ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 29 - 30, 2010
New Orleans, Louisiana

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge Sandra Segal Ikuta
District Judge Karen Caldwell
District Judge David Coar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Bankruptcy Judge Judith H. Wizmur
Dean Lawrence Ponoroff
Michael St. Patrick Baxter, Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
David A. Lander, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
G. Eric Brunstad, Jr., Esquire, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Committee) (telephonically)
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)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
John Rabiej, Administrative Office of the U.S. Courts (Administrative Office)
James Ishida, Administrative Office
James H. Wannamaker, Administrative Office
Stephen “Scott” Myers, Administrative Office
Robert J. Niemic, Federal Judicial Center
Philip S. Corwin, Butera & Andrews

District Judge William H. Pauley, III was unable to attend the meeting.

The following summary of matters discussed at the meeting is written in the order of the meeting agenda unless otherwise specified, not necessarily in the order actually discussed. It should be read in conjunction with the agenda materials and other written materials referred to, all of which are on file in the office of the Secretary of the Standing Committee.

An electronic copy of the agenda materials, other than materials distributed at the meeting after the agenda was published, is available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/Reports.aspx Votes and other action taken by the Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and Introduction of new members and subcommittee chairs.

The Chair welcomed the members and guests to the meeting and recognized new members, Judge Sandra Segal Ikuta (Ninth Circuit Court of Appeals), and Judge Arthur I. Harris, (Bankruptcy, Southern District of Ohio). The Chair also recognized Judge Wizmur as the new chair of the Subcommittee on Business Issues, and Mr. Rao as the new chair of the Subcommittee on Attorney Conduct and Healthcare.

2. Approval of minutes of Boston meeting of October 1 - 2, 2010.

The Boston minutes were approved with the correction of typographical errors pointed out by the Chair, Judge Harris, and Mr. Kohn.

3. Oral reports on meetings of other committees:

(A) January 2010 meeting of the Committee on Rules of Practice and Procedure (the "Standing Committee").

The Reporter said that Committee's report to the Standing Committee consisted only of information items. She said the Standing Committee accepted the Committee's report on the rules and forms published for comment and the need for a public hearing to consider testimony on the proposed amendments, which was held in New York City; the Committee's consideration of a comprehensive revision to Part VIII of the Bankruptcy Rules (including holding a one-day conference at Harvard Law School with judges, clerks of court, practitioners, and academics); the Committee's forms modernization project; and the creation of a revised set of Director's reaffirmation forms to be used when a debtor seeks to reaffirm a pre-bankruptcy debt.

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

Judge Conti gave the report. She said that at its last meeting, the Bankruptcy Committee focused on the bankruptcy judgeship bill, which, if passed, would add 13 new judgeships. She said that the bill was pending in Congress. She added that the Bankruptcy Committee will consider new case weighting standards at its next meeting this June. She said that, because of the BAPCPA changes to the Bankruptcy Code, it is likely that the new case weights will reveal that judges are spending more time adjudicating cases and that the need for new judges is even greater than the judgeship request currently pending in Congress.

Judge Conti said that the Bankruptcy Committee is also looking at ways to encourage the use of recall judges. She said that it put forth a proposal at the last Judicial Conference meeting that would encourage circuits to take an early look at whether a particular judge would be recalled prior to that judge's retirement. She said, however, that because of concerns raised at the Judicial Conference meeting about the wording the Bankruptcy Committee withdrew the proposal to consider alternative language to be submitted at a later date.

(C) March 2010 and October 2009 meetings of the Advisory Committee on Civil Rules.

Judge Wedoff said that that the Civil Rules Committee met twice since this Committee's last meeting and, although it had proposed no rule changes at either meeting, there was still a lot of activity. He said a primary topic of discussion was the upcoming civil litigation conference at Duke Law School in May, 2010, which would focus primarily on the costs of civil litigation, including the costs of discovery. Mr. McCabe added that the Duke conference was shaping up to be a big event, and recommended that members review the presenters' materials posted on the Courts' public website.

Judge Wedoff said that the Civil Rules Committee also continues to monitor case law development and congressional action concerning the heightened pleading standards announced by the Supreme Court in Iqbal and Twombly. He said another recent focus was a possible change to Rule 45, to simplify and streamline it, and to consider establishing standards for setting up and continuing protective orders.

(D) April 2010 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that the Evidence Committee's restyling project is now complete. She added that in response to a comment there had been a slight change to the restyling of Evidence Rule 1101 from the version that was published, to clarify that the rule applied throughout bankruptcy (not just to proceedings, but to cases as well).

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

[See discussion at Agenda Item 8].

(F) Progress report from the Sealing Subcommittee.

The Reporter said that at its last meeting, the Standing Committee's Sealing Subcommittee discussed the FJC's study of sealed cases. She that there were no instances of sealed bankruptcy cases, and she anticipated that the Sealing Committee would not be recommending any rule changes with respect to sealing cases. She said it may make recommendations, however, with respect to the eventual unsealing of cases.

(G) Progress report from the Privacy Subcommittee.

Judge Coar said he and the Reporter attended the Standing Committee's Privacy Subcommittee meeting at Fordham Law School, and that he was struck by the complexity of issues and tension of goals between providing public access to court documents and demonstrating transparency of process, on the one hand, and protecting litigants' privacy interests, on the other hand.

The Reporter said that in preparation for its meeting the Privacy Committee did a study to determine the availability of full social-security numbers in online court filings. She said that in over 10 million electronic documents filed online in 2009, 2,899 contained full social-security numbers, about 2,200 of which were filed in bankruptcy cases. She said that in discussing the findings, participants acknowledged that the large number of court filings made in bankruptcy cases probably meant that the rate of noncompliance with redaction rules was probably not that much higher in than in ordinary civil cases. Nevertheless, there was concern that a greater effort should be made to educate creditors as to the need to redact personal information from attachments to filings – particularly attachments to the proof of claim.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning comments submitted on the proposed amendment to Rule 3001 and proposed new Rule 3002.1.

(A)(1) Comments on the mortgage provisions.

The Reporter explained that she would first review the comments and testimony responding to the proposed amendments to Rule 3001(c) and proposed new Rule 3002.1 as they relate to claims secured by a security interest in the debtor's principal residence. She said she would address the comments and testimony as they relate to unsecured claims at agenda item 4(A)(2). The Chair added that Mr. Rao would then review the related new mortgage forms -- Draft Mortgage Proof of Claim Attachment, Official Form 10 (Attachment A); Draft Notice of Payment Change, Official Form 10 (Supplement 1); and Draft Notice of Postpetition Fees, Charges and Expenses, Official Form 10 (Supplement 2) – and that the Committee would then

consider the chapter 13 mortgage-related provisions as a whole.

Rule 3001(c)(2).

As published in August 2009, Rule 3001(c) would be amended to add a new paragraph (2) that would apply to individual debtor cases. The new paragraph consists of four subparagraphs, which the Reporter discussed in turn.

Subdivision (c)(2)(A) would require the filing of an itemized statement with the proof of claim ("POC") that specifies prepetition interest, fees, expenses, and charges included in the claim.

The Reporter said that there was little negative comment with respect to this subparagraph insofar as it applies to home mortgages and that the Subcommittee recommended that it be approved as published.

Subdivision (c)(2)(B) would require inclusion in the POC of the amount necessary to cure any default as of the petition date with respect to a claim secured by a security interest in the debtor's property.

The Reporter said that some comments incorrectly assumed that this provision would apply to judicial liens. She noted that the rule itself was phrased in terms of a "security interest," which is defined at 11 U.S.C. § 101(51) as a lien created by agreement. She said that the Subcommittee recommended adding the phrase "secured by a security interest" to the committee note discussion as well to emphasize that only security interests are addressed by the rule. She said the revised note was at page 53 of the agenda materials.

Subdivision (c)(2)(C) would require that if a claim secured by a security interest in the debtor's principal residence is one for which an escrow account has been established, the POC include an escrow account statement prepared as of the petition date.

The Reporter said that a comment from the National Association of Chapter 13 Trustees suggested that it might be difficult for smaller servicers to run an analysis as of a particular date. The Subcommittee recommended no change, however, because it concluded that such an analysis was a necessary step in calculating the claim and that all servicers would need to find a way to accomplish the task.

The Reporter said that Judge Marvin Isgur said in his comment and testimony that the preparation of an escrow statement as of the petition date might conflict with the Fifth Circuit's decision in Campbell v. Countrywide Homes, Inc., 545 F.3d 348 (2008), concerning whether a particular default occurred pre- or post-petition. The Subcommittee, however, did not think the rule dictated how defaults should be allocated and therefore did not think it was inconsistent with any existing case law. The Subcommittee recommended approving subparagraph (C) as

published.

Judge Ikuta noted that the rule requires preparation of the escrow statement in accordance with "applicable nonbankruptcy law" and asked if any law other than RESPA could apply. If not, she suggested changing the reference to RESPA. Mr. Rao responded that the Subcommittee chose the broader phrase because RESPA establishes a floor for escrow statements, but that state law might also apply and might have additional requirements.

Subdivision (c)(2)(D) would authorize sanctions against a creditor in an individual debtor case who fails to provide any of the information required by subdivision (c). Unless the court found that the creditor's failure to provide the required information was substantially justified or harmless, the creditor would be prohibited from presenting the omitted information in a contested matter or adversary proceeding. In addition to, or in place of, prohibiting the use of the omitted information, subparagraph (D) also authorized "other appropriate relief," including the award of reasonable expenses and attorney's fees.

The Reporter said that there were several comments critical of the sanctions provision. Among other things, critical comments maintained that that the provision sweeps too broadly and that by requiring the attachment of additional supporting documentation in every case, even when there is no demonstrated need for the information, the proposed amendments to Rule 3001(c), including its sanction provision, would abridge creditors' substantive rights in violation of the Rules Enabling Act.

Some comments viewed the sanctions provision in subparagraph (D) as being tantamount to claim disallowance, making it inconsistent with § 502 of the Code, as well as disproportionate to the violation in most cases. In support of the latter argument, Professor Bernadette Bollas Genetin of the University of Akron School of Law (comment 09-BK-130) quoted from Judge Posner's opinion in In re Stoecker, 5 F.3d 1022, 1028 (7th Cir. 1993): "Forfeitures of valuable claims, and other heavy sanctions, should be reserved for consequential or easily concealed wrongs. A creditor should therefore be allowed to amend his incomplete proof of claim. . . . to comply with the requirements of Rule 3001, provided that other creditors are not harmed by the belated completion of the filing."

The Reporter said that the Subcommittee carefully considered the comments, and that a majority recommended that the provision be approved as published. Two Subcommittee members, however, Judge Perris and Mr. Kohn, favored an alternative version set out at pages 37-40 of the agenda materials.

Judge Perris and Mr. Kohn spoke in favor of their alternative escalating sanctions proposal, which would start by requiring the debtor to file and serve a Request to Amend Claim that specifies the deficiency in the claim. They said the request would include an accounting of attorney's fees and costs reasonably incurred in seeking a cure of the deficiency and would give the creditor an opportunity to amend the claim or cure the deficiency. They said the proposal

includes additional procedural steps that would result in escalating sanctions if the claimant failed to respond.

Judge Perris said she preferred some variation of the alternative version because she thought the published sanctions version was too one-sided. Historically, debtors and creditors alike have been given liberal leave to amend their filings. She said this made sense particularly in the claims-resolution process where the purpose was to resolve disputes as efficiently as possible. The published sanctions provision, however, would change the liberal amendment policy in a one-sided way, sanctioning only creditors for the failure to file all required documents in the first instance.

Mr. Rao said that he didn't think the alternative sanctions provision would work with proposed Rule 3002.1. That rule, he said, is designed as a response to the current failure by some creditors to notify chapter 13 debtors of payment and fee changes during the case by establishing time frames by which such notices must be made. The harm the rule is designed to address is the accumulation of unpaid fees and charges over the course of the case, resulting in a large deficiency when the debtor emerges from bankruptcy with the expectation of a fresh start.

The alternative sanction, he said, is triggered only when the creditor files something for the debtor to dispute. Mr. Rao said he was concerned about what would happen if the type of creditor the rule is trying to address simply does as it has always done and waits until the end of the case to notify the debtor of accrued fees and charges. He reasoned that under the alternative sanction procedure, the debtor might be able to object at that time and possibly get an award of attorney's fees, but at the end of the day, the accumulated unpaid fees and charges due under the note will still be due, and the opportunity to pay those fees and charges over the course of the chapter 13 plan will have been missed.

Judge Harris agreed with Judge Perris that the published sanction provision does not seem evenhanded. He acknowledge the proponents' point that the language was simply derived from the discovery sanctions in Rule 37, but pointed out that sanctions in that context apply to disclosures that apply to both parties. In this case, the "disclosures" are required only of the creditor and only the creditor can be sanctioned. He said the new procedural requirements would probably be enough to encourage claimants to file the required attachments and questioned whether sanctions were needed at all.

Judge Wedoff said the starting point for sanctions is a grave problem. Creditors, including mortgage holders, simply do not comply with the existing disclosure requirements, and a stronger enforcement mechanism is needed. The rationale for the published mechanism is that it is parallel to what the civil rules do with initial disclosures required under Rule 26. Like the initial disclosures in Rule 26, the filings a creditor must make under proposed amended Rule 3001 and new Rule 3002.1 are required so that debtor or other parties can understand the creditor's claim.

Judge Wedoff added that the published sanctions scheme is a graduated one. Although the creditor would not be able to use material it should have provided before an objection was filed, it could make that failure harmless by simply providing the material at a later date. The Debtor will still have to object and show a legitimate objection to the claim, and the committee note makes clear that simple failure to attach documents is not a ground for disallowance of the claim.

Judge Coar said he disagreed with those who thought the sanction was not evenhanded. The creditor starts out with a statutory presumption that its claim is valid. Unless there is an objection, the claim will be paid according to its priority. It is not unbalanced in this context to require the creditor to document the claim or face a sanction. Absent documentation, the trustee and debtor often will not know what to object to.

Judge Ikuta asked two questions. First, if the creditor doesn't file the required information at the outset, would that constitute unfair surprise to the debtor? Second, if the creditor is not allowed to use the omitted information later in the case, is it really tantamount to disallowance?

In response to the first question, Judge Wedoff thought it well could be unfair surprise to a debtor and certainly would be to a trustee. In response to Judge Ikuta's second question, Judge Wedoff said it would not amount to disallowance because the debtor must still allege a valid objection to the claim, and the debtor's assertions would be subject to cross examination. Mr. Rao added that the debtor has an incentive to schedule claims because they won't be discharged otherwise. Since scheduling a claim amounts to an admission, the debtor won't likely be in a position to falsely deny that it owes the debt simply because the creditor failed to attach documentation.

Mr. Baxter pointed out that the committee note discussion of the sanction provision speaks in terms of what the court "may" do, while the rule itself says that the sanction "shall" be applied. Members of the Subcommittee explained that "may" was used in the committee note because the rule allowed for the possibility of different sanctions. Members then discussed amending the rule at lines 29 and 30 at page 52 of the materials by changing the default sanction from "the holder *shall* be precluded from presenting the omitted information" to "the holder *may* be precluded from presenting the omitted information." After initially voting 7 to 6 in favor of the published version, the Committee voted a second time and **approved revising Rule 3001(c)(2)(D) by substituting "may" for "shall" subject to a number of style revisions, and changing the lead-in to read as follows: "If the holder of a claim fails to provide any of the information required by this subdivision (c), the court may, after notice and a hearing, take either of both of the following actions: (i) preclude the holder from presenting the omitted information …; or (ii) award other appropriate relief …".**

Rule 3002.1:

The Reporter said that proposed new Rule 3002.1, also published for comment in August 2009, would require the filing in chapter 13 cases of several notices regarding claims secured by a security interest in the debtor's principal residence. The rule would provide for three types of notice: (1) notice of payment changes with respect to home mortgages that are being cured and maintained pursuant to § 1322(b)(5); (2) notice of fees, expenses, and charges incurred after the petition was filed; and (3) notice of final cure payment. The proposed rule also includes a sanction provision modeled on the proposed sanction provision of Rule 3001(c)(2)(D). The Reporter discussed the comments to each provision of new Rule 3002.1 in turn.

Notice of payment changes. Subdivisions (a) and (b) of the rule deal with the timing, filing, and content of payment change notices. As published, the notice would have to be filed by the holder of the claim and served on the debtor, debtor's counsel, and the trustee at least 30 days before the new mortgage payment amount was due.

The Reporter said that some of the comments suggested different time periods and that particular concern was expressed with respect to Home Equity Line of Credit (HELOC) loans (which often adjust every month), or any loan with an interest rate that adjusts frequently. After considering the comments and noting that notice of a change to the monthly payment of a HELOC outside of bankruptcy must be given between 25 and 120 days before the payment is due, the Subcommittee recommended the notice period be shortened to "no later than 21 days before the next payment."

Mr. Rao added that the Subcommittee concluded that the 21-day period would be sufficient in bankruptcy, that it was consistent with the recent change in the federal rules to express time periods less than 30 days in multiples of seven days, and that it allowed for lengthier notice if required by non-bankruptcy law.

Choice of docket. The Reporter explained that as published, the rule requires that the creditor notices required under subdivisions (a) - (c) and (e) be filed as supplements to the claim on the claims docket, rather than on the court's main docket. She said that prior to publishing, both the Bankruptcy Clerks' Advisory Group (BCAD) and the Bankruptcy Judge Advisory Group (BJAG) recommended that creditors file the required notices on the claims docket to avoid overburdening the main court docket and to reduce the likelihood that a large group of non-attorney filers would request electronic filing privileges on the main docket.

The Reporter said two comments addressed the choice of docket issue. The BJAG filed a comment emphasizing its support of filing such notices on the claims docket. The second comment consisted of a survey compiled by Glen Palman of the Bankruptcy Court Administration Division of the Administrative Office. Mr. Palman's survey indicated that 74% of 58 responding bankruptcy clerks favored filing the notices on the main court docket.

The Subcommittee concluded that the filing destination wasn't critical to the rule's success, but it favored a uniform approach as opposed an *ad hoc* system governed by local rule. It therefore recommended that subdivisions (a) - (c) be approved as published with respect to the requirement that the notices under those subdivisions be filed on the claims docket.

Applicability of Rule 3001(f). The Reporter said that, as published, the notices required under proposed Rule 3002.1 are not subject to Rule 3001(f)'s provision of prima facie validity. She said that during his testimony in New York, Mr. Philip S. Corwin asserted that Rule 3001(f) *should* apply to the notices filed under Rule 3001.2, but he did not elaborate on his assertion either in his testimony or his written comments. The Reporter said that the Committee decided to exclude the operation of Rule 3001(f) from Rule 3002.1 in order to place the burden of proving the validity of postpetition payment changes and assessments on the mortgagee if there is an objection. She said that the Subcommittee continues to support that decision, and therefore recommends that the provisions of proposed Rule 3002.1 that state that Rule 3001(f) does not apply be approved as published.

The Reporter said that three comments addressed the requirements of subdivision (c) that the mortgagee serve a notice of fees, expenses, and charges "no later than 180 days after the date when the fees, expenses, or charges are incurred" or that the debtor or trustee file a motion "no later than one year after service of the notice" to obtain a court determination of the validity of the fees, expenses, and charges. She said that some comments suggested different time periods and others cautioned that the published time periods would be too costly in small cases.

The Reporter explained that, in proposing the timing provisions, the Committee attempted to avoid imposing an unreasonable burden on either the debtor or the mortgagee, while at the same time allowing a judicial determination that would permit the debtor to make necessary adjustments in ongoing payments. She said that the Subcommittee continues to support the time periods in proposed Rule 3002.1(c) and therefore recommended that they be approved as published.

Procedure for determining the status of the debtor's payments at the end of the case. The Reporter said that several comments raised issues about the procedure provided in subdivisions (d) - (f) regarding the debtor's successful cure of any default and completion of all payments due after the petition. The most serious concern relates to the timing of the notice provision. As drafted, subdivision (d) requires the trustee to file a notice of final cure payment no later than 30 days after the amount required to cure a mortgage default has been paid in full. This notice triggers the mortgagee's obligation to state whether it agrees that the default has been cured and also to indicate whether the debtor is "otherwise current on all payments." The procedure was proposed in order to permit a determination at the end of the case of whether the debtor is current on all mortgage payments.

The Reporter said that three comments pointed out that a mortgage default is sometimes cured early in the case, especially if the amount in default is relatively small, and that in such an

instance the published procedure would announce only that the debtor was current at the time of the cure, and not, as intended, current on all payments at the end of case. A suggested fix was to tie the procedure for verifying that the mortgage was current to the debtor's completion of payments under the plan, rather than to the final cure payment.

The Reporter said that the Subcommittee agreed with the comments that subdivision (d) should be revised to meet the goal of providing a procedure to determine the status of the mortgage at the end of the case. It therefore recommended that Rule 3002.1(d) be approved with the first sentence revised to read as follows: "No later than 30 days after completion by the debtor of all payments under the plan, the trustee in a chapter 13 case shall file and serve upon the holder of the claim, the debtor, and the debtor's counsel a notice stating that the amount required to cure the default has been paid in full." Judge Perris suggested a friendly amendment, changing the beginning of the sentence from "No later than" to "Within."

The Reporter said that because the mortgagee would face sanctions for failing to comply with the rule, the Subcommittee also recommended that a statement be added to subdivision (d) that requires the trustee's notice to inform the mortgagee of the need to provide a response under subdivision (e). With the exception the changes discussed above, the Subcommittee recommended that subdivisions (d) through (f) of proposed Rule 3002.1 be approved as published.

Sanctions. The Reporter said that proposed Rule 3002.1(g) was intended to parallel the sanctions provisions the Committee just reviewed and modified in Rule 3001(c)(2)(D), and said the changes to both provisions should be the same.

Appropriateness of the rule in non-conduit districts. The Reporter said that several comments suggested that proposed Rule 3002.1 will work only in districts in which the chapter 13 trustees make all mortgage payments ("conduit" districts). See 09-BK-035, -037, -140. These comments are based on the fact that subdivisions (a) and (c) require notices to be filed on the claims docket and service to be made on the trustee and that subdivision (d) provides for notice of the final cure payment to be given by the trustee.

The Reporter explained that the rule was drafted, however, with both conduit and non-conduit districts in mind. If the debtor makes postpetition mortgage payments directly, the debtor and the debtor's counsel will receive the required notices, as will the trustee. Moreover, it is because the debtor may be making payments directly that subdivision (d) provides that the trustee will only file a notice regarding the completion of cure payments (which are made by the trustee), rather than a notice regarding the postpetition mortgage payments.

In light of the misunderstanding apparent in some of the comments, however, the Subcommittee recommended adding a statement to the committee note clarifying that the rule applies in all districts, regardless of whether the debtor makes ongoing mortgage payments directly to the mortgagee, or through the chapter 13 trustee. She said the recommended language

was in the last sentence of the first paragraph of the committee note.

Draft Mortgage Forms for Publication.

Mr. Rao walked the Committee through the contents of the three proposed mortgage forms at Agenda Item 5(A), starting at page 114 of the materials – the Draft Mortgage Proof of Claim Attachment, Official Form 10 (Attachment A); the Draft Notice of Mortgage Payment Change, Official Form 10 (Supplement 1); and the Draft Notice of Postpetition Mortgage Fees, Charges, and Expenses, Official Form 10 (Supplement 2). He said the Subcommittee's recommendation was to publish the attachment and two supplements for comment this August so that they would be on the same approval track for final approval as Rule 3001(c)(2) and 3002.1(b) and (c).

Mr. Rao explained that Attachment A was designed to be attached to the proof of claim form (POC) and filed at the same time as the POC to implement the requirements of Rule 3001(c)(2). Because it would be filed as an attachment, no signature line was required. Mr. Rao added that Mr. Myers had drafted an alternative version of Attachment A (starting at page 116 of the materials and labeled "alternative 2") that presented the same information in a slightly different format. Mr. Myers explained that the main difference was a greater use of tables in "alternative 2" so that that some of the information could be presented in columns and more easily tabulated.

Judge Harris recommended that the header for whichever version of Attachment A is approved include the debtor's name and case number.

Mr. Rao explained that the two supplement forms were designed to implement Rule 3002.1(a) - (c). In response to a comment from Judge Ikuta about the language in the signature block, Mr. Rao explained that the signature blocks would be conformed to whatever the Committee decided to do with the signature block on Form 10, which would be discussed at Agenda Item 5(B).

Judge Harris asked whether there had been any discussion of applying the supplements to non-residential mortgages. Judge Wedoff said that that issue was not before the Subcommittee, but that it might be something the Committee should consider in the future.

After additional discussion about the proposed mortgage forms, the proposed change to Rule 3001(c)(2) and proposed new Rule 3002.1, the following motions were made:

A motion to recommend final approval of Rule 3001(c)(2) in its entirety as set forth at pages 51-53 of the materials, with the subparagraph (D) drafting revisions and other changes discussed above and subject to review by the Style Subcommittee, passed without objection.

A motion to recommend final approval of Rule 3002.1, as set forth at pages 54-59 with the changes discussed above including conforming the sanctions provision with Rule 3001(c)(2)(D), and subject to review by the Style Subcommittee, passed without objection.

A motion to approve Attachment A, alternative 2 (as opposed to alternative 1), for publication, as shown as page 116 of the materials passed 12 to 1, subject to restyling before publication.

A motion to approve Supplements 1 and 2 for publication, subject to conforming the signature blocks to the Committee's recommendation for the signature block on Official Form 10 (at Agenda Item 5(B)), passed without objection, subject to restyling before publication.

After the meeting all three forms were reviewed by an outside consultant who works with the Forms Subcommittee in connection with the Forms Modernization Project ("FMP" – discussed below at Agenda Item 8). The FMP consultant recommended a number of stylistic and formatting changes which were distributed to committee members by email. The styled versions were revised in response to committee member comments **and, by email vote, the Committee recommended for publication final styled versions of the mortgage forms.**

4(A)(2) Comments on the bulk claim and revolving credit provisions.

The Reporter explained that, as published in August 2009, a proposed amendment to Rule 3001(c) – redesignated as (c)(1) – would have required the holder of a claim based on an open-end or revolving consumer credit agreement to attach to its proof of claim the last account statement sent to the debtor prior to the commencement of the bankruptcy case. She said that there was a dramatic split in the commentary between representatives of the bulk claims industry and credit card issuers (arguing against the proposal) and the consumer debtor bar and trustees (arguing in favor of the proposal).

Representatives of bulk purchasers of credit card debt objected on several grounds arguing, among other things, that the last account statement will often not be available when the proof of claim is filed (under federal record retention policies for financial institutions, credit card account records generally need only be retained for two years). Another reason cited in opposition was that account statements often reveal private information about the debtor (e.g., where purchases were made or the type of medical treatment obtained).

Asserting that there is a low objection rate to claims filed by bulk claims purchasers, some opposing comments questioned whether there was a problem at all. Others pointed out that Rule 9011 and criminal sanctions are already available to police fraudulent claims, and asserted that adding the threat of sanctions coupled with a requirement for information that is impractical or impossible to obtain will have a devastating impact on the debt purchasing market, which they say provides important benefits to the U.S. economy.

On the other side of the issue, numerous comments filed by consumer bankruptcy lawyers and trustees strongly supported the proposed amendments. They recounted their frustrating experiences in dealing with bare POCs filed by bulk claims purchasers. They said that claims failed to comply with existing documentation requirements and that it was impossible to determine how the claim amounts were calculated. Furthermore, they argued, when additional information was sought, claimants frequently failed to respond until an objection was filed, at which point they either withdrew their claims or belatedly provided information that should have been attached to the POC.

Debtors' lawyers explained the disincentives to challenging inadequately documented claims. The lawyer often would receive no additional compensation for the effort, and any money freed up from payment of a challenged claim would just go to other unsecured creditors. In some cases, they said, the cost of objecting would exceed the payment that would be made to the creditor. Nevertheless, some lawyers or trustees said that they did pursue challenges to claims filed by bulk purchasers and discovered claims that were time-barred, filed against the wrong debtor, or excessive in amount.

Supporters of the amendments applauded the proposal to provide sanctions for the failure of claimants to comply with the rules. They noted the burdens placed on debtors seeking bankruptcy relief and expressed the view that bulk purchasers should not be free to ignore rule requirements based on assertions that compliance would be unduly burdensome.

Some members of the consumer bar advocated strengthening the proposed requirements and sanctions. Some desired a requirement that a credit card claimant provide not only the last account statement, but also the dates of the last payment and of the last actual charge on the account. Others wanted the original credit agreement with the debtor's signature to be attached to the POC. Several argued that POCs that fail to comply with the documentation requirements should be disallowed.

The Reporter explained that the proposal to attach the last account statement for credit card claims arose because, despite the existing requirement in Rule 3001 to the attach the writing on which a claim is based, holders of credit card debt rarely attach the underlying agreements or any of the amendments or statements that support their claim. When little supporting information is provided with a proof of claim, the burden is placed on a debtor or trustee to seek, through informal means or by discovery, information that Rule 3001(c) or Form 10 requires the claimant to provide in support of its claim.

In reviewing the comments, however, the Subcommittee concluded that the rule should not require the attachment of information that is frequently unavailable or impracticable to obtain. Likewise, it concluded that, if there is a less burdensome way for a creditor to provide the information needed to assess the validity of its claim, the rule should not insist on the provision of that information in a more costly or difficult manner.

The Subcommittee therefore recommended withdrawing the proposal for the attachment of the last account statement in Rule 3001(c)(1) and in its place recommended for publication a new subdivision (c)(3). That provision requires a statement of the following information, to the extent applicable: (1) the name of the entity from whom the creditor purchased the account; (2) the name of the entity to whom the debt was owed at the time of the last transaction on the account by an account holder; (3) the date of the last transaction on the account by an account holder; (4) the date of the last payment on the account; and (5) the date on which the account was charged to profit and loss.

The Reporter said that there was a split in the Subcommittee about whether bulk claims filers should be required to comply with new (c)(3) – described above – in *addition to* the requirement of (c)(1) to provide writings on which the claim is based, but that the majority recommended that the new (c)(3) reporting requirements *in place of* the (c)(1) attachment requirements.

The Committee discussed the Subcommittee's recommendation. Mr. Rao said that he supported proposed (c)(3) as an alternative to requirement of providing the last account statement, but that he was worried that using (c)(3) as a replacement for (c)(1) would result in the debtor having to incur costs through discovery or court filings in order to obtain original writings. He said the original credit card agreement might not matter in most instances, but could have a bearing on statute of limitation defenses because the agreement would include the parties' choice of law provision. He said he wouldn't have a problem with the Subcommittee's proposed draft if it included a provision that the original writing the claim is based on must be turned over on request by a party in interest.

Judge Wedoff proposed an amendment that would allow a party in interest to obtain the writing on which an open-end or revolving consumer credit claim is based by making a request in writing for that documentation from the holder of the claim. After discussing possible language, a suggestion was made to designate (c)(3), as proposed in the agenda materials at pages 71 and 72, as (c)(3)(**A**), and add a new (c)(3)(**B**), as follows: "On written request of a party in interest, the holder of such a claim shall provide the documents required in paragraph (1) of this subdivision."

After further discussion, **the Committee voted to recommend for publication new 3001(c)(3) as revised above, subject to review by the Style Subcommittee.**

(B) Recommendations concerning comments submitted on:

(1) Proposed amendment to Rule 2003.

The Reporter reviewed the comments pertaining to the proposed amendment to Rule 2003(e), providing that, if the section 341 meeting is adjourned, "[t]he presiding official shall

promptly file a statement specifying the date and time to which the meeting is adjourned." She explained that the purpose of the amendment was two-fold: (1) to provide notice of the date and time to which the meeting has been continued; and (2) to discourage premature motions to dismiss or convert the case under § 1307(e) when a meeting is adjourned or "held open" as permitted by § 1308(b)(1) of the Code in order to allow the debtor additional time in which to file a tax return with taxing authorities.

The Reporter said that the comments generally supported the amendment as published, with the exception of comment 09-BK-139, submitted by Deborah A. Butler, Associate Chief Counsel of the IRS on behalf of the Office of Chief Counsel. Ms. Butler suggested several changes based on the view that § 1308(b)(1) requires the trustee to declare specifically that the meeting is being "held open for the purpose of allowing the debtor additional time in which to file his or her tax returns." She distinguished that authority from the broader and more general authority of the officer presiding at a meeting of creditors to "adjourn" the meeting as necessary. Ms. Butler argued that the rule as proposed "could lead debtors to believe that any adjournment of the section 341 meeting would qualify as holding the meeting open for purposes of section 1308."

The Reporter explained that in drafting the proposal, the Subcommittee determined that there was no substantive difference between the terms "held open" and "adjourned," and consequently agreed with Ms. Butler's point that "any adjournment" would qualify as holding open the meeting for purposes of § 1308(b)(1), at least so long as the date to which the meeting is adjourned does not exceed the time limits of § 1308(b)(1)(A) and (B). Accordingly, the Subcommittee recommended no change to the rule as published.

Mr. Kohn reiterated and emphasized some of the points raised by Ms. Butler's comment in opposing the rule as published. He pointed out that Congress wasn't writing on a clean slate when it gave the trustee the ability to "hold open" a meeting to allow a limited amount time to file required tax returns, and that a notice to "hold open" a meeting would send a clear signal to parties in interest that there was a tax problem in the case. "Adjournment" on the other hand, has historically been associated with trustee discretion for time periods well beyond those in § 1308. He was concerned that an adjournment for a discretionary reason could result in allowing the debtor an indefinite period of time to file taxes.

Judge Wedoff responded that indefinite adjournment for tax-filing purposes is not possible because § 1308 contains hard deadlines for filing taxes, so that, while any adjournment would result in allowing the debtor additional time to file taxes, it could only do so up to the statutory deadlines. He said he was more concerned that requiring a trustee to use different notices to "hold open" or "adjourn" would be confusing and could cause problems simply because the trustee filed the wrong form.

After additional discussion, **the Committee voted 9-4 to recommend that Rule 2003 be adopted as published.**

(2) Proposed amendment to Rule 4004.

The Reporter recapped the purpose of the proposed amendment to Rule 4004(b). She explained that the amendment is intended to address the situation in which there is a gap between the deadline under Rule 4004(a) for objecting to a debtor's discharge and the court's entry of the discharge order. If during that period the trustee or a creditor discovers that the debtor had engaged in conduct that would provide a basis for denial of the discharge, it would be too late to object. Moreover, even if the conduct would otherwise provide a basis for revocation of the discharge once the order was entered, revocation would not be available if § 727(d) required that the party seeking revocation not have knowledge of the conduct until after the granting of the discharge.

The Reporter said three comments were received. Two comments, by Bankruptcy Judges Wesley Steen and Marvin Isgur, supported the change but recommended going further and allowing objections to discharge for any of the reasons listed in 11 U.S.C. § 727(a), not just grounds for revocation listed in § 727(d). A third comment, from the Insolvency Law Committee of the Business Law Section of the State Bar of California (ILC), suggested that the committee note make clearer that the revision was meant to apply to any of the grounds listed in § 727(d), and not just subsection (d)(1).

The Reporter said that Subcommittee carefully considered the comments. She said it considered a draft revision that would allow for the bringing of any § 727(a) ground for discharge until the discharge was actually entered, but rejected such a solution as unnecessarily prolonging the possibility of discharge litigation in cases in which the discharge is not promptly entered after the objection period closes. Instead, the Subcommittee continued to favor allowance of objections based on grounds for revocation under § 727(d). She said the Subcommittee did recommend including the following language the committee note after considering the ILC comments:

> Furthermore, during that period the debtor may commit an act that provides a basis for both denial and revocation of the discharge. In ~~that~~ those situations, subdivision (b)(2) allows a party to file a motion for an extension of time to object to discharge based on those facts so long as they were not known to the party before expiration of the deadline for objecting. The motion must be filed promptly after discovery of those facts.

After discussing the Subcommittee's recommendation, the Committee recommended approval of the amendment with the change to the committee note discussed above.

(3) Proposed amendment to Official Forms 22A, 22B, and 22C.

The Reporter said that there were no comments opposing the proposed substitution at

several places on Forms 22A-C of the phrases "household" and "household size" with "number of persons" and "family size," and that the Subcommittee recommended that the forms be approved as published.

Judge Wedoff added that there was one comment, 09-BK-032, by attorney William J. Neild, unrelated to the proposed changes. Attorney Neild suggested that B22A be amended to allow employee debtors to deduct from income any telecommunications expenses incurred in the course of their work. Judge Wedoff suggested that the issue be referred to the Subcommittee.

A motion to recommend approval of the proposed changes to Forms 22A, 22B and 22C effective December 2010, and to refer Comment 09-BK-032 to the Consumer Subcommittee carried without opposition,

(C) Recommendation concerning Suggestion 09-BK-H by Judge Margaret Dee McGarity (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 3007(a) to provide for disposition of objections to claims by negative notice, rather than requiring a hearing.

Judge Wedoff explained that the Subcommittee drafted a proposal to allow for negative notice under Rule 3007(a), which was contained in the agenda materials. After its consideration of the matter, however, it became aware of a related suggestion from the BJAG, 09-BK-N. That suggestion asks the Committee to address a split of authority on the interplay between the current language in Rule 3007(a), Rule 9014, and Rule 7004 with respect to the service and notice requirements for an objection to claim. Judge Wedoff said the Subcommittee therefore was withdrawing its recommendation so that both suggestions could be considered together. **The Chair referred Suggestion 09-BK-H back to the Consumer Subcommittee to be considered along with Suggestion 09-BK-N**

(D) Recommendation concerning Suggestion 09-BK-K by the National Association of Chapter 13 Trustees and Wells Fargo Corporation to add a claims identifier to Official Form 10, the proof of claim.

The Reporter said that the Consumer Subcommittee carefully considered the suggestion for the addition of a uniform claim identifier (UCI) on Form 10. The Subcommittee concluded that the proposed UCI could assist chapter 13 trustees in getting payments more easily to the correct creditor and credited to the correct account. Moreover, the Subcommittee identified no privacy problems under current laws, rules, and policies that would be presented by the use of the proposed 24-character identifier. It therefore recommended the designation of space for this item in Form 10. [See Agenda Item 5(B) for the discussion about the placement of the UCI on Form 10.]

(E) Oral report concerning possible revision of Schedule C to deal with the extent of a claimed exemption; issues that the Supreme Court will be considering in Schwab

v. Reilly (08-538) [See also, Agenda Item 4(B) for the October 2009 meeting.]

Judge Wedoff said that the Subcommittee would continue to hold any suggested revision of Schedule C until after Supreme Court decides Schwab v. Reilly.

(F) Recommendation concerning proposed amendment to Rule 7056 to provide an exception to the time for filing a motion for summary judgment set out in Civil Rule 56, as amended effective December 1, 2009. [March 2009 agenda item 13 and October 2009 agenda item 10].

Judge Wedoff explained that, when the new version of FRCP 56 (which is incorporated into the Bankruptcy Rules by BR 7056) went into effect on December 1, 2009, it included a new default deadline that requires a summary judgment motion be filed within 30 days from the close of discovery. He said such a deadline often would not make sense in bankruptcy cases, and that many courts have established different default deadlines by standing order or local rule.

Judge Wedoff recommended a change to Rule 7056 that would establish a more meaningful default deadline in bankruptcy of "30 days before the initial date set for a scheduled evidentiary hearing on an issue for which summary judgment is sought." After a short discussion, **a motion recommending publishing an amendment to Rule 7056 as set forth at page 107 of the agenda materials carried without opposition.**

5. Report of the Subcommittee on Forms.

(A) Recommendations on proposed forms to address problems related to claims secured by a debtor's home: Draft Mortgage Proof of Claim Attachment, Official Form 10 (Attachment A); Draft Notice of Payment Change, Official Form 10 (Supplement 1); Draft Notice of Postpetition Fees, Charges and Expenses, Official Form 10 (Supplement 2).

[See Committee action at Agenda Item 4(A)(1).]

(B) Recommendations on proposed amendments to Form 10, the Proof of Claim, including the wording of a creditor certification; the statement about attachment of a summary; inconsistent use of the pronoun "you" and whether some parts of the form should be worded in the first person; and Suggestion (10-BK-B) by Rena M. Myers to provide additional space for the "filed" stamp.

Judge Perris reviewed the proposed changes to the proof of claim form, (Official Form 10).

At the fall 2009 meeting in Boston, the Advisory Committee approved the Subcommittee's recommendation concerning the interest rate information in Item 4 of the form.

The amendment consists of adding "(at time case filed)" under "Annual Interest Rate _____%" and adding check boxes to indicate whether that rate is fixed or variable. Additional suggestions for amendments to Form 10 were discussed in Boston and referred to the Subcommittee for further consideration.

The matters that were referred to the Subcommittee relate to the following: (1) the wording of the declaration in the date and signature block; (2) the statement in Item 7 about the attachment of a summary of any documents that support the claim; and (3) ambiguity in the references to "your claim" throughout the form. After the fall 2009 meeting, three suggestions relating to Form 10 were also referred to the Subcommittee. They relate to the addition of spaces on the form for a date-stamp and for a uniform claim identifier and the placement of greater emphasis on the need to redact attached documents. All of these issues are discussed below.

Creditor Declaration. Judge Perris said that the Consumer Subcommittee initially recommended that the following declaration be added to the date and signature block of Form 10: "By signing, the person filing the claim declares under penalty of perjury the information provided above is true and correct." In discussing this proposal at the fall meeting, some members questioned whether the declaration imposed too high a standard on the person signing, and some members suggested allowing the statement to be made "upon information and belief" or "after reasonable inquiry." Another issue raised was whether the declaration should be in the name of someone other than the person filing the claim, such as "the person on whose behalf this claim is filed."

The Forms Subcommittee carefully considered the matter, and concluded that a declaration similar to ones used in other forms (such as Official Forms 2 and 6) is appropriate for a proof of claim. Because some members were concerned that the person filing a proof of claim might later assert total reliance on someone else regarding the validity of the information, the Subcommittee concluded that the declarant should be held to a standard of reasonableness. Judge Perris said that the Subcommittee therefore recommended that the following declaration be added to the signature block of Form 10: "I declare under penalty of perjury that the information provided above is true and correct to the best of my knowledge, information, and reasonable belief."

The Subcommittee also considered *who* should make the declaration. At the fall meeting, some committee members said that the person filing the claim on behalf of a creditor is often a lawyer or a company employee with relatively little direct knowledge of the creditor's accounts. That prompted the suggestion of requiring the certification to be made by "the person on whose behalf this claim is filed," although another member responded that the person actually filing the proof of claim should be required to engage in a reasonable inquiry before doing so. Another concern was whether the declaration should be made by a "person" (including a corporation) or an "individual."

Currently the signature provision of Form 10 applies to the "person filing this claim." That is who must sign it, yet it also requires the filer to "sign and print the name and title, if any, of the creditor or other person authorized to file this claim." According to Rule 3001(b), a proof of claim "shall be executed by the creditor or the creditor's authorized agent." If the creditor fails to timely file a claim, the trustee or debtor may file under Rule 3004, and a guarantor, surety, indorser, or other codebtor may file under Rule 3005.

Judge Perris said that the Subcommittee concluded that a real, live person should have to take responsibility for assuring the accuracy of a proof of claim. Thus it recommended requiring the signature of an individual – either the creditor or other individual entitled to file a proof of claim or the creditor's authorized agent. To simplify the wording of the date and signature box, the Subcommittee recommended that four checkboxes be added to designate the role of the individual signing the form: (1) creditor; (2) authorized agent; (3) trustee or debtor; or (4) guarantor, surety, indorser, or other codebtor. The Subcommittee further recommended that the instruction for Item 8 state that the form must be signed by an individual and that it emphasize the significance of the signature as a declaration. Finally, the Subcommittee recommended that the instructions state that when a proof of claim is filed by a servicing agent for a creditor, both the name of the individual filing the claim and the name of the servicing agent be provided. The name of the individual filing the claim would be indicated in the signature block beside "Print name," and the name of the servicing agent would be listed in the signature block beside "Company." (The name of the creditor is already listed at the top of page 1 of the form.)

In discussing the Subcommittee's recommendations, Judge Harris suggested that there should be something added to the instruction for Item 8 that clarifies that the declaration is derived from Rule 9011(b). After considering language variations, the Committee approved adding to the instruction "Your signature is also a certification that the claim meets the requirements of FRBP 9011(b)," and also approved a suggestion by Judge Wizmur to ask for the email address as part of the contact information in the notice and address boxes at the top of the form and in Item 8.

The Use of a Summary of the Writings Supporting a Claim. Rule 3001(c) requires that when a claim is based on a writing, "the original or a duplicate shall be filed with the proof of claim." If it has been lost or destroyed, an explanation must be filed with the claim. The current version of Form 10 instructs the filer in Item 7 to attach "redacted copies of any documents that support the claim." It goes on to state: "You may also attach a summary." The meaning of the second sentence is not clear. It could either mean "you also have permission to attach a summary, rather than the documents themselves" or "you may also attach a summary in addition to the supporting documents." The first meaning is not consistent with the Rule 3001(c); the second one is.

During discussion of this issue at the fall meeting, the sense of the Committee was that the supporting documents should be attached to the proof of claim, as Rule 3001(c) requires, and that a summary may be added if the creditor believes it would be useful. In referring this matter

to the Subcommittee, the Chair asked it to consider whether an exception allowing the filing of only a summary should be created for the situation in which the supporting documents are voluminous and, if so, how that exceptional circumstance should be defined.

Judge Perris said that the Subcommittee recommended amending Form 10 to conform to Rule 3001(c) and that the submission of a summary not be permitted in lieu of attaching the supporting documents themselves. She said that there does not appear to be any technological barrier to filing lengthy documents under the current CM/ECF system, and the Subcommittee concluded that because a proof of claim executed and filed in accordance with the rules constitutes prima facie evidence of the validity of the claim, it is appropriate to require the submission of supporting documentation.

Accordingly, the Subcommittee recommended amending Item 7 to require the attachment of redacted copies of documents that support the claim or that provide evidence of the perfection of any security interests and to eliminate any reference to summaries. It also recommended that the instructions for Item 7 be amended to provide that a summary may be attached *in addition* to redacted copies of the document.[1]

Proposed Wording Changes in the Form. The Consumer Subcommittee previously pointed out that an inconsistency exists in the current form with respect to the meaning of "your." In most places "your" refers to the creditor, but a proof of claim may also be filed by a debtor or trustee, and there is a checkbox to indicate such a filing. When someone other than the creditor files the proof of claim, the references to "your claim" are inaccurate.

The Subcommittee concluded that this issue can be resolved by eliminating the word "your" before "claim" and substituting "the" or "this." The Subcommittee incorporated the proposed changes, as indicated on the mock-up of the form included in the materials.

Amendments in Response to Suggestions. The Reporter said that suggestions were submitted regarding Form 10, and that the Subcommittee recommended amendments in response to each of the suggestions.

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[1] The Chair noted that the Committee's earlier decision at Agenda Item 4(A)(2) to recommend publishing this fall proposed new Rule 3001(c)(3) – which would allow a summary instead of underlying documents for an open-end credit claim – does not bear on the proposal in this agenda item to remove any reference to summaries at Item 7. She explained that, because of added procedural requirements, a change to a federal bankruptcy rule takes a year longer than a change to an official form. Thus, if ultimately approved, the proposed open-end credit claim procedure in Rule 3001(c)(3) will not go into effect until December 1, 2012. The currently proposed revisions for Form 10, however, are on track to go into effect a year earlier, on December 1, 2011.

The Chair said that if, after the comment period next spring, the Committee recommends going forward with the Rule 3001(c)(3) change, that a corresponding carve-out in Instruction 7 of Form 10 could be published for comment next year, with a target effective date of December 1, 2012, to coincide with the effective date of the proposed rule change.

The first suggestion (09-BK-K) was submitted by George Stevenson, which proposes that Form 10 be amended to provide space for a uniform claim identifier. Background and discussion of the suggestion is included as Agenda Item 4(D). In response to the Consumer Subcommittee's endorsement of the suggestion and the referral of the matter to this Subcommittee, the Forms Subcommittee recommended amending Form 10 to add space for this optional information as Item 3b, and adding instructions regarding the UCI as indicated in the mockup of Form 10 in the materials.

The second suggestion (10-BK-B) was submitted by Rena Myers, case administrator in the Bankruptcy Court for the Eastern District of Tennessee. She suggested that there is a need for more space on the form to allow for a legible date-stamp. The Subcommittee agreed and recommended that Form 10 be modified as indicated on the mockup in the materials.

The final suggestion (10-BK-C) was submitted by Therese Buthod, clerk of court for the Bankruptcy Court for the Eastern District of Oklahoma. She said that filers often fail to redact personal identifier information from documents attached to proofs of claim, and suggested emphasizing the need to redact documents in Item 7 of Form 10. The Subcommittee agreed with the suggestion and recommended that the word "redacted" be written in bold type at the beginning of Item 7 as shown in the mockup.

In discussing the definition of "redacted," committee members recommended the following changes: changing the beginning of the second sentence **"A creditor must show only the last four digits of …"; adding to the end of the definition the following – "If the claim is based on the delivery of health care goods or services, limit disclosure of confidential health care information."**

Judge Perris explained that, as a result of the proposed changes, Official Form 10 would expand to three pages. Accordingly, references to instructions or definitions on the "reverse side" should be eliminated, since the form itself is now on two pages and the instructions and definitions are on pages two and three.

After additional discussion, the Committee recommended publishing Form 10 as set forth in the materials for comment, with the changes discussed above. After the meeting, a number of style changes were made to the form in response to suggestions from the Forms Subcommittee's Forms Modernization Consultant. **The Committee approved the styled version by email vote.**

(C) Oral report on recommendation (by email vote) that the Director of the Administrative Office amend Director's Form B240A, the Reaffirmation Agreement; issue Instructions for Form B240A; and continue to make available the former reaffirmation form (now designated as Form 240A/B ALT).

Judge Perris reminded the Committee that at its fall 2009 meeting it considered a revised reaffirmation agreement form (Director's Form 240A) and recommended that the Director promulgate it and post it on the internet, while continuing to post the older version for a six-month transition period. She said that, after posting of the new form in December, the Administrative Office ("AO") learned from clerks that some creditor attorneys thought that it was inconsistent with the Bankruptcy Code, and that two creditor attorneys contacted the AO directly with their concerns. See Suggestion 09-BK-L (suggestion of Bradley Halberstadt) and Suggestion 10-BK-A (suggestion of Richardo I. Kilpatrick).

Judge Perris said that the Subcommittee discussed the suggestions by conference call on January 13, and reaffirmed its prior conclusion that § 524(k)(2) allows form drafters flexibility in wording and organization of the mandated disclosures because it authorizes the disclosures to be made "in a different order and . . . [to] use terminology different from that set forth in paragraphs (2) through (8)," with the exception of two terms – "Amount Reaffirmed" and "Annual Percentage Rate" – whose use is required. Because paragraphs (2) through (8) comprise all of the statutory disclosure requirements – including language that is contained in quotation marks – the Subcommittee again concluded that no particular language, other than the two specified terms, is statutorily mandated.

The Subcommittee did, however, conclude that in order to ensure compliance with the substance of § 524(k) and (m), additional revisions to Form 240A should be made with respect to the: (1) specification of fees and costs included in the amount reaffirmed; (2) description of the repayment terms; and (3) information about the effective date of agreements for which there is a presumption of undue hardship. Judge Perris said the Committee approved the revisions by email vote, and that on the Committee's recommendation, the Director promulgated the newly revised version on April 1, 2010. Judge Perris said that details about the differences between the April 2010 version and the December 2009 version it replaced were discussed in detail in the Reporter's memorandum in the materials.

Judge Perris said that, although B240A is a Director's form and its use is not required by the Bankruptcy Code or Rules, many courts require its use by local rule. She said that the Committee's original intent in revising the form was to create a version that was easier for debtors to read and understand. The form was not, however, appropriate for all circumstances. In particular, she explained, because some of the statutory disclosures were in the reaffirmation agreement portion of the form, it could not be used to provide necessary disclosures if the parties decided to use their own reaffirmation agreement – a practice the statute allows.

Accordingly, form instructions were also posted on the court's website with the April version of the form. Among other things, the new instructions set out the purpose of the form, the legal authority governing reaffirmation agreements, and the reasons for the revision, as well as basic directions for completing the form. These instructions also explain that § 524(k)(2) authorizes a different order and language from that set out in the statute, that the form is not appropriate for attachment to a stand-alone reaffirmation agreement, and that the Code

authorizes parties to use their own agreement.

Finally, Judge Perris explained that in order to provide a uniform set of disclosures for separate reaffirmation agreements, the original Form 240A, re-labeled as Form 240A/B ALT, will remain on the website indefinitely. If attached to a separate reaffirmation agreement, Form 240A/B ALT will provide the disclosures required by § 524(k).

(D) Recommendations and reports on other amendments to the bankruptcy forms:

(1) Recommendation on Suggestion (09-BK-G) by Kathleen Crosser to create a separate petition for use in chapter 15 cases.

The Reporter reviewed the suggestion as set out in her memo in the materials, and explained that the Committee considered and declined at its October 2008 meeting to adopt a separate chapter 15 petition when it considered a similar suggestion submitted by Judge Laurel Myerson Isicoff (Bankr. S.D. Fla.). Among the reasons that the Advisory Committee declined to accept this suggestion was the relatively small number of chapter 15 petitions that are filed annually.

The Reporter said that the Subcommittee concluded that the problems with the petition cited by Ms. Crosser are not sufficiently serious to require immediate action. The space for indicating the chapter in which the petition is filed and, for chapter 15 cases, whether recognition is being sought of a main or non-main foreign proceeding, has a clear format. Members of the Subcommittee also did not think that the foreign representative signature box is especially confusing.

The Subcommittee therefore recommends that any adjustments to the petition form await developments of the Forms Modernization Project. **After a short discussion, the Chair referred the suggestion to the Forms Subcommittee's Forms Modernization Project.**

(2) Recommendation on revision of the captions of Official Forms 20A and 20B.

Mr. Myers explained that B20A and B20B should be amended to change their captions in two respects. First, the forms should instruct the filer to list all names used by the debtor in the last eight, rather than six, years. This change would conform the forms to a 2005 amendment of § 727(a)(8) of the Bankruptcy Code that extended the period between chapter 7 discharges from six to eight years. Second, the filer should be instructed to redact the debtor's individual taxpayer identification number (ITIN), in addition to the current requirement to redact the debtor's social security number. The need to redact an ITIN is required by Rule 9037.

The Committee voted unanimously to approve the amendments without publication.

(3) Oral report on amendments to Official Forms 1, 6C, 6E, 7, 10, 22A, and 22C, and Directors Forms 200 and 283, to conform to the dollar adjustments to the Bankruptcy Code on April 1, 2010, as provided in section 104(a) of the Code.

The Reporter said the above forms were amended on April 1, 2010 to incorporate the dollar adjustments to the Bankruptcy Code that occur every three years under 11 U.S.C. § 104(a).

6. Report of the Subcommittee on Business Issues.

(A) Recommendation concerning comments submitted on the proposed amendments to Rule 2019.

Judge Wizmur and the Reporter reviewed the comments and the Subcommittee's recommendation regarding Rule 2019.

Repeal of Rule 2019 or adoption of an alternative to its verified statement requirement. Judge Wizmur explained that the Committee's consideration of Rule 2019 was prompted by a suggestion of two trade associations that the rule be repealed. After publication of the proposed amendments, however, those organizations no longer advocated repeal. The only commentator who supported repeal of Rule 2019 was attorney Thomas Lauria. In both his testimony and his written comments, he argued that the rule chills participation by *ad hoc* committees in chapter 11 cases, that it is used improperly for tactical purposes by parties, and that its valid purpose can be fulfilled by the use of discovery. Another attorney, Martin Bienenstock, suggested that parties be allowed to satisfy Rule 2019 by filing three certifications rather than the verified statement required by the rule. The certifications would require a party to state the amount of its pre- and postpetition claims against the debtor and whether it held economic interests in the debtor or in an affiliate of the debtor that would increase in value if the debtor's estate decreased in value.

The overwhelming majority of commentators supported a clarified and reinvigorated Rule 2019, even if they opposed specific aspects of the proposed amendments. They favored providing greater transparency in the chapter 11 reorganization process and permitting creditors and equity security holders to have access to information about possible conflicts of interest of those purporting to represent them.

Price and date of acquisition information. Most of the opposition to the published amendments focused on the proposed rule provisions that would have required the disclosure of the date when each disclosable economic interest was acquired (if not more than one year before the filing of the petition) and, if directed by the court, the amount paid for each disclosable economic interest. These disclosure obligations would have applied to each covered entity, indenture trustee, member of a group or committee, and to each creditor or equity security holder represented by a covered entity, indenture trustee, or committee or group (other than an official

committee).

The objectors to these provisions raised the following concerns:

- The price paid for a claim or interest is generally irrelevant to any issue in a chapter 11 case.
- If this information should ever be relevant, it could be obtained through discovery or pursuant to the court's inherent authority to order its disclosure.
- Pricing information is highly guarded by distressed debt purchasers. Requiring its disclosure will allow competing firms to determine the disclosing party's trading strategy.
- Parties in interest engage in the strategic use of the authority to compel the disclosure of this confidential information.
- The existence of this requirement, proposed to be made explicitly applicable to *ad hoc* committees, will discourage the formation of such groups and will decrease the purchasing of distressed debt.
- The disclosure of the date of purchase enables other parties to determine the purchase price by using market reports. Thus the required disclosure in all cases of the date of purchase will result in the acquisition price being revealed, whether or not the court directs its disclosure.

Bankruptcy Judge Robert Gerber of the Southern District of New York testified in favor of the published amendments, including the provisions for disclosure of date and price of acquisition. He indicated, however, that a more general disclosure of the time of acquisition and a required showing of relevance of price might be sufficient to serve the rule's purposes.

Disclosure regarding clients who do not actively participate in the case. The National Bankruptcy Conference ("NBC") commented that an entity, such as a law firm, should not be made subject to the rule when it represents more than one client with respect to a chapter 11 case but it does not appear in court to seek or oppose the granting of relief on behalf of more than one of those clients. NBC argued that if a client remains passive in the case, there is no reason to require the public disclosure of its holdings merely because it retained a firm that happens to represent one or more other creditors or equity security holders.

Exclusions from the rule. Several comments asserted that administrative agents under credit agreements should not be required to disclose information regarding each of the lenders in its syndicated credit facility; others argued further that such agents should be exempted altogether from the rule's coverage. It was argued that these entities are not agents in the traditional sense of that term since the lenders are free to take positions adverse to the agent. Furthermore, it was contended, the lenders themselves often are not acting in concert with each other and so should not be covered by the rule just because there happens to be an administrative agent under the credit agreement.

Somewhat similarly, the argument was made that indenture trustees should not be required to make disclosures regarding every bondholder under the applicable indenture merely because the bonds were issued under an indenture. Another comment stated that the rule should be revised to make clear that it does not cover class action representatives.

Supplemental statements. Several comments addressed the proposed requirement in subdivision (d) that supplemental verified statements be filed monthly, setting forth any material changes in the facts disclosed in a previously filed statement. The comments expressed concern that the requirement would be overly burdensome on the parties and the court. Some commentators sought clarification that a supplemental statement would not have to be filed if no changes had occurred. One comment suggested that verified statements be supplemented only when the group, committee, or entity that filed the original statement was seeking to participate in matters before the court. That change, it was argued, would relieve parties no longer active in the case from the continuing obligation to file supplemental statements.

The enforcement provision of subdivision (e). The published draft of amended Rule 2019 proposed mostly organizational and stylistic changes to the existing provisions of Rule 2019(b), which authorize sanctions for the failure to comply with the rule's requirements. The published revision of the rule moved the sanctions provisions to subdivision (e). Judge Wizmur said that two sets of written comments criticized the breadth of proposed subdivision (e). Like the existing rule, the proposed subdivision would have authorized the court to determine and impose sanctions for violations of applicable law other than Rule 2019. It would also continue to specify certain materials that the court could examine in making its determination.

Both the comment submitted by the Loan Syndications and Trading Association ("LSTA") and the Securities Industry and Financial Markets Association ("SIFMA") and the comment submitted by the Insolvency Law Committee of the Business Law Section of the California State Bar questioned the authority of bankruptcy courts to determine "whether there has been any failure to comply with any other applicable law regulating the activities and personnel of any entity, group, committee, or indenture trustee" and "whether there has been any impropriety in connection with any solicitation." LSTA and SIFMA also argued that the materials that the court can examine in making a determination under this subdivision should be left to the Federal Rules of Evidence.

Disclosure by entities that are seeking or opposing relief. As published, Rule 2019(b) would have authorized the court, on motion of a party in interest or on its own motion, to require disclosure of some or all of the information specified in subdivision (c)(2) by an entity that seeks or opposes the granting of relief. This part of the rule would apply to individual entities that do not represent others. While disclosure by such entities would not be routinely required, the provision would authorize the court to order disclosure when knowledge of a party's economic stake in the debtor would assist the court in evaluating the party's arguments.

Two commentators expressed concerns about this part of the proposed rule. The Clearing House Association argued that the addition of the provision was inconsistent with the original purpose of the rule – protection of represented parties; that it could be obtained by means of discovery or Rule 2004 if relevant; and that it would lead to abusive litigation by parties seeking merely to harass opponents. Bankruptcy Judge Michael Lynn of the Northern District of Texas also expressed concern about the likely tactical use of this provision. He suggested that an order for such disclosure by an entity that is not representing others should issue only on the court's own motion, or on motion by the U.S. trustee, the case trustee, or an examiner.

The Subcommittee carefully considered all of the views expressed in the testimony and comments and recommended making several changes to the published rule as set forth at pages 165 through 171 of the materials. The Reporter said that although there were many recommended changes, the Subcommittee concluded that the revised version should go forward for final approval because the changes described below were responsive to suggestions made in the comments and testimony and narrow in some respects the provisions of the published rule. In addition to stylistic changes, the version set out in the materials includes the following changes after publication:

- The addition of a definition of "represent" or "represents" in subdivision (a)(2) that limits the meaning of the terms to taking a position before the court or soliciting votes on a plan, thereby removing entities that are only passively involved in a case from coverage under the rule.
- The addition of a provision in subdivision (b)(1) providing that the covered groups, committees, and entities are those that represent or consist of multiple creditors or equity security holders that act in concert to advance their common interests and are not composed entirely of affiliates or insiders of one another.
- The elimination of the provision in subdivision (b) of the published amendments that authorized the court to require disclosure by an entity that does not represent anyone else.
- The addition of subdivision (b)(2), which excludes certain entities from the rule's disclosure requirements unless the court orders otherwise.
- The elimination from subdivision (c) of the authorization for the court to order the disclosure of the amount paid for a disclosable economic interest.
- With respect to disclosure of the date of acquisition of a disclosable economic interest, the limitation of the requirement in subdivision (c) to the quarter and year of acquisition and the restriction of its application to an unofficial group or committee that claims to represent any entity other than its members.
- Revision of subdivision (d) to require the filing of supplemental statements only when a covered entity, group, or committee is taking a position before the court or solicits votes on a plan, and any fact disclosed in its most recently filed statement has changed materially.

- Revision of subdivision (e) to limit the scope of its sanctions provision to failures to comply with the provisions of Rule 2019 and to eliminate the enumeration of materials the court may examine in making a determination of noncompliance.
- The addition of a sentence to the committee note stating that the rule does not affect the right to obtain information by means of discovery or as ordered by the court under authority outside the rule.

The Committee thoroughly discussed the Subcommittee's recommended changes.

Some members questioned the wording of subdivision (b)(2)(E), which would exclude "an investment advisor that represents individual funds." The Committee agreed that the provision should be reworded because "represents" is a defined term in the rule, and that word as used in subdivision (b)(2)(E) was not intended to be restricted to that limited meaning. Additionally, members suggested that the exclusion should be phrased in terms of the represented funds rather than the investment advisor.

Subject to a post-meeting resolution of the proper wording of the subdivision (b)(2)(E) and review by the Style Subcommittee, **the Committee unanimously recommended that revised Rule 2019 be approved as set forth in the materials with the following changes: delete "on behalf of another entity," from subdivision (a)(2), and at subdivision (c)(1)(B), change the second instance of "entity" to "creditor or equity security holder."** [However, as a result of changes made by the Styling Subcommittee, the phrase "on behalf of another entity" was added back in to subdivision (a)(2).]

After the meeting, upon the recommendation of Judge Wizmur and the Reporter, the Committee concluded that, even without an express exclusion, an investment advisor would not be an entity that has to file a verified statement merely by virtue of its status as an investment advisor. Thus no exclusion is needed. To the extent, however, that an investment advisor participates as a member of a covered group or committee, it would be subject to the rule's requirements to the same extent as the other members.

By email vote, the Committee approved deleting subdivision (b)(2)(E) from the rule.

(B) Recommendation concerning whether the time limits in Rule 7054(b) should be amended to conform to Civil Rule 54 and the new time computation provisions.

The Reporter said that the Committee voted at its fall 2009 meeting to recommend changing the five-day in Rule 7054(b) to seven days, in conformity with the new time computation rules. The question of whether to change to a multiple of seven days the existing the one-day period for the taxing of costs by the clerk was referred to the Subcommittee.

The Subcommittee considered the issue during its February 18, 2010, conference call.

Rule 7054(b) is the counterpart to Civil Rule 54(d). As part of the time computation amendments, the one-day notice period in Rule 54(d) was extended to 14 days because the one-day period was thought to provide an "unrealistically short" amount of time in which to prepare and present a response to the prevailing party's bill of costs. At the fall meeting the Committee discussed whether there is a similar need to extend the period in bankruptcy cases, and it requested Jim Waldron to survey clerks about their views. Mr. Waldron sent out a query to the clerks in January.

In response to Mr. Waldron's survey question "Should Rule 7054(b) be amended to allow the clerk to tax costs on 14 days notice instead of the currently authorized one day period?", 75.4% of the 65 respondents answered yes. Of the respondents who commented, several stated that one day was too short, and a number of them indicated that their local practice was to provide more time. Several of the clerks also noted that confusion would be reduced by having the notice period in Rule 7054(b) be the same as in Rule 54(d). The Subcommittee therefore recommended publishing for comment the Committee's previous recommendation to change the five-day period in Rule 7054(b) to seven days, as well as the proposal to change to 14 days the one-day period the clerk has to tax costs. **After a short discussion, the Committee adopted the Subcommittee's recommendation.**

(C) Recommendation concerning whether the effective date provision of Article VIII of Official Form 25A, the model chapter 11 plan for a small business debtor, should be changed in light of the time computation amendments

The Reporter explained that B25A, the model chapter 11 plan, contains a default effective date provision, Section 8.02, and that the effective date of the plan is "eleventh *business* day following entry of the order of confirmation." She said the wording presents two problems. First it is incompatible with the new 14-day appeal period in Rule 8002(a), and second, the counting of business days is inconsistent with the newly adopted days-are-days approach to time computation in the federal rules. After discussing various revisions to the Reporter's draft at page 181 of the materials, **the Committee voted to retain the concept of "first <u>business</u> day following the date that is fourteen dates after the entry of the order of confirmation," and to rewrite the last sentence.**

> 8.02 <u>Effective Date of Plan</u>. The effective date of this Plan is the ~~eleventh~~ <u>first</u> business day following the date <u>that is fourteen days after</u>~~of~~ the entry of the order of confirmation. ~~But i~~<u>If, however,</u> a stay of the confirmation order is in effect on that date, the effective date will be the first business day after the ~~at~~ date on which ~~no~~<u>the</u> stay of the confirmation order <u>expires or is otherwise terminated</u> ~~is in effect, provided that the confirmation order has not been vacated~~.

The Committee voted to recommend publishing for comment the above revision of Section 8.02, with a proposed effective date of December 1, 2011.

(D) Recommendation concerning Suggestion 09-BK-H by Judge Margaret Dee McGarity (on behalf of the Bankruptcy Judges Advisory Group) to adopt a rule which provides for closing individual chapter 11 cases after confirmation of a plan and reopening the cases as necessary.

The Reporter said that Judge McGarity's suggestion addresses the timing of the closing of individual chapter 11 bankruptcy cases. The suggestion notes that, as a result of the 2005 BAPCPA amendments, a discharge in an individual chapter 11 case is usually not entered until the completion of payments under the plan. If the case remains open until the discharge is entered, the debtor is obligated to make quarterly payments to the U.S. trustee for several years. In order to avoid paying those fees, some debtors have sought to have their case closed shortly after confirmation, to be reopened upon completion of the plan payments in order to receive a discharge. The suggestion notes that courts have disagreed over whether to allow the case to be closed at that point.

Judge McGarity noted some of the problems presented by the pre-discharge closing of an individual chapter 11 case: no stay is in effect while the plan is being carried out; enforcement of the plan may be sought by creditors in separate state court actions; and the payment of a fee for reopening will be required in order to seek a plan modification, conversion or dismissal, or discharge. While BJAG did not propose any specific rule amendments, Judge McGarity suggested that the group felt that some guidance would be helpful, "such as a streamlined procedure for reopening for enforcement of an individual chapter 11 plan, reopening for discharge, or automatic reopening linked to the terms of the plan, with noticing provisions."

For reasons discussed in the Reporter's memorandum in the agenda materials, the Subcommittee concluded that the Rule 3022 allows the case to be closed "[a]fter the estate is fully administered" and that full administration and entry of a final decree does not require completion of payments under the plan. The Subcommittee therefore recommended that no rule change be proposed.

The Subcommittee did recommend, however, that the Bankruptcy Administration Committee be advised of possible problems presented by an instruction in the current fee schedule regarding the fee for reopening a chapter 11 case. The Subcommittee was concerned that, as currently drafted, the Bankruptcy Court Miscellaneous Fee Schedule, issued by the Judicial Conference under 28 U.S.C. § 1930(b) and as effective on January 1, 2010, may *require* the full $1,000 chapter 11 filing fee to reopen a chapter 11 case and complete the ministerial task of entering a discharge after the plan payments are completed. Although the schedule provides that the "court may waive [the] fee under appropriate circumstances," it also states that the "reopening fee must be charged when a case has been closed without a discharge being entered."

As waiver of the reopening fee is a matter outside the scope of the rules, the Subcommittee recommended bringing the matter to the attention of the Bankruptcy Administration Committee, and asking it to consider whether fee waivers should be authorized

for reopening individual chapter 11 cases in order for the debtor to obtain a discharge or at the request of a creditor. **After a short discussion, the Committee agreed with the Subcommittee's analysis and recommended no change in the rules.**

Mr. McCabe and Mr. Wannamaker said that AO staff would raise the fee waiver issue with the Bankruptcy Administration Committee, which has an advisory role on bankruptcy fee issues, and the Court Administration and Case Management Committee, which has the primary responsibility for bringing fee issues to the attention of the Judicial Conference.

(E) Recommendation concerning Suggestion 09-BK-M by Judge Colleen A. Brown and Judge Robert E. Littlefield, Jr. to amend Rule 7004(h) to clarify the service requirements set forth in the rule.

The Reporter reviewed Judge Brown and Judge Littlefield's suggestion concerning the service requirement of Rule 7004(h) which governs service on insured depository institutions in contested matters and adversary proceedings.

Among other alternatives, the rule requires service by certified mail "addressed to an officer of the institution." The Reporter explained that this subdivision of Rule 7004 was added by § 114 of the Bankruptcy Reform Act of 1994, 108 Stat. 4106. The statute declares that "Rule 7004 of the Federal Rules of Bankruptcy Procedure is amended . . . by adding" the language now set out in subdivision (h).

Judge Brown requests the Advisory Committee to consider clarifying the meaning of service by certified mail "addressed to an officer of the institution." She says that the language is unclear and is subject to several interpretations. For example, she questions whether the envelope must be addressed to an officer by name and title; to an officer by name; to "Officer"; or to a designated official position, such as "President." She seeks clarification of the rule because there is no definitive case law on the question and bankruptcy courts face the dilemma of "determining whether service is sufficient to warrant the granting of a motion when there have been no objections filed and any one of these variations could reasonably be construed to comply with Rule 7004(h)."

After considering the suggestion, the Subcommittee concluded that the Committee lacks authority to recommend an amendment to this subdivision of the rule. Congress enacted Rule 7004(h) by statute, and the legislation prescribed the language of the subdivision. Because 28 U.S.C. § 2075, the bankruptcy rules enabling act, does not allow bankruptcy rules to supersede statutory provisions, the Subcommittee believes that in this instance there is no authority to "clarify" the rule through the bankruptcy rule-making process.

The Reporter noted that the requirement in Rule 7004(h) that the service be "addressed to an officer of the institution" is not unique in the rules. Rule 7004(b)(3) similarly requires the mailing of a summons and complaint "to the attention of an officer" or others, and Civil Rule

4(d)(1)(A)(ii) provides that a mailed request for the waiver of formal service by a corporation be "addressed . . . to an officer" or others. Despite the lack of clarity about how these requirements must be carried out, Congress mandated the wording of Rule 7004(h), so the Subcommittee concluded that resolution of its meaning will have to continue to be worked out through the case law. **After a short discussion, the Committee agreed to take no affirmative action on the suggestion.**

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

(A) Oral report on the status of revision of the Part VIII rules, including incorporation of comments following the special open subcommittee meeting held on September 30, 2009.

Mr. Brunstad said he made about 300 changes to the draft since the fall meeting in Boston, or roughly half the number of changes made after the previous special open meeting in San Diego. He said that, again, many of the changes were mechanical, such as moving statutory cross references, but that there were also changes that had required significant thought. He said that Rule 8009 has become very long because of his attempt to accommodate both written and electronic filings, and he suggested that one possible solution might be to pull out the indicative ruling provisions. He added that he thought the draft was now at a mature stage, and incorporated much of the thinking of some of the best minds through the comments received in San Diego and Boston.

The Chair and membership thanked Mr. Brunstad for all the time and effort he has expended in getting this project off the ground, even after his term on the Committee expired. For his part, Mr. Brunstad said he has enjoyed the project immensely, but that he was happy now to pass it on to the Reporter and the Subcommittee.

(B) Discussion of the underlying goals of the revision of the Part VIII bankruptcy appellate rules.

The Reporter said that Subcommittee is proceeding with its consideration of a comprehensive revision of the bankruptcy appellate rules (Part VIII of the Bankruptcy Rules) and that it endorsed the following goals for the revision:

- Make the bankruptcy appellate rules easier to read and understand by adopting the clearer and more accessible style of the Federal Rules of Appellate Procedure (FRAP).
- Incorporate into the Part VIII rules useful FRAP provisions that currently are unavailable for bankruptcy appeals.
- Retain distinctive features of the Part VIII rules that address unique aspects of bankruptcy appeals or that have proven to be useful in that context.

- Clarify existing Part VIII rules that have caused uncertainty for courts or practitioners or that have produced differing judicial interpretations.
- Modernize the Part VIII rules to reflect technological changes – such as the electronic filing and storage of documents – while also allowing for future technological advancements.

With the benefit of valuable input from users of the existing Part VIII rules obtained at special meetings held in March and September 2009, the Subcommittee anticipates submitting a draft of a revised version of Part VIII rules to the Advisory Committee for consideration at its fall 2011 meeting.

After a discussion, the Committee endorsed the Subcommittee's recommendation and also endorsed a suggestion that staff attempt to coordinate the Committee's spring 2011 meeting with the meeting of the Advisory Committee on Appellate Rules so that the committees can coordinate their efforts to modernize the two sets of appellate rules.

8. Oral report on status of the Bankruptcy Forms Modernization Project.

Judge Perris said that her report would cover CM/ECF and NextGen CM/ECF as well as the Forms Modernization Project (FMP).

CM/ECF. Judge Perris said that CM/ECF's next release is version 4.0. Three courts will test it in the next month or two. The main features are that it brings into the national program an order processing module and better navigation. She said version 5.0 is scheduled for 2011.

NextGen. Judge Perris said that NextGen CM/ECF is going like gangbusters. District Court NextGen is now moving forward. The Project Steering Groups for Bankruptcy and District Next Generation of CM/ECF have been merged. Bankruptcy and District continue to have separate groups developing requirements for clerks and chambers; there is a joint group developing the requirements for outside stakeholders. All groups are busy creating their "requirements" (which Judge Perris described as the "wish list" phase of the project). She said that the bankruptcy clerks group, which started first, has released its fourth set of requirements for comments. She said that bankruptcy chambers group is also moving forward, and that a systems architecture study has begun. She said that the requirements phase is projected to be finished on February 2012.

The Forms Modernization Project. Judge Perris said that the FMP is designed to go hand-and-hand with NextGen in that NextGen will allow the information collected by the forms to be electronically uploaded and accessible in formats consistent with policy of the Judicial Conference with appropriate privacy safeguards.

She referred the group to Tab 8 of the Supplemental Materials, and said that the FMP's forms revision expert has been very helpful in focusing the group. She said that the group has

finished its rewrite of the Petition and Schedules A and B, and that it was now working on the Social Security Form, a form for renters facing an eviction judgment who want to keep their rental unit, the fee waiver and fee installment forms, and the rest of the schedules.

Judge Perris explained that in general, the revision process for a particular form starts with forms expert's review and draft of the form, followed by a working group's review and revision over several conference calls and redrafts, and finally by the full group review and comments. In order to gauge reaction to the new forms, the FMP leadership has been doing presentations at FJC workshops, the clerks' operational practices forum, and using on-line questionnaires. In the future, she anticipates seeking reaction from trustee groups and other outside user groups.

Judge Perris said that the next meeting of the full group would be on June 25.

9. Oral Report by the Subcommittee on Technology and Cross Border Insolvency concerning comments submitted on proposed new Rule 1004.2.

The Reporter said that this was the second time that Rule 1004.2 has been published for comment. She said that as originally published, subdivision (b) of the rule provided that the U.S. trustee or a party in interest may challenge the center of main interests ("COMI") designation made by the debtor in its chapter 15 petition, by motion "filed no later than 60 days after the notice of the petition has been given to the movant under Rule 2002(q)(1)." She said that the Committee had been persuaded by comments that the proposed 60-day time period was too long, and that a challenge should be filed before the hearing on the petition for recognition is held.

The Rule was republished to provide that "[u]nless the court orders otherwise, the motion shall be filed no later than seven days before the date set for the hearing on the petition for recognition." No comments were submitted in response to republication. **A motion to recommend final approval with an effective date December 1, 2011 was approved without objection.**

10. Oral Report of the Subcommittee on Attorney Conduct and Health Care concerning comments submitted on the proposed amendment to Rule 6003.

The Reporter said that there were no comments concerning the proposed amendment, which clarifies that although the rule limits the time for entry of certain orders, it does not prevent the court from providing that the effective date of the order may relate back in time to the motion for relief or some other time. **A motion to recommend final approval with approval with an effective date of December 1, 2011, carried without objection.**

Discussion Items

11. Discussion of Suggestion (09-BK-J) by Judge William F. Stone, Jr., (1) to amend Rules

9013 and 9014 to require that the caption of a motion initiating a contested matter set forth the name of any party whose interest would be affected, and (2) to consider adopting a rule to provide for applications for the allowance of administrative expenses.

Judge Stone's suggestion to style a motion for a contested matter as an adversary proceeding was referred to the Consumer Subcommittee, and his suggestion for a rule to provide for applications for the allowance of administrative expenses was referred to the Business Subcommittee.

12. Oral report on Hamilton v. Lanning (08-998), in which the Supreme Court is considering projected disposable income calculations in chapter 13 cases, and its implications for Form 22C.

The Reporter said the Supreme Court has not yet ruled in the case. Depending on how the court comes out, it may be necessary to revise Form 22C and possibly 22A.

13. Discussion of Suggestion (09-BK-I) by Dana C. McWay (on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group) to amend Rule 1007(b)(7) to allow the course provider to file Official Form 23 (the statement that an individual chapter 7 or chapter 13 debtor has completed the required personal financial management course).

Motion to refer the suggestion to the Consumer Subcommittee carried without objection.

14. Oral report on the results of the email poll of the Committee on possible responses to a proposal to amend the three-day rule in Civil Rule 6(d).

The Reporter said that after an email poll, the Committee did not support a change in the three-day rule at this time, and that that result has been conveyed to the Standing Rules Committee.

Information Items

15. Oral report on the status of pending legislation, including S. 3217, Senator Dodd's Financial Reform proposal; H.R. 4506, to authorize additional bankruptcy judgeships; H.R. 4677 and S. 3033, which provide additional protections for workers whose employers are in bankruptcy; and H.R. 4950, which increases compensation for chapter 7 trustees, and other legislation.

Mr. Wannamaker said there is a great deal of interest in S. 3217, which would create a new non-Bankruptcy Code liquidation process for financial firms that pose a systemic risk to the nation's financial system – including the creation of the Orderly Liquidation Authority Panel. The panel would consist of three bankruptcy judges from the District of Delaware. They would

consider applications by the Secretary of the Treasury to appoint the Federal Deposit Insurance Corporation as receiver of large financial companies which are in default or are in danger of default. Mr. Wannamaker said that the current version of the legislation did not appear to require preparation work for the Committee because the contemplated panel would be required to develop its own procedural rules.

Mr. Wannamaker said that the judgeship bill appears to have a fair chance of passage, but that none of the other pending bankruptcy-related legislation appeared likely to be voted on in this Congress.

16. Memo of January 19, 2010, by the Director of the Administrative Office on the Standing Order Guidelines approved by the Judicial Conference.

The Chair said that the Standing Committee had approved this Committee's recommendation that the explanatory memorandum for the guidelines be augmented to explain that a local court rule is an order for the purpose of statutes and rules that contain a provision that is applicable "unless the court orders otherwise." She said that the approved language did not, however, get posted and distributed as planned, but that she has discussed the problem with AO staff and has been assured that the link would be updated and that information would be conveyed to the courts.

17. Letter of September 30, 2009, by Judge Bernice B. Donald on behalf of the American Bar Association concerning the restrictions on attorneys in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. 109-8); response by Judge Carl E. Stewart; and syllabus, Milavetz v. United States, No. 08-1119.

The Chair reviewed the ABA's resolution that BAPCPA violates the First Amendment insofar as it imposes restrictions upon the bankruptcy-related legal advice certain lawyers can provide to their clients and requires them to identify themselves as debt relief agencies. She noted that in Milavetz the Supreme Court rejected the proposition that the statutory definition of debt relief agency is overly broad, and it concluded that Section 526(a)(4) of the Code prohibits a debt relief agency only from advising a debtor to incur more debt because the debtor is filing for bankruptcy, rather than for a valid purpose. No action required.

18. Oral update on opinions interpreting section 521(i).

The Reporter said that not much has changed since her last update. The courts are still divided on whether "automatic" means automatic, and the only the circuit opinions find that the bankruptcy court has discretion to retain the case after the 45th day. She said that so long as the courts seemed to breaking in favor of finding the that statute allows discretion, it would be hard to develop a rule to implement automatic dismissal.

19. *Bull Pen*: Proposed amendments to Official Form 10, approved at

March 2009 and October 2009 meetings.

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

Proposed amendment to Rule 7054(b) approved at October 2009 meeting.

Mr. Wannamaker said that as a result of action at this meeting, only indicative rulings remained in the Bull Pen.

20. Rules Docket.

Mr. Wannamaker asked members to review the rules tracking docket and to let him know if they spot any errors. He said he hoped members found it to be a useful tool in keeping abreast of the Committee's work.

21. Oral report on posting a definitive set of Bankruptcy Rules.

Mr. Ishida said definitive rules have gone through another round of review and are now posted on the courts' public website. He said that according to a statistical review of "page hits" it is one of the most popular pages on the rules website. He said that initially it appeared that the House Judiciary Committee's Office of the Law Revision Counsel would not have the resources necessary to publish the bankruptcy rules in pamphlet form as they do the other federal rules. In a recent email exchange, however, he became encouraged that they may have found necessary resources, and he was hopeful that a pamphlet form would be available within a year.

22. Future meetings:

Fall 2010 meeting, September 30 - October 1, 2010, at the Bishop's Lodge in Santa Fe, New Mexico. The Chair sought suggestions of possible locations for the spring 2011 meeting.

23. New business.

None.

24 Adjourn.

Respectfully submitted,

Stephen "Scott" Myers