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The Future of the Bankruptcy Rules

by

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In the year 3535, if I were still alive,[1] I would find no Bankruptcy Rules.[2] The destiny of the Bankruptcy Rules is to serve as a footnote in books of future classics professors and legal historians who study extinct western civilizations, much as today they study Roman and Greek law and procedure.[3]

Taking a more modest approach, what can we expect to find in the year 2046, fifty years from now? There is a prospect for radical reform; bankruptcy cases for human beings could be removed from the judicial system as part of a social program.[4] This social program would recognize the "fresh start" for individuals as a fundamental aspect of social welfare or from an efficiency standpoint as a way to maximize human resources by incentivizing debt-burdened human beings to reintegrate into society. There is also a prospect that business bankruptcy and reorganization could be taken over by accountants or turnaround experts outside the legal system.[5] But the more

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[1]This theme is inspired by the Zager & Evans album "*In the Year 2525*."

[2]The term "Bankruptcy Rules" or "Rules" refers to the Federal Rules of Bankruptcy Procedure. FED. R. BANKR. P. (1996).

[3]Bankruptcy Rules will become extinct when bankruptcy law itself becomes extinct as technological advances lead businesspeople to the speedy, inexpensive determination of near perfect information and truth. Even if risk-taking results in losses, perfect information should indicate optimal economic solutions to the collective insolvency problems of the future without the need for judicial intervention.

[4]*See* Kenneth N. Klee, *Restructuring Individual Debts* (to be presented at the 1996 National Conference of Bankruptcy Judges; on file in draft with the author). As with any radical proposal, path dependence and incumbency factors stand as strong barriers to reform. *See generally* Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 643-62 (1996) (discussing forms of path dependence). People who depend on the current system for their livelihood will defend the system against radical change at all costs.

[5]Telephone Conversation with Daniel E. Armel, Baymark Strategies LLC (May 13, 1996). Indeed, this battle is being waged as insolvency professionals seek to advise Eastern European and Asian countries about the kind of insolvency system they should adopt. *Compare, e.g.*, accountant-based reforms proposed in Russia and Belarus, where a major accounting firm was the key advisor, *with, e.g.*, legal-based reforms in China and Slovenia, where lawyers or judges were key advisors.

likely scenario is that the United States will endure and its bankruptcy problems will continue to be administered by the federal courts.[6]

If federal courts continue to administer bankruptcy cases and proceedings, what changes can we expect in the Bankruptcy Rules? We should expect the Rules to be revised to take account of technological developments.[7] We should expect the Rules to be streamlined and more national in scope. We should expect the Rules to be modernized to deal with the changes made by the Bankruptcy Reform Act of 1978. And slowly, but surely, we should find the process of promulgating Rules to become more expeditious than it is today.[8]

I. REVAMPING THE RULES ENABLING ACT

Turning to the process for promulgating Rules, it is hard to conceive of a less efficient process. Congress has delegated the promulgation of rulemaking to the Supreme Court[9] which in turn has delegated the problem to the Judicial Conference of the United States.[10] The Judicial Conference in turn has delegated the task to its Committee on Rules of Practice and Procedure ("Standing Committee")[11] which has set up an Advisory Committee on the

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[6]*See supra* note 4, regarding path dependence and incumbency factors that should influence this outcome.

[7]This topic is developed in another article in this issue of *The Journal* and is beyond the scope of this Article. *See* Honorable James J. Barta, *The Impact of Technology on the Bankruptcy Rules*, 70 AM. BANKR. L.J. 287 (1996).

[8]The rulemaking process is cumbersome. At a minimum, the Supreme Court takes three years to formulate a rule before it transmits the rule to Congress. *See infra* text accompanying notes 9-24. For a thorough discussion of the rulemaking process, *see* Alan N. Resnick, *The Bankruptcy Rulemaking Process*, 70 AM. BANKR. L.J. 245 (1996).

[9]Section 2075 of Title 28 of the United States Code provides in pertinent part:

> The Supreme Court shall have 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.
>
> Such rules shall not abridge, enlarge, or modify any substantive right.
>
> The Supreme Court shall transmit to Congress not later than May 1 of the year in which a rule prescribed under this section is to become effective a copy of the proposed rule. The rule shall take effect no earlier than December 1 of the year in which it is transmitted to Congress unless otherwise provided by law.

28 U.S.C. § 2075 (1994).

[10]The Judicial Conference of the United States is established by § 331 of Title 28 of the United States Code. *See* 28 U.S.C. § 331 (1994). The Judicial Conference is the annual session and any special sessions of a conference composed of the Chief Justice of the United States Supreme Court, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit. *Id.* Congress has required the Judicial Conference to prescribe and publish procedures for all federal rules promulgated by the Supreme Court under § 2072 of the Judicial Code. *See* 28 U.S.C. § 2073 (1994). The Supreme Court has used its discretion to involve the Judicial Conference with procedures for Bankruptcy Rules. *Compare* 28 U.S.C. §§ 2072-74 (1994) *with* 28 U.S.C. § 2075 (1994).

[11]As of June, 1996, the Standing Committee was chaired by District Judge Alicemarie H. Stotler.

Federal Rules of Bankruptcy Procedure ("Advisory Committee"), whose members[12] are appointed for three-year terms by the Chief Justice.

In practice, the Advisory Committee considers and debates changes to the Rules. Even meritorious changes are ignored unless there is a crisis or a comprehensive overhaul in progress as it is considered impolitic for the Advisory Committee to bother the Standing Committee with a stream of technical amendments on an annual basis.[13]

The Reporter[14] and Chair of the Advisory Committee receive an audience from the Standing Committee to present proposed Rules amendments that have been approved by the Advisory Committee, published for comment by the bench and bar, and reviewed or revised by the Advisory Committee in light of public comments. If the Standing Committee concurs, it approves the proposed Rules amendments with or without modifications and recommends action by the Judicial Conference.

The Standing Committee's recommendation is placed on the agenda of the Judicial Conference, which meets twice a year. If the Judicial Conference approves the package, it is forwarded to the Supreme Court which almost always rubber stamps the proposal, though not without occasional dissent.[15] The Supreme Court must transmit a copy of the Rules to Congress not later

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Also serving on the Committee were Circuit Judges Frank H. Easterbrook and Phyllis A. Kravitch; District Judges Thomas S. Ellis, III, William R. Wilson, Jr., and James A. Parker; Delaware Supreme Court Chief Justice E. Norman Veasey; Professor Geoffrey C. Hazard, Jr., Director of the American Law Institute; practicing lawyers Alan W. Perry, Alan C. Sundberg, Sol Schreiber, and Gene W. Lafitte; and Deputy Attorney General Jamie S. Gorelick from the United States Department of Justice, serving *ex officio*. Professor Daniel R. Coquillette served as Reporter for the Standing Committee.

[12]As of June, 1996, the Advisory Committee on Bankruptcy Rules was chaired by Bankruptcy Judge Paul Mannes. Also serving on the Committee were Circuit Judge Alice M. Batchelder; District Judges Adrian G. Duplantier and Eduardo C. Robreno; Judge Jane A. Restani of the Court of International Trade; Bankruptcy Judges Donald E. Cordova, A. Jay Cristol, and Robert J. Kressel; Professor Charles J. Tabb; practicing lawyers R. Neal Batson, Kenneth N. Klee, Leonard M. Rosen, Gerald K. Smith, and Henry J. Sommer; and J. Christopher Kohn from the United States Department of Justice, serving *ex officio*. District Judge Thomas S. Ellis, III, Liaison from the Standing Committee, Professor Daniel R. Coquillette, Reporter for the Standing Committee, Professor Alan N. Resnick, Reporter for the Advisory Committee, Joseph G. Patchan from the Executive Office of United States Trustee, and Richard G. Heltzel, Chief Clerk of the United States Bankruptcy Court for the Eastern District of California and Clerk-Adviser to the Advisory Committee, along with staff from the Administrative Office and Federal Judicial Center, also regularly attended meetings of the Advisory Committee.

[13]*See, e.g.*, Advisory Committee on Bankruptcy Rules, Minutes of Meeting of March 21-22, 1996, at 15 ("Rather than burden the Standing Committee with a few proposed rules amendments, followed by additional proposed amendments in 1997, the consensus was that the [Advisory] Committee should assemble a substantial package of amendments before transmitting.").

[14]Professor Alan N. Resnick of Hofstra University School of Law serves as the current Reporter to the Advisory Committee. He was appointed by the Chief Justice without a fixed term. Professor Resnick follows Professors Kennedy, King, and Taggart as the only chief reporters to the Advisory Committee since its inception in 1964. *See* Lawrence P. King, *The History and Development of the Bankruptcy Rules*, 70 AM. BANKR. L.J. 217, 242-43 (1996).

[15]*See, e.g.*, Amendments to Federal Rules of Bankruptcy Procedure, 411 U.S. 992-94 (1973) (Douglas,

than May 1 of the year in which they are proposed to become effective.[16] The Rules then become effective not earlier than December 1st in the year proposed,[17] unless Congress enacts restrictive or amendatory legislation that is signed by the President.[18]

When they become effective, the Rules have the force and effect of law,[19] though never presented to the President for action.[20] They then become the binding law of the land[21] under the Supremacy Clause of the Constitution[22] and preempt any inconsistent local rules.[23] At best, this process takes three years.[24]

Streamlining the process will not be easy, because judges jealously protect their calendars and prerogatives and believe they are best suited to determine how cases should proceed in their courtrooms. Indeed, the notion that each courtroom is a fiefdom that is the private domain of the sitting judge has led to the proliferation of local bankruptcy rules[25] and unofficial so-called local-

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J., dissenting). Other Supreme Court Justices have dissented periodically from proposed Federal Rules of Civil Procedure. *See, e.g.*, Amendments to Federal Rules of Civil Procedure, 507 U.S. 1089, 1096 (1993).

[16]28 U.S.C. § 2075 (1994). *See supra* note 9.

[17]For many years, Rules proposed by May 1 were effective not earlier than August 1 in the year proposed. *See, e.g.*, 28 U.S.C. § 2075 (1988). The three-month review period proved to be too pressing for Congress, which enlarged the period to seven months in 1994. *See* 28 U.S.C. § 2075 (1994), as amended by the Bankruptcy Reform Act of 1994, § 104, Pub. L. No. 103-394, 108 Stat. 4106. This change conformed the period for Congress to review proposed Bankruptcy Rules with the period to review other proposed federal rules. *See* 28 U.S.C. § 2074(a) (1994).

[18]Recent amendments to Federal Rule of Civil Procedure 26 proved controversial in the Supreme Court and Congress. *See* Amendments to Federal Rules of Civil Procedure, 507 U.S. 1096 (1993) (Scalia, Thomas, and Souter, JJ., dissenting); Civil Rules Amendments Act of 1993, H.R. 2814, 103d Cong., 1st Sess. (1993), as passed by the House of Representatives on November 3, 1993, 139 CONG. REC. H8747 (daily ed. Nov. 3, 1993). The bill died in the Senate, and the amendments to Federal Rule of Civil Procedure 26 became effective on December 1, 1993.

[19]*See* 28 U.S.C. § 2075 (1994). *See also* Bonner v. Adams (*In re* Adams), 734 F.2d 1094, 1098-99 (5th Cir. 1984) (Bankruptcy Act case noting that local bankruptcy rules have the force and effect of law unless inconsistent with the Federal Rules of Bankruptcy Procedure).

[20]Although the Rules Enabling Acts were signed by the President, they authorize the Supreme Court to propose new rules that have the force and effect of law without presidential signature or additional congressional approval. *See* 28 U.S.C. §§ 2072, 2075 (1994).

[21]Procedural rules should be regarded as reflecting congressional intent because Congress acquiesces in their approval. Hanna v. Plumer, 380 U.S. 460, 471 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 14-15 (1941).

[22]*See* U.S. CONST. art. VI, cl. 1.

[23]Although Bankruptcy Rule 9029 allows district courts to adopt local bankruptcy rules, they must not be inconsistent with the national rules or prohibit or limit use of the Official Forms. FED. R. BANKR. P. 9029.

[24]*See* Resnick, *supra* note 8, at 266.

[25]Some districts have no local bankruptcy rules, others have a few, and others have complete sets. The local bankruptcy rules are compiled in COLLIER BANKRUPTCY PRACTICE GUIDE App. 1 & 2 (Matthew Bender 1996). For an example of a lengthy set of local rules, *see* Local Bankruptcy Rules for the United States Bankruptcy Court of the Central District of California.

local rules.[26] As a matter of politics, power, and constitutionality, it is doubtful that Congress will delegate the rulemaking process to bankruptcy judges, even if the day comes when they obtain the Article III status mentioned in the Constitution for those government officials who exercise the judicial Power of the United States. And Congress will certainly not want to "waste" time by writing the Bankruptcy Rules itself.

This author believes that if the rulemaking process changes at all, the Supreme Court will acquiesce in congressional appointment of a Standing Commission to suggest Rules changes directly to Congress. The composition of the Commission would be sufficiently controlled by appointments of the Chief Justice so that the judiciary's fears of loss of control would be assuaged.[27] This suggestion has the unfortunate side effect that Rules changes would have to be voted on by each house of Congress and signed by the President before they become effective, but the framers of the Constitution thought that was a reasonable system to enact our laws. Detractors of this proposal will also rightly point out how important it is for the Standing Committee to coordinate the five bodies of rules[28] and for a style committee to determine the uniform phrasing of the Rules.[29]

Perhaps the wisdom of proposals to modernize the Rules Enabling Act can best be evaluated once it is determined who will resolve bankruptcy cases and whether they will remain in the federal court system. But in order for new proposals to have any chance of adoption, there must be a catalyst for change. That catalyst might be the discontent generated by the failure of the existing Rules to address issues raised by the 1978 Bankruptcy Code and subsequent amendments and to accommodate litigation in the bankruptcy courts as we know them. But to what extent does discontentment exist today and what are the prospects for its existence in the future? It is to those subjects that we now turn.

II. CHANGES TO ACCOMMODATE THE 1978 BANKRUPTCY CODE

The delay in the rulemaking process is intolerable, and people living in the future will not countenance it. This turgid process explains why

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[26]As a matter of practice, some judges in multi-judge districts adopt their own oral or written procedures that are affectionately known as "local-local rules," which are sometimes inconsistent with local or national bankruptcy rules. Prudence precludes the citation of examples.

[27]Under the Appointments Clause of the Constitution, Congress may authorize appointments of inferior Officers of the United States to be made by Courts of Law. *See* U.S. CONST. art. II, § 2, cl. 2.

[28]Currently, in addition to the Bankruptcy Rules, the Standing Committee has jurisdiction over the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Federal Rules of Civil Procedure, and the Federal Rules of Criminal Procedure. *See* 28 U.S.C. § 2073(b) (1994).

[29]*See* Resnick, *supra* note 8, at 271-73.

although the Bankruptcy Code was enacted in 1978, the first Rules dealing with it were not promulgated until 1983.[30] Those Rules were a rehash of the Rules adopted for the Bankruptcy Act of 1898[31] in 1973 and 1976.[32]

The fit between the newly promulgated Rules and the Bankruptcy Code was not perfect, and the rulemaking process has not completely remedied this situation over time. Specifically, the Advisory Committee has failed to propose comprehensive Rules for specialized bankruptcy cases and proceedings. For example, the 1978 Bankruptcy Code enacted § 304[33] to deal with cases ancillary to foreign proceedings, but no Rules have been promulgated to deal with these cases.[34] Nor have comprehensive Chapter 9[35] Rules been adopted.[36] Nor have Rules been adopted to deal with special provisions involving stockbrokers[37] or commodity brokers.[38] These gaps and others should be filled over the next fifty years when the Advisory Committee devotes resources to address these technical areas. But there remain other aspects of the Rules that require improvement.

III. CHANGES TO STREAMLINE THE RULES

The failure of the rulemaking process to address these issues has been the cause of some discontent, but generally lawyers and judges are happy with the current system.[39] One notable exception is discontent with districts that

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[30]Bankruptcy Rules, 461 U.S. 973 (1983). For a gripping description of how the Advisory Committee worked in earnest, *see* King, *supra* note 14, at 237-40.

[31]Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979).

[32]*See, e.g.*, United States v. Waindel (*In re* Waindel), 65 F.3d 1307, 1309 (5th Cir. 1995)(characterizing Rule 3002's disallowance of late-filed claims as "a vestige of practice under the 1898 Bankruptcy Act; the original authors of the Bankruptcy Rules more or less transcribed the absolute bar date rule based on the Act into Rule 3002 accompanying the Code"); King, *supra* note 14, at 238 ("The existing Rules formed the base from which the new Rules could proceed but, obviously, with a considerable number of differences.").

[33]11 U.S.C. § 304 (1994).

[34]Congress intentionally left numerous procedural matters out of the Bankruptcy Code to be dealt with in the Rules. *See* H.R. REP. NO. 595, 95th Cong., 1st Sess. 292-308 (1977) [hereinafter "HOUSE REPORT"]. Congress made specific suggestions for Rules dealing with § 304. *See id.* at 294 (suggestions 20-22).

[35]11 U.S.C. §§ 901-46 (1994).

[36]Congress made several suggestions for Chapter 9 Rules. *See* HOUSE REPORT, *supra* note 34, at 301-02 (suggestions 191-206). There are a few special rules for Chapter 9 cases. *E.g.*, FED. R. BANKR. P. 1007(e), 2018(c), 6006(c). But the Rules make some of the Chapter 11 rules applicable in Chapter 9 cases, even if the fit is imperfect. *See, e.g.*, FED. R. BANKR. P. 1007(d), 2018(d), 2019, 3003, 3014, 3016, 3017, 3018, 3019, 3020.

[37]Subchapter III of Chapter 7 contains special provisions dealing with the liquidation of stockbrokers that are not liquidated under the Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (1970). *See* 11 U.S.C. §§ 741-752 (1994).

[38]Subchapter IV of Chapter 7 contains special provisions dealing with the liquidation of commodity brokers, as defined in § 101(6) of the Bankruptcy Code, 11 U.S.C. § 101(6) (1994). *See id.* §§ 761-66 (1994).

[39]*See* ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CENTER, A SURVEY ON THE FEDERAL

have adopted numerous detailed local rules, some of which are inconsistent with the national rules.[40] This issue should have been ameliorated by the recent amendment to Rule 9029 circumscribing the scope of local rules and requiring conformance to any uniform numbering system prescribed by the Judicial Conference;[41] but, based on the Standing Committee's recommendation[42] contrary to the view of the Advisory Committee,[43] the Judicial Conference refused to adopt a required uniform numbering system for local bankruptcy rules.[44]

Another source of discontent pertains to litigation rules.[45] While participants in the system are generally satisfied with litigation in adversary proceedings,[46] there is significant dissatisfaction with the litigation process

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RULES OF BANKRUPTCY PROCEDURE (1996) [hereinafter "SURVEY RESULTS"]. *See also* Resnick, *supra* note 8, at 273-75 (describing the survey methodology and results in detail).

[40]The Advisory Committee held a hearing in Pasadena, California on February 28, 1992, that in part addressed inconsistencies between the national Rules and the local rules for the United States Bankruptcy Court for the Central District of California. *See* Minutes of Advisory Committee on Bankruptcy Rules, Feb. 28, 1992, at 3.

[41]Effective December 1, 1995, Bankruptcy Rules 9029 and 8018 were amended to require that local bankruptcy rules conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

[42]*See* REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (March, 1996), at 7 ("Recommendation: That the Judicial Conference: a. Adopt a numbering system for local rules of court that corresponds with the relevant Federal Rules of Practice and Procedure; and b. Set April 15, 1997 as the effective date of compliance with the uniform numbering system so that courts will have sufficient time to make necessary changes to their local rules.").

[43]*See* REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES (December 5, 1995), at 1-2 ("At the Standing Committee's request, the Advisory Committee has developed a uniform numbering system for local bankruptcy rules that coordinates with the numbering system of the Federal Rules of Bankruptcy Procedure. A copy is attached to this report as Appendix A. The Advisory Committee presents this numbering system to the Standing Committee and recommends that it be approved.").

[44]*See* PRELIMINARY REPORT JUDICIAL CONFERENCE ACTIONS (March 12, 1996), at 13 ("a. Adopted a numbering system for local rules that corresponds with the relevant Federal Rules of Practice and Procedure; and b. Set April 15, 1997 as the effective date of compliance with the uniform numbering system so that courts will have sufficient time to make necessary changes to their local rules."). Thus, by failing to prescribe a detailed local numbering system, the Judicial Conference has left discretion in local courts to use their own numbering scheme as long as it is based on the Federal Rules of Bankruptcy Procedure.

[45]*See* SURVEY RESULTS, *supra* note 39.

[46]Federal Rule of Bankruptcy Procedure 7001 defines adversary proceeding as follows:

> It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11, chapter 12 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, 12, or 13 plan, (9) to obtain a declara-

outside of adversary proceedings.[47] In part, this is due to the fragmented[48] and constitutionally suspect[49] jurisdictional system imposed on the bankruptcy judges since 1984.[50] But even if bankruptcy judges had pervasive, constitutional jurisdiction, users of the system would continue to be concerned with the internal complexity of the Rules and the failure of the Rules to adapt to the reforms made beginning with the 1978 Bankruptcy Code.

The Rules are unnecessarily complex, containing procedures called contested matters, motions, applications, and objections.[51] As is recognized in the literature,[52] the Rules lack a clear, concise scheme regarding notice and

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tory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed pursuant to 28 U.S.C. § 1452.

FED. R. BANKR. P. 7001.

[47]*See* SURVEY RESULTS, *supra* note 39.

[48]The jurisdiction of the bankruptcy judges has been fragmented ever since the Supreme Court held unconstitutional the comprehensive grant of jurisdiction to non-Article III bankruptcy judges in the 1978 Bankruptcy Code. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). Under the current jurisdictional scheme, jurisdiction over bankruptcy cases and proceedings is vested in the district court which delegates jurisdiction over the case and proceedings to bankruptcy judges. *See* 28 U.S.C. §§ 157(a), 1334 (1994). The bankruptcy judges can determine core proceedings, as illustrated in 28 U.S.C. § 157(b), but may only make a report and recommendation to the district court with respect to non-core matters related to the case, unless all parties consent to the exercise of jurisdiction by the bankruptcy judge. *See* 28 U.S.C. § 157(b)-(c) (1994). And the bankruptcy judge has no power to hear certain matters that are unrelated to the bankruptcy case or that pertain to the distribution of personal injury tort or wrongful death claims. *See* 28 U.S.C. § 157(b)(2) (1994); *e.g.*, Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)(holding that a proceeding is related to a case under Title 11 if "the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy"). *See also* Celotex v. Edwards, 115 S. Ct. 1493, 1499 (1995)("Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth."). In addition, the district court is required to withdraw the reference of certain proceedings and abstain from hearing other proceedings. *See* 28 U.S.C. §§ 157(d), 1334(c)(2) (1994). If the right to jury trial applies in a proceeding that may be heard by a bankruptcy judge, the judge may conduct the jury trial only if specially designated to do so by the district court and with the consent of the parties. *See* 28 U.S.C. § 157(e) (Supp. I 1995). Cases also question the authority of bankruptcy judges to exercise the contempt power. *E.g.*, Griffith v. Oles (*In re* Hipp, Inc.), 895 F.2d 1503, 1511 (5th Cir. 1990)(indicating that the bankruptcy judge may not exercise criminal contempt power where the offense was not committed in or near the presence of the judge). Thus, the jurisdiction of the bankruptcy judge is truly fragmented.

[49]The constitutional concerns addressed by the Supreme Court in *Northern Pipeline* may not have been solved by congressional amendments to the Bankruptcy Code. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, (July 10, 1984) [hereinafter "BAFJA"]. The Constitution still precludes non-tenured judges, such as the bankruptcy judges, from exercising the "judicial Power" of the United States, whatever it may be. *See* U.S. CONST. art. III, § 1.

[50]*See* BAFJA, *supra* note 49.

[51]For example, contested matters are governed by Rule 9014; motions are governed by Rule 9013; Rules 1006(b), 2007(a), 2014, 2015(a)(7), 2016, 7065, 9020(b), and 9027(a) refer to the filing of an application; and Rule 3007 refers to an objection. Section 1113(b) of the Bankruptcy Code refers to an application, which Rule 6006 requires be made by motion that creates a contested matter under Rule 9014. *See* 11 U.S.C. § 1113(b) (1994); FED. R. BANKR. P. 6006, 9014.

[52]*E.g.*, Honorable Steven W. Rhodes, *Eight Statutory Causes of Delay and Expense in Chapter 11 Bankruptcy Cases*, 67 AM. BANKR. L.J. 287, 318-22 (1993). "[T]he procedural requirements in bankruptcy are complex, confusing, and incomplete." *Id.* at 321.

service. These defects should be cured to simplify bankruptcy litigation, but only once the substance of the 1978 Bankruptcy Code is considered in the analysis.

The 1978 Bankruptcy Code introduced the concept that certain actions could be taken without a hearing if proper notice has been given and no objection is timely made.[53] This "after notice and a hearing" procedure has been ignored to some extent by the existing Rules.[54]

The Rules also should be reformed to deal with situations where time is of the essence. Currently, courts entertain emergency motions, motions to shorten time, and orders to show cause. A unified procedure should remove some of the regional variation and discontent in dealing with these issues. For example, the procedure could specify which matters require advance notice, the amount of notice, and the parties entitled to notice.[55]

Finally, there is a dramatic variation in the requirements of bankruptcy courts respecting attorney admissions and ethical requirements. For example, some courts require the retention of local counsel in order for an out-of-town attorney to appear *pro hac vice*. The Rules should adopt uniform standards of professional conduct in bankruptcy courts and eliminate the parochial practice of requiring out-of-town counsel to retain local counsel as a condition to appearance in a case or proceeding. Full development of these topics, however, is beyond the scope of this Article.

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[53]Section 102(1) of the Bankruptcy Code, the rules of construction, provides:

> In this title—
> (1) "after notice and a hearing", or a similar phrase—
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
> (B) authorizes an act without an actual hearing if such notice is given properly and if—
> (i) such hearing is not requested timely by a party in interest; or
> (ii) there is insufficient time for a hearing to be commenced before such act must be done, and the court authorizes such act . . . .

11 U.S.C. § 102(1) (1994).

[54]Certain Rules follow the procedure and permit an act to be done without a hearing if no objection is timely filed. *E.g.*, FED. R. BANKR. P. 4001(d)(3), 6004(b), (e), 6007(a). But other Rules require a hearing even where the Bankruptcy Code has used the "after notice and a hearing" convention to authorize an uncontested act to be taken without a hearing. *E.g.*, FED. R. BANKR. P. 4001(b) provides for a hearing on a motion to use cash collateral whereas § 363(b)(1) & (c)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 363(b)(1), (c)(2)(A) (1994), authorizes the use of cash collateral out of the ordinary course of business "after notice and a hearing" and in the ordinary course of business with "consent" without a hearing; and FED. R. BANKR. P. 3017(a) requires the court to hold a hearing on approval of a Chapter 9 or Chapter 11 disclosure statement, even though § 1125(b) of the Bankruptcy Code, 11 U.S.C. § 1125(b) (1994), permits a disclosure statement to be approved by the court "after notice and a hearing."

[55]Rule 4001 sets forth an expedited procedure in certain predictable situations where time is of the essence. *See* FED. R. BANKR. P. 4001. By contrast, Rule 9006(c) sets forth a very vague standard for reduction of time in irregular circumstances. *See* FED. R. BANKR. P. 9006(c).

CONCLUSION

Absent radical changes to the Bankruptcy Code or court system, inertia will insure that changes to the Bankruptcy Rules occur incrementally. Judges and practitioners are familiar and comfortable with the current Rules and there is little call for change.[56]

Nevertheless, as time goes by, the Bankruptcy Rules will be modernized and improved. Technological changes will require the Rules to accommodate electronic filing and signatures, at a minimum, and perhaps virtual, paperless trials during the next fifty years. Revisions to streamline the litigation rules and to adapt the Rules to the 1978 Bankruptcy Code, as amended, are also inevitable. And maybe, someday, the glacial pace of the rulemaking process will accelerate due to the need for responsiveness required by a world in which time becomes more compressed each year.

This author does not pretend to have a crystal ball or to be able to divine the future. Time will tell to what extent any of the predictions discussed in this Article come to pass.

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[56]The respondents to the SURVEY RESULTS were content with most of the Rules. *See supra* note 39.