ADVISORY COMMITTEE ON BANKRUPTCY RULES

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

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 F. 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,

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