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The Bankruptcy Rulemaking Process

by

Alan N. Resnick*

The Federal Rules of Bankruptcy Procedure ("Rules") govern most procedural aspects of bankruptcy cases and proceedings. The Rules impact on virtually every stage of a bankruptcy case, from filing the petition to closing the case. Many Rules deal with nonadversarial administrative matters, while others shape the form of litigation and specify detailed procedural requirements for the resolution of disputes. Although the Bankruptcy Code contains the substantive body of bankruptcy law and understandably receives the greatest attention and scrutiny in the legal literature,¹ a lack of familiarity with procedural requirements under the Rules could lead to the inadvertent deprivation of important substantive rights.

Despite the importance of the Bankruptcy Rules in day-to-day practice, the process by which they are promulgated is not commonly known. Law school courses on bankruptcy rarely, if ever, cover the Rules and, in the rare event that they are discussed, the source and development of this body of law is almost always overlooked. Other typical law school courses relating to litigation and procedural aspects of the law, including the core first-year Civil Procedure course in most American law schools, focus on concepts and provisions of particular federal rules, but rarely analyze or critique the rulemaking process itself beyond acknowledging that federal procedural rules are promulgated by the Supreme Court.

This Article examines the rulemaking process by which new Bankruptcy Rules are made and existing Rules are amended. Recent developments and trends in the rulemaking process, as well as certain restrictions, conflicts, and tensions that the rulemakers face, will be explored. The goal is to increase public awareness of the dynamics of the rulemaking process and to stimulate greater participation in the process by judges, practicing lawyers, and

*Benjamin Weintraub Professor of Bankruptcy Law, Hofstra University School of Law. Copyright Alan N. Resnick 1996. All rights reserved. The author is the Reporter to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States. The views and opinions expressed in this Article are the author's own and do not represent official positions of any committee, governmental agency, or other organization.

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¹See, e.g., Symposium, *Letters to the Commission*, 69 AM. BANKR. L.J. 431 (1995).

academics.²

I. THE RULES ENABLING ACT

The statutory delegation of federal rulemaking authority to the Supreme Court is found in the Rules Enabling Act.³ Although Congress first enacted the Rules Enabling Act in 1934 to delegate to the Supreme Court the power to promulgate procedural rules governing civil cases in federal district courts,⁴ it was not until 1964 that Congress expressly gave the Supreme Court rulemaking authority with respect to bankruptcy cases. Specifically, § 2075 of Title 28 was added to the Rules Enabling Act to give the Court "the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11."⁵

The first Bankruptcy Rules promulgated under the Rules Enabling Act became effective in 1973 and governed procedures in cases under the former Bankruptcy Act.⁶ Consistent with the repeal of the former Act and the enactment of the Bankruptcy Code as part of the Bankruptcy Reform Act of 1978,⁷ the then-existing Rules were replaced with the current body of Rules that became effective in 1983.

Congressional delegation of rulemaking authority to the Supreme Court does not mean that the nine Justices, assisted by their clerks and Court staff, actually formulate and draft rules. Rather, an elaborate system involving several procedural steps and committees results in the presentation to the Justices of recommendations for specific new rules or modifications of existing rules. This process, beginning with the mere suggestion for a change in the Rules and ending with the effectiveness of the Supreme Court's order promulgating the change, is a slow, multi-level, deliberative process that lasts, in the absence of the emergency acceleration of the process, at least thirty months to three years.

The rulemaking process relating to the Bankruptcy Rules must be viewed in the context of the larger federal rulemaking scheme. There are five principal bodies of federal rules promulgated under the authority granted to the

²See Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1676-78 (1995), for a discussion of the need for greater participation by judges and practicing lawyers in the federal rulemaking process.

³28 U.S.C. §§ 2071-77 (1994).

⁴For discussions on the history of the Rules Enabling Act, see Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323 (1991); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982); Alexander Holtzoff, *Origin and Sources of the Federal Rules of Civil Procedure*, 30 N.Y.U. L. REV. 1057 (1955); McCabe, *supra* note 2.

⁵28 U.S.C. § 2075 (1994). The Rules Enabling Act, including § 2075, has been amended in several respects since its enactment.

⁶National Bankruptcy Act of 1898, 30 Stat. 544 (1898).

⁷Pub. L. No. 95-598, 92 Stat. 2549 (1978).

Supreme Court by Congress: the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Bankruptcy Procedure, and the Federal Rules of Evidence. Title 28 of the United States Code sets forth the general structure of the rulemaking process, as well as certain requirements relating to that process. In addition to the statutory provisions governing the rulemaking process, the Judicial Conference of the United States has adopted "Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure."⁸

II. THE RULEMAKERS

In addition to the Supreme Court, these committees and other bodies in the federal judiciary play significant roles in the rulemaking process.

A. THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Judicial Conference of the United States consists of the Chief Justice, the chief judges of the thirteen federal courts of appeals, the Chief Judge of the Court of International Trade, and twelve district judges.⁹ The Judicial Conference meets twice each year, in March and September, to consider various policy and administrative matters relating to the federal judiciary. In 1958, Congress gave the Judicial Conference major responsibility in the rulemaking process.¹⁰ Today, Title 28 of the United States Code requires the Judicial Conference to "carry on a continuous study of the operation and effect of the general rules of practice and procedure," and to recommend to the Supreme Court "from time to time" changes to the procedural rules for the purpose of promoting "simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay."¹¹ In essence, any proposal for an amendment to the Bankruptcy Rules must first be approved by the Judicial Conference before it will be considered by the Supreme Court.

B. THE STANDING COMMITTEE

The Judicial Conference has established the Committee on Rules of Practice, Procedure, and Evidence, commonly called the "Standing Committee," to supervise and coordinate the rulemaking process.¹² The Standing Committee

⁸54 Fed. Reg. 13,752 (April 5, 1989), reprinted in Proposed Rules, 163 F.R.D. 91, 159-63 (1995).

⁹The court of appeals judges of each circuit, except the Federal Circuit, select one district judge from that circuit to serve on the Judicial Conference.

¹⁰See Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1994)). See also McCabe, *supra* note 2, at 1659.

¹¹28 U.S.C. § 331 (1994).

¹²See *id.* § 2073(b).

coordinates the work of several advisory committees, suggests areas or specific proposals to be studied by the advisory committees, considers proposed amendments recommended by the advisory committees and, if approved, presents those proposals to the Judicial Conference.

Each member of the Standing Committee is appointed by the Chief Justice and usually serves for not more than two three-year terms. The Standing Committee is currently chaired by a district judge, and also includes as members three court of appeals judges, three district judges, a state chief justice, four practicing lawyers, one law professor, and the Deputy Attorney General (*ex officio*). The Standing Committee is also served by a reporter, who is a law professor with expertise in federal procedural matters, and by a secretary who coordinates the operational aspects of the rulemaking process.¹³ The Standing Committee does not include any bankruptcy judges or practitioners who specialize in bankruptcy.

C. THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

The Enabling Act also provides for the establishment of advisory committees to assist in the rulemaking process. The Advisory Committee on Bankruptcy Rules is one of the five advisory committees charged with the duty to "carry on 'a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use' in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary."¹⁴

The membership of the Advisory Committee represents a cross-section of the judiciary, academia, and the bar. The current chair of the Advisory Committee is a bankruptcy judge, and the other members include one court of appeals judge, two district judges, one judge who sits on the Court of International Trade, three bankruptcy judges, one law professor whose teaching and scholarly writing has focused on bankruptcy, and five practicing lawyers who specialize in bankruptcy.¹⁵ Each member is appointed by the Chief Justice and serves for not more than two three-year terms.¹⁶ In addition, the Director of the Commercial Litigation Branch of the Civil Division of the

¹³The current secretary also serves as the Assistant Director for Judges Programs of the Administrative Office of the United States Courts.

¹⁴Part I, Section 1, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 54 Fed. Reg. 13,752 (April 5, 1989).

¹⁵One practicing lawyer is currently a visiting law school professor. Of the five practitioners, one is a legal services lawyer specializing in consumer bankruptcy law and the other four are primarily engaged in business bankruptcies.

¹⁶The current chair, The Honorable Paul Mannes, Chief Bankruptcy Judge for the District of Maryland, was a member of the Advisory Committee for six years before commencing a three-year term as chair.

Department of Justice serves as an *ex officio* member representing the interests of the various agencies of the United States government. One bankruptcy clerk and the Director of the Executive Office for United States Trustees also participate in the work of the Advisory Committee, although they do not vote. One member of the Standing Committee, a district judge, regularly attends Advisory Committee meetings as a liaison for the Standing Committee. In recent years, the Standing Committee chair and reporter have also attended Advisory Committee meetings.

The Advisory Committee meets at least twice each year, usually in March or April, and again in September. Each meeting usually lasts two days. The Advisory Committee has various *ad hoc* subcommittees to deal with specific areas. For example, some of the most active subcommittees in recent years have been the Subcommittee on Style, the Subcommittee on Technology, the Subcommittee on Local Rules, and the Subcommittee on Official Forms. Subcommittees often meet by telephone conference between scheduled meetings of the full Advisory Committee.

Each advisory committee, including the Advisory Committee on Bankruptcy Rules, has a reporter appointed by the Chief Justice of the Supreme Court. The reporter is a law professor who, among other tasks, coordinates the committee's agenda, prepares and circulates to committee members memoranda analyzing suggestions for rule amendments, drafts proposed amendments and committee notes for the committee's consideration, and summarizes and circulates to the committee members comments received from the bench and bar in response to published proposals. The reporter does not vote on committee resolutions or recommendations. The reporter of each advisory committee also assists in the preparation and presentation of semi-annual reports to the Standing Committee, and, together with the Advisory Committee chair, attends Standing Committee meetings for the purpose of presenting the reports.

D. THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Any discussion of the rulemaking process would be incomplete without a general description of its elaborate administrative support system, the depth and efficiency of which has been greatly improved during the past decade.

The Administrative Office of the United States Courts, often referred to as the "A.O.," is the governmental agency charged with the administration of the federal judiciary, except for the Supreme Court.¹⁷ The Assistant Direc-

¹⁷See 28 U.S.C. §§ 601-12 (1994). See generally Richard S. Arnold, *L. Ralph Mecham: A Tribute*, 44 AM. U. L. REV. 1479 (1995). Commenting on the Administrative Office under the leadership of its current director, Leonidas Ralph Mecham, Chief Justice William H. Rehnquist has written that the A.O. "is committed, above all, to providing high quality services to judges and court administrators so that judicial business proceeds smoothly and with the degree of excellence the public has come to expect. These

tor for Judges Programs of the A.O., an attorney who currently serves as the secretary to the Standing Committee, coordinates the operational aspects of the rules process, attends all Standing Committee meetings and most advisory committee meetings, maintains and makes available to the public the records of the committees, and receives, acknowledges, and circulates to the appropriate advisory committee all correspondence received from the public. He also supervises the Chief of the Rules Committee Support Office of the A.O., which provides day-to-day administrative support, such as making arrangements for meetings, preparing final manuscripts of proposed amendments for publication and transmittal to the Supreme Court, and printing and circulating agenda materials and other documents to the committees. The Chief of the Rules Committee Support Office and one assistant, both of whom are lawyers, usually attend advisory committee meetings to provide administrative support.

A staff attorney in the Bankruptcy Judges Division of the A.O. also provides valuable assistance to the Advisory Committee on Bankruptcy Rules. In addition to attending all Advisory Committee meetings, she prepares drafts of minutes, assists the reporter in the preparation of meeting agenda, provides the reporter and Advisory Committee with statistical and other information regarding the operation of the courts and clerks' offices, and assists subcommittees working on special projects. For example, in connection with the Advisory Committee's recent project in devising a uniform local rule numbering system, she gathered existing local rules from the vast majority of districts, analyzed and categorized them, and prepared for consideration by the Subcommittee on Local Rules an initial draft of a numbering system that relates to the national rule numbers. Similarly, in connection with proposed improvements of the official forms, she often prepares and arranges for the printing of initial drafts of proposed new and amended forms for consideration by the Subcommittee on Forms. In sum, she serves as a valuable legal and administrative assistant to the Advisory Committee's chair and reporter, and to the chairs of the various subcommittees.

III. THE RULEMAKING PROCESS

The bankruptcy rulemaking process can be divided into several stages:

A. SUGGESTING RULE CHANGES

The sources of suggestions for rule changes are varied. The members of the Advisory Committee are frequent sources of suggestions based on their

efforts include stronger staff support to policymakers in the Judicial Conference of the United States and its committees" Honorable William H. Rehnquist, *Some Introductory Thoughts*, 44 AM. U. L. REV. 1477, 1477 (1995).

experiences as judges, lawyers, or scholars. When a member of the Advisory Committee—who is a judge sitting on a bankruptcy appellate panel in the Ninth Circuit—found that there was some ambiguity regarding the appellate panel's power to impose sanctions for a frivolous appeal, he suggested that the Rules clarify that power and, as a result, a new Rule 8020 was proposed to give the appellate panel the same sanctioning power that the Appellate Rules give the court of appeals.¹⁸

The reporter, who monitors legislative and judicial developments in the bankruptcy field, often suggests rule changes in response to those developments. For example, when the Court of Appeals for the Ninth Circuit held in *Anderson v. Mouradick* (*In re Mouradick*)¹⁹ that, based on the literal application of Bankruptcy Rule 8002, an appellant lost the right to appeal merely because the bankruptcy judge was delayed in granting a timely-filed motion to extend the time to file a notice of appeal,²⁰ the reporter brought the decision to the attention of the Advisory Committee. The Committee, considering that decision and analogous provisions of the Federal Rules of Appellate Procedure,²¹ recommended that Rule 8002(c) be amended to protect from the consequences of the court's delay an appellant who files a timely extension motion, successfully obtains a court order granting an extension, and files a notice of appeal within ten days after entry of the order granting the extension.²²

Whenever there are legislative changes—especially amendments to the Bankruptcy Code or to Title 28 of the United States Code relating to bankruptcy courts—the reporter analyzes those changes to determine whether new rules are needed to implement the statutory changes. Similarly, the reporter analyzes statutory changes to determine whether any existing rules are inconsistent with the new legislation and makes appropriate suggestions for rule amendments. For example, the Bankruptcy Reform Act of 1994 amended the Bankruptcy Code to provide for an appeal as a matter of right from interlocutory orders extending or reducing the period in which only the debtor may file a Chapter 11 plan.²³ This change necessitates an amendment to Bankruptcy Rule 8001, which governs the procedure for taking an appeal, because current Rule 8001 provides for an appeal as a matter of right only

¹⁸See *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure*, Rule 8020, published for public comment in September, 1995. See also FED. R. APP. P. 38.

¹⁹13 F.3d 326 (9th Cir. 1994).

²⁰*Id.* at 327-29.

²¹See FED. R. APP. P. 4.

²²See *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure*, Rule 8002(c), published for public comment in September, 1995.

²³See 28 U.S.C. § 158(a) (1994), as amended by § 102 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. See also 11 U.S.C. § 1121 (1994) (setting forth the period within which only the debtor may file a Chapter 11 plan).

from final orders.²⁴ Rule changes to implement or conform to Bankruptcy Code and Title 28 amendments resulting from the 1994 reform also have to be made with respect to, among other areas, small business Chapter 11 cases,²⁵ the election of Chapter 11 trustees,²⁶ and consent to have a bankruptcy judge conduct a jury trial.²⁷

Other sources of suggestions include bankruptcy judges, bankruptcy court clerks, practicing attorneys, bar associations and other professional organizations, law professors, the Executive Office for United States Trustees, and other Judicial Conference committees. Letters containing these suggestions are acknowledged by the secretary of the Standing Committee, and copies are sent to the Advisory Committee's chair and reporter. Upon the final disposition of the suggestion, whether it is rejected or results in a rule change, it is the current practice of the secretary of the Standing Committee to send a letter explaining that disposition to the person who made the suggestion.

The Standing Committee has become a more frequent source of suggestions for possible rule changes. As will be discussed below, the growing trend towards uniformity among the different bodies of federal rules has resulted in greater input from the Standing Committee at the initial stages of the rulemaking process. For example, in 1992, the Standing Committee requested that each advisory committee consider amending its respective rules relating to local rules, including possible amendments limiting adverse consequences or sanctions that may result from the violation of a local rule relating to form or of a particular judge's standing order or "chambers rule." A related issue was whether the national rules should impose on local courts a new uniform numbering system for local rules. The Standing Committee's request was the product of an extensive project on local rules under the direction of Professor Daniel R. Coquillette of Boston College Law School, Reporter to the Standing Committee.²⁸ As a result of the independent work of the advisory committees—as well as the collective efforts to achieve uniformity by the advisory committee chairs and reporters under the leadership of the

²⁴See *Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure*, Rule 8001(a), published for public comment in September, 1995.

²⁵See 11 U.S.C. §§ 101(51C), 1121(e), 1125(f) (1994), as amended by § 217 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

²⁶See 11 U.S.C. § 1104(b), as amended by § 211 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. In Chapter 11 cases filed before October 22, 1994, the effective date of the amendment, all trustees are appointed by the United States trustee in consultation with parties in interest, rather than elected by creditors.

²⁷See 28 U.S.C. § 157(e) (1994), added by § 112 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

²⁸The Standing Committee established the Local Rules Project in 1985 to review local rules of district courts and courts of appeals. See McCabe, *supra* note 2, at 1688-89.

Standing Committee's reporter—all four bodies of procedural rules have been amended, effective as of December 1, 1995, to add a uniform version of amendments dealing with uniform local rule numbering, local rules imposing requirements of form, and procedural orders of individual judges.²⁹

B. CONSIDERATION BY THE ADVISORY COMMITTEE

The reporter presents to the Advisory Committee all suggestions that are received from any source. The reporter analyzes the suggestion, performs appropriate legal research, and prepares a memorandum to the Advisory Committee containing his recommendation regarding the suggestion. The recommendation may be rejection, adoption as presented, adoption of an amended version of the suggestion, deferral for further study or monitoring of judicial developments, referral to a subcommittee for further consideration, or some other action. Most often, the reporter will present alternative responses to the suggestion that include several different drafts of proposed amendments and accompanying advisory committee notes that implement the suggestion.

The written suggestion, as well as the reporter's memorandum explaining the suggestion and containing his recommendations, are included in the agenda materials that are circulated to the Advisory Committee approximately four weeks prior to the next meeting. Although meetings are open to the public³⁰ and notices announcing all meetings are published in the *Federal Register*,³¹ experience has shown that the committee and support staff are almost always the only people that attend.

In some cases, a suggestion for a Rule amendment is disposed of at one meeting without the need for further consideration, either by rejection or

²⁹See FED. R. APP. P. 47, FED. R. BANKR. P. 8018 and 9029, FED. R. CIV. P. 83, FED. R. CRIM. P. 57, as amended December 1, 1995. The most significant changes to these rules, with minor variations to accommodate differences in the four bodies of federal rules, are: (1) a new requirement that local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States;" (2) the addition of a provision stating that "[a] local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement;" and (3) a new provision restricting the effect of orders or chambers rules of particular judges that are not incorporated in local rules, which states that "[n]o sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, Official Forms, or the local rules of the district unless the alleged violator has been furnished in the particular case with actual notice of the requirement."

³⁰The Rules Enabling Act was amended in 1988 to require open meetings except when a committee goes into executive session for cause. See 28 U.S.C. § 2073(c), as amended by Pub. L. No. 100-702 (1988). Although § 2073(c) did not govern the Advisory Committee on Bankruptcy Rules until 1994, Advisory Committee meetings held before 1994 were open to the public nonetheless. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 104(e), 108 Stat. 4106.

³¹Part I, Section 3(a), Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 54 Fed. Reg. 13,752 (April 5, 1989), reprinted in Proposed Rules, 163 F.R.D. 91, 161 (1995).

adoption of a proposed amendment. In other cases, the suggestion is referred back to the reporter for further consideration and drafting, or to an appropriate subcommittee. If the suggestion is adopted, the Advisory Committee decides whether the proposed amendment should be presented to the Standing Committee at its next meeting, or whether it should be delayed until other proposed amendments are ready to be presented to the Standing Committee as a package.

Before submitting the approved draft to the Standing Committee with a request for publication, the draft of the proposed rule amendment and committee note is referred to the Advisory Committee's Subcommittee on Style. The draft is also forwarded to the Standing Committee's consultant on style for his comments and suggestions, which are then considered by the Advisory Committee's Subcommittee on Style.³² The Subcommittee focuses on stylistic matters only—such as sentence structure, wording preferences, and punctuation—and deliberates with the Advisory Committee's chair and reporter to finalize the draft.

C. PUBLICATION FOR COMMENT AND PUBLIC HEARINGS

The purpose of presenting the proposed amendment to the Standing Committee is to request publication for public comment. Unless there is a need for urgency, the Standing Committee entertains such requests by the various advisory committees only at its June meeting. In that way, the Standing Committee approves publication requests from all advisory committees at the same time each year, and one annual package containing all proposed federal rule changes is published.

Requests for publication are not routinely granted. The chairs and reporters to the advisory committees prepare written reports to the Standing Committee that include drafts of all proposed amendments and accompanying advisory committee notes. Those advisory committee reports are bound in an agenda book that is circulated by the Rules Support Office to the Standing Committee and to the chairs and reporters of the advisory committees approximately four weeks prior to the Standing Committee meeting. The chairs and reporters make oral presentations to the Standing Committee explaining the proposed amendments and the reasons for them, and requesting permission to publish them for comment by the bench and bar.

Members of the Standing Committee often ask probing questions relating to the reason, effect, or form of the suggested change, and sometimes make clarifying and stylistic improvements before authorizing publication. The

³²If comments and suggestions are received by the consultant on style too late for consideration before the proposed amendments are presented to the Standing Committee with a request for publication, his comments are considered by the Advisory Committee after the publication period expires and before the proposed amendments are presented to the Standing Committee for final approval.

Standing Committee may also send a proposal back to the advisory committee, together with general or specific recommendations for further consideration. Although the Standing Committee may also reject a request for publication, more often than not, it authorizes publication of proposed amendments.

Upon approval by the Standing Committee, the secretary publishes proposed amendments to give the public an opportunity to comment on them. Unlike legislation, this process gives judges, lawyers, court clerks, law professors, bar associations, national organizations, and others an opportunity to analyze and submit written comments regarding the proposed changes. Although the Standing Committee or its chair may shorten the publication period under certain circumstances, and may eliminate publication entirely in the rare case of a technical or conforming amendment,³³ Judicial Conference procedures normally require that the public have at least six months following publication for the submission of comments on proposed federal rule amendments.³⁴

The publication of proposed rule amendments has become more widespread and effective in recent years. A booklet that includes the drafts of proposed amendments to all five bodies of federal rules, together with advisory committee notes explaining each change, is published and distributed by the secretary. The booklet also includes reprints of portions of the advisory committees' reports to the Standing Committee that summarize the proposed changes. The cover and first page of the booklet requests comments, announces the places and times of public hearings at which anyone may testify regarding the proposed amendments, announces the deadline for written comments, and lists the address to which comments may be sent.

The booklets of proposed amendments are mailed to more than 10,000 organizations and individuals on the secretary's mailing list, which includes

³³See Part 1, Section 4(d), Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedures, 54 Fed. Reg. 13,752 (April 5, 1989), *reprinted as amended in Proposed Rules*, 163 F.R.D. 91, 161 (1995), which provides that either the Standing Committee or its chair may shorten the publication period when it is determined:

that the administration of justice requires that a proposed rule change should be expedited and that appropriate public notice and comment may be achieved by a shortened comment period, without public hearings, or both. The Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary. Whenever such an exception is made, the Standing Committee shall advise the Judicial Conference of the exception and the reasons for the exception.

Id.

³⁴See Part 1, Section 4(b), Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedures, 54 Fed. Reg. 13,752 (April 5, 1989), *reprinted in* 163 F.R.D. 91, 161 (1995).

federal judges, bar associations, all law schools accredited by the American Bar Association, all state attorneys general, chief justices of every state, federal agencies, the Executive Office for United States Trustees, United States Attorneys and other Department of Justice officials, individual lawyers and law firms, and anyone else who requests a copy. Professional organizations, such as the National Bankruptcy Conference, the American Bankruptcy Institute, the Commercial Law League of America, and the National Association of Bankruptcy Trustees, receive these booklets. They are also mailed to approximately forty major legal publishers with a request that they be published. The proposed amendments are also published in the yellow pages appearing at the beginning of *West's Bankruptcy Reporter* advance sheets with a call for comments, as well as in other advance sheets and on the Internet.

In addition to the full texts of the proposed amendments, the secretary and the Rules Committee Support Office of the A.O. prepare and distribute thousands of short pamphlets that contain brief summaries of the proposed amendments and other information regarding the timing and procedure for the submission of comments.³⁵

Whenever proposed amendments to the Rules are published for comment, at least one public hearing is scheduled to give lawyers, judges, and others the opportunity to orally express their views.³⁶ The Advisory Committee's chair presides at the hearing and the members and reporter are present and often engage in a useful dialogue with each witness. Notice of the hearing is published together with the proposed amendments. In most years, one public hearing is scheduled to be held in Washington, D.C.,³⁷ but several hearings may be held when appropriate. For example, when extensive amendments were being considered in 1990 primarily to conform the Rules to the comprehensive 1986 statutory changes,³⁸ public hearings were held in three cities during the public comment period.

D. RECONSIDERATION IN LIGHT OF PUBLIC COMMENT

After the six-month public comment period expires and the public hearings have been held, the Advisory Committee meets for the purpose of considering the public comments and testimony.

The Advisory Committee, if persuaded by public comment that a pro-

³⁵See McCabe, *supra* note 2, at 1668.

³⁶See Part I, Section 4(c), Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 54 Fed. Reg. 13,752 (April 5, 1989), *reprinted in*, 163 F.R.D. 91, 161 (1995).

³⁷When amendments are proposed that are noncontroversial and few in number, public hearings are often canceled for lack of witnesses interested in testifying.

³⁸See Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.

posed amendment is not warranted or may have adverse consequences not previously recognized by the committee, may decide to abort the proposed amendment entirely. Or, the Advisory Committee may decide to go forward with the proposal, but with such substantial changes to the published draft that warrant another publication for public comment. The Advisory Committee may approve the published draft of the proposed rule amendment, but modify the advisory committee note to better explain the amendment. If a proposed amendment is approved in the same, or substantially the same, form as published, or with minor changes that do not warrant further publication for comment, the Advisory Committee will again present the proposed amendment to the Standing Committee at its next meeting with a request for final approval.

E. CONSIDERATION BY THE STANDING COMMITTEE

After final approval by the Advisory Committee, the proposed amendments are submitted to the Standing Committee with a request that they be approved and forwarded to the Judicial Conference.

The Advisory Committee's chair and reporter also prepare a written report to the Standing Committee—commonly called a GAP report—that includes the final drafts of the proposed amendments and advisory committee notes, a summary of the written comments received and oral testimony presented at the public hearings, explanations of any changes made to the published draft, and any minority views of Advisory Committee members who want to express their separate views. Since 1992, any report requesting final approval of rule amendments must also identify any proposed amendments that are the subject of substantial controversy. This report is included in the agenda materials circulated to the members of the Standing Committee approximately four weeks prior to its June meeting. The Standing Committee may reject any proposed amendment, send it back to the Advisory Committee for further consideration in view of specific or general concerns, or approve it—either as presented by the Advisory Committee or as modified by the Standing Committee. It is not uncommon for the Standing Committee to approve a proposed amendment as presented, but to request that the advisory committee note be expanded to clarify aspects of the amendment.

F. APPROVAL BY THE JUDICIAL CONFERENCE OF THE UNITED STATES

Proposed amendments that are finally approved by the Standing Committee are presented to the Judicial Conference for approval, usually at its September meeting. The reports of both the Advisory Committee and the Standing Committee regarding the proposed amendments accompany the draft of the proposed amendments and advisory committee notes that are

forwarded to the Judicial Conference. If approved by the Conference, the proposed amendments are forwarded to the Supreme Court with a recommendation that they be prescribed.

G. ADOPTION BY THE UNITED STATES SUPREME COURT

The Rules Enabling Act, by specifying certain deadlines, contemplates that federal rules will not be promulgated or amended by the Supreme Court more frequently than once each year. The Enabling Act now requires that the Supreme Court transmit to Congress a copy of any new rule or amendment "not later than May 1 of the year in which a rule prescribed under this section is to become effective."³⁹ It also provides that amendments to the Bankruptcy Rules "shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law."⁴⁰ In practice, the Supreme Court usually adopts and sends to Congress any new federal procedural rules and rule amendments only in April, and they become effective only on December 1.

Since the Judicial Conference approves rules changes at its September meeting, and the Supreme Court does not act on them until April of the following year, the Court has approximately seven months to consider the proposed amendments. If the Supreme Court approves the proposed amendments, the Chief Justice signs and transmits to Congress an order prescribing the amendments, to become effective on December 1.⁴¹

In considering proposed amendments approved by the Judicial Conference, the Justices of the Supreme Court generally do not engage in a line-by-line *de novo* review. Justice White, in a separate statement on the Supreme Court's adoption of amendments to the Federal Rules of Civil Procedure in 1993, enlightened the public on the role of the Justices in acting on proposed amendments approved by the Judicial Conference.⁴² Most of the twenty-one Justices who sat on the Court with Justice White during a thirty-one year period "concluded that . . . Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference."⁴³ Justice White suggested that "it would be a mistake

³⁹28 U.S.C. § 2075 (1994), as amended by § 104 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Prior to the 1994 amendment, amendments to the Bankruptcy Rules became effective on August 1. The amendment was designed to conform to the other sections of the Rules Enabling Act that have made amendments to the other federal rules effective on December 1.

⁴⁰*Id.*

⁴¹*Id.*

⁴²See Amendments to Federal Rules of Civil Procedure, 507 U.S. 1089, 1091 (1993).

⁴³*Id.* at 1094. Justice White stated two reasons for this conclusion:

First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some [of] us, and I remain of this view, were quite sure that the

for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have said, over the years our role has been a much more limited one."⁴⁴

The Court's limited role in analyzing proposed amendments to federal rules does not mean that it merely rubber stamps them. It is apparent that certain amendments have been carefully reviewed at the Supreme Court level in recent years, resulting in dissenting opinions by individual Justices. In 1993, Justices Scalia and Thomas dissented from amendments to Civil Rule 11 regarding sanctions, and Justices Scalia, Thomas, and Souter dissented from amendments to Civil Rule 26 regarding discovery.⁴⁵ Although the Court almost always prescribes proposed rule amendments approved by the Judicial Conference, the Court deferred certain proposed amendments to the Civil Rules in 1991 pending further consideration,⁴⁶ and it withheld part of the proposed amendments to Rule 412 of the Federal Rules of Evidence in 1994 to the extent that amendments regarding the inadmissibility of evidence of a victim's past sexual behavior would apply in civil cases.⁴⁷

H. CONGRESSIONAL REVIEW

The Supreme Court's order prescribing amendments is transmitted to the Speaker of the House on or before May 1, and is referred to the House Judiciary Committee. Except to the extent that legislation rejecting, deferring, or modifying any amendment is enacted before December 1 of that year, the proposed amendments become effective on that date.

IV. OFFICIAL BANKRUPTCY FORMS

A bankruptcy case is paper intensive. The volume of paper generated, either by clerks, courts, or the parties is sometimes staggering. In Chapter 11 cases involving large, complex companies with hundreds or thousands of cred-

Judicial Conference and its committees, "being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we."

Id. (quoting from a 1966 opinion of Justice Douglas dissenting in part from the Court's promulgation of amendments to the Federal Rules of Civil Procedure, 383 U.S. 1089, 1090 (1966) (Douglas, J., dissenting)).

⁴⁴*Id.* at 1096.

⁴⁵Amendments to Federal Rules of Civil Procedure, 507 U.S. 1089, 1096. See FED. R. CIV. P. 11 and 26, as amended in 1993.

⁴⁶See Letter of Transmittal, Amendments to Federal Rules of Civil Procedure, 500 U.S. 964 (1991).

⁴⁷Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. § 2076, H.R. Doc. No. 250, 103d Cong., 2d Sess. (reprinted at 114 S. Ct. intro. page 682-84) (1994). See McCabe, *supra* note 2, at 1684-86.

itors, shareholders, and other parties in interest, the efficient administration of the case requires the smooth handling of an enormous volume of paper.

Early in the case, the debtor is required to file the list of creditors, schedules, and a statement of financial affairs.⁴⁸ The clerk or some other person designated by the court (often the debtor in a large Chapter 11 case) must send to all creditors notice of the commencement of the case, the meeting of creditors, and the fixing of certain deadlines for acting.⁴⁹ Proofs of claim are filed by creditors or by others on behalf of creditors.⁵⁰ Depending on the type and complexity of the case, various motions,⁵¹ contested matters,⁵² objections to claims,⁵³ notices of asset sales,⁵⁴ pleadings in adversary proceedings,⁵⁵ disclosure statements,⁵⁶ plans,⁵⁷ and other documents flood the clerk's office.

In order to facilitate the processing of the paperwork of bankruptcy administration, the Judicial Conference prescribes Official Bankruptcy Forms. Bankruptcy Rule 9009 provides that the Official Forms "shall be observed and used with alterations as may be appropriate."⁵⁸ In essence, these forms are obligatory, but flexibility exists to modify the forms in appropriate circumstances. Forms may be combined, and the contents may be rearranged, to permit economies in their use. Several forms are rarely altered, such as the forms for the petition, schedules, and statement of financial affairs. Other forms are frequently altered, such as the Official Form for an order confirming a Chapter 11 plan. If a document conforms to the appropriate official form, all courts must accept it.⁵⁹

The procedures for promulgating and amending Official Forms are similar to the rulemaking process, except in the following two respects. First, the Supreme Court and Congress are not involved in the process because the Judicial Conference has the power to promulgate and amend the Official Forms. Of course, Congress may enact legislation that amends an Official

⁴⁸11 U.S.C. § 521 (1994); FED. R. BANKR. P. 1007.

⁴⁹See FED. R. BANKR. P. 2002(a), (f).

⁵⁰See 11 U.S.C. §§ 501, 502 (1994); FED. R. BANKR. P. 3002-05.

⁵¹See FED. R. BANKR. P. 9013.

⁵²See FED. R. BANKR. P. 9014.

⁵³See FED. R. BANKR. P. 3007.

⁵⁴See 11 U.S.C. § 363(b) (1994); FED. R. BANKR. P. 2002(a), (c)(1), 6004.

⁵⁵See FED. R. BANKR. P. 7001-87.

⁵⁶See 11 U.S.C. § 1125 (1994); FED. R. BANKR. P. 3016, 3017.

⁵⁷See 11 U.S.C. §§ 941, 1121, 1221, 1321 (1994); FED. R. BANKR. P. 3015, 3016.

⁵⁸FED. R. BANKR. P. 9009. Rule 9009 of the Bankruptcy Rules also recognizes the existence of so-called "Director's forms." See *id.* These forms are issued by the Director of the Administrative Office of the United States Courts, rather than by the Judicial Conference, and are used by clerks, judges, and practitioners for guidance and convenience.

⁵⁹A 1991 amendment to Bankruptcy Rule 9029 makes it clear that a local rule may not prohibit or limit the use of any Official Form.

Form, and has done so.⁶⁰ Second, there is no formal requirement that proposed amendments to Official Forms be published for comment by the bench and bar. Nonetheless, it has been the practice of the Advisory Committee to request, and the Standing Committee to approve, publication of proposed amendments for public comment.

Suggestions for amendments to the Official Forms are received in the same manner and from the same sources as suggestions for Rule amendments. Suggestions are referred to the Advisory Committee's Subcommittee on Forms for its consideration. The subcommittee, from time-to-time, recommends to the Advisory Committee a package of amendments. Both the subcommittee and the full Advisory Committee rely heavily on the assistance of the Bankruptcy Judges Division of the Administrative Office for initial drafting and formatting of proposed changes.

V. RESTRICTIONS ON BANKRUPTCY RULEMAKING

The delegation of rulemaking authority under the Rules Enabling Act, and the process for making or amending rules pursuant to that authority, are not without limitations. In addition to a restriction that is applicable only to the Federal Rules of Bankruptcy Procedure, there are general limitations applicable to all federal procedural rulemaking.

A. SUBSTANTIVE RIGHTS MAY NOT BE AFFECTED

The Rules Enabling Act provides that the Bankruptcy Rules, as well as the other federal procedural rules, "shall not abridge, enlarge, or modify any substantive right."⁶¹ Since most procedural rules can have some impact on a party's substantive rights—such as a time limit for filing a proof of claim⁶² or for filing a complaint objecting to discharge⁶³—the dividing line between substantive rights and nonsubstantive rights is a difficult one to draw. This is an issue that the Advisory Committee must deal with when evaluating suggestions for proposed amendments.

⁶⁰For example, § 322 of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 357, amended the Official Form for the voluntary petition by adding two numbered paragraphs and an exhibit (Exhibit B). Specific language was added to the form to require an individual debtor, whose debts are primarily consumer debts, to state, in essence, that he or she is aware of the availability of relief under Chapter 7 or 13, but has chosen to seek relief under Chapter 7. This language was changed by Congress in 1986, pursuant to § 283(aa) of the Bankruptcy Judges, U.S. Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088, to include references to Chapters 11 and 12. Exhibit B is the declaration of the debtor's attorney that he or she explained to the debtor the availability of relief under Chapters 7, 11, 12, and 13.

⁶¹28 U.S.C. § 2075 (1994). The same provision is included in 28 U.S.C. § 2072, which governs the other bodies of federal rules. *Id.* § 2072.

⁶²See FED. R. BANKR. P. 3002, 3003.

⁶³See FED. R. BANKR. P. 4004.

B. BANKRUPTCY RULES MAY NOT SUPERSEDE STATUTES

Section 2072 of Title 28 governs rulemaking relating to the Federal Rules of Civil Procedure, Criminal Procedure, and Appellate Procedure, and the Federal Rules of Evidence. Although these rules may not modify substantive rights, § 2072(b) provides that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”⁶⁴ This provision, commonly called the “supersession clause,” gives the Supreme Court flexibility in devising and amending procedural rules that will supersede any current statute that may be in conflict with them—so long as substantive rights are not affected. The advisory committees for these bodies of rules are not constrained by existing procedural statutory provisions in recommending changes to improve efficiency in case administration and judicial procedure. Of course, this flexibility is not free from congressional control; under the Rules Enabling Act process, Congress has at least seven months to take action to block a rule amendment before its effective date.

The promulgation and amendment of the Federal Rules of Bankruptcy Procedure are governed by § 2075, rather than § 2072. In contrast to § 2072, § 2075 does not contain a supersession clause. Therefore, the Bankruptcy Rules are the only federal rules that may not conflict with a procedural statutory provision.

The Bankruptcy Code and the bankruptcy-related sections of Title 28 of the United States Code contain many provisions that are procedural in nature. Some of these procedural provisions are general, leaving it to the Bankruptcy Rules to fill in the gaps and provide the details. To illustrate, § 501(c) of the Code provides that “[i]f a creditor does not timely file a proof of such creditor’s claim, the debtor or the trustee may file a proof of such claim.”⁶⁵ Yet, the Code does not indicate what “timely” means. This was deliberately left to the Rules, and Rules 3002 and 3003 fill in the details by providing time deadlines.

Sometimes the Code is very specific on procedural matters. Section 362(e) contains time limits and procedural requirements, including provisions on preliminary hearings and final hearings, governing motions for relief from the automatic stay.⁶⁶

⁶⁴28 U.S.C. § 2072(b) (1994).

⁶⁵11 U.S.C. § 501(c) (1994).

⁶⁶11 U.S.C. § 362(e) provides:

(e) Thirty days after a request . . . for relief from the stay of any act against property of the estate . . . , such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under

Probably the most important—or at least the most frequently used—procedural aspect of the Bankruptcy Code is the use of the phrase “after notice and a hearing.” This phrase, used fifty-eight times in the Code, means “after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.”⁶⁷ But this language also authorizes an act without an actual hearing if “such notice is given properly and if such a hearing is not requested timely by a party in interest”⁶⁸ or “there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act.”⁶⁹

In essence, the phrase “after notice and a hearing” means that a hearing is not required unless requested. In contrast, several Code sections require an actual hearing whether or not one is requested. For example, § 1128 requires that “[a]fter notice, the court shall hold a hearing on confirmation of a [Chapter 11] plan.”⁷⁰ Similar Code provisions requiring confirmation hearings are found in Chapter 12 and Chapter 13.⁷¹

In analyzing any suggestion for amendments to the Rules, these procedural aspects of the Code must be considered. For example, a suggestion that has been made is to amend the rules to eliminate the need for plan confirmation hearings in cases under Chapter 11, 12, or 13 where there are no timely-filed written objections. It has been suggested that this change would improve judicial efficiency and reduce legal expenses. But, regardless of the Advisory Committee’s views on the merits of this suggestion, it should be addressed to Congress in the form of a recommendation to amend §§ 1128, 1224, or 1324 of the Code. On the other hand, if the Rules Enabling Act applicable to the Bankruptcy Rules had a supersession clause, the Rules probably could eliminate the necessity of a confirmation hearing where there are no objections and, therefore, it would be appropriate for the Advisory Committee to consider the merits of the suggested change.

Another suggestion that has been made is to amend the Rules to permit the court, in all Chapter 11 cases, to conditionally approve a disclosure state-

subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

Id.

⁶⁷11 U.S.C. § 102(1)(A) (1994).

⁶⁸*Id.* § 102(1)(B)(i).

⁶⁹*Id.* § 102(1)(B)(ii).

⁷⁰*Id.* § 1128.

⁷¹*See id.* §§ 1224, 1324.

ment before distribution to creditors, and to combine the hearing on final approval of the disclosure statement and the hearing on confirmation of the Chapter 11 plan. This procedure has been available under the Bankruptcy Code since the Bankruptcy Reform Act of 1994, but only for a "small business"⁷² that has elected to be treated as a small business.⁷³ Could the Rules now be amended to permit this streamlined procedure in large Chapter 11 cases, when it is the clear Congressional intention to limit it to a "small business?" Without commenting on the wisdom of such an amendment, it appears that any amendment to the Rules to provide for conditional approval of disclosure statements in *all* Chapter 11 cases would be improper—in the absence of a supersession clause—because of an inconsistency with the Code.

Courts have not been shy in holding that Bankruptcy Rules that are inconsistent with the Bankruptcy Code are invalid. In 1992, when a bankruptcy court was faced with the question of whether a claim in a Chapter 13 case could be disallowed solely because it was tardily-filed, the court held that Bankruptcy Rule 3002 was invalid to the extent that it prohibits tardily filed claims from being allowed.⁷⁴ Specifically, the court found that Rule 3002 was inconsistent with the Code because § 502(b) of the Code did not list tardy filing as a ground for disallowance.⁷⁵ As a result, the Rule was effectively disregarded by the court. This problem was cured by the Bankruptcy Reform Act of 1994 which, with certain stated exceptions, added tardiness in filing a proof of claim as a ground for objecting to the allowance of the claim.⁷⁶

From time-to-time, recommendations to amend rules have been based on an apparent or arguable inconsistency between a present Rule and the letter or spirit of the Code. Most recently, the proposed abrogation of Rule 3016(a) was approved by the Supreme Court and, in the absence of congressional action, will become effective on December 1, 1996. Rule 3016(a) provides:

⁷²Section § 101(51C) defines "small business" to mean:

a person engaged in commercial or business activities (but does not include a person whose primary activity is the business of owning or operating real property and activities incidental thereto) whose aggregate noncontingent liquidated secured and unsecured debts as of the date of the petition do not exceed \$2,000,000.

11 U.S.C. § 101(51C) (1994).

⁷³See 11 U.S.C. §§ 101(51C), 1121(e), 1125(f), as amended by § 217 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. The 1994 amendments apply only in cases commenced on or after October 22, 1994.

⁷⁴See, e.g., *In re Hausladen*, 146 B.R. 557 (Bankr. D. Minn. 1992)(en banc). *Contra*, e.g., *In re Zimmerman*, 156 B.R. 192 (Bankr. W.D. Mich. 1993)(en banc).

⁷⁵*In re Hausladen*, 146 B.R. at 559-60.

⁷⁶See 11 U.S.C. § 502(b)(9) (1994), added by § 213 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

(a) TIME FOR FILING PLAN. A party in interest, other than the debtor, who is authorized to file a plan under § 1121(c) of the Code, may not file a plan after entry of an order approving a disclosure statement unless confirmation of the plan relating to the disclosure statement has been denied or the court otherwise directs.⁷⁷

The purpose of Rule 3016(a) is to control the filing of competing Chapter 11 plans after a disclosure statement has been approved. That is, if a disclosure statement has been approved so that the vote solicitation process has begun with respect to a plan, competing plans may not be filed by parties other than the debtor until the court denies confirmation of the plan that relates to the disclosure statement. This prohibition, which could be lifted by the court at any time, permits the voting process to be completed before competing plans are to be considered.

The reason for abrogating this provision is *not* because it would improve procedures in Chapter 11 cases. In fact, the reason has nothing to do with the merits or wisdom of Rule 3016(a). Rather, the only reason for the abrogation is that in certain situations it *could* have the effect of extending the debtor's exclusive period for filing a Chapter 11 plan without first satisfying the statutory requirements for an extension of that period set forth in § 1121 of the Code. Section 1121 provides that the court may extend the exclusivity period only if a party in interest so requests and the court, after notice and a hearing, finds cause for the extension.⁷⁸ Rule 3016(a) could have the effect of automatically extending the period without a showing of cause, subject to the court's power to expressly permit a competing plan to be filed. Rather than requiring the debtor to go to court to ask for an extension of exclusivity for cause as contemplated by Code § 1121(d), Rule 3016(a) could have the effect of extending exclusivity automatically and placing the burden of seeking judicial relief on the party in interest who wants to file a competing plan during the vote solicitation period on a different plan.

In addition to the Code and Title 28, there are other statutes that may impact on the Rules. In fact, on rare occasions, Congress has enacted legislation that expressly amends a Bankruptcy Rule.⁷⁹ Most recently, as part of the Bankruptcy Reform Act of 1994, Congress amended Bankruptcy Rule 7004 by adding a new subdivision (h) that requires, with certain exceptions, service of process by certified mail, rather than ordinary first class mail, when

⁷⁷FED. R. BANKR. P. 3016(a).

⁷⁸11 U.S.C. § 1121(d) (1994).

⁷⁹For a more general discussion of legislation that amends federal procedural rules without adherence to the Rules Enabling Act process, see McCabe, *supra* note 2, at 1682-87.

serving a bank or another insured depository institution.⁸⁰

In view of the absence of a supersession clause in the Bankruptcy Rules Enabling Act, together with the extensive procedural provisions contained in the Code and Title 28, the first determination that must be made in evaluating any suggestion to change bankruptcy procedure—and which is usually the first issue researched by the reporter to the Advisory Committee—is whether the recommended change would require a statutory amendment.

C. RULEMAKING TAKES A LONG TIME

A virtue that characterizes the rulemaking process under the Rules Enabling Act is thoroughness. The process begins when the source of a suggestion for change communicates it to someone involved in rulemaking, usually the secretary of the Standing Committee, the Bankruptcy Judges Division of the Administrative Office, or the Advisory Committee's chair or reporter. The suggestion is analyzed by the reporter, alternative forms of an amendment to implement the suggestion are drafted, the Advisory Committee considers the change, and, if approved, the Advisory Committee presents a preliminary draft to the Standing Committee with a request for publication. The six-month publication period is followed by an Advisory Committee meeting at which public comments are considered, and a final draft is then presented to the Standing Committee for approval and presentation to the Judicial Conference. The Supreme Court promulgates the amendment before May 1 of the year following Judicial Conference approval, but it cannot become effective until December 1 of that year so that Congress has an opportunity to act.

In sum, the Advisory Committee considers the amendment at a minimum of two meetings (at least one before publication and one after publication); the Standing Committee considers it at a minimum of two meetings (one at which it approves publication and one the following year to consider final approval); and the Style Subcommittee of the Advisory Committee reviews it, as does a style consultant and the Style Subcommittee of the Standing Committee, before it goes to the Judicial Conference.

But there is a price paid for such thoroughness. That price is time. From the time when a suggestion for change is first received by the Advisory Committee, to the time that a rule change becomes effective, is in most situations at least three years. It is not surprising, therefore, that a frequent criticism of the rulemaking process is that it takes too long to promulgate or amend a rule.

This time delay—which exists for all bodies of federal rules—is probably

⁸⁰Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 114, 108 Stat. 4106. See FED. R. BANKR. P. 7004(h).

most significant in connection with the Bankruptcy Rules. As discussed above, the Bankruptcy Rules must be consistent with bankruptcy statutes. In fact, many amendments to the Rules are designed to either conform to, or to implement, statutory changes to the Code or to Title 28. Given this close relationship between bankruptcy statutes and the Rules, most bankruptcy legislation requires at least several Rule amendments.

For example, since the promulgation of the present Rules in 1983, the most comprehensive amendments to the Rules were made in 1987 and in 1991. Most of the 1987 amendments implemented the Bankruptcy Amendments and Federal Judgeship Act of 1984,⁸¹ and most of the 1991 amendments implemented the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986.⁸² Proposed amendments designed to implement the Bankruptcy Reform Act of 1994 were published for public comment in 1995 and, if promulgated, will become effective on December 1, 1997.

The long period required for amending rules designed to implement statutory changes in a field in which statutory changes are relatively frequent results in at least some rules being incomplete, invalid, or misleading—at least in part—at almost any time. For example, at the time of this writing, Rule 8001 limits the right to file a notice of appeal to situations in which the bankruptcy court has entered a *final* order, judgment, or decree, and requires a motion for leave to appeal from any interlocutory order. Yet, the Bankruptcy Reform Act of 1994 amended Title 28 to permit appeals as a matter of right from interlocutory orders increasing or reducing the debtor's exclusive period in which to file a Chapter 11 plan.⁸³ This rule could mislead practitioners and, in any event, is invalid to the extent that it requires an appellant to file a motion for leave to appeal from an interlocutory order extending exclusivity—and will remain so until at least December 1, 1997.

Delays in promulgating Rule amendments designed to implement statutory changes has another cost—the proliferation of nonuniform local rules, standing orders, or other local practices. For example, the Bankruptcy Reform Act of 1994 provides for bankruptcy judges to preside at jury trials under certain circumstances, with the express consent of the parties.⁸⁴ The Reform Act also, for the first time, gives creditors the right to elect a trustee

⁸¹Pub. L. No. 98-353, 98 Stat. 333 (1984).

⁸²Pub. L. 99-554, 100 Stat. 3088 (1986).

⁸³28 U.S.C. § 158(a), as amended by § 102 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

⁸⁴28 U.S.C. § 157(e), added by § 112 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

in a Chapter 11 case.⁸⁵ A "small business" is now permitted to "elect to be considered a small business" which has certain ramifications.⁸⁶ Procedural rules for the implementation of these Code changes are needed and, in many districts, the courts will not want to await the three-year national rulemaking process for uniform rules on these subjects. The result could be nonuniform local rules or standing orders.

In an effort to provide some assistance and uniformity pending the promulgation of national rules on these subjects, the Advisory Committee on Bankruptcy Rules drafted and approved "Suggested Interim Rules" for adoption by courts as local rules.⁸⁷ These interim rules, which have no binding effect and are merely suggestions made to local courts, were also approved by the Standing Committee.

The length of the rulemaking process may give the impression that rule changes are infrequent—not more than once every three years. But that is not the case. In fact, there are at least some rule changes in most years. Focusing on recent years, there were rule amendments that became effective in 1991, 1993, 1995, and there are further amendments expected to become effective in 1996 and 1997—which means that rule changes will become effective in each of five years within a seven year period.

Rather than reduce the frequency of amendments to the Rules, the result of the long rulemaking process is that separate packages of proposed amendments are at different stages of the process at the same time.⁸⁸ For example, in the Fall of 1995, there were three packages of proposed amendments in the pipeline: (1) amendments to two Bankruptcy Rules⁸⁹ were approved by the Supreme Court in April of 1995, transmitted to Congress for its review, and scheduled to become effective on December 1, 1995; (2) proposed amendments to twelve Bankruptcy Rules⁹⁰ were approved by the Judicial Conference in September of 1995, and were transmitted to the Supreme Court for its approval with a possible effective date of December 1, 1996; and (3) a

⁸⁵11 U.S.C. § 1104 (1994), as amended by § 211 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

⁸⁶11 U.S.C. § 101(51C), 1121(e), 1125(f), as amended by § 217 of the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

⁸⁷The use of suggested interim rules is not new. It was also used after the enactment of the Bankruptcy Reform Act of 1978, pending the 1983 revisions to the national Rules. Similarly, after the enactment of the 1986 legislation that added to the Code Chapter 12 for family farmers, suggested interim rules were drafted by the Advisory Committee and forwarded to courts for adoption as local rules to govern Chapter 12 cases pending the 1991 revisions to the national Rules.

⁸⁸The practice of having separate packages of amendments in different stages of the rulemaking process at the same time has not gone without criticism. See, e.g., Charles Alan Wright, *Forward: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1 (1994).

⁸⁹FED. R. BANKR. P. 8018, 9029.

⁹⁰FED. R. BANKR. P. 1006, 1007, 1019, 2002, 2015, 3002, 3016, 4004, 5005, 7004, 8008, 9006.

preliminary draft of proposed amendments to eleven Bankruptcy Rules⁹¹ and four new Rules⁹² were published for public comment in September of 1995, which cannot become effective before December 1, 1997.

VI. RECENT TRENDS IN THE RULEMAKING PROCESS

A. GREATER UNIFORMITY AMONG FEDERAL RULES

The Bankruptcy Rules are a specialized body of procedural rules tailor-made to implement the Code and other bankruptcy-related statutes. The rationale justifying the existence of these rules is that there is a need for such specialization. That is, bankruptcy procedures are, and should be, different than procedures in nonbankruptcy cases.

The need for specialized rules limited to bankruptcy cases does not, however, mean that *all* aspects of bankruptcy practice are unique and deserve special treatment. Those aspects of a bankruptcy case that are similar to other forms of civil dispute resolution may, but need not, differ from procedures that govern nonbankruptcy litigation. For example, where a trustee sues a person to recover property that was fraudulently conveyed by the debtor within one year before the commencement of the bankruptcy case, the substantive law governing the cause of action may be the Bankruptcy Code.⁹³ But should the Federal Rules of Civil Procedure govern the lawsuit, or should specialized procedural rules applicable only in bankruptcy proceedings govern? The Bankruptcy Rules answer this question by treating this matter as an "adversary proceeding" governed by Part VII of the Rules,⁹⁴ which incorporates by reference many of the Federal Rules of Civil Procedure. Most aspects of the lawsuit—such as forms of pleadings, counterclaims, discovery, joinder, third-party practice, class actions, and summary judgment—would be governed by the specific Civil Rules expressly made applicable by the Bankruptcy Rules.⁹⁵

In considering rule amendments, the Advisory Committee and the Standing Committee have been sensitive to the need for specialized rules tailor-made for bankruptcy cases, while attempting to achieve uniformity among the different bodies of federal rules where possible. In balancing these inter-

⁹¹FED. R. BANKR. P. 1019, 2002, 2007.1, 3014, 3017, 3018, 3021, 8001, 8002, 9011, 9035.

⁹²Proposed new FED. R. BANKR. P. 1020 (small business elections), 3017.1 (conditional approval of disclosure statements in small business cases), 8020 (damages and costs for frivolous appeals), and 9015 (jury trials).

⁹³See 11 U.S.C. § 548 (1994).

⁹⁴See FED. R. BANKR. P. 7001.

⁹⁵See FED. R. BANKR. P. 7001-87. Because many of the Bankruptcy Rules incorporate by reference particular Civil Rules, one member of the Advisory Committee on Bankruptcy Rules regularly attends meetings of the Advisory Committee on Civil Rules to monitor proposed amendments that could affect proceedings in bankruptcy cases.

ests, the Advisory Committee has, from time-to-time, recommended rule changes solely for the purpose of achieving uniformity when there is not a sufficient bankruptcy-related reason to justify a specialized rule that departs from other federal rules on the same topic.

The rules on signing of papers and sanctions provides a good illustration. Bankruptcy Rule 9011 and Civil Rule 11 both deal with these subjects. At the suggestion of the chair of the Standing Committee, Bankruptcy Rule 9011 was amended in 1991 to conform to the language of Civil Rule 11 so that there would be uniformity in language and substance, except for minor differences necessary to reflect certain papers that are filed only in bankruptcy cases. In 1993, however, Civil Rule 11 was substantially modified to include certain controversial provisions. One of those controversial provisions provides a "safe harbor" that essentially protects, from sanctions, a person who files a frivolous paper but then withdraws it within a twenty-one day period.⁹⁶ Once these amendments were made to Civil Rule 11, the Advisory Committee on Bankruptcy Rules was faced with the question of whether it should recommend that Bankruptcy Rule 9011 be amended to conform to revised Civil Rule 11.

In dealing with the Bankruptcy Rule 9011 question, should the Advisory Committee merely ask whether there is any bankruptcy-related reason for departing from Civil Rule 11? If there is no bankruptcy-related reason for departing, is the task merely the ministerial one of conforming the language of Rule 9011 to that of Civil Rule 11? Or should the Advisory Committee make its own *de novo* analysis of whether it agrees with the merits and wisdom of the 1993 amendments to Civil Rule 11? Hypothetically, if the Advisory Committee were to believe that the safe harbor provision was not a good one, and that it should not have been added to Civil Rule 11, would it be appropriate for the Advisory Committee to refrain from recommending any amendments to Bankruptcy Rule 9011?

In balancing the desire for uniformity with the need for appropriate bankruptcy-related departures, the Advisory Committee has recommended that Bankruptcy Rule 9011 be amended to conform to revised Civil Rule 11 in almost every respect. This recommendation was not the result of an independent *de novo* determination that each and every aspect of revised Civil Rule 11 is beneficial. If writing on a clean slate, the Advisory Committee may, or may not, have drafted a different rule. The driving force behind the proposed amendments to Rule 9011 was the desire to conform to Civil Rule 11 to achieve uniformity where there is no bankruptcy-related reason to depart.

Despite the desire for uniformity, the preliminary draft of the proposed

⁹⁶FED. R. CIV. P. 11(c)(1)(A).

amendments to Bankruptcy Rule 9011 that was published for comment in September, 1995 departs from Civil Rule 11 in one important respect. The twenty-one day safe harbor provision will not be applicable if the challenged paper is a bankruptcy petition. As indicated in the committee note to the proposed amendments, "[t]he filing of a [bankruptcy] petition has immediate serious consequences, including the imposition of the automatic stay under § 362 of the Code, which may not be avoided by the subsequent withdrawal of the petition."⁹⁷ In addition, as the committee note indicates, "a petition for relief under chapter 7 or chapter 11 may not be withdrawn unless the court orders dismissal of the case for cause after notice and a hearing."⁹⁸ Therefore, if a person files a petition in violation of Bankruptcy Rule 9011, as it is proposed to be amended, the filer will not be able to seek protection under the twenty-one day safe harbor. In essence, the Advisory Committee has recommended a significant departure from Civil Rule 11 because of an important bankruptcy-related reason, while conforming to the Civil Rule in all other material respects.

The balancing of—or tension between—the desire for uniformity and the need for bankruptcy-related departures is not new, but is likely to receive more attention in the future because the emphasis on uniformity has been increasing. Within the past few years, at the initiative of the Standing Committee, uniform amendments to all bodies of federal procedural rules have been made in the areas of local rules and procedural requirements of individual judges (standing orders),⁹⁹ and have been proposed with respect to the clerk's obligation to accept papers for filing and the filing of papers by electronic means.¹⁰⁰ But the area in which the desire for uniformity has been receiving the most attention in recent years is that of style.

B. UNIFORMITY OF STYLE

In addition to focusing on the substance of rules and any proposed amendments, it is essential for rulemakers to pay close attention to the precision and clarity of language so that rules are unambiguous and user-friendly.

The responsibility for proper grammar, phrasing, and writing style falls initially on the reporter as drafter. After the Advisory Committee on Bankruptcy Rules has approved the substance of a proposed amendment, and prior to publication for comment, its Subcommittee on Style reviews drafts for the

⁹⁷*Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy Procedure*, Rule 9011, published for public comment in September, 1995.

⁹⁸*Id.* See 11 U.S.C. §§ 707(a), 1112(b) (1994).

⁹⁹See FED. R. APP. P. 47, FED. R. BANKR. P. 8018 and 9029, FED. R. CIV. P. 83, and FED. R. CRIM. P. 57, as amended December 1, 1995.

¹⁰⁰See Proposed Amendments to FED. R. APP. P. 25, FED. R. BANKR. P. 5005, and FED. R. CIV. P. 5, which, if approved by the Supreme Court and Congress, will become effective on December 1, 1996.

sole purpose of focusing on writing style. This Style Subcommittee often meets by telephone conference and exchanges marked drafts by facsimile. In rare cases, such as when comprehensive rule amendments were published for comment in 1989, the subcommittee held special meetings so that its members and the reporter could work exclusively on stylistic improvements. In working on stylistic questions, the reporter and members of the subcommittee often consider phrasing and terminology of the Bankruptcy Code to achieve some level of uniformity between the substantive statute and the procedural rules governing bankruptcy.

The focus on style was raised to a new level when in 1991 the Standing Committee created its own Style Subcommittee.¹⁰¹ In addition to reviewing all drafts of proposed amendments received from the advisory committees, the Style Subcommittee has been in the process of re-styling at least two bodies of rules from beginning to end. In particular, the Appellate Rules have been completely rewritten in preliminary draft form in a clearer and much improved style, and a complete stylistic revision of the Civil Rules is in progress at this time. The preliminary draft of the re-styled Appellate Rules will be published for comment in the near future. Although the project is at least several years away, and will likely depend on the success of the other re-styling projects, at some point the Bankruptcy Rules may also go through a comprehensive cover-to-cover re-styling.

A consultant on style, Bryan A. Garner, works closely with the Standing Committee's Style Subcommittee and the reporters to the advisory committees to achieve greater clarity and uniformity in style. Mr. Garner reviews all proposed Bankruptcy Rule amendments and his comments are then considered by the Advisory Committee. In connection with his work, Mr. Garner has been writing a resource, titled "Guidelines for Drafting and Editing Court Rules," that—although still a work-in-progress in preliminary form—has been a valuable guide for reporters at the initial drafting and editing stages.

The increased emphasis on style has resulted in greater clarity and uniformity in language—both at the initial drafting stage and at the critical reviewing stage. This growing and welcomed awareness can only improve the quality of federal rules. But there remains a tension between two admirable goals: the desire for uniformity among the five bodies of federal rules, and the desire for uniformity between the Bankruptcy Code and the Bankruptcy Rules.

To illustrate, § 521 of the Code provides that the debtor "*shall file*" a list of creditors,¹⁰² and Rule 1007 provides that, in a voluntary case, the debtor "*shall file* with the petition a list containing the name and address of each

¹⁰¹See McCabe, *supra* note 2, at 1682.

¹⁰²11 U.S.C. § 521(a) (1994) (emphasis added).

creditor"¹⁰³ Use of the words "shall file" is consistent with the Code. In fact, the Code always uses the word "shall" when indicating a duty, as do the Rules. In the proposed re-stylized version of the Appellate Rules, the word "shall," whenever used in similar phrases, is deliberately replaced by the preferred word "must."¹⁰⁴ If the re-styled Appellate Rules are adopted, should the Bankruptcy Rules depart from the style of the Code and conform to the style of the Appellate Rules? If the word "shall" is eradicated from all other bodies of federal rules, should the Bankruptcy Rules follow?

The approach taken by the rulemakers in dealing with this conflict is the same as the approach taken with respect to other uniformity issues. That is, the style of the Bankruptcy Rules should conform to that of the other federal rules, unless there is a bankruptcy-related reason for departing. Conforming to certain phrasing and language of the Bankruptcy Code to maintain uniformity between the substantive and procedural law governing bankruptcy has been appropriately recognized as such a bankruptcy-related reason.

C. IMPROVEMENTS IN FACT FINDING: EMPIRICAL EVIDENCE

An important aspect of any effective rulemaking process is the gathering of information on which to base rulemaking decisions. This is one area of bankruptcy rulemaking that has greatly improved in recent years and is likely to continue to improve.

The members of the Advisory Committee—especially the bankruptcy judges and practicing lawyers—have always been an important source of information regarding day-to-day practice. A bankruptcy clerk and a representative of the Executive Office for United States Trustees regularly participate in the work of the Advisory Committee and have offered valuable insight into actual practices in the courts. In addition, the letters from judges and lawyers that contain suggestions for amendments are often supported by descriptions of procedural problems and deficiencies in rules that need fixing. But much of this information is anecdotal and is limited to the specific experiences of these sources.

Another traditional source of information is the legal literature and judicial opinions. The reporter continuously monitors reported court decisions, law review articles, bankruptcy-related newsletters, and advance sheets. But this source is limited to issues that are fully litigated or of interest to law review writers, and only occasionally offers significant empirical data.

The increasing use of subcommittees to gather important information and to acquire expertise in certain areas has been helpful to the rulemaking pro-

¹⁰³FED. R. BANKR. P. 1007 (emphasis added).

¹⁰⁴Preliminary Draft of Proposed Revision of Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules, April, 1996.

cess. The most notable example is the extensive work of the Subcommittee on Technology. During the early 1990s, this subcommittee held meetings at which presentations were made by experts on specific topics relating to automation—ranging from the latest advances in electronic transmission and storage of data to the futuristic “virtual courtroom” employing video conferencing. The expertise acquired by the subcommittee resulted in the adoption, in 1993, of a Rule designed to permit banks, credit card companies, taxing authorities, and other entities that ordinarily receive notices by mail in a large volume of bankruptcy cases, to arrange to receive by electronic transmission all or part of the information required to be contained in such notices.¹⁰⁵ Electronic transmission of information, without the need to send paper notices, is more convenient and less costly for both the sender (usually the clerk’s office) and the receiver.

The work of the Subcommittee on Technology also has produced proposed amendments to Rule 5005,¹⁰⁶ and similar amendments to the other bodies of federal procedural rules,¹⁰⁷ that will enable courts to adopt local rules that permit filing, signing, and verifying documents by electronic means. The desire to move toward efficient use of electronic technology without the complexity and delay that would be caused by awaiting the formulation of national standards for hardware and software requirements, or for determining requirements for transmitting signatures, will result in experimentation and innovation at the local level. Monitoring local developments in this area may result in the future adoption of national standards by the Judicial Conference. The next frontier for the Subcommittee on Technology is likely to be in the area of paperless electronic service of process.

Two sources of empirical evidence that are extremely helpful in the rulemaking process are the Bankruptcy Judges Division of the Administrative Office of the United States Courts, and the Federal Judicial Center.¹⁰⁸ The A.O. gathers statistics on bankruptcy cases and informally surveys clerks and courts to obtain information requested by the Advisory Committee relating to specific issues.

The Federal Judicial Center has recently engaged in more formal surveys and fact-finding at the request of the Advisory Committee. For example,

¹⁰⁵FED. R. BANKR. P. 9036.

¹⁰⁶The proposed amendments to Rule 5005 will become effective on December 1, 1996, unless Congress enacts legislation that provides otherwise.

¹⁰⁷Similar amendments will be made to Rule 25 of the Federal Rules of Appellate Procedure, and Rule 5 of the Federal Rules of Civil Procedure, effective December 1, 1996, unless Congress enacts legislation that provides otherwise.

¹⁰⁸The Federal Judicial Center is an agency “whose purpose it shall be to further the development and adoption of improved judicial administration in the courts of the United States.” 28 U.S.C. § 620(a) (1994). Among other functions, the Center conducts “research and study of the operations of the courts.” *Id.* § 620(b)(1).

when the Advisory Committee was considering suggestions relating to the application to contested matters of the 1993 amendments to Civil Rule 26 requiring mandatory disclosures as part of the discovery process,¹⁰⁹ the Federal Judicial Center compiled data informing the Advisory Committee as to whether each district in the United States has opted out of the new Civil Rule 26 disclosure requirements.¹¹⁰ The fact that the vast majority of districts has decided that Civil Rule 26 should not be applicable to contested matters in bankruptcy cases was useful in determining the impact of any suggested amendments to the Bankruptcy Rules on this issue.

Most recently, at the request of the Advisory Committee, the Federal Judicial Center conducted an extensive project designed to determine whether, and to what extent, the users of the Bankruptcy Rules believe that there are general problems or deficiencies in the Rules. The Research Division of the Federal Judicial Center developed a questionnaire—designed to be exploratory and open-ended, asking primarily about perceived problems with the Bankruptcy Rules and Official Forms—and sent it to more than 3,100 recipients, including 334 bankruptcy judges, 244 district judges, 88 circuit judges, 96 clerks of bankruptcy courts, 482 Chapter 7 and Chapter 13 trustees, 344 government attorneys involved in bankruptcy cases, 178 law school deans (to be forwarded to the appropriate faculty members), and 1,373 bankruptcy practitioners. Questionnaires were also sent to the heads of more than a dozen bankruptcy-related organizations, such as the American Bankruptcy Institute, the National Bankruptcy Conference, and the Commercial Law League of America.

Twenty-three percent of the recipients responded to the survey. The majority of respondents indicated that they have not experienced problems with the Rules, and do not think that revisions are necessary. However, a substantial number of those who responded (32%) suggested that there may be areas that are not now covered by the Rules, but should be (such as rules on attorney admission to the court). Twenty-eight percent of those who responded suggested that certain rules be clarified to remove ambiguities.

The Federal Judicial Center survey has helped the Advisory Committee's Long-Range Planning Subcommittee identify three areas that warrant further study. The first area is litigation practice, including the possible consolidation of different types of procedures for requesting relief (applications, motions, contested matters, and adversary proceedings). The second area, which is closely-related to the first, involves requirements for holding hearings when the Code uses the defined phrase "after notice and a hearing." The third area

¹⁰⁹See FED. R. CIV. P. 26, which is applicable in adversary proceedings under FED. R. BANKR. P. 7026 and, unless the court otherwise directs, to contested matters under FED. R. BANKR. P. 9014.

¹¹⁰FED. R. CIV. P. 26 permits courts, by local rule or order, to opt out of certain discovery provisions.

relates to attorney admission and ethics.¹¹¹

CONCLUSION

The Federal Rules of Bankruptcy Procedure are under continuous review. The present Rules were promulgated in 1983—which is only thirteen years ago—but were substantially amended in 1987 and again in 1991, primarily to conform to comprehensive amendments to the Bankruptcy Code. They also have been improved almost annually in more limited ways. Further proposed amendments are now at various stages in the rulemaking process.

The process by which federal procedural rules are made and amended has been described as “perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules.”¹¹² The process is slow and meticulous, receiving careful scrutiny and review at several stages. “The openness of the rule making process ensures that all interested persons have an opportunity to identify and comment on drafting ambiguities and potential problems.”¹¹³

Lawyers and judges should alert the rulemakers, especially the Advisory Committee on Bankruptcy Rules, to specific problems and complaints that they experience in participating in the bankruptcy system under the present Rules. Whether or not a lawyer wants to communicate a specific suggestion to remedy an existing problem, merely identifying the problem so that the Advisory Committee could focus on it and, if appropriate, develop a proposed solution, assists in the improvement of the Rules. In addition, responses from members of the bench and bar to the call for comments on published proposed amendments could be important indicators of the wisdom, or deficiencies, of proposed rule changes.

¹¹¹A subcommittee was formed in early 1995 to study and make recommendations relating to disclosure requirements for professionals and other areas governing professional responsibility.

¹¹²*Long Range Plan for the Federal Courts*, December, 1995, Committee on Long Range Planning, Judicial Conference of the United States, p. 58.

¹¹³*Id.* However, experience has shown that few judges and lawyers respond to proposed amendments during the six-month public comment period. See McCabe, *supra* note 2, at 1676-78, for a discussion of the need for greater participation by judges and practicing lawyers.