MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Eugene R. Wedoff, Chair
Advisory Committee on Bankruptcy Rules

DATE: December 12, 2011

RE: Report of the Advisory Committee on Bankruptcy Rules

I. Introduction

The Advisory Committee on Bankruptcy Rules met on September 26 and 27, 2011, at Northwestern University School of Law in Chicago. The draft minutes of that meeting are attached to this report as Appendix C.

Among the matters the Committee considered at the fall meeting were several suggestions for amendments to existing rules and forms that were submitted by bankruptcy judges, organizations, and members of the bar. The Committee also discussed the potential impact on the Bankruptcy Rules and Official Forms of recent court decisions and legislation. Finally, the Committee continued its deliberations regarding two multi-year projects – the revision of Part VIII of the Bankruptcy Rules and the Forms Modernization Project.

The Committee brings to the Standing Committee one action item from the September meeting. As discussed in Part II of this report, the Committee considered and voted to recommend publishing for comment proposed amendments to Rules 7054 and 7008(b). These amendments are intended to clarify the procedure for seeking an award of attorney's fees in adversary proceedings.

Part III of the report presents for the Standing Committee's preliminary consideration the first half of the proposed comprehensive revision of Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts. The Committee does not seek approval for publication of any of the proposed rules at this meeting. Instead, the entire Part VIII revision package will be brought to the Standing Committee at the June meeting with a recommendation that they be published for comment in August 2012.

The remainder of the report discusses the rules and forms published for comment in August 2011 and the following additional information items:

- unanswered questions raised by *Stern v. Marshall* and courts' initial responses to the decision;
- the Committee's decision to take no further action on the suggestion of the Institute for Legal Reform for quarterly reporting of claims activity by trusts established under § 524(g) of the Bankruptcy Code; and
- the current status of the Forms Modernization Project and the Committee's timetable for seeking publication for comment of the revised forms.

II. Action Item—Rules 7054 and 7008(b)

The Committee unanimously recommends that amendments to Rules 7054 and 7008(a) be published for comment. Rule 7054 would be amended to make applicable in adversary proceedings most of the provisions regarding attorney's fees in Civil Rule 54(d)(2). Rule 7008(b), which requires pleading a claim for attorney's fees in the complaint or other appropriate pleading, would be deleted. The two rules, with the proposed amendments indicated, are set out in Appendix A.

In March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion in which it "suggest[ed] that the Judicial Conference's Advisory Committee on Bankruptcy Rules may want to address th[e] apparent 'gap' in Rule 7054." *Charlie Y., Inc. v. Carey (In re Carey)*, 446 B.R. 384, 389 n.3 (2011). The gap to which the court referred is the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it has its own provision – subdivision (b) – governing the recovery of costs by a prevailing party, and it does not have a provision that parallels Rule 54(d)(2), which governs the recovery of attorney's fees.

The reason that Bankruptcy Rule 7054 originally incorporated Civil Rule 54(a)-(c), but not (d), was that Rule 54(d) provided that "costs *shall be awarded as of course* to the prevailing party unless the court otherwise directs" (emphasis added). The Bankruptcy Rules Committee concluded that costs should not be routinely awarded to the prevailing party against a bankruptcy estate since the impact of the award would be borne by creditors.[1] Rule 7054(b), which was adopted instead of Rule 54(d), provides that "[t]he court *may allow costs* to the prevailing party except when a statute of the United States or these rules otherwise applies" (emphasis added).

[1] *See* Laura B. Bartell, *Award of Costs in Bankruptcy Courts*, 17 J. BANKR. L. & PRAC. 6 (Sept. 2008) (quoting Advisory Committee Note to Bankruptcy Rule 754, the predecessor of Rule 7054).

The 1993 amendment to Rule 54(d) substantially expanded the subdivision to expressly address attorney's fees as well as costs. The existing provision was renumbered (d)(1) and was re-titled "Costs Other Than Attorney's Fees." Paragraph (2), titled "Attorney's Fees," was added, and it requires a "claim for attorney's fees and related nontaxable expenses . . . [to] be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." Fed. R. Civ. P. 54(d)(2)(A). The rule governs the timing ("no later than 14 days after the entry of judgment") and content of the motion and the conduct of the proceedings in response to the motion, incorporating Rule 78, dealing with motion practice. It also authorizes local rules to adopt special procedures for resolving fee issues without extensive evidentiary hearings, and it permits the referral of fee issues to special masters and magistrate judges. The provision is not applicable to fees awarded as sanctions under the rules or under 28 U.S.C. § 1927.

Rule 7054 was never amended to incorporate any of the provisions of Rule 54(d)(2) or to otherwise address the procedure for claiming attorney's fees. Attorney's fees are addressed instead by Rule 7008(b). That provision, which has no counterpart in Civil Rule 8, provides that "[a] request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate."

Under existing Rules 7054 and 7008(b), there is a lack of uniformity in how bankruptcy courts handle awards of attorney's fees. The Central District of California, for example, has a local bankruptcy rule governing the taxation of costs and the award of attorney's fees. It generally requires filing a motion for attorney's fees within 30 days after the entry of judgment or other final order "[i]f not previously determined at trial or other hearing." Thus by local rule that district has adopted a bankruptcy rule similar to Civil Rule 54(d)(2)(A).[2] A recent decision of the Bankruptcy Court for the Southern District of New York, however, discussed the general inapplicability of Rule 54(d)(2) in bankruptcy proceedings, with the possible exception of class actions. *In re* Partsearch Techs., Inc., 2011 WL 2456227 (Bankr. S.D.N.Y. June 21, 2011), at *13.[3] Yet another court concluded that an award of attorney's fees in bankruptcy is generally governed by Rule 7008(b), but held in that case that, because the applicable Virgin Islands law defined attorney's fees as "costs," Rule 7054(b) applied. *In re* Kool, Mann, Coffee & Co., 2007 WL 1202888 (Bank. D.V.I. 2007). Finally, the Ninth Circuit BAP, in the *Carey* decision that led to the Committee's consideration of this issue, recognized that Rule 7008(b) requires the pleading of a claim for attorney's fees, but the court said that the rule "does not shed any light on whether such a claim must be proven at trial or left for determination on application or motion following the trial." Because there was no local bankruptcy rule that governed the procedure for pursuing an attorney's fees claim beyond the pleading stage, the court concluded that "no provision of the Rules proscribed the Appellant's request for an award of attorney's fees through the Fee Motion following the trial of the Adversary Proceeding." 446 B.R. at 390.

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[2] *See also In re* Branford Partners, 2008 WL 8444795, at * 4 (9th Cir. BAP 2008) ("A post trial motion for costs is the 'preferred method' for seeking attorneys' fees and costs.").

[3] The court noted that Rule 7023 fully incorporates Civil Rule 23 and that Rule 23(h)(1) provides that a claim for an award of attorney's fees must be made by motion under Rule 54(d)(2). The court cited the Collier treatise as stating that "'Rule 54(d)(2) is applicable in bankruptcy, but only with respect to class actions,'" but noted that another commentator questioned whether "'Rule 23(h) can override the procedures set forth in Rule 7008(b).'" 2011 WL 2456227 at * 13.

In order to clarify the procedure for seeking an award of attorney's fees and to promote uniformity, the Committee voted to propose amending Rule 7054 to include much of the substance of Civil Rule 54(d)(2) and to delete Rule 7008(b). By bringing the bankruptcy rules into closer alignment with the civil rules, this amendment would eliminate a potential trap for an attorney, particularly one familiar with the civil rules, who might overlook the Rule 7008(b) requirement to plead a request for attorney's fees as a claim in the complaint, answer, or other pleading. As under the civil rules, the procedure for seeking an award of attorney's fees would be governed exclusively by Rule 7054, unless the governing substantive law requires the fees to be proved at trial as an element of damages.

All of the provisions of Rule 54(d)(2), however, cannot be made applicable in bankruptcy proceedings. Subdivision (d)(2)(D) would not be incorporated in its entirety because bankruptcy courts may not refer matters to special masters, *see* Bankruptcy Rule 9031, or magistrate judges. *See* 28 U.S.C. § 636. The reference to Rule 78 in Civil Rule 54(d)(2)(C) would also not be incorporated because that rule is not applicable in bankruptcy proceedings.

III. Interim Report on the Revision of Part VIII of the Bankruptcy Rules

As reported at past meetings, the Committee has been engaged for several years in a project to revise the Part VIII Bankruptcy Rules, which govern appeals from bankruptcy courts, primarily to district courts and bankruptcy appellate panels. Among the goals of this project are to bring the bankruptcy appellate rules into closer alignment with the Federal Rules of Appellate Procedure and to incorporate into the rules greater use of electronic transmission, filing, and storage of court documents. At the outset of the project, the Committee hosted two mini-conferences on the subject of the bankruptcy appellate rules. In attendance were judges, lawyers, court personnel, and academics who had substantial experience with bankruptcy appeals.

The Committee has worked on this project in conjunction with the Advisory Committee on Appellate Rules and has been greatly assisted in its work by that committee's reporter. The two advisory committees held a joint meeting in April 2011, and last summer a meeting to review and edit the Part VIII draft and accompanying committee notes was conducted by a working group composed of several members of the Bankruptcy Rules Committee, its reporters, a member of the Appellate Rules Committee, and that committee's reporter. Half of the revised draft that resulted from this meeting was considered by the Committee at its September 2011 meeting. After a full discussion, the Committee approved for submission to the Standing Committee Rules 8001-8012, subject to the additional revision of a few rules and review by the style consultants. The other half of the revised Part VIII rules (Rules 8013-8028) will be presented to the Committee at its spring 2012 meeting.

The Committee does not seek any action by the Standing Committee on the Part VIII rules at this meeting. The first half of the revision, which is being presented for preliminary review, still needs to undergo style review and further consideration by the Committee of a few of its provisions. If the Committee approves the entire Part VIII revision, it will submit the revision to the Standing Committee at the June 2012 meeting with a recommendation that it be published for comment in August 2012. Under that schedule, the presumptive effective date of the new bankruptcy appellate rules would be December 1, 2014.

The revision of Part VIII is comprehensive. Existing rules have been reorganized and renumbered, some rules have been combined, and provisions of other rules have been moved to

several new locations. Much of the language of the existing rules has been restyled. Because of the comprehensive nature of the proposed revision, it is not possible to present the amendments in a redlined version pointing out changes to the existing rules. Nor can the proposed revision be presented in a comparative format like the one used for the restyled Evidence Rules.

Rather, to introduce the first half of the proposed revision of Part VIII to the Standing Committee and assist in its preliminary consideration of these rules, this part of the report will provide a brief discussion of each of the first twelve proposed rules. Significant changes from the existing Bankruptcy Rules, decisions to depart from the Appellate Rules, and any significant issues that have arisen are noted for each rule. The text of proposed Rules 8001-8012 and accompanying committee notes are attached to this report as Appendix B.

Rule 8001 (Scope of Part VIII Rules; Definitions) – This rule is new; it does not have a counterpart in the existing Part VIII rules, but it is similar to Appellate Rule 1. The rule explains the scope of Part VIII. It clarifies that these rules apply to appeals from a bankruptcy court to the district court or bankruptcy appellate panel and that some of the rules (specified in the Committee Note) apply to appeals from bankruptcy courts to courts of appeals.

Rule 8001 also provides definitions of three terms that are used in Part VIII – BAP, appellate court, and transmit. The definition of "transmit" includes a key feature of the revised Part VIII: there is a presumption that documents are to be sent electronically. This presumption does not apply to pro se parties and can be overridden by the governing rules of a court. Although use of the word "transmit" is generally avoided in federal rules, the Committee favors its use here to signal to the reader that it is a term with a special meaning.

Although the Committee is not embarking on a general restyling of the Bankruptcy Rules, in revising Part VIII it has adopted many of the style conventions of the Appellate Rules, including the use of "must" rather than "shall." The Committee believes that this part of the Bankruptcy Rules is sufficiently discrete that its use of restyled language and form will not cause confusion in the meaning of rules in the other parts.

Rule 8002 (Time for Filing Notice of Appeal) – This rule is largely a restyled version of current Rule 8002. Because 28 U.S.C. § 158(c)(2) refers to this rule by number, the provisions regarding the time for filing a notice of appeal must be retained in Rule 8002, rather than being placed after the rule governing the procedure for taking an appeal as of right, as the Appellate Rules are organized. The revised rule retains the 14-day period for filing a notice of appeal in bankruptcy cases.

Subdivision (c) regarding an appeal by an inmate confined in an institution is a new provision. It mirrors the provision in Appellate Rule 4(c)(1) and (2).

Rule 8003 (Appeal as of Right – How Taken; Docketing of Appeal) – This rule is based on Appellate Rule 3. It includes provisions of current Rule 8001(a) governing the taking of an appeal by right and Rule 8004 governing service of notice of the filing of a notice of appeal. The proposed rule includes new provisions, modeled on Appellate Rule 3(b), allowing joint and consolidated appeals.

In a significant change from current Rule 8007(b), an appeal would be docketed in the appellate court when the clerk of that court receives the notice of appeal, rather than, as under

current practice, when the complete record is transmitted to the appellate court. This change reflects the view expressed by some participants in the mini-conferences that docketing in the appellate court should occur earlier in order to eliminate most instances of a motion being filed in the appellate court with regard to a case not yet on its docket.

Rule 8004 (Appeal by Leave – How Taken; Docketing of Appeal) – This rule contains provisions that are currently set forth in Rules 8001(b) and 8003. It follows the format and style of Appellate Rule 5, but it retains the current bankruptcy practice of requiring the filing of a notice of appeal in addition to a motion for leave to appeal.

Consistent with proposed Rule 8003, this rule provides that docketing in the appellate court should occur promptly after the clerk of that court receives the notice of appeal and motion for leave to appeal. As a result of this change in the time of docketing, responses in opposition to motions for leave to appeal would be filed in the appellate court rather than in the bankruptcy court, a change from existing Rule 8003(a).

Rule 8005 (Election to Have Appeal Heard by District Court Instead of BAP) – This rule is a revision of current Rule 8001(e). Under 28 U.S.C. § 158(c)(1), if a bankruptcy appellate panel has been established to hear appeals from a bankruptcy court, an appellant may elect to have an appeal heard instead by a district court by making an election at the time of filing a notice of appeal, and an appellee may make such an election within 30 days after service of the notice of appeal. The proposed rule provides for the promulgation of an Official Form for making an election. The Committee believes that use of this form would make the election process more straightforward and less likely to give rise to challenges. Should a dispute about the validity of an election arise, the rule provides a procedure for resolution of the dispute. The court in which the appeal is pending when a determination of the validity of an election is sought would have authority to determine whether an election has been properly made according to the rule and statute.

Rule 8006 (Certification of Direct Appeal to Court of Appeals) – This rule, like current Rule 8001(f), implements 28 U.S.C. § 158(d)(2), which authorizes certification of bankruptcy appeals for direct review by a court of appeals under three circumstances: (1) if the court in which the case is pending, acting on its own motion or on the request of a party, makes the certification specified in § 158(d)(2)(A)(i), (ii), and (iii); (2) if all parties to the appeal make the certification; or (3) if a majority of appellants and a majority of appellees request the court to make the certification, in which case the court is required to do so. Because of the earlier time of docketing an appeal in the appellate court under the proposed rules, this rule provides that, for purposes of certification only, a case remains pending in the bankruptcy court for 30 days after the effective date of a notice of appeal. Once a certification is made, a request for permission to take a direct appeal to the court of appeals must be filed with the circuit clerk within 30 days after the certification. Appellate Rule 6 would be amended to provide in new subdivision (c) the procedures for requesting permission of the court of appeals and for any subsequent proceedings in that court.

Rule 8007 (Stay Pending Appeal; Bonds; Suspension of Proceedings) – This rule is derived from current Rule 8005 and Appellate Rule 8. In a change from the current rule, Rule 8007 would apply to appeals taken directly to the court of appeals, as well as to ones taken to the district court or the bankruptcy appellate panel. It retains a feature of current Rule 8005 that differs from Rule 8. If a bankruptcy court grants a stay or other relief authorized under

subdivision (a) of the rule, a party may seek to have that order vacated or modified by means of a motion filed in the reviewing court, rather than by filing a notice of appeal.

Rule 8008 (Indicative Rulings) – This rule would add to the Bankruptcy Rules a provision governing indicative rulings. Because it addresses procedures in both the trial and appellate courts, the proposed rule is a combination of Civil Rule 62.1 and Appellate Rule 12.1. Subdivision (a), which authorizes the bankruptcy court to issue an indicative ruling, and subdivision (b), which requires the movant to notify the "court in which the appeal is pending" of the bankruptcy court's ruling, would apply when a bankruptcy appeal is pending in the court of appeals, as well as when an appeal is pending in the district court or bankruptcy appellate panel. Subdivision (c), however, which authorizes the "appellate court" to remand for further proceedings, would apply only to district courts and bankruptcy appellate panels. Appellate Rule 12.1(b) would govern the actions of a court of appeals in response to an indicative ruling of a bankruptcy court. However, the procedures of proposed Rule 8008(c) and Appellate Rule 12.1(b) are identical.

Rule 8009 (Record and Issues on Appeal; Sealed Documents) – This rule is a revision of current Rule 8006. It borrows provisions from Appellate Rules 10 and 11(a) that would be new to the Bankruptcy Rules, including provisions regarding a statement of the record when no transcript is available, an agreed statement as the record on appeal, and correction or modification of the record. Rule 8009 would continue the current practice in bankruptcy appeals of having the parties designate items to be included in the record on appeal. It would include a new provision regarding the handling of documents under seal that are designated for inclusion in the record. That provision has no counterpart in the Appellate Rules. Rule 8009 would apply to direct appeals to the court of appeals, as well as to appeals to the district court and the bankruptcy appellate panel.

Rule 8010 (Completion and Transmission of the Record) – This rule is derived from current Rule 8007 and Appellate Rule 11. The Committee is still considering how best to draft the rule so that it will work smoothly in the majority of bankruptcy courts that record proceedings electronically without a court reporter present. The provision of current Rule 8007(b) regarding the docketing of an appeal upon the appellate clerk's receipt of the complete record has been deleted and, as noted above, replaced by provisions in Rules 8003 and 8004 requiring the appeal to be docketed when the appellate clerk receives the notice of appeal. In addition to applying to appeals from the bankruptcy court to the district court and to the bankruptcy appellate panel, Rule 8009 would apply to cases on direct appeal to the court of appeals under 28 U.S.C. §158(d)(2).

Rule 8011 (Filing and Service; Signature) – This rule is based on current Rule 8008 and Appellate Rule 25. It adopts the format, style, and some of the greater detail of Rule 25, and—consistent with the overall goals of the Part VIII revision project—it places a greater emphasis on the electronic filing and service of documents. Subdivision (e) is a new provision that would require an electronic signature of counsel or unrepresented parties for documents filed electronically in the appellate court.

Rule 8012 (Corporate Disclosure Statement) – This rule, new to the Part VIII rules, is based on Appellate Rule 26.1.

IV. Rules and Forms Published for Comment in August 2011

At the June 2011 meeting, the Standing Committee authorized the publication of proposed amendments to Bankruptcy Rules 1007, 3007, 5009, 9006, 9013, and 9014, and proposed amendments to Official Forms 6C, 7, 22A, and 22C. The deadline for submission of comments on these proposed amendments is February 15, 2012. Thus far eight comments have been submitted on the published amendments. Public hearings are tentatively scheduled for January 13, 2012, in Washington, D.C., and February 10, 2012, in Chicago, Illinois. No requests to testify at a hearing have yet been submitted.

The Committee will consider all of the comments submitted on the proposed amendments during its March 2012 meeting. The Committee will present the amendments approved at that meeting, with any appropriate changes, to the Standing Committee at its June 2012 meeting for its approval and transmittal to the Judicial Conference.

V. Other Information Items

A. *Stern v. Marshall*

The Committee continues to monitor case law developments following the Supreme Court's decision in *Stern v. Marshall*. In *Stern*, the Court considered whether a bankruptcy judge had the power, consistent with Article III, to hear and finally determine a debtor's state law counterclaim against a creditor who had filed a transactionally related claim against the estate. Although the governing statute, 28 U.S.C. § 157(b)(1) & (b)(2)(C), categorizes estate counterclaims as "core" proceedings that may be fully adjudicated by a bankruptcy judge, the Court held that the Constitution permits a bankruptcy judge to enter a final judgment, without consent of the parties, only when a counterclaim "stems from the bankruptcy itself or would necessarily be resolved in the claims allowance process." Finding that test to be unsatisfied, the Court ultimately concluded that the creditor's counterclaim was entitled to the Article III forum the creditor had demanded.

Because the case touches on the power of bankruptcy judges to enter final judgments in disputes before them, *Stern* has garnered a high level of interest among the bankruptcy courts and the Article III courts. It has already been cited in more than 180 federal court opinions. Many citations to *Stern* reflect relatively restrained applications by bankruptcy courts of the Supreme Court's test for when they may finally determine a dispute. *See, e.g.*, *In re Salander O'Reilly Galleries*, 453 B.R. 106, 118 (Bankr. S.D.N.Y. 2011) (concluding that the bankruptcy court could finally determine a dispute that "implicate[d] the adjudication of the [creditor's] proof of claim"). Others involve decisions by district courts contemplating (and usually rejecting) the argument that *Stern* requires withdrawal of a proceeding referred to the bankruptcy court. *See, e.g.*, *In re Mortgage Store, Inc.*, 2011 WL 5056990 (D. Hawaii Oct. 5, 2011) (denying withdrawal of the reference because the bankruptcy court could submit proposed findings and conclusions even if it could not enter a final judgment); *Kelley v. JPMorgan Chase & Co.*, 2011 WL 4403289 at *5-6 (D. Minn. Sept. 21, 2011) (same).

While the Supreme Court described its holding as "a 'narrow' one," *Stern* has generated three significant open questions percolating in the courts. The first is whether the Court's decision applies to fraudulent conveyance actions. The second is whether the consent of litigants is sufficient to permit a bankruptcy court to enter final judgment when doing so would otherwise

be beyond the court's powers under *Stern*. The third is whether there are some proceedings over which the bankruptcy court has no power at all to entertain because of the interplay between *Stern* and provisions of the Judicial Code and Bankruptcy Rules.

The application of *Stern* to fraudulent conveyance actions—a common feature of bankruptcy litigation—has created divergent views. The Judicial Code categorizes actions "to determine, avoid, or recover fraudulent conveyances" as core proceedings. 28 U.S.C. § 157(b)(2)(H). Nevertheless, a number of decisions have read that statutory provision to run afoul of *Stern* in light of the Supreme Court's previous description of fraudulent conveyance actions as essentially common law claims like those usually committed to the Article III courts. *See Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 56 (1989). Other courts, however, have found fraudulent conveyance actions to be sufficiently entwined with the bankruptcy process to permit the bankruptcy court to enter final judgment. *Compare In re Canopy Fin. Inc.*, 2011 WL 3911082 (N.D. Ill. Sept. 1, 2011) (concluding that the bankruptcy court cannot enter a final judgment on a fraudulent conveyance action), and *In re Blixseth*, 2011 WL 3274042, at *11–12 (Bankr. D. Mont. Aug. 1, 2011) (same), with *In re Heller Ehrman LLP*, 2011 WL 4542512 at *5-6 (Bankr. N.D. Cal. Sept. 28, 2011) (finding that a fraudulent conveyance action may be finally determined by the bankruptcy court), *In re Am. Bus. Fin. Servs., Inc.*, 457 B.R. 314, 319-20 (Bankr. D. Del. 2011) (holding that a bankruptcy court may enter final judgment in a fraudulent conveyance action involving "matters integral to the bankruptcy case"), and *In re Refco*, 2011 WL 5974532 at *9 (Bankr. S.D.N.Y. Nov. 30, 2011) ("Article III of the Constitution does not prohibit the bankruptcy courts' determination of fraudulent transfer claims under 11 U.S.C. §§ 544 and 548 by final judgment."). At least one decision has drawn a distinction, for Article III purposes, between proceedings brought under the Bankruptcy Code's own fraudulent conveyance provisions, §§ 548 and 549, and those brought under state law but asserted in bankruptcy as permitted by Code § 544. *See In re Innovative Commc'n Corp.*, 2011 WL 3439291, at *3-4 (Bankr. D.V.I. Aug. 5, 2011) (concluding that a bankruptcy court may finally determine a fraudulent conveyance action brought under § 548 but not under § 544). Although no court of appeals so far has confronted the question, the Ninth Circuit recently invited briefing on whether *Stern* prohibits bankruptcy courts from entering final judgment in a fraudulent conveyance action. *In re Bellingham Insurance Agency, Inc.*, 661 F.3d 476 (9th Cir. 2011).

The second question prompted by *Stern* is whether and to what extent the consent of the litigants may authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond a bankruptcy judge's powers. Every court to consider the matter has held (or assumed) that litigant consent is ordinarily sufficient to permit a bankruptcy judge to enter a final judgment. The consent question has arisen in a variety of contexts. Typically, bankruptcy courts have simply noted that the parties have consented to entry of a final judgment, and that their consent satisfies *Stern*. In some cases, however, the court has raised *sua sponte* a potential *Stern* issue and required the parties to file a formal consent or objection to the bankruptcy court's power to adjudicate. *See, e.g., In re Rancher Energy Corp.*, 2011 WL 5320971 at *3 (Bankr. D. Colo. Nov. 2, 2011) (ordering the litigants to enter a formal consent or objection to the bankruptcy court's power to enter final judgment). In other cases, the consent question has been raised in the district court on a motion to withdraw the reference. *See, e.g., Mercury Companies, Inc. v. FNF Sec. Acquisition, Inc.*, 2011 WL 5127613 (D. Colo. Oct. 31, 2011) (rejecting the argument by defendants in a fraudulent conveyance action that "one cannot consent to the Bankruptcy Court's jurisdiction where the Bankruptcy Court does not have the authority to

resolve claims before it").[4] What constitutes "consent" and the timing of that consent have presented additional wrinkles. *See In re Development Specialists, Inc.*, 2011 WL 5244463, at *11-13 (S.D.N.Y. Nov. 2, 2011) (finding no consent even though the objecting parties had previously admitted that the bankruptcy court had jurisdiction and requested that the bankruptcy court enter judgment in their favor).

A third post-*Stern* question is whether the decision creates a category of disputes that fall into an adjudicatory gap between core and noncore proceedings. Courts have addressed whether there are some proceedings that a bankruptcy court cannot, as a constitutional matter, hear and finally determine as core proceedings but that the court also cannot, as a statutory and Rules matter, dispose of by a report and recommendation as noncore proceedings. The difficulty comes from the interplay between the Judicial Code's list of core proceedings and the provisions for the treatment of noncore proceedings. Bankruptcy courts may hear without finally determining "a proceeding that is not a core proceeding." 28 U.S.C. § 157(c)(1); *see also* Fed. R. Bankr. P. 9033. No provision explicitly provides for that treatment in a core proceeding. Therefore, some litigants have argued, claims governed by *Stern* cannot be treated as noncore proceedings, because the statute categorizes them as "core." At the same time, the argument goes, they cannot be heard and finally decided by the bankruptcy court without violating Article III. To date, only one bankruptcy court has embraced this reasoning. *See In re Blixseth*, 2011 WL 3274042 at *10-12. Other courts that have considered the argument have rejected it. *See, e.g., In re El-Atari*, 2011 WL 5828013, at *4-5 (E.D. Va. Nov. 18, 2011); *In re Mortgage Store, Inc.*, 2011 WL 5056990, at *5-6; *In re Canopy Fin., Inc.*, 2011 WL 3911082, at *4-5.

As this summary of decisions demonstrates, the post-*Stern* landscape is rapidly developing. The Committee will continue to assess whether there is a need for responsive rulemaking in light of continuing developments.

B. *Suggestion of Institute for Legal Reform for Quarterly Reporting by § 524(g) Trusts*

The Institute for Legal Reform ("ILR") submitted a suggestion to amend the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." In bankruptcy cases in which debtors face liability on asbestos-related personal injury or property damage claims, § 524(g) of the Bankruptcy Code permits the creation of a trust to pay those claimants, including future claimants, after confirmation of the debtor's plan of reorganization. Under ILR's proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment the trusts received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment presented to trusts by asbestos claimants if that information is relevant to litigation in any state or federal court. In explaining its suggestion, ILR stated that claimants may be making demands to asbestos trusts that are inaccurate or inconsistent with similar claims that the claimants brought in the tort system, thereby seeking overcompensation and depleting trusts to the detriment of future trust claimants. The proposal would represent a departure from the current practice among asbestos trusts, which typically make periodic reports

[4] Further guidance may come from a nonbankruptcy case pending in the Fifth Circuit, which has requested briefing on the question whether parties may consent to the entry of a final judgment by a magistrate judge in light of *Stern*. *See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, No. 10-20640 (5th Cir. Sept. 9, 2011).

of aggregate claims-handling information but do not disclose detailed information about the treatment of individual demands for payment.

The Committee recognized that ILR's suggestion addressed an important matter deserving careful attention. Committee members, however, expressed concern about the proposal. Because it would apply to trust operations after the confirmation of a debtor's plan of reorganization, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although perhaps beneficial to parties in nonbankruptcy tort litigation, was arguably of limited use to bankruptcy courts and might be beyond the proper reach of the Bankruptcy Rules.

In assessing these concerns, members referred to comments received from interested individuals and groups—including practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and ILR—who responded to a request from the Chair of the Committee for input on ILR's suggestion. Although some of the detailed responses supported the proposal, the majority urged the Committee not to adopt it. Many comments questioned whether bankruptcy rulemaking of the kind proposed was the appropriate mechanism to address the issues raised by ILR.

In light of these concerns, the Committee adopted the recommendation of its Business Subcommittee that further action not be taken on ILR's suggestion.

C. *Forms Modernization Project ("FMP")*

Since 2008 the Committee's Subcommittee on Forms has led a project to revise the Official Forms. Among the goals of this project are obtaining more complete and accurate responses on the forms, making the questions easier to understand, giving end users of the information the ability to extract data needed for specific purposes, and coordinating with the next generation of CM/ECF ("NextGen"). In the early stages of its work, the FMP decided that particular forms should no longer apply to all types of debtors. Instead, there should be forms specifically designed for individual debtors and another set for debtors that are entities, such as corporations. The FMP began by drafting individual debtor forms. At the Committee's September 2011 meeting, Bankruptcy Judge Elizabeth Perris, chair of the FMP and the Subcommittee on Forms, reported that drafts of the initial official bankruptcy forms to be filed by individuals have been prepared and approved by the FMP. Those drafts were included in the Committee's agenda materials.

The FMP has sought feedback on the drafts from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys, a group of attorneys from the Executive Office for United States Trustees, and an organization of creditor attorneys. Comments from those organizations and other reviewers have been mixed. Most reviewers support the user-friendly language in the new forms, but some believe the language is less precise and will lead to more pro se filings. Others think that the length of the forms (including instructions not intended to be filed) will discourage pro se filings, but will require additional work for debtor's counsel and therefore increase fees. Reviewers were less concerned about the length of the forms once they were informed that the goal was to make the new forms effective in conjunction with NextGen, which will allow custom reports to be created from the data collected on the forms.

The FMP's goal had been to publish the individual filing package for comment in August 2012, which would mean that the new forms could be effective as early as December 1, 2013. In light of comments about length, the FMP believes that the acceptance and success of the individual filing package will depend to a large extent on whether NextGen is sufficiently operational to permit data to be extracted from the forms when they go into effect.

It is not clear that NextGen will be at that stage by the end of 2013. Accordingly, the Committee preliminarily approved the FMP's recommendation to seek to publish in 2012 a subset of the individual filing package, consisting of, the fee waiver and installment fee forms, the income and expense forms, and the means test forms. These particular forms involve only the debtors' income and expenses and are not significantly longer than the forms they replace. The FMP will work with NextGen to emphasize the need to extract data from these forms when they become effective. For the same reasons, the FMP will recommend that a revised proof of claim form be included in the initial group of forms for publication.

The Committee will review the forms and revisit its publication recommendation at the spring meeting, after the FMP considers all the pre-publication comments. While the first forms are being tested, the FMP is working on the business forms and additional forms for individuals.

Appendix A

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE*

For Publication for Public Comment

Rule 7008. General Rules of Pleading

~~(a) APPLICABILITY OF RULE 8 F.R.CIV. P.~~ Rule 8 F.R. Civ. P. applies in adversary proceedings. The allegation of jurisdiction required by Rule 8(a) shall also contain a reference to the name, number, and chapter of the case under the Code to which the adversary proceeding relates and to the district and division where the case under the Code is pending. In an adversary proceeding before a bankruptcy judge, the complaint, counterclaim, cross-claim, or third-party complaint shall contain a statement that the proceeding is core or non-core and, if non-core, that the pleader does or does not consent to entry of final orders or judgment by the bankruptcy judge.

~~(b) ATTORNEY'S FEES. A request for an award of attorney's fees shall be pleaded as a claim in a complaint, cross-claim, third-party complaint, answer, or reply as may be appropriate.~~

* New material is underlined; matter to be omitted is lined through.

COMMITTEE NOTE

This rule is amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil Procedure, had the potential to serve as a trap for the unwary.

The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply.

Rule 7054. Judgments; Costs[**]

(a) JUDGMENTS. Rule 54(a)-(c) F.R. Civ. P. applies in adversary proceedings.

(b) COSTS; ATTORNEY'S FEES

(1) *Costs Other Than Attorney's Fees*. The court may allow costs to the prevailing party except when a statute of the United States or these rules otherwise provides. Costs against the United States, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 14 days' notice; on motion served within seven days thereafter, the action of the clerk may be reviewed by the court.

[**] Incorporates amendments that are due to take effect on December 1, 2012, if approved by the Supreme Court and Congress takes no action otherwise.

(2) *Attorney's Fees.*

(A) Rule 54(d)(2)(A)-(C) and (E) F.R. Civ. P. applies in adversary proceedings except for the reference in Rule 54(d)(2)(C) to Rule 78.

(B) By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings.

COMMITTEE NOTE

Subdivision (b) is amended to prescribe the procedure for seeking an award of attorney's fees and related nontaxable expenses in adversary proceedings. It does so by adding new paragraph (2) that incorporates most of the provisions of Rule 54(d)(2) F.R. Civ. P. The title of subdivision (b) is amended to reflect the new content, and the previously existing provision governing costs is renumbered as paragraph (1) and re-titled.

As provided in Rule 54(d)(2)(A), new subsection (b)(2) does not apply to fees recoverable as an element of damages, as when sought under the terms of a contract providing for the recovery of fees incurred prior to the instant adversary proceeding. Such fees typically are required to be claimed in a pleading.

Rule 54(d)(2)(D) F.R. Civ. P. does not apply in adversary proceedings insofar as it authorizes the referral of fee matters to a master or a magistrate judge. The use of masters is not authorized in bankruptcy cases, *see* Rule 9031, and 28 U.S.C. § 636 does not authorize a magistrate judge to exercise jurisdiction upon referral by a bankruptcy judge. The remaining provision of Rule 54(d)(2)(D) is expressed in subdivision (b)(2)(B) of this rule.

Rule 54(d)(2)(C) refers to Rule 78 F.R. Civ. P., which is not applicable in adversary proceedings. Accordingly, that reference is not incorporated by this rule.

Appendix B

FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

Rule

Rule 8001. Scope of Part VIII Rules; Definitions

(a) GENERAL SCOPE. These Part VIII rules govern the procedure in United States district courts and bankruptcy appellate panels for appeals taken from judgments, orders, and decrees of bankruptcy courts. They also govern certain procedures involving appeals to courts of appeals under 28 U.S.C. § 158(d).

(b) DEFINITIONS

(1) "BAP." As used in these Part VIII rules, "BAP" means a bankruptcy appellate panel established by the judicial council of a circuit and authorized to hear appeals from the bankruptcy court for the district in which an appeal is taken under 28 U.S.C. § 158.

(2) "APPELLATE COURT." As used in these Part VIII rules, "appellate court" means either the district court or the BAP – whichever is the court in which the bankruptcy appeal is pending or to which the appeal will be taken.

(3) "TRANSMIT." As used in these Part VIII rules, "transmit" means to send electronically unless the document is being sent by or to an individual who is not represented by counsel or the governing rules of the court permit or require mailing or other means of delivery of the document in question.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. As provided in subdivision (d) of this rule, the term "appellate court" is used in Part VIII to refer to the court – district court or BAP – to which a bankruptcy appeal is taken.

Subsequent appeals to courts of appeals are generally governed by the Federal Rules of Appellate Procedure. Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8026 governs the granting of a stay of an appellate court judgment pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Any form of the term "transmit" is used to encompass the electronic conveyance of information. Except as applied to pro se parties, a requirement in the Part VIII rules to transmit a document means that it must be sent electronically unless applicable rules or orders require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

(a) FOURTEEN-DAY PERIOD.

(1) Except as provided in Rule 8002(b) and (c), the notice of appeal required by Rule 8003 or 8004 must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed.

(2) If one party files a timely notice of appeal, any other party may file a notice of appeal with the bankruptcy clerk within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise allowed by this rule, whichever period ends later.

(3) A notice of appeal filed after a bankruptcy court announces a decision or order, but before entry of the judgment, order, or decree, is treated as filed after entry of the judgment, order, or decree and on the date of entry.

(4) If a notice of appeal is mistakenly filed with the appellate court or the court of appeals, the clerk of that court must indicate on the notice the date on which it was received and transmit it to the bankruptcy clerk. The notice of appeal is then considered filed in the bankruptcy court on the date so indicated.

(b) EFFECT OF MOTION ON TIME FOR APPEAL.

(1) If a party timely files in the bankruptcy court

any of the following motions, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(A) to amend or make additional findings under Rule 7052, whether or not granting the motion would alter the judgment;

(B) to alter or amend the judgment under Rule 9023;

(C) for a new trial under Rule 9023; or

(D) for relief under Rule 9024 if the motion is filed no later than 14 days after entry of the judgment.

(2)(A) If a party files a notice of appeal after the court announces or enters a judgment, order, or decree – but before it disposes of any motion listed in Rule 8002(b)(1) – the notice becomes effective when the order disposing of the last such remaining motion is entered.

(B) A party intending to challenge on appeal an order disposing of any motion listed in Rule 8002(b)(1), or the alteration or amendment of a judgment, order, or decree upon such a motion, must file a notice of appeal or an amended notice of appeal. The notice of appeal or amended notice of appeal must be filed in compliance with Rule 8003 or 8004 and within the time

prescribed by this rule, measured from the entry of the order disposing of the last such remaining motion.

(3) No additional fee is required to file an amended notice of appeal.

(c) APPEAL BY AN INMATE CONFINED IN AN INSTITUTION.

(1) If an inmate confined in an institution files a notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files under Rule 8002(c) the first notice of appeal from a judgment, order, or decree of a bankruptcy court to an appellate court, the 14-day period provided in Rule 8002(a)(2) for another party to file a notice of appeal runs from the date when the bankruptcy court dockets the first notice.

(d) EXTENSION OF TIME FOR APPEAL.

(1) The bankruptcy court may extend the time for filing a notice of appeal by a party unless the judgment, order, or decree appealed from:

(A) grants relief from an automatic stay under § 362, 922, 1201, or 1301 of the Code;

(B) authorizes the sale or lease of property or the use of cash collateral under § 363 of the Code;

(C) authorizes the obtaining of credit under § 364 of the Code;

(D) authorizes the assumption or assignment of an executory contract or unexpired lease under § 365 of the Code;

(E) approves a disclosure statement under § 1125 of the Code; or

(F) confirms a plan under § 943, 1129, 1225, or 1325 of the Code.

(2) The bankruptcy court may extend the time to file a notice of appeal if:

(A) a motion for extension of time is filed with the bankruptcy clerk within the time prescribed by this rule; or

(B) a motion is filed with the bankruptcy

clerk no later than 21 days after the time prescribed by this rule expires and is accompanied by a demonstration of excusable neglect; but

(C) no extension of time for filing a notice of appeal may exceed 21 days after the time otherwise prescribed by this rule, or 14 days after the date the order granting the motion is entered, whichever is later.

COMMITTEE NOTE

This rule is derived from former Rule 8002 and F.R. App. P. 4(a) and (c). With the exception of subdivision (c), the changes to the former rule are stylistic. The rule retains the former rule's 14-day time period for filing a notice of appeal, as opposed to the longer periods permitted for appeals in civil cases under F.R. App. P. 4(a).

Subdivision (a) continues to allow any other party to file a notice of appeal within 14 days after the first notice of appeal is filed, or thereafter to the extent otherwise authorized by this rule. Subdivision (a) also retains provisions of the former rule that prescribe the date of filing of the notice of appeal if the appellant files it prematurely or in the wrong court.

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a), tolls the time for filing a notice of appeal when certain post-judgment motions are filed, and it prescribes the effective date of a notice of appeal that is filed before the court disposes of all of the specified motions. As under the former rule, a party that wants to appeal the court's disposition of such a motion or the alteration or amendment of a judgment, order, or decree in response to such a motion must file a notice of appeal or, if it has already filed one, an amended notice of appeal.

Although Rule 8003(a)(3)(C) requires a notice of appeal to be accompanied by the required fee, no additional fee is required for the filing of an amended notice of appeal.

Subdivision (c) mirrors the provisions of F.R. App. P. 4(c)(1) and (2), which specify timing rules for a notice of appeal filed by an inmate

confined in an institution.

Subdivision (d) continues to allow the court to grant an extension of time to file a notice of appeal, except with respect to certain specified judgments, orders, and decrees.

Rule 8003. Appeal as of Right – How Taken; Docketing of Appeal

(a) FILING THE NOTICE OF APPEAL.

(1) An appeal from a judgment, order, or decree of a bankruptcy court to an appellate court as permitted by 28 U.S.C. § 158(a)(1) or (a)(2) may be taken only by filing a notice of appeal with the bankruptcy clerk within the time allowed by Rule 8002.

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the appellate court to act as it considers appropriate, including dismissing the appeal.

(3) The notice of appeal must:

(A) conform substantially to the appropriate Official Form;

(B) be accompanied by the judgment, order, or decree, or part thereof, being appealed; and

(C) be accompanied by the prescribed fee.

(4) If requested by the bankruptcy clerk, each appellant must promptly file the number of copies of the notice of appeal that the bankruptcy clerk needs for compliance with Rule 8003(c).

(b) JOINT OR CONSOLIDATED APPEALS.

(1) When two or more parties are entitled to appeal

from a judgment, order, or decree of a bankruptcy court and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When parties have separately filed timely notices of appeal, the appellate court may join or consolidate the appeals.

(c) SERVING THE NOTICE OF APPEAL.

(1) The bankruptcy clerk must serve notice of the filing of a notice of appeal by transmitting it to counsel of record for each party to the appeal – excluding the appellant – or, if a party is proceeding pro se, sending it to the pro se party's service address.

(2) The bankruptcy clerk's failure to serve notice does not affect the validity of the appeal.

(3) The bankruptcy clerk must give each party served notice of the date on which the notice of appeal was filed and note on the docket the names of the parties served and the date and method of the service.

(4) The bankruptcy clerk must promptly transmit the notice of appeal to the United States trustee, but failure to transmit notice to the United States trustee does not affect the validity of the appeal.

(d) TRANSMITTING THE NOTICE OF APPEAL TO THE APPELLATE COURT; DOCKETING THE APPEAL.

(1) The bankruptcy clerk must promptly transmit the notice of appeal to the BAP clerk if a BAP has been established for appeals from that district and the appellant has not elected to have the appeal heard by the district court. Otherwise, the bankruptcy clerk must promptly transmit the notice of appeal to the district clerk.

(2) Upon receiving the notice of appeal, the clerk of the appellate court must docket the appeal under the title of the bankruptcy court action with the appellant identified – adding the appellant's name if necessary.

COMMITTEE NOTE

This rule is derived in part from former Rule 8001(a) and F.R. App. P. 3. It encompasses stylistic changes to the former provision governing appeals as of right. In addition it addresses joint and consolidated appeals and incorporates and modifies provisions of former Rule 8004 regarding service of the notice of appeal. The rule changes the timing of the docketing of an appeal in the district court or BAP.

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C. § 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

Subdivision (b), which is an adaptation of F.R. App. P. 3(b), permits the filing of a joint notice of appeal by multiple appellants that have sufficiently similar interests that their joinder is practicable. It also provides for the appellate court's consolidation of appeals taken separately by two or more parties.

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). By using the term "transmitting," it modifies the former rule's requirement that service of the notice of appeal be accomplished by mailing and allows the bankruptcy clerk to serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address – whether street, post office box, or email – most recently provided to the court.

Subdivision (d) modifies the provision of former Rule 8007(b), which delayed the docketing of an appeal by the appellate court until the record was complete and transmitted by the bankruptcy clerk. The new provision, adapted from F.R. App. P. 3(d) and 12(a), requires the bankruptcy clerk to promptly transmit the notice of appeal to the clerk of the appellate court. Upon receipt of the notice of appeal, the clerk of the appellate court must docket the appeal. Under this procedure, motions filed in the appellate court prior to completion and transmission of the record can generally be placed on the docket of an already pending appeal.

Rule 8004. Appeal by Leave – How Taken; Docketing of Appeal

(a) NOTICE OF APPEAL AND MOTION FOR LEAVE TO APPEAL. An appeal from an interlocutory judgment, order, or decree of a bankruptcy court as permitted by 28 U.S.C. § 158(a)(3) may be taken only by filing with the bankruptcy clerk a notice of appeal as prescribed by Rule 8003(a) and within the time allowed by Rule 8002. The notice of appeal must be accompanied by a motion for leave to appeal prepared in accordance with Rule 8004(b) and, unless served electronically using the court's transmission equipment, with proof of service in accordance with Rule 8011(d).

(b) CONTENT OF MOTION; RESPONSE.

(1) A motion for leave to appeal under 28 U.S.C. § 158(a)(3) must include the following:

(A) the facts necessary to understand the questions presented;

(B) the questions themselves;

(C) the relief sought;

(D) the reasons why leave to appeal should be granted; and

(E) an attachment of the interlocutory judgment, order, or decree from which appeal is sought, and any

related opinions or memoranda.

(2) A party may file with the clerk of the appellate court a response in opposition or a cross-motion within 14 days after the motion is served.

(c) TRANSMITTING THE NOTICE OF APPEAL AND MOTION; DOCKETING THE APPEAL; DETERMINING THE MOTION.

(1) The bankruptcy clerk must promptly transmit the notice of appeal and the motion for leave to appeal, together with any statement of election under Rule 8005, to the clerk of the appellate court.

(2) Upon receiving the notice of appeal and motion for leave to appeal, the clerk of the appellate court must docket the appeal under the title of the bankruptcy court action with the movant-appellant identified – adding the movant-appellant's name if necessary.

(3) The motion and any response or cross-motion are submitted without oral argument unless the appellate court orders otherwise. If the motion for leave to appeal is denied, the appellate court must dismiss the appeal.

(d) FAILURE TO FILE A MOTION. If an appellant does not file a motion for leave to appeal an interlocutory judgment,

order, or decree, but timely files a notice of appeal, the appellate court may:

- direct the appellant to file a motion for leave to appeal; or
- treat the notice of appeal as a motion for leave to appeal and either grant or deny leave.

If the court directs that a motion for leave to appeal be filed, the appellant must file the motion within 14 days after the order directing the filing is entered, unless the order provides otherwise.

(e) DIRECT APPEAL TO COURT OF APPEALS. If leave to appeal an interlocutory judgment, order, or decree is required under 28 U.S.C. § 158(a)(3) and has not been granted by the appellate court, an authorization by the court of appeals of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the requirement for leave to appeal.

COMMITTEE NOTE

This rule is derived from former Rules 8001(b) and 8003 and F.R. App. P. 5. It retains the practice for interlocutory bankruptcy appeals of requiring a notice of appeal to be filed along with a motion for leave to appeal. Like current Rule 8003, it alters the timing of the docketing of the appeal in the appellate court.

Subdivision (a) requires a party seeking leave to appeal under 28 U.S.C. § 158(a)(3) to file with the bankruptcy clerk both a notice of appeal and a motion for leave to appeal.

Subdivision (b) prescribes the contents of the motion, retaining the

requirements of former Rule 8003(a). It also continues to allow another party to file a cross-motion or response to the appellant's motion. Because of the prompt docketing of the appeal under the current rule, the cross-motion or response must be filed in the appellate court, rather than in the bankruptcy court as the former rule required.

Subdivision (c) requires the bankruptcy clerk to transmit promptly the notice of appeal and the motion for leave to appeal to the appellate court. Upon receipt of the notice and the motion, the clerk of the appellate court must docket the appeal. Unless the appellate court orders otherwise, no oral argument will be held on the motion.

Subdivision (d) retains the provisions of former Rule 8003(c). It provides that if the appellant timely files a notice of appeal, but fails to file a motion for leave to appeal, the court can either direct that a motion be filed or treat the notice of appeal as the motion and either grant or deny leave.

Subdivision (e), like former Rule 8003(d), treats the authorization of a direct appeal by the court of appeals as a grant of leave to appeal under 28 U.S.C. § 158(a)(3) if the appellate court has not already granted leave to appeal. Thus a separate order granting leave to appeal is not required. If the court of appeals grants permission to appeal, the record must be assembled and transmitted in accordance with Rules 8009 and 8010.

Rule 8005. Election to Have Appeal Heard by District Court Instead of BAP

(a) FILING OF THE STATEMENT OF ELECTION. To elect under 28 U.S.C. § 158(c)(1) to have an appeal heard by the district court, a party must:

(1) submit a statement of election that conforms substantially to the appropriate Official Form; and

(2) file the statement within the time prescribed by 28 U.S.C. § 158(c)(1).

(b) TRANSFER OF THE APPEAL. Upon receiving an appellant's timely statement of election, the bankruptcy clerk must transmit all documents related to the appeal to the district court. Upon receiving a timely statement of election by a party other than the appellant, the BAP clerk must promptly transfer the appeal and any pending motions to the district court.

(c) DETERMINING THE VALIDITY OF AN ELECTION. No later than 14 days after the statement of election is filed, a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

(d) APPEAL BY LEAVE – TIMING OF ELECTION. If an appellant moves for leave to appeal under Rule 8004 and fails to file a separate notice of appeal concurrently with the filing of its

motion, the motion must be treated as if it were a notice of appeal for purposes of determining the timeliness of the filing of a statement of election.

COMMITTEE NOTE

This rule is derived from former Rule 8001(e), and it implements 28 U.S.C. § 158(c)(1).

As was required by the former rule, subdivision (a) requires an appellant that elects to have its appeal heard by a district court, rather than a BAP, to file with the bankruptcy clerk a statement of election when it files its notice of appeal. The statement must conform substantially to the appropriate Official Form. If a BAP has been established for appeals from the bankruptcy court and the appellant does not file a timely statement of election, any other party that elects to have the appeal heard by the district court must file a statement of election with the BAP clerk no later than 30 days after service of the notice of appeal.

Subdivision (b) requires the bankruptcy clerk to transmit all appeal documents to the district clerk if the appellant files a timely statement of election. If the appellant does not make that election, the bankruptcy clerk must transmit the appeal documents to the BAP clerk, and upon a timely election by any other party, the BAP clerk must promptly transfer the appeal to the district court.

Subdivision (c) provides a new procedure for the resolution of disputes regarding the validity of an election. A motion challenging the validity of an election must be filed no later than 14 days after the statement of election is filed. Nothing in this rule prevents a court from determining the validity of an election on its own motion.

Subdivision (d) provides that, in the case of an appeal by leave, if the appellant files a motion for leave to appeal but fails to file a notice of appeal, the filing and service of the motion will be treated for timing purposes under this rule as the filing and service of the notice of appeal.

Rule 8006. Certification of Direct Appeal to Court of Appeals

(a) EFFECTIVE DATE OF CERTIFICATION. Certification of a judgment, order, or decree of a bankruptcy court for direct review in a court of appeals under 28 U.S.C. § 158(d)(2) is effective when the following events have occurred:

(1) the certification has been filed;

(2) a timely appeal has been taken from the judgment, order, or decree in accordance with Rule 8003 or 8004; and

(3) the notice of appeal has become effective under Rule 8002.

(b) FILING OF CERTIFICATION. The certification required by 28 U.S.C. § 158(d)(2)(A) must be filed with the clerk of the court in which a matter is pending. For purposes of this rule, a matter is pending in the bankruptcy court for 30 days after the effective date of the first notice of appeal from the judgment, order, or decree for which direct review in the court of appeals is sought. A matter is pending in the appellate court thereafter.

(c) JOINT CERTIFICATION BY ALL APPELLANTS AND APPELLEES. A joint certification by all the appellants and appellees under 28 U.S.C. § 158(d)(2)(A) must be made by

executing the appropriate Official Form and filing it with the clerk of the court in which the matter is pending. The parties may supplement the certification with a short statement of the basis for the certification, which may include the information listed in Rule 8006(f)(3).

(d) COURT THAT MAY MAKE CERTIFICATION.

(1) Only the bankruptcy court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(2) Only the appellate court may make a certification on request of parties or on its own motion while the matter is pending before it as provided in Rule 8006(b).

(e) CERTIFICATION ON THE COURT'S OWN MOTION.

(1) A certification on the court's own motion under 28 U.S.C. § 158(d)(2)(A) must be set forth in a separate document. The clerk of the certifying court must serve this document on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1). The certification must be accompanied by an opinion or memorandum that contains the information required by Rule 8006(f)(3)(A)-(D).

(2) Within 14 days after the court's certification, a

party may file with the clerk of the certifying court a short supplemental statement regarding the merits of certification.

(f) CERTIFICATION BY THE COURT ON REQUEST.

(1) A request by a party for certification that a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists, or a request by a majority of the appellants and a majority of the appellees, must be filed with the clerk of the court in which the matter is pending within the time specified by 28 U.S.C. § 158(d)(2)(E).

(2) A request for certification must be served in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(3) A request for certification must include the following:

(A) the facts necessary to understand the question presented;

(B) the question itself;

(C) the relief sought;

(D) the reasons why the appeal should be allowed and is authorized by statute and rule, including why a circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and

(E) a copy of the judgment, order, or decree that is the subject of the requested certification and any related opinion or memorandum.

(4) A party may file a response to a request for certification within 14 days after the request is served, or such other time as the court in which the matter is pending may allow. A party may file a cross-request for certification within 14 days after the request is served, or within 60 days after the entry of the judgment, order, or decree, whichever occurs first.

(5) The request, cross-request, and any response are not governed by Rule 9014 and are submitted without oral argument unless the court in which the matter is pending otherwise directs.

(6) A certification of an appeal under 28 U.S.C. § 158(d)(2) in response to a request must be made in a separate document served on the parties in the manner required for service of a notice of appeal under Rule 8003(c)(1).

(g) PROCEEDING IN THE COURT OF APPEALS FOLLOWING CERTIFICATION. A request for permission to take a direct appeal to the court of appeals under 28 U.S.C. § 158(d)(2) must be filed with the circuit clerk within 30 days after the date the certification becomes effective under subdivision (a).

COMMITTEE NOTE

This rule is derived from former Rule 8001(f), and it provides the procedures for the certification of a direct appeal of a judgment, order, or decree of a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Once a case has been certified in the bankruptcy court or the appellate court for direct appeal and a request for permission to appeal has been timely filed, the Federal Rules of Appellate Procedure govern further proceedings in the court of appeals.

Subdivision (a), like the former rule, requires that an appeal be properly taken – now under Rule 8003 or 8004 – before a certification for direct review in the court of appeals takes effect. This rule requires the timely filing of a notice of appeal under Rule 8002 and accounts for the delayed effectiveness of a notice of appeal under the circumstances specified in Rule 8002. Normally a notice of appeal is effective when it is filed in the bankruptcy court. Rule 8002, however, delays the effectiveness of a notice of appeal when (1) it is filed after the announcement of a decision or order but prior to the entry of the judgment, order, or decree; or (2) it is filed after the announcement or entry of a judgment, order, or decree but before the bankruptcy court disposes of certain post-judgment motions.

When the bankruptcy court enters an interlocutory judgment, order, or decree that is appealable under 28 U.S.C. § 158(a)(3), certification for direct review in the court of appeals may take effect before the appellate court grants leave to appeal. The certification is effective when the actions specified in subdivision (a) have occurred. Rule 8004(e) provides that if the court of appeals grants permission to take a direct appeal before leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

Subdivision (b) provides that a certification must be filed in the court in which the matter is pending, as determined by this subdivision. This provision modifies the former rule. Because of the prompt docketing of appeals in the appellate court under Rules 8003 and 8004, a matter is deemed – for purposes of this rule only – to remain pending in the bankruptcy court for 30 days after the effective date of the notice of appeal. This provision will in appropriate cases give the bankruptcy judge, who will be familiar with the matter being appealed, an opportunity to decide whether certification for direct review is appropriate. Similarly, subdivision (d) provides that, when certification is made by the court, only the court in which the matter is then pending according to (b) may make the

certification.

Section 158(d)(2) provides three different ways in which an appeal may be certified for direct review. Implementing these options, the rule provides in subdivision (c) for the joint certification by all appellants and appellees, in subdivision (e) for the bankruptcy or appellate court's certification on its own motion, and in subdivision (f) for the bankruptcy or appellate court's certification on request of a party or of a majority of appellants and a majority of appellees.

Subdivision (g) requires that, once a certification for direct review has been made, a request to the court of appeals for permission to take a direct appeal to that court must be filed with the circuit clerk no later than 30 days after the effective date of the certification. Rule 6(c) of the Federal Rules of Appellate Procedure, which incorporates all of F.R. App. P. 5 except subdivision (a)(3), prescribes the procedure for requesting the permission of the court of appeals, and it governs proceedings that take place thereafter in that court.

Rule 8007. Stay Pending Appeal; Bonds; Suspension of Proceedings

(a) INITIAL MOTION IN THE BANKRUPTCY COURT; TIME TO FILE.

(1) A party must ordinarily move first in the bankruptcy court for the following relief:

(A) a stay of a judgment, order, or decree of the bankruptcy court pending appeal;

(B) approval of a supersedeas bond;

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending; or

(D) the suspension or continuation of proceedings in a case or other relief permitted by Rule 8007(e).

(2) A motion for a type of relief specified in Rule 8007(a)(1) may be made in the bankruptcy court either before or after the filing of a notice of appeal of the judgment, order, or decree appealed from.

(b) MOTION IN THE APPELLATE COURT OR THE COURT OF APPEALS IN A DIRECT APPEAL; CONDITIONS ON RELIEF.

(1) A motion for a type of relief specified in Rule 8007(a)(1), or to vacate or modify an order of the bankruptcy court granting such relief, may be made in the appellate court or in the

court of appeals in a direct appeal to that court.

(2) The motion must:

(A) show that it would be impracticable to move first in the bankruptcy court if the moving party has not sought relief in the first instance in the bankruptcy court; or

(B) state the bankruptcy court's ruling and any reasons given by the bankruptcy court for its ruling.

(3) The motion must also include:

(A) the reasons for granting the relief requested and the pertinent facts;

(B) originals or copies of affidavits or other sworn statements supporting facts subject to dispute; and

(C) relevant parts of the record.

(4) The movant must give reasonable notice of the motion to all parties.

(c) FILING OF BOND OR OTHER SECURITY. The appellate court may condition relief under this rule on the filing of a bond or other appropriate security with the bankruptcy court.

(d) REQUIREMENT OF BOND FOR TRUSTEE OR THE UNITED STATES. When a trustee appeals, a bond or other appropriate security may be required. When an appeal is taken by the United States, its officer, or its agency or by direction of any

department of the federal government, a bond or other security is not required.

(e) CONTINUATION OF PROCEEDINGS IN THE BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject to the authority of the appellate court or court of appeals, the bankruptcy court may:

(1) suspend or order the continuation of other proceedings in the case; or

(2) make any other appropriate orders during the pendency of an appeal on terms that protect the rights of all parties in interest.

COMMITTEE NOTE

This rule is derived from former Rule 8005 and F.R. App. P. 8. It now applies to direct appeals in courts of appeals.

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1) expands the list of relief enumerated in F.R. App. P. 8(a)(1) to reflect bankruptcy practice. It includes the suspension or continuation of other proceedings in the bankruptcy case, as authorized by subdivision (e). Subdivision (a)(2) clarifies that a motion for a stay pending appeal, approval of a supersedeas bond, or any other relief specified in paragraph (1) may be made in the bankruptcy court before or after the filing of a notice of appeal.

Subdivision (b) authorizes a party to seek the relief specified in (a)(1), or the vacation or modification of the granting of such relief, by means of a motion filed in the appellate court or the court of appeals. Accordingly, a notice of appeal need not be filed with respect to a bankruptcy court's order granting or denying such a motion. The motion for relief in the appellate court or court of appeals must state why it was impracticable to seek relief initially in the bankruptcy court, if a motion was

not filed there, or why the bankruptcy court denied the relief sought.

Subdivisions (c) and (d) retain the provisions of the former rule that permit the appellate court (and now the court of appeals) to condition the granting of relief on the posting of a bond by the appellant, except when that party is a federal government entity. Rule 9025 governs proceedings against sureties.

Rule 8008. Indicative Rulings

(a) RELIEF PENDING APPEAL. If a party files a timely motion in the bankruptcy court for relief that the bankruptcy court lacks authority to grant because of an appeal that has been docketed and is pending, the bankruptcy court may:

(1) defer consideration of the motion;

(2) deny the motion; or

(3) state that the court would grant the motion if the court in which the appeal is pending remands for that purpose, or state that the motion raises a substantial issue.

(b) NOTICE TO COURT IN WHICH THE APPEAL IS PENDING. If the bankruptcy court states that it would grant the motion, or that the motion raises a substantial issue, the movant must promptly notify the clerk of the court in which the appeal is pending.

(c) REMAND AFTER INDICATIVE RULING. If the bankruptcy court states that it would grant the motion or that the motion raises a substantial issue and the appeal is pending in an appellate court, the appellate court may remand for further proceedings, but it retains jurisdiction unless it expressly dismisses the appeal. If the appellate court remands but retains jurisdiction, the parties must promptly notify the clerk of that court when the

bankruptcy court has decided the motion on remand.

COMMITTEE NOTE

This rule is an adaptation of F.R. Civ. P. 62.1 and F.R. App. P. 12.1. It provides a procedure for the issuance of an indicative ruling when a bankruptcy court determines that, because of a pending appeal, the court lacks jurisdiction to grant a request for relief that the court concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy court's authority to act in the face of a pending appeal. (Rule 8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. In these circumstances, the bankruptcy court has authority to resolve the motion without resorting to the indicative ruling procedure.)

Subdivision (b) requires the movant to notify the court in which an appeal is pending if the bankruptcy court states that it would grant the motion or that it raises a substantial issue. This provision applies to appeals pending in the district court, the BAP, or the court of appeals.

Federal Rules of Appellate Procedure 6 and 12.1 govern the procedure in the court of appeals following notification of the bankruptcy court's indicative ruling.

Subdivision (c) of this rule governs the procedure in the district court or BAP upon notification that the bankruptcy court has issued an indicative ruling. The appellate court may remand to the bankruptcy court for a ruling on the motion for relief. The appellate court may also remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. Otherwise, the appellate court may remand for the purpose of ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy court rules, provided that the appeal is not then moot and any party wishes to proceed.

Rule 8009. Record and Issues on Appeal; Sealed Documents

(a) DESIGNATION AND COMPOSITION OF RECORD ON APPEAL; STATEMENT OF ISSUES ON APPEAL.

(1) *Appellant's Duties.* Within 14 days after:

- filing a notice of appeal as prescribed by Rule 8003(a);
- entry of an order granting leave to appeal; or
- entry of an order disposing of the last remaining motion of a kind listed in Rule 8002(b)(1);

whichever is later,

the appellant must file with the bankruptcy clerk and serve on the appellee a designation of the items to be included in the record on appeal and a statement of the issues to be presented. A designation and statement served prematurely must be treated as served on the first day on which filing is timely under this paragraph.

(2) *Appellee's and Cross-Appellant's Duties.* Within 14 days after service of the appellant's designation and statement, the appellee may file and serve on the appellant a designation of additional items to be included in the record on appeal and, if the appellee has filed a cross-appeal, the appellee as cross-appellant must file and serve a statement of the issues to be presented on the cross-appeal and a designation of additional items

to be included in the record.

(3) *Cross-Appellee's Duties*. Within 14 days after service of the cross-appellant's designation and statement, a cross-appellee may file and serve on the cross-appellant a designation of additional items to be included in the record.

(4) *Record on Appeal*. Subject to Rule 8009(d) and (e), the record on appeal must include the following:

- items designated by the parties as provided by paragraphs (1)-(3);
- the notice of appeal;
- the judgment, order, or decree being appealed;
- any order granting leave to appeal;
- any certification under 28 U.S.C. § 158(d)(2);
- any opinion, findings of fact, and conclusions of law of the court relating to the subject of the appeal, including transcripts of all oral rulings;
- any transcript ordered as prescribed by Rule 8009(b); and
- any statement required by Rule 8009(c).

Notwithstanding the parties' designations, the appellate court may order the inclusion of additional items from the record as part of the record on appeal.

(5) *Copies for the Bankruptcy Clerk.* If paper copies are needed, a party filing a designation of items to be included in the record must provide to the bankruptcy clerk a copy of any designated items that the bankruptcy clerk requests. If the party fails to provide the copy, the bankruptcy clerk must prepare the copy at the party's expense.

(b) TRANSCRIPT OF PROCEEDINGS.

(1) *Appellant's Duty*. Within the time period prescribed by Rule 8009(a)(1), the appellant must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not already on file that the appellant considers necessary for the appeal, and file the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the appellant is not ordering a transcript.

(2) *Cross-Appellant's Duty*. Within 14 days after the appellant files with the bankruptcy clerk a copy of the transcript order or a certificate stating that appellant is not ordering a transcript, the appellee as cross-appellant must:

(A) order in writing from the reporter a transcript of any parts of the proceedings not ordered by appellant and not already on file that the cross-appellant considers necessary

for the appeal, and file a copy of the order with the bankruptcy clerk; or

(B) file with the bankruptcy clerk a certificate stating that the cross-appellant is not ordering a transcript.

(3) *Appellee's or Cross-Appellee's Right to Order*. Within 14 days after the appellant or cross-appellant files with the bankruptcy clerk a copy of a transcript order or certificate stating that a transcript will not be ordered, the appellee or cross-appellee may order in writing from the reporter a transcript of any parts of the proceedings not already ordered or on file that the appellee or cross-appellee considers necessary for the appeal. The order must be filed with the bankruptcy clerk.

(4) *Payment*. At the time of ordering, a party must make satisfactory arrangements with the reporter for paying the cost of the transcript.

(5) *Unsupported Finding or Conclusion.* If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all testimony and copies of all exhibits relevant to that finding or conclusion.

(c) STATEMENT OF THE EVIDENCE WHEN A

TRANSCRIPT IS UNAVAILABLE. Within the time period prescribed by Rule 8009(a)(1), the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection, if a transcript of a hearing or trial is unavailable. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be submitted to the bankruptcy court for settlement and approval. As settled and approved, the statement must be included by the bankruptcy clerk in the record on appeal.

(d) AGREED STATEMENT AS THE RECORD ON APPEAL. Instead of the record on appeal as defined in (a), the parties may prepare, sign, and submit to the bankruptcy court a statement of the case showing how the issues presented by the appeal arose and were decided in the bankruptcy court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the court's resolution of the issues. If the statement is accurate, it, together with any additions that the bankruptcy court may consider necessary to a full presentation of the issues on appeal, must be approved by the bankruptcy court and certified to the appellate court as the record

on appeal. The bankruptcy clerk must then transmit it to the clerk of the appellate court within the time provided by Rule 8010. A copy of the agreed statement may be filed instead of the appendix required by Rule 8018(b).

(e) CORRECTION OR MODIFICATION OF THE RECORD.

(1) If any difference arises about whether the record truly discloses what occurred in the bankruptcy court, the difference must be submitted to and settled by that court and the record conformed accordingly. If an item has been improperly designated as part of the record on appeal, a party may move to strike the improperly designated item.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected, and a supplemental record may be certified and transmitted:

(A) on stipulation of the parties;

(B) by the bankruptcy court before or after the record has been forwarded; or

(C) by the appellate court.

(3) All other questions as to the form and content of the record must be presented to the appellate court.

(f) SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party must identify it without revealing confidential or secret information. The bankruptcy clerk must not transmit a sealed document to the clerk of the appellate court as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court as part of the record on appeal must file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the appellate court.

(g) OTHER. All parties to an appeal must take any other action necessary to enable the bankruptcy clerk to assemble and transmit the record.

(h) DIRECT APPEALS TO COURT OF APPEALS. Rules 8009 and 8010 apply to appeals taken directly to the court of appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009 and 8010 to the "appellate court" includes the court of appeals when it has authorized a direct appeal under 28 U.S.C. § 158(d)(2). In direct appeals to the court of appeals, the reference in Rule 8009(d) to Rule 8018(b) means F.R. App. P. 30.

COMMITTEE NOTE

This rule is derived from former Rule 8006 and F.R. App. P. 10 and 11(a). It retains the practice of former Rule 8006 of requiring the parties to designate items to be included in the record on appeal. In this respect the bankruptcy rule differs from the appellate rule. Among other things, F.R. App. P. 10(a) provides that the record on appeal consists of all the documents and exhibits filed in the case. This requirement would often be unworkable in a bankruptcy context because thousands of items might have been filed in the overall bankruptcy case.

Subdivision (a) provides the time period for the appellant's filing of a designation of items to be included in the record on appeal and a statement of the issues to be presented. It then provides for the designation of additional items by the appellee, cross-appellant, and cross-appellee, as well as for the cross-appellant's statement of the issues to be presented in its appeal. Subdivision (a)(4) prescribes the content of the record on appeal. Ordinarily, the bankruptcy clerk will not need to have paper copies of the designated items because the clerk will either transmit them to the appellate court electronically or otherwise make them available electronically. If the bankruptcy clerk requires a paper copy of some or all of the items designated as part of the record, the clerk may request the parties to provide the necessary copies, and the parties must comply with the request.

Subdivision (b) governs the process for ordering a complete or partial transcript of the bankruptcy court proceedings. In situations in which a transcript is unavailable, subdivision (c) allows for the parties' preparation of a statement of the evidence or proceedings, which must be approved by the bankruptcy court.

Subdivision (d) adopts the practice of F.R. App. P. 10(d) of permitting the parties to agree on a statement of the case in place of the record on appeal. The statement must show how the issues on appeal arose and were decided in the bankruptcy court. It must be approved by the bankruptcy court in order to be certified as the record on appeal.

Subdivision (e), modeled on F.R. App. P. 10(e), provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated.

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the

appellate court to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the appellate court.

Subdivision (g), which requires the parties' cooperation with the bankruptcy clerk in assembling and transmitting the record, retains the requirement of former Rule 8006, which was adapted from F.R. App. P. 11(a).

Subdivision (h) is new. It makes the provisions of this rule and Rule 8010 applicable to appeals taken directly to a court of appeals under 28 U.S.C. § 158(d)(2). See F.R. App. P. 6(c)(2)(A) and (B).

Rule 8010. Completion and Transmission of the Record

(a) DUTIES OF REPORTER TO PREPARE AND FILE TRANSCRIPT. The reporter must prepare and file a transcript as follows:

(1) Upon receiving an order for a transcript, the reporter must file in the bankruptcy court an acknowledgment of the request, the date it was received, and the date on which the reporter expects to have the transcript completed.

(2) Upon completing the transcript, the reporter must file it with the bankruptcy clerk, who will notify the clerk of the appellate court of the filing.

(3) If the transcript cannot be completed within 30 days of receipt of the order, the reporter must seek an extension of time from the bankruptcy clerk. The clerk must enter on the docket and notify the parties whether the extension is granted.

(4) If the reporter does not file the transcript within the time allowed, the bankruptcy clerk must notify the bankruptcy judge.

(b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT RECORD.

(1) Subject to Rules 8009(f) and 8010(b)(5), when

the record is complete for purposes of appeal, the bankruptcy clerk must transmit to the clerk of the appellate court either the record or a notice of the availability of the record and the means of accessing it electronically.

(2) If there are multiple appeals from a judgment or order, the bankruptcy clerk must transmit a single record.

(3) Upon receiving the transmission of the record or notice of the availability of the record, the clerk of the appellate court must enter its receipt on the docket and give prompt notice to all parties to the appeal.

(4) If the appellate court directs that paper copies of the record be furnished, the clerk of that court must notify the appellant and, if the appellant fails to provide the copies, the bankruptcy clerk must prepare the copies at the appellant's expense.

(5) Subject to Rule 8010(c), if a motion for leave to appeal has been filed with the bankruptcy clerk under Rule 8004, the bankruptcy clerk must prepare and transmit the record only after the appellate court grants leave to appeal.

(c) RECORD FOR PRELIMINARY MOTION IN APPELLATE COURT. If, prior to the transmission of the record as prescribed by (b), a party moves in the appellate court for any of

the following relief:

- leave to appeal;
- dismissal;
- a stay pending appeal;
- approval of a supersedeas bond, or additional security on a bond or undertaking on appeal; or
- any other intermediate order –

the bankruptcy clerk, at the request of any party to the appeal, must transmit to the clerk of the appellate court any parts of the record designated by a party to the appeal or a notice of the availability of those parts and the means of accessing them electronically.

COMMITTEE NOTE

This rule is derived from former Rule 8007 and F.R. App. P 11.

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript. In courts that record courtroom proceedings electronically, the person who transcribes the recording of a proceeding is the reporter for purposes of this rule.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete and, in the case of appeals under 28 U.S.C. § 158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed

electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the appellate court to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the appellate court dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be sent promptly to the appellate court by the bankruptcy clerk. Accordingly, by the time the clerk of the appellate court receives the record, the appeal will already be docketed in that court.

Subdivision (c) is derived from former Rule 8007(c) and F.R. App. P. 11(g) . It provides for the transmission of parts of the record designated by the parties for consideration by the appellate court in ruling on specified preliminary motions filed prior to the preparation and transmission of the record on appeal.

Rule 8009(h) makes this rule applicable to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). It also provides that, for purposes of this rule and Rule 8009,"appellate court" includes the court of appeals when it has authorized a direct appeal under § 158(d)(2).

Rule 8011. Filing and Service; Signature

(a) FILING.

(1*) Filing with the Clerk.* A document required or permitted to be filed in the appellate court must be filed with the clerk of that court.

(2) *Filing: Method and Timeliness.*

(A) *In general*. Filing may be accomplished by transmission to the clerk of the appellate court. Except as provided in Rule 8011(a)(2)(B)(ii), (B)(iii), and (C), filing is timely only if the clerk receives the document within the time fixed for filing.

(B) *Brief or appendix*. A brief or appendix is timely filed if, on or before the last day for filing, it is:

(i) transmitted to the clerk of the appellate court in accordance with applicable electronic transmission procedures for the filing of documents in that court;

(ii) mailed to the clerk of the appellate court by first-class mail – or other class of mail that is at least as expeditious – postage prepaid, if the court's procedures permit or require a brief or appendix to be filed by mailing; or

(iii) dispatched to a third-party commercial carrier for delivery within three days to the clerk of the

appellate court, if the court's procedures permit or require a brief or appendix to be filed by commercial carrier.

(C) *Inmate filing*. A document filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(D) *Copies*. If a document is filed electronically in the appellate court, no paper copy is required. If a document is filed by mail or delivery to the appellate court, no additional copies are required The appellate court may, however, require by local rule or order in a particular case the filing or furnishing of a specified number of paper copies.

(3) *Filing a Motion with a Judge*. In appeals to the BAP, if a motion requests relief that may be granted by a single judge, any judge of that court may permit the motion to be filed with that judge. The judge must note the filing date on the motion and transmit it to the BAP clerk.

(4) *Clerk's Refusal of Documents*. The clerk of the appellate court must not refuse to accept for filing any document transmitted for that purpose solely because it is not presented in proper form as required by these rules or by any local rule or practice.

(b) SERVICE OF DOCUMENTS REQUIRED. Copies of all documents filed by any party and not required by these Part VIII rules to be served by the clerk of the appellate court must, at or before the time of filing, be served on all other parties to the appeal by the party making the filing or a person acting for that party. Service on a party represented by counsel must be made on counsel.

(c) MANNER OF SERVICE.

(1) Service must be made electronically if feasible and permitted by local procedure. If not, service may be made by any of the following methods:

(A) personal, including delivery to a responsible person at the office of counsel;

(B) mail; or

(C) third-party commercial carrier for delivery within three days.

(2) When it is reasonable, considering such factors as the immediacy of the relief sought, distance, and cost, service on a party must be by a manner at least as expeditious as the manner used to file the document with the appellate court.

(3) Service by mail or by commercial carrier is complete on mailing or delivery to the carrier. Service by electronic means is complete on transmission, unless the party making service receives notice that the document was not transmitted successfully to the party attempted to be served.

(d) PROOF OF SERVICE.

(1) Documents presented for filing must contain either:

(A) an acknowledgment of service by the person served; or

(B) proof of service in the form of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) for each person served, the mail or electronic address, facsimile number, or the address of the place of delivery, as appropriate for the manner of service.

(2) The clerk of the appellate court may permit documents to be filed without acknowledgment or proof of service at the time of filing, but must require the acknowledgment or proof of service to be filed promptly thereafter.

(3) When a brief or appendix is filed by mailing, delivery, or electronic transmission in accordance with Rule 8011(a)(2)(B), the proof of service must also state the date and manner by which the document was filed.

(e) SIGNATURE. If filed electronically, every motion, response, reply, brief, or submission authorized by these Part VIII rules must include the electronic signature of the person filing the document or, if the person is represented, the electronic signature of counsel. The electronic signature must be provided by electronic means that are consistent with any technical standards that the Judicial Conference of the United States establishes. If filed in paper form, every motion, response, reply, brief, or submission authorized by these rules must be signed by the person filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

This rule is derived from former Rule 8008 and F.R. App. P. 25. It adopts some of the additional details of the appellate rule, and it provides greater recognition of the possibility of electronic filing and service.

Subdivision (a) governs the filing of documents in the appellate court. Consistent with other provisions of these Part VIII rules, subdivision (a)(2) requires electronic filing of documents, including briefs and appendices, unless the appellate court's procedures permit or require other methods of delivery to the court. An electronic filing is timely if it is received by the clerk of the appellate court within the time fixed for filing. No paper copies need be submitted when documents are filed electronically, unless the appellate court requires them.

Subdivision (a)(4) provides that the clerk of the appellate court may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The appellate court may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rule, and may prescribe such other relief as the court deems appropriate.

Subdivisions (b) and (c) address the service of documents in the appellate court. Except for documents that the clerk of the appellate court must serve, a party that makes a filing must serve copies of the document on all other parties to the appeal. Service on represented parties must be made on counsel. The methods of service are listed in subdivision (c). Electronic service is required when feasible and authorized by the appellate court.

Subdivision (d) retains the former rule's provisions regarding proof of service of a document filed in the appellate court. In addition it provides that, when service is made electronically, a certificate of service must state the mail or electronic address or facsimile number to which service was made.

Subdivision (e) is a new provision that requires an electronic signature of counsel or an unrepresented filer for documents that are filed electronically in the appellate court. The method of providing an electronic signature may be specified by a local court rule that is consistent with any standards established by the Judicial Conference of the United States. Paper copies of documents filed in the appellate court must bear an actual signature of counsel or the filer. By requiring a signature, subdivision (e) ensures that a readily identifiable attorney or party takes responsibility for every document that is filed.

Rule 8012. Corporate Disclosure Statement

(a) WHO MUST FILE. Any nongovernmental corporate party appearing in the appellate court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(b) TIME FOR FILING; SUPPLEMENTAL FILING. A party must file the statement prescribed by subdivision (a) with its principal brief or upon filing a motion, response, petition, or answer in the appellate court, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include a statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under subdivision (a) changes.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 26.1. It requires the filing of corporate disclosure statements and supplemental statements in order to assist appellate court judges in determining whether they have interests that should cause recusal. If filed separately from a brief, motion, response, petition, or answer, the statement must be filed and served in accordance with Rule 8011. Under Rule 8015(a)(7)(B)(iii), the corporate disclosure statement is not included in calculating applicable word-count limitations.

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 26 - 27, 2011
Chicago, Illinois

(DRAFT MINUTES)

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge Robert James Jonker
District Judge Adalberto Jordan
District Judge William H. Pauley III
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire

The following persons also attended the meeting:

District Judge Jean Hamilton (new member – term beginning 10/01/11)
Richardo I. Kilpatrick, Esquire (new member – term beginning 10/01/11)
Professor S. Elizabeth Gibson, reporter
Professor Troy McKenzie, assistant reporter
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joan Humphrey Lefkow, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee)
Professor Daniel Coquillette, reporter of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Nan Eitel, Associate General Counsel – Chapter 11, EOUST
Professor Douglas Baird (attended second day only)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Jonathan Rose, Rules Committee Support Officer, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Administrative Office
Jeffery Barr, Administrative Office
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office

Molly Johnson, Federal Judicial Center (FJC)
Beth Wiggins, FJC
Christopher Blickley, law clerk for the Hon. Eugene R. Wedoff
Kathy Byrne, Cooney & Conway
Joseph D. Frank, Frank/Gecker LLP

The following member was unable to attend the meeting:

John Rao, Esquire

Introductory Items

1. Greetings; Introduction of new committee members and Administrative Office staff, and acknowledgment of the service of outgoing committee members.

The Chair welcomed new members Judge Jean Hamilton (E.D. MO), and Richardo I. Kilpatrick, Esquire. He also introduced the Administrative Office's new Rules Committee Officer, Jonathon Rose, and its Deputy Rules Committee Officer, Benjamin Robinson.

The Chair thanked outgoing members Judge William Pauley and Michael Lamberth for their hard work and their many contributions to the Committee over the past six years.

2. Approval of minutes of San Francisco meeting of April 7 - 8, 2011.

The San Francisco minutes were approved with minor changes noted by Mr. Kohn.

3. Oral reports on meetings of other committees:

(A) June 2011 meeting of the Committee on Rules of Practice and Procedure.

The Chair said the Standing Committee approved all the Committee's action items.

(B) June 2010 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Lefkow reported that in light of current budget concerns, Congress is unlikely to approve the Judicial Conference's most recent request for over 50 additional bankruptcy judges. Consequently, the Bankruptcy Committee was focused on the need for extending the 28 temporary bankruptcy judgeship positions that were added in 2005 and are now set to expire. She explained that the expiration of a temporary bankruptcy judgeship position in a district means that the next retiring judge in that district cannot be replaced – unless the temporary position is extended. Because roughly two thirds of bankruptcy judges will be eligible for retirement in the next 10

years, a contraction of the total number of bankruptcy judges is likely if the temporary positions are not extended or made permanent.

Judge Lefkow said that the Bankruptcy Committee has approved a policy for courtroom sharing in new construction. She said the new policy would be triggered most often in larger courts, but would probably have no immediate effect because new construction is unlikely in the current budget environment.

(C) Meeting of the Advisory Committee on Civil Rules.

Judge Harris said that Civil Rules Committee will not meet until November, but that its Subcommittee on Discovery held a mini-conference on discovery preservation and sanctions issues in Dallas on September 9. He said no decisions were made at the mini-conference, but that much of the material discussed has been posted on the U.S. Courts' public website at: http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/DallasMiniConfSept2011.aspx.

(D) Meeting of the Advisory Committee on Evidence.

Judge Wizmur said the Evidence Committee will next meet in October and that there is nothing new to report since its last meeting. She said the restyled evidence rules have been approved and are in effect. She also noted that a proposed amendment to Evidence Rule 803(10) was out for publication. The amendment—to the hearsay exception for absence of public record or entry—is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts,* 129 S. Ct. 2527 (2009).

(E) Meeting of the Advisory Committee on Appellate Rules.

The Reporter said the Appellate Rules Committee will next meet in October. She noted that the Committee met jointly with the Appellate Rules Committee at its last meeting to discuss proposed changes to the bankruptcy appellate rules (the Part VIII Rules). She said that the Appellate Rules Committee was also proposing amendments to Appellate Rule 6 concerning bankruptcy appeals, including a new subdivision governing appeals taken directly to a court of appeals from a bankruptcy court. The proposed amendments are designed to coordinate with proposed changes to the Part VIII Rules.

(F) Bankruptcy CM/ECF Working Group and the CM/ECF NextGen Project.

Judge Perris reported on the work of the CM/ECF Working Group and the CM/ECF NextGen Project in the context of her report on the Forms Modernization Project at Agenda Item 7.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion (11-BK-B) by Judge A. Benjamin Goldgar (Bankr. N.D. Ill.) to amend Rule 3002(a) to require secured creditors to file proofs of claim.

The Assistant Reporter said that Judge Goldgar suggests amending the Bankruptcy Rules to require secured creditors to file proofs of claim. According to Judge Goldgar, Rule 3002(a), which currently provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ," has led to confusion with respect to the need for secured creditors to file claims. Courts disagree on two related questions: (1) whether a secured creditor must file a proof of claim to participate in a chapter 13 plan, and (2) whether a nongovernmental secured creditor must file a proof of claim within 90 days of the meeting of creditors, as required by Rule 3002(c).

The Subcommittee discussed Judge Goldgar's suggestion and concluded that the issue deserves further study. Because the omission of secured creditors from Rule 3002(a) has the greatest impact in chapter 13 cases, the Subcommittee recommended that the Advisory Committee fold the suggestion into the ongoing project to draft a model chapter 13 plan and related amendments to the Bankruptcy Rules.

Although several members agreed that the failure of a secured creditor to file a proof of claims was most problematic in chapter 13, where the secured creditor may be barred from collecting anything during the course of the debtor's chapter 13 plan, others noted that there are issues in chapter 7 as well. And some members suggested a possible need for different approaches in chapters 7 and 13. **After additional discussion, the Chair asked the Subcommittee to consider a rule change that would apply to all chapters, allowing for the possibility that a model plan provision might be the best approach in chapter 13**

(B) Recommendation concerning Suggestion (10-BK-K) by Judge Paul Mannes to amend Rule 4004(c)(1)(J) to delay the entry of a discharge if a scheduled hearing on a reaffirmation agreement has not concluded.

Judge Harris said the Subcommittee concluded that the basis for the suggested amendment was the requirement that a hearing to disapprove a reaffirmation agreement based on undue hardship be concluded before the entry of the discharge. Judge Mannes would add explicit language to Rule 4004(c)(1) to permit the entry of the discharge to be delayed until after the conclusion of such a hearing.

The Subcommittee, however, did not see a need for the amendment. Rule 4004(c)(1)(K) already provides for a delay in the entry of a discharge if "a presumption has arisen under § 524(m)

that a reaffirmation agreement is an undue hardship." The exception is broader than the one proposed by Judge Mannes, and it encompasses the situation he apparently had in mind. If the court has scheduled a reaffirmation hearing that has to be concluded before the discharge is entered, it would be a situation in which a presumption of undue hardship has arisen. Thus under Rule 4004(c)(1)(K), the court could delay the entry of the discharge until after the conclusion of the hearing.

Although the Subcommittee did not recommend any changes to Rule 4004(c)(1) to address the issue raised by Judge Mannes, as described in the agenda materials, it did identify some wording problems that could be considered by the Advisory Committee at an appropriate time. It also identified a more immediate issue in Rule 4004(c)(1) concerning pending changes Rule 1007(b)(7).

The Committee has proposed an amendment to Rule 1007(b)(7) that would relieve the debtor of the obligation to file Official Form 23 if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) of Rule 4004(c)(1), however, provides for delay in the entry of the discharge if "the debtor has not filed with the court a statement of completion of a course concerning personal financial management [Official Form 23] as required by Rule 1007(b)(7)." If the amendment to Rule 1007(b)(7) is adopted, Rule 4004(c)(1)(H) will need to be reworded so that it will not unnecessarily delay the discharge if the debtor's "failure" to file Official Form 23 is because the course provider has already notified the court that the debtor completed the required personal financial management course.

The Committee agreed that no amendment to Rule 4004(c) is needed to address Judge Mannes' suggestion, and asked the Subcommittee to report at the spring meeting on any needed changes to Subparagraph (c)(1)(H) to conform to the pending Rule 1007(b)(7) changes.

5. Joint Report by the Subcommittees on Business Issues and Consumer Issues.

> Recommendation concerning the opinion issued by the Ninth Circuit BAP in *Charlie Y., Inc. v. Carey* concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings.

Judge Harris explained that in March 2011 the Ninth Circuit Bankruptcy Appellate Panel issued an opinion—*Charlie Y., Inc. v. Carey (In re Carey),* 446 B.R. 384, 389 n.3 (2011)—in which it suggested that the Advisory Committee might want to address the absence of a provision in Rule 7054 concerning the procedure for obtaining an allowance of attorney's fees in adversary proceedings. Although Rule 7054(a) incorporates Civil Rule 54(a)-(c), it does not have a provision that parallels Civil Rule 54(d)(2), which governs the recovery of attorney's fees. Instead Rule 7008(b) provides that attorney fees must be pled as a claim in the complaint.

The Subcommittee recommended that Rule 7054 be amended to include much of the substance of Civil Rule 54(d)(2) and that the provision on attorney's fees in Rule 7008 be deleted. The amendments would clarify the procedure for seeking an award of attorney's fees and provide a nationally uniform procedure for doing so. They also would bring the bankruptcy rules into closer alignment with the civil rules and eliminate a trap for the unwary. Proposed language amending Rules 7054 and 7008 was included in the agenda materials.

A motion to recommend publication of amendments to Rules 7008 and 7054 as set forth in the agenda book, subject to review by the Style Subcommittee, was approved without objection.

6. Joint Reports by the Subcommittees on Consumer Issues and Forms.

(A) Recommendation on how and when to gather input on the new mortgage forms and the desirability of including a complete loan history on Form 10-A

Judge Harris gave the report. He said that in light of comments and testimony about the need for a full loan history as an attachment to the proof of claim, the Subcommittees considered how best to get feedback on the loan summary contained the newly approved attachment to the proof of claim form, B10 (Attachment A), as well as the two new proof of claim supplement forms, B10 (Supplement 1) and B10 (Supplement 2), that will be used in chapter 13 cases.

Because B10 (Attachment A), B10 (Supplement 1) and B10 (Supplement 2) will not be used until December 1, 2011, the Subcommittees suggested waiting to solicit feedback until parties have developed some experience with the new forms. They recommended, therefore, holding a mini-conference next fall, possibly in conjunction with the fall 2012 Committee meeting. The Subcommittees favored a mini-conference as the best option for promoting a back-and-forth exchange of ideas and concerns about the new forms from interested parties, but recognized that in the current budget environment cost may be a factor.

The Committee agreed that a mini-conference would provide the most effective feedback on the new proof of claim attachment and supplements and recommended such a conference in the fall, with targeted conference calls as a fallback position if funding is not available for the mini-conference. As a cost-saving measure, members agreed that the proposed mini-conference should overlap if possible with the fall Committee meeting.

(B) Oral report on consideration of a form or model chapter 13 plan.

Judge Perris reported that the working group has reviewed many of the model plans in existence, and it has requested information from judges around the country about the idea of a national model plan. The Assistant Reporter said there have been 40-50 responses – mostly in support of the project (though many supporters anticipate negative responses once a detailed plan is produced for comment). Some responses objected to the idea of a national plan, arguing that it is

more important that chapter 13 plans be flexible and allow for local practice, but that was a minority position.

Judge Perris said that the working group has gone through common plan provisions and has preliminary ideas on what should be in the plan. Many choices remain, however, such as whether claims dealt with in the plan must also be addressed through the claims allowance process, whether payments can or should be made outside the plan, and whether payments are made from a pot, or by percentage. The working group will also consider whether changes in the rules are needed to make a national chapter 13 plan easier to implement. For example, a change to Rule 3001 that requires secured creditors to file a proof of claim could also explain when and how to resolve differences (if any) in the amount listed on the proof of claim and the amount listed in the debtor's plan.

Judge Perris said that now that the working group has considered what should be in a plan, the next step will be to draft a model plan and consider possible rule changes. She said that in the spring the group may recommend rule changes and talk about seeking pre-publication comment from interested groups.

(C) Recommendation concerning the amendment of section 109(h)(1) of the Bankruptcy Code by the Bankruptcy Technical Corrections Act of 2010, Pub. L. No. 111-327, regarding the timing of credit counseling for individual debtors.

The Assistant Reporter said the Subcommittees discussed a technical change to 11 U.S.C. § 109(h)(1) that, read literally, could allow an individual debtor to complete the "pre-petition" credit counseling briefing after the petition is filed, so long as it is completed on the same day the petition is filed. The Subcommittees considered whether the rules and forms should be revised to account for this possibility.

The Assistant Reporter said that prior to this technical change, many courts concluded that statutory requirement to complete credit counseling briefing during the 180-day period "preceding the date of filing" meant that the requirement could not be satisfied on the same calendar day the petition is filed. Other courts concluded that same-day completion satisfied the statutory language so long as the course is completed before the petition is filed. The Assistant Reporter said that the purpose of the technical change was presumably to address the statutory ambiguity that led to the split in the case law, but that the "fix" seems to have introduced a new ambiguity. Because there is no case law on the new language, the Subcommittees recommended waiting before revising the rules or forms.

Committee members agreed that, because the forms and rules anticipate that the credit counseling course will be taken before the petition is filed, no change is needed unless case law develops that allows debtors to take the course post-petition but on the day of filing. **Members agreed to await further developments in the case law.**

(D) Oral report on revising Official Form 22A and advising the courts to rescind Interim Rule 1007-I if the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is no longer available after December 18, 2011.

The Chair explained that the temporary exclusion from the means test for Reservists and National Guard members provided in Public Law No. 110-438 is scheduled to expire on December 18, 2011. Mr. Wannamaker reported, however, that a four-year extension of the exclusion has just been voted out of the House of Representative's Judiciary Committee, and that an extension seems uncontroversial. The Chair added that no action was necessary at this time, but if the proposed extension fails to pass before December 18, the Committee will have to consider whether to revise Official Form 22A to remove the exclusion as an option. If Congress seems likely to extend the exclusion but has not done so by December 18, one possible option will be to leave the form unchanged, but notify courts, the public, and the EOUST that the option may be temporarily unavailable.

7. Report of the Subcommittee on Forms.

Review of the draft individual forms developed by the Bankruptcy Forms Modernization Project and the question whether the rules should be amended to establish standards regarding signatures by parties in the electronic context in which the courts currently operate.

Judge Perris reported on the most recent updates to CM/ECF, including program changes needed to implement the new amendment and supplements to the proof of claim (B10-A, B10-S1, and B10-S2) that are scheduled to go into effect December 1, 2011.

She said that functional requirements phase of CM/ECF NextGen should be complete by February 12, 2012. The next step (Phase 2) will be to take all of the requirements, code them and put them into effect. Rollout will probably be in iterations and modules, with the first module coming out as early as the end of 2013. She said the plan was to use as much code as possible from existing CM/ECF and not lose any existing functionality. It will probably take four to six years to fully implement.

Mr. Waldron spoke briefly on the pro se pathfinder project. He said the pro se pathfinder was an electronic filing module for unrepresented debtors being developed by NextGen and tested in current CM/ECF pilot courts. Mr. Waldron and Judge Perris noted that one obstacle being examined in the pro se pathfinder that has also come up in the Forms Modernization Project was whether electronic signatures are enforceable under the bankruptcy code and existing rules. Mr. Waldron said for the initial testing phases, the pro se pathfinder will require users to submit a hard copy signature page that incorporates by reference the debtor's signature from the various official forms. He believes, however, that standards establishing the acceptability of electronic signatures in some form would greatly facilitate electronic filings. **The Chair referred the electronic**

signature issue to the Technology and Cross Boarder Subcommittee for consideration of any needed rule changes.

For the benefit of new members, Judge Perris gave an overview of the Forms Modernization Project (FMP). She explained that the FMP was an undertaking by the Forms Subcommittee to systematically revise all official bankruptcy forms to make them more understandable and thereby improve the accuracy of the data collected and to improve the interface between the forms and technology. She said the FMP surveyed judges, clerks, case trustees, United States trustees, law professors and members of the bankruptcy bar for comments on what does and does not work in the current forms. Armed with that information and drafting help from a contractor with experience in revising tax forms, census forms and other government and corporate forms, the FMP began the drafting process.

The guiding principles behind redrafting the forms were to help debtors understand the bankruptcy process and what they are being asked by using conversational language, instructions, and context to explain the process and show the timing of the case. In general, the idea was to improve the accuracy of the information provided by the debtors, and help them better understand what they are attesting to under penalty of perjury. Judge Perris said that the FMP has solicited and is reviewing pre-publication comments from a number of external users, including the National Association of Chapter Thirteen Trustees, the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys and a group of attorneys from the Executive Office for United States trustees.

Judge Perris said that the conversational language and length of the forms has led to negative feedback from some reviewers. Some criticized the FMP forms as making bankruptcy look too easy, and thereby encouraging pro se filings. Others thought the length of the forms would make them harder for regular users to sort through and would increase attorney costs because it would take longer for counsel to review the forms. Conversely, some thought the project was a laudable achievement and while the conversational tone might seem more inviting, it was also more understandable. Moreover, the many warnings and amount of detail requested would make the need for counsel plainer, which would tend to lower the likelihood of pro se filings.

One important concept that emerged throughout the drafting process and through comments received on early drafts of the FMP forms is that input (what debtors see and sign) and output (what judges, clerks, trustees, creditors, and others need to review) are different things. Judge Perris said that because the FMP forms were designed to maximize the accuracy of input, they were not necessarily great for output and the comments reflected that fact. She said the issue was particularly complicated because different users are interested in different output. Judges, for example, often want to compare income and expense information on the schedules and means test forms in the context of requests for fee waivers. Case trustees, on the other hand, might be most interested in comparing exemptions and any security interests as they pertain to particular properties.

Judge Perris said the need for customized output is where NextGen and the FMP intersect. Reviewers were generally excited about the prospect that NextGen would collect the data contained in the forms and that user-created reports could be generated from the form data. If the Judicial Conference allowed non-judiciary users, such as case trustees and other parties in the case, to generate reports, the length of the new forms would much less of an issue to those users.

Judge Perris asked the Advisory Committee for guidance on a number of issues going forward. She asked whether members agreed that the conversational language would lead to more pro se filings, and, if so, whether more formal language should be reintroduced. No member favored reintroducing more formal language, and several members questioned the assumption that conversational language would lead to more pro se filings. With respect to increased costs, one member thought that if the length of the forms required more attorney time to review debtor responses, it was probably time well spent and could eliminate problems that would otherwise come up later in the case.

Next, Judge Perris asked for comments on the increased length of the FMP forms, which she said is generally attributable to the increased use of close-ended questions and integrated instructions. She said that the current forms, which consist of mostly open-ended questions and separate instructions, provide a model for shortening, but that comments solicited at the beginning of the Forms Modernization Project were that debtors don't seem to read separate instructions and often don't answer open-ended questions. Several members voiced support of the increased use of integrated instructions and close-ended questions, and they suggested that the issue of length would recede after the forms are used for a while.

Judge Perris suggested three approaches to publication of the new forms: (1) publish the whole individual filing package at once; (2) publish a subset of the individual package – the fee waiver and installment payment forms, and the income, expense and means test forms; or (3) radically change the current direction.

She said the FMP leadership favored publishing only the subset in 2012 for at least two reasons. First, under the normal publication process, any forms published in 2012 will be ready to go into effect on December 1, 2013. Although parts of CM/ECF NextGen may be operational by December 2013, no computer code has been written yet, and different constituents will have their own ideas of what should be implemented first. Second, given that the appellate rules package is also on track to be published in 2012, publishing just a subset of the forms would be less of a shock to the bankruptcy community and may allow for more constructive feedback.

The Chair supported an incremental approach, and said he thought the Committee already began that approach when it published the mortgage-related attachment and supplements to the proof of claim form last year, as all three of the new forms followed the formatting and some of the plain language style of FMP forms. Several other members agreed with the Chair, and **the Committee voted in favor of an incremental approach and recommended working with NextGen to get it implemented as soon as possible.**

8. Report of the Subcommittee on Business Issues.

(A) Consideration of Suggestion 10-BK-H by the Institute for Legal Reform for a rule and form to promote greater transparency in the operation of trusts established under section 524(g) of the Bankruptcy Code.

The Assistant Reporter explained that the Institute for Legal Reform ("ILR") proposed an amendment to the Bankruptcy Rules to require "greater transparency in the operation of [asbestos] trusts established under 11 U.S.C. § 524(g)." Under the ILR proposal, asbestos trusts would file with bankruptcy courts quarterly reports describing in detail each demand for payment received during the reporting period. The proposal would also require trusts to disclose to third parties information regarding demands for payment by asbestos claimants if that information is relevant to litigation in any state or federal court.

Committee members recognized that the ILR suggestion addressed an important matter deserving careful attention, but members also expressed concern that the proposal presented difficult jurisdictional questions and would not serve a sufficiently bankruptcy-specific purpose. Because it would apply to trust operations after confirmation of a plan, members noted that the proposal might exceed the limited scope of post-confirmation bankruptcy jurisdiction. Members also stated that the proposal, although possibly beneficial to parties in nonbankruptcy tort litigation, was of limited use in administering bankruptcy cases and therefore might be beyond the proper reach of the Bankruptcy Rules.

Members discussed comments received from interested individuals and groups (practicing lawyers, asbestos trusts, representatives of future asbestos claimants, bar organizations, and the ILR) who responded to a request from the Chair for input on the ILR suggestion. As detailed in the agenda materials, some responses supported the proposal, but most urged the Committee not to adopt it, and many questioned whether the bankruptcy rules are the appropriate mechanism to address the concerns raised by the ILR.

After discussing the ILR suggestion and considering all the responses, the Committee adopted the recommendation of the Business Subcommittee that further action not be taken on ILR's suggestion.

(B) Recommendation concerning Suggestion (10-BK-J) by Judge Linda Riegle to amend Rule 1014(b).

The Reporter described Judge Reigle's suggestion. Bankruptcy Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as

otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

Judge Riegle expressed concern that there is no mechanism for alerting the first court that a subsequent case has been filed. She also said that the rule seems to prevent the second court from transferring venue on its own motion, and she offered suggested amendments that would address the problems.

For reasons detailed in the agenda materials, the Subcommittee concluded that the amendments suggested by Judge Riegle are unnecessary. As currently drafted, the rule provides a solution for a problem the venue statute leaves open: which of the judges of the different districts has authority to transfer venue. The rule avoids possible conflicting rulings by giving the authority to decide venue to the judge in the first filed case. The Subcommittee was not concerned that the judge in the first case would not become aware of the second case because generally some party in the second case will have an interest in bringing that case to the attention of the judge in the first case.

The Subcommittee did conclude, however, that Rule 1014(b) should be amended to state clearly when the stay of any subsequently filed case goes into effect. Rather than selecting either the filing of a subsequent petition or the filing of a motion under the rule as the event that commences the stay, the Subcommittee recommended that an order by the first court be required. That requirement would eliminate any uncertainty about whether a stay was in effect. It would also permit a judicial determination – not just a party's assertion – that the rule applied and that a stay of other proceedings was needed. The Subcommittee also recommended a number of stylistic changes that could be made to the rule if the Committee decided to recommend a change clarifying when the stay in the second case goes into effect. **After a short discussion, the Committee agreed with the Subcommittee, and recommended publishing for comment the proposed changes, as set forth in the agenda materials, in the summer of 2012.**

(C) Recommendation concerning Suggestion 09-BK-J by Judge William F. Stone, Jr., for rules and an Official Form to govern applications for the payment of administrative expenses.

Judge Wizmur gave the report. She said that Judge Stone's suggestion was referred to the Subcommittee at the spring 2010 Committee meeting. The Subcommittee recommended at the fall 2010 meeting that additional information be gathered to determine whether there is a need for a national rule or official form for the allowance of administrative expenses. Accepting that recommendation, the Committee asked Molly Johnson and Beth Wiggins of the Federal Judicial Center ("FJC") to survey bankruptcy clerks and business bankruptcy attorneys regarding local rules and practices currently governing applications for administrative expenses, whether there have been problems with existing practices, and whether a national rule and form is needed.

Ms. Johnson reported on the survey results at the spring 2011 Advisory Committee meeting. After disucssing the results, the Committee asked the Subcommittee to consider the range of possible responses to Judge Stone's suggestion and to recommend whether one or more national rules and/or forms for the allowance of administrative expenses should be developed.

During a conference call on June 15, the Subcommittee reviewed the survey results and noted that there did not seem to be a major outcry for a rule or national form. Clerks saw virtually no problem at all, and, of over 2000 ABA business bankruptcy committee attorneys surveyed, only about five percent responded. Although approximately two-thirds of the 94 business attorney respondents thought a national rule could be helpful, few thought there was a problem with the local procedures that have developed over the past thirty years. Because the lack of a national rule for paying administrative expenses did not seem to be a problem, the Subcommittee recommended that Judge Stone's suggestion not be pursued further.

After a short discussion, the Committee accepted the Subcommittee's recommendation that there is no need for a national rule or form governing the payment of administrative expenses.

9. Report of the Subcommittee on Privacy, Public Access, and Appeals.

Oral report on the revision of the Part VIII rules.

For the benefit of the new members, Judge Pauley and the Reporter recapped the progress of the of the Subcommittee's efforts over the past several years to review Part VIII of the Bankruptcy Rules, which govern appeals from bankruptcy courts to district courts and bankruptcy appellate panels. They explained that an early goal of the revision project was to bring the bankruptcy appellate rules more in line the Federal Rules of Appellate Procedure (FRAP) and that comment on early drafts emphasized the need to incorporate into the rules greater use of the electronic transmission, filing, and storage of electronic documents.

Over the summer, a working group composed of several members of the Advisory Committee, its reporters, a member of the Appellate Rules Advisory Committee, and that committee's reporter met to thoroughly review and edit the Part VIII draft and accompanying committee notes. The Reporter explained that the working group recommended a number of changes and that during this meeting she would go through approximately one half of the package, explain drafting choices, and ask for comments. She said the Subcommittee would present the second half of the draft at the spring 2012 meeting, with a recommendation that the entire package be published for public comment in August 2012.

The Reporter said that a number of general drafting decisions reflected reoccurring issues throughout the Part VIII draft. For example, the working group concluded that references to appellate "court" are more common than appellate "judge" and therefor adopted an "appellate court" convention. And, although the bankruptcy rules historically favor "shall" over "must," the

working group concluded that using "must" would make the Part VIII rules more consistent with FRAP. The working group also decided that internal references to "this rule" should be avoided if possible, and instead chose to restate the entire rule or refer to the rule subsection. **The Committee supported the working group's drafting conventions.**

The Committee reviewed Rules 8001 – 8012, and recommended publishing them for public comment in August 2012, with changes described below and subject to the additional revision of a few rules and review by the style consultant.

Rule 8001: Subsection (b) deleted; new (b) "Definitions" added with BAP and Appellate Court as (b)(1) and (b)(2) respectively; "Transmit" changed from subsection (e) to (b)(3) and the Subcommittee was asked to add language clarifying that the court must allow reasonable exceptions to the preference for electronic filing.

Rule 8002: no amendments suggested.

Rule 8003: changed "district court or a BAP" references to "appellate court;" at line 34, added "*sending it* to the pro se party's last known address;" made several other stylistic changes.

Rule 8004: changed "district court or a BAP" references to "appellate court" and the Reporter said she would search the draft and replace similar instances; Judge Pauley suggested changes to the committee note describing subsection (d) to be added after the meeting.

Rule 8005: one member suggested changing "the BAP clerk" at line 16 to "a BAP clerk."

Rule 8006: several changes to the committee note to explain the effective date of the certification and to deal with interlocutory judgments (interlocutory judgment language to come from strike-out material at lines 13-20 of Rule 8004).

Rule 8007: revisions to paragraph one of the committee note.

Rule 8008: no changes.

Rule 8009: bullet points added to 8009(a)(1); line 103, change "judge" to "court"; line 106, change "truthful" to "accurate."

Rule 8010: one member noted that requiring the court reporter to file a transcript in the BAP or district court would be problematic in practice because bankruptcy court reporters typically do not have authority to file electronically in those courts. District courts and BAPs generally can, however, view the lower court's docket, so it probably makes more sense to allow all filings to occur on the bankruptcy court's docket. **A motion to allow all filings by the reporter on the bankruptcy court docket passed and the Subcommittee agreed to revise Rule 8010 accordingly for consideration in the spring. Other stylistic changes also approved.**

Rule 8011: Subsection (2)(D) deleted, other stylistic changes made and **a motion to strike the reference to Rule 9037 and consider at the next meeting which 9000 rules apply carried without objection**.

Rule 8012: stylistic changes.

10. Report of the Subcommittee on Attorney Conduct and Health Care.

(A) Recommendation on Suggestion 10-BK-M by the States' Association of Bankruptcy Attorneys for a uniform rule for national admissions and local counsel requirements for governmental entities.

The Reporter said that the States' Association of Bankruptcy Attorneys ("SABA") has proposed a rule that would allow attorneys admitted to practice in any U.S. bankruptcy court, and in good standing in all jurisdictions in which they are a members of the bar, to practice in one or more cases in any other bankruptcy court, subject to certain conditions. Under the proposal, eligible attorneys would not be required to associate with local counsel for these representations.

Although the suggestion proposed a national admission rule applicable to all attorneys, the Subcommittee focused primarily on an alternative proposal limited to government attorneys. The Reporter said that subcommittee members recognized the difficulties that strict admission and local counsel requirements pose for state and local government attorneys who are required to participate in an out-of-state bankruptcy cases, but they questioned whether the matters raised by SABA are ones appropriately addressed by the Advisory Committee. Many bankruptcy court admission rules are governed by the district court, and the idea of a national federal bar or national admission standards to federal courts has been advocated for many years without success because both the Advisory Committee and the Standing Committee have been reluctant to override local admission requirements.

After discussing the suggestion, the Committee accepted the recommendation by the Subcommittee to take no further action.

(B) Recommendation on Suggestion 10-BK-N by Judge Thomas Waldrep concerning a new rule to provide greater transparency in the process for retaining counsel to creditors' committees.

The Assistant Reporter said that the issue arose in the context of *In re United Building Products,* 2010 WL 4642046 (Bankr. D. Del. Nov. 4, 2010). In that case the court denied the application to retain a law firm as committee counsel because it had engaged in solicitation for that position through the use of a surrogate to obtain the proxies of creditors. He said the Subcommittee was aware of EOUST interest in *United Building Products*, and suggested awaiting responsive action from the EOUST.

Mr. Redmiles said that the formation of committees was under review by the EOUST well before the *United Building Products* came out, and Ms. Eitel said that the EOUST has developed new internal guidance and template forms for U.S. trustees that explain how to form committees. She said the biggest problem with respect to committee formation was getting creditors to serve at all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

In response to a question from the Chair, Ms. Eitel said the EOUST does not think any amendments to the Bankruptcy Rules are needed to address the *United Building Products* situation, and that Bankruptcy Rule 2014 is sufficiently broad to do its job. **After further discussion, the Committee decided to take no action on Judge Waldrep's suggestion at this time.**

11. Oral Report of the Subcommittee on Technology and Cross Border Insolvency.

No report.

Discussion Items

12. Oral report on the impact of the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter gave a brief overview of *Stern* and then explained that there appear to be two immediate practical considerations. He said that in light of some of the language in *Stern* there was concern about whether parties can consent to entry of a final judgment by a bankruptcy judge in matters that are not "constitutionally" core matters. In his opinion, consent is still valid in part because the court made a point of demonstrating that there was no consent with respect to the issue before it, the counterclaim. On the other hand, the court found that consent to final judgment on the proof of claim itself was explicit, and it had no concerns with bankruptcy judge entering a final judgment on that matter. In addition, the Court made clear that its ruling was a narrow one. The Assistant Reporter said the consent issue is a concern to many commentors, however, and a panel of the Fifth Circuit is already seeking briefing on whether *Stern* upsets long-standing case law that consent to a final judgment by a magistrate judge is valid.

A second issue raised by *Stern* is how best to deal with the apparent statutory gap that now exists in 28 U.S.C. § 157. Although *Stern*-like counterclaims were found to be "core" in sense of the statute, the Court made clear that the bankruptcy court could not enter a final judgment on that matter constitutionally, at least not without the consent of the parties. Section 157 has no guidance, however, on a bankruptcy court's power to decide a matter that is core under the statute, but is not core under the Constitution. The Assistant Reporter said it makes sense to treat the *Stern*-like matters as if they are non-core but otherwise related to the bankruptcy case under Section 157(c),

such that the bankruptcy judge can enter a final judgment if consent is given by both parties; otherwise, the court can enter a report and recommendation.

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and to monitor case law, passed without opposition.**

13. Oral report on the change in how the IRS allocates internet services in its "National Standards and Local Standards," which are used by debtors to complete Official Forms 22A and 22C.

The Chair said that effective October 3, 2011, the IRS will remove internet service expenses from its "Other Necessary Expense" category, and incorporate that expense into its Local Standards for Housing and Utilities. He said the change will affect Official Forms 22A and 22C. Both forms currently direct the debtor to deduct as an expense the actual amount paid for telecommunication services, including "internet service." OF 22A, Line 32; OF 22C, Line 37. Because of the IRS change, the forms will double count internet expenses if any are reported on telecommunication lines of the forms.

Mr. Redmiles gave members some background information about how the IRS change came about and why the notice to the EOUST and the Committee was too short to revise the forms this year. Members agreed that any needed revisions to the forms would be technical and would not require publication, so that once revised they could go into effect in December 2012. **The Chair asked the Consumer Subcommittee to suggest changes for December 1, 2012 that the Committee could consider at its spring meeting.**

14. Suggestion 11-BK-C by Wendell J. Sherk to amend Official Forms 22A and 22C to allow debtors with a below-median income to file shortened versions of the forms.

The Chair said that the FMP had incorporated the suggestion into its proposed drafts of 22A and 22C, which the Committee will consider at its spring meeting.

15. Suggestion 11-BK-D by Sabrina L. McKinney to amend Official Form B10 to provide a space for designating the amount of a general unsecured claim.

Afer the meeing the suggestion was referred to the Consumer and Forms Subcommittees, along with a suggestion by Mr. Kilpatrick that B10 also address leases and executory contracts.

16. Suggestion 11-BK-E by Judge A. Thomas Small to amend Rules 7016 and 8001 to permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all.

Some members expressed concerns about how knowledge of the waiver might affect the bankruptcy judge's consideration. **Referred to the Appellate Rules Subcommittee.**

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and 9006(f) to provide that the deadline for responding runs from the date of service of a summons, rather than the date of issuance.

Referred to the Business and Consumer Subcommittees.

Information Items

18. Oral report on the status of bankruptcy-related legislation.

Mr. Wannamaker reported on pending bankruptcy legislation. He said HR 2192, introduced on 6-15-11 by Representative Steve Cohen, was of particular interest because it would extend the temporary exclusion from the means-test in Public Law No. 110-438 for certain Reservists and National Guard members for an additional four years. Mr. Wannamaker said the bill was referred to the Judiciary Committee on June 15, 2011, and was voted out of committee last week. [See also, Agenda Item 6-D].

19. Oral update on opinions interpreting section 521(i) of the Bankruptcy Code.

The Reporter said that courts continue to say that despite the automatic dismissal language in 11 U.S.C. § 521(i), a bankruptcy court retains discretion not to dismiss, at least if it appears that the debtor is trying to use the provision to avoid court scrutiny.

20. *Bull Pen*:

A. Proposed new Rule 8007.1 and the proposed amendment to Rule 9024 (indicative rulings), approved at September 2008 meeting.

B. Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7), which would authorize providers of postpetition personal financial courses to notify the court directly of a debtor's completion of the course, approved at September 2010 meeting.

C. Amendment to Box 7 on Official Form 10 to add a reminder to attach the new mortgage attachment form under proposed Rule 3001(c), (Official Form 10 (Attachment A)), and the statement concerning open-end or revolving consumer credit agreements under proposed Rule 3001(c)(3)(A), approved at April 2011 meeting.

No comments were made on matters in the bull pen.

21. Rules Docket.

Mr. Wannamaker said the rules docket was meant to help the Advisory Committee keep track of its work, and that he would appreciate any comments.

22. Future meetings:

Spring 2012 meeting, March 29 - 30, 2012, at the Arizona Biltmore http://www.arizonabiltmore.com in Phoenix, Arizona. Possible locations for the fall 2012 meeting.

The Chair said he was considering Portland, Oregon for the fall, 2012 meeting, but that he was open to suggestions.

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers