the merits of the June 2, 2003 Order, the court does not reach them.

decree and any order from which an appeal lies." In the bankruptcy context, an order is "final" and therefore appealable as a matter of right under 28 U.S.C. § 158(a)[8] if it resolves a "discrete dispute[] within the larger case." Sumy v. Schlossberg, 777 F.2d 921, 923 (4th Cir. 1985). Most adversary proceedings and "contested matters" constitute discrete disputes. Id. Bankruptcy Rule 9014 governs "contested matters," and provides in part that "[i]n a contested matter in a case under the [Bankruptcy] 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." Fed. R. Bankr. P. 9014. Under Bankruptcy Rule 6006(a), "[a] proceeding to assume, reject, or assign an executory contract or unexpired lease, other than as part of a plan, is governed by Rule 9014." Fed. R. Bankr. P. 6006(a). Bankruptcy Rule 5003(a) provides that

> [t]he clerk shall keep a docket in each case under the [Bankruptcy] Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

Fed. R. Bankr. P. 5003(a). Finally, under Bankruptcy Rule 9022(a), a copy of the written order is then to be mailed to all contesting

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[8] In relevant part, 28 U.S.C. § 158(a) provides that "[t]he district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C.A. § 158(a) (West. Supp. 2003).

parties.[9] Thus, under Bankruptcy Rule 9021, an order granting a debtor-in-possession's motion to reject an executory contract is a final order because it resolves a contested matter. Therefore, a separate document setting forth that order should be entered on the day the order is made final and effective and a copy of the order should be mailed to contesting parties.[10]

That procedure was not followed by the bankruptcy court in this case. Instead, the bankruptcy judge issued a final ruling from the bench granting Positive Changes' motion to reject the

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[9] In relevant part, Rule 9022(a) provides:

> Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail . . . on the contesting parties and on other entities as the court directs. . . . Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time for appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

Fed. R. Bankr. P. 9022.

[10] It is interesting to note that, largely due to the frequent recurrence of the type of procedural error the bankruptcy court made in this case, Rule 58 of the Federal Rules of Civil Procedure was amended in 2002 to delete language providing that "[a] judgment is only effective when so set forth [in a separate document] and entered as provided by Rule 79(a)." See Fed. R. Civ. P. 58 (2001). In making the 2002 amendments, the Advisory Committee "discard[ed] the attempt to define the time when judgment becomes 'effective'" because the "simple separate document requirement has been ignored in many cases." Fed. R. Civ. P. 58 advisory committee's note, 2002 Amendments (2003). Nonetheless, Bankruptcy Rule 9021 has not been amended. It still provides that judgment is effective "when entered as provided in rule 5003." Fed. R. Bankr. P. 9021. Therefore, the proper procedure for the bankruptcy court to follow is to set forth each final order on a separate document on the day the order is rendered, and for the clerk to note the entry of that order on the publicly available bankruptcy docket.

Licensing Agreement, and directed the attorney representing Positive Changes to draft a written order setting forth the bench ruling. In other words, the bankruptcy court failed to follow Bankruptcy Rule 9024's "separate document requirement" by issuing a final order from the bench but not setting it forth in a separate, docketed document. The real issue on this appeal is whether the failure of the bankruptcy court to follow the procedures establishing the separate document requirement required the bankruptcy court to relieve appellant from its final order, pursuant to Bankruptcy Rule 9024.[11]

The sole purpose of the separate document requirement is to definitively establish when time for appeal begins to run. In re Colley, 818 F.2d 443, 444 (5th Cir. 1987) (per curiam). In other words, the separate document requirement is not meant to restrain judges' ability to issue immediately effective final orders. Moreover, an appeal from the denial of a motion for reconsideration cannot be used to enforce the separate document requirement, which is waived if no timely objection is made. See id. at 444-45 (holding that appellant waived its right to a separate document by

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[11] The court notes that the relevant issue is not whether such a procedural error would provide a basis for reversal on direct appeal. Appealing a motion for reconsideration under Rule 60(b) is not a means to obtain complete review of the proceedings below where timely notice of appeal was not filed. Polities v. United States, 364 U.S. 426, 437 (1960). Instead, on review of a Rule 60(b) motion, the court's inquiry is limited to the specific bases for relief provided by that Rule. Id. Mere procedural error in the court below is not one of them.

failing to appeal the underlying judgment). Appellant had the opportunity to challenge the procedures applied by the bankruptcy court by timely filing notice of appeal of the June 2, 2003 Order, but failed to do so. Therefore, appellant has waived its right to have the bankruptcy court's judgment entered on a separate document.

A. The Denial of Appellant's Motion on the Basis of Rule 60(b)(1) Was Not an Abuse of Discretion

Rule 60(b)(1) provides the trial judge with the discretionary authority to relieve a party of a final order for "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). Generally, this Rule is used to relieve a party from its own errors. The bankruptcy court's September 25, 2003 Memorandum Opinion and Order analyzed appellant's motion as such and found that appellant's failure to make an election on or before May 23, 2003 was not the result of excusable neglect. (Mem. Op. and Order, Sept. 25, 2003, at 10.) Appellant has not challenged the bankruptcy court's Rule 60(b)(1) analysis. Instead, appellant claims that under Rule 60(b)(1), the bankruptcy court should have granted appellant relief from the bankruptcy court's own mistake in entering the June 2, 2003 Order, which contained an election date that had already passed.[12]

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[12] In its brief on appeal, appellant argues that the bankruptcy court's Rule 60(b)(1) analysis was based on "irrelevant" evidence because appellant was under no duty to elect prior to June 2, 2003. (Appellant's Br. on Appeal, at 12.)

In some cases, courts have used Rule 60(b)(1) to relieve a party from the court's own error. See 11 Charles Alan Wright, et al, Federal Practice and Procedure § 2858, at 293-94 (2d ed. 1995). However, the only reason to use Rule 60(b)(1) in this manner is to save judicial resources by eliminating the need for the appellate court to review and reverse where the trial court recognizes its own error in applying the relevant law. See Oliver v. Home Indem. Co., 470 F.2d 329, 330 (5th Cir. 1972). It is not an avenue for a dissatisfied party to obtain review of a trial court's final order after the time for appeal has expired. United States v. McCoy, 198 F. Supp. 716, 723 (D.N.C. 1961). For that reason, relief under Rule 60(b)(1) based on an error of law is not available after the time for appeal has run. See 11 Wright, et al, § 2858, at 296-97.

Appellant argues that the court was mistaken in entering the June 2, 2003 Order because (1) the order required appellant to make an election before its right to elect had accrued, and (2) appellant could not have made a timely election under the Order because it set a deadline that expired before the written order was entered. (Appellant's Br. on Appeal, at 10-13.)

First, the June 2, 2003 written Order did not require appellant to make an election before its right to elect had accrued under the Bankruptcy Code. It was a procedurally defective written order confirming a valid and final order made from the bench by the bankruptcy judge on May 7, 2003. Appellant correctly argues that,

under 11 U.S.C. § 365(n)(1)(B), "the right of a licensee to elect to retain rights under an intellectual property agreement arises upon rejection of the executory contract and not before it." (Appellant's Br. on Appeal, at 10.) Appellant is further correct that rejection becomes effective only upon court approval. See In re Revco D.S., Inc., 109 B.R. 264, 267-70 (Bankr. N.D. Ohio 1989). But appellant's further assertion that a court's approval is effective only upon entry of a written order is incorrect. Rejection is effective as soon as it is approved by the court. A bench ruling in open court at the completion of a hearing on the motion to reject is sufficient to make rejection effective. See In re Va. Packaging Supply Co., 122 B.R. 491, 494 (Bankr. E.D. Va. 1990) (holding that debtor's rejection of non-residential lease was effective for purposes of lessee's election rights upon bench ruling approving rejection); see also Revco, 109 B.R. at 267 (holding same). Thus, rejection of the Licensing Agreement was effective on May 7, 2003. Though the bankruptcy court should have entered a written final order on May 7, 2003, confirming this bench ruling, the fact that the written order was not entered until June 2, 2003, did not require appellant to make its election before its right to elect had accrued.

Second, and for essentially the same reasons, the June 2, 2003 Order did not require appellant to do the impossible. On May 7, 2003, the bankruptcy court ordered that the date for election

pursuant to 11 U.S.C. § 365(n)(1)(B) be set for May 23, 2003. That oral order was effective immediately and a separate document confirming it should have been docketed that day. The fact that it was not, however, did not make compliance with the order itself impossible. It resulted only in procedural confusion due to the fact that the written order that should have been docketed on May 7, 2003, was not entered until June 2, 2003. Such a procedural error is not the type of court-made "mistake" upon which relief under Rule 60(b)(1) is necessarily required. Given that appellant had actual knowledge of the court's May 7, 2003 final ruling before the election date of May 23, 2003, and notice of the May 7, 2003 hearing,[13] it was not an abuse of discretion for the bankruptcy judge to deny relief under Rule 60(b)(1).

B. The Bankruptcy Court's Order Was Not Void under Rule 60(b)(4)

Under Rule 60(b)(4), "a judgment is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or it acted in a manner inconsistent with due process of law." Carter, 136 F.3d at 1006. Thus, if the setting of the May 23, 2003 election deadline violated appellant's due process rights, then under Rule 60(b)(4) the court may relieve appellant from the order setting that deadline. Appellant argues that the June 2, 2003 Order was entered in violation of due process because it stated that the deadline for § 365(n)(1)(B) election had already

[13] See supra at 4-5.

passed. Again, appellant's argument fails because the relevant date is May 7, 2003, not June 2, 2003.

Importantly in this case, "[m]erely erroneous procedure and notice . . . will not suffice for Rule 60(b)(4) relief unless the circumstances cross over the line from mere error to error that violates the due process clause of the Fifth Amendment." In re Loloee, 241 B.R. 655, 660 (B.A.P. 9th Cir. 1999). The Due Process Clause of the Fifth Amendment entitles parties whose property interests are at stake in a judicial proceeding to "notice and an opportunity to be heard." Dusenbery v. United States, 534 U.S. 161, 167 (2002) (citation omitted). Notice is adequate for Fifth Amendment due process purposes if it is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." Id. at 168 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)).

Appellant does not contest that it received adequate notice of the May 7, 2003 hearing and was given a fair opportunity to be heard there. Instead, appellant argues that its due process rights were violated because (1) it was not given adequate notice of the court's decision to set the May 23, 2003 deadline for election, and (2) compliance with the written order was impossible because it set a deadline that had already passed. Both of appellant's arguments fail. The June 2, 2003 Order did not violate the Due Process Clause of the Fifth Amendment; it was a procedurally defective

written document confirming the bankruptcy court's immediately effective May 7, 2003 bench order.

As to appellant's first argument, appellant cannot create a due process issue by choosing not to attend a bankruptcy hearing that will dispose of its "largest and most valuable asset" and then by ignoring the fact that the court fully adjudicated its rights as to that asset in its absence. Due process requires that interested parties be given notice of the hearing and an opportunity to be heard prior to the court rendering a decision. See, e.g., Dusenbery, 534 U.S. at 167. In other words, the Fifth Amendment requires notice of the pendency of the action, not of the result. Id. at 168. The Constitution does not require the court to ensure that all parties that voluntarily skip such a hearing be provided with immediate notice of what took place there. On May 7, 2003, the bankruptcy judge held a hearing and ordered that May 23, 2003, be set as the final date on which appellant could file written notice of its desire to retain its rights under the Licensing Agreement. Notice of that hearing and a fair opportunity for appellant to be heard at that hearing is all that due process requires. Appellant cannot immunize itself from the effects of an order issued at that hearing by choosing not to attend.[14] Moreover, appellant received actual notice of the order in time to comply.[15]

Further, the fact that compliance with the written order was

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[14] See supra at 4.

[15] See supra at 4-5.

technically impossible was not a violation of due process because actual compliance was not impossible.[16] The bankruptcy judge ordered that May 23, 2003, be set as the last day for appellant to make its election at the May 7, 2003 hearing. Appellant, aware that the May 7, 2003 hearing was set to determine this issue, could have confirmed that the May 23, 2003 date was set at any time after May 7, 2003, by simply contacting the bankruptcy clerk. Further, appellant was informed that the May 23, 2003 date had been set at the latest by May 20, 2003, when it received a copy of the proposed written order. Given that the Licensing Agreement was appellant's "largest and most valuable asset," the decision to elect to retain its rights under the Licensing Agreement should not have been a difficult one.[17] Compliance certainly was not impossible.

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[16] Appellant cites Maggio v. Zeitz, 333 U.S. 56 (1948), for the proposition that where compliance is impossible, a court order violates due process. That is not exactly what the court in Maggio held. Rather, in Maggio, the Court vacated and remanded the district court's order adjudging a trustee in bankruptcy to be in contempt for failure to comply with a turnover order, where the evidence showed that the trustee was no longer in possession of the property at the time the court found him in contempt. Maggio, 333 U.S. at 77-78. Thus, the situation in Maggio is not similar to the circumstances in this case, where, at the time of the bankruptcy court's order on May 7, 2003, appellant was fully capable of compliance. Moreover, the Court's opinion in Maggio was based on principles of "good judicial administration," not due process. Id. at 77.

[17] The real flaw in this due process argument is that it is predicated on the assertion that the May 23, 2003 deadline was only a "proposed deadline" until the written order of June 2, 2003 was entered. As previously stated, this assertion is erroneous. See supra at 15-16. On April 8, 2003, when Positive Changes filed its motion to reject, May 23, 2003, was the deadline it proposed that the court set for election under § 365(n)(1)(B). Appellant received notice of this "proposed deadline" when Positive Changes

Therefore, this due process argument fails.

C. The Denial of Appellant's Motion on the Basis of Rule 60(b)(6) Was Not an Abuse of Discretion

Finally, under Rule 60(b)(6), the court may relieve a party or its representative from an order for "any other reason justifying relief from the operation of the judgment." Fed. R. Civ. P. 60(b)(6). The broad language of this Rule "provides courts with authority adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice," but the Rule "should only be applied in 'extraordinary circumstances.'" Liljeberg v. Health Svcs. Acquisition Corp., 486 U.S. 847, 864 (1988) (internal citations and quotations omitted). Courts have found such "extraordinary circumstances" to be present in few cases. See, e.g., Liljeberg, 486 U.S. at 864 (holding that "extraordinary circumstances" do not necessarily exist in all cases where presiding judge had an interest in the outcome of a bench trial). Moreover, several cases have held that Rule 60(b)(6) may not be used to relieve a party from its own failure to protect its interests. See, e.g., Ackerman v. United States, 340 U.S. 193, 198 (1950) ("There must be an end to litigation some day, and free, calculated, deliberate choices are not to be relieved from.");

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mailed to it a copy of the motion to reject and a copy of the notice of hearing. The May 23, 2003 date ceased to be a "proposed deadline" and became the actual deadline on May 7, 2003, when the bankruptcy judge granted Positive Changes' motion and set that date as the last day on which licensees could elect under § 365(n)(1)(B). Appellant had every opportunity to comply with this order.

Jardine, Gill & Duffus, Inc. v. M/V Cassiopeia, 523 F. Supp. 1076, 1085 (D. Md. 1981) ("[R]elief is generally unavailable under Rule 60(b)(6) when the moving party has failed to take legal steps to protect his interests.").

This case does not present "extraordinary circumstances" of the kind that necessitate relief under Rule 60(b)(6). In fact, though the June 2, 2003 Order was procedurally defective, what transpired in the bankruptcy court was quite ordinary.[18] Positive Changes filed a voluntary Chapter 11 petition in the bankruptcy court on February 7, 2003. Pursuant to 11 U.S.C. § 365(a) and Bankruptcy Rule 6006(a), Positive Changes filed a motion to reject certain executory contracts on April 8, 2003, and sent adequate notice to all interested parties of its motion. The bankruptcy court set a hearing to resolve the matter for May 7, 2003, and all interested parties were given notice of this hearing in mid-April. On May 7, 2003, the hearing was held and the bankruptcy judge resolved the matter, ordering that the Licensing Agreement be rejected and setting a deadline for appellant to retain its rights

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[18] The court notes that if appellant had not received any notice of the bankruptcy court's May 7, 2003 final order, the use of Rule 60(b)(6) to relieve appellant from its duties under that order may have been appropriate. See Wright, et al, § 2864, at 353-55 ("The most common 'other reason' for which courts have granted relief is when the losing party fails to receive notice of the entry of judgment in time to file an appeal. . . . However, courts have denied relief in cases which notice was not received if counsel is deemed to have been negligent in keeping apprised of the state of the case."). In this case, relief under Rule 60(b)(6) was not required because appellant received actual notice of the May 7, 2003 ruling.

under the agreement of May 23, 2003. Appellant chose not to attend the May 7, 2003 hearing and not to make even a phone call to the bankruptcy clerk or an inspection of the publicly available bankruptcy docket to determine its outcome. Despite actual notice that the bankruptcy judge had set the May 23, 2003 deadline at the hearing at the latest by May 20, 2003, appellant still chose not to act on it until May 29, 2003, six days after the deadline had expired. Rule 60(b)(6) does not require the bankruptcy judge under these circumstances to relieve appellant from its own failure to protect its interests. In other words, the bankruptcy judge did not abuse his discretion under Rule 60(b)(6).

IV. Conclusion

For the reasons stated above, the bankruptcy court's September 25, 2003 Order denying appellant relief under Federal Rule of Bankruptcy Procedure 9024 is **AFFIRMED**. The Clerk is **DIRECTED** to send a copy of this Memorandum Opinion and Order to all counsel of record and to the Bankruptcy Court.

IT IS SO ORDERED.

Rebecca Beach Smith
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
March 10, 2004

A TRUE COPY, TESTE:
CLERK, U.S. DISTRICT COURT
BY _____
DEPUTY CLERK

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **BANKRUPTCY RULE 1019(5)(A)–DEBTOR-IN-POSSESSION DUTIES**

DATE: **AUGUST 17, 2004**

The Committee received a request from Mr. R. Bradford Leggett (04-BK-C) that it consider an amendment to Bankruptcy Rule 1019(5)(A) governing the obligations of a debtor in possession to file reports after the conversion of a case from chapter 11 to chapter 7. The rule requires the debtor in possession (or the trustee appointed in the chapter 11 case) to file a schedule of unpaid debts that were incurred after the filing of the petition and before the conversion of the case. The debtor in possession also must file and transmit to the United States trustee a final report and account for the chapter 11 case. The problem identified by Mr. Leggett is that the conversion of the case to chapter 7 terminates a debtor in possession's status so that the entity called upon to prepare, file, and transmit reports under the rule does not exist. While Mr. Leggett identifies this as a problem, he is also concerned that the effect of such a shortcoming in the rule is that counsel for the former chapter 11 debtor-in-possession retains the obligation to provide representation in the preparation of those reports, but cannot be paid from the estate because of the Supreme Court's decision in Lamie v. U.S. Trustee, 124 S.Ct. 1023 (2004). In Lamie, a chapter 11 case was converted to chapter 7, and the debtor's attorney sought an award of fees for services rendered on behalf of the debtor in the chapter 7 case. The Court held that the debtor's attorney could not be paid out of the estate because § 330(a)(1) does not authorize the payment of fees to debtor's counsel in a chapter 7 case.

In a case in which Mr. Leggett served as counsel for the debtor in possession, he sought to be employed by the chapter 7 trustee after the conversion of the case. Having already served as counsel to the debtor in possession, the chapter 7 trustee applied for authority to retain Mr. Leggett as a special counsel under § 327(e) of the Bankruptcy Code. The court, however, denied the application. Rather, the court held that employment under § 327(e) is improper when the purpose of the employment is "to perform duties that are already mandated as an obligation of the debtor in possession." The attorney's only option is to seek to withdraw from the representation if the court so allows. A copy of Mr. Leggett's letter and the related documents are attached.

A debtor in possession is a chapter 11 animal. The "oxygen" available under the other chapters of the Code is insufficient to sustain that animal. Consequently, when a case is converted from chapter 11 to another chapter, the debtor in possession goes out of existence. Nevertheless, Rule 1019(5)(A) directs this nonexistent entity to make and file reports. Consequently, Rule 1019(5)(A) should be amended to reflect that it is the debtor, not the debtor-in-possession, that must file the appropriate reports under that subdivision of the rule. No amendment needs to be made with respect to the obligation of the chapter 11 trustee to file these reports. Even though § 348(e) terminates the service of that trustee, the rule accurately describes the person with the obligation to file the reports as the "trustee serving at the time of conversion."

Rule 1019(5)(A) could be amended in the following way to resolve the problem of the rule directing an entity that does not exist to take some action. The amendment simply puts the duty on the debtor rather than the debtor in possession, unless a chapter 11 trustee was serving in the case at the time of the conversion.

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

* * * * * *

(5) Filing final report and schedule of postpetition debts

(A) Conversion of Chapter 11 or Chapter 12 case

Unless the court directs otherwise, if a chapter 11 or chapter 12 case is converted to chapter 7, the debtor ~~in possession~~ or, if ~~the debtor is not a debtor in possession, the~~ a trustee was serving at the time of conversion, the trustee shall:

(i) not later than 15 days after conversion of the case, file a schedule of unpaid debts incurred after the filing of the petition and before conversion of the case, including the name and address of each holder of a claim; and

(ii) not later than 30 days after conversion of the case, file and transmit to the United States trustee a final report and account;

* * * * * *

COMMITTEE NOTES

The rule is amended to clarify that it is the debtor, rather than the debtor in possession, that must file the schedule of unpaid debts incurred during the chapter 11 case as well as a final report and account. Conversion of the case from chapter 11 terminates the existence of the debtor in possession. Consequently, these duties fall to the debtor rather than the debtor in possession, and

the rule is amended to reflect that consequence of conversion.

The proposed amendment to Rule 1019(5)(A) "corrects" the problem of a debtor-in-possession acting in a chapter 7 case. It does not, however, address the more fundamental problem presented by Mr. Leggett's letter. That is, how does counsel for the former debtor-in-possession obtain compensation for services rendered to perform the duties required by Rule 1019(5)(A?. The court in In re Rainbow Transport Services, Inc., the case attached to this memorandum, refused to permit the employment of the counsel for the former debtor in possession by the chapter 7 trustee under § 327(e). While that section does permit the trustee to employ an attorney that has represented the debtor for a special purpose, it "does not authorize the employment of the debtor's attorney to represent the estate generally or to represent the trustee in the conduct of the bankruptcy case." S.Rep. 95-989 at 38 (July 14, 1978). Thus, the limitations inherent in § 327(e) and the Supreme Court's decision in Lamie v. U.S. Trustee would seem to prevent the payment of attorneys fees for services rendered by the counsel for the former debtor in possession. Instead, the debtor in possession might seek to delay or stay the entry of the order of conversion until the reports required under Rule 1019(5)(A) can be prepared. Even if the order of conversion were stayed, there will always be some need for additional reporting because the reports require the compilation of information up to the moment of conversion. Nevertheless, preparation of a substantial portion of these reports during the chapter 11 can reduce the extent of exposure to the counsel for the debtor-in-possession for substantial additional services for which compensation would not be available. It may be, however, that as Judge Carruthers noted in Rainbow Transport Services, Inc., that

> [w]hen the representation of a debtor-in-possession is undertaken by counsel in a

chapter 11 case, the counsel takes on certain responsibilities and certain risks. The responsibilities include representing the debtor-in-possession in such a manner that the debtor complies with the Federal Rules of Bankruptcy Procedure. The risks assumed by counsel include the risk that there might not be sufficient monies to pay for all the services rendered.

One option that the Committee might wish to explore is the possibility of putting the burden of preparing these reports on the chapter 7 trustee. If this were an obligation of the chapter 7 trustee, the trustee and his/her counsel could be compensated for those services. The problem, however, is that this places the burden arguably on the wrong person. The debtor (former debtor in possession) has possession of and access to all the information necessary to prepare the reports. The same would be true for a chapter 11 trustee if one had been appointed in the chapter 11 case. Since these are the persons who operated the business, they should have the obligation to prepare these reports. Unfortunately, that may leave them with no prospect for being compensated for providing that service. This might provide some incentive for a more regular preparation of periodic reports that would limit the amount of time and effort necessary to prepare these final reports after conversion of the case.

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **BANKRUPTCY RULE 7007.1(b)–TIME FOR FILING CORPORATE OWNERSHIP STATEMENT**

DATE: **AUGUST 17, 2004**

Bankruptcy Rule 7007.1 was added to the rules effective December 1, 2003. As the Committee Note states, the rule is derived from Rule 26.1 of the Federal Rules of Appellate Procedure. It also largely parallels Civil Rule 7.1. There is, however, a significant difference between Civil Rule 7.1 and Bankruptcy Rule 7007.1. The time for filing the disclosure statement in the two rules is different. I believe that our version of the timing requirement is incorrect and should be amended.

Under Rule 7007.1(b) the corporate ownership statement must be filed with the "first pleading in an adversary proceeding." The problem is that Rule 7007 provides that Civil Rule 7 applies in adversary proceedings. Under Civil Rule 7(a), pleadings are a very limited set of documents. Importantly, pleadings do not include motions that might be the first paper filed in a case. As a result, Civil Rule 7.1 does not tie the time for filing the disclosure statement with the filing of a pleading. Rather, the filing must be made with the parties "first appearance, pleading, petition, motion, response, or other request addressed to the Court." I believe that we should amend Rule 7007.1(b) to conform to the civil rule provision.

Rule 7007.1 Corporate Ownership Statement

* * * * * *

(b) Time for filing

A party shall file the statement required under Rule 7007.1(a) with its first ~~pleading in an adversary proceeding~~ appearance, pleading, petition, motion, response, or other request addressed to the court. A party shall file a supplemental statement promptly upon any change in circumstances that this rule requires the party to identify or disclose.

COMMITTEE NOTE

The rule is amended to clarify that a party must file a corporate ownership statement with its initial paper filed with the court. The party's initial filing may not be a pleading, as pleadings are defined in Rule 7 F.R. Civ. P. made applicable in adversary proceedings by Rule 7007. The amendment also brings Rule 7007.1 more closely in line with Rule 7.1 F.R. Civ. P.

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **REQUIRED USE OF ELECTRONIC FILING UNDER RULE 5005(a)(2)**

DATE: **AUGUST 19, 2004**

The Committee on Court Administration and Case Management (CACM) has requested the Advisory Committees on the Civil Rules and the Bankruptcy Rules to consider amending the rules to encourage mandatory electronic filing. CACM believes that encouraging the mandatory implementation of electronic filing will lead to significant financial savings for the judiciary and has recommended that Bankruptcy Rule 5005(a)(2) be amended to permit local courts to adopt mandatory electronic filing requirements. This would require an amendment to Rule 5005(a)(2) which currently allows the courts to adopt local rules that permit electronic filing. The amendment would switch from a rule authorizing the adoption of local rules "permitting electronic filing" to one that would authorize the courts to adopt local rules that would require electronic filing. Such an amendment follows.

RULE 5005. Filing and Transmittal of Papers

(a) FILING

* * * * * *

(2) FILING BY ELECTRONIC MEANS

A court may by local rule ~~permit~~ require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the

United States establishes. A document filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules, the Federal Rules of Civil Procedure made applicable by these rules, and § 107 of the Code.

* * * * * *

COMMITTEE NOTE

The rule is amended to authorize the adoption of local rules that would require that documents be filed by electronic means. These local rules also may include appropriate exceptions to the requirement. Electronic filing of documents is the norm in many courts, and the rule as amended will permit the courts that are in differing stages in the adoption of electronic filing of documents to proceed at their own pace towards a total electronic filing environment.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT
of the
JUDICIAL CONFERENCE OF THE UNITED STATES

August 2, 2004

04-AP-D
04-BK-D
04-CV-G
04-CR-C

Honorable David F. Levi
Chief Judge
United States District Court
2504 U.S. Courthouse
501 I Street
Sacramento, CA 95814-7300

Dear Judge Levi:

At our recent Summer meeting, and as part of the Executive Committee's budget initiative, our Committee considered a myriad of cost containment ideas, one of which was that all cases filed in federal court be done exclusively through the CM/ECF system. After discussing this proposal, it was the consensus of the Committee that significant savings can and will be achieved through electronic filing, and therefore mandatory electronic filing should be encouraged to the fullest extent possible. Because this proposal has obvious implications for the federal rules of procedure and therefore your Committee, I wanted to alert you to our Committee's recommendations.

As you are aware, our Committee – at the request of and in coordination with your Committee – has developed model local electronic filing rules (which were subsequently endorsed by the Judicial Conference) that strongly encourage electronic filing. One of the fundamental reasons for developing these model rules was to assist the Rules Committee in its consideration of the development of national rules for electronic filing. These rules have been provided to the courts for over two years, and have been of great assistance in implementing CM/ECF.

At our Summer meeting, the Committee considered a series of proposed amendments to those rules that would create a presumption that all documents would be electronically filed, unless otherwise ordered by the court upon a showing of good cause. The Committee decided, however, that these proposals would probably conflict with the current Fed. R. Civ. P. 5(e) and Fed. R. Bankr. P. 5005, which state that a court may "permit" electronic filing, and therefore declined to endorse them. Instead, our Committee decided to tackle the issue head on, by recommending that the Rules Committee consider expedited amendments to the civil and

bankruptcy rules that would authorize the courts to "require" the use of electronic filing but that would also incorporate appropriate exceptions. Fundamentally, the Committee believes this to be the most appropriate way to formally implement electronic case filing into the culture of the federal courts. And, while the Committee was cognizant of the fact that the Appellate courts will not start implementing CM/ECF until January of 2005, and will not go live until January 2006 at the earliest, we believe now is an appropriate time to begin the rules process to effect these changes, in order that they be implemented as quickly as possible.

In the meantime, the Committee also plans to consider amendments – to the extent they are possible – to the current model local rules that would more strongly encourage the use of electronic filing without violating the current federal rules. The Committee is also requesting the Executive Committee, as part of its cost containment initiative, to strongly urge courts to work with their local bars to ensure that CM/ECF is implemented to the greatest extent possible. The Committee believes this will help eliminate paper filing practices, as well as dual paper and electronic filing practices, in favor of the full incorporation of electronic case filing, thereby achieving cost savings through this technology.

Therefore, based on the Committee's recommendations, I would like to formally request that the Rules Committee propose, on an expedited basis, amendments to Rule 5(e) of the Federal Rules of Procedure and Rule 5005(a)(2) of the Federal Rules of Bankruptcy Procedure that would authorize the courts to "require" the use of electronic filing, but would also incorporate appropriate exceptions. I would also welcome any suggestions your Committee may have regarding our initiative to review the current model local rules with an eye towards amending them to more strongly encourage electronic filing.

Thank you for your consideration of these proposals, and please do not hesitate to contact me if you would like to discuss them further. Our two committees have devoted an enormous amount of time and energy to these issues, and it looks like those efforts will continue for some time. I sincerely believe, however, that our efforts have been a great contribution to the federal judiciary.

Sincerely,

John W. Lungstrum

John W. Lungstrum

cc: Peter McCabe
John Rabiej

MEMORANDUM

TO: **ADVISORY COMMITTEE ON BANKRUPTCY RULES**

FROM: **JEFF MORRIS, REPORTER**

RE: **RULE 8002 – EXTENDING THE APPEAL TIME**

DATE: **AUGUST 19, 2004**

Under Rule 8002, a notice of appeal must be filed within ten days of the entry of the judgment, order or decree being appealed. This deadline is much shorter than deadlines applicable in other federal civil litigation[1], and the courts generally have applied the deadline strictly.[2] Given that it is both a short period and that it is different from most other appeal deadlines, the bankruptcy appeal rule can be a trap for the unwary. The potential harshness of the rule is exacerbated by the delays in service of judgments, orders, and decrees. For example, several judges at the roundtable discussion of rules issues at the FJC meeting in Seattle last week noted that it frequently takes two to three days for the Bankruptcy Noticing Center to send these orders to the parties. If the delivery of the mail takes an additional two or three days, the party will not receive the order until approximately one-half of the appeal time has run. Further complicating the problem is the different counting rule for ten day periods under Bankruptcy Rule 9006(a) as compared to Civil Rule 6. Under the Bankruptcy Rules, the ten day period includes all intervening Saturdays, Sundays, and holidays, while those intervening days would be

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[1] Rule 4(a)(1) of the Federal Rules of Appellate Procedure provides that a notice of appeal in a civil case must be filed within 30 days of the entry of the order appealed from.

[2] See, e.g., In re Weston,. 18 F.3d 860 (10th Cir. 1994); In re Souza, 795 F.2d 853 (9th Cir. 1986).. The courts upheld the short deadlines even prior to the enactment of the Bankruptcy Code. See, e.g., In re Plotkin, 247 F.Supp. 1965 (S.D.N.Y. 1965)

excluded under the Civil Rules. This effectively shortens the ten day period under the Bankruptcy Rules as compared to the Civil Rules.

The roundtable discussion included several possible solutions to the problem of the extremely short appeal time. One solution was to extend the time from ten days to fifteen days in Rule 8002. Another possible solution would be to amend Rule 9006(a) to make it consistent with the civil rules regarding the exclusion of intervening Saturdays, Sundays, and holidays. This would be very comparable to extending the deadline to fifteen days. A third solution suggested, and the one that seemed to generate the most support was to change the starting point for counting the appeal time so that it begins to run from the time of service of the judgment, order or decree rather than from the time of the entry of the order. This solution retains the "short" deadline which is viewed as necessary for the efficient administration of bankruptcy cases while still giving the parties an adequate time to determine whether to appeal the decision. This solution is also superior to the suggested change in the counting mechanism set out in Rule 9006(a) because changing that counting rule would alter the timing of other matters under the Bankruptcy Rules.[3]

The widespread adoption of CM/ECF and electronic noticing may reduce the need for any amendment of Rule 8002. In the meantime, the Committee may wish to consider whether any change should be made. A draft of an amended Rule 8002 that uses the service of the order

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[3] Rule 9006 was amended in 1987 to conform to the civil rule counting provision that excluded intervening Saturdays, Sundays, and holidays if the prescribed period in the rule was less than 11 days. Rule 9006 was amended again, just two years later, to reinstate the rule to its current version as regards intervening weekends and holidays. The Committee Note to the 1989 amendment reinstating the original version of the rule described the effect of the 1987 amendment as "an undesirable result" contrary to prompt administration of cases by extending 10-day time periods to at least 14 calendar days.

appealed from as the triggering event for the start of the appeal time.

RULE 8002. Time for Filing Notice of Appeal

(a) TEN-DAY PERIOD

The notice of appeal shall be filed with the clerk within 10 days of the date of the service ~~entry~~ of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. A notice of appeal filed after the announcement of a decision or order but before entry of the judgment, order, or decree shall be treated as filed after such entry and on the day thereof. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which it was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

COMMITTEE NOTE

The rule is amended to create a new starting point for the running of the time within which to file a notice of appeal. The time begins to run from the date on which the judgment, order, or decree is served rather than from the date of the entry of the judgment, order, or decree. Since a party has only 10 days within which to file a notice of appeal, commencing that time period from the date of entry of the judgment, order, or decree appealed from is

especially short if the aggrieved party has to await service of the paper before even knowing that the court has issued an appealable order. Delays in service would effectively reduce the time to appeal to a matter of days. Commencing the running of the appeal time with the service of the judgment, order, or decree should provide the parties with a sufficient period of time to determine whether to appeal.

Thomas Small
05/05/2004 12:59 PM

To: Mark McFeeley/NMB/10/USCOURTS@USCOURTS
cc: Morris@udayton.edu
Subject: Re: rules change

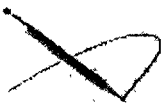
Mark,

I have had the same concern, and in fact for that reason I have the clerk's office serve most of my orders. I will see that it gets on the agenda for our meeting in the fall. Tom
Mark McFeeley

Mark McFeeley
04/30/2004 01:35 PM

To: Thomas Small/NCEB/04/USCOURTS@USCOURTS
cc: David S Kennedy/TNWB/06/USCOURTS@USCOURTS
Subject: rules change

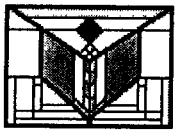
Tom---hi---hope you have already gone for the weekend!! it was mentioned at the Bankruptcy Judges Advisory Committee meeting that many judges would be more comfortable sending out orders through the BNC if Rule 8002(a) were changed to either lengthen the time frame to perhaps 15 dates or to provide that the time to appeal runs from the time of service of the judgement, order etc. Seems like there is some general feeling that the up to 2 day delay built into the BNC system might put some folks at a disadvantage-- i do not know if the committee has ever considered this before and it is interesting that most other time periods run from the date of service so perhaps there was a good reason that it is not so in this rule. anyway, thought i would raise the question---- mark



Thomas
Small/NCEB/04/USCOURTS
07/16/2004 11:26 AM

To Ellen Johanson/NDB/08/USCOURTS
cc
Subject Re: Proposed Local Rules

Thank you for your comment. There are several members of the Rules Committee who think the appeal time should be longer when the BNC serves the orders. I try, as you do, to be sure that the clerk's office serves those orders that might be appealed. Thanks again. Tom Small
Ellen Johanson/NDB/08/USCOURTS



Ellen
Johanson/NDB/08/USCOURT
S
07/16/2004 10:34 AM

To Thomas Small/NCEB/04/USCOURTS@USCOURTS
cc
Subject Proposed Local Rules

Judge Small, I hope you don't mind that I am sending you an e-mail. Bankruptcy Judge William Hill as shared his work book from the recent Chief Bankruptcy Judge meeting. I read your Report of Advisory Committee on Bankruptcy Rules. I was interested in the roundtable discussion to be held in a few weeks in Seattle and particularly interested in expansion of the ten day appeal time. I am very much in favor of such an expansion.

I don't anticipate that use of CM/ECF will become mandatory in the near future in North Dakota, thus immediate electronic notice will not be the norm for many bankruptcy practitioners. We use the Bankruptcy Noticing Center to serve the majority of our orders and notices, but of course, that adds several days to the length of time it gets out of the court and into the hands of the debtors, creditors, bankruptcy attorneys etc. We have to be extremely careful to make sure we hand-mail copies of appealable orders to ensure that parties have sufficient time to review orders and make appeals. The parties are still short changed within their ten day appeal time when we use regular mail.

I advocate an expansion of the ten day appeal time.

Ellen A. Johanson
Clerk, U.S. Bankruptcy Court
District of North Dakota

Model Local Bankruptcy Court Rules for Electronic Case Filing

Endorsed by the Judicial Conference of the United States

September 2003

Introduction

Because most existing court rules and procedures have been designed with paper court documents in mind, some modifications are needed to address issues arising when court documents are filed in electronic form. This set of model local rules was developed for federal bankruptcy courts implementing the electronic case filing capabilities of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) Project, and can be adapted by courts that offer some other method of electronic filing of court documents.

The original model was compiled by a subcommittee of the Court Administration and Case Management Committee that included as members representatives from the Committee on Automation

and Technology (now the Committee on Information Technology) and the Committee on Rules of Practice and Procedure. The subcommittee reviewed the rules and procedures for electronic filing developed in the CM/ECF prototype district and bankruptcy courts. It also undertook an informal survey of those courts to find out how well those procedures operated. The information indicated general satisfaction with courts' existing procedures. There was also general agreement that it was essential to include the bar in the process of developing and modifying the local procedures governing electronic filing.

This set of model local rules for electronic case filing was based to a significant extent on the procedures used in courts that served as prototype courts for the federal judiciary's CM/ECF Project. It was approved by the Judicial Conference in September 2001. Additional experience suggests that some modifications are appropriate.

There are separate sets of model local civil and criminal rules for district courts and this set of model local rules for bankruptcy courts. They use the same terminology and are identical to the extent possible and appropriate. Courts are free to adapt the provisions of these model local rules as they choose. (Please note that "Interim Bankruptcy Rules" will be promulgated and recommended for adoption as local rules to implement pending comprehensive bankruptcy reform legislation upon enactment. Unlike model local rules, including these model local rules governing electronic case filing, courts will be urged to adopt the "interim bankruptcy rules" as local rules without change.)

The Federal Rules of Procedure (e.g., Bankruptcy Rules 5005, 7005 and 8008) provide that a court may "by local rule" permit filing, signing and verification of documents by electronic means. The Federal Rules also authorize each district court to make and amend rules governing bankruptcy practice (Bankruptcy Rule 9029(a)). Thus, each court that intends to allow electronic filing should have at least a general authorizing provision in its local rules.[1] The model rules developed here may be used either as a set of local rules, or as the contents for a general order or other administrative procedures. The use of local rules promotes the requirements of the Rules Enabling Act, provides better public notice of applicable procedures, and allows for input from the bar. On the other hand, use of general orders gives courts more flexibility to modify requirements and rules in response to changing circumstances. If local rules are used, it should be noted that Fed.R.Bankr.P. 9029 and related Judicial Conference policy require that rule numbering conform to the numbering system of the Federal Rules. The model rules could be added as a group to local rules corresponding to Fed.R.Bankr.P. 5005 or 9029, or existing local rules on specific topics could be amended.

Note: These model procedures use the term "Electronic Filing System" to refer to the court's system that receives documents filed in electronic form. The term "Filing User" is used to refer to those who have a court-issued log-in and password to file documents electronically.

Rule 1- Scope of Electronic Filing

> The court will designate which cases will be assigned to the Electronic Filing System. Except as expressly provided and in exceptional circumstances preventing a Filing User from filing electronically, all petitions, motions, memoranda of law, or other pleadings and documents required to be filed with the court in connection with a case assigned to the Electronic Filing System must be electronically filed.

In a case assigned to the Electronic Filing System after it has been opened, parties must promptly provide the clerk with electronic copies of all documents previously provided in paper form. All subsequent documents must be filed electronically except as provided in these rules or as ordered by the court.

Notwithstanding the foregoing, attorneys and others who are not Filing Users in the Electronic Filing System are not required to electronically file pleadings and other papers in a case assigned to the System. Once registered, a Filing User may withdraw from participation in the Electronic Filing System by providing the clerk's office with written notice of the withdrawal.

Derivation

The first and third paragraphs of the Model Rule are derived from the Southern District of California Bankruptcy procedures, with the exception of the last sentence of the third paragraph, which is derived from the Eastern District of Virginia Bankruptcy procedures. The second paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides that the court will designate which cases will be assigned to the electronic filing system. It also establishes a presumption that all documents filed in cases assigned to the electronic filing system should be electronically filed. Some courts have designated certain types of cases for electronic filing, while some have determined that all cases are appropriate for electronic filing. However, the Rule does not make electronic filing mandatory. Mandatory electronic filing appears to be inconsistent with Fed.R.Bankr.P. 5005, which states that a court "may permit" papers to be filed electronically, and provides that the clerk "shall not refuse to accept for filing any paper presented . . . solely because it is not presented in proper form." However, the Federal Rules clearly permit a court to strongly encourage lawyers to participate in electronic case filing, and the Model Rule is written to provide such encouragement.

2. For cases assigned to the electronic filing system after documents have already been filed conventionally, the Model Rule states that the parties must provide electronic copies of all previously filed documents. In cases removed to the federal court, parties in cases assigned to the electronic filing system are required to provide electronic copies of all previous filings in the state court. Where documents filed in paper form were previously scanned by the court, electronic filing would not be necessary.

3. Some courts offering electronic filing require fees to be paid in the traditional manner, while others permit or require electronic payment of fees. Nothing in the rule would constrain the court in providing for a desired method of payment of fees.

4. Electronic case filing raises privacy concerns. Electronic case files can be more easily accessible than traditional paper case files, so there is a greater risk of public dissemination of sensitive information found in case files. See Model Rule 12. The Judicial Conference is investigating and evaluating the privacy concerns attendant to electronic case files, and is working to develop a policy.

Rule 2- Eligibility, Registration, Passwords

Attorneys admitted to the bar of this court (including those admitted pro hac vice and attorneys authorized to represent the United States), United States trustees and their assistants, bankruptcy administrators and their assistants, private trustees, and others as the court deems appropriate, may register as Filing Users of the court's Electronic Filing System. Registration is in a form prescribed by the clerk and requires the Filing User's name, address, telephone number, Internet e-mail address, and, in the case of an attorney, a declaration that the attorney is admitted to the bar of this court.

If the court permits, a party to a pending action who is not represented by an attorney may register as a Filing User in the Electronic Filing System solely for purposes of the action. Registration is in a form prescribed by the clerk and requires identification of the action as well as the name, address, telephone number and Internet e-mail address of the party. If, during the course of the action, the party retains an attorney who appears on the party's behalf, the attorney must advise the clerk to terminate the party's registration as a Filing User upon the attorney's appearance.

Provided that a Filing User has an Internet e-mail address, registration as a Filing User constitutes: (1) waiver of the right to receive notice by first class mail and consent to receive notice electronically; and (2) waiver of the right to service by personal service or first class mail and consent to electronic service, except with regard to service of a summons and complaint under Fed.R.Bankr.P. 7004. Waiver of service and notice by first class mail applies to notice of the entry of an order or judgment under Fed.R.Bankr.P. 9022.

Once registration is completed, the Filing User will receive notification of the user log-in and password. Filing Users agree to protect the security of their passwords and immediately notify the clerk if they learn that their password has been compromised. Users may be subject to sanctions for failure to comply with this provision.

Derivation

The first three paragraphs of Model Rule 2 are adapted from the Eastern District of New York procedures. The last paragraph is derived from the Northern District of Ohio procedures.

Commentary

1. The Model Rule specifically provides that attorneys admitted pro hac vice, U.S. trustees and their assistants, attorneys for the United States, bankruptcy administrators and their assistants, and private trustees can be Filing Users in electronic filing systems. It also recognizes that the court may wish to permit others, e.g., claims filers, to participate. These additional filers could at the court's option be provided with limited filing privileges. The Model Rule also recognizes that a court may wish under

certain circumstances to permit pro se filers to take part in electronic case filing. Such participation is left to the discretion of the court.

2. The Model Rule provides that a person who registers with the System (a Filing User) thereby consents to electronic service and notice of documents subject to the electronic case filing system. Amendments to Fed.R.Civ.P. 5, which is incorporated by reference into Fed.R.Bankr.P. 7005 and 9014, permit electronic service on a person who consents "in writing." The Committee Notes indicate that the consent may be provided by electronic means. A court may "establish a registry or other facility that allows advance consent to service by specified means for future action." Thus, a court might use CM/ECF registration as a means to have parties consent to receive service electronically.

3. The consent to receive electronic notice and service is intended to cover the full range of notice and service except those documents to which the service requirements of Fed.R.Bankr.P. 7004 apply. These provisions operate independently from the notices sent by the Bankruptcy Noticing Center under Fed.R.Bankr.P. 9036.

4. Several districts currently have provisions addressing the possibility of compromised passwords. Such a provision may be useful in a User Manual for the electronic filing system. The provision might read as follows:

> Attorneys may find it desirable to change their court assigned passwords periodically. In the event that a Filing User believes that the security of an existing password has been compromised and that a threat to the System exists, the Filing User must give immediate notice by telephone to the clerk, chief deputy clerk or systems department manager and confirm by facsimile in order to prevent access to the System by use of that password.

Rule 3-Consequences of Electronic Filing

> Electronic transmission of a document to the Electronic Filing System consistent with these rules, together with the transmission of a Notice of Electronic Filing from the court, constitutes filing of the document for all purposes of the Federal Rules of Bankruptcy Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed.R.Bankr.P. 5003.
>
> Before filing a scanned document with the court, a Filing User must verify its legibility.
>
> When a document has been filed electronically, the official record is the electronic recording of the document as stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 1, a document filed electronically is deemed filed at the date and time stated on the Notice of Electronic Filing from the court.

Filing a document electronically does not alter the filing deadline for that document. Filing must be completed before midnight local time where the court is located in order to be considered timely filed that day.

Derivation

The first and third paragraphs of Model Rule 3 are adapted from the Eastern District of New York procedures. The second paragraph is derived from the District of Nebraska procedures. The fourth paragraph is adapted from the Northern District of Ohio procedures.

Commentary

1. The Model Rule provides a "time of filing" rule that is analogous to the traditional system of file stamping by the Clerk's office. A filing is deemed made when it is acknowledged by the Clerk's office through the CM/ECF system's automatically generated Notice of Electronic Filing.

2. The Model Rule makes clear that the electronically filed documents are considered to be entries on the official docket.

Rule 4- Entry of Court-Issued Documents

All orders, decrees, judgments, and proceedings of the court will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Fed.R.Bankr.P. 5003 and 9021. All signed orders will be filed electronically by the court or court personnel. Any order or other court-issued document filed electronically without the original signature of a judge or clerk has the same force and effect as if the judge or clerk had signed a paper copy of the order and it had been entered on the docket in a conventional manner.

Orders may also be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.

The court may sign, seal and issue a summons electronically, although a summons may not be served electronically.

A Filing User submitting a document electronically that requires a judge's signature must promptly deliver the document in such form as the court requires.

Derivation

The first two sentences of the first paragraph of the Model Rule are adapted from the Eastern District of

New York procedures. The last sentence is derived from the procedures of the Northern District of Georgia Bankruptcy Court. The second paragraph is derived from the District of Columbia and District of Nebraska procedures. The fourth paragraph is adapted from Eastern District of New York procedures

Commentary

1. Not all courts have a provision in their electronic filing procedures addressing the electronic entry of court orders. In at least one court without such a provision, a question arose about the validity of electronically filed court orders. The Model Rule specifically states that an electronically filed court order has the same force and effect as an order conventionally filed. Judges in many courts authorize "text-only" orders, which are docket entries that themselves constitute the order. These text-only orders, which are generally used for routine matters, do not require production of a .pdf document.

2. The Model Rule contemplates that a judge can authorize personnel, such as a law clerk or judicial assistant, to electronically enter an order on the judge's behalf.

3. The Model Rule leaves the method for submitting proposed orders to the discretion of the court. Courts have been using a variety of methods, including having them sent by email to the court in word-processing format or having them filed as .pdf documents.

4. The Model Rule expressly provides that a court may sign, seal and issue a summons electronically. This authorizes only issuance of the summons. A summons may not be served electronically, however.

Rule 5- Attachments and Exhibits

> Filing Users must submit in electronic form all documents referenced as exhibits or attachments, unless the court permits conventional filing. A Filing User must submit as exhibits or attachments only those excerpts of the referenced documents that are directly germane to the matter under consideration by the court. Excerpted material must be clearly and prominently identified as such. Filing Users who file excerpts of documents as exhibits or attachments under this rule do so without prejudice to their right to timely file additional excerpts or the complete document. Responding parties may timely file additional excerpts or the complete document that they believe are directly germane. The court may require parties to file additional excerpts or the complete document.

Derivation

The Model Rule is adapted from the Southern District of New York Bankruptcy procedures. The last sentence is derived from the rules of the District of Kansas.

Commentary

1. One issue that has arisen in most courts using electronic filing relates to attachments or exhibits not originally available to the filer in electronic form, and that must be scanned (or imaged) into Portable Document Format before filing. Examples include leases, contracts, proxy statements, charts and graphs. A scanned document creates a much larger electronic file than one prepared directly on the computer (*e.g.*, through word processing). The large documents can take considerable time to file and retrieve. The Model Rule provides that if the case is assigned to the electronic filing system, the party must file this type of material electronically, unless the court specifically permits conventional filing.

2. It is often the case that only a small portion of a much larger document is relevant to the matter before the court. In such cases, scanning the entire document imposes an inappropriate burden on both the litigants and the courts. To alleviate some of this inconvenience, the Model Rule provides that a Filing User must submit as the exhibit only the relevant excerpts of a larger document. The responding party then has a right to submit other excerpts of the same document under the principle of completeness.

3. This rule is not intended to alter traditional rules with respect to materials that are before the court for decision. Thus, any material on which the court is asked to rely must be specifically provided to the court.

4. For courts permitting claims to be filed electronically, this rule also governs proofs of claim. Official Form 10, the Proof of Claim, already permits creditors to file a summary if the documentation for the claim is voluminous.

Rule 6-Sealed Documents

> Documents ordered to be placed under seal must be filed conventionally, and not electronically, unless specifically authorized by the court. A motion to file documents under seal may be filed electronically unless prohibited by law. The order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. A paper copy of the order must be attached to the documents under seal and be delivered to the clerk.

Derivation

The Model Rule is adapted from the Western District of Missouri procedures.

Commentary

1. The Model Rule recognizes that other laws may affect whether a motion to file documents under seal, or an order authorizing the filing of such documents, can or should be electronically filed. It is possible that electronic access to the motion or order may raise the same privacy concerns that gave rise to the

need to file a document conventionally in the first place. For similar reasons, the actual documents to be filed under seal should ordinarily be filed conventionally.

2. See Model Rule 12 for another provision addressing privacy concerns arising from electronic filing.

Rule 7- Retention Requirements

> Documents that are electronically filed and require original signatures other than that of the Filing User must be maintained in paper form by the Filing User until [number] years after all time periods for appeals expire. On request of the court, the Filing User must provide original documents for review.

Derivation

Model Rule 7 is adapted from the Eastern District of Virginia Bankruptcy procedures.

Commentary

1. Because electronically filed documents do not include original, handwritten signatures, it is necessary to provide for retention of certain signed documents in paper form in case they are needed as evidence in the future. The Model Rule requires retention only of those documents containing original signatures of persons other than the person who files the document electronically. The filer's use of a log-in and password to file the document is itself a signature under the terms of Model Rule 8.

2. The Model Rule places the retention requirement on the person who files the document. One alternative is to place retention responsibility on counsel and/or the firm representing the party on whose behalf the document was filed. (Thus, if counsel changes, the documents would be transferred along with the rest of the case file.) Another possible solution is to require the filer to submit the signed original to the court, so that the court can retain it. Some government officials have expressed a preference to have such documents retained by the court, in order to make it easier to retrieve the documents for purposes such as a subsequent prosecution for fraud. Some have suggested that a debtor's original signature be filed with the court because the signature is so important on bankruptcy petitions and schedules.

3. Courts have varied considerably on the required retention period. Some have limited it to the end of the litigation (plus the time for appeals). Others have required longer retention periods (four or five years). Assuming that the purpose of document retention is to preserve relevant evidence for a subsequent proceeding, the appropriate retention period might relate to relevant statutes of limitations.

4. Some districts require the filer to retain a paper copy of *all* electronically filed documents. Such a requirement seems unnecessary, and it tends to defeat one of the purposes of using electronic filing. Other courts have required retention of "verified documents," i.e., documents required to be verified

under Fed.R.Bankr.P. 1008 or documents in which a person verifies, certifies, affirms, or swears under oath or penalty of perjury. See, *e.g.*, 28 U.S.C. § 1746 (unsworn declarations under penalty of perjury).

Rule 8- Signatures

The user log-in and password required to submit documents to the Electronic Filing System serve as the Filing User's signature on all electronic documents filed with the court. They also serve as a signature for purposes of Fed.R.Bankr. P. 9011, the Federal Rules of Bankruptcy Procedure, the local rules of this court, and any other purpose for which a signature is required in connection with proceedings before the court. Each document filed electronically must, if possible, indicate that it has been electronically filed. Electronically filed documents must include a signature block [in compliance with local rule number [ ] if applicable] and must set forth the name, address, telephone number and the attorney's [name of state] bar registration number, if applicable. In addition, the name of the Filing User under whose log-in and password the document is submitted must be preceded by an "s/" and typed in the space where the signature would otherwise appear.

No Filing User or other person may knowingly permit or cause to permit a Filing User's password to be used by anyone other than an authorized agent of the Filing User.

Documents containing the signature of non-Filing Users are to be filed electronically with the signature represented by a "s/" and the name typed in the space where a signature would otherwise appear, or as a scanned image.

Documents requiring signatures of more than one party must be electronically filed either by: (1) submitting a scanned document containing all necessary signatures; (2) representing the consent of the other parties on the document; (3) identifying on the document the parties whose signatures are required and by the submission of a notice of endorsement by the other parties no later than three business days after filing; or (4) in any other manner approved by the court.

Derivation

The first and fourth paragraphs of the Model Rule are adapted from the Northern District of Ohio procedures. The second paragraph is derived from the Southern District of New York Bankruptcy procedures.

Commentary

1. Signature issues are a subject of considerable interest and concern. The CM/ECF system is designed to require a log-in and password to file a document. The Model Rule provides that use of the log-in and password constitutes a signature, and assures that such a signature has the same force and effect as a written signature for purposes of the Federal Rules of Bankruptcy Procedure, including Fed.R.Bankr. P. 9011, and any other purpose for which a signature is required on a document in connection with proceedings before the court.

2. At the present time, other forms of digital or other electronic signature have received only limited acceptance. It is possible that over time and with further technological development, a system of digital signatures may replace the current password system.

3. Some users of electronic filing systems have questioned whether an s-slash requirement is worth retaining. The better view is that an s-slash is necessary; otherwise there is no indication that documents printed out from the website were ever signed. The s-slash provides some indication when the filed document is viewed or printed that the original was in fact signed.

4. The second paragraph of the Model Rule does not require an attorney or other Filing User to personally file his or her own documents. The task of electronic filing can be delegated to an authorized agent, who may use the log-in and password to make the filing. However, use of the log-in and password to make the filing constitutes a signature by the Filing User under the Rule, even though the Filing User does not do the physical act of filing.

5. Issues arise when documents being electronically filed have been signed by persons other than the filer, *e.g.*, stipulations and affidavits. For documents signed by individuals without log-ins and passwords (non-Filing Users), the Model Rule provides that the signature can appear as a "s/" or as a scanned image. Under Model Rule 7 above, the Filing User must retain a paper copy with the original signature of any such document filed by the Filing User. The Model Rule provides for considerable flexibility in the filing of documents signed by more than one party, e.g., stipulations. Courts may wish to modify or narrow the options if, for example, they believe that administering the three-day period for endorsements would be burdensome. Or, another solution is to provide an immediate but short opportunity, e.g., 10 days from the receipt of the Notice of Electronic Filing, for others to challenge the authenticity of their signatures on an electronic document.

6. Courts may wish to underscore the fact that a Filing User's log-in and password constitutes the Filing User's signature, by including a statement to that effect on the registration form.

Rule 9- Service of Documents by Electronic Means

The "Notice of Electronic Filing" that is automatically generated by the court's Electronic Filing System constitutes service or notice of the filed document on Filing Users. Parties who are not Filing Users must be provided notice or service of any pleading or other document electronically filed in accordance with the Federal Rules of Bankruptcy Procedure and the local rules.

> A certificate of service must be included with all documents filed electronically, indicating that service was accomplished through the Notice of Electronic Filing for parties and counsel who are Filing Users and indicating how service was accomplished on any party or counsel who is not a Filing User.

Derivation

The first sentence of Model Rule 9 is derived from the rules of the District of Kansas. The second paragraph is derived from the Northern District of Ohio's procedures.

Commentary

1. The amendments to the Federal Rules (Fed.R.Bankr.P. 7005, 9014, Fed.R.Civ.P. 5(b)) authorizing service of documents by electronic means do not permit electronic service of process for purposes of obtaining personal jurisdiction (i.e., Rule 7004 service).

2. The CM/ECF system automatically generates a Notice of Electronic Filing at the time a document is filed with the system. The Notice indicates the time of filing, the name of the party and attorney filing the document, the type of document, and the text of the docket entry. It also contains an electronic link (hyperlink) to the filed document, allowing anyone receiving the Notice by e-mail to retrieve the document automatically. The CM/ECF system automatically sends this Notice to all case participants registered to use the electronic filing system. If the court is willing to have this Notice itself constitute service, it may, under the amendments to the Federal Rules, do so through a local rule. The amendments require a local rule if a court wants to authorize parties to use its "transmission facilities" to make electronic service. The Model Rule includes such a provision by providing that the court's automatically generated notice of electronic filing constitutes service.

3. Parties who are not Filing Users are not deemed under the Model Rules to have consented to electronic notice or service of the Notice of Electronic Filing. They must be served in some other way authorized by the Federal Rules of Bankruptcy Procedure (which incorporate Fed.R.Civ.P. 5(b)). Under the rules, they can be served in the traditional way with a paper copy of the electronically filed document, or they can consent in writing to service by any other method, including other forms of electronic service such as fax or direct e-mail.

4. An amendment to Fed.R.Bankr.P. 9006(f) provides that the three additional days to respond to service by mail will apply to electronic service as well. The Committee Note on the parallel amendment to Fed.R.Civ.P. 6(e) states:

> Electronic transmission is not always instantaneous, and may fail for any number of reasons. It may take three days to arrange for transmission in readable form. Providing added time to respond will not discourage people from asking for consent to electronic transmission, and may encourage people to give consent. The more who consent, the quicker will come the improvements that make electronic service ever more attractive.

5. While some courts accept the Notice of Electronic Filing as a certificate of service, other courts require a separate certificate of service to be included with the filed document indicating that the

document was electronically filed using the CM/ECF system and the manner, electronically through the Notice of Electronic Filing or otherwise, in which parties were served.

Rule 10- Notice of Court Orders and Judgments

Immediately upon the entry of an order or judgment in an action assigned to the Electronic Filing System, the clerk will transmit to Filing Users in the case, in electronic form, a Notice of Electronic Filing. Electronic transmission of the Notice of Electronic Filing constitutes the notice required by Fed.R.Bankr.P. 9022. The clerk must give notice to a person who has not consented to electronic service in paper form in accordance with the Federal Rules of Bankruptcy Procedure.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. Amendments to Fed.R.Bankr.P 9022 authorize electronic notice of court orders where the parties consent. The Model Rule provides that for all Filing Users in the electronic filing system, electronic notice of the entry of an order or judgment has the same force and effect as traditional notice. The CM/ECF system automatically generates and sends a Notice of Electronic Filing upon entry of the order or judgment. The Notice contains a hyperlink to the document.

Rule 11- Technical Failures

A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.

Derivation

The Model Rule is adapted from the Eastern District of New York procedures.

Commentary

1. CM/ECF is designed so that filers access the court through its Internet website. The Model Rule addresses the possibility that a party may not meet a filing deadline because the court's website is not accessible for some reason. Cf. Fed.R.Bankr.P. 9006(a) (permitting extension of time when "weather or other conditions have made the clerk's office inaccessible"). The Model Rule also addresses the

possibility that the filer's own unanticipated system failure might make the filer unable to meet a filing deadline.

2. The Model Rule does not require the court to excuse the filing deadline allegedly caused by a system failure. The court has discretion to grant or deny relief in light of the circumstances.

Rule 12- Public Access

> Any person or organization, other than one registered as a Filing User under Rule 2 of these rules, may access the Electronic Filing System at the court's Internet site [Internet address]by obtaining a PACER log-in and password. Those who have PACER access but who are not Filing Users may retrieve docket sheets and documents, but they may not file documents.
>
> In connection with the filing of any material in an action assigned to the Electronic Filing System, any person may apply by motion for an order limiting electronic access to or prohibiting the electronic filing of certain specifically-identified materials on the grounds that such material is subject to privacy interests and that electronic access or electronic filing in the action is likely to prejudice those privacy interests.
>
> Information posted on the System must not be downloaded for uses inconsistent with the privacy concerns of any person.

Derivation

The first paragraph of the Model Rule is adapted from the District of Arizona Bankruptcy procedures. The second paragraph is adapted from the Eastern District of New York procedures. The third paragraph is adapted from the Southern District of New York Bankruptcy procedures.

Commentary

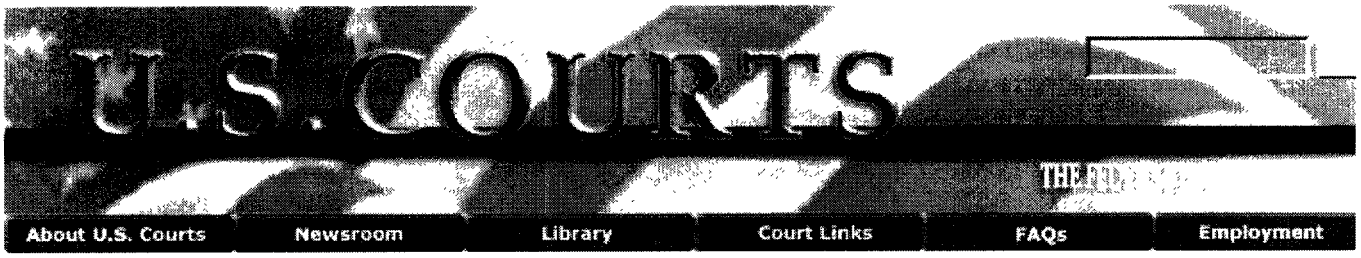
1. A subcommittee of the Judicial Conference Committee on Court Administration and Case Management is currently assessing the privacy concerns arising from electronic case filing. The Judicial Conference may at some point develop policies to address these concerns. The rule can be adapted to reflect any future specific policies or suggestions adopted by the Judicial Conference.

2. The Model Rule is consistent with Judicial Conference policy to limit remote public access to electronic case files to those who have obtained a PACER password.

3. The second paragraph of the Model Rule is not intended to create substantive rights. It simply highlights the fact that a person may apply for a protective order when Internet access to a case file or document is likely to result in the loss of that person's legitimate interest in privacy.

1. An example of a local rule authorizing electronic filing is as follows:

The court will accept for filing documents submitted, signed or verified by electronic means that comply with procedures established by the court.



Electronic Access to Courts

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Case Management

CM / ECF

Electronic Case Files

About CM/ECF

CASE MANAGEMENT/ELECTRONIC CASE FILES (CM/ECF) AUGUST 2004

Implementation of the federal judiciary's Case Management/Electronic Case Files (CM/ECF) system continues in district and bankruptcy courts across the country. CM/ECF not only replaces the courts' aging electronic docketing and case management systems, but also provides courts the option to have case file documents in electronic format, and to accept filings over the Internet.

CM/ECF systems are now in use in fifty district courts, seventy-six bankruptcy courts, the Court of International Trade and the Court Federal Claims. Most of these courts are accepting electronic filings Over 15 million cases are on CM/ECF systems. And over 100,000 attorneys and others have filed documents over the Internet. Unde current plans, the number of CM/ECF courts will increase steadily each month into 2005. Each court goes through an implementatior process that takes about 10 months.

Attorneys practicing in courts offering the electronic filing capabilit are able to file documents directly with the court over the Internet The CM/ECF system uses standard computer hardware, an Interne connection and a browser, and accepts documents in Portable Document Format (PDF). The system is easy to use – filers prepar a document using conventional word processing software, then sav it as a PDF file. After logging onto the court's web site with a court issued password, the filer enters basic information relating to the case and document being filed, attaches the document, and submi it to the court. A notice verifying court receipt of the filing is generated automatically. Other parties in the case then automatically receive e-mail notification of the filing.

CM/ECF also provides courts the ability to make their documents available to the public over the Internet. The Judicial Conference

has adopted a set of recommendations relating to privacy and pub access to electronic case files. As part of the process to develop these recommendations, public comment was sought on a number of possible approaches. The Judicial Conference's Committee on Court Administration and Case Management is overseeing implementation of the recommendations..

There are no added fees for filing documents over the Internet usi CM/ECF; existing document filing fees do apply. Electronic access t court data is available through the Public Access to Court Electroni Records (PACER) program. Litigants receive one free copy of documents filed electronically in their cases, which they can save c print for their files. Additional copies are available to attorneys anc the general public for viewing or downloading at seven cents per page, with a maximum cost per document of $2.10. Directed by Congress to fund electronic access through user fees, the judiciary has set the fee at the lowest possible level sufficient to recoup program costs.

The national roll-out of the CM/ECF system for bankruptcy courts started in early 2001, and is scheduled to take two to three years. The CM/ECF system for district courts began to roll out nationally i May 2002. Implementation of the CM/ECF system for appellate courts is currently scheduled to begin in late 2004.

For more information, please contact: Barbara Kimble, Office of Judges Programs (202) 502-1862

Relevant websites:

http://www.uscourts.gov/cmecf/cmecf.html
http://www.privacy.uscourts.gov/
http://www.pacer.psc.uscourts.gov/

Courts Currently Operational on CM/ECF

*Courts Accepting Electronic Filing

District Courts

Alabama Middle
Alabama Southern*
California Central
California Northern*
Connecticut*
District of Columbia*
Florida Middle*
Florida Northern*
Georgia Northern*
Illinois Central
Illinois Southern*
Indiana Southern*
Indiana Northern*
Iowa Northern*
Kansas*
Kentucky Eastern
Kentucky Western
Louisiana Western*
Maryland*
Maine*
Massachusetts*
Michigan Eastern
Michigan Western*
Minnesota
Missouri Eastern*
Missouri Western*
Nebraska*
New Hampshire
New Jersey*
New York Eastern*
New York Western*
New York Southern*
New York Northern*
Ohio Northern*
Ohio Southern*
Oklahoma Western*
Oregon*
Pennsylvania Eastern*
Pennsylvania Middle*

Bankruptcy Courts

Alabama Middle*
Alabama Northern
Alabama Southern*
Alaska*
Arizona*
Arkansas Eastern*
Arkansas Western*
California Northern*
California Southern*
Colorado*
Connecticut
Delaware*
District of Columbia
Florida Middle*
Florida Northern*
Georgia Northern*
Guam
Hawaii*
Illinois Central
Illinois Northern*
Illinois Southern*
Indiana Northern*
Iowa Northern*
Iowa Southern*
Kansas
Kentucky Eastern*
Kentucky Western*
Louisiana Eastern*
Louisiana Middle*
Louisiana Western*
Maine*
Maryland*
Massachusetts*
Michigan Western*
Mississippi Northern
Missouri Eastern*
Missouri Western*
Nebraska*
Nevada*

District Courts

Puerto Rico*
South Dakota*
Tennessee Eastern
Tennessee Western
Texas Eastern*
Texas Northern
Virginia Western*
Washington Western*
West Virginia Southern
Wisconsin Eastern*
Wyoming

Court of International Trade*
Court of Federal Claims*

Bankruptcy Courts

North Dakota
New Hampshire*
New Jersey*
New York Eastern*
New York Northern*
New York Southern*
New York Western*
North Carolina Eastern
North Carolina Middle
North Carolina Western*
Ohio Northern*
Ohio Southern*
Oklahoma Eastern
Oklahoma Northern*
Oregon
Pennsylvania Eastern*
Pennsylvania Middle
Pennsylvania Western*
Rhode Island*
South Carolina*
South Dakota*
Tennessee Western*
Texas Eastern*
Texas Northern*
Texas Southern*
Texas Western*
Utah*
Vermont*
Virginia Eastern*
Washington Eastern*
Washington Western*
West Virginia Northern*
West Virginia Southern*
Wisconsin Eastern
Wisconsin Western*
Wyoming*

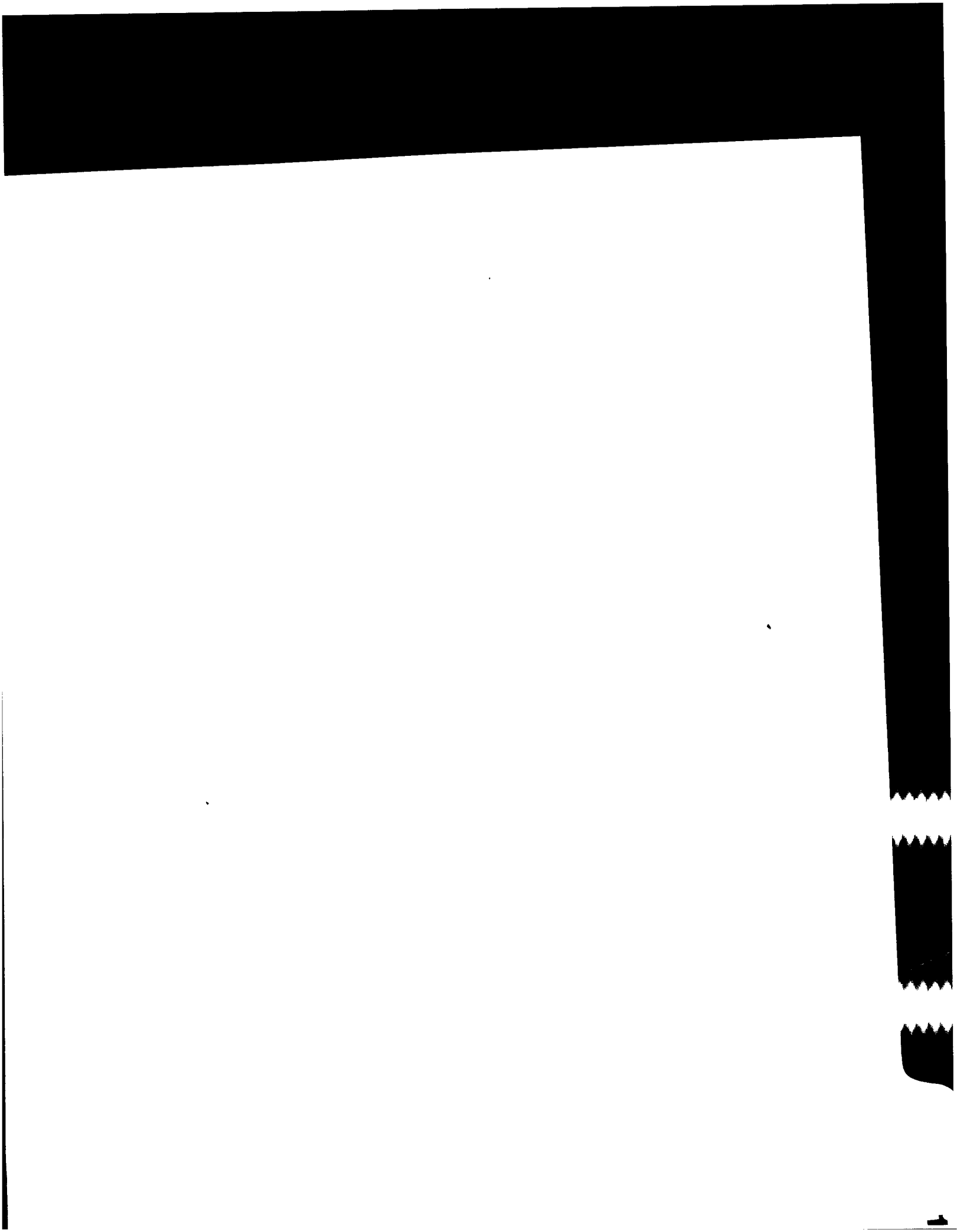
Courts Currently in the Process of Implementing CM/ECF

District Courts

Alabama Northern
Arkansas Eastern
Arkansas Western
Arizona
California Eastern
California Southern
Colorado
Delaware
Georgia Middle
Georgia Southern
Guam
Hawaii
Idaho
Illinois Northern
Iowa Southern
Louisiana Eastern
Louisiana Middle
Mississippi Northern
Mississippi Southern
North Carolina Middle
North Carolina Western
Oklahoma Northern
Pennsylvania Western
Rhode Western
Texas Western
Tennessee Middle
Texas Southern
Texas Western
Utah
Vermont
Virginia Eastern
Washington Eastern
West Virginia Northern

Bankruptcy Courts

California Central
California Eastern
Florida Southern
Georgia Middle
Georgia Southern
Idaho
Indiana Southern
Michigan Eastern
Minnesota
Mississippi Southern
New Mexico
Puerto Rico
Tennessee Eastern
Tennessee Middle
Virginia Western



MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: RULE 9006(b)(3) Enlargement of Time to Object to Discharge

DATE: AUGUST 18, 2004

Bankruptcy Rule 9006(b) governs the enlargement of time limits set out elsewhere in the rules. Paragraph (3) of the subdivision allows enlargement of the time limits for certain acts "only to the extent and under the conditions stated in those rules." Among those rules is Rule 4004(a). Rule 4004(a) sets the deadline for filing a complaint objecting to a debtor's discharge. Rule 4004(b) then provides that the deadline set in subdivision (a) can only be extended for cause shown. Thus, the rule governing the extension of the deadline for filing an objection to discharge is Rule 4004(b), not Rule 4004(a). Therefore, the Advisory Committee may wish to consider a simple amendment to Rule 9006(b)(3) to change the cross reference from 4004(a) to 4004(b). Another possibility is add a cross reference to Rule 4004(b) so that enlargement of both of these time limits is available only under that rule.

There is no parallel problem with the cross reference to Rule 4007(c) that governs extensions of time for the filing of a complaint to determine the dischargeability of a debt because that subdivision of the rule includes both the deadline for filing the complaint as well as the grounds for extension of the deadline. Rule 4004 splits those two concepts between subdivisions (a) and (b). An alternative fix for the rule would be to combine current subdivisions (a) and (b) of Rule 4004 into a single subdivision (a) similar to the format of Rule 4007(a). Otherwise, Rule 9006(b)(3) could be amended in the following way.

RULE 9006. Time

* * * * * *

(b) ENLARGEMENT

* * * * * *

(3) ENLARGEMENT LIMITED

The court may enlarge the time for taking action under Rules 1006(b)(2), 1017(e), 3002(c), 4003(b), 4004 (a), 4004 (b), 4007(c), 8002, and 9033, only to the extent and under the conditions stated in those rules.

* * * * * *

COMMITTEE NOTE

The rule is amended to add a cross reference to Rule 4004(b) among those rules for which the enlargement of time to take action is not permitted by Rule 9006, but is only permitted to the extent allowed under Rule 4004(b). Enlargement of the time to file a complaint to determine dischargeability as well as an extension of that time are governed by Rule 4004 and not by the enlargement of time provisions of Rule 9006.

Thomas
Small/NCEB/04/USCOURTS
07/01/2004 12:04 PM

To Judge Joan Feeney/MAB/01/USCOURTS
cc Morris@udayton.edu
Subject Re: Servicemembers Relief Act

Joan,

I am sorry I didn't get a chance to talk to you at the Chief Judges' Workshop, but I had to get back to Raleigh.

The Service Members Act is not on the Rules Committee's radar, perhaps it should be. If we were to take something up at our next meeting the earliest it would be published would be August of 2005. Final approval from the Standing Committee would be June 2006, Judicial Conference approval September 2006, Supreme Court transmits to Congress May 1, 2007, and rule becomes effective Dec. 1, 2007. Based on that schedule I think a local rule would be in order. I would be interested in what you come up with. In the meantime I will ask our reporter to see if this is something that we should put on the agenda in September.

Thanks for calling this to my attention. See you in Seattle. Best wishes. Tom
Judge Joan Feeney/MAB/01/USCOURTS

Judge Joan
Feeney/MAB/01/USCOURTS
07/01/2004 11:34 AM

To Thomas Small/NCEB/04/USCOURTS@USCOURTS
cc Judge Henry Boroff/MAB/01/USCOURTS@USCOURTS
Subject Servicemembers Relief Act

Dear Tom,

It was nice to see you in Washington. Thank you for your Rules Committee report. I had one question I didn't get a chance to ask you. In Massachusetts, we are considering adopting local rules concerning the Service Members Relief Act, and the question presented is should we do that now or wait to see what the Rules Committee does. Is the Rules Committee considering any Federal Rules of Bankruptcy Procedure implementing the Service Members Relief Act in the bankruptcy courts? If so, how long will the process take? Do you think we should go forward with our local rules pending action by the Rules Committee ? Henry and I would greatly appreciate any advice you could give us on this issue.

Also, congratulations on your appointment to the JCUS.

Thanks. Joan.

Judge Joan Feeney
1101 Thomas P. O'Neill Jr. Federal Building
10 Causeway Street
Boston, MA 02222-1074
Tel.: (617) 565-6049
Fax: (617) 565-8761

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

February 17, 2004

MEMORANDUM TO: CHIEF JUDGES, UNITED STATES DISTRICT COURTS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATE JUDGES

SUBJECT: The Servicemembers Civil Relief Act of 2003 **(IMPORTANT INFORMATION)**

On December 19, 2003, the President signed into law H.R. 100, the Servicemembers Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (the act), which revises the Soldiers' and Sailors' Civil Relief Act of 1940. The purpose of the act is to provide for the temporary suspension of judicial and administrative proceedings and transactions that may adversely affect servicemembers during their military service, thereby enabling them to devote their energy to the defense needs of the United States.

The act protects servicemembers, defined as members of the uniformed services on active duty or under a call to active service in the National Guard, and commissioned officers of the Public Health Service or the National Oceanic and Atmospheric Administration in active service. The act's provisions are also extended to a servicemember's dependants (spouse, children, and others). It applies to any civil judicial or administrative proceeding commenced in any court or administrative agency of the United States or of any state or subdivision, including any commonwealth, territory, or possession of the United States and the District of Columbia. Therefore, the act applies to matters before the United States district courts. The act is effective as of December 19, 2003, and applies to any civil case that is not final before that date.

The attachment to this memorandum provides a general synopsis of the protections afforded to servicemembers by the act. Individual titles and sections of the act contain specific requirements for granting relief to a servicemember, exceptions to granting such relief, and penalties pursuant to title 18, United States Code, (including fines and or imprisonment) for violation of the act. Therefore, you are strongly encouraged to read the full text of the act, available from the Library of Congress at http://thomas.loc.gov.

If you have questions about the Servicemembers Civil Relief Act of 2003 or need assistance locating a copy of the law, please contact the Article III Judges Division at (202) 502-1860 or the Magistrate Judges Division at (202) 502-1830.

Leonidas Ralph Mecham

Attachment

ATTACHMENT

Review of the Servicemember's Civil Relief Act of 2003

A stay of proceedings, reopening of judgment, and other relief granted by the Servicemember's Civil Relief Act of 2003, Pub. L. No. 108-189, 117 Stat. 2835 (2003) (the act), can be initiated at the court's discretion or upon application to the court by the servicemember or the servicemember's legal representative. The general standard for granting such extraordinary relief is that the servicemember's military service materially affects the servicemember's ability to defend a civil action or comply with the underlying obligation. Additionally, many of the provisions of this act continue to apply following the servicemember's release from military service.

If the act permits or requires an application to be made to a court, and the underlying matter is not before any court, such application may be made to any court which would otherwise have jurisdiction over the matter.

The act provides, in part, as follows:

- **Default Judgments.** Before entry of a default judgment, the plaintiff must file with the court an affidavit indicating whether the defendant is or is not in military service or that the plaintiff is unable to determine the defendant's military status. If the court cannot determine the defendant's military status based upon the affidavit(s), it may require the plaintiff to post a bond before entry of a default judgment. If it is later discovered that the defendant is in military service, the bond would be available to indemnify the defendant servicemember against any loss or damage suffered due to entry of a default judgment, should that default judgment be set aside.

  If it appears that the defendant is in military service, the court may not enter a judgment until after it appoints an attorney to represent the defendant. Further, the court may upon its own motion and shall upon application by counsel for the defendant grant a stay of proceedings for a minimum period of 90 days if there may be a defense to the action requiring the defendant's presence or if counsel is unable to contact the defendant or determine if a meritorious defense exists.

  A servicemember or representative may apply to the court to reopen the default judgment. The act authorizes a court to vacate or set aside a default judgment it entered against a servicemember during that servicemember's period of military service plus 60 days to allow the servicemember to defend the action if it appears

that the military service interfered with the ability to defend the civil action and the servicemember has a meritorious or legal defense to the action. The act specifically provides, however, that the rights, title, and interest acquired by a bona fide purchaser for value are not impaired by vacating the default judgment. An application to reopen a default judgment must be made during or up to 90 days after the servicemember's military service.

- **Stay of Proceedings When Servicemember Has Notice**. The act provides that at any stage before final judgment is entered in a civil action in which a servicemember is a party, the court may on its own motion or shall upon application of the servicemember (including supporting documentation) stay the action for a period of not less than 90 days. An application for a stay of proceedings does not constitute the servicemember's appearance or waiver of any substantive or procedural defenses. A servicemember may apply to the court for an extension of the initial stay. A court that refuses to grant an additional stay must appoint counsel to represent the servicemember in the action.

  When a civil action is stayed pursuant to the act, penalties for the servicemember's non-compliance with the underlying contract obligation shall not accrue during the period of the stay. Further, the court may reduce or waive any penalty incurred by the servicemember during the period of military service for failure to perform under the terms of a contract, if the military service materially affected the servicemember's ability to perform the obligation.

- **Stay of Execution or Vacation of Judgment, Attachment, or Garnishment.** A court may on its own motion or shall upon application stay the execution of any judgment or order entered against the servicemember and vacate or stay an attachment, garnishment of property or money, or debts in the possession of the servicemember or a third party, if it determines that the servicemember's ability to comply with a court judgment or order is materially affected by military service. This court power extends to actions or proceedings commenced before, during, or up to 90 days after the defendant's military service. The stay of execution may be ordered for the period of military service plus 90 days, or for any part thereof. The court may order the servicemember to make installment payments to the plaintiff during the stay period. With court approval, a plaintiff may proceed against non-military co-defendants.

- **Statute of Limitations.** The act tolls the statute of limitations for bringing any civil action or proceeding in a court by or against the servicemember or the servicemember's heirs, executors, administrators, or assigns during the

servicemember's period of military service (excluding any statute of limitations under the Internal Revenue Code).

- **Interest Cap.** Interest on an obligation or liability, entered into by the servicemember or the servicemember and spouse jointly prior to the servicemember's entry into military service, can not bear interest in excess of six percent per year during the period of military service. Contract rate interest in excess of six percent is forgiven. The amount of any periodic payment due under the terms of the contract shall be reduced by the amount of the forgiven interest for that payment period.

  The servicemember must provide written notice and documentation to the creditor to access the limited interest rate provided by this act. A court, however, may grant a creditor relief from the interest cap if it finds the servicemember's ability to pay the contract rate of interest on the obligation is not materially affected by military service.

- **Evictions and Distress.** The act provides that, absent court order, a landlord may not evict a servicemember or dependants from a primary residence for which normal monthly rent does not exceed $2,400 (subject to an annual price inflation adjustment) or subject the premises to a distress action. Upon application by the landlord for an order permitting eviction or distress of the premises, the court may on its own motion or shall on application of the servicemember stay an eviction or proceeding for distress, or may adjust the obligation under the lease to preserve the interests of all parties. The court is empowered to grant equitable relief to a landlord if a stay of eviction is granted. An allotment from the servicemember's pay can be made to satisfy the terms of the court's order.

- **Protection Under Installment Contracts for Purchase or Lease.** The act provides that a contract for the purchase of real or personal property (including a motor vehicle) or the lease or bailment of such property, for which the servicemember made a deposit or installment payment before entering military service, may not be rescinded or terminated for a breach of terms occurring before or during military service without court order. Likewise, the property may not be repossessed absent a court order. Courts are granted the authority to order repayment to the servicemember of installment payments or deposits as a condition of termination of the contact, to stay the proceedings for an equitable period of time, or to make other equitable disposition to preserve the interests of all parties.

- **Mortgages and Trust Deeds.** In the case of a secured debt on real or personal property owned by the servicemember, which originated before the period of military service, the court may or shall upon application, after hearing, stay a proceeding to enforce the mortgage obligation brought during or within 90 days after the military service. Alternatively, the court may adjust the obligation to preserve the interests of all parties. Absent a court order or written agreement between the lender and the servicemember, a sale or foreclosure of the property for breach of a mortgage or trust obligation is not valid if made during or within 90 days after military service. As a condition of permitting foreclosure, repossession, or termination of the contract, the court may order the servicemember's equity in the property (as valued by court appointed appraisers) to be paid to the servicemember or dependents.

- **Termination of Residential or Motor Vehicle Leases.** A servicemember may terminate a residential or automotive lease entered into before the start of military service. Further, a servicemember, who executes a residential or automotive lease and subsequently receives military orders for a permanent change of duty station or to deploy for a period of not less than 90 days, may terminate such lease. A servicemember terminates a lease by delivery of written notice with documentation to the lessor, and by return of the motor vehicle not later than 15 days after delivery of the written notice. The act provides for payment of arrearage and other obligations incurred by termination of the lease and for refund of rents or lease payments made in advance.

- **Assignment of Insurance Policies.** If, prior to entry into military service, a servicemember assigned a life insurance policy to secure payment of an obligation, the assignee may not, absent court order, exercise any right or option obtained under the assignment during the period of military service plus one year. Exceptions to the prohibition include: by written consent of the servicemember; when the premiums are due and unpaid; or upon the death of the insured. A court may refuse to grant the assignee leave to exercise its rights under the assignment if the court determines that the servicemember's ability to comply with the terms of the underlying obligation is materially affected by military service.

- **Enforcement of Storage Liens.** A party that holds a lien on the property or effects of a servicemember may not, absent court order, foreclose or otherwise enforce any liens on such property during the servicemember's military service plus 90 days. The court may on its own motion or shall on application stay the foreclosure or adjust the obligation equitably.

- **Protection of Life Insurance.** The act provides protection to the servicemember for life insurance policies up to $250,000 in coverage and in force not less than 180 days before the date of the insured's entry into military service and at the time of application under the act. The insured, the insured's legal representative, or the insured's beneficiary may apply in writing for protection of the life insurance contract from lapse, termination, or forfeit for the nonpayment of a premium from the date of receipt of the application through the period of the insured's military service plus two years. After receipt of the application, the Secretary of Veterans Affairs determines whether the particular insurance contract is entitled to such protection. The Secretary will notify the insured and insurer of the determination. The insured and the insurer are deemed to have constructively agreed to any policy modification.

  Unpaid premiums due under a protected life insurance policy are to be treated as a policy loan on the policy. If the policy matures during the protection period, unpaid premiums plus interest will be deducted from the insurance proceeds.

  Unpaid premiums due on a policy protected by the act are guaranteed by the United States. The amount paid by the United States shall be treated as a debt owed to the United States by the servicemember. The United States may collect the debt from the servicemember or offset the debt against funds owed to the servicemember.

- **Taxes and Assessments**. The act addresses taxes or assessments (other than income tax) due and unpaid before or during the servicemember's period of military service. This includes taxes on personal property (*e.g.*, an automobile tax) and real property taxes. Absent a court order, the servicemember's personal or real property may not be sold to enforce collection of such tax. Further, the court may stay a proceeding to enforce the collection of a tax or assessment during the period of military service plus 180 days. Interest may accrue on the unpaid tax at a rate of six percent per year. If a servicemember's property is sold or forfeited to enforce the collection of a tax or assessment, the servicemember has the right to redeem the property or commence an action to redeem during the period of military service plus 180 days.

  The act also addresses a servicemember's income taxes. It provides that upon the servicemember's notice to the taxing authority, the collection of income tax on the income of a servicemember falling due before or during military service is deferred for a period of not more than 180 days after the servicemember's release from military service if the servicemember's ability to pay the income tax is

materially affected by military service. No interest or penalties accrue during this deferral period. However, the statute of limitations against the collection of an income tax obligation deferred pursuant to this act is tolled for the period of the servicemember's military service plus 270 days.

The act also addresses the issue of a servicemember's residence and domicile with respect to the person, personal property, and income of the servicemember due to the servicemember's presence or absence in any jurisdiction of the United States in compliance with military orders.

- **Anticipatory Relief.** The act provides that a servicemember may, during military service or within 180 days following release from the military, apply to a court for relief from any obligation or liability incurred by the servicemember before the servicemember's military service or from a tax or assessment falling due before or during the servicemember's military service. Subject to the act's requirements and court determination, servicemembers are able to apply for relief before a default occurs.

- **Business or Trade Obligations.** The act provides that if a servicemember's business has an obligation or liability for which the servicemember is personally liable, the servicemember's assets not held in connection with the business may not be available for satisfaction of the business' obligation or liability during the servicemember's military service.

- **Protection of Persons Secondarily Liable on Servicemember's Obligations.** The act permits a court to extend the protections granted to servicemembers to any persons secondarily liable on the servicemember's obligations. Whenever pursuant to the act a court stays, postpones, or suspends: (1) the enforcement of an obligation or liability; (2) the prosecution of a suit or proceeding; (3) the entry or enforcement of an order, writ, judgment, or decree; or (4) the performance of any other act, the court may also grant such relief to a surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on the obligation. Additionally, when a court vacates or sets aside the judgment or decree entered against the servicemember, the court may set aside or vacate a judgment or decree as to another person who is liable on the obligation.

  A surety, guarantor, endorser, accommodation maker, comaker, or other person primarily or secondarily liable on a servicemember's obligation may execute a waiver of these protections in a separate writing (with exceptions).

- **Bail Bond Not to be Enforced During Period of Military Service.** A court may not enforce a bail bond during the period of military service of the principal on the bond when the military service prevents the surety from obtaining the attendance of the principal. The court may discharge the surety and exonerate the bail, in accordance with principles of equity and justice, during or after the period of military service of the principal.

- **Waiver of Rights by a Servicemember**. A servicemember may waive the rights and protections provided by the act. A waiver permitting:

  1) modification, termination, or cancellation of a contract, lease, bailment, obligation secured by a mortgage, or other security interest; or

  2) permitting the repossession or foreclosure of property securing a debt

  must be made in a separate writing, executed during or after the servicemember's period of military service.

- **Other Topics Addressed.**

  - Effect of Exercise of Rights under the Act (e.g. prohibition on future denial or revocation of credit based upon exercise of rights under the act)
  - U.S. Citizens Serving with Allied Forces
  - Co-Defendants Not in Military Service
  - Extension of Protections to Reservists and Inductees
  - Rights in Public Lands // Desert Land Entries // Mining Claims // Mineral Permits

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF TEXAS
501 WEST TENTH STREET, ROOM 128
FORT WORTH, TX 76102-3643

03-BK-005

CHAMBERS OF
DENNIS MICHAEL LYNN
U.S. BANKRUPTCY JUDGE

Telephone: (817) 333-6020
Facsimile: (817) 333-6002

January 6, 2004

Honorable A. Thomas Small, Chair
Advisory Committee on Bankruptcy Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Small:

I respectfully submit the following suggestions regarding the proposed amendments to the Federal Rules of Bankruptcy Procedure:

1. In the first sentence of Rule 3005, the reference should be to "Rule 3002(c)" to conform to the amendment to Rule 3004.

2. I would also suggest moving the later phrase "file a proof of the claim" to follow the word "may" in order to conform to Rule 3004.

3. I suggest further amending Rule 9006 to limit after-the-fact extensions of time for filing proofs of claim under Rules 3004 and 3005 based on excusable neglect. Extension under Rule 3004 or 3005 should only be permissible to the extent allowed under Rule 3002(c) or Rule 3003(c).

I hope these suggestions are of use.

Sincerely,

Dennis Michael Lynn

DML:bj

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: AMENDMENT TO PROCEDURAL FORM 271

DATE: August 20, 2004

Section 350 of the Bankruptcy Code requires the court to close a case after the estate is fully administered and the court has discharged the trustee. Director's Procedural Form 271, formerly Official Form 33, was developed for that purpose.

The procedural form includes a provision cancelling the trustee's bond. At the time the form was developed, many trustees had a separate bond for each case. The bond was cancelled when the court closed the case. Most trustees now use "blanket" bonds which cover all of their cases. The provision cancelling the trustee's bond is no longer needed or appropriate in most cases since the "blanket" bond continues in effect for the trustee's other cases. If the trustee has a separate bond for the case being closed, the form may be adapted for the circumstances of the particular case.

In addition, the December 1, 2003, privacy-related amendments to the rules and forms have necessitated revisions of the caption.

Copies of the current form and the proposed revision are attached.

B 271 DRAFT
(9/04)

United States Bankruptcy Court

_____ District Of _____

In re

Case No. _____

Debtor(s)
Last four digits of Social Security No(s).:
Employer's Tax Identification (EID) No(s). [if any]:

Chapter _____

FINAL DECREE

The estate of the above named debtor has been fully administered.

☐ The deposit required by the plan has been distributed.

IT IS ORDERED THAT:

☐ _____
(name of trustee)
is discharged as trustee of the estate of the above-named debtor;

☐ the chapter _____ case of the above named debtor is closed; and

☐ [other provisions as needed]

_____
Date

_____
Bankruptcy Judge

*Set forth all names, including trade names, used by the debtor within the last 6 years. (Fed R. Bankr. P. 1005). For joint debtors, set forth the last four digits of both social security numbers.

B 271
(8/96)

United States Bankruptcy Court

_____ District Of _____

In re

Case No. _____

Debtor
Social Security No.:
Employer Tax I.D. No.:

Chapter _____

FINAL DECREE

The estate of the above named debtor has been fully administered.

☐ The deposit required by the plan has been distributed.

IT IS ORDERED THAT:

☐ _____
(name of trustee)
is discharged as trustee of the estate of the above-named debtor ~~and the bond is cancelled.~~

☐ the chapter _____ case of the above named debtor is closed; and

☐ [other provisions as needed]

_____
Date

_____
Bankruptcy Judge

*Set forth all names, including trade names, used by the debtor within the last 6 years (Fed. R Bankr P 1005). For joint debtors set forth both social security numbers

There are no amendments pending in the "bull pen."

[redacted]

Effective Dates of Proposed Bankruptcy Rules Amendments

December 1, 2004

1011
2002(j)
9014

Official Forms 16D and 17

December 1, 2005

1007
3004
3005
4008
7004
9006

Official Form 6 - Schedule G

December 1, 2006

1009
2002(g) *
4002
5005
7004
9001 *
9036 *

Official Form 6 - Schedule I

* These proposed amendments may be considered on a "fast track" basis. If so, they could be effective on December 1, 2005.

BANKRUPTCY RULES SUGGESTIONS DOCKET
(By Rule Number)

ADVISORY COMMITTEE ON BANKRUPTCY RULES

The docket sets forth suggested changes to the Federal Rules of Bankruptcy Procedure considered by the Advisory Committee since 1997. The suggestions are set forth in order by: (1) bankruptcy rule number, (2) form number, and where there is no rule or form number (or several rules or forms are affected), (3) alphabetically by subject matter.

Suggestion	Docket No., Source & Date	Status
	BANKRUPTCY RULES	
Rule 1019(5)(A) Deal with "nonexistence" of debtor-in-possession.	04-BK-C R. Bradford Leggett, Esq. 5/21/04	5/04 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 2002(g) Allow entity to designate address for purpose of receiving notices.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/4/02 00-BK-A Raymond P. Bell, Esq., Fleet Credit Card Services, L.P. 1/18/00	2/02 - Referred to chair and reporter 3/02 - Committee considered 4/03 - Committee considered 9/03 - Committee considered and approved in principle 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 2016 Require debtor's attorney to disclose details of professional relationship with debtor	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and deferred action **PENDING FURTHER ACTION**

Rule 3002(c) Provide exception for Chapters 7 and 13 corporate cases where debtor not an individual.	01-BK-F Judge Paul Mannes 6/23/00	6/00 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3005 Conforming amendment to Rule 3004.	03-BK–005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 3017.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 4002 Clarify debtor's obligation to provide substantiating documents	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 4003(b) Allow retroactive extension of deadline, and provide that secured creditors may object to exemption claim.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter **PENDING FURTHER ACTION**

Rule 4008 Provide a deadline for filing reaffirmation agreement.	01-BK-E Francis F. Szczebak, Esq., for the BK Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered and deferred decision. Referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approved 6/04 - Standing Committee approved **PENDING FURTHER ACTION**
Rule 5005(a)(2) Authorize courts to require electronic filing, with appropriate exceptions	04-BK-D Judge John W. Lungstrum 8/2/04	8/04 - Referred to reporter and chair **PENDING FURTHER ACTION**
Rule 5005(c) Add Clerk of the Bankruptcy Appellate Panel to entities already listed.	03-BK-B Judge Robert J. Kressel 7/2/03	7/03 - Referred to chair and reporter 9/03 - Committee considered and approved for publication 1/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Rule 6007(a) Require the trustee to give notice of specific property he intends to abandon.	99-BK-I Physa Griffith South, Esq. 10/13/99	12/99 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**

Rule 7001 Dispense with requirement of filing adversarial complaint in certain circumstances	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and referred to Consumer Subcommittee 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee considered and referred to Attorney Conduct Subcommittee **PENDING FURTHER ACTION**
Rule 7023.1 Eliminate rule extension number.	00-BK-013 01-BK-C Patricia Meravi 1/22/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 7026 Eliminate mandatory disclosure of information in adversary proceedings.	00-BK-008 01-BK-A Jay L. Welford, Esq.and Judith G. Miller, Esq., for the Commercial Law League of America 1/26/01 00-BK-009 01-BK-B Judy B. Calton, Esq. 1/12/01	2/01 - Referred to chair and reporter **PENDING FURTHER ACTION**
Rule 9006 Limit after-the-fact extensions of time under Rules 3004 and 3005.	03-BK–005 Judge Dennis Lynn 1/6/04	1/04 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**
Rule 9011 Make grammatical correction.	97-BK-D John J. Dilenschneider, Esq. 5/30/97	6/97 - Referred to chair, reporter, and committee **PENDING FURTHER ACTION**

Rule 9036 State that notice by electronic means is complete upon transmission.	02-BK-A Bankruptcy Clerk Joseph P. Hurley, for the BK Noticing Working Group 2/1/02	2/02 - Referred to reporter, chair and committee 9/03 - Committee considered and approved in principle 1/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
BANKRUPTCY FORMS		
Official Form 1 Amend Exhibit C to the Voluntary Petition.	02-BK-D Gregory B. Jones, Esq. 2/7/02	2/02 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Schedule I Amend to make applicable in Chapter 7 and 11 proceedings	03-BK-D Lawrence A. Friedman 8/1/03	8/03 - Sent to chair and reporter 9/03 - Committee considered and approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment **PENDING FURTHER ACTION**
Official Form 9 Direct that information regarding bankruptcy fraud and abuse be sent to the United States trustee.	97-BK-B US Trustee Marcy J.K. Tiffany 3/6/97	3/97 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B9C Provide less confusing notice of commencement of bankruptcy form to debtors and creditors.	00-BK-E Ali Elahinejad 2/23/00	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Official Form B10 Amend Proof of Claim form.	04-BK-A Glen K. Palman 2/19/04	3/04 - Referred to reporter, chair, and Subcommittee on Forms **PENDING FURTHER ACTION**
SUBJECT MATTER		

Fraud Amend the rules to protect creditors from fraudulent bankruptcy claims and the mishandling of cases by trustees.	02-BK-B Dr. & Mrs. Glen Dupree 2/4/02	2/02 - Referred to chair and reporter **PENDING FURTHER ACTION**
New Rule Incorporate proposed Civil Rule 5.1 in the bankruptcy rules.	03-BK-F Judge Geraldine Mund 10/14/03	10/03 - Referred to reporter and chair 3/04 - Committee considered and approved 4/04 - Civil Rules Committee tabled proposed CV Rule 5.1 **PENDING FURTHER ACTION**
Small Claims Procedure Establish a "small claims" procedure.	00-BK-D Judge Paul Mannes 3/13/00 (see also 98-BK-A)	5/00 - Referred to reporter, chair, and committee **PENDING FURTHER ACTION**
Social Security Number Allow credit reporting agencies to have access to debtor's full social security number.	03-BK-E Experian (Janet Slane, Director, Product Infrastructure) 10/07/03	10/03 - Referred to reporter and chair **PENDING FURTHER ACTION**

The next meeting of the Committee will take place

March 10 - 11, 2005
at
Sarasota Hyatt, Sarasota, FL

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The Committee will discuss dates and locations for
the Fall 2005 meeting.
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Calendar for September 2005 - November 2005 (United States)

September 2005

Su	Mo	Tu	We	Th	Fr	Sa
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

October 2005

Su	Mo	Tu	We	Th	Fr	Sa
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

November 2005

Su	Mo	Tu	We	Th	Fr	Sa
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30			

Holidays and Observances

Sep 5 Labor Day
Oct 10 Columbus Day
Oct 31 Halloween
Nov 11 Veterans Day
Nov 24 Thanksgiving Day

Calendar generated on http://www.timeanddate.com/calendar/