ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Austin, TX
April 22-23, 2014

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of April 22 - 23, 2014
Austin, Texas

Introductory Items

1. Greetings and expression of appreciation for Judge Judith H. Wizmur. (Judge Wedoff)

2. Approval of minutes of Minneapolis meeting of September 24 - 25, 2013. (Judge Wedoff)

    ● Draft minutes.

3. Oral reports on meetings of other committees:

    (A) January 2014 meeting of the Committee on Rules of Practice and Procedure, including decision to table proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 (*Stern-related rules*.) (Judge Wedoff and Professor McKenzie)

    ● Draft minutes of the January 3 - 4, 2013, Standing Committee meeting.

    (B) Intercommittee - CM/ECF Subcommittee. (Judge Wedoff and Professor Gibson)

    (C) January 2014 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Wedoff)

    (D) November 2013 meeting of the Advisory Committee on Civil Rules and hearing on rules published for comment. (Judge Harris)

    (E) October 2013 meeting (rescheduled to April 2014) of the Advisory Committee on Evidence. (Judge Harris)

    (F) October 2013 meeting of the Advisory Committee on Appellate Rules. (Judge Jordan) **(Meeting Canceled)**

    (G) Bankruptcy Next Generation of CM/ECF Working Group. (Judge Perris)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Harris, Professor Gibson, and Professor McKenzie)

   (A) Recommendation concerning Suggestion 11-BK-N by David S. Yen for fee waiver forms addressing fees other than the chapter 7 filing fee (Judge Harris and Professor Gibson)

   ● Memo of March 10, 2014 by Professor Gibson.

   (B) Recommendation concerning Suggestion 13-BK-G by Gary Streeting that Rule 1015(b) be changed to use the word "spouse" instead of "husband" and "wife." (Judge Harris and Professor Gibson)

   ● Memo of March 24, 2014 by Professor Gibson.

   (C) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments. (Judge Harris and Professor Gibson)

   (D) Oral report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim. Placed in dugout at fall 2013 meeting pending receipt of comments on the Chapter 13 Plan Form and related rules amendments (Judge Harris and Professor McKenzie)

5. Report by the Chapter 13 Plan Form Working Group, and, with respect to Rule 9009, the Forms Subcommittee. (Judge Wedoff, Mr. Kilpatrick, Professor McKenzie, and Judge Perris)

   (A) Recommendation regarding proposed chapter 13 plan form (Official Form 113), and proposed amendments to Bankruptcy Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009. (Judge Wedoff, Mr. Kilpatrick, and Professor McKenzie)

   ● Memo of April 2, 2014, by Professor McKenzie.
   ● Official Form 113 at Appendix B.
   ● Summary of Comments at Appendix C.

(B) Joint recommendation from the Chapter 13 Working Group and the Forms Subcommittee regarding proposed amendments to Rule 9009.

● Memo of April 2, 2014, by Professor McKenzie.

6. Report by the Mortgage Claim Form Working Group. (Ms. Michaux and Professor Gibson)

(A) Recommendation concerning amending the Mortgage Proof of Claim Attachment to require inclusion of a loan history. (Ms. Michaux, Professor Gibson)

● Memo of March 20, 2014, by Professor Gibson.
● Official Form 410A at Appendix B.

7. Joint Report by the Subcommittees on Consumer Issues and Forms. (Judge Harris, Judge Perris, and Professor Gibson, Professor McKenzie)

(A) Report concerning recommended revisions to the Committee Note describing proposed amendments to Rule 3002.1 that the Advisory Committee has recommended be published this fall. Report addressing other issues regarding the ambiguity or uncertainty of Rule 3002.1. (Judge Harris and Professor Gibson)

● Memo of March 17, 2014, by Professor Gibson.

(B) Recommendation concerning Suggestion 13-BK-K by Mike Bates, Senior Company Counsel, Wells Fargo, to amend line 3 of the Reaffirmation Agreement Coversheet to allow for the disclosure of the simple interest rate on the amount to be reaffirmed, as an alternative to disclosing the annual percentage rate (APR). (Judge Perris and Professor McKenzie)

● Memo of March 26, 2014, by Professor McKenzie.
● Official Form 427 at Appendix A.

8. Report by the Subcommittee on Forms and the Forms Modernization Project. (Judge Perris, Professor Gibson, Mr. Myers, Ms. Healy)

(A) Report on the status of the Forms Modernization Project; review of comments and recommendation concerning the republished means-test forms, the modernized individual debtor forms; review and recommendation of the remaining modernized forms to be published including the case opening forms for non-individual debtors.

- Memo of March 26, 2014, by Judge Perris.

- Proposed Official Forms 22A-1, 22A-1Supp, 22A-2, 22B, 22C-1, 22C-2; Committee Notes; and Instructions at Appendix A; Summary of Comments at Appendix D.

- Proposed new Official Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 113, 119, 121, 318, 423 and 427; Committee Notes; and Instructions at Appendix A; Summary of Comments at Appendix D.

- Proposed new Official Forms 106J, 106J-2, 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, B207, 309A, 309B, 309C, 309D, 309E, 309F, 309G, 309H, 309I, 401, 314, 410, 410A, 410S1, 410S2, 11A, 11B, 312, 313, 315, 416A, 416B, 416D, 423, 424; Committee Notes; and Instructions at Appendix B.

- Modernized Bankruptcy Forms Numbering Conversion Chart.

(B) Oral report regarding the Advisory Committee's decision at the fall 2103 meeting to recommend Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend the Voluntary Petition to include checkboxes for the documents small business debtors are required to file under § 1116(1) of the Bankruptcy Code. (Judge Perris and Professor Gibson)**.**

- Official Form 101 at Appendix A and Official Form 201 at Appendix B.

(C) Recommendation regarding proposed Official Form 106J-2 to be used in joint debtor cases where Debtor 1 and Debtor 2 maintain separate households. (Mr. Myers)

- Memo of March 26, 2014 by Mr. Myers
- Proposed Official Forms 106J and 106J-2 at Appendix B.

(D) Recommendation to abrogate Official Forms 11A and 11B and reissue them as director's procedural forms. (Ms. Healy)

- Memo of March 19, 2014 by Ms. Healy
- Abrogated Forms 11A and 11B at Appendix B.

(E) Oral Report regarding effect of June 1, 2014 Fee Changes on Official Forms (Judge Perris, Mr. Myers)

- March 27, 2014 email from bankruptcy forms vendor to Scott Myers

9. Report by the Subcommittee on Business Issues. (Judge Wizmur, Professor Gibson, Professor McKenzie)

   (A) Recommendation concerning: (1) amendment to Rule 9006(f) published for comment in 2013; (2) recommendation by the intercommittee CM/ECF Subcommittee and endorsed by the Standing Rules Committee at its January 2014 meeting, to eliminate the three-day extension to time periods in cases of electronic service from Civ. Rule 6(d), Bankruptcy Rule 9006(f), Crim. Rule 45(c), and Appellate Rule 26(c); and (3) suggestion by member Edward Morrison to extend the elimination of the three day rule to all modes of service by eliminating Rule 9006(f). (Judge Wizmur, Professor Gibson and Professor McKenzie)

   - Memo of March 15, 2014, by Professor Gibson.

   (B) Recommendation concerning suggestion 13-BK-H by Dan Dooley, regarding Rule 2016 for special fee procedures. (Judge Wizmur and Professor McKenzie)

   - Memo of March 24, 2014, by Professor McKenzie.

   (C) Recommendation concerning suggestion 12-BK-I by Judge Stuart Bernstein, regarding Forms 9F and 9F(Alt.) and § 1141(d)(6)(a), that the forms be amended to deal with complaints to deny discharge for a debt "of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit." (Judge Wizmur and Professor Gibson)

   - Memo of March 14, 2014, by Professor Gibson.

   (D) Recommendation concerning suggestion by member Edward Morrison to remove from Rule 2002(f)(7) the requirement to notice a confirmation order in a small business chapter 11 case. (Judge Wizmur and Professor McKenzie)

   - Memo of March 24, 2014, by Professor McKenzie.

10. Report by the Subcommittee on Privacy, Public Access, and Appeals. (Judge Jordan, Professor Gibson, and Professor McKenzie)

   (A) Recommendation concerning an issue raised in *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 745-46 (7th Cir. 2013) of whether the appellate rules should provide

a deadline to certify a bankruptcy decision for direct appeal to the court of appeal. (Judge Jordan and Professor Gibson)

● Memo of March 10, 2014, by Professor Gibson.

(B) Recommendation concerning comment 12-BK-008 by the National Conference of Bankruptcy Judges that the appellate rules include a provision, similar to FRAP 41, for issuance of a mandate by the district court or BAP. (Judge Jordan and Professor Gibson)

● Memo of March 13, 2014, by Professor Gibson.

(C) Recommendation concerning comment 12-BK-008 by the National Conference of Bankruptcy Judges for further changes to proposed Rule 8023, scheduled to go into effect December 1, 2014.

● Memo of March 11, 2014, by Professor Gibson.

(D) Oral Report concerning (1) whether the record before the bankruptcy court should be the record on appeal – made available electronically – with parties referring by number to the appropriate bankruptcy court docket entries in their appellate briefs, or (2) whether an amendment should be adopted to deal with an incomplete record due to failure of the parties to designate the record on appeal. (Judge Jordan and Professor Gibson)

11. Report by the Subcommittee on Technology and Cross Border Insolvency. (Mr. Baxter, Professor Gibson, Professor McKenzie)

(A) Review of comments and recommendation concerning Rule 5005(a) electronic signature amendment (Mr. Baxter and Professor Gibson)

● Memo of March 16, 2014, by Professor Gibson.

(B) Recommendation concerning proposed Chapter 15 petition. (Mr. Baxter and Professor McKenzie)

● Memo of March 25, 2014, by Professor McKenzie.
● Proposed Official Form 401 at Appendix B.

(C) Recommendation concerning Suggestion 13-BK-F, by Judge Barry Schermer to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings. (Mr. Baxter and Professor McKenzie)

● Memo of March 25, 2014, by Professor McKenzie.

12. Report by the Subcommittee on Attorney Conduct and Health Care. (Judge Jonker and Professor McKenzie)

(A) Oral report concerning the Subcommittee's initial consideration of Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals. (Judge Jonker and Professor McKenzie)

(B) Oral report concerning Suggestion 13-BK-J by attorney Neil Enmark regarding time for filing Bankruptcy Rule 2016(b) statement. (Judge Jonker and Professor McKenzie)

Discussion Items

13. Oral report concerning Suggestion 14-BK-B by the Committee on Court Administration and Case Management to amend various rules to address redaction of private information in documents filed in closed cases (Judge Wedoff)

● Letter of February 5, 2014, from Judge Julie A. Robinson to Judge Jeffrey S. Sutton (distributed separately).

14. Oral report concerning Suggestion 14-BK-A by Mike Bates to amend Rule 3002.1 to address notice of payment changes for home equity loans and lines of credit. (Judge Wedoff)

● Suggestion 14-BK-A.

15. Oral report concerning suggestion by member David Lander for a rule change requiring particularized notices in large cases of motions that affect less than all creditors in large cases. (Judge Wedoff)

Information Items

16. Oral report on the status of bankruptcy-related legislation. (Judge Wedoff, Professor Gibson, Mr. Myers)

17. Oral update on opinions interpreting section 109(h) of the Bankruptcy Code. (Professor Gibson)

18. *Bullpen.* (Mr. Myers): The following items have been approved for submission to the Committee on Practice and Procedure in the future:

    (A) Proposed revisions to Rule 8002(a)(5) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting);

    (B) Proposed revisions to Rule 8006(b) in response to Comment 12-BK-033 (approved at the fall 2013 Advisory Committee meeting);

19. *Dugout*. Suggestions and issues deferred for future consideration. (Mr. Myers):

    (A) Recommendation for conforming change to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1. *Placed in dugout at fall 2013Advisory Committee meeting pending final approval of proposed Fed. R. Civ. Pro. 1.*

    (B) Suggestion 12-BK-M by Judge Scott Dales to amend Rule 2001(h) to mitigate the cost of giving notice to creditors who have not filed proof of claim. *Suggestion placed in dugout at fall 2013Advisory Committee meeting pending comments on Chapter 13 Plan Form and related rules amendments.(See Agenda Item 4(D) above).*

    (C) Comments 12-BK–005, 12-BK-015, 12-BK040 regarding designation of the record in bankruptcy appeals. *Placed in dugout at fall 2013Advisory Committee meeting pending possible consideration by the Standing Committee's CM/ECF Subcommittee. (See Agenda Item 10(D) above).*

20. Rules Docket. (Mr. Myers)

21. Future meetings: Fall 2014 meeting, September 29 – 30 in Charleston, South Carolina. Possible locations for the spring 2015 meeting.

22. New business.

23. Adjourn.

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Eugene R. Wedoff** United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604
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Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date		End Date
Eugene R. Wedoff Chair	B	Illinois (Northern)	Member: Chair:	2004 2010	---- 2014
Michael St. Patrick Baxter	ESQ	Washington, DC		2008	2014
Jean C. Hamilton	D	Missouri (Eastern)		2011	2014
Arthur I. Harris	B	Ohio (Northern)		2010	2015
Sandra Segal Ikuta	C	Ninth Circuit		2010	2015
Robert James Jonker	D	Michigan (Western)		2010	2016
Adalberto Jose Jordan	C	Eleventh Circuit		2010	2016
Richardo I. Kilpatrick	ESQ	Michigan		2011	2014
J. Christopher Kohn*	DOJ	Washington, DC		----	Open
David A. Lander	ESQ	Missouri		2008	2014
Jill A. Michaux	ESQ	Kansas		2012	2015
Edward R. Morrison	ACAD	New York		2010	2016
Elizabeth L. Perris	B	Oregon		2007	2014
Amul R. Thapar	D	Kentucky (Eastern)		2013	2016
Judith H. Wizmur	B	New Jersey		2008	2014
S. Elizabeth Gibson Reporter	ACAD	North Carolina		2008	Open

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	Scott Myers	202-502-1913

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* Ex-officio

LIAISON MEMBERS

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Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective March 31, 2014

Subcommittee on Consumer Issues Judge Arthur I. Harris, Chair Judge Sandra Segal Ikuta Judge Judith H. Wizmur David A. Lander, Esq. Jill Michaux, Esq. Richardo I. Kilpatrick, Esq. Professor Edward R. Morrison James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Business Issues** Judge Judith H. Wizmur, Chair Judge Jean C. Hamilton Judge Robert James Jonker Judge Amul R. Thapar J. Christopher Kohn, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. Professor Edward R. Morrison James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison*
Subcommittee on Forms Judge Elizabeth L. Perris, Chair Judge Judith H. Wizmur Judge Arthur I. Harris J. Christopher Kohn, Esq. Jill Michaux, Esq. Richardo I. Kilpatrick, Esq. James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison* Patricia S. Ketchum, Esq., *Consultant*	**Forms Modernization Project** Judge Elizabeth L. Perris, Chair Judge Judith H. Wizmur Judge Arthur I. Harris J. Christopher Kohn, Esq. Richardo I. Kilpatrick, Esq. James J. Waldron, *ex officio* Ramona D. Elliott, Esq., *EOUST liaison* Patricia S. Ketchum, Esq., *Consultant*
Subcommittee on Privacy, Public Access and Appeals Judge Adalberto Jordan, Chair Judge Sandra Segal Ikuta Judge Amul R. Thapar Judge Elizabeth L. Perris J. Christopher Kohn, Esq. Michael St. Patrick Baxter, Esq. David A. Lander, Esq. Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Style** Judge Sandra Segal Ikuta, Chair Judge Amul R. Thapar Judge Judith H. Wizmur Judge Arthur I. Harris J. Christopher Kohn, Esq. David A. Lander, Esq. Michael St. Patrick Baxter, Esq.

March 31, 2014

Subcommittee on Attorney Conduct and Healthcare Judge Robert James Jonker, Chair Judge Amul R. Thapar Judge Jean C. Hamilton Judge Arthur I. Harris Jill Michaux, Esq. Ramona D. Elliott, Esq., *EOUST liaison*	**Subcommittee on Technology and Cross Border Insolvency** Michael St. Patrick Baxter, Esq., Chair Judge Sandra Segal Ikuta Judge Adalberto Jordan Judge Arthur I. Harris Professor Edward R. Morrison Ramona D. Elliott, Esq., *EOUST liaison*
Appellate Rules Liaison: Judge Adalberto Jordan ---------- **Civil Rules Liaison:** Judge Arthur I. Harris	**Evidence Rules Liaison:** Judge Judith H. Wizmur ---------- **CM/ECF Working Group and CM/ECF Next Gen Liaison:** Judge Elizabeth L. Perris

March 31, 2014

TAB 1

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of September 24 - 25, 2013
At the University of St. Thomas, School of Law
Minneapolis, Minnesota

Draft Minutes

The following members attended the meeting:

Bankruptcy Judge Eugene R. Wedoff, Chair
Circuit Judge Sandra Segal Ikuta
Circuit Judge Adalberto Jordan
District Judge Jean Hamilton
District Judge Robert James Jonker
District Judge Amul R. Thapar
Bankruptcy Judge Arthur I. Harris
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Judith H. Wizmur
Professor Edward R. Morrison
Michael St. Patrick Baxter, Esquire
Richardo I. Kilpatrick, Esquire
J. Christopher Kohn, Esquire
David A. Lander, Esquire (by telephone)
Jill Michaux, Esquire

The following persons also attended the meeting:

Professor S. Elizabeth Gibson, reporter
Professor Troy A. McKenzie, assistant reporter
Roy T. Englert, Jr., Esq., liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
Bankruptcy Judge Erithe A. Smith, liaison from the Committee on Bankruptcy Administration
Jonathan Rose, Secretary, Standing Committee, and Rules Committee Officer
Ramona D. Elliott, Deputy Director /General Counsel, Executive Office for U.S. Trustees (EOUST)
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
Peter G. McCabe, Assistant Director, Office of Judges Programs, Administrative Office of the U.S. Courts (Administrative Office)
Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees (by telephone)
Andrea L. Kuperman, Chief Counsel to the Rules Committees (by telephone)
James H. Wannamaker, Administrative Office
Scott Myers, Administrative Office
Bridget Healy, Administrative Office
Molly Johnson, Federal Judicial Center

District Judge Patrick J. Schiltz, District of Minnesota
Associate Dean Joel Nichols, St. Thomas School of Law
Professor Nancy B. Rappaport, William S. Boyd School of Law, UNLV
Michael T. Bates, Senior Company Counsel, Wells Fargo
Margaret Burks, President, National Association of Chapter 13 Trustees
Jon M. Waage, Chapter 13 Trustee, Middle District of Florida
Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees
Debra L. Miller, Chapter 13 Trustee, Northern District of Indiana

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. An electronic copy of the agenda materials is available at http://www.uscourts.gov/RulesAndPolicies/rules/archives/agenda-books/committee-rules-bankruptcy-procedure.aspx. Votes and other action taken by the Advisory Committee and assignments by the Chair appear in **bold**.

Introductory Items

1. Greetings and welcome to new member Judge Amul R. Thapar.

The Chair welcomed the Advisory Committee's newest member, Judge Thapar, and thanked Judge Schiltz and Associate Dean Joel Nichols for hosting the Advisory Committee's meeting at the Saint Thomas School of Law. The participants introduced themselves and the Chair recognized Mr. McCabe for his service to all the rules committees and Mr. Wannamaker for his many years of service as primary staff support for the Advisory Committee. The Chair noted that both men would be retiring in the next few months and the Advisory Committee would deeply miss their institutional knowledge and camaraderie.

2. Approval of minutes of New York meeting of April 2 - 3, 2013.

The draft minutes were approved.

3. Oral reports on meetings of other committees:

(A) June 2013 meeting of the Committee on Rules of Practice and Procedure, including the request for comments on the alternatives included in the proposed amendment of Rule 5005(a)

The Reporter, Chair, and Judge Wizmur gave the report. All of the Advisory Committee's recommendations were approved. The form of the proposed amendment to Rule 5005(a) was modified to provide alternative proposals with respect to electronic signatures of individuals who are not registered users of the judiciary's case management and electronic case filing system (CM/ECF).

Judge Wizmur explained that the Advisory Committee on Evidence did not think there was a need to change the evidence rules in order for electronic signatures to be admissible as evidence. There was, however, concern about how scanned signatures would be validated.

The Reporter and the Chair explained that a cross-committee "CM/ECF Subcommittee" has been created to consider the impact of electronic filing on the existing federal rules. As part of that subcommittee's initial recommendations, alternative versions of the proposed amendments to Rule 5005(a) have been published for public comment. With respect to individuals who are not registered users of CM/ECF, one proposed version of the rule would deem the registered user's electronic submission of the signature to validate it. In bankruptcy cases that would mean the debtor's attorney would validate the debtor's signature by submitting it as part of a CM/ECF filing. The alternative proposal would require that a notary public validate the signature of the non-registered user.

(B) Cross-committee CM/ECF Subcommittee

The Reporter explained that in addition to weighing in on the proposed amendments to Rule 5005, the CM/ECF Subcommittee has also proposed eliminating the 3-day extension in Rule 9006(f) and Civil Rule 6(d) in cases of electronic service. She said that the proposal would be taken to the Standing Committee in January. Several members supported the idea, and one member suggested that the 3-day extension should be removed for all modes of service. But other members noted occasional problems with electronic service including spam filters, security settings, and the failure of electronic mail servers. The Chair said that he would relate concerns about ineffective electronic service to the Standing Committee.

(C) June 2013 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Smith said that the term of the Bankruptcy Administration Committee's Chair, Judge Joy Conti, ends this month, and that the new chair, Judge Danny Reeves, begins his term on October 1, 2013.

Judge Smith said that the General Accounting Office has issued its report "Efforts to Consolidate and Share Services between District and Bankruptcy Clerks' Offices" and that it did not find any evidence that consolidation would save money. She said that the AO has gathered data on shared services and it hopes to have a report at the Committee's December meeting. She said there appear to be savings in shared services, but that the savings are difficult to quantify.

Judge Smith said that the Committee approved funding for recalled bankruptcy judges and temporary law clerks. The Committee has endorsed the use of video conferencing to save costs where possible, and has again been asked to look at eliminating the Bankruptcy Appellate Panels (BAPs) as a cost savings measure. As it has in the past, the Committee determined eliminating the BAPs would be cost-shifting rather than cost-saving.

With respect to judgeship requests, Judge Smith explained that the Committee has been asked to prioritize judgeship needs. Judge Smith also sent members a copy of the revised *In Forma Pauperis* guidelines that were recently approved by the Judicial Conference.

(D) April 2013 meeting of the Advisory Committee on Civil Rules.

Judge Harris said that the amendments on civil discovery that emerged out of the Duke conference have been approved for publication. Most proposed amendments, if adopted, will automatically apply in bankruptcy proceedings because most of the bankruptcy discovery rules incorporate civil discovery rules. The "Scope and Purpose" rule for bankruptcy (Rule 1001) does not, however, incorporate the civil rule version (Rule 1). Accordingly, if the Advisory Committee decides to track the proposed amendment to Rule 1, a conforming change to Rule 1001 will have to be recommended and approved. In this respect, the Chair approved Judge Harris' request to put in the dugout consideration of an amendment to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1.

(E) May 2013 meeting of the Advisory Committee on Evidence.

Judge Wizmur said that in addition to the electronic signature issue with respect to Rule 5005, the Evidence Rules Advisory Committee will hold a mini-conference in Portland, Maine next month (October 2013) to discuss the impact of technology on the rules of evidence.

(F) April 2013 meeting of the Advisory Committee on Appellate Rules.

Judge Jordan said that the Appellate Rules Committee has approved published revisions to Appellate Rule 6 that would (1) update that Rule's cross-references to the Bankruptcy Part VIII Rules, (2) amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling, (3) add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. §158(d)(2), and (4) take account of the range of methods available now or in the future for dealing with the record on appeal.

(G) Bankruptcy Next Generation of CM/ECF Working Group.

Judge Perris and Mr. Waldron said that the development of CM/ECF NextGen continues and that test courts should begin seeing the first release early next year and that full implementation by all bankruptcy courts is targeted for early 2015. Mr. Myers added that the Administrative Office has had a number of conference calls with private forms vendors in connection with the development of NextGen. Some vendors have expressed concern that not all of their competitors will invest the resources to comply with the new requirements and may thereby obtain a competitive pricing advantage for their software. Mr. Myers said the vendors have been told, however, that courts will likely issue deficiency notices to bankruptcy attorneys who submit forms without all the data required by NextGen and that as a result attorneys will seek out vendors that do comply with the new requirements.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

(A) Recommendation concerning Suggestion 12-BK-B by Matthew T. Loughney (on behalf of the Bankruptcy Noticing Working Group) to amend Rule 2002(f)(7) to require notice of the confirmation of the debtor's chapter 13 plan.

Rule 2002(f)(7) currently requires notice to creditors of the entry of confirmation orders in cases under chapters 9, 11, and 12—but not chapter 13. The Assistant Reporter said that the Administrative Office's Bankruptcy Noticing Working Group has suggested that the rule be expanded to require notice when a chapter 13 confirmation order is entered. The Working Group explained that although courts can order notice of entry of a chapter 13 confirmation order under Rule 9022, adding the notice requirement to Rule 2007(f)(7) would provide clarity about who should receive the notice.

The Assistant Reporter said that the Subcommittee carefully considered the suggestion but concluded that a rule amendment was unnecessary. The Subcommittee first concluded that notice of the chapter 13 plan confirmation hearing, already required by the bankruptcy rules, was sufficient notice of the pending entry of a confirmation order, and that creditors represented by counsel who have entered an appearance in the case will receive electronic notice when the chapter 13 confirmation order is entered on the docket.

The Subcommittee also conducted an informal survey of 77 court clerks and found that approximately 80% reported that the judges in their courts already routinely require some type of notice under Rule 9022. Given that current noticing practices appear to be sufficient, and that the Subcommittee is already considering a separate suggestion to limit certain notice requirements in chapter 13 cases that may be costly and provide little benefit, the Subcommittee recommends that no further action be taken on the suggestion. **The Advisory Committee agreed with the Subcommittee and no further action will be taken on the suggestion.**

Professor Morrison said that, like chapter 13 cases, there seemed to be little benefit to providing notice of entry of the confirmation order in small business chapter 11 cases. At Professor Morrison's request, **the Chair asked the Business Subcommittee to consider removing small business chapter 11 cases from the list in Rule 2002(f)(7).**

(B) Recommendation concerning Comment 11-BK-12 by Judge Eric L. Frank regarding the negative notice procedure for objections to claims in the proposed amendment to Rule 3007 that was published in 2011.

Judge Harris and the Reporter reminded members that the Advisory Committee previously proposed an amendment to Rule 3007(a) in response to two suggestions submitted on behalf of the Bankruptcy Judges Advisory Group ("BJAG"). The first suggestion (09-BK-H),

from Judge Margaret D. McGarity, proposed an amendment to permit the use of a negative notice procedure for objections to claims. The second suggestion (09-BK-N), from Judge Michael E. Romero, sought clarification of the proper method of serving objections to claims. Judge Romero noted that some courts require service under Rule 7004 because an objection to a claim creates a contested matter and Rule 9014(b) provides that the "motion [initiating a contested matter] shall be served in the manner provided for service of a summons and complaint by Rule 7004." Other courts have concluded that Rule 3007(a) governs claims objections by specifying the notice recipient of a claims objection.

2011 Proposed Amendments to Rule 3007(a)

The Reporter said that Advisory Committee addressed the suggestions through proposed amendments to Rule 3007(a) published for comment in 2011-12. The amendments adopted an objection procedure to make clear that Rule 7004 applies to claims objections only if the recipient is the United States, an officer or agency of the United States, or an insured depository institution. Otherwise, the claimant must be served by first class mail at the address and name set out on the proof of claim. The proposed amendments also permitted a negative noticing procedure.

The Reporter said that there were two comments in response to the published amendments. Judge Eric Frank questioned whether a negative notice procedure is generally appropriate for an objection to a claim since, under Rule 3001(f), a properly executed and filed proof of claim is entitled to be treated as prima facie evidence of the validity and amount of the claim. Given this evidentiary effect of a proof of claim, Judge Frank suggested that in many situations a claim should not be disallowed by default and without a hearing. The other comment was submitted by Mr. Raymond P. Bell, Jr. (11-BK-015), who agreed with Judge Frank.

In his comment, Judge Frank contended that the problem with the proposed amendment arose more from the Committee Note than from the text of the rule itself. While the rule's reference to "any deadline to request a hearing" might suggest that a claim can be disallowed just because of the failure to make such a request, it did not expressly say so. The Committee Note, however, stated that the amendment authorized local rules to *require* a claimant to request a hearing or file a response. He therefore suggested that, "at a minimum," the Committee Note be revised to "state unequivocally that although local rules may impose the obligation on a claimant to respond to a proof of claim, there may [be] matters in which a proof of claim is valid and allowable notwithstanding the failure to file a response to claims objection or request a hearing …." In his view, the Committee Note should indicate that, with regard to those matters, the court has a duty to determine whether Rule 3001(f) requires allowance of the claim, even if the claimant does not respond or request a hearing.

At the spring 2012 meeting, the Subcommittee recommended that the proposed amendments to Rule 3007(a) be withdrawn so that they could be considered along with the package of rule amendments accompanying the development of a national chapter 13 plan form. The proposed plan form would allow certain claims to be determined through the plan and the

Subcommittee concluded that the method of service on the claimant should be the same regardless of whether the claim amount was determined through the plan or through a claims objection.

The Proposed 2013 Amendments to Rules 3007 and 3012

In connection with the chapter 13 plan form published for comment in August 2013, the Standing Committee published amendments to Rules 3007 and 3012 that would require enhanced Rule 7004 service for requests to determine the amount of secured and priority claims in chapter 12 and 13 cases. The proposed amendments to Rule 3012 make clear that secured claims can be modified through the plan as well as by claim objection or motion, and that priority claim amounts can be challenged though a claim objection or motion. Regardless of the form of objection, however, the proposed amendment to Rule 3012 appears to require service under Rule 7004. Outside the chapter 12 and chapter 13 context, however, the proposed 2013 amendment to Rule 3007 leaves the current method of objecting to claims unchanged – arguably requiring only that the objection and hearing be mailed or otherwise delivered to the claimant.

The Reporter said that the Subcommittee was asked to try to create a unified approach to the service of claim objections as well as claim modifications accomplished through plans. She said that the Advisory Committee's 2011 proposed amendment to Rule 3007(a) was based on the belief that claim objections should generally be served on the person that the claimant designated on the proof of claim for receipt of notices, rather than according to Rule 7004. She said that the Subcommittee continues to recommend this method of service for claim objections, and that it therefore recommends final approval of Rule 3007(a) as published in 2011 and as shown in the agenda materials beginning at page 98. She added that the Subcommittee also acknowledged Judge Frank's concerns and that it therefore recommends adding language to the Committee Note (as shown at page 99 of the agenda materials) to make clear that an objection to a claim does not automatically overcome the prima facie validity of a proof of claim that is afforded by Rule 3001(f).

The Reporter said that the Subcommittee also continued to recommend the portion of the proposed 2013 amendment to Rule 3012 that would allow a secured claim to be modified through a chapter 12 or 13 plan, along with the more formal Rule 7004 service in that context to increase the likelihood that affected claimants are made aware that the plan proposes to modify their claim. The Reporter said that the Subcommittee now recommends revising published Rule 3012 to clarify that all claims objections, including objections to secured and priority claims, be served on the person designated on the proof of claim in accordance with proposed Rule 3007(a); that secured claims being modified through a plan be governed by the service provision in Rule 3012; and that motions to modify a claim be governed as they currently are, by Rule 9014.

A motion to approve the Subcommittee's recommendations, subject to further amendments after considering comments on the published versions of Rule 3007 and 3012, passed without objection.

(C) Recommendation concerning conforming amendments of Rule 1007(a)(1) and (a)(2) to reflect the changed designations of the schedules proposed by the Forms Modernization Project.

Judge Harris explained that because schedules E and F are being combined for the Forms Modernization Project, the Subcommittee recommended a technical conforming amendments to Rule 1007(a)(1) and (a)(2) replacing references to schedules E and F with E/F. **A motion to conform the rule to the new form designations, effective when the new forms go into effect, passed without opposition.** The Chair explained that because the proposed amendment was conforming, publication would not be necessary.

(D) Oral report concerning Suggestion 12-BK-I by Judge John E. Waites (on behalf of the Bankruptcy Judges Advisory Group) to amend Rule 1006(b) to provide that courts may require a minimum initial payment with requests to pay filing fees in installments.

Judge Harris said that the Subcommittee was aware that some courts already require an initial payment with a fee installment application, and that it has asked the FJC to research the prevalence of the practice and the amount of required initial installments. On behalf of the FJC, Ms. Johnson said that she hopes to have research done in time for a Subcommittee call before the spring meeting.

(E) Oral report concerning Suggestion 12-BK-M by Judge Scott W. Dales to amend Rule 2002(h) to mitigate the cost of giving notice to creditors who have not filed proofs of claim in a chapter 13 case.

Judge Harris reviewed the suggestion. Bankruptcy Rule 2002(a) requires that certain notices go to all creditors. After the claims bar date in a chapter 7 case, however, Rule 2002(h) allows the court to enter an order limiting future notices to creditors who have either filed a claim or who have been given an extension to file a claim at a later date. Judge Dales suggests that Rule 2002(h) be revised and made applicable to chapter 13, or even to all chapters.

Judge Harris said that the Subcommittee recommends putting Judge Dale's suggestion in the dugout until after the published chapter 13 amendments have been considered. There were no objections to the Subcommittee's recommendation, and the suggestion was placed in the dugout.

5. Report by the Chapter 13 Plan Form Working Group.

Oral report concerning (1) responses to the publication of the chapter 13 plan form and the implementing rules amendments and (2) outreach to the chapter 13 community concerning the plan form and rules.

The Chair recognized the various people attending the meeting who commented on and/or attended meetings regarding the plan form. The Assistant Reporter discussed the plan

form process, and Mr. Kilpatrick explained the developments of an adequate protection order. Mr. Kilpatrick also noted that most of the comments received so far have been positive and many have included constructive suggestions for improvements. The Chair added that he anticipates many comments which should generate a full discussion of the plan form and the chapter 13 process at the spring 2014 meeting.

6. Report by the Mortgage Claim Form Working Group.

Oral report concerning amending Official Form 10A (Mortgage Proof of Claim Attachment) to require inclusion of a loan history.

Ms. Michaux explained that the working group was formed at the spring 2013 meeting. It has already had several conference calls, and the members hope to have a proposal for a detailed loan history to replace Official Form 10A ready to be considered at the spring 2014 meeting. The purpose of a detailed loan history, in contrast to the summary that is now Official Form 10A, Ms. Michaux said, is to provide as a default a clear accounting of how payments have been applied to the loan so that debtors can object to the claim calculation when appropriate.

7. Joint Report by the Subcommittees on Consumer Issues and Forms

(A) Recommendations concerning (1) Suggestion 13-BK-E by Judge Carol Doyle to amend Rule 3002.1 to clarify that the rule applies to all claims secured by a chapter 13 debtor's principal residence when the plan proposes to maintain mortgage payments postpetition and (2) providing guidance on whether the creditor's obligations under Rule 3002.1 cease to apply if the automatic stay is lifted with respect to the residence.

The Reporter explained that Judge Doyle's suggestion highlights a case law split on whether Rule 3002.1(a) applies only in chapter 13 cases in which an arrearage is being cured under 11 U.S.C. § 1322(b)(5). Among other things, the rule requires a mortgagee to provide certain notices pertaining to payment changes, fees, expenses, and charges, but some courts have ruled that these reporting requirements arise only if the chapter 13 plan is curing an arrearage. Others, including Judge Doyle, have concluded that the reporting requirements apply so long as the plan provides for maintaining current payments on the debtor's mortgage.

The Subcommittees agreed with Judge Doyle that Rule 3002.1(a) should be amended to clarify that it requires compliance with the rule whenever a plan provides for the maintenance of postpetition mortgage payments. If a debtor is trying to remain current on a home mortgage, he or she needs to know if the amount required to be paid has changed, whether or not an arrearage is being cured. The Subcommittees also recommended amending the rule to clarify that it applies regardless of whether the debtor or the trustee is making plan payments. **The Advisory Committee agreed with both recommendations.**

The Subcommittees further agreed that the rule should be amended to clarify that the creditor's reporting requirements cease at some point after a motion to lift the automatic stay is granted with respect to the debtor's principal residence. There was no agreement, however, as to when that point arrives. The views coalesced around two positions: (1) effective date of the order terminating the stay and (2) transfer of title from the debtor.

The Advisory Committee discussed the two alternatives proposed by the Subcommittees. Some members favored termination of the reporting requirements when the stay is lifted because the date is easy to determine and would be uniform throughout national bankruptcy practice. A title transfer date, in contrast, would vary depending on state foreclosure law. Members supporting the title transfer date pointed out, however, that the debtor and creditor often continue to negotiate after the stay is lifted, with the mortgage eventually being reinstated. The Chair said that either proposal would merely be a default provision and that a court could order that reporting requirements continue if that made sense is a particular situation. **After further discussion, and over three dissents, the Committee recommended publishing the "stay termination" alternative as the default date for ending a creditor's Rule 3002.1(a) reporting requirements.** One member also suggested adding language to the Committee Note to encourage courts to consider requests for continued reporting in appropriate circumstances, but no particular language was recommended.

(B) Oral report concerning Suggestion 11-BK-N by David S. Yen for a rule and form for applications to waive fees other than filing fees under 28 U.S.C. § 1930(f)(2) and (f)(3).

Judge Harris said that the Subcommittee tabled the suggestion until the Judicial Conference approved guidelines for fee waivers under 28 U.S.C. § 1930(b). As reported by Judge Smith at Item 3C above, fee waiver guidelines have now been approved. Judge Harris said that the Subcommittee will review the new guidelines, consider the suggestion, and report back at the spring meeting.

8. Report by the Subcommittee on Forms and the Forms Modernization Project.

(A) Report on the status of the Forms Modernization Project and preliminary review of filing forms for non-individual debtors, including a chapter 15 petition.

Judge Perris provided an overview of the Forms Modernization Project and the Next Generation of CM/ECF. She said that the code for CM/ECF NextGen is being written now and that testing should begin in four test courts in January 2014. The test courts are scheduled to go live next summer, and the rest of the courts will follow later. She said that it would probably not be until early- to mid-2015 that all courts will be live on the first release of NextGen. The projected rollout is compatible with the release of the modernized bankruptcy forms, she said, because the bulk of the forms will not be ready to go into effect until December 1, 2015, shortly after most courts are expected to be using the first release of NextGen.

Judge Perris said that the individual debtor forms are currently out for public comment and that the Forms Subcommittee and Forms Modernization Project (FMP) will make recommendations for any needed changes and for final approval at the spring meeting. The recommended effective date for the individual debtor forms will be no earlier than December 1, 2015, however, because the new form numbering scheme developed for bankruptcy forms makes it necessary to put the bulk of the new forms into effect at the same time, and the non-individual debtor version of case opening forms will not be published for comment until next year. Mr. Myers briefly described the form numbering scheme and reported that an updated chart showing current and projected form numbers was included in the agenda materials beginning at page 281.

For this meeting, Judge Perris said that the FMP was seeking preliminary feedback on the non-individual debtor instruction booklet, case opening forms for non-individual debtors, B201, B202, B204, B205, B206Sum, B206A/B, B206D, B206E/F, B206G, B206H, B207, an Official Form for opening a chapter 15 case, B401, and the proof of claim form, B410. She said that the forms and their Committee Notes started at page 147 of the agenda materials. Members suggested a number of changes, and Judge Perris explained that the suggestions and any others she received would be evaluated by FMP working groups over the winter in the next round of form revisions.

(B) Recommendation concerning Suggestion 13-BK-B by Judges Eric L. Frank and Bruce I. Fox to amend the Voluntary Petition to include checkboxes for the documents small business debtors are required to file under § 1116(1) of the Bankruptcy Code.

The Reporter said that the Subcommittee considered the suggestion and agreed that the following language should be added to both versions of the voluntary petition: "If you indicate that the debtor is a small business as defined in 11 U.S.C. § 101(51D), you must append the attachments required under 11 U.S.C. § 1116(a)(1)." **The Advisory Committee agreed with the recommendation.**

(C) Oral report on the revision of the bankruptcy subpoena forms as a consequence of the amendment of Civil Rule 45 effective December 1, 2013.

Judge Harris explained that pending changes to Civil Rule 45 require revisions to the bankruptcy subpoena forms, which incorporate language directly from the rule. Although Director's Procedural Forms are not required to be used, Subcommittee members and AO staff revised the bankruptcy subpoena forms to more closely follow the presentation and organization of the civil rule subpoena forms. Form 255 is to be used to compel testimony at a hearing or trial, Form 256 for a deposition, and Form 257 for production or inspection. As is the case currently, Form 254 is to be used as a subpoena for Rule 2004 examinations. Judge Harris said that because the subpoena forms are Director's Procedural Forms, formal approval by the Advisory Committee is not necessary. He added that the forms are scheduled to go into effect on December 1, 2013, when revised Rule 45 becomes effective.

9. Report by the Subcommittee on Business Issues

(A) Oral report on the status of the proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033 scheduled to take effect on December 1, 2013, and other amendments proposed in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011).

The Assistant Reporter said that the *Stern* rules (proposed amendments to Rules 7008, 7012, 7016, 9027, and 9033) have been approved by the Judicial Conference and are on track to become effective December 1, 2014, if approved by the Supreme Court and if Congress does not act to the contrary. He said that the timing was somewhat complicated, however, because after the Advisory Committee and the Standing Committee recommended the proposed amendments for final approval, the Supreme Court granted review of *Executive Benefits Insurance Agency v. Arkison*, No. 12-1200. One question presented in *Arkison* is whether bankruptcy judges are constitutionally authorized, based on the express or implied consent of the parties, to resolve a proceeding otherwise entitled to an Article III forum.

The Chair explained that the proposed *Stern* amendments are premised on the idea that parties can expressly consent to final adjudication by a bankruptcy judge. Because both *Arkison* and the proposed *Stern* amendments raise the issue of consent, he said, the Supreme Court may decide to hold any decision on the *Stern* rules until after *Arkison* is decided. If the Court holds consideration of the *Stern* rules past May 1, 2014, he said, the rules would not go into effect until December 1, 2015, at the earliest.

NOTE: After the meeting, the Advisory Committee and the Standing Committee reconsidered the decision to recommend submitting the *Stern* amendments to the Supreme Court. The rules package was submitted to the Court earlier than usual this year to give the Court the option of handling its Rules Enabling Act work at the beginning of its term. Including the *Stern* amendments in the rules package undermines the goal of presenting a clean package that the Court could consider and potentially resolve early in the term. In addition, concerns were raised that the proposed *Stern* amendments could be perceived as favoring one side of the *Arkison* debate, and that amendments to the rules might be required after the case was decided. Based on the new recommendations of the Advisory Committee and the Standing Committee, the Executive Committee of the Judicial Conference withdrew the proposed *Stern* amendments from the rules package submitted to the Supreme Court.

(B) Recommendation concerning Suggestion 13-BK-D by David Tilem to add a checkbox for other voting parties to Official Form 14, the ballot for confirmation of a Chapter 11 plan.

The Assistant Reporter said that Mr. Tilem suggested the need for an "other" checkbox on Official Form 14, Ballot for Accepting or Rejecting Plan, to accommodate claims such as lease rejections. The Subcommittee considered the suggestion and concluded that no change was necessary. Official Form 14 is a generic ballot that is designed to incorporate the classes of

claims and interests described in the plan of reorganization. The plan proponent modifies the ballot form as needed so that each class identified in the plan has a ballot. If the plan proposes to separately classify lease rejection damages, for example, the proponent would incorporate that class name into the version of Official Form 14 given to members of the class.

After a short discussion, no member opposed the Subcommittee's recommendation that no further action be taken on the suggestion.

10. Report by the Subcommittee on Privacy, Public Access, and Appeals.

(A) Recommendation concerning Suggestion 13-BK-A by David W. Ostrander to include the debtor's age on the Statement of Financial Affairs or the Schedules of Assets and Liabilities.

The Assistant Reporter said that the Advisory Committee has historically required debtors to disclose information on publicly available bankruptcy forms only if that information is deemed necessary to the bankruptcy process. For example, the means-test forms require information about whether the debtor is over or under age 65 because that information is necessary in order to apply the IRS national standards for health care costs. The Subcommittee was unable, however, to determine a more general bankruptcy administration need for public disclosure of the debtor's specific age on bankruptcy forms, and therefore recommended that no further action be taken on the suggestion. **No member opposed the recommendation.**

(B) Recommendations concerning amendments to the bankruptcy appellate rules.

Judge Jordan said that the Subcommittee reviewed a number of previously tabled comments with respect to the restyled Part VIII bankruptcy appellate rules that are on track to become effective December 1, 2014. The Subcommittee concluded that some of the comments should be rejected at this time, and that others should be put in the bullpen or dugout until after the revised Part VIII rules take effect and there has been sufficient experience with them to determine whether any additional amendments will be needed.

The Reporter presented the suggestions and noted the Subcommittee's recommendation as to whether: (1) no change should be made, (2) a proposed amendment should be put in the bullpen for recommended implementation at a later date, or (3) a proposed amendment should be held in the dugout to be considered at a later date.

Rule 8002 (Time for Filing Notices of Appeal)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8002 should include a provision like FRAP 4(a)(6), which permits the district court to reopen the time to file an appeal for someone who did not receive notice of entry of the judgment within 21 days after its entry.*

The Reporter said that FRAP 4(a)(6) is not incorporated into the existing appellate rules, and that, in light of the need for finality of a bankruptcy court order or judgment, the Subcommittee recommended against incorporating it into the restyled appellate rules. No committee member opposed the recommendation.

Comment 12-BK-033—Judge Christopher M. Klein : *It would be useful for Rule 8002 to have a provision similar to FRAP 4(a)(7), which addresses when a judgment or order is entered for purposes of Rule 4(a). The provision helps clarify timing issues presented by the separate-document requirement.*

The Subcommittee concluded that the rules specifying when a separate document is required and the impact of the requirement on the date of entry of the judgment are sufficiently confusing that, as suggested by Judge Klein, Rule 8002 would likely be improved by adding a provision similar to FRAP 4(a)(7). A proposed new Rule 8002(a)(5) was set out in the agenda materials beginning at page 324. **The Advisory Committee agreed to recommend the proposed change and placed it in the bullpen.**

Rule 8003 (Appeal as of Right—How Taken; Docketing the Appeal) and Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal)

Comment 12-BK-036—Mary P. Sharon, Clerk (1st Cir. BAP): *There is an inconsistency between Rule 8003 and Rule 8004. Rule 8003(c) requires the bankruptcy clerk to serve the notice of appeal, whereas Rule 8004(a) places that duty on the appellant.*

The Subcommittee recommends that no change be made to the service provisions of revised Rules 8003 and 8004. The rules are consistent with the parallel FRAP provisions. Because an appellant seeking leave to appeal under Rule 8004 will have to serve its motion on other parties, the Subcommittee concluded that it makes sense to require service of the notice of appeal along with the motion. No member opposed the Subcommittee's recommendation.

Rule 8004 (Appeal by Leave—How Taken; Docketing the Appeal): In response to a comment suggesting that an appellate court be allowed to treat a motion for leave to appeal as a notice of appeal if a notice of appeal is not filed, the Subcommittee raised the following issue for further consideration: Should the requirement that a notice of appeal be filed, in addition to a motion for leave to appeal, be eliminated from revised Rule 8004?

Subcommittee members observed that the requirement that a notice of appeal be filed along with a motion for leave to appeal has been as been a longstanding part of the rule on leave to appeal. No one outside the Subcommittee has questioned the need for a notice in this circumstance, and after careful consideration, the Subcommittee recommended that no change be made to the rule. No Advisory Committee member opposed the recommendation.

Rule 8005 (Election to Have an Appeal Heard by the District Court Instead of the BAP)

Comment 12-BK-033—Judge Christopher M. Klein: *Rule 8005 does not retain the provision of current Rule 8001(e)(2), which provides for the withdrawal of an election with the district court's acquiescence.*

For reasons described in the agenda materials, Subcommittee members recommended no change to revised Rule 8005. No Advisory Committee member opposed the recommendation.

Rule 8006 (Certifying a Direct Appeal to the Court of Appeals)

12-BK-033—Judge Christopher M. Klein: *Rule 8006(c) should provide an opportunity for the bankruptcy court to comment on the proceeding's suitability for direct appeal when a certification is jointly made by all appellants and appellees.*

Subcommittee members agreed that the court of appeals would likely benefit from the court's statement about whether the appeal satisfies one of the grounds for certification. The Subcommittee decided, however, that authorization should not be limited to the bankruptcy court. Because under Rule 8006(b) the matter might be deemed to be pending in the district court or BAP at the time or shortly after the parties file the certification, those courts should also be authorized to file a statement with respect to appeals pending before them. The Subcommittee's recommended amendment to Rule 8006(b) was set forth at page 330 of the agenda materials. **The Advisory Committee approved the proposed revisions to Rule 8006(b) for the bullpen. In addition, the Subcommittee was asked to consider whether a deadline for certifying a direct appeal should be added to the rule.**

Rule 8009 (Record on Appeal; Sealed Documents)

12-BK-005—Judge Robert J. Kressel; 12-BK-015—Judge Barry S. Schermer 12-BK-040—Bankruptcy Clerks Advisory Group: *Designation of the record should not be required.*

Because the recently appointed CM/ECF Subcommittee of the Standing Committee will likely consider this issue, the Subcommittee recommended deferring consideration of the suggestion until after the CM/ECF Subcommittee submits its report. **The Advisory Committee agreed and the suggestion was put in the dugout.**

Rule 8010 (Completing and Transmitting the Record)

12-BK-008—National Conference of Bankruptcy Judges; 12-BK-034—Oregon State Bar Debtor-Creditor Section Local Rules and Forms Committee; 12-BK-040—Bankruptcy Clerks Advisory Group: *Rule 8010(b)(1) should be revised to fix an outside deadline for the clerk's transmission of the record, even if parties are slow to designate the record.*

The suggestion would be moot if the suggestion to revise Rule 8009 to eliminate designation of the record is approved. The Subcommittee therefore recommended that consideration of this suggestion be deferred until after the CM/ECF Subcommittee submits its

report and the Subcommittee takes up the proposed amendment to Rule 8009. **The Advisory Committee agreed, and the suggestion was put in the dugout.**

12-BK-014—Judge Dennis Montali: *In some cases when the appellate court orders paper copies of the record to be delivered, it may be appropriate for the appellee to provide them. Add to the end of the first sentence of Rule 8010(b)(4), "or the appellee where appropriate."*

The Subcommittee recommended no change because the issue of furnishing paper copies will likely diminish as courts continue to adapt to the use of electronic storage and transmittal of documents. No member of the Advisory Committee objected to the Subcommittee's recommendation.

Rule 8011 (Filing and Service; Signature)

12-BK-005—Judge Robert J. Kressel; 12-BK-026—Judge S. Martin Teel, Jr.: *Rule 8011(a)(2) should not follow the ill-advised rule of FRAP 25(a)(2)(B) of having different filing rules for briefs and appendices. The filing rules should be the same for those documents as for all others—requiring receipt by the clerk by the deadline.*

The Subcommittee recommended no change. Currently, briefs are timely if mailed on or before the last day for filing. This practice is longstanding and is consistent with FRAP, which is one of the goals of amending the Part VIII rules. Moreover, as electronic filing of briefs becomes more prevalent, the mailing rules become less significant. No Advisory Committee member objected to the recommendation.

Other Issues

The Reporter said that the Subcommittee has retained three other comments on the revised Part VIII rules for further consideration. They concern whether a provision should be added to the rules providing for the issuance of a mandate by the district court and BAP upon the disposition of a bankruptcy appeal, and whether revised Rule 8023 should be amended to clarify the procedure for voluntary dismissal of appeals when (1) the appeal concerns an objection to discharge or (2) the trustee is a party to the appeal. It has been suggested that the requirements of Rules 7041 and 9019 for bankruptcy court review in those situations should also apply to appeals. The Subcommittee will make recommendations to the Advisory Committee regarding those comments at a later meeting.

11. Report by the Subcommittee on Technology and Cross Border Insolvency.

Oral report concerning Suggestion 13-BK-F by Judge Barry Schermer to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings.

Mr. Baxter said that the Subcommittee concluded that the rules are inconsistent about the requirement of a summons when a chapter 15 petition is filed. In practice, he said, most courts do not issue a summons regardless of whether the case seeks recognition of a foreign main or a foreign non-main proceeding. He said that the Subcommittee is considering several alternatives and will bring a recommendation to the Advisory Committee at the spring meeting.

12. Report by the Subcommittee on Attorney Conduct and Health Care.

> Oral report concerning Suggestion 13-BK-C by the American Bankruptcy Institute's Task Force on National Ethics Standards to amend Rule 2014 to specify the relevant connections that must be described in the verified statement accompanying an application to employ professionals.

The Chair acknowledged Professor Rappaport, who authored the suggestion and was at the meeting, and thanked her for her efforts on the suggestion.

Judge Jonker said that ABI's Ethics Task Force suggestion asserts that the Rule 2014 requirement to disclose all of a professional's "connections" to the debtor and other bankruptcy case parties in an employment application is overbroad and leads to voluminous "telephone-book" disclosures of every conceivable connection, thereby making it hard for courts and interested parties to find and evaluate those connections that are actually relevant. The suggestion would require disclosure only of "relevant connections," and it offered a definition of the term "relevant."

Judge Jonker reminded the Advisory Committee that a very similar suggestion was considered approximately ten years ago, but it was eventually withdrawn. He said that the current suggestion seems to make sense, but that the Subcommittee needs more information prior to making a decision. The Assistant Reporter is researching the issue, and there will be an update at the spring 2014 meeting**.**

Discussion Items

13. Oral report concerning Suggestion 13-BK-G by Gary Streeting to amend Rule 1015(b).

Referred to the Consumer Subcommittee.

14. Oral report concerning Suggestion 13-BK-H by Dan Dooley to amend Rule 2016 to require attorneys and other professionals employed by the estate to submit weekly reports and fee applications.

Referred to the Business Subcommittee.

15. Oral report concerning Suggestion 13-BK-I by Judge Stuart Bernstein to amend Official Forms 9F and 9F(Alt.).

Referred to the Business Subcommittee.

Information Items

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

Mr. Wannamaker reviewed bankruptcy-related legislation that has been introduced in Congress. None of the bills, he said, seemed likely to move forward anytime soon.

17. Bullpen.

Mr. Wannamaker explained that the "bullpen" is a designation for items that have been approved by the Advisory Committee but are held for a time pending submission to the Standing Committee. He said that the bullpen was empty before this meeting, but as a result of Advisory Committee's actions over the past two days, the following items had been approved to be held in the bullpen for submission to the Standing Committee in the future: (a) proposed revisions to Rule 8002(a)(5) (see Item 10B); and (b) proposed revisions to Rule 8006(b) (see Item 10B).

18. Dugout.

Mr. Wannamaker said that the "dugout" is a newly created designation for suggestions or issues that require further study before the Advisory Committee is asked to make a recommendation. A list of dugout items was included in the agenda materials.

The following items were added to the dugout during the meeting: (a) Recommendation for conforming change to Rule 1001 to track proposed changes to Fed. R. Civ. Pro 1; (b) Suggestion 12-BK-M (see Item 4E); and (c) Comments 12-BK-005, 12-BK-15, and 12-BK-040 regarding designation of the record in bankruptcy appeals (see Item 10B, Rule 8009).

19. Rules Docket.

Mr. Wannamaker asked members to review the Rules Docket and email any proposed changes to him.

20. Future meetings.

The spring 2014 meeting will be held April 22 – 23, in Austin, Texas. The fall 2014 meeting will be held September 29 – 30 in Charleston, South Carolina.

21. New business.

No new business.

22. Adjourn.

Respectfully submitted,

Scott Myers

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 9-10, 2014
Phoenix, Arizona
Draft Minutes as of March 13, 2014

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 9 and 10, 2014. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Elizabeth J. Shapiro, Esq., represented the Department of Justice.

Professor Geoffrey C. Hazard, Jr., consultant to the committee, and Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated.

Professor Daniel R. Coquillette, the committee's reporter, chaired a panel discussion on the political and professional context of rulemaking with the following panelists: Judge Lee H. Rosenthal, former chair of the committee; Judge Diane P. Wood, former member of the committee; Judge Marilyn L. Huff, former member of the committee; Judge Anthony J. Scirica (by telephone), former chair of the committee; Peter G. McCabe, Esq., former secretary to the committee.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter (by telephone)
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair

Professor Sara Sun Beale, Reporter (by telephone)
Professor Nancy J. King, Associate Reporter (by telephone)
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting, including a very economical rate for the hotel.

Committee Membership Changes

Judge Sutton announced that the terms of Judges Huff and Wood had ended on October 1, 2013. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work, and presented each with a plaque. Judge Sutton also announced that Mr. McCabe, who had served as secretary to the committee for 21 years, had recently retired from the Administrative Office. Judge Sutton noted that Mr. McCabe had been the longest serving employee of the Administrative Office and had dedicated 49 years to government service. Judge Sutton thanked Mr. McCabe for his extraordinary service to the committee and the courts. He also noted that the committee would be losing three great musicians, as Judges Huff and Wood and Mr. McCabe were all talented musicians.

Judge Sutton introduced the new committee members, Judge Graber and Judge St. Eve, and he summarized their impressive legal backgrounds.

Judge Sutton noted that the representatives from the Civil Rules Committee were at the courthouse holding a hearing on the proposals that are currently out for public comment, but that they would be joining the second day of the meeting.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee, without objection and by voice vote, approved the minutes of the last meeting, held on June 3–4, 2013.

REPORT OF THE ADMINISTRATIVE OFFICE

Judge Sutton reported that the rules committees had been engaged with Congress recently. He said that last June Congress had introduced legislation to deal with patent assertion entities. He said the first draft from the House was aggressive in attempting to

preempt the Rules Enabling Act process. He reported that he and Judge Campbell had met several times with congressional staffers, that the original draft legislation had been modified, that there were several bills under consideration, and that discussions are continuing.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of December 16, 2013 (Agenda Item 3). Judge Colloton reported that the advisory committee's fall meeting had been cancelled due to the lapse in appropriations during the government shutdown and that it had no action items to present.

Informational Items

Judge Colloton highlighted a few items that the advisory committee currently has on its agenda.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that a lopsided circuit split has developed concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Appellate Rule 4(a)(4), which provides that the "timely" filing of certain motions tolls the time to appeal. The advisory committee is considering whether and how to amend the rule to answer this question. Civil Rule 6(b) provides that a district court may not extend the time for filing motions under Civil Rules 50, 52, or 59. Nonetheless, district courts sometimes extend the time to file such motions even though Civil Rule 6(b) does not allow it. In other instances, a party files a motion late, the opposing party does not object, and the district court rules on it on the merits. Thus, the question has arisen whether a motion is "timely" under Appellate Rule 4(a)(4) if it is not within the time set in the Civil Rules but is nonetheless considered on the merits by the district court either because of an erroneous extension or the failure of the opposing party to object.

The Sixth Circuit has held that where the non-movant forfeits its objection to the motion's untimeliness, the motion is timely for purposes of Rule 4(a)(4). However, the Third, Seventh, Ninth, and Eleventh Circuits have held to the contrary. The courts holding that such motions are not timely reason that Rule 4(a)(4) was designed to provide a uniform deadline for the named motions in order to set a definite point in time when litigation would come to an end. Making the time for filing these motions depend on developments in the district court introduces a disparity that Rule 4(a)(4) was designed to eliminate. Judge Colloton noted that the Seventh Circuit has commented that the Sixth

Circuit's approach was uncomfortably close to the "unique circumstances" doctrine that was overruled in *Bowles v. Russell*, 551 U.S. 205 (2007). He added that the advisory committee will address these issues at its spring meeting.

A member stated that he supported the minority view that would forgive a late filing if it was done in reliance on a court order. Judge Sutton questioned whether doing so would overrule *Bowles*. The member responded that it would not; the rules could provide that if the deadline is set by rule and the judge purports to extend it in error, then a litigant who has relied on the erroneous extension is excused from the consequences of late filing. Another member noted it is different if the deadline is set by statute.

Another member suggested a wording change to one of the tentative sketches of possible amendments to address this issue, asking if there was a more sensitive way to reference the limits on judicial authority in the phrase: "a court order that exceeds the court's authority (if any) to extend the deadline . . . ." The reporter responded that she understood the concern, but she did not want the rule language to imply that a court had authority to extend deadlines outside the time allowed in the rules, as judges exceeding their authority in this regard is the root of the problem. She said that all suggestions on wording are welcome. Another member suggested instead using language along the lines of: "a court order that extends the deadline beyond that otherwise permitted by the rules . . . ."

FED. R. APP. P. 4(C)

Judge Colloton reported that the advisory committee has also begun a project to examine Rule 4(c)(1)'s inmate-filing provision for notices of appeal. The advisory committee is considering amendments to the rule that might address, among other things, whether an inmate must prepay postage in order to benefit from the inmate-filing rule; whether and when an inmate must provide a declaration attesting to the circumstances of the filing; whether the inmate must use a legal mail system when one exists in the relevant institution; and whether a represented inmate can benefit from the inmate-filing rule. The project grew out of a 2007 suggestion by Judge Diane Wood, suggesting that the committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule requires prepayment of postage. Judge Colloton reported that there is ambiguity in the case law on whether prepayment of postage is required; whether inmates must file a declaration; and the meaning of the sentence in the rule that says that if a legal mail system exists, the inmate must use the system. He said that a subcommittee is working on these and related issues.

LENGTH LIMITS

Judge Colloton reported that the Appellate Rules have some length limits set out in type-volume terms and some set out in pages. He said that the advisory committee is considering whether all the limits should be measured by type-volume given the

ubiquitous use of computers, and if so, the best means of appropriately converting current limits that are set in pages to type-volume limits. He noted that when the rules governing the length of briefs were changed to convert to type-volume limits, the rules set a type-volume limit that approximated the conversion from a page limit and provided a shorter safe harbor set in pages. The advisory committee is considering the option of taking a similar approach for other limits that are currently set in pages.

Judge Colloton stated that a safe harbor set in pages must be shorter than the type-volume limit to prevent lawyers from using the safe harbor to get around the type-volume limit, but the shorter page limit can create a hardship for pro se litigants. As a result, another option the advisory committee is considering would differentiate between papers prepared on a computer and papers prepared without the aid of a computer. Judge Colloton noted that it was unlikely that lawyers would switch to using typewriters in order to get around the type-volume limits. Another issue is that there is evidence that when the brief page limit was converted from 50 pages to a type-volume limit of 14,000 words, it resulted in an increase in the permitted length of a brief. The advisory committee is considering whether to adjust that limit to 12,500 or 13,000 words as part of the length-limit project.

AMICUS BRIEFS ON REHEARING

Judge Colloton reported that the advisory committee is also considering the possibility of addressing amicus filings in connection with petitions for panel rehearing and/or rehearing en banc. He stated that the advisory committee had heard that lawyers are frustrated that there is no rule with respect to rehearing that sets out when an amicus brief must be filed or how long it must be. The committee is considering whether there should be a national rule on these topics. Judge Colloton noted that some circuits have no local rule on these matters. However, there is a concern that any rule that addresses amicus briefs on petitions for rehearing might stimulate more such amicus briefs, which some courts do not desire. Judge Colloton noted that some courts even have rules that generally prohibit amicus filings on rehearing, or that only allow them with leave of court. Matters that could be addressed by a proposed rule include length, timing, and other topics that Rule 29 addresses with respect to amicus filings at the merits-briefing stage.

A judge member noted that amicus briefs are usually helpful on rehearing. She stated that sometimes there are sleeper issues that the appellate court may not be aware of and that she favored explicitly clarifying that such amicus briefs are permissible. Judge Colloton noted that the suggestion, if implemented, would not require allowing amicus briefs on rehearing, but instead would set out the procedure to be followed if the circuit allowed such amicus briefs.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of December 12, 2013 (Agenda Item 4).

Amendment for Final Approval

FED. R. BANKR. P. 1007(a)

Judge Wedoff reported that the advisory committee was seeking approval to make a technical and conforming amendment to Rule 1007(a). Subdivisions (a)(1) and (a)(2) of Rule 1007 require the filing at the outset of a case of the names and addresses of all entities included on "Schedules D, E, F, G, and H." The restyled schedules for individual cases that were published for comment in August 2013 use slightly different designations. Under the new numbering and lettering protocol of the proposed forms, the schedules referred to in Rule 1007(a)(1) and (a)(2) will become Official Forms 106 D, E/F, G, and H—reflecting a combination of what had been separate Schedules E and F into a single Schedule E/F. Judge Wedoff stated that in order to make Rule 1007(a) consistent with the new form designations, the advisory committee was proposing a conforming amendment to subdivisions (a)(1) and (a)(2) of that rule. Judge Wedoff reported that the revised schedules would not go into effect until December 1, 2015, so he asked that the conforming rule change be held back to go into effect on the same date.

The committee, without objection and by voice vote, approved the proposed amendment to Rule 1007(a) for transmission to the Judicial Conference for final approval without publication.

Informational Items

CHAPTER 13 PLAN FORM

Professor McKenzie reported on comments received on the published proposed chapter 13 plan form and related rule amendments. The advisory committee had drafted an official form for plans in chapter 13 cases and had proposed related amendments to nine of the Bankruptcy Rules. Professor McKenzie reported that the form and rule amendments were published in August 2013 and have drawn over 30 comments so far. He said that very few comments expressed opposition to the form, but many were long and detailed. Professor McKenzie reported that since so many comments had already come in, the working group had already begun categorizing and reviewing the comments, although of course its work could not be completed until the comment period closed in February and all the comments were received.

Professor McKenzie said that one common theme that had emerged was what to do when the form provides a number of choices to the debtor even though some choices may not be available in the debtor's district. The advisory committee did not take a position on the differences in these choices between districts, but one concern is that providing the choice of various options on the form might indicate that the committee was stating that both choices are available to a debtor. Professor McKenzie noted that the concern is that this might lead to confusion and increased litigation. Judge Wedoff provided an example. He said one open question is, if the debtor wants to pay a mortgage, whether he can pay the mortgagee directly or instead must pay the trustee. If the payment is to the trustee, there is a fee assessed on the payment, meaning that more has to be paid on the mortgage claim. Some jurisdictions require it to be paid through the trustee, while others allow the debtor to be the payment manager. Judge Wedoff noted that providing both options on the form might imply that both options are available in all jurisdictions. Professor McKenzie added that one way to respond to the comments would be to include a warning on the form that the provision of an option does not mean it is available in the debtor's district. The working group will report to the advisory committee at the spring meeting.

A participant asked whether the advisory committee had gotten feedback that the form will be confusing to pro se debtors. Professor McKenzie responded that so far there had only been a couple of comments on how the form might impact pro se litigants. One comment had said it might attract additional pro se litigants, and the other had said it would be confusing to pro se litigants. The participant asked how the advisory committee could get more input from pro se litigants, since such litigants do not often comment on published proposals. Professor McKenzie stated that the advisory committee hopes to get comments from consumer bankruptcy groups, who often think about the nature of pro se litigation, and he noted that it is very difficult for pro se litigants to get through chapter 13 bankruptcies successfully. He said that one thing the working group is considering is more prominent language about that difficulty. Judge Wedoff noted that providing a plan form might help pro se litigants because it would set out what needs to be done and might allow some debtors to do it on their own without an attorney.

Judge Wedoff noted that as part of its Forms Modernization Project, the advisory committee had been looking closely at whether the forms can be used by pro se debtors. He said one of the goals of that project is to make the forms more user-friendly. Another participant noted that law students use the forms when they represent clients in bankruptcy clinics, and he suggested that the advisors for such clinics might be a good source of information on how the forms might be used by law students, which can be analogized to the pro se context. Judge Wedoff noted that the advisory committee, with the help of the Federal Judicial Center, had been vetting the proposed forms with a group of law students.

ELECTRONIC SIGNATURES

Judge Wedoff reported on the comments received on proposed amendments to Rule 5005 on filing and transmittal of papers, which is designed to address the question of how to deal with electronic signatures by someone other than the attorney who is filing a document in a bankruptcy case. He noted that there is no problem with signatures of attorneys who file documents because they have to have a login and password, which constitutes their signature. To date, the rules have not addressed the signatures of nonfilers, which in bankruptcy is primarily the debtor. Judge Wedoff noted that the typical practice has been for local rules to require the filing attorney to retain the original document signed by the nonfiler for a period of time, usually five years. Attorneys have pointed out that this becomes a problem in terms of storage space. Some bankruptcy firms may generate thousands of case filings a year, making the volume of original documents to retain substantial. In addition, some lawyers have reported that they are uncomfortable retaining documents that might later be used to prosecute a crime against their clients. Further, the prosecutor in a future criminal prosecution will be relying on the attorney's good faith in retaining documents with the original signatures.

The proposal published for comment provides that, instead of requiring the retention of a "wet" signed copy, the original signature could be scanned into a computer readable document and the scanned signature would be usable in lieu of the original for all purposes. Judge Wedoff noted that the published proposal asked for comment on two alternatives. One would have a notary certify that it is the debtor signing and that it is the complete document. The other would deem filing by a registered person equivalent to the person's certification that the scanned signature was part of the original document.

Professor Gibson said that only four comments had been received so far. One expressed confusion about when original documents must be retained under the proposed rule. Another erroneously read the proposal to require the entire document, not just the signature page, to be scanned, which would require much more electronic storage space. She said that two recent comments support the proposed amendment and urge adoption without requiring a notary's certification.

The representative for the Department of Justice noted that the Evidence Rules Committee had been planning to host a symposium on electronic evidence this past fall, which would have included a discussion of this issue of electronic signatures, but that the symposium was cancelled due to the government shutdown. She noted that the scheduling of the symposium had nonetheless prompted the Department to come to some tentative conclusions on this issue. While the Department will be submitting formal comments, the representative previewed the initial views of the Department. She reported that there was resistence in the Department to removing the retention of original signatures. She noted that there was a great amount of work done within the Department

in examining this issue. There was a working group that cut across disciplines and there was a survey conducted of U.S. Attorney's offices. She said that prosecutors overwhelmingly thought there was no problem with the current system. They also reported that taking away the requirement of retaining originals would lead to more cases where signatures were repudiated. The vast majority of survey respondents thought the proposed rule would make it much harder to prove authenticity in situations where the signatures were repudiated. She noted that the FBI has a policy that it will not provide definitive testimony to authenticate a signature without the original document. With an electronic signature, the FBI cannot determine certain characteristics that they would look at in comparing signatures, like pressure points and whether there were tremors. Without having an FBI expert, prosecutors would have to resort to circumstantial evidence to prove authenticity, which would often involve measures such as getting warrants to search computers to show that a document was generated from that computer, conducting forensic analysis, tracing IP addresses, and similar actions that would add burden and expense.

The Department's representative explained that the Department also looked at the tax experience because Evidence Rule 902(10) makes certain types of documents self-authenticating when a statute provides for prima facie presumption of authenticity. The advisory committee note states that the tax statute is one example. However, in looking into the possibility of creating a statutory presumption, the Department found that it would have to be either a generic statute that addressed this subject holistically or a bankruptcy-specific statute. The problem with a bankruptcy-specific statute, she said, was that the Department had found at least 101 different crimes that require the authenticity of the signature to be proven as an element of the crime. If a bankruptcy-specific statute were implemented, she said, there was the possibility of needing to do seriatim statutes because bankruptcy might just be the first area to start doing everything electronically. She said eventually there might need to be dozens of statutes. Yet, the alternative of crafting a generic statute now to address the subject holistically created the concern that it would have unintended consequences if all the possibly affected criminal statutes were not first examined. Thus, she noted, it was premature to start trying to get a statute without knowing all of the ramifications. She also stated that survey respondents felt the tax statute was somewhat unique in that taxpayers are required by law to sign a return and if they repudiate their signature on the return that means they have violated the law by not filing a tax return if there is no other valid tax return with their signature. She noted that Judge Wedoff has explained that there are some parallels in bankruptcy.

The Department participant also stated that the working group did not find persuasive the concerns that have been raised about why the rule should be changed. She stated that publicly-filed documents are not privileged, so an attorney should not be concerned about being called upon to produce a client's documents. Further, professional responsibility rules prohibit an attorney from assisting with a crime or fraud. She said

that while storage can be burdensome, there are retention periods, so there should be recycling of the documents and not an ever-increasing amount of documents needing to be retained. She noted that one possibility raised by Judge Wedoff was that perhaps the whole document could be scanned and saved electronically and only the signature page would need to be kept in its original format, and she noted that this option was something to think about. Finally, the working group was not persuaded by the rationale that there are varying retention periods across the country. The group felt that if that was a concern, then it could be fixed simply by creating a uniform retention period. The prosecutors thought that the varying periods actually hurt them the most because the retention periods are often shorter than the statute of limitations for the crimes being prosecuted. In sum, she said, the Department feels that it is premature to remove the retention requirements. There was a feeling in the Department, she said, that technology is continuing to move forward. It might be that in the near future things like thumb prints and biometrics will serve as signatures, which would solve the problem of authenticating without the need to store lots of documents. The participant stated that the Department would have presented this summary of its views in greater detail at the symposium, and that the Department is committed to working with the committee on this issue.

Judge Wedoff said that the advisory committee will await the formal comment from the Department and expressed gratitude for hearing their initial views in the interim. He noted that the prosecuting community has not had the experience of having to use scanned signatures in lieu of having an FBI expert testify to the validity of a wet signature. Whether scanned signatures would present a problem in persuading the trier of fact is not yet clear. Bankruptcy presents a special circumstance, he said. Even without the change to Rule 5005, he said, every document filed by a debtor's attorney is filed under Civil Rule 11, which requires certifying that the filing is authentic. Rule 5005 would only underline the Rule 11 requirement that the signature is authentic. So, the debtor who asserts that a signature on a filed document is not his own will have to overcome the fact that the signature appears to be his own and will have to assert that his attorney lied when the document was filed. It may be that it is not that difficult to persuade a trier of fact of the legitimacy of a debtor's signature on a bankruptcy document. He also noted that, in this regard, there may be some source of empirical evidence as to the difficulty of not having wet signatures because there is at least one jurisdiction in the country—Chicago—that does not have a requirement for retaining wet signatures for debtors' filings for several years. Any prosecutions that have taken place in that district would have taken place on the basis of the debtor's scanned copy. He stated that there are not a lot of these types of prosecutions that come up and that when they do come up, debtors do not contest the legitimacy of their signature. He noted that he had encountered situations where a United States Trustee had filed a motion to deny the debtor a discharge because the debtor supplied deliberately false information on the debtor's schedules. The debtors defend against those arguments not on the basis that they did not sign the schedules, but by arguing things like they told their attorney about the

matter at issue and the attorney did not put it in the schedule or they did not realize it was required to be put on the schedule. He stated that he had never encountered a case where the debtor denied his own signature. Judge Wedoff reported that the Department of Justice representative had agreed to look into the Department's survey results that had come from Chicago.

A member questioned whether the concern was with ensuring the integrity of the judicial process or collateral consequences and enabling future prosecutions. Judge Wedoff responded that the advisory committee's initial approach was designed to ensure the integrity of the judicial process. We want to make sure, he said, that the documents being filed are legitimately signed by the debtor. The informal feedback from the Department has to do with collateral consequences, and the concern is the potential difficulty in proving malfeasance by the debtor. The member responded that a similar concern may be true in many areas of the law and he wondered whether the rules committees' focus ought to be on the judicial process, not necessarily to make it easier or harder for the Department of Justice to prosecute crimes years later.

Judge Sutton emphasized that this is just now out for publication and the advisory committee is awaiting the formal response from the Department. He asked whether the rescheduled Evidence Rules technology symposium will include this issue. Professor Capra responded that it would not because the original idea had been to get ahead of the public comment and to get the Department's views on this issue, which has already been accomplished. While others were going to participate, they now had the ability to comment during the public comment process, which would be over by the time a new symposium could be scheduled. Professor Capra noted that one thing that came up in putting the original symposium together is that the issue is not forgery, but that the true signature might be improperly attached to the document. He said that is the issue that concerned the CM/ECF Subcommittee—someone could just scan a signature and put it on any document. Judge Wedoff said that this is why the two alternative means of assuring that the signature was authentic and was attached to the proper document were published for public comment. The Department's representative noted that the Department did not think that the option of requiring a notary's signature was a good one.

Judge Wedoff noted that it might be that bankruptcy could serve as an experiment for testing this. There are extra protections in bankruptcy, he said, like the attorney certification, that would not necessarily exist in other areas. He said that the advisory committee would have a better idea of what to do next after the comment period ends. The Department of Justice's representative noted that as a matter of evidence, the attorney's certification could not be introduced because it would be hearsay, so there would still be the need for a witness to testify to the person's signature, which might lead to calling lawyers to testify.

A member noted that the Department's concerns were about collateral prosecutions years down the road, and that he was not sure the judiciary should be too concerned about that. He said the requirements to authenticate the signature might impose a burden in current proceedings for the benefit of possible later collateral proceedings. He added that the advisory committee's concerns should be that this document in this litigation is what it purports to be. A certification by the attorney, as an officer of the court, should normally be sufficient for that purpose, he said. He said he was open to the possibility of the need for further assurances, but that the question should be focused on assuring that the document is authentic for the current litigation, not on assuring its authenticity for use in possible later collateral proceedings.

Professor Coquillette commented that the rules committees have a goal of transsubstantive rulemaking, but bankruptcy is really different in this area because of the factors mentioned by Judge Wedoff, such as attorney certification.

A member asked whether the advisory committee is studying what is going on in Chicago, where there is no requirement to retain wet signatures. Judge Wedoff reported that the Department of Justice had done a survey and was going to see if it could pull out data on prosecutions in Chicago. Judge Wedoff said that he would talk to the local United States Trustee's office to find out their experience. He noted that he is not aware of any criminal prosecutions for bankruptcy fraud in Chicago that raised a question of validity of the debtor's signature. The number of prosecutions for bankruptcy fraud is very small to begin with, he said, and then it would be a very small subset of that small subset that would involve the validity of the debtor's signature. So, he said, there would not be a huge amount of empirical data to gather on this.

Judge Sutton thanked Judge Wedoff for the summary of the issues and thanked the Department's representative for previewing the results of the Department's work on this issue.

FORMS MODERNIZATION PROJECT

Judge Wedoff provided an update on the advisory committee's Forms Modernization Project, a multi-year project to revise many of the official bankruptcy forms. The work began in 2008 and is being carried out by an ad hoc group composed of members of the advisory committee's subcommittee on forms, working with representatives of other relevant Judicial Conference committees. The goals of the project are to improve the official bankruptcy forms by providing a uniform format and using non-legal terminology, and to make the forms more accessible for data collection and reporting. The advisory committee decided to implement the modernized forms in stages in order to allow for fuller testing of the technological features and to facilitate a smoother transition. Judge Wedoff said that the first two phases of the project were

nearly complete: a small number of the modernized forms became effective on December 1, 2013, and the balance of the forms used by individual debtors is currently out for comment. Their effective date will be delayed until December 1, 2015, to coincide with the effective date of the non-individual forms. Judge Wedoff said that, surprisingly, not many comments had been received yet on the individual forms out for public comment. He said the comment period was not yet over, but that so far the revised forms seem to have been met with general acceptance.

The final batch will be non-individual forms, which were separated from individual forms because they ask for different information in many situations, and which would be expected to become effective on December 1, 2015. Judge Wedoff noted that people filling out non-individual forms are likely to have access to a more sophisticated legal understanding of the bankruptcy system. Non-individuals have to be represented by an attorney, and are usually associated with corporations or other entities that are likely to have a better understanding of the information called for on the forms.

Judge Wedoff said the agenda materials provided an example of a non-individual form to show the differences from the individual form. The non-individual form is shorter and uses more technical accounting language than the individual form, but not legalese. He said that this is a preview of what the advisory committee will likely be presenting for approval for publication at the Spring 2014 Standing Committee meeting. When this last batch of forms is approved, he said, the advisory committee will be finished with the complete package of form changes.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 6, 2013 (Agenda Item 9).

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that the advisory committee sought approval to publish at an appropriate time changes to Rule 82 on venue for admiralty or maritime claims to reflect changes Congress had made to the venue statutes. It has long been understood that the general venue statutes do not apply to actions in which the district court exercises admiralty or maritime jurisdiction, except that the transfer provisions do apply. This proposition could become ambiguous when a case either could be brought in the admiralty or maritime jurisdiction or could be brought as an action at law under the "saving to suitors" clause. Rule 82 has addressed this problem by invoking Rule 9(h) to ensure that the Civil Rules do not appear to modify the venue rules for admiralty or

maritime actions. It provides that an admiralty or maritime claim under Rule 9(h) is not a civil action for purposes of 28 U.S.C. §§ 1391–1392. Rule 9(h) provides that an action cognizable only in the admiralty or maritime jurisdiction is an admiralty or maritime claim for purposes of Rule 82. It further provides that if a claim for relief is within the admiralty or maritime jurisdiction but also is within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim.

Professor Cooper reported that legislation had added a new § 1390 to the venue statutes and repealed the former § 1392. The reference to § 1392 in current Rule 82 clearly needs to be deleted as a technical amendment, he said. The advisory committee also thought it was appropriate to add a reference to § 1390, but the reason was a little more complicated.

Professor Cooper explained that new § 1390(b) provides that the whole chapter on venue, apart from the transfer provisions, does not apply in a civil action when the district court exercises jurisdiction conferred by § 1333. Section 1333 provides jurisdiction for admiralty and maritime cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." By referring to § 1333, § 1390(b) removes application of the general venue statutes for cases that can be brought only in the admiralty or maritime jurisdiction and for cases that might have been brought in some other grant of subject-matter jurisdiction but that have been designated as admiralty or maritime claims under Rule 9(h). Since the general venue provisions do not apply when the court is exercising admiralty or maritime jurisdiction, it seems wise to add § 1390 to Rule 82. Doing so would make claims designated as admiralty or maritime claims under Rule 9(h) exempt from the general venue provisions just as those that get admiralty or maritime jurisdiction under § 1333 are so exempt. Professor Cooper noted that the advisory committee had sent the proposed revision to the Maritime Law Association, which had approved of the proposal. Nonetheless, the advisory committee recommended the proposal for publication, not for approval as a technical amendment, because of the complexity of the subject matter.

The committee, without objection and by voice vote, approved the proposed amendment to Civil Rule 82 for publication.

FED. R. CIV. P. 6(d)

Judge Campbell reported that the advisory committee recommended for publication at a suitable time an amendment to Rule 6(d), which currently provides three extra days for responding to certain types of service, including service by electronic means. The proposed amendment would strike the reference in Rule 6(d) to Rule 5(b)(2)(E), which references electronic service. This change would remove the three extra days for electronic service. Judge Campbell said that the Appellate, Bankruptcy,

and Criminal Rules Committees were working through this same issue now with respect to parallel provisions in each set of rules. He stated that, depending on the timing of approval of similar changes to the other sets of rules, they could all be published together, or the Civil Rules change could be published first as a bellwether. He added that the advisory committee also recommended adding parenthetical explanations to Rule 6(d) that would provide brief explanations of the type of service referenced. This would prevent users from having to flip back to the cross-referenced rules to find the types of service that receive the three added days. The committee note, he said, could explain that service via CM/ECF does not constitute service under Rule 5(b)(2)(F), which covers service by other means to which the party being served has consented, and which is subject to the three-day rule.

A member asked whether the advisory committee had considered removing "consent" from the three-day rule as well. Judge Campbell responded that it had not; the issue was just brought to his attention this morning. The member noted that the three-day rule was invented for mail. He questioned the rationale behind applying it to leaving papers with the clerk when no one knows where the party is. He suggested that the advisory committee consider restricting the three-day rule to service by mail. Judge Campbell said that the advisory committee could consider this point. He added that these other methods of service have always been subject to the three-day rule and the advisory committee had not heard of a problem. Clearly, he said, electronic service no longer requires three extra days; the committee could look more broadly at whether three extra days are warranted in other circumstances. Judge Wedoff noted that there is a proposal to remove the added three days as widely as possible in the Bankruptcy Rules. Judge Sutton added that the member's point about whether three extra days were needed in other circumstances was a good one. At least, he said, the question could be raised in publication as to whether to remove other types of service from the three-day rule. He suggested that the advisory committee discuss it at their next meeting.

Judge Campbell said that the advisory committee would consider these issues and that he would want to hear the views of court clerks as well. However, he said, the advisory committee's plate was so full right now with considering the next steps for the proposals that were published last August, that he would prefer not to do that investigation now. One option, he said, would be to publish the proposal to eliminate electronic service from the three-day rule and ask for comment on whether the committee should also eliminate service by leaving the paper with the clerk or by other means consented to. Judge Sutton noted that the simplest route would be to delay publication during the investigation into the other means of service, but he saw no reason to hold off on removing the extra three days for electronic service. The member who had made the suggestion stated that he would not oppose publication, but that he thought it should ask for comment on whether the three-day rule should be abolished altogether. He noted that service by mail is now mostly limited to pro se litigants or people who do not have

computers. He said the committee could publish the proposal to remove electronic service from the three-day rule and ask for comments as to whether it would be wise to restrict it just to service by mail or to abolish it altogether.

Professor Capra noted that the idea of restricting the three-day rule came from the CM/ECF Subcommittee, and the idea was to have a uniform approach. He said all of the advisory committees would be considering this issue, except for the Evidence Rules Committee, but it was unlikely that it would be resolved by the spring.

A member asked whether there should be a separate three-day rule for pro se litigants. She noted that this is an issue primarily affecting pro se litigants, who often only receive service by mail. Judge Campbell noted that some courts do have CM/ECF for pro se litigants, so some do get instantaneous service.

Judge Sutton suggested that the committee could tentatively approve the proposal for publication with a slight variation in the committee note and questions requesting comment on whether the three-day rule should be deleted altogether or limited to service by mail. The hope, he said, would be for publication this summer. Judge Campbell agreed that this sounded like a fine approach.

The committee, without objection and by voice vote, tentatively approved the proposed amendment to Civil Rule 6(d) for publication, with a slight change in the committee note to address service under Rule 5(b)(2)(F), together with questions on whether the three-day rule should be abolished altogether or limited to service by mail. The committee will consider the final proposal again before publication, likely at its spring meeting.

Informational Items

FED. R. CIV. P. 17(c)(2)

Judge Campbell reported that the advisory committee had decided against further action on Rule 17(c)(2), which directs that "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action." He stated that in *Powell v. Symons*, 680 F.3d 301 (3d Cir. 2012), the Third Circuit had noted the lack of guidance as to when a court should appoint a lawyer or guardian to assist an unrepresented party. He said that research had revealed that six circuits have adopted standards similar to that of the Third Circuit, which is that there is no obligation to *sua sponte* inquire into competence. Under this view, Rule 17(c)(2) only applies when there is verifiable evidence of incompetence. Judge Campbell said that all circuits agree that there is no obligation to appoint a guardian just because a party exhibits odd behavior.

The advisory committee had concluded that it should not attempt to write a rule in this area. Judge Campbell explained that if judges were obligated to inquire about a guardian whenever they saw something less than full competence, the issue would become unmanageable. Further, he said, there were no resources readily available to pay for guardians. In fact, he said, there were not usually funds available to pay for appointed lawyers either. Judge Campbell said that to write a rule that sets standards for the wide variety of circumstances in which this could arise would be nearly impossible. He added that relevant considerations would include evidence of incompetence, other resources available to assist the person, the merits of the claim, the risk to the opposing party in terms of time and delay, case management steps, and more. The advisory committee concluded that this was best left to the common law. Judge Campbell said the advisory committee felt that these issues need to be decided on a case-by-case basis and that principles will develop over time. As a result, he said the advisory committee recommended no action at this time.

A member stated that he agreed with the advisory committee's conclusion, noting that it is a case-by-case judgment call as to how to handle incompetence. Further, he said, there can be verifiable evidence of incompetence even with lawyers involved.

E-RULES

Judge Campbell reported that the advisory committee, along with the other advisory committees, is in the early stages of addressing the question of what to do with electronic communications under the rules. He said one option is to adopt a rule that says anything that can be done in writing can be done electronically, but that raises all kinds of complications. Another option is to go rule by rule and determine what to do with the issue of electronic communications.

DISCOVERY COST SHIFTING

Judge Campbell stated that the advisory committee's discovery subcommittee is in the early stages of examining the question of whether the rules should expand the circumstances in which a party requesting discovery should pay part or all of the costs of responding. He said that Congress and some bar groups had asked for a review of this issue. The proposals published for comment last August include revision of Rule 26(c) to make explicit the authority to enter a protective order that allocates the costs of responding to discovery. If this proposal is adopted, experience in administering it may provide some guidance on the question of whether more specific rule provisions may be useful. Judge Campbell said the advisory committee is in the early stages of examining this issue and will report on its progress in the future.

CACM PROJECTS

Judge Campbell reported that the Court Administration and Case Management Committee (CACM) has raised a number of topics that may lead to Civil Rules amendments, but that action on all of these topics has been deferred pending further development by CACM.

PUBLISHED PROPOSALS

Judge Campbell reported that the advisory committee had held two of the three scheduled public hearings on the proposals published for comment. He said 40 more witnesses were scheduled for an upcoming hearing in Dallas, with 29 more on the waiting list. He said the advisory committee was not scheduling another hearing because it would be too difficult to fit a fourth hearing in all of the members' schedules, and the advisory committee was committed to reading all of the written submissions. He said 405 submissions had already been received and that the committee will review them all carefully. He noted that the hearings have been very valuable and there is work to do to refine the proposals. He added that the advisory committee will decide what to do at its April meeting and will make a recommendation to the Standing Committee at its May meeting.

A participant asked if that schedule was too expedited. He asked whether the advisory committee would have enough time to do the job by the May meeting. Judge Campbell said he thought there was sufficient time. He noted that the advisory committee had been working on the published proposals for five years. He said the committee's task in April will not be gathering information, but using its best judgment in light of everything it had heard through public comment.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set forth in Judge Raggi's memorandum of December 20, 2013 (Agenda Item 5), and her supplemental memorandum of December 30, 2013.

Amendment for Final Approval

FED. R. CRIM. P. 12

Judge Sutton reported that the advisory committee had been considering amendments to FED. R. CRIM. P. 12 on motions that must be raised before trial and the consequences of late-filed motions since 2006. He provided some background on the current proposals. He noted that the Judicial Conference had approved the proposed

amendment to Rule 12 that the committee had approved at its last meeting and had transmitted it to the Supreme Court. The Court had raised several questions about the proposed amendment. Judge Sutton noted that the package of proposals, including Criminal Rule 12, had been submitted to the Court earlier than in years past to give the Court flexibility in terms of timing its review of the proposals. He noted that one benefit of submitting the proposals early is that if the Court had questions, they might be able to be addressed within the same rulemaking cycle. He stated that this was uncharted territory because in the past, when the proposals were submitted to the Court later, if the Court had questions about the proposals, it would simply recommit them to the advisory committee for further consideration. In this case, however, there might be time to propose changes and have them considered by the Court in the same rulemaking cycle.

Judge Sutton noted that the Court had raised several questions about the Rule 12 proposal. First, as transmitted to the Court, the proposed amendment had stated that the court could consider an untimely motion raising a claim of failure to state an offense (FTSO) if the defendant showed prejudice. The Court had asked to whom the required prejudice would be. Judge Sutton noted that the intent of the amendment was that it would be prejudice to the defendant. Second, the Court had asked, if the prejudice is to the defendant, how the defendant would show prejudice before trial. Judge Sutton stated that one form of prejudice is lack of notice, and another occurs if the grand jury did not properly indict under the elements of the crime. Third, the Court had noted the anomaly of having in proposed Rule 12(c)(3)(A) a required showing of "good cause" for relief from the consequences of failing to timely raise most Rule 12(b)(3) motions, while proposed Rule 12(c)(3)(B) would require prejudice for consideration of late-raised FTSO claims. Judge Sutton noted that by requiring "good cause" alone in (A) and "prejudice" alone in (B), the implication was that there was no requirement of showing "prejudice" in (A). That is not what the committee intended. On the other hand, by requiring "good cause" in (A), and only "prejudice" in (B), the committee had intended the negative implication to be that there was no requirement of showing "cause" under (B) for claims of failure to state an offense. Judge Sutton added that it was odd to have language in the same subsection that intended one negative implication but not another negative implication.

Judge Raggi then explained that the advisory committee recommended resolving the third concern raised by the Court by having one standard for relief from failure to timely raise all Rule 12(b)(3) motions — "good cause," the standard currently used in the rule. She noted that there was disquiet, especially among the members of the defense bar on the committee, about making an FTSO claim a required pre-trial motion when for so long it had been viewed as the equivalent of jurisdiction and something that could be raised at any time. She added that, faced with the fact that it is now recognized as something that should be raised early on, some members of the defense bar had suggested that the committee use a different standard for FTSO claims that would be easier to meet

than "good cause." That is why the advisory committee eventually decided to use just "prejudice" for FTSO claims, no matter what the cause for failing to raise it in timely manner. She noted that everyone recognized that it was a bit curious to have two standards for granting relief from the consequences of belatedly filing a required pretrial motion. She said that the advisory committee has now had more time to think about the proposal. The advisory committee did not want to put the Rule 12 proposal in jeopardy by insisting on two standards. The subcommittee had given it enormous thought and decided that pursuing a separate standard for FTSO claims was not worth the risk to the whole proposal and that "good cause" would be adequate for those claims.

Judge Raggi noted that no one stands convicted of a crime unless every element of the crime is proven beyond a reasonable doubt. The proposed rule addresses only those situations where even though a defendant is proven guilty beyond a reasonable doubt on every element, a failure to charge it correctly should for some reason be heard late on a showing of prejudice. But, she asked, what would the prejudice be in that situation? The advisory committee, she said, had asked what they were really putting at risk by insisting on two standards. She stated that it was now the subcommittee's view and the unanimous view of the advisory committee that it was not worthwhile to pursue a separate standard for FTSO claims, and that a "good cause" standard should apply for all late-raised claims that are not jurisdictional.

Judge Raggi noted that, at the suggestion of a member of the advisory committee, the committee note had been revised to explain that "good cause" is "a flexible standard that requires consideration of all interests in the particular case." She said that this language was in brackets, but that it would be part of the text of the committee note, if approved. This language, she said, would make clear that the court should consider cause, consider prejudice, and consider everything that might be relevant. She explained that the reason the words "cause and prejudice" were not used was to avoid confusion with the use of that phrase in the habeas corpus context. Instead, the revised note language is intended to make clear that "good cause" is a holistic inquiry. She stated that it made sense to trust the district judges to understand that.

Judge Raggi requested that the committee approve the revised proposed amendment to Rule 12 and the accompanying committee note. Finally, Judge Raggi noted that the advisory committee was unsure about whether the change could be accomplished in the current rulemaking cycle. One of the questions the advisory committee had raised, she said, was whether this was a change that would require republication. She reported that the advisory committee was not sure and had consulted with Professor Coquillette, who did not think republication was necessary. She noted that if the committee approved the revised proposal, it could potentially go back to the Court and be considered in this year's rulemaking cycle. She said it was the Standing Committee's decision whether to republish.

Professor Coquillette noted that traditionally the committee republishes when anyone would be surprised by the changes after publication and would feel that they did not have a chance to debate the proposal. But, he noted that in this case, the appropriate standard for relief from late-raised FTSO claims had been debated back and forth for the seven year history of this proposal. Everyone had notice that the appropriate standard was at issue and had a chance to comment on that during the public comment period. Judge Sutton also noted that for the past eight years or so, everyone has known that the rule was being changed to require FTSO claims to be brought before trial and the standard for raising such claims late has been on the table the whole time.

A member stated that his initial reaction was to republish, but that he realized that the Court had the authority to make changes to the committee's proposals itself. If the Court wanted to make a change and just wanted to make sure the rules committees agreed, then it would seem to be a procedure contemplated by the Rules Enabling Act. However, if the proposal is really back in the committee's court, then he said he would have to grapple with the republication question. He stated that he tended to think it is better to republish in the case of a "tie."

Judge Sutton stated that the Court could have proceeded in different ways and this is uncharted territory, but that he believed the committee should treat the proposal as if it were back in front of the committee. Another member asked what the procedure would be if the proposal had gone to a vote in the Court and been rejected. Judge Sutton responded that it depends, and that if a subsequent change by the committees had already been fully vetted, it would not be republished. The reason for republication is if the committee thinks it will get new insights or if someone will be surprised by a change. The member noted that the republication question is similar to a court amending an opinion and giving another opportunity for filing a petition for rehearing. She said that if the changes on rehearing are responsive to the comments already received, the courts usually do not give another opportunity for rehearing.

Professor Beale noted that there had been a previous occasion in which the advisory committee had made changes in response to a remand from the Supreme Court and the committee had not republished. Professor Capra noted that the Evidence Rules Committee had not republished when it made changes after a proposed amendment to Evidence Rule 804(b)(3) was returned by the Court.

Judge Raggi noted that not only had the advisory committee heard lots on this subject, but what it is proposing now is to leave the standard in the current rule in place.

Another member stated that he had no views on the need to republish, but questioned whether there is a negative implication in the new proposed committee note language describing "good cause" as a "flexible standard that requires consideration of all

interests in the particular case." The member explained that the existing standard has been interpreted to require showing, among other things, prejudice, and he wondered whether the note language could potentially be understood to relieve a defendant of having to show prejudice.

Judge Raggi responded that she could not foreclose the possibility of the language being read that way, but from a practical perspective, this is how Rule 12 now treats FTSO claims. She added that, up until the time the jury is empaneled and jeopardy attaches, Rule 12, in another section, lets a trial judge entertain any motion. She stated that presumably on appeal, circuit courts will continue to apply a plain error standard to late-raised claims. So, she said, we are talking about what the judge will entertain in the window of time between when jeopardy attaches and when judgment is entered. Judge Raggi stated that she would be surprised if trial judges would entertain such late motions without a showing of prejudice once jeopardy has attached. She added that if the committee were to see that happening in practice, it could consider amending the rule to spell out a prejudice requirement in the rule, but, given that district judges are constrained by this portion of the rule only in the time between jeopardy attaching and judgment, she thought most judges would require a showing of prejudice. The member stated that as a practical matter that is true, but that he was not sure that the new language in the note added anything. He stated that if it does not add anything substantive, it is not needed.

Judge Raggi explained that the note language explaining that "good cause" is a "flexible standard" makes one of the defense bar members supportive of the proposal, which is something that should not be discounted. She stated that all three advisory committee members who represent defendants voted for this rule in part because of this new language in the note. In fact, she said, something even more detailed had been proposed originally by a defense bar member.

Judge Sutton noted that "good cause" suggests flexibility and that to the extent some have concerns about putting FTSO defenses with all other claims required to be raised before trial, emphasizing flexibility is important to make clear that courts might treat different types of late-raised motions differently, depending on the circumstances.

Another member asked if the new note language is a comfort blanket for some members of the advisory committee. Judge Raggi agreed that it was in part, but noted that the language was derived from the fact that some members wanted to ensure that judges would understand that the seriousness of the motion should also be taken into account in deciding the consequences of a late-raised motion, while recognizing that it would not be appropriate to assume that every FTSO motion is more important than every multiplicity motion, for example.

A member questioned whether there are examples of a change like this going through without being republished. Judge Sutton responded that there were, both with respect to Criminal Rules proposals and Evidence Rules proposals, but the fact that there were other instances in which the committee had made changes after remand from the Supreme Court without republishing does not mean that there should never be republication in response to comments from the Court. But here, he noted, the Rule 12 proposed changes seemed more like the instances in which the committees had not republished. Judge Raggi noted that the advisory committee had already made changes to the Rule 12 proposal after publication without republishing. She added that the advisory committee had received many comments from the defense bar on the published proposals and that while there is the possibility that someone might argue that the last version they saw had a separate standard for FTSO claims, she was not sure that the committee was ever obliged to have two different standards as opposed to the one that is there. The cost of republishing, she noted, would be putting off the effective date of the rule change by another two years. She was comforted by the fact that not one of the defense members of the advisory committee had urged republication.

Judge Sutton noted that the advisory committee had made more substantive changes after publication and before sending it back to the Standing Committee than the current proposed change. Judge Raggi agreed, but noted that the changes after public comment had been made in response to comments received during the public comment period. Professor Coquillette noted that the history of this rule proposal did not require republication here, where the defense bar members of the advisory committee did not have concerns and the issues have been fully discussed. He added that none of the defense bar members of the advisory committee had argued that this change would be a surprise.

A member moved to approve the proposed amendment to Rule 12. The member who had questioned the note language seconded the motion, explaining that as a practical matter, district judges will have no problem applying the amendment and note language. The committee unanimously approved the proposed amendment without republication. Judge Sutton noted that if the proposal is approved in the rest of the Rules Enabling Act process, the committees will closely monitor what happens with FTSO defenses and the "good cause" standard. Judge Sutton thanked Professors Beale and King for their hard work on this proposal.

The committee, without objection and by voice vote, approved the proposed amendment to Criminal Rule 12 for transmission to the Judicial Conference for final approval.

Informational Items

Judge Raggi noted that the advisory committee did not meet in the fall because of the lapse in appropriations due to the government shutdown, but that the advisory committee had a full agenda for its spring meeting.

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee was considering the Department of Justice's request to amend Rule 4, which deals with service of summons. The Department had suggested that the rule is deficient for serving foreign organizations who have no agent or place of business in the United States, but whose conduct has criminal consequences in the United States. The current rule allows serving organizations at their last known mailing address in the United States, but these foreign entities do not have any such address. Until there is an appearance by the foreign entity, it cannot be prosecuted, but the Department asserted that if there was a way to properly serve such entities, many of them would enter an appearance rather than risk consequences like forfeiture. Judge Raggi noted that the request appeared to be driven by a desire to have a means of service that would either get foreign entities to respond or would permit the Department to begin forfeiture proceedings if the foreign entity did not respond. Judge Raggi noted that whether it is appropriate for forfeiture proceedings to be instituted based on service is a matter for future litigation.

As to what methods a proposed rule might approve for service, Judge Raggi reported that it is clear that the advisory committee will recommend that if there is an applicable treaty that provides for service in a particular manner, such service will suffice. Similarly, she said, compliance with an agreement with a foreign country on the proper means of service will also suffice. Judge Raggi added that the Department also seeks to have a "catch-all" provision that anything that a judge signs off on will suffice, but some members of the advisory committee were uncomfortable with that because a judge might order service by a U.S. official that would violate the foreign country's laws. She noted that if the object of service is a person, it does not matter how he or she got before the court. She said that the proposal has moved towards including a catch-all provision that would instruct the Department to serve in whatever manner it thinks is reasonable and then the court can deal with the issue of due process once the defendant enters an appearance.

The proposed amendment would ensure organizations that are committing domestic offenses are not able to avoid liability through the expedient of declining to maintain an agent, place of business, or mailing address within the United States. A subcommittee has been assigned to consider the proposal and has approved a proposed amendment for discussion by the full advisory committee. The advisory committee will

take it up at its April meeting.

FED. R. CRIM. P. 41

Judge Raggi reported that the Department has also submitted a proposal to amend Rule 41 to enlarge the territorial limits for warrants to search electronic storage media and electronically stored information. The purpose of the proposed amendment is to enable law enforcement to investigate and prosecute botnets and crimes involving Internet anonymizing technologies. Rule 41(b) does not directly address the circumstances that arise when officers seek to execute search warrants, via remote access, over modern communications networks such as the Internet. The proposed amendment is intended to address two increasingly common situations: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts. The Department reports problems with determining the district in which to seek the warrant when it does not know where the computer to be searched is located.

The proposed amendment would authorize a court in a district where activities related to a crime have occurred to issue a warrant to be executed by remote access for electronic storage media and electronically stored information whether located within or outside the district. Judge Raggi noted that there were potential concerns about the particularity requirements of warrants when the Department does not know exactly what it is searching. Thus, the advisory committee had asked the Department to draft some warrants of the sort that it thinks might need judicial authorization. Judge Raggi added that once the advisory committee sees examples of the types of warrants that might be presented to federal judges, it will have a better idea of how to proceed. She said that the proposal has been referred to a subcommittee, which is expected to report at the advisory committee's April meeting.

OTHER PROPOSALS

Judge Raggi noted that other proposals under consideration were in the agenda materials and did not need an oral report at this time. One such proposal involved the question of whether there is any need to clarify Rule 53, which prohibits "broadcasting" judicial proceedings in order to clarify the rule's application to tweets from the courtroom. Another requests the committee to consider amending Rules 11 and 32 to make presentence reports available in advance of a guilty plea so that all parties will be aware of the potential sentence. Another proposal under consideration would amend Rule 45(c) to eliminate the three extra days currently provided to respond when service is made by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of December 2, 2013 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that the proposed amendment to Rule 803(10), the hearsay exception for the absence of public records, which the Standing Committee approved in June 2012, took effect on December 1, 2013.

He noted that four proposals from the advisory committee were pending before the Supreme Court. The proposed amendments to Rules 801(d)(1)(B) and 803(6)–(8) had been approved by the Standing Committee in June 2013, were approved by the Judicial Conference on the consent calendar at its September 2013 meeting, and had been transmitted to the Supreme Court for consideration.

Judge Fitzwater reported that the Fall 2013 meeting, which would have included a technology symposium and which had been cancelled due to the government shutdown, was rescheduled at the same location for Spring 2014. He said the Department of Justice would not be presenting on the electronic signature issue, as had been planned for the original symposium, although the advisory committee would be willing to host them if continuing dialogue would be desirable. Judge Sutton commented that the advisory committee should think about whether it would be useful to bring people together to discuss the electronic signature issue. Judge Fitzwater noted that it does dovetail with the technology symposium that the advisory committee is planning in conjunction with its next meeting. He added that the symposium might examine things like the ancient document exception to the hearsay rule, which may seem anachronistic in the current era of data storage.

Judge Sutton noted that Professor Capra recently appeared on the cover of the *Fordham Lawyer*, a magazine published by the Fordham Law School, and that the complimentary article featured Professor Capra's work for the rules committees.

PANEL DISCUSSION ON THE POLITICAL AND PROFESSIONAL CONTEXT OF RULEMAKING

Professor Coquillette presided over a panel discussion on the political and professional context of rulemaking. The other panelists included Judge Huff, a former committee member; Judge Wood, a former committee member; Judge Rosenthal, former chair of the Standing and Civil Rules Committees; Judge Anthony Scirica (by phone),

former chair of the committee and former chair of the Executive Committee of the Judicial Conference; and Peter G. McCabe, former secretary to the committee. Professor Coquillette introduced each member and stated their relevant background.

PROFESSOR COQUILLETTE

Professor Coquillette provided background on opposition to the rules committees' work. He noted that historically there have been three groups who are suspicious about the rules committees' work, including the traditional formalists, who believed that the judge's role is to decide cases, not to do anything prospective; the rule skeptics, who thought that uniformity through codification, with transsubstantive rules that apply in all types of cases, was not practical; and the political populists, who believe that rulemaking ought to be done by elected representatives of the people. Professor Coquillette noted that while the rules committees could never please these three groups, they should continue to be sensitive to their concerns.

PETER G. MCCABE

Mr. McCabe provided background on the history of the Rules Enabling Act. He discussed changes the rules committees made over time to make the process more open, transparent, and easily accessible. Mr. McCabe also discussed the committees' efforts to make sure there was a strong empirical basis for amendments. He also emphasized the committees' efforts to ensure evenhandedness and the nonpolitical nature of their role. To get a wide range of views, the rules committees take measures such as inviting members of the bar to come to meetings, conducting surveys and miniconferences, and reaching out to congressional members and staff to inform them about the rulemaking process and about pending rule amendments. Mr. McCabe concluded that the rulemaking system is healthy, effective, and credible, but that the challenge of balancing authority between the judicial and legislative branches will continue to exist and will be an area that the committees will continuously need to focus their attention.

JUDGE ANTHONY J. SCIRICA

Judge Scirica spoke about his experience with the Private Securities Litigation Reform Act and the Class Action Fairness Act and their impact on the rules committees' work. He emphasized the benefits of delegating rulemaking authority to the judiciary through the careful process set out in the Rules Enabling Act, but noted that substantive matters are best addressed by Congress.

JUDGE LEE H. ROSENTHAL

Judge Rosenthal discussed how the rules committees can engage with Congress without becoming politicized. She emphasized the importance of effective and energetic

explanation of the careful, transparent, open, and deliberate nature of the Rules Enabling Act and its process, as well as clear explanation of the purpose behind the delegation of authority under that Act. She noted that the rules committees have worked closely with Congress on a number of issues, including the enactment of Evidence Rule 502 and statutory changes to correspond to recent changes to the Appellate Rules and to the recent Time Computation Project. She concluded that the rules committees need to continue to be vigilant in explaining the importance of the rulemaking process under the Rules Enabling Act and in informing Congress of upcoming changes, while remaining distant from political pressures.

JUDGE MARILYN L. HUFF

Judge Huff discussed her experience with the Time Computation Project, which went through each set of rules to make counting time uniform and easier to apply. She said that as part of the project, the committees had examined the federal statutes that would be affected by such changes and that Congress ultimately amended 29 statutes in conjunction with the project. Judge Huff also discussed her experience as the liaison to the Evidence Rules Committee and as a member of the Standing Committee's Style Subcommittee during the project to restyle the Evidence Rules. Finally, Judge Huff discussed her experience serving on the Standing Committee's Forms Subcommittee. She concluded that these examples show that, consistent with the Rules Enabling Act process, there are often workable solutions within the judiciary, with congressional involvement, to some concerns about the litigation process.

JUDGE DIANE P. WOOD

Judge Wood discussed the triggers for rules committee action, and said triggers include legislative changes; Supreme Court decisions; suggestions from judges, academics, and empirical researchers; and examination of state court practices. She discussed instances in which the rules committees should be skeptical of these triggers. She also introduced the idea of a qualification to the generally accepted norm that the rules are transsubstantive, noting that the committees aim for more than transsubstantivity and seek to make rules that have a broad generality that can be applied in every case in federal court. She concluded that the committees now have the challenge of dealing with problems that may change more quickly than the rulemaking process and that the committees may need another model for that type of problem. She noted that some problems are best addressed outside the rulemaking arena.

REPORT OF THE CM/ECF SUBCOMMITTEE

Professor Capra reported on the work of the CM/ECF Subcommittee, as set out in Judge Michael Chagares's memorandum and attachments of December 4, 2013 (Agenda Item 7). He said there are five main items that the subcommittee has been working on,

and that its work would probably move forward in stages. He added that the reporters to the advisory committees had done outstanding work for the subcommittee.

The first issue the subcommittee was working on was electronic signatures, as explained during the Bankruptcy Rules Committee's report. Professor Capra explained that if the Bankruptcy Rules proposal works, other committees will likely follow with similar proposals, and the CM/ECF Subcommittee will oversee the process. He said that the problem the rule is trying to deal with is not forgery, but using a single signature line and putting it on multiple documents.

Professor Capra said that the second step the subcommittee took was for the reporters to look through their respective rules to see where use of CM/ECF may conflict with existing language. He said addressing all of the items found would be a daunting task. For example, he said, there were dozens of places in the Criminal and Bankruptcy Rules that may not accommodate use of CM/ECF.

The third matter the subcommittee looked at was abrogation of the three-day rule. Professor Capra said that he would take the comments received today on the Civil Rules proposal back to the subcommittee. He added that he thought it was likely that the committees could coordinate a uniform committee note and that the goal would be for the rules to be changed in as uniform a manner as possible. He added that the reporters had been working hard on this issue.

Fourth, Professor Capra said that the subcommittee was looking at the proposal for a civil rule requiring electronic filing. He said he thought this was possibly feasible, but that there are issues about what the exceptions should be. He added that one reason it may be desirable to have a requirement of electronic filing in the federal rules is that the local rules already require it almost universally. On the other hand, he said, the local rules have a lot of exceptions and are not uniform in terms of the exceptions, and that is something that needs to be worked through.

Professor Capra reported that the final issue the subcommittee was considering was whether it would be useful and feasible to have a universal rule that would essentially say that "paper equals electrons." The subcommittee is examining whether, instead of going through all of the rules and changing each rule to accommodate electronic filing and information, there is the possibility of a universal fix. Professor Capra noted that there is a proposed template for such an approach in the agenda materials. The first part of the template would say, "In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information." Professor Capra said that this tracks what the Evidence Rules have done, but that there can be problems with this approach. For example, he said, the Criminal Rules would need carve-outs. The second part of the template would state: "In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be

accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States]." He said that there were still a lot of issues and potential problems to think through, including the need for exceptions, as to whether such an approach would work.

Professor Capra said that the subcommittee was working with CACM because the "CM/ECF Next Gen" was being overseen by that committee and it would clearly have implications for the subcommittee's work. He added that the committee does not yet know what Next Gen will do and there is a concern in the subcommittee that the rules committees should be cautious about getting too far out in advance of a problem that does not yet exist. He said that to try to change the rules in advance of Next Gen, when Next Gen might not be what the committees think it is, could create problems. He said that the subcommittee is therefore proceeding with caution.

A member noted that Next Gen is behind schedule and it might be at least two years away from completion. Professor Capra added that there are CACM members on the subcommittee and CACM staff in the Administrative Office who are helping with the subcommittee's work as well.

NEXT COMMITTEE MEETING

Judge Sutton concluded the meeting by thanking the AO staff for the wonderful job in planning the meeting and coordinating all of the logistics. The committee will hold its next meeting on May 29–30, 2014, in Washington, D.C.

Respectfully submitted,

Jonathan C. Rose
Secretary

Andrea L. Kuperman
Chief Counsel

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: FURTHER CONSIDERATION OF SUGGESTION FOR THE PROMULGATION OF OFFICIAL FORMS TO IMPLEMENT 28 U.S.C. § 1930(f)(2) and (3)

DATE: MARCH 10, 2014

The Advisory Committee previously considered Suggestion 11-BK-N, submitted by attorney David Yen, which requested the promulgation of official forms to implement 28 U.S.C. § 1930(f)(2) and (3). No final action has been taken on the suggestion because the Judicial Conference has been in the process of finalizing its procedures on fee waivers. Because a final policy has not yet been made public, **the Subcommittee recommends that the suggestion be held in the dugout until the policy is published.**

Background

Rule 1006(c) and Official Form 3B currently govern the waiver of filing fees by chapter 7 individual debtors, as authorized by 28 U.S.C. § 1930(f)(1).[1] Subsection (f)(2) of that statute authorizes the district court or bankruptcy court to waive other fees prescribed by the Judicial Conference for "such debtors"—that is, debtors who qualify for a filing fee waiver under (f)(1). And subsection (f)(3) provides that subsection (f) "does not restrict the district court or the bankruptcy court from waiving, in accordance with Judicial Conference policy, fees prescribed under this section for other debtors and creditors." Mr. Yen proposed that procedures and Official Forms be adopted for (1) debtors who have qualified for a filing fee waiver and who

[1] Subsection (f)(1) of 28 U.S.C. § 1930 permits the waiver of the filing fee in a chapter 7 case for an individual debtor who has income "less than 150 percent of the income official poverty line . . . applicable to a family of the size involved" if the debtor is unable to pay that fee in installments. "Filing fee" is defined as the fees required to be paid to the clerk upon the commencement of a chapter 7 case.

seek the waiver of additional fees, and (2) debtors not entitled to a filing fee waiver under § 1930(f)(1), as well as creditors, who seek fee waivers.

At the fall 2012 Advisory Committee meeting in Portland, the Committee accepted the Subcommittee's recommendation not to promulgate a new form to implement § 1930(f)(2) but to ask the Forms Subcommittee and the AO staff to create a Director's Form for applications for fee waivers under § 1930(f)(3). The Subcommittee reasoned that existing Official Form 3B could be adapted for (f)(2) fee waivers, but that it would be useful to make available a different fee waiver form for requests under (f)(3).

After the fall 2012 meeting, further work on a Director's Form to implement § 1930(f)(3) was temporarily put on hold. It was noted that the statutory provision does not affirmatively provide authority for fee waivers. Instead, it just says that subsection (f) does not restrict judicial authority to waive fees for other debtors and creditors "in accordance with Judicial Conference policy." Because the Judicial Conference was then in the process of considering a final bankruptcy *in forma pauperis* policy to replace the interim policy that had been in effect since 2005, the Advisory Committee chair and AO staff decided that consideration of a new Director's Form should await the Judicial Conference's adoption of the final policy regarding bankruptcy fee waivers.

Although the Judicial Conference adopted Final Bankruptcy *In Forma Pauperis* Procedures ("Procedures") in September 2013, it authorized the Committee on the Administration of the Bankruptcy System to make non-substantive, technical, or conforming revisions to the procedures as necessary. The Procedures have not yet been published. However, during its conference call on January 17, 2014, the Subcommittee had before it the

Bankruptcy Committee's draft of the Procedures that the Bankruptcy Committee submitted to the Judicial Conference. It discussed Mr. Yen's suggestion in light of the draft Procedures.

Draft of Final Bankruptcy *In Forma Pauperis* Procedures

The draft Procedures, like the interim procedures adopted in 2005, set out the standards of eligibility for waiver of an individual chapter 7 debtor's filing fee and the procedures for ruling on a fee waiver application. The new policy provides more detail than the interim policy about how developments in a chapter 7 case might necessitate revocation or vacation of the initial fee waiver ruling. Of greatest significance to Mr. Yen's suggestion is § 820.50 of the draft Procedures, which addresses Waiver of Additional Fees Under 28 U.S.C. § 1930(b) and (c).[2] The interim policy had merely stated that "Other fees scheduled by the Judicial Conference under 28 U.S.C. §§ 1930(b) and (c) may be waived in the discretion of the bankruptcy court or district court for individual debtors whose filing fee has been waived." That statement reflected the authority granted under § 1930(f)(2). The final policy includes an expanded discussion and authorization of the waiver of "other fees" (*i.e.*, fees other than ones that are payable upon commencement of a chapter 7 case). Section 820.50(a) governs waiver of other fees for individual debtors.[3] It authorizes a court in its discretion to waive fees that are imposed after the filing of a case for two types of debtors: (1) an individual debtor whose filing fee has been waived, and (2) an individual debtor "for whom the totality of circumstances during the pendency of the case and appeal warrant such waiver upon request."

When the court rules on a debtor's application to waive the filing fee, § 820.50(a)(2) authorizes the court to consider whether to authorize the waiver of all other fees imposed by the

[2] Section 1930(b) authorizes the Judicial Conference to prescribe additional fees, and (c) prescribes a $5 fee for filing a notice of appeal or application for appeal.

[3] There is no subsection (b).

Judicial Conference under § 1930(b) and (c). If the court extends the waiver beyond the filing fee, the policy provides that the waiver order should specify the extent of the waiver granted. A debtor that is granted a waiver of the filing fee may also later seek an extension of that waiver to other fees by showing that he or she still satisfies the waiver requirements specified in the policy. In the case of a debtor for whom the filing fees was not waived at the outset of a case, § 820.50(a)(3) provides that the debtor may seek a waiver of other fees by showing that he or she now meets the waiver eligibility requirements.

The draft Procedures authorize courts to adopt local rules "to address the application of a fee waiver to other fees under § 1930(b) and (c)."

The Subcommittee's Further Consideration of the Suggestion

The Subcommittee concluded that, although the final policy draft provides more detailed authority for courts to waive "other" fees in individual chapter 7 debtors under § 1930(f)(2), it does not increase the need for a new official application form for that purpose. Because the request for waiver of these fees will sometimes be made at the same time as the application for waiver of the filing fee under subsection (f)(1) and will always be governed by the same eligibility standard, Official Form 3B can be used or adapted by courts for waiver applications under subsection (f)(2).

The Subcommittee also decided that the Advisory Committee should reconsider the earlier decision to create a Director's Form for fee waivers under subsection (f)(3). That provision does not itself authorize fee waivers. Instead, it preserves the right of the Judicial Conference to adopt a policy authorizing the waiver of fees for "other debtors and creditors." Because the Final Bankruptcy *In Forma Pauperis* Procedures, as proposed, do not provide for waivers of this type, members of the Subcommittee thought that it would be premature for a

Director's Form to be adopted for fee applications under subsection (f)(3). The Subcommittee recommends that a final decision on the Suggestion, however, be suspended until the Procedures are published and can be consulted. Until then, it recommends that the Suggestion be held in the dugout.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

SUBJECT: SUGGESTION REGARDING THE REFERENCES IN RULE 1015(b) TO "HUSBAND AND WIFE"

DATE: MARCH 24, 2014

Gary Streeting, an attorney advisor with the Bankruptcy Court for the Eastern District of Missouri, has submitted Suggestion 13-BK-G in which he points out that Rule 1015(b) refers to "a joint petition . . . pending in the same court by or against (1) a husband and wife . . . ." He suggests that, in light of the decision in United States v. Windsor, 133 S. Ct. 2675 (2013), which held § 3 of the Defense of Marriage Act ("DOMA") unconstitutional, Rule 1015(b) should be amended to substitute the word "spouses" for "husband and wife."

The suggestion was discussed by the Subcommittee during its conference call on January 17 and in follow-up emails. **The Subcommittee recommends that the suggestion be acted on favorably, with a determination of when to seek publication of the proposed amendment left up to the Advisory Committee.**

Rule 1015(b) and §§ 302 and 522 of the Code

Rule 1015 deals with the Consolidation or Joint Administration of Cases Pending in the Same Court. Subsection (b) applies to cases involving related debtors. It authorizes the joint administration of estates when "a joint petition or two or more petitions are pending in the same court by or against (1) a husband and wife, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate." It goes on to

address the need of "a husband and wife" to use the same exemption laws if their individual cases are jointly administered.

In contrast to the language of Rule 1015(b), § 302 of the Code authorizes the filing of a joint petition under a chapter by "an individual that may be a debtor under such chapter and such individual's spouse." Section 522(b)(1), however, addresses the election of exemptions by "debtors who are husband and wife" when they file a joint case or their individual cases are ordered to be jointly administered under Rule 1015(b).

The *Windsor* Decision

In *Windsor* the Supreme Court held that § 3 of DOMA, Pub. L. 104-199, § 3(a) (1996), violates due process and equal protection principles applicable to the federal government. The statute amended the Dictionary Act to provide as follows:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

1 U.S.C. § 7.

The Court concluded in *Windsor* that "the principal purpose and the necessary effect of [DOMA] are to demean those persons who are in a lawful same-sex marriage." 133 S. Ct. at 2695. "DOMA," the Court said, "writes inequality into the entire United States Code." *Id.* at 2694. DOMA identifies "a subset of state-sanctioned marriages and make[s] them unequal." *Id.* at 2695. This led the Court to conclude that § 3 "is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution." The Court limited its holding to "lawful marriages." *Id.* at 2696.

Application of *Windsor* to Rule 1015(b)

The Subcommittee concluded that under *Windsor* the reference in § 302 of the Code to "such individual's spouse" should be interpreted to include a same-sex spouse in a marriage that is lawful under state law. Having been invalidated, § 3 of DOMA no longer mandates a narrower interpretation. Instead, the state recognition of the marriage controls. Thus, as a few courts held prior to *Windsor*, a lawfully married same-sex couple is eligible to file a joint bankruptcy petition. *See, e.g., In re* Balas, 449 B.R. 567 (Bankr. C.D. Cal. 2011) (holding DOMA unconstitutional and denying motion to dismiss for cause joint petition filed by legally married same-sex couple); *In re* Somers, 448 B.R. 677 (Bankr. S.D.N.Y. 2011) (denying motion to dismiss for cause joint petition filed by legally married same-sex couple).

Because the Subcommittee determined that Rule 1015(b) should reflect the possibility of joint bankruptcy cases filed by same-sex spouses, it recommends that the first sentence of the subdivision be revised in the manner suggested by Mr. Streeting: "If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~ spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates."

The second reference in Rule 1015(b) to "a husband and wife" presented a slightly more complicated issue for the Subcommittee. This provision implements § 522 of the Code, which uses the language "husband and wife" rather than "spouse." *See* § 522(b)(1) ("In . . . individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife . . . ."). The rule states:

> An order directing joint administration of individual cases of a husband and wife shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time

> within which either may amend the election so that both shall have elected the same exemptions.

In referring to individual cases of a husband and wife, Rule 1015(b) uses the language of the statute without reliance on the interpretive rule of DOMA.

Members of the Subcommittee noted that, if the first sentence of Rule 1015(b) were changed to include joint and individual petitions by or against "spouses," it would make no sense to retain "husband and wife" in the sentence dealing with exemptions. Doing so would suggest that same-sex debtor couples whose cases are jointly administered have an option not available to heterosexual debtor couples—one spouse could elect state exemptions and the other could elect the federal bankruptcy exemptions. The Subcommittee saw no reason that the rules about exemption selection should be different for jointly administered cases of same-sex couples. *Cf. Windsor*, 133 S. Ct. at 2695 (discussing DOMA's effect of divesting married same-sex couples of duties and responsibilities that apply to other married couples).

The Subcommittee therefore concluded that Rule 1015(b) should be amended to change both references to "husband and wife" to "spouses." Doing so would acknowledge the practical consequences that flow from *Windsor*: legally married same-sex couples can file joint petitions or have their individual estates jointly administered, and they should be subject to the same bankruptcy rules as other married couples. Moreover, the reasoning of *Windsor* suggests that providing different treatment would likely be unconstitutional.

The Subcommittee's recommended action is similar to the Executive Branch's response to *Windsor*. In Rev. Rul. 2013-17, http://www.irs.gov/pub/irs-drop/rr-13-17.pdf, the IRS determined that "[f]or Federal tax purposes, the terms 'spouse,' 'husband and wife,' 'husband,' and 'wife' [as used in the Internal Revenue Code and Treasury regulations] include an individual married to a person of the same sex if the individuals are lawfully married under state law . . . ."

The Service reasoned that in light of *Windsor* not only gender-neutral but also gender-specific terms relating to marriage (such as "husband" and "wife") should be interpreted to apply to lawfully married same-sex spouses because a contrary interpretation would raise "serious constitutional questions." Rev. Rul. 2013-17 at 5. It relied in particular on the *Windsor* Court's concern about "'creating two contradictory marriage regimes within the same State . . . , thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.'" *Id.* (quoting 133 S. Ct. at 2694).

Thereafter the Department of Justice announced a similar policy. *See* http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-140210.html. In particular, the U.S. Trustee Program has stated:

> In light of *Windsor*, the USTP will interpret the terms "spouse," "marriage," and "husband and wife" in the Bankruptcy Code and Bankruptcy Rules to include same-sex married couples. The USTP will also interpret these terms to refer to individuals who are lawfully married under any state law, including individuals married to a person of the same sex who were legally married in a state that recognizes such marriages, but who are domiciled in a state that does not recognize such marriages. Thus, the USTP will apply the relevant Bankruptcy Code and Bankruptcy Rule provisions to same-sex spouses just as it would apply them to opposite-sex spouses.

http://www.justice.gov/ust/eo/public_affairs/consumer_info/index.htm.

The problem presented by Rule 1015(b) is unique. No other rule includes the language "husband and wife," and § 522(b)(1) is the only Code provision that uses those words. Some of the Official Forms currently refer to "husband," "wife," or "husband and wife" (*see* Schedules A, B, D, E, F), but the modernized forms abandon that terminology in favor of "Debtor 1" and "Debtor 2."

Rule 1015(b), as proposed for amendment, and its Committee Note are set on the following pages. The Subcommittee discussed the timing of publication of the amendment,

should the Advisory Committee approve it, but the Subcommittee makes no recommendation on that issue. Because the proposed amendment is just a change in terminology, it might be viewed as one that could wait in the bullpen for other amendments to Rule 1015 or for a group of small amendments. On the other hand, because it is being proposed to acknowledge the constitutional rights of a group of debtors whose rights have previously been denied, it may be appropriate to proceed with a request for publication this summer.

Rule 1015. Consolidation or Joint Administration of Cases Pending in the Same Court

* * * * *

(b) CASES INVOLVING TWO OR MORE RELATED DEBTORS. If a joint petition or two or more petitions are pending in the same court by or against (1) ~~a husband and wife~~ spouses, or (2) a partnership and one or more of its general partners, or (3) two or more general partners, or (4) a debtor and an affiliate, the court may order a joint administration of the estates. Prior to entering an order the court shall give consideration to protecting creditors of different estates against potential conflicts of interest. An order directing joint administration of individual cases of ~~a husband and wife~~ spouses shall, if one spouse has elected the exemptions under § 522(b)(2) of the Code and the other has elected the exemptions under § 522(b)(3), fix a reasonable time within which either may amend the election so that both shall have elected the same exemptions. The order shall notify the debtors that unless they elected the same exemptions within the time fixed by the court, they will be deemed to have elected the exemptions provided by § 522(b)(2).

* * * * *

COMMITTEE NOTE

Subdivision (b) is amended to replace "a husband and wife" with "spouses" in light of the Supreme Court's decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: CHAPTER 13 PLAN FORM WORKING GROUP

RE: NATIONAL CHAPTER 13 PLAN FORM PROJECT—PUBLIC COMMENTS ON THE PLAN FORM AND ACCOMPANYING AMENDMENTS TO THE BANKRUPTCY RULES

DATE: APRIL 2, 2014

At its spring 2013 meeting in New York, the Advisory Committee voted to seek publication of an Official Form for chapter 13 plans, together with accompanying rule amendments, prepared by the Chapter 13 Plan Form Working Group. The plan form project was published for public comment in August 2013. As expected, the project generated a large number of public comments. The Advisory Committee received approximately 150 public comments in total on the forms and rule amendments published in August, and the great majority of those comments touched (sometimes at length) on the chapter 13 project. In addition, two witnesses offered testimony regarding the project at a January 31, 2014, public hearing.

The Working Group held multiple meetings by conference call to review the comments. After careful deliberation, the Working Group has decided to propose a number of changes to the published plan form and more limited changes to the published rule amendments. **Because it considers the changes to the form to be significant, the Working Group recommends that the Advisory Committee seek republication of the chapter 13 plan form.** The Working Group does not believe that the limited changes to the published rules it endorses require republication. **Accordingly, the Working Group recommends that the Advisory Committee seek final approval of the amended rules, as modified after publication.** Due to the different timelines necessary for approval of official forms and amendments to the Bankruptcy Rules, the

Working Group contemplates that the chapter 13 plan form and amended rules would still come into effect at the same time in 2015. The amended rules (except Rule 9009) as modified have been appended to this memorandum.

This memorandum discusses the comments received on the chapter 13 plan form project and the Working Group's assessment of those comments. Given the large number of comments and the great deal of detail with which many of them assessed the form and rule amendments, this memorandum covers the comments the Working Group considered most significant. Summaries of all comments on the chapter 13 plan form and rule amendments are included separately at Appendix C.

I. General Comments

The Working Group began a preliminary review of public comments in late fall 2013. While realizing that it could not make definitive decisions about possible changes to the published form or rule amendments until the close of the public comment period, the Working Group anticipated that the chapter 13 plan project would generate a large number of comments, many of which were being submitted in advance of the deadline. The Working Group's review intensified when the public comment period ended. In all, the Working Group convened for nine multi-hour conference calls.

Few of the early comments expressed outright opposition to adoption of the plan form, although certain comments were critical of the project. Later comments, however, were more heavily weighted toward opposition. Confronting a significant volume of negative comments gave the Working Group pause. Indeed, the level of opposition prompted the Working Group to revisit the question whether the Advisory Committee should go forward with the project at all—or, at least, whether the Advisory Committee should reconceive the form as one to which individual bankruptcy courts could choose to opt in. After extensive deliberation, however, the Working Group unanimously concluded that the chapter 13 plan form and rule amendments were worthy of adoption, but with modifications prompted by the public comments. The Working

Group similarly concluded that it would defeat the goal of encouraging more uniformity in chapter 13 practice if the form were turned into an optional one.

As this memorandum explains, the Working Group's review of the public comments indicated that opposition to the project was commonly expressed on account of particular features—or misapprehensions of particular features—of the plan form and rules. Because the Working Group believes that the changes to the form and rule amendments it recommends will adjust or clarify parts of the project that attracted the brunt of criticism, it is satisfied that these concerns have been addressed.

A. Comments on the Plan Form

The most pointed criticisms of the plan form focused on a range of general objections to the wisdom of the project: (i) that the form diminishes the freedom of debtors to propose lawful chapter 13 plans and infringes upon the authority of bankruptcy judges to adjudicate and administer chapter 13 cases; (ii) that the form is too long and complicated and will be costly to complete, review, and administer; (iii) that the form will create a costly transition period requiring retraining (of lawyers, trustees, and court staff) and causing uncertainty and litigation; (iv) that current chapter 13 practice is satisfactory, and therefore the plan form is a solution in search of a problem; (v) that the form will be ill-suited for the local variations in chapter 13 practice across the country; (vi) that the form will not achieve the goal of greater uniformity in chapter 13 law, because local variations will inevitably persist; and (vii) that the form implicitly encourages the growth of a national chapter 13 practice for creditors and debtors at the expense of the benefits derived from local expertise.

1. The Working Group's Consideration of General Comments

The Working Group had anticipated many of the general objections to the plan form during its own deliberations as the form was being drafted. Some of these general objections were also rehearsed at the January 2013 mini-conference held by the Working Group in Chicago. Nevertheless, the comments prompted the Working Group to revisit these concerns.

a. Flexibility and authority

The concern that the form will unduly limit the flexibility of debtors and the authority of courts in the chapter 13 process was expressed by a significant number of comments. Henry Sommer, on behalf of the National Association of Consumer Bankruptcy Attorneys (comment 42), made the point directly. In his view, clarification was needed to ensure that the form permits debtors to exercise their right to propose a plan under Code § 1321, which provides that the "debtor shall file the plan," and § 1322(b)(11), which permits the debtor to include in the plan any appropriate provision not inconsistent with the Code. On the other side of the bench, Judge S. Martin Teel (Bankr. D.D.C.) (comment 142) expressed concern that a mandatory plan form would interfere with bankruptcy courts' discretion in administering chapter 13 cases. The same point was made in concrete form by Chief Judge Robert Nugent (D. Kan.), on behalf of the bankruptcy judges of the district (comment 51), who objected that the form would disrupt his court's mortgage conduit payment program. Many comments echoed Chief Judge Nugent's concern. The Working Group saw versions of this general objection in several of the comments.

The Working Group ultimately decided that this concern rested on a misapprehension of the purpose and function of the chapter 13 plan form. The form is merely that—a form. It is not, in itself, a plan. Rather, it presents features typically found in a range of chapter 13 plans in an ordered sequence. For debtors, the form does not limit their ability to propose any plan in

conformity with the Code. That is the principal reason for the inclusion of a place on the form (Part 9) for provisions not found elsewhere in, or contrary to, the form. Nothing in the form diminishes the debtor's ability to propose a plan of the debtor's choosing.

Similarly, the form does not mandate that a court must accept the debtor's choice of a particular option included on the form. The inclusion of various options reflects the range of features commonly found in chapter 13 plans, but it does not require the availability of an option in any particular court. As will be explained below, the Working Group decided to add an explicit warning to the form that reminds debtors of this point.

b. Complexity and transition costs

The Working Group anticipated the concern about the complexity of the form and the attendant transition costs it might generate. A number of comments expressed these concerns. Judge Brian D. Lynch (Bankr. W.D. Wash.), on behalf of the bankruptcy judges of his district (comment 44), objected that the form was too long and more complex than his district's current form, and would therefore increase the difficulty of completing, reviewing, and administering chapter 13 plans. Nancy Spencer Grigsby, a chapter 13 trustee (D. Md.), on behalf of the standing trustees for the district (comment 90), raised the same concern, as did other comments.

For three reasons, the Working Group concluded that these concerns, while understandable, did not justify abandoning the project. First, the length of the form as published would not necessarily reflect the length of the form when used to file a typical chapter 13 plan. The various parts of the form, as explicitly stated on the document, need not be reproduced if the debtor does not include information in a particular section. The Working Group anticipates, therefore, that most plans filed using the form will be substantially simpler than the full length of the form as published.

Second, the Working Group drafted the plan form after consulting widely with chapter 13 trustees, creditors' and debtors' attorneys, the United States Trustee Program, bankruptcy clerks, and bankruptcy judges from a cross-section of districts. This consultation included the Chicago mini-conference, at which participants offered comments, concerns, and suggestions that were incorporated into the plan form. In other words, there is no basis for the suggestion in a number of public comments (*e.g.*, comment 47 by Keith A. Rodriguez, a chapter 13 trustee (W.D. La.)) that the plan form reflects the idiosyncratic preferences of bankruptcy judges on the Advisory Committee.

Third, the Working Group received feedback from "real world" attempts at implementing the form. Debra Miller, a chapter 13 trustee (N.D. Ind.) (comment 158), reported that her district had adopted the draft plan form a year ago. The experience of that district, as she also testified at the public hearing in January, was that the plan form had worked well. Although Ms. Miller provided suggestions for clarifying and streamlining the form, she explained that it had not led to confusion or an increase in litigation. The Working Group also engaged the Federal Judicial Center to ask career law clerks at bankruptcy courts in a variety of districts to complete the form using data from sample case dockets. The comments identified portions of the form that could be simplified, which the Working Group ultimately pursued. But, as one of the law clerks noted, the form became easier to use with experience.

c. Greater uniformity in chapter 13

A number of comments were skeptical that the form would improve chapter 13 practice. Some of these comments viewed the local variations in chapter 13 practice as appropriate, and therefore the form would not solve a problem that needed to be solved. Judge Lamar W. Davis, Jr. (Bankr. S.D. Ga.) (comment 45) explained this objection with reasoning that was endorsed by

other comments. In Judge Davis's view, the current system of chapter 13 practice, although variable from district to district, is not broken. Indeed, a number of comments took the position that greater uniformity was unnecessary or even detrimental in chapter 13. Judge Terrence L. Michael (Bankr. N.D. Okla.) (comment 65) commented that there is no need for uniformity, because local variation was an embedded feature of chapter 13. Relatedly, some comments expressed doubt that the Advisory Committee's goal of greater uniformity in chapter 13 procedures was even possible. Judge Lynch (comment 44) noted that courts disagree on issues such as lien stripping, claim modifications, and lien avoidance, and that these disagreements would persist even after the adoption of a national plan form. In his view, the alleged benefits of a mandatory plan form would therefore be more academic than real, because courts would be unlikely to change their existing positions on these issues.

The Working Group believes that many of these comments misperceived the ambitions of the chapter 13 plan form project. Because the Advisory Committee cannot abridge, enlarge, or modify substantive rights, the Working Group understood from the outset that the project would be limited to improving procedures in chapter 13 cases. Nevertheless, the Working Group concluded that more uniform procedures would have the beneficial effect of encouraging the clarification of open questions of law in chapter 13 cases. Because chapter 13 procedures across the country are so fragmented, an appeal in one case arising in a particular district has limited persuasive force elsewhere. The varieties of local chapter 13 plans mean that courts talk past each other when deciding issues of importance in chapter 13. In turn, the limited reach of decisions in chapter 13 cases means that interested parties have diminished incentives to press issues on appeal in a manner that would generate case law of broader reach. Having a common plan form would thereby lead to greater clarity in the law governing chapter 13 cases. Even

longstanding disputes are more likely to percolate through the court system to be resolved nationally when there is a uniform form at issue, as was the case in the Supreme Court's decision in *Schwab v. Reilly*, 560 U.S. 770 (2010).

Moreover, the Working Group believes that these comments have underestimated the costs of local variations in chapter 13 plan forms and the potential savings from a common form in chapter 13 cases—savings that would outweigh the short-term transition costs following the adoption of a national form. A national form would benefit debtors. By decreasing the costs of software used to process cases, a national plan would reduce the overhead costs borne by debtors' attorney. Because of the disparity in local chapter 13 forms, vendors must customize software, at greater expense, for limited markets. A national form would allow vendors to produce software more cost effectively for a national market. A national form would benefit creditors as well, because it holds the promise of more efficient review of chapter 13 plans. Particularly for creditors operating regionally or nationally, a single plan form would lead to substantial reductions in the cost of reviewing chapter 13 plans. And, for both creditors and debtors, a national form would mean decreased educational costs by making feasible national educational programs and written materials for chapter 13 cases.

The other benefit that would come with a national chapter 13 plan form is the ability of courts to review chapter 13 plans more efficiently, particularly if those plans contain nonstandard provisions. This point reflects the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, which emphasized bankruptcy judges' duty to review chapter 13 plans for conformity with the Code. 559 U.S. 260, 277 n.14 (2010). Judge Davis (comment 45) viewed this portion of the *Espinosa* opinion as going beyond the holding of the case. But regardless of how it is characterized, the Court's statement is one the Working Group found worthy of attention.

d. National chapter 13 practice

Some comments criticized the plan form as part of an unwise effort to nationalize chapter 13 practice. For example, Chief Judge Susan Barrett (Bankr. S.D. Ga.), on behalf of the judges of the court (comment 127), raised the concern that consumer creditor practice has become regionalized or nationalized, and that the plan form would lead to regionalization or nationalization of consumer debtor practice as well. Chief Judge Barrett believes the changes in the creditor bar have been detrimental to the chapter 13 process, because non-local lawyers are less well prepared, less likely to communicate effectively with debtor's counsel, and less accountable to the local court where a case is pending. In her view, these changes have increased expense and delay in chapter 13 cases. Judge Michael (comment 65) raised a similar concern, expressing the suspicion that the plan form is designed to encourage the development of large, debtor-side chapter 13 practices operating nationally but located in a few major metropolitan areas.

These concerns are unwarranted. The Working Group did not set out to restructure the consumer debtor bar. And it does not believe that any such restructuring would be the likely outcome of adopting a national plan form. Other areas of consumer debtor practice in which forms are more uniform (e.g., chapter 7) have not been transformed in the manner feared by these comments.

2. Whether the Plan Form Should be Optional

Many of the critical comments urged the Advisory Committee not to make the plan form mandatory. One version of this view was stated by Judge Michael (comment 65), who observed that if the plan form is truly an improvement, it will be adopted voluntarily. Mark J. Giske, an attorney in Washington state (comment 148), suggested that local districts could choose to opt in

if they wished to use the form. Other comments suggested a state-by-state design for the plan form.

The Working Group considered these comments but, ultimately, adhered to the view that a national plan form should be used in all chapter 13 cases. A nonmandatory plan form would not serve the purpose of encouraging greater uniformity in chapter 13 practice that was discussed earlier.

B. Comments on the Rule Amendments

In contrast to the plan form, the amended rules generated few critical comments. Most objections to the amended rules were really objections to the plan form project—the amendments that sparked the most objections were those to Rule 3015(c) and Rule 9009, which together would require the use of the chapter 13 plan form without alteration. Otherwise, the amendment to Rule 3002, which would require a secured creditor to file a proof of claim to have an allowed claim and would alter the claims bar date for claims in chapters 7, 12, and 13, generated a number of comments, many of them positive. Questions about service and notice issues surfaced in a number of comments across the amended rules. The Working Group's consideration of comments about specific rules is discussed below in connection with each rule. Rule 9009, however, is discussed in a separate memorandum reflecting the joint consideration of the Working Group and the Subcommittee on Forms with respect to the comments on that rule.

II. Specific Comments on the Plan Form

Most of the comments—even those with a more positive view of the project—focused on particular features of the form. These comments, which will be discussed in greater detail in connection with the specific plan provisions, raised the following concerns: (i) that the form, by

including the option for debtors to make payments directly to creditors, will disrupt courts' required use of the trustee as a conduit for payments on secured claims ("conduit districts"); (ii) that the form, by not mandating the imposition of a wage order, will lead to the failure of more chapter 13 plans; (iii) that the form does not contain a section dedicated to preconfirmation adequate protection payments; (iv) that the form calls for insufficient detail about attorney's fees and too much detail about trustee's fees; (v) that the section of the form setting forth an order of distribution of payments is objectionable; (vi) and that the form channels too many issues for resolution at confirmation, which will be made more unwieldy.

A. Part 1 (Notices)

A number of comments on Part 1 of the form suggested that it should contain a warning about the availability of options presented on the form. Jon Waage, a chapter 13 trustee (M.D. Fla.) (comment 8), gave the cautionary example of a debtor whose plan proposes to pay secured claims directly, rather than through the trustee, even though the bankruptcy court where the debtor's case is pending is a conduit district. K. Michael Fitzgerald, a chapter 13 trustee (W.D. Wash.) (comment 14), made the same suggestion. The underlying concern was echoed by many comments on specific provisions of the form—particularly Part 3, § 3.1, which deals with the payment of secured claims.

The Working Group found these suggestions to be well taken. It has altered the notice box in Part 1 in two main respects. First, the notice box has been expanded and reworked, so that the notice is directed separately at debtors and creditors. Second, the notice to debtors states clearly that "the presence of an option on the form does not indicate that the option is appropriate in your circumstances or that it is permissible in your judicial district." In keeping with an alteration to amended Rule 3015(f), explained below, the form requires an objection to be filed

no later than seven days before the date set for the confirmation hearing (rather than seven days before the confirmation hearing).

Several comments doubted that the checkboxes in Part 1 that were meant to call attention to particular features of a debtor's plan (secured claim valuation, lien avoidance, and nonstandard provisions) would serve that purpose. For example, Cynthia T. Lawson, an attorney in Knoxville, Tenn. (comment 39), stated that debtors' attorneys were likely to check all three boxes, whether or not applicable. Doing so would ensure that counsel did not inadvertently overlook one of those features and render it ineffective. The Working Group doubted that this would be a common occurrence, if only because a debtor's attorney who routinely checked all three boxes in every case would make an unfavorable impression on the trustee and the court. Doing so would, in essence, broadcast the attorney's carelessness. Moreover, the experience in districts using plan forms with similar warning boxes has been that the boxes are checked only where this is appropriate.

Many comments raised specific stylistic suggestions about language, and these changes were also considered by the Working Group.

B. Part 2 (Plan Payments and Length of Plan)

The comments on Part 2 concerned principally whether the form offered sufficient flexibility to accommodate a range of circumstances. The Working Group agreed with comments suggesting that the form should permit the debtor to propose to make payments in amounts and intervals that vary by more than two "steps." An instruction has been added to Part 2, § 2.1, directing debtors to add more step payments as need. Similarly, the Working Group added to this section language stating that if the plan provides for fewer than 60 months of payments, additional monthly payments will be made to the extent necessary to make the

payments specified in the debtor's plan. In § 2.2, the Working Group adopted the suggestion to add a space for regular payments that are made to the trustee by a method other than a payroll deduction or direct payment by the debtor. As several comments noted, some debtors may propose payments through an electronic funds transfer system such as ACH.

The Working Group similarly reworked the portion of Part 2 dealing with tax refunds in order to anticipate different circumstances. A significant number of negative comments criticized the tax refund provisions. For example, Jan Hamilton, a chapter 13 trustee (D. Kan.) (comment 6), pointed out that the choices given on the published form (either turning over the entire refund or any refund over a specific dollar amount) did not take account of earned income tax credits that may be exempt. The National Association of Chapter 13 Trustees (comment 11) noted that it is common in some districts for debtors to turn over tax refunds for a period other than the plan term. Henry Sommer (comment 42) also expressed a common concern by criticizing the published form's direction for tax returns to be submitted by April 20 of each year. He observed that debtors may seek extensions to file their returns after April 15.

These comments persuaded the Working Group to alter the approach taken in this portion of the form. What was § 2.3 in the published form has been divided into two sections, with one (§ 2.3) dealing with federal income tax refunds and another (§ 2.4) dealing with additional sources of payments. The tax refund provisions now provide the option of not turning over any refund, turning over all refunds (other than earned income tax credits) during the plan term and supplying the trustee with tax returns within fourteen days of filing them, or turning over the refund as otherwise specified.

A number of comments questioned the need for, and the placement of, a checkbox for the applicable commitment period in Part 2. The Working Group decided to remove this portion of the form.

C. Part 3 (Treatment of Secured Claims)

The principal criticism about Part 3 concerned the availability of the option not to pay secured claims through the trustee. Indeed, it appears that a substantial part of the opposition to the adoption of the plan form arose from objections about this issue. Chief Judge Nugent (comment 51) described the concern that the form will jeopardize the mortgage conduit program in the District of Kansas as the leading reason prompting the bankruptcy judges of that district to oppose the plan form.

Concerns about the treatment of conduit payments were common. An omnibus comment submitted by the National Association of Chapter Thirteen Trustees (comment 11) insisted that the form should not give debtors the option of paying secured claims directly in conduit districts. Chief Judge Laura K. Grandy (Bankr S.D. Ill.) (comment 74), Chief Judge David S. Kennedy (Bankr. W.D. Tenn.), on behalf of four of five judges of the court (comment 99), and James Jacobsen, on behalf of the States' Association of Bankruptcy Attorneys (comment 97), among others, raised similar concerns. Some comments, such as the one submitted by Ray Hendren, a chapter 13 trustee (W.D. Tex.) (comment 139), viewed the form's inclusion of a "direct pay" option as improper, because it would indicate that the Advisory Committee had taken a position on a question of substantive law. To be sure, a few comments reached a different conclusion—that the form should not include the option for conduit payments. Judge Teel (comment 142) expressed this view, because in his district debtors are required to make direct payments on secured claims. And in other jurisdictions, case law establishes that debtors have an option to

make direct payments in at least some situations. See, e.g., *In re Aberegg*, 961 F.2d 1307, 1309–10 (7th Cir. 1992).

As explained earlier, the Working Group has decided to add warning language to Part 1 of the form that should answer the concern about the presence of options in the form.. The warning language makes clear to debtors that the provision of an option does not mean that the option will be accepted by the bankruptcy court where the debtor's case is pending. The Working Group believes that this language will signal to debtors—and to courts and trustees—that the Advisory Committee does not take a position on the advisability or permissibility of a particular option included on the form.

Additional changes to the form include alterations to the language regarding the lifting of the automatic stay. As published, § 3.1 provided that "if relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, all payments under this plan as to that collateral will cease and all claims as to that collateral will no longer be treated by the plan." A number of comments raised two objections to that language. First, as Henry Sommer (comment 42) explained, debtors may wish, for a variety of legitimate reasons, to continue making payments even after the stay is lifted. Judge Arthur S. Weissbrodt (Bankr. N.D. Cal.) (comment 92), Judge Teel (comment 142), and others made the same point. Second, as Judge Kay Woods (Bankr. N.D. Ohio) (comment 10) pointed out, the language of the published form ("all claims as to that collateral will no longer be treated by the plan") suggested that the plan would not treat an unsecured deficiency claim as to the collateral for which the stay was lifted. The Working Group found these comments to be well taken, and altered the language in § 3.1 accordingly, to provide that only "secured claims" based on the collateral as to which relief from stay was

granted would no longer be treated and to make clear that this result would be subject to contrary court order.

A number of comments criticized the lack of preconfirmation adequate protection provisions on the form. The Working Group decided before the form and rules were published that a separate form should govern adequate protection payments, and that this additional form should be a Director's Form rather than an Official Form. Since any plan cannot be effective until it is confirmed, the Working Group did not believe that it would be appropriate for the plan form to propose to govern the pre-confirmation matter of adequate protection.

Section 3.2, which permits the debtor to request the court's determination of the value of secured claims, drew positive and negative comments. Mark D. Sammons, a bankruptcy court clerk (D. Md.) (comment 75), and Nancy Spencer Grigsby, a chapter 13 trustee (D. Md.), on behalf of the standing trustees for the district (comment 90), described this section as in conflict with Fourth Circuit case law, because the form, together with the rule amendments, would eliminate the need for a separate motion. Some comments viewed this section as running afoul of the prima facie validity of proofs of claim, or in the alternative described it as unworkable, because a court would need a basis for valuation, for which the plan itself would not be evidence. Judge Roger Efremsky (Bankr. N.D. Cal.), on behalf of six judges of the court (comment 85), expressed this view. Other comments raised objections in the nature of due process concerns about this section. On the other hand, Henry Sommer (comment 42) supported inclusion of this section. Daniel Press, a Virginia attorney (comment 156), supported this aspect of the form and took issue with negative comments' characterization of Fourth Circuit case law. Similarly, Judge Weissbrodt (comment 92) observed that his division of the Northern District of California

had successfully used the valuation procedure provided in the form, and that the procedure raised no due process concerns.

Ultimately, the Working Group was not persuaded by the concerns about § 3.2. Requesting a court's determination of the value of a secured claim is commonly pursued by motion under current Rule 3012, and the form merely serves as such a request. Concerns about due process are notice concerns, and the accompanying rules amendments answer those concerns by requiring Rule 7004 service when a plan requests valuation. In addition, the checkbox notice provision in Part 1 will alert parties in interest to the debtor's request.

Several comments objected to the treatment of governmental claims in Part 3. Section 3.2 provides that for secured claims of a governmental unit, the amount listed on the proof of claim controls over the amount listed on the debtor's plan. Henry Hildebrand, III, a chapter 13 trustee (M.D. Tenn.) (comment 98), urged the Advisory Committee not to exclude governmental claims from the valuation provision of § 3.2. Other comments reiterated this view, including those of Byron Meredith, a chapter 13 trustee (S.D. Ga.) (comment 100), and Debra Miller (comment 158). Indeed, Tracy Updike, a Pennsylvania attorney who filed a comment on behalf of the M.D. Pa. Bankruptcy Bar Association (comment 132), explained that permitting the plan to control would be *less* burdensome for governmental creditors. In Ms. Updike's view, it would avoid the necessity of their having to amend proofs of claim or defend claims objections.

The Working Group decided to adhere to its decision to exclude governmental claims from the valuation provision of § 3.2. This choice reflects the longer proof of claim bar date enjoyed by governmental creditors, which in turn reflects the realities of the internal processes of governmental units that are creditors in bankruptcy cases.

In § 3.4, the Working Group has decided to include a space for the calculation of lien avoidance. This provision had been published as Exhibit A to the plan form, but the Working Group concluded that the information in Exhibit A should be combined with the information in § 3.4.

D. Part 4 (Treatment of Trustee's Fees and Priority Claims)

A significant number of comments criticized the way in which Part 4 handled attorney's fees and trustee's fees. The published form includes an estimate for the balance of attorney's fees owed. It also includes an estimate of the percent of plan payments that will go toward the trustee's fees, and a dollar estimate for the total amount of those fees. In general, comments complained of a lack of detail about attorney's fees and a surfeit of detail about trustee's fees.

Almost all of the comments with respect to the provision on trustee's fees (§ 4.2), objected to its inclusion. Comments viewed this section as unnecessary and problematic. Many commenters, such as Jon Waage (comment 11), correctly observed that the trustee's fee fluctuates periodically and is determined according to statutory provisions. These comments feared, as K. Michael Fitzgerald (comment 14) predicted, that the section would generate objections by trustees seeking to avoid being bound by the fee calculated in the plan.

With respect to attorney's fees (§ 4.3), the weight of the comments tilted heavily in favor of greater detail and precision. For example, Jan Hamilton (comment 6) suggested that the form should instruct the trustee as to the exact amount to pay the debtor's attorney. Rod Danielson, a chapter 13 trustee (C.D. Cal.) (comment 24), also requested greater detail about the treatment of outstanding attorney's fees, although he noted that bankruptcy courts differed on this issue. Cynthia T. Lawson (comment 39) sought information on the form about attorney's fees paid prior to filing the plan. Many other comments echoed these remarks. Judge S. Martin Teel

(comment 142), on the other hand, suggested that the attorney's fee estimate should simply be removed.

The Working Group, after deliberation, decided to leave both the attorney's fee and trustee's fee provisions intact but to clarify in a Committee Note the limited purpose of these sections. An estimate of trustee's fees may be essential to assess plan feasibility. The estimate of the trustee's fee would not in any way bind the trustee. A statement to this effect has been added to the Committee Note. The Working Group also concluded that an estimate of outstanding attorney's fees would be helpful in evaluating plan feasibility. But, from an early stage of the chapter 13 plan form project, the Working Group has been sensitive to the local differences in attorney's fee procedures in chapter 13 cases. In light of these divergent practices, the Working Group decided against attempting to spell out detailed attorney's fee instructions in Part 4. Those might be determined by a separate fee order under Code § 330, the confirmation order, or some other procedure set by local rule.

The Committee Note has been altered as follows. First, a sentence has been added to warn that the estimated trustee's fee on the form does not affect the trustee's entitlement to fees as determined by statute. Second, the Committee Note is now augmented to instruct that additional details about the payment of attorney's fees, including information about their timing and approval, are left to the requirements of local practice.

In §§ 4.4 and 4.5, the Working Group followed the suggestion of several comments and clarified the wording and organization of the form. Section 4.4 of the published form referred to "other priority claims," which, as a comment submitted by the NACTT (comment 11) suggested, was ambiguous. The Working Group retitled the section (to read "Priority claims other than attorney's fees and those treated in section 4.5") to clarify what it covered. A number of

comments, such as the one submitted by Henry Sommer (comment 42), questioned the need for the details included in § 4.4 of the published form. These details included the basis for priority treatment, the interest rate, and the estimated monthly payment on each claim. As Mr. Sommer and others pointed out, these details may not be known at confirmation. In any event, priority creditors would be listed in the debtor's schedules, so repeating them on the form would be unnecessary. The Working Group ultimately removed all of these details and required only an estimate of the total amount of priority claims to be paid, again to assist in determining feasibility. Mr. Sommer noted that the title of § 4.5 on the published form ("Domestic support obligations assigned to a governmental unit and paid less than full amount") was underinclusive, because Code § 507(a)(1)(B) covers domestic support obligations owed to a governmental unit, whether or not they have been assigned. The Working Group adjusted the title of this section accordingly.

Two other changes to this Part bear note. First, the language of § 4.1 has been changed. Section 4.1 as published stated: "All allowed priority claims other than those treated in § 4.5 will be paid in full without interest, unless otherwise stated." Because of the Working Group's changes to § 4.4, the wording of § 4.1 was altered to remove the phrase "unless otherwise stated." Second, as is discussed below in connection with Part 5, the Working Group has included a limitation to § 4.5 reflecting the requirement of Code § 1325(a)(4).

E. Part 5 (Treatment of Nonpriority Unsecured Claims)

The Working Group has reordered Part 5. The published form treated maintenance and cure of unsecured claims in § 5.1, then treated separately classified nonpriority unsecured claims in § 5.2, then nonpriority unsecured claims in § 5.3, and finally interest in § 5.4. On reflection,

the Working Group concluded that Part 5 should begin with a general statement regarding the payment of nonpriority unsecured claims (now § 5.1) and then describe the treatment of nonpriority unsecured claims (now § 5.2). These features are the ones that will be most commonly used, and therefore should come first in Part 5. Interest will now be treated in § 5.3, maintenance and cure in § 5.4, and other separately classified unsecured claims in § 5.5.

The section providing options for the payment of nonpriority unsecured claims drew some critical comments. For example, Mark D. Sammons (comment 75) and Dan Melchi, an attorney in Georgia (comment 43), argued that debtors should not be given the option of paying the funds remaining after disbursements to all other creditors. Instead, these comments insisted that debtors should be required to pay a sum certain, and that debtors will routinely choose the "funds remaining" option because it would not require a specific commitment to pay. The Working Group believes that the choices provided in this section are appropriate, as they reflect the variety of payment options found in chapter 13 plans around the country. As the new warning language in Part 1 indicates, however, a debtor's selection of one or more options may draw an objection or may otherwise be found unacceptable in a particular bankruptcy court. The Working Group did agree with comments suggesting that it was unnecessary to state, as the published form did in § 5.3, that "[a]llowed nonpriority unsecured claims that are not separately classified will be paid, pro rata, *up to the full amount of the claims*." (emphasis added). That phrase, in what is now § 5.2, has been removed.

The liquidation analysis in the same section drew a number of comments. The NACTT (comment 11), Chief Judge Nugent (comment 51), and Tracy Updike (comment 132) pointed out that the best interest test of Code § 1325(a)(4) looks to how much allowed unsecured claims—nonpriority and priority—would be paid in a chapter 7 liquidation. The language of the

published form referred only to nonpriority unsecured claims. The Working Group decided to retain this language in Part 5 but to add comparable language in Part 4, which deals with priority unsecured claims. Because Part 4 otherwise requires full payment of priority unsecured claims, the Working Group inserted a best interest test in the portion of Part 4 that contemplates less than full payment on priority claims. Section 4.5 now provides that domestic support obligations assigned or owed to governmental units and paid less than the full amount will not receive less than the amount they would have been paid in a liquidation under chapter 7.

F. Part 6 (Executory Contracts and Unexpired Leases)

The chief objection to Part 6 was the default presumption that executory contracts and unexpired leases will be rejected unless expressly assumed. Rod Danielson (comment 24) urged the Advisory Committee to adopt the opposite presumption. He was concerned that the published form would void telephone, home rental, and auto rental agreements unless specifically assumed—a result that debtors, and particularly pro se debtors, may not intend. Several other comments echoed this concern. Other comments, however, endorsed the default chosen on the published form. As Annette Crawford, a chapter 13 trustee (M.D. La.) (comment 12), observed, rejection as the default would keep the debtor and debtor's attorney from falling into the trap of inadvertently assuming a burdensome lease or contract.

The Working Group decided to adhere to the decision to make rejection the default presumption. For the reasons expressed by Ms. Crawford, the Working Group concluded that inadvertent assumption is generally more worrisome than inadvertent rejection. If, for example, the debtor neglects to assume a telephone contract but continues making timely payments, it is very unlikely that the phone company will end the debtor's service. On the other hand, if the

debtor inadvertently assumes a timeshare property, the consequences may be more serious and difficult to unwind.

Henry Sommer (comment 42) suggested that the form should not present any default, or should expressly provide for the debtor neither to assume nor reject leases and contracts. This so-called "ride-through" option is sometimes found in chapter 13 plans. The Working Group considered this option to be sufficiently uncommon that it would be better placed in the nonstandard provisions box in Part 9.

G. Part 7 (Order of Distribution of Trustee Payments)

The comments on Part 7 were voluminous and, with few exceptions, negative. The published form proposed a partially completed order of distribution, with trustee's fees listed first, followed by monthly payments on secured claims. Some comments, such as comments submitted by Pam Bassel, a chapter 13 trustee (N.D. Tex.) (comment 141), and Judge Teel (comment 142) believed the provision should be removed altogether, on the ground that the trustee (and not the debtor) should determine the distribution of payments. Others criticized the presentation of payment distributions as following a sequential order. As Chief Judge Mary P. Gorman (Bankr. C.D. Ill.) (comment 117) pointed out, Code § 1322(b)(4) permits concurrent payments on secured and unsecured claims. A minority of comments favored leaving the order of distributions blank for the debtor to complete. Peter D. Schneider, a Philadelphia attorney, on behalf of Community Legal Services, Inc. (comment 121), and Ray Hendren (comment 139) suggested this approach. Finally, a few comments, such as one submitted by Rick A. Yarnall, a chapter 13 trustee (D. Nev.) (comment 136), suggested that the form should propose a default order of distributions.

The Working Group discussed Part 7 at length before the form was published. On further reflection, the Working Group has decided to leave this provision in the plan form with an alteration and a revised Committee Note. The listing of monthly payments on secured claims has been removed, principally for the reason given by Chief Judge Gorman. But the Working Group decided not to remove the order of distributions entirely. The payment of trustee's fees remains, but the rest of the order has been left blank. The Committee Note has been augmented to indicate that debtors do not need to complete this part. Instead, they may choose to leave the order of distributions to be determined by the trustee. The Working Group considers this approach to be the most flexible, as it accommodates a variety of practices while preserving debtors' ability to propose a plan of their choosing. Of course, as Part 1 now warns, a debtor's choice may draw an objection or otherwise be found unacceptable.

H. Part 8 (Vesting of Property of the Estate)

As published, Part 8 provided that property of the estate "shall revest in the debtor(s) upon" plan confirmation, closing of the case, or some other event specified by the debtor. Some comments, such as that of Nancy Spencer Grigsby (comment 90), objected to giving debtors a choice of when the estate revests. Others expressed a similar objection that debtors should not be able to choose the revesting event simply by checking a box. This was the concern expressed by Gary D. Gray, on behalf of the Chief Counsel of the Internal Revenue Service (comment 93). In Mr. Gray's view, debtors might elect to keep property in the estate so that the automatic stay immunizes them from postpetition creditors, including the IRS. Because Code § 1327(b) provides that revesting at confirmation is the default rule, Mr. Gray urged that a debtor should have to provide a reason for choosing some other revesting point. On the other hand, Chief Judge Nugent (comment 51) was concerned that the ordering of the options on the form (with

revesting at confirmation listed first) would lead debtors *not* to choose a later point to revest, even if that would be the better point to revest in a particular case. In addition, Tracy Updike (comment 132) and other commenters noted that the choice offered on the published form—confirmation or case closing—was underinclusive, because case closing is not necessarily the same as discharge.

The Working Group decided to adhere to the structure of this portion of the plan form. Although the Working Group acknowledged the concerns expressed by comments about the use or misuse of revesting by debtors, the Code leaves the option of revesting at different points of time. Again, an individual debtor may be ill served by revesting at one point instead of another, but that should not call for removing options from the form. In any event, the default rule of § 1327(b) is subject to a contrary provision in the order of confirmation as well as in the plan.

On a final note, a comment by David S. Yen, a Chicago attorney (comment 154), observed that Code § 1322(b)(9) permits vesting of property of the estate in an entity other than the debtor. The Working Group believed that this choice is sufficiently uncommon that it did not need to be mentioned expressly on the form. A debtor, of course, may choose to include it as a nonstandard provision in Part 9.

I. Part 9 (Nonstandard Plan Provisions)

Part 9 drew relatively few comments. Lisa Tancredi, a Maryland attorney, on behalf of Maryland State Bar Association, Consumer Bankruptcy Section, and the Bankruptcy Bar Association for the District of Maryland (comment 122), applauded the inclusion of a nonstandard provisions section. Other comments welcomed the flexibility of being able to include nonstandard provisions, but preferred that they be displayed after each provision being altered. Anne V. Kealing, an attorney in Edina, Minnesota (comment 49), offered this

suggestion, as did Chief Judge Nugent (comment 51). Jan Hamilton (comment 6) argued that a single place for nonstandard provisions would lead to the inclusion of a hodge-podge of provisions that would be counterproductive to the goals of a national plan form.

The Working Group concluded that its chosen format for nonstandard provisions is preferable. As the Working Group appreciated throughout the process of drafting the form, the process of reviewing chapter 13 plans would be made easier if there were a single place for laying out nonstandard provisions. Distributing those provisions throughout the form would negate this benefit.

A comment submitted by Craig Goldblatt, a Washington attorney, on behalf of several large banks (comment 124), expressed concern that Part 9 contained no limitation on what could be included therein. His concern was echoed by the suggestion of a number of comments that local courts opposed to the adoption of a national plan form might encourage debtors to place extensive local provisions—and perhaps entire local plan forms that would be superseded by the national form—into Part 9.

Although this concern gave pause, the Working Group did not think it warranted an attempt to place limits on the use of Part 9. First, it is important to reiterate that the form must be flexible enough to permit debtors to propose plans of their choosing. Placing limits on Part 9 would countermand that requirement. Second, the warning language now added to Part 1 should serve to caution debtors that the inclusion of nonstandard provisions in Part 9 will not guarantee their acceptance by a court. Third, with respect to the possibility of courts' using Part 9 out of disagreement with the adoption of a national plan form, the Working Group thought it important to assume good faith on the part of courts. Indeed, although a number of judges submitted comments in opposition to the plan form, these comments were constructive and reasoned—and

not merely dismissive of the undertaking. In any event, the Working Group noted that relatively few of the country's approximately 350 bankruptcy judges expressed opposition to the adoption of a plan form.

J. Part 10 (Signatures)

Comments on Part 10—the signature box—questioned whether debtors should be required to sign a plan. As published, the form required debtors who are not represented by counsel to sign. Otherwise, only the debtors' attorney was required to sign. This was the subject of extensive discussion within the Working Group before publication of the form. The principal concern behind choosing not to require debtors' signatures in all cases was the potential inconvenience of doing so, particularly in rural areas where debtors and their counsel may not be within close proximity. Because debtors must sign the petition, the Working Group did not believe a represented debtor's signature was necessary for purposes of preventing bankruptcy fraud or the like.

A number of comments, however, urged the Advisory Committee to reconsider this choice. For example, Annette Crawford (comment 12) suggested that a debtor might plead ignorance as to the contents of a plan without a signature, and that the debtor's signature also protects the debtor's attorney. Robert E. Hyman, a chapter 13 trustee (E.D. Va.) (comment 41), expressed the same concern, as did a number of other comments. Rod Danielson (comment 24) noted that providing for a represented debtor to sign the plan would give it evidentiary weight that is useful, for example, in valuation of collateral. A number of comments criticized the certification accompanying the signature as too limited. As published, the form stated that the signature "certifies that all provisions of this plan are identical to the Official Form 113." Other

comments suggested that the certification should instead speak to the correctness of the plan or its compliance with the Code.

The Working Group decided to adhere to its earlier decision against requiring a represented debtor to sign the plan. Nevertheless, the Working Group was persuaded that permitting a represented debtor to sign would be beneficial. Accordingly, Part 10 has been reworked to state that the debtors' signatures are "required if not represented by an attorney; otherwise optional." The Working Group also decided to remove the certification language from the signature box. On reflection, members of the group agreed that the published certification was too limited in scope.

III. Specific Comments on the Amended Rules

Comments on the amended rules focused on the claims bar date, issues relating to service and notice, the mandatory nature of the plan form, and related concerns. The comments will be discussed in connection with each amended rule, other than Rule 9009 on the use of official forms, which is addressed in a separate memo.

A. Rule 2002

The published amendment to Rule 2002 would require giving twenty-one days' notice of the time fixed for filing objections to confirmation in a chapter 13 case, and twenty-eight days' notice of the time fixed for the confirmation hearing. A supportive comment was received from Henry Sommer (comment 42). One comment, submitted by Beverly M. Burden, a chapter 13 trustee (E.D. Ky.) (comment 129), suggested altering Rule 2002 to limit the required notice of pre-confirmation plan modifications. Stylistic changes were offered by James Jacobsen (97).

The Working Group made no changes to the published rule. With respect to the notice issue, the Working Group decided against making changes to the basic notice provisions already

included in the Bankruptcy Rules. A more comprehensive project on noticing may be undertaken by the Advisory Committee, and reconsideration of these issues would be better in that context.

B. Rule 3002

Rule 3002 drew a large number of comments, as the Working Group expected. Many comments supported the amendment to Rule 3002(a), which would require a secured creditor to file a proof to have an allowed claim. The amendment to Rule 3002(c), which would alter and shorten the claims bar date, however, drew more negative comments.

Judge A. Benjamin Goldgar (Bankr. N.D. Ill.), on behalf of the National Conference of Bankruptcy Judges (comment 59), took issue with the language (regarding a secured creditor's lien) in the published amendment to Rule 3002(a). The NCBJ viewed that language ("A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim") as unwieldy and offered a stylistic revision. Several other comments made a similar point. The Working Group decided to retain the language as published. That language, which was added to respond to concerns about courts' treatment of the liens of secured creditors who do not file proofs of claim, closely tracks Code § 506(d)(2). This was intentional, and the Committee Note calls attention to that Code section.

For similar reasons, the Working Group declined to adopt the suggestion of Gary D. Gray (comment 93), who raised the concern of the IRS that Rule 3002(a) should expressly protect a secured creditor's right of setoff. Although Mr. Gray's reading of Code § 506(d)(2) to include rights of setoff may be correct, the Working Group did not want to stray from the text of the Code itself to avoid taking a position on a question of substantive law.

For Rule 3002(c), a number of comments called the sixty-day bar date for claims too short. Judge Teel (comment 142) expressed this view, as did Judge Eric Frank (Bankr. E.D. Pa.) (comment 60) and several others. More plentiful, however, were expressions of concern about the bifurcated bar date for mortgage claims in published Rule 3002(c). These comments thought the additional time for the submission of supplemental documents required by Rule 3001(c)(1) and (d) gave unwarranted favored treatment to mortgage creditors. This point was expressed, for example, by Michael Gallagher, a Pennsylvania attorney (comment 58), among others. By contrast, Craig Goldblatt (comment 124) expressed the view of mortgage servicers that bifurcation might give rise to new disputes about proofs of claim. He urged the retention of a longer overall bar date and the amendment of a different rule (Rule 3001(c)(2)(C)).

With two exceptions, the Working Group decided not to change the bar date amendments. The goal of these amendments was to encourage, to the maximum extent possible, the filing of proofs of claim ahead of confirmation. The Working Group is satisfied that the sixty-day bar date will generally be sufficient time for filing proofs of claim. The bifurcated bar date for mortgage claims reflects the concern that retrieval of supporting documents may take longer than sixty days in many cases. This proposal was generated through discussions at the Chicago mini-conference. Rather than delay the bar date for all claims, the Working Group limited this partial extension to the aspects of those claims that appeared to raise the potential for further delay.

The Working Group has made two changes to the language of Rule 3002(c). In order to be consistent with amended Rule 3002(c)(6), the reference to "60 days after the petition" in 3002(c) has been altered to "60 days after the order for relief." These terms are equivalent in the context of the rule. Also, the Working Group reworded amended Rule 3002(c) to clarify that the

listed exceptions apply to all cases—and not only involuntary chapter 7 cases—included in the subdivision.

Finally, a few comments made note of the possible effect of amended Rule 3002(c) in chapter 7 cases. For example, Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees (comment 151), expressed concern that the shorter bar date will conflict with Rule 2002(e) and the provision that proofs of claim in chapter 7 cases need not be filed until such time as the trustee gives notice of sufficient assets to pay a dividend. Craig Goldblatt (comment 124) expressed essentially the same concern.

The Working Group believes that this concern is adequately met by current Rule 3002(c)(5), which controls the filing of proofs of claim after a notice of no assets. The amendments to the rules would not affect Rule 3002(c)(5).

C. Rule 3007

The Working Group has made no changes to Rule 3007. Some of the comments offered stylistic suggestions. Others were more substantive and touched in particular on service requirements. Gary D. Gray (comment 93) urged the Advisory Committee to settle the conflict over proper service upon the federal government. Judge Teel (comment 142) and Beverly M. Burden (comment 129) also suggested service-related alterations.

The Advisory Committee addressed service requirements for objections to claims at the fall 2013 meeting, when it approved amendments to Rule 3007(a) that were published for comment in 2011. Under amended Rule 3007(a), service of a claim objection would be made on most claimants by mailing notice to the person listed on the proof of claim. Service on federal government and insured depository institution claimants, however, would be made according to the applicable provisions of Rule 7004. The amended rule would also clarify that a hearing need

not be held on every claim objection, so long as the claimant received notice and an opportunity for a hearing. Finally, the Committee voted at the fall 2013 meeting to delete the following language that was included in the proposed amendment to Rule 3007(a) published for comment last summer: "Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a . . . ." This deletion was made because Rule 3012 does not address objections to claims, which is the subject of Rule 3007. Thus no exception to the latter rule is required.

D. Rule 3012

Amended Rule 3012 drew support and opposition. Judge Weissbrodt (comment 92) and Henry Sommer (comment 42) expressly endorsed the ability of a chapter 13 plan to include a request for the determination of allowed secured claim values. Other comments opposed this change to the rules on various grounds. Dan Melchi (comment 43) argued that the provision unconstitutionally deprives creditors of due process by taking their property (protected by the prima facie validity of a proof of claim) without compensation. Craig Goldblatt (comment 142) criticized the amendment as a substantial change from current practice that will limit procedural protections before stripping off a lien.

The Working Group did not find these objections persuasive. For the reasons given earlier in this memorandum regarding § 3.2 of the plan form, the inclusion of a request for valuation of a secured claim in a chapter 13 plan does not violate substantive rights.

Although Gary D. Gray (comment 93) expressed the IRS's support for the exclusion of governmental creditors' secured claims from this valuation procedure, other comments did not believe that government creditors should be so excluded. For the reasons given earlier in the

discussion of § 3.2 of the plan form, the Working Group decided against altering this part of the published rule amendment.

The Working Group did decide, however, to make one change to published Rule 3012. Rule 3012(c) as published stated that a request to determine the amount of a secured claim of a governmental unit "may be made by motion or in a claim objection after the governmental unit files a proof of claim . . . ." In order to clarify that these options are the exclusive ones for determination of the value of governmental secured claims, the Working Group has inserted the word "only" before "made by motion."

The Advisory Committee also approved amendments to Rule 3012(b) at the fall 2013 meeting. With the amendments, Rule 3012(b) would require service in the manner provided in Rule 7004 for a chapter 12 or 13 plan that requests determination of the amount of a secured claim, but would leave to Rules 3007(a) and 9014(b) the method of service for claims objections and motions to determine the amount of a secured claim, respectively.

E. Rule 3015

Amended Rule 3015(c) would require plans filed in chapter 13 cases to "be prepared as prescribed by the appropriate Official Form." The amendment also provides that provisions deviating from the Official Form are effective only if they are placed in the part of the form reserved for nonstandard provisions. Comments objecting to this provision were based mostly on opposition to a mandatory plan form, as discussed earlier in this memorandum. The NCBJ (comment 59), however, took issue with the statement in the amended rule that nonstandard provisions would not be "effective" if placed outside the appropriate part of the plan form. The Working Group did not believe that this statement strayed into substantive law.

Nevertheless, the Working Group's discussions raised another concern about Rule 3015(c). The amended rule does not account for the possibility that the Advisory Committee may decide not to adopt a mandatory plan form, or may adopt one and then reconsider that position in later years. The Working Group therefore altered the language of Rule 3015(c) to account for this possibility. Because this change is more limited than the published amendment, republication is not necessary.

Rule 3015(f) drew a number of comments about its application in districts that ordinarily confirm plans without a hearing. Judge Teel (comment 63) explained that the deadline for objections should not be determined by the confirmation hearing, which may be set at a late date. The NACTT (comment 11) expressed a similar concern—that if no hearing occurred, then there would be no deadline to object to confirmation. The Working Group decided to keep the timing of the deadline for objections to confirmation as a function of the confirmation hearing, but to alter the language to account for the NACTT's concern. Because Code § 1324(b) sets a limited window for when the confirmation hearing must occur, the Working Group did not think that the amendment to Rule 3015(f) would cause significant delay in the filing of objections to confirmation. The Working Group did, however, add language to the amendment to require objections to be filed "at least seven days before the *date set for the* hearing on confirmation." Thus, even if no hearing is held, a deadline for objections would be clear.

Several comments opposed Rule 3015(g) as one improperly affecting substantive rights. This view was expressed by Craig Goldblatt (comment 124), Mark D. Sammons (comment 75), and Judge Karen K. Brown (Bankr. S.D. Tex.) (comment 82). In essence, these comments assert that Rule 3015(g) cannot provide that the determination of the amount of a secured claim

through a chapter 13 plan is binding. For the reasons discussed earlier in connection with § 3.2 of the form, the Working Group did not find these objections persuasive.

Prompted by a comment from the IRS's Office of General Counsel, the Working Group has made a small change to Rule 3015(g). Gary D. Gray (comment 93) urged the Advisory Committee to clarify that a determination of the amount of a secured claim through a plan must conform to Rule 3012. The Working Group has reworded the language of amended Rule 3012(g) to provide that any "determination made in accordance with Rule 3012"—rather than "under Rule 3012"—will be binding.

Several comments about Rule 3015(h) raised concerns about notice and service. As discussed earlier, the Working Group's general position was not to undertake extensive changes to notice and service provisions. But as noted by several comments, including one by Matthew T. Loughney, a bankruptcy court clerk (M.D. Tenn.), on behalf of the Bankruptcy Noticing Working Group (comment 13), amended Rule 3015(h) used the word "served" but did not clarify what type of service was intended. The Working Group thought the concern was sufficient to warrant a clarifying statement in the Committee Note that service in this rule does not necessarily require Rule 7004 service. Another change to the Committee Note regarding Rule 3015(h) was made to point out that the option to serve a summary of a proposed plan modification remained in the rule.

F. Rule 4003

A number of comments opposed the amendment to Rule 4003(d), which would recognize lien avoidance under Rule 522(f) through a plan. Judge Dennis Montali (Bankr. N.D. Cal.) (comment 71) stated the objection that a court could not make a valuation determination without

evidence, and a plan is not evidence. This objection was discussed earlier in connection with § 3.2 of the plan form.

Several comments raised questions about an ambiguity in the amended rule as to who would be served. The comment of Matthew T. Loughney (comment 13) spelled out the concern. As published, the amended rule provided that lien avoidance could be commenced by a "plan served in the manner provided by Rule 7004 for service of a summons and complaint." The Working Group proposes the addition of clarifying language stating that only the affected creditors need to receive Rule 7004 service.

G. Rule 5009

Several comments raised concerns about amended Rule 5009(d). That provision permits a debtor to request "an order determining that the lien on" property of the estate "has been satisfied." The final sentence of the amended rule provides further than an "order entered under this subdivision is effective as a release of the lien." Judge Meredith Jury (Bankr. C.D. Cal.) (comment 53) objected that "satisfaction" requires payment, and that "avoided" would be a better term. M. Regina Thomas, a bankruptcy court clerk (N.D. Ga.) (comment 115), raised the same concern. Relatedly, the NCBJ (comment 59) suggested changing the language to state that the claim, and not the lien, has been satisfied. Craig Goldblatt (comment 124) submitted a more pointed criticism, taking the position that there is no authority under the Code for a bankruptcy court to make such a determination, and that doing so would be a matter of private right that cannot be heard and determined by a non-Article III bankruptcy court.

The Working Group decided to reword the provision. The phrase "an order determining that such secured claim has been satisfied and the lien on that property has been released" has been substituted in the first sentence of the rule. To avoid the suggestion that this rule was

straying into areas of substantive law, the Working Group decided to remove the final sentence. Corresponding changes were made to the Committee Note. Because these changes at most limit the scope of the proposed amendment, the Working Group believes that republication is not required.

H. Rule 7001

Few comments addressed the amendment to Rule 7001, which makes clear that an adversary proceeding is not needed for proceedings under Rule 3012 or 4003(d). Mark D. Sammons (comment 75) and Judge Jennie D. Latta (Bankr. W.D. Tenn.) (comment 150) supported the amendment. The NCBJ (comment 59), however, expressed reservations. In particular, the NCBJ viewed Rule 3012 as addressing relief by motion, which would not be a "proceeding" that would need to be excluded from Rule 7001(2). The Working Group understood the meaning of proceedings to be broader than adversary proceedings—in other words, something could be called a proceeding and not be categorized as an adversary proceeding. Accordingly, the additional clarity of amended Rule 7001 was deemed worthwhile.

Additions since publication are indicated by double underlining. Deletions since publication are indicated by double strikethroughs.

Rule 2002. Notices to Creditors, Equity Security Holders, Administrators in Foreign Proceedings, Persons Against Whom Provisional Relief is Sought in Ancillary and Other Cross-Border Cases, United States, and United States Trustee

(a) TWENTY-ONE-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivisions (h), (i), (*l*), (p), and (q) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of:

* * * * *

(7) the time fixed for filing proofs of claims pursuant to Rule 3003(c); ~~and~~

(8) the time fixed for filing objections and the hearing to consider confirmation of a chapter 12 plan; and

(9) the time fixed for filing objections to confirmation of a chapter 13 plan.

(b) TWENTY-EIGHT-DAY NOTICES TO PARTIES IN INTEREST. Except as provided in subdivision (*l*) of this rule, the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than

(1) 28 days' notice by mail of the time fixed ~~(1)~~ for filing objections and the hearing to consider approval of a disclosure statement or, under §1125(f), to make a final determination whether the plan provides adequate

information so that a separate disclosure statement is not necessary; ~~and~~

(2) 28 days' notice by mail of the time fixed for filing objections and the hearing to consider confirmation of a chapter 9~~,~~ or chapter 11~~, or chapter 13~~ plan; and

(3) 28 days' notice by mail of the time fixed for the hearing to consider confirmation of a chapter 13 plan.

* * * * *

COMMITTEE NOTE

Subdivisions (a) and (b) are amended and reorganized to alter the provisions governing notice under this rule in chapter 13 cases. Subdivision (a)(9) is added to require at least 21 days' notice of the time for filing objections to confirmation of a chapter 13 plan. Subdivision (b)(3) is added to provide separately for 28 days' notice of the date of the confirmation hearing in a chapter 13 case. These amendments conform to amended Rule 3015, which governs the time for presenting objections to confirmation of a chapter 13 plan. Other changes are stylistic.

Rule 3002. Filing Proof of Claim or Interest

(a) NECESSITY FOR FILING. ~~An~~ A secured creditor, unsecured creditor, or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed, except as provided in Rules 1019(3), 3003, 3004, and 3005. A lien that secures a claim against the debtor is not void due only to the failure of any entity to file a proof of claim.

(b) PLACE OF FILING. A proof of claim or interest shall be filed in accordance with Rule 5005.

(c) TIME FOR FILING. In a voluntary chapter 7 ~~liquidation~~ case, chapter 12 ~~family farmer's debt adjustment~~ case, or chapter 13 ~~individual's debt adjustment~~ case, a proof of claim is timely filed if it is filed not later than ~~90~~ 60 days after the ~~date the petition is filed~~ order for relief or the date of the order of conversion to a chapter 12 or 13 case~~,~~, and ~~I~~in an involuntary chapter 7 case, a proof of claim is timely filed if it is filed not later than 90 days after the order for relief is entered, ~~the first date set for the meeting of creditors called under § 341(a) of the Code,~~ except as follows:

* * * * *

(6) ~~If notice of the time to file a proof of claim has been mailed to a creditor at a foreign address, o~~On motion filed by ~~the~~ a creditor before or after the expiration of the time to file a proof of claim, the court may extend the time to file a proof of claim by not more than 60 days from the date of the order granting the motion. The motion may be granted if the court finds that ~~the notice was~~

~~insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim~~

(A) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim because the debtor failed to timely file the list of creditors' names and addresses required by Rule 1007(a), or

(B) the notice was insufficient under the circumstances to give the creditor a reasonable time to file a proof of claim, and notice of the time to file a proof of claim was mailed to the creditor at a foreign address.

(7) A proof of claim filed by the holder of a claim that is secured by a security interest in the debtor's principal residence is timely filed if

(A) the proof of claim, together with the attachments required by Rule 3001(c)(2)(C), is filed not later than 60 days after the order for relief is entered, and

(B) any attachments required by Rule 3001(c)(1) and (d) are filed as a supplement to the holder's claim not later than 120 days after the order for relief is entered.

COMMITTEE NOTE

Subdivision (a) is amended to clarify that a creditor, including a secured creditor, must file a proof of claim in order to have an allowed claim. The amendment also clarifies, in accordance with § 506(d), that the failure of a secured creditor to file a proof of claim does not render the creditor's lien void. The amendment preserves the existing exceptions to this rule under Rules 1019(3), 3003, 3004, and 3005. Under Rule 1019(3), a creditor does not need to file another proof of claim after conversion of a case to chapter 7. Rule 3003 governs the filing of a proof of claim in chapter 9 and chapter 11 cases. Rules

3004 and 3005 govern the filing of a proof of claim by the debtor, trustee, or another entity if a creditor does not do so in a timely manner.

Subdivision (c) is amended to alter the calculation of the bar date for proofs of claim in chapter 7, chapter 12, and chapter 13 cases. The amendment changes the time for filing a proof of claim in a voluntary chapter 7 case, a chapter 12 case, or a chapter 13 case from 90 days after the § 341 meeting of creditors to 60 days after the petition date. If a case is converted to chapter 12 or chapter 13, the 60-day time for filing runs from the order of conversion. In an involuntary chapter 7 case, a 90-day time for filing applies and runs from the entry of the order for relief.

Subdivision (c)(6) is amended to expand the exception to the bar date for cases in which a creditor received insufficient notice of the time to file a proof of claim. The amendment provides that the court may extend the time to file a proof of claim if the debtor fails to file a timely list of names and addresses of creditors as required by Rule 1007(a). The amendment also clarifies that if a court grants a creditor's motion under this rule to extend the time to file a proof of claim, the extension runs from the date of the court's decision on the motion.

Subdivision (c)(7) is added to provide a two-stage deadline for filing mortgage proofs of claim secured by an interest in the debtor's principal residence. Those proofs of claim must be filed with the appropriate Official Form mortgage attachment within 60 days of the order for relief. The claim will be timely if any additional documents evidencing the claim, as required by Rule 3001(c)(1) and (d), are filed within 120 days of the order for relief. The order for relief is the commencement of the case upon filing a petition, except in an involuntary case. See § 301 and § 303(h). The confirmation of a plan within the 120-day period set forth in subdivision (c)(7)(B) does not prohibit an objection to ~~the~~any proof of claim.

Rule 3007. Objections to Claims[1]

(a) ~~OBJECTIONS TO CLAIMS~~TIME AND MANNER OF SERVICE. An objection to the allowance of a claim and a notice of objection that conforms substantially to the appropriate Official Form shall be ~~in writing and~~ filed. ~~and~~ served at least 30 days before any scheduled hearing on the objection or any deadline for the claimant to request a hearing. The objection and notice shall be served as follows:

(1) on the claimant by first-class mail to the person most recently designated by the claimant on its original or amended proof of claim as the person to receive notices, at the address so indicated; and

(A) if the objection is to a claim of the United States, or any of its officers or agencies, in the manner provided for service of a summons and complaint by Rule 7004(b)(4) or (5); or

(B) if the objection is to a claim of an insured depository institution, according to Rule 7004(h); and

(2) on the debtor or debtor in possession and the trustee by first-class mail or other permitted means.

~~Except to the extent that the amount of a claim is determined under Rule 3012 in connection with plan confirmation in a chapter 12 or 13 case, a copy of the objection with notice of the hearing thereon shall be mailed or otherwise delivered~~

[1] The changes made after publication consist of proposed amendments to the rule that were published for comment in August 2011.

~~to the claimant, the debtor or debtor in possession, and the trustee at least 30 days prior to the hearing.~~

COMMITTEE NOTE

~~Subdivision (a) is amended to provide that an objection to a claim is unnecessary if the determination of the amount of the claim is made through a chapter 12 or chapter 13 plan in accordance with Rule 3012.~~

Subdivision (a) is amended to specify the manner in which an objection to a claim and notice of the objection must be served. It clarifies that Rule 7004 does not apply to the service of most claim objections. Instead, a claimant must be served by first-class mail addressed to the person that the claimant most recently designated on its proof of claim to receive notices, at the address so indicated. If, however, the claimant is the United States, an officer or agency of the United States, or an insured depository institution, service must also be made according to the method prescribed by the appropriate provision of Rule 7004. The service methods for the depository institutions are statutorily mandated, and the size and dispersal of the decision-making and litigation authority of the federal government necessitate service on the appropriate United States attorney's office and the Attorney General, as well as the person designated on the proof of claim.

As amended, subdivision (a) no longer requires that a hearing be scheduled or held on every objection. The rule requires the objecting party to provide notice and an opportunity for a hearing on the objection, but, by deleting from the subdivision references to "the hearing," it permits local practices that require a claimant to timely request a hearing or file a response in order to obtain a hearing. The official notice form served with a copy of the objection will inform the claimant of any actions it must take. However, while a local rule may require the claimant to respond to the objection to a proof of claim, the court will still need to determine if the claim is valid, even if the claimant does not file a response to a claim objection or request a hearing.

Rule 3012. ~~Valuation of Security~~ Determination of the Amount of Secured and Priority Claims

~~The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.~~

(a) DETERMINATION OF AMOUNT OF CLAIM. On request by a party in interest and after notice—to the holder of the claim and any other entity the court designates—and a hearing, the court may determine

(1) the amount of a secured claim under § 506(a) of the Code, or

(2) the amount of a claim entitled to priority under § 507 of the Code.

(b) REQUEST FOR DETERMINATION; HOW MADE. Except as provided in subdivision (c), a request to determine the amount of a secured claim may be made by motion, in a claim objection, or in a plan filed in a chapter 12 or 13 case. When the request is made in a chapter 12 or chapter 13 plan, the plan shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004. A request to determine the amount of a claim entitled to priority may be made only by motion or in a claim objection. ~~The request shall be served on the holder of the claim and any other entity the court designates in the manner provided for service of a summons and complaint by Rule 7004.~~

(c) CLAIMS OF GOVERNMENTAL UNITS. A request to determine the amount of a secured claim of a governmental unit may be made by motion or in a claim objection after the governmental unit files a proof of claim or after the time for filing one under Rule 3002(c)(1) has expired.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (a) provides, in keeping with the former version of this rule, that a party in interest may seek a determination of the amount of a secured claim. The amended rule provides that the amount of a claim entitled to priority may also be determined by the court.

Subdivision (b) is added to provide that a request to determine the amount of a secured claim may be made in a chapter 12 or chapter 13 plan, as well as by a motion or a claim objection. When the request is made in a plan, the plan must be served on the holder of the claim and any other entities the court designates according to Rule 7004. Secured claims of governmental units are not included in this subdivision and are governed by subdivision (c). The amount of a claim entitled to priority may be determined through a motion or a claim objection.

Subdivision (c) clarifies that a determination under this rule with respect to a secured claim of a governmental unit may be made by motion or in a claim objection, but not until the governmental unit has filed a proof of claim or its time for filing a proof of claim has expired.

Rule 3015. Filing, Objection to Confirmation, Effect of Confirmation, and Modification of a Plan in a Chapter 12 ~~Family Farmer Debt Adjustment~~ or a Chapter 13 ~~Individual's Debt Adjustment~~ Case

(a) FILING OF CHAPTER 12 PLAN. The debtor may file a chapter 12 plan with the petition. If a plan is not filed with the petition, it shall be filed within the time prescribed by § 1221 of the Code.

(b) FILING OF CHAPTER 13 PLAN. The debtor may file a chapter 13 plan with the petition. If a plan is not filed with the petition, it shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct. If a case is converted to chapter 13, a plan shall be filed within 14 days thereafter, and such time may not be further extended except for cause shown and on notice as the court may direct.

(c) ~~DATING. Every proposed plan and any modification thereof shall be dated.~~FORM OF CHAPTER 13 PLAN. ~~The plan filed in a chapter 13 case shall be prepared as prescribed by the appropriate Official Form~~ If an Official Form is adopted for plans filed in chapter 13 cases, that form must be used. Provisions not otherwise included in the Official Form or deviating from the Official Form are effective only if they are included in a section of the Official Form designated for nonstandard provisions and are also identified in accordance with any other requirements of the Official Form.

(d) NOTICE ~~AND COPIES~~. If the plan ~~The plan or a summary of the plan shall be~~ is not included with the ~~each~~ notice of the hearing on confirmation mailed pursuant to Rule 2002, the debtor shall serve the plan on the trustee and all creditors when it is filed with the court. ~~If required by the court, the debtor shall~~

~~furnish a sufficient number of copies to enable the clerk to include a copy of the plan with the notice of the hearing.~~

(e) TRANSMISSION TO UNITED STATES TRUSTEE. The clerk shall forthwith transmit to the United States trustee a copy of the plan and any modification thereof filed pursuant to subdivision (a) or (b) of this rule.

(f) OBJECTION TO CONFIRMATION; DETERMINATION OF GOOD FAITH IN THE ABSENCE OF AN OBJECTION. An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee, ~~before confirmation of the plan~~ at least seven days before the date set for the hearing on confirmation. An objection to confirmation is governed by Rule 9014. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(g) EFFECT OF CONFIRMATION. Any determination made ~~under~~ in accordance with Rule 3012 of the amount of a secured claim under § 506(a) of the Code in a chapter 12 or 13 case is binding on the holder of the claim, even if the holder files a contrary proof of claim under Rule 3002 or the debtor schedules that claim under § 521(a) of the Code, and regardless of whether any objection to the claim has been filed under Rule 3007.

~~(g)~~ (h) MODIFICATION OF PLAN AFTER CONFIRMATION. A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The

clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 21 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. ~~If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice.~~ If a copy is not included with the notice and the proposed modification is sought by the debtor, a copy shall be served on the trustee and all creditors in the manner provided for service of the plan by subdivision (d) of this rule. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

COMMITTEE NOTE

This rule is amended and reorganized.

Subdivision (c) is amended to require use of ~~the~~ an Official Form if one is adopted for chapter 13 plans. The amended rule also provides that nonstandard provisions in a chapter 13 plan must be set out in the section of the Official Form specifically designated for such provisions and identified in the manner required by the Official Form.

Subdivision (d) is amended to ensure that the trustee and creditors are served with the plan in advance of confirmation. Service may be made either at the time the plan is filed or with the notice under Rule 2002 of the hearing to consider confirmation of the plan.

Subdivision (f) is amended to require service of an objection to confirmation at least seven days before the hearing to consider confirmation of a plan. The seven-day notice period may be altered in a particular case by the court under Rule 9006.

Subdivision (g) is amended to provide that the amount of a secured claim under § 506(a) may be determined through a chapter 12 or chapter 13 plan in accordance with Rule 3012. That determination controls over a contrary proof of claim, without the need for a claim objection under Rule 3007, and over the schedule submitted by the debtor under § 521(a). The amount of a secured claim of a governmental unit, however, may not be determined through a chapter 12 or chapter 13 plan under Rule 3012.

Subdivision (h) was formerly subdivision (g). It is redesignated and amended to clarify that service of a proposed plan modification must be made in accordance with subdivision (d) of this rule. The option to serve a summary of the proposed modification has been retained. Unless required by another rule, service under this subdivision does not need to be made in the manner provided for service of a summons and complaint by Rule 7004.

Rule 4003. Exemptions

* * * * *

(d) AVOIDANCE BY DEBTOR OF TRANSFERS OF EXEMPT PROPERTY. A proceeding by the debtor to avoid a lien or other transfer of property exempt under § 522(f) of the Code shall be commenced by motion in the manner provided for by ~~in accordance with~~ Rule 9014, or by a chapter 12 or 13 plan served on the affected creditors in the manner provided by Rule 7004 for service of a summons and complaint. Notwithstanding the provisions of subdivision (b), a creditor may object to a motion or chapter 12 or 13 plan provision filed under § 522(f) by challenging the validity of the exemption asserted to be impaired by the lien.

COMMITTEE NOTE

Subdivision (d) is amended to provide that a request under § 522(f) to avoid a lien or other transfer of exempt property may be made by motion or by a chapter 12 or chapter 13 plan. A plan that proposes lien avoidance in accordance with this rule must be served as provided under Rule 7004 for service of a summons and complaint. Lien avoidance not governed by this rule requires an adversary proceeding.

Rule 5009. Closing Chapter 7 ~~Liquidation~~, Chapter 12 ~~Family Farmer's Debt Adjustment~~, Chapter 13 ~~Individual's Debt Adjustment~~, and Chapter 15 ~~Ancillary and Cross-Border~~ Cases; Order Declaring Lien Satisfied

(a) CLOSING OF CASES UNDER CHAPTERS 7, 12, AND 13. If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

* * * * *

(d) ORDER DECLARING LIEN SATISFIED. In a chapter 12 or chapter 13 case, if a claim that was secured by property of the estate is subject to a lien under applicable nonbankruptcy law, the debtor may request entry of an order determining that ~~the~~such secured claim has been satisfied and the lien on that property has been ~~satisfied~~released. The request shall be made by motion and shall be served on the holder of the claim and any other entity the court designates in the manner provided by Rule 7004 for service of a summons and complaint. ~~An order entered under this subdivision is effective as a release of the lien.~~

COMMITTEE NOTE

Subdivision (d) is added to provide a procedure by which a debtor in a chapter 12 or chapter 13 case may request an order declaring a secured claim~~lien~~ satisfied and a lien released. A debtor may need documentation for title purposes of the elimination of a second mortgage or other lien that was secured by property of the estate. Although requests for such orders are likely to be made at the time the case is being closed, the rule does not prohibit a request at another time if the lien has been ~~satisfied~~ released and any other requirements for entry of the order have been met.

Other changes to this rule are stylistic.

Rule 7001. Scope of Rules of Part VII

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

* * * * *

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, ~~other than~~ not including a proceeding under Rule 3012 or Rule 4003(d);

* * * * *

COMMITTEE NOTE

Subdivision (2) is amended to provide that the determination of the validity, priority, or extent of a lien under Rule 3012 or Rule 4003(d) does not require an adversary proceeding. The determination of the amount of a secured claim may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 3012. Thus, a debtor may propose to eliminate a wholly unsecured junior lien in a chapter 12 or chapter 13 plan without a separate adversary proceeding. Similarly, the avoidance of a lien on exempt property may be sought through a chapter 12 or chapter 13 plan in accordance with Rule 4003(d). An adversary proceeding continues to be required for lien avoidance not governed by Rule 4003(d).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: PUBLIC COMMENTS ON PUBLISHED AMENDMENT TO RULE 9009

DATE: APRIL 2, 2014

Last year the Advisory Committee published a significant reworking of Rule 9009, which governs the use and alteration of Official Forms. In general, current Rule 9009 requires only substantial compliance with Official Forms and expressly provides that "[f]orms may be combined and their contents rearranged to permit economies in their use." The published amendment to Rule 9009 is more restrictive and requires the use of Official Forms "without alteration, except as otherwise provided in these rules or in a particular Official Form." The amended rule also specifies five narrow categories of permissible modifications. This more restrictive version of Rule 9009 was prompted by the confluence of the Advisory Committee's Forms Modernization Project and the publication of an Official Form for chapter 13 plans. For each project, the Advisory Committee had devoted a great deal of attention to the format, sequencing, and presentation of information. In particular, the chapter 13 plan form requires nonstandard provisions to appear only in one portion of the form, and it would defeat the purpose of this feature if the form could be rearranged freely.

After reviewing the public comments on amended Rule 9009, the Subcommittee on Forms recommends, and the Chapter 13 Plan Form Working Group also endorses, changes to the published amendment to Rule 9009. These changes would provide greater flexibility in

the use and reproduction of forms without reverting to the permissive standard of the current rule. For that reason, the Subcommittee does not believe that republication is necessary.

Comments on the Published Amendment

The Advisory Committee received twenty-two comments specifically expressing views about the published amendment. The comments were largely negative. Many of the comments opposed the amended rule principally out of opposition to the chapter 13 plan form. For example, Judge Brian D. Lynch (Bankr. W.D. Wash.), on behalf of the bankruptcy judges of the district (comment 44), Judge Terrence L. Michael (N.D. Okla.) (comment 65), and Chief Judge James K. Coachys (Bankr. S.D. Ind.) (comment 101) objected that the proposed revisions to Rule 9009 appeared to exist solely to make the plan form mandatory and therefore should be discarded in their entirety. That view, however, was not the only reason for criticism of the published rule.

A significant number of comments described the restrictions in the published rule as too severe. Raymond J. Obuchowski, on behalf of the National Association of Bankruptcy Trustees (comment 151), supported the concept of Rule 9009 but urged the Advisory Committee to revise it to accommodate the need for greater flexibility in the use of forms. Henry Sommer, on behalf of the National Association of Consumer Bankruptcy Attorneys (comment 42), observed that there have been few, if any, situations where courts have found inappropriate alterations under Rule 9009's current language. He urged the Advisory Committee to maintain language allowing appropriate alterations and rearrangements to permit economies, such as the use of smaller font sizes to save on printing and service costs. Scott Ford, on behalf of the Bankruptcy Clerks Advisory Group (comment 56), called the proposed amendments to Rule 9009 a departure from

the current rule that would generate more work for clerk's offices if they were tasked with checking that submitted forms comply with the revised rule.

Although the published rule carves out five specified exceptions, these were criticized as too limited or unclear. Subdivision (a)(5) of the amended rule drew strong criticism. That part of the published rule, applicable to "court orders in a particular case only," would permit "any change that does not conflict with an applicable rule or with an Official Form that the order addresses or implements." Judge A. Benjamin Goldgar (Bankr. N.D. Ill.), on behalf of the National Conference of Bankruptcy Judges (comment 59), described this provision as unclear and one that does not address a real problem. To the extent the language is meant to prevent courts from entering orders that contradict forms or rules, the NCBJ noted that parties have remedies under the Bankruptcy Rules or on appeal. Judge John Waites (Bankr. D.S.C.) (comment 80), agreed with the NCBJ's comments and urged that subdivision (a)(5) be removed.

The interplay between the amended rule and electronic generation of forms prompted concerns. Walter Oney, a Massachusetts attorney (comment 31), offered a comment based on his experience as a lawyer and a developer of bankruptcy software. He observed that it would be impractical for software-generated forms to be exact reproductions of Official Forms. Mr. Oney gave examples of minor deviations from an Official Form that might be employed by a software developer and that would not affect the substance or the order in which information is presented. He feared that without greater flexibility in this regard, published Rule 9009 will cause serious hardships for software developers. A similar point was made by Dana C. McWay, a bankruptcy court clerk (Bankr. E.D. Mo.) (comment 67), who believed amended Rule 9009 would sometimes prompt parties to file forms that courts do not want to receive. Ms. McWay explained that the CM/ECF system in her court generates electronic versions of certain orders, such as the

filing fee installment form. These versions are not identical reproductions of the applicable Official Forms.

The Subcommittee's Considerations

After discussing the concerns raised in the comments, the Subcommittee on Forms has decided to recommend changing the published amendment to Rule 9009 to provide more flexibility in the alteration of Official Forms. This recommendation was endorsed by the Working Group.

The Subcommittee has proposed three changes to the published rule. First, the Subcommittee has added an additional source of permissible modifications—the instructions on an Official Form. As published, Rule 9009 allows alterations permitted in the Bankruptcy Rules or in an Official Form itself. On reflection, the Subcommittee believed that more flexibility is needed to account for circumstances that might arise with respect to particular Official Forms. Given the length of time needed to amend an Official Form (two years) and the Bankruptcy Rules (three years), the Subcommittee took the view that a more rapid method should be available to deal with problems or concerns about the permissible extent of deviations from a form that might come to light. The use of the form's instructions would serve that need. This additional source of flexibility, however, would be limited to the national instructions accompanying an Official Form and not local variations of those instructions.

Second, the Subcommittee added a general exception to the requirement that an Official Form must be used "without alteration." The additional language would allow alteration "to permit minor changes not affecting substance or the order of presenting information." The separately enumerated permissible changes listed in Rule 9009(a) are permissible changes included in that general exception. The Subcommittee viewed this change as less drastic than a

return to the language of current Rule 9009. In the Subcommittee's judgment, the added language—although imposing a standard and not an exacting rule—should make clear the intention of limiting changes to an Official Form but allowing appropriate deviations from a "pixel by pixel" reproduction.

Third, the Subcommittee has deleted subdivisions (a)(1) and (a)(5) from the published rule. On reflection, the Subcommittee did not consider these provisions necessary in light of the new language adding more flexibility to the published rule. The Subcommittee also took note of comments indicating apparent confusion about these provisions.

Rule 9009, with alterations reflecting these changes, is set out below. Changes since publication are noted by double strikethrough for deletions and double underlining for additions.

Rule 9009. Forms

(a) OFFICIAL FORMS. ~~Except as otherwise provided in Rule 3016(d), the~~ The Official Forms prescribed by the Judicial Conference of the United States shall be ~~observed and~~ used ~~with alterations as may be appropriate~~ without alteration, except as otherwise provided in these rules ~~or~~, in a particular Official Form, or in the national instructions regarding a particular Official Form. Official Forms may be modified to permit minor changes not affecting substance or the order of presenting information, including changes that

~~(1) to use font faces substantially similar to those prescribed, maintaining the prescribed size and style;~~

(~~2~~) (1) ~~to~~ expand the prescribed areas for responses in order to permit complete responses;

(~~3~~) (2) ~~to~~ delete space not needed for responses; or

(~~4~~) (3) ~~to~~ delete items requiring detail in a question or category if the filer indicates—either by checking "no" or "none" or by stating in words—that there is nothing to report on that question or category~~; and~~.

~~(5) for court orders in a particular case only, to make any change that does not conflict with an applicable rule or with an Official Form that the order addresses or implements.~~ ~~Forms may be combined and their contents rearranged to permit economies in their use.~~

(b) DIRECTOR'S FORMS. The Director of the Administrative Office of the United States Courts may issue additional forms for use under the Code.

(c) CONSTRUCTION. The forms shall be construed to be consistent with these rules and the Code.

COMMITTEE NOTE

This rule is amended and reorganized into separate subdivisions.

Subdivision (a) addresses permissible modifications to Official Forms. It requires that an Official Form be used without alteration, except when another rule ~~or~~, the Official Form itself, or the national instructions applicable to an Official Form permit~~s~~ alteration. The former language generally permitting alterations has been deleted, but the rule preserves the ability ~~of a filer~~ to make minor modif~~y~~ications to an Official Form that do not affect substance or the order in which information is presented on a form. Permissible changes include those that merely ~~to use a typeface substantially similar to the prescribed size and style, to~~ expand or delete the space for responses as appropriate~~, and to~~ or delete

inapplicable items so long as the filer indicates that no response is intended. For example, when more space will be necessary to completely answer a question on an Official Form without an attachment, the answer space may be expanded. Similarly, varying the width or orientation of columnar data on a form for clarity of presentation would be a permissible minor change. On the other hand, many Official Forms indicate on their face that certain changes are not appropriate. The Official Form for chapter 13 plans, for example, requires that topics be addressed in a particular order, and that nonstandard provisions be addressed in a specified section of the ~~plan~~form. Any changes that contravene the instructions on the Official Form ~~chapter 13 plan~~ would be prohibited by this rule.

~~The rule permits modification of court orders included in the Official Forms, provided that the modification does not conflict with any applicable rule or Official Form. For example, the court may add an additional provision to the Order Approving Payment of Filing Fee in Installments, which is part of Official Form 3A.~~

The creation of subdivision (b) and subdivision (c) is stylistic.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: MORTGAGE CLAIM FORM WORKING GROUP

SUBJECT: REVISED MORTGAGE PROOF OF CLAIM ATTACHMENT

DATE: MARCH 20, 2014

At the spring 2011 meeting, the Advisory Committee gave its final approval to Form 10A (Attachment A)—Mortgage Proof of Claim Attachment. The form, which went into effect on December 1, 2011, is required to be filed in an individual debtor case with the proof of claim ("POC") of a creditor that asserts a security interest in the debtor's principal residence. Attachment A requires a statement of the principal and interest due as of the petition date; a statement of prepetition fees, expenses, and charges; and a statement of the amount necessary to cure any default as of the petition date.

The Working Group now presents for the Committee's consideration a revised Attachment A, which requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. **The Working Group recommends that the proposed form—to be redesignated as Official Form 410A—be published for comment in summer 2014.**

Background

When the Committee gave its approval to Attachment A in April 2011, members carefully considered the comments and testimony that had been submitted in response to the publication of the proposed form. Committee members agreed that a major issue raised at the hearing and in the comments was whether a mortgage claimant should be required to provide an

account history as an attachment to its POC. The Committee had considered this issue prior to recommending the proposed form for publication, and the decision not to require this information had been based largely on a desire to increase the disclosure of information about the basis for a mortgage claim without imposing an undue burden on the mortgagee or overwhelming the debtor with too much detail.

At the spring 2011 meeting, the Committee discussed various options that would allow further consideration of whether a loan history should be required. In the end, it agreed with the Consumer and Forms Subcommittees that it was important that the new rules requiring greater disclosure of information about mortgage claims[1] and the implementing forms[2] not be delayed and that they remain on track to take effect in December 2011. Amending Attachment A to require a loan history would have required republication and thus a year's delay in the effective date of the form. The Committee decided that all of the mortgage forms should take effect at the same time as the new rule provisions.

The Committee did not, however, dismiss completely the possibility of requiring a loan history. Testimony and comments supporting such a requirement persuasively explained the value of the information included in a loan history. But only a small number of persons had been heard from. The Committee decided that gathering information about people's experience with the proposed rules and forms after they went into effect could be helpful to the Advisory Committee in deciding later whether to require a loan history.

With that purpose in mind, the Committee convened a mini-conference of mortgage lenders and servicers, chapter 13 trustees, consumer debtors' attorneys, judges, and a bankruptcy

[1] These rules are Rules 3001(c)(2) and 3002.1.

[2] At the same time that Attachment A was approved, the Committee also approved new Official Forms 10S1 (Notice of Mortgage Payment Change) and 10S2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges).

clerk, along with members of the Committee, in September 2012 in Portland, Oregon. Among the issues on which there was general agreement among the mini-conference participants were the following suggestions for changes to Attachment A:

- A detailed payment history should be attached to the proof of claim. The payment history should be in a form that can be automated.
- Disclosure requirements should be uniform nationwide; local variations should be prohibited.
- The proof of claim attachment should include the amount of the regular mortgage payment applicable as of the petition date.
- The proof of claim attachment should show the calculation of the total claim as of the petition date.

At the spring 2013 meeting, the Committee approved the formation of a working group to draft a new Attachment A that incorporates the changes suggested at the mini-conference.

The Working Group and Its Recommendation

The Consumer and Forms Subcommittees created the Mortgage Forms Working Group with the following members: Judge Perris, Ms. Michaux, Ms. Elliott, Professor Gibson, and at the invitation of Judge Wedoff, the following persons from outside the Committee: Bankruptcy Judge Elizabeth Magner (E.D. La.); Mike Bates of Wells Fargo; and Debra Miller, chapter 13 trustee (N.D. Ind.). Ms. Michaux chaired the group, which met by conference call throughout the latter part of the summer and the fall of 2013 and during the winter of 2014. Judge Magner, Mr. Bates, and Ms. Miller—all of whom, from different perspectives, are knowledgeable about the issues presented by home mortgage claims—played a critical role in negotiating form provisions that were acceptable to the group.

The proposed form, which would replace the existing Attachment A, follows this memorandum in the agenda materials, along with a Committee Note and Instructions. The new form would require a home mortgage claimant to provide a history of the loan account starting

with the "First Date of Default." As explained in the Committee Note and Instructions, that date is the first date on which the borrower failed to make a payment in accordance with the terms of the note and mortgage, unless the note was subsequently brought current with no principal, interest, fees, escrow payments, or other charges immediately payable. The loan history would show when payments were due; when the debtor made payments and how those payments were applied; when fees and charges were incurred; and what the balances were for the various components of the loan after amounts were received or fees and charges were incurred. Advocates of requiring a loan history have stated that disclosure of this information will enable a debtor to see the basis for a mortgage claim and the arrearage amount, thereby facilitating resolution of disputes about mortgage amounts in some cases and providing a basis for objecting to claim amounts in others.

From the mortgage claimant's perspective, the proposed Attachment A has the advantage of being in a format that can be automated, unlike the existing form that must be completed by hand. Mr. Bates has consulted with various lenders to determine that automation of the form is feasible. The pending amendments to Rule 9009 would require the uniform implementation of the new form in all districts, thereby allowing creditors to develop universally applicable software for form completion.

In addition to requiring a loan history, the proposed Attachment A would provide spaces for calculating the total amount of the debt and any prepetition arrearage. It also calls for the claimant to state the amount of the monthly mortgage payment as of the petition date.

In sum, the proposed form requires a mortgage claimant to disclose all of the information that the current Attachment A requires, but it does so in a format that the Working Group believes is more transparent and is capable of being more easily and accurately completed. The

proposed form also requests information that the current form does not—statement of the current mortgage payment and calculation of the total amount of the debt. These changes are responsive to the views expressed at the mini-conference. Publication of the form will allow for greater input on whether the proposed changes are desirable.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND FORMS

SUBJECT: AMENDMENTS TO RULE 3002.1

DATE: MARCH 17, 2014

I. Follow-up from Fall Meeting

At the fall 2013 meeting in Minneapolis, the Advisory Committee accepted the Subcommittees' recommendation to propose for publication an amendment to Rule 3002.1(a) that clarifies (1) that the rule applies to any chapter 13 plan that provides for the maintenance of home mortgage payments, whether or not an arrearage is being cured, and (2) that it applies regardless of whether the trustee or the debtor makes the maintenance payments to the holder of a home mortgage claim. The amendment as approved at the meeting and its accompanying Committee Note follow:

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~ secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments ~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~.

* * * * *

COMMITTEE NOTE

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

The Advisory Committee also considered when the notice obligations under Rule 3002.1 should cease to apply if the automatic stay is lifted with respect to the debtor's principal residence. The Subcommittees presented two possible cessation dates to the Committee without making a recommendation: (1) the effective date of the order terminating the stay and (2) the date of transfer of title from the debtor. After a full discussion of the question, the Committee voted, with 3 dissents, to adopt the first option. With that amendment included, the rule provides as follows:

Rule 3002.1. Notice Relating to Claims Secured by Security Interest in the Debtor's Principal Residence

(a) IN GENERAL. This rule applies in a chapter 13 case to claims (1) that are ~~(1)~~ secured by a security interest in the debtor's principal residence, and (2) for which the plan provides that either the trustee or the debtor will make contractual installment payments ~~provided for under § 1322(b)(5) of the Code in the debtor's plan~~. Unless the court orders otherwise, the notice requirements of this rule cease to apply when an order terminating or annulling the automatic stay becomes effective with respect to the residence securing the claim.

* * * * *

Following the Committee vote, a member of the Committee suggested that language be included in the Committee Note to encourage courts in appropriate situations to be open to requests to continue the reporting requirements after stay relief is granted. The Subcommittees reviewed a draft of the Committee Note during their conference call on January 17. **They recommend that the following addition to the Committee Note (indicated by underlining) be approved to reflect the additional proposed amendment to subdivision (a)**:

COMMITTEE NOTE

Subdivision (a) is amended to clarify the applicability of the rule. Its provisions apply whenever a chapter 13 plan provides that contractual payments on the debtor's home mortgage will be maintained, whether they will be paid by the trustee or directly by the debtor. The reference to § 1322(b)(5) of the Code is deleted to make clear that the rule applies even if there is no prepetition arrearage to be cured. So long as a creditor has a claim that is secured by a security interest in the debtor's principal residence and the plan provides that contractual payments on the claim will be maintained, the rule applies.

Subdivision (a) is further amended to provide that, unless the court orders otherwise, the notice obligations imposed by this rule cease on the effective date of an order granting relief from the automatic stay with regard to the debtor's principal residence. Debtors and trustees typically do not make payments on mortgages after the stay relief is granted, so there is generally no need for the holder of the claim to continue providing the notices required by this rule. Sometimes, however, there may be reasons for the debtor to continue receiving mortgage information after stay relief. For example, the debtor may intend to seek a mortgage modification or to cure the default. When the court determines that the debtor has a need for the information required by this rule, the court is authorized to order that the notice obligations remain in effect or be reinstated after the relief from the stay is granted.

II. Other Issues for Consideration

At the September 2012 mini-conference on the mortgage forms and rules, some other issues were identified regarding the ambiguity or uncertainty of Rule 3002.1. During the January 17 conference call, the Subcommittees considered whether to pursue any of those issues now so

that any additional amendments could be included with the ones discussed above. The additional issues regarding Rule 3002.1 that the Subcommittees considered were the following:

- Should home equity lines of credit (HELOCs) either be excluded from Rule 3002.1 or treated differently under the rule?
- Should a procedure for objecting to a payment change be added to the rule?
- Should the rule provide an affirmative procedure for seeking a declaration at the end of a case that the mortgage is current?
- Should Rule 3002.1(c) be clarified regarding whether there is a need to report charges that the court has already approved?
- Should the claims docket continue to be used for filing notices of fees, expenses, and charges?

The Subcommittees concluded that the already approved amendments should not be held up while the remaining issues are studied. **The Subcommittees therefore recommend that the amendments to Rule 3002.1 that were approved at the fall 2013 meeting, along with the revised Committee Note, be sent to the Standing Committee with a request for publication in August 2014 and that the additional issues be retained on the Subcommittees' joint agenda.**

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND FORMS

RE: REQUIRED DISCLOSURE OF THE INTEREST RATE ON REAFFIRMATION AGREEMENT FORMS

DATE: MARCH 26, 2014

Mike Bates, senior counsel at Wells Fargo, has submitted a suggestion (13-BK-K) about a potential discrepancy between the forms for reaffirmation agreements. Form 240A/B ALT, a Director's Form, gives a choice of disclosures regarding the interest rate on the reaffirmed debt. That form requires the disclosure of the rate of interest calculated as (i) the annual percentage rate, or (ii) the simple interest rate applicable to the amount reaffirmed. By contrast, Official Form 27 (Reaffirmation Agreement Cover Sheet), requires disclosure of the annual percentage rate and does not give the choice of disclosing the simple interest rate instead. Mr. Bates raises the concern that parties who choose to disclose only the simple interest rate on Form 240A/B ALT are nevertheless required to go through the exercise of calculating the annual percentage rate in order to complete Official Form 27.

The Subcommittees discussed the suggestion during a joint conference call on January 17, 2014. **The Subcommittees recommend that Official Form 27 be altered to clarify that the form does not always require the calculation of the annual percentage rate.** Official Form 27 is intended to allow a court to determine whether reaffirmation would result in an undue hardship for the debtor. Because the Bankruptcy Code permits disclosure of the simple interest rate in appropriate circumstances, and because the additional information provided by the annual

percentage rate is not essential for courts in making the undue hardship determination, the Subcommittees concluded that Official Form 27 should be harmonized with Form 240A/B ALT.

Official Form 27 is being restyled and redesignated as Official Form 427, which was published for public comment in August 2013. The restyled form will not go into effect until December 2015 at the earliest. Although there would be time to republish the form, the Subcommittees do not view the changes to the form as requiring republication.

Reaffirmation and Forms 240A/B ALT and 27

The Bankruptcy Code imposes a number of prerequisites to the enforceability of an agreement reaffirming an otherwise dischargeable debt. Under Code § 524(c)(2), a reaffirmation agreement is enforceable only if, among other things, the debtor receives certain disclosures at or before the time the debtor signs the agreement. Those disclosures are specified in § 524(k), which requires the disclosure statement to include the "Annual Percentage Rate" and to use that term. § 524(k)(3)(E). But the Code gives a choice of disclosures that satisfy the defined term "Annual Percentage Rate." It can be disclosed as the annual percentage rate, determined under provisions of the Truth in Lending Act, that was disclosed in the most recent statement prior to the debtor's entering into the reaffirmation agreement.[1] In the alternative, the rate can be disclosed as the simple interest rate applicable to the amount reaffirmed as of the date the disclosure is made to the debtor. Disclosure of the simple interest rate, however, is appropriate only to the extent that the annual percentage rate "is not readily available or not applicable." §

[1] The Code points to two different provisions of the Truth in Lending Act to determine the annual percentage rate, depending on whether or not the debt is based on an open-ended credit plan. *See* § 524(k)(3)(E)(i)(I), (ii)(I).

524(k)(3)(E)(i)(I), (ii)(I). At the election of the party making the disclosures, both rates may be disclosed. § 524(k)(3)(E)(i)(III), (ii)(III).

This statutory structure leads to a non-intuitive result. The term "Annual Percentage Rate" defined in § 524(k)(3)(E) can mean *either* the annual percentage rate calculated in accordance with the Truth in Lending Act, or it can mean the simple interest rate. In other words, the "Annual Percentage Rate" could be the simple interest rate.

Form 240A/B ALT, which is used when the parties draft their own reaffirmation documents instead of using the Director's Forms for reaffirmation agreements, incorporates language reflecting § 524(k)(3)(E)'s choice of disclosures. Part A of the form permits disclosure of either the annual percentage rate under the Truth in Lending Act or the simple interest rate "to the extent . . . [the annual percentage] rate is not readily available or not applicable." By contrast, Line 3 of Official Form 27 requests the "[a]nnual percentage rate of interest" prior to bankruptcy and under the reaffirmation agreement. It does not refer to the option in § 524(k)(3)(E) of disclosing only the simple interest rate if the annual percentage rate is not readily available or not applicable.

Discussion

The Subcommittees discussed ways to reconcile the two forms such that it would not be necessary to calculate the annual percentage rate for Official Form 27 if the simple rate of interest were disclosed on Form 240A/B ALT. A more straightforward reading of the forms, however, is that Official Form 27 does require the calculation of the annual percentage rate even in cases when Form 240A/B ALT would not require it.

One could view Official Form 27 and Form 240A/B ALT as being in harmony for two reasons. First, because § 524(k)(3)(E) defines "Annual Percentage Rate" in a way that sometimes embraces the simple interest rate, it is arguably permissible, when the annual percentage rate is not readily available or not applicable, to report the simple interest rate on Line 3 of Official Form 27. As Mr. Bates's suggestion indicates, however, that is not a natural reading of the form. Second, a party completing the form could write "N/A" for "not available" or "not applicable"—again, in keeping with § 524(k)(3)(E).[2] Nevertheless, parties completing Official Form 27 would likely believe it necessary to disclose the annual percentage rate on Line 3 as calculated under the Truth in Lending Act. Whether this was intended when the form was first drafted is not clear. The Committee Note is silent on the issue, and a perusal of the Advisory Committee archives from when Official Form 27 was being considered for publication does not reveal any discussion of the interest rate disclosure.[3]

The Subcommittees then considered whether the discrepancy between Official Form 27 and Form 240A/B ALT is appropriate, in light of the different purpose that Official Form 27 serves. Official Form 27 aids the court's determination of the question whether reaffirmation would create a presumption of undue hardship for the debtor. This is the stated purpose in the form's Committee Note. Under § 524(m), a presumption of undue hardship arises if the debtor's monthly income less the debtor's monthly expenses (as shown on the statement in support of the reaffirmation agreement) is less than the scheduled payments on the reaffirmed debt. If that

[2] It should be noted, however, that the fillable version of the form available on the U.S. Courts website accepts only numeric entries on Line 3.

[3] Official Form 27 was published in August 2008 and went into effect in December 2009. The Advisory Committee discussed the draft form at its spring 2007 meeting. After approving several changes to the draft at that meeting, the Advisory Committee approved publication of the form. None of the approved changes involved what is now Line 3.

presumption is not rebutted to the court's satisfaction, the court may disapprove the agreement. § 524(m)(1). Official Form 27 is a cover sheet that aims to capture, in an accessible format, the information necessary to judge if the proposed reaffirmation agreement would create an undue hardship.

The Subcommittees do not believe, however, that disclosure of the annual percentage rate is essential for a court's determination of undue hardship under § 524(m). The annual percentage rate, which takes into account a variety of costs associated with borrowing, is intended to reveal the "true" rate of interest on a loan—information that the simple interest rate might mask. But a judge called to consider undue hardship under § 524(m) will focus on more direct evidence of whether a reaffirmed debt is beyond the debtor's ability to repay, such as the total monthly payment.

To make clear that it is not always necessary to calculate and disclose the annual percentage rate on Official Form 27, the Subcommittees recommend two changes to Line 3. The first is to use the capitalized term "Annual Percentage Rate"—rather than "Annual percentage rate of interest"—to emphasize that the term is defined in the Code. The second is to include a reference to the relevant Code provision, § 524(k)(3)(E). These changes would be explained in the following Committee Note:

COMMITTEE NOTE

> Line 3 of the form has been changed to clarify the requirement to disclose an annual percentage rate of interest. Section 524(k)(3)(E) of the Bankruptcy Code defines the "Annual Percentage Rate" to be disclosed in connection with a reaffirmation agreement. Line 3 of the form now includes a reference to that Code provision, which in appropriate circumstances permits disclosure of the simple interest rate as the Annual Percentage Rate.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: FORMS MODERNIZATION PROJECT

DATE: MARCH 26, 2014

A. Background

The Bankruptcy Official Forms Modernization Project (FMP) began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Subcommittee, working in liaison with representatives of other relevant Judicial Conference committees.

As explained in an earlier memorandum, the dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF (Next Gen), and the modernized forms are being designed to use the enhanced technology that will become available through Next Gen. The Advisory Committee has decided to implement the modernized forms in stages, which should allow for fuller testing of the technological features and a smoother transition. A small number of the modernized forms became effective on December 1, 2013: the fee waiver and installment fee forms (B3A and B3B) and the income and expense forms (B6I and B6J). The means test forms (B22A-1, B22A-2, B22B, B22C-1, and B22C-2) were revised and republished last summer. Subject to obtaining the necessary approvals, the means test forms will become effective on December 1, 2014. The bulk of the remaining forms will be submitted with a request to make them effective on December 1, 2015, or as soon thereafter as technologically possible. That effective date will allow the remaining

individual forms to become effective at the same time as the non-individual forms, which will not be published until later this year.

Although delivery of Next Gen 1.1 to the bankruptcy courts will start in early 2015, it is unclear how quickly the courts will implement it. Next Gen 1.2 is scheduled to be delivered to the courts in mid-2015. Before the courts can "go live" on Next Gen, they will need to be on a centralized server and do testing, training, and other tasks. By the time the bulk of the forms become effective in December 2015, it is expected that most courts will be live on Next Gen.

From a forms perspective, the major change in Next Gen will be the ability to store all forms information as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose. The use of centralized servers will not prevent local courts from extracting whatever forms data they want and displaying it in a customized format. Unfortunately, the extraction of data in a format and order created by a judiciary employee using a report writing tool will be limited in versions 1.1 and 1.2 of Next Gen, because forms data must be turned into business objects before it can readily be used in a report. Recently the technologists within the judiciary have advised that data from Schedules 106I and 106J will be captured as business objects, so people working in the judiciary will be able to prepare reports using that data. Those schedules, which contain information about an individual debtor's income and expenses, are frequently used by judges and clerks' office personnel in processing fee waivers, reaffirmation agreements, and chapter 13 plan confirmations. It is uncertain what additional forms data will be made into business objects, and when that will occur.

The information on the published forms is frequently accessed by both judiciary and non-judiciary end users. Once the judiciary implements the report writing tool and the full data

capture available through Next Gen, judges and clerks' staff will be able to use forms data to generate customized reports using any of the available data. It is unclear what, if any, access to forms data non-judiciary users will have in Next Gen. Providing such access will require development of both pertinent policies of the Judicial Conference of the United States (JCUS) and pertinent technology in Next Gen. During that process the JCUS can address the concerns raised about data access. Currently, Next Gen is not scheduled to include technology that would allow non-judiciary users to access forms data in Next Gen.

B. Fall 2013 Advisory Committee Meeting

During the fall 2013 Advisory Committee meeting, most of the forms modernization discussion focused on the draft non-individual forms. At the request of the FMP and the Subcommittee, the Advisory Committee provided comments on the following draft non-individual forms: B201 (Petition), B202 (Declaration), B204 (20 largest creditors), B205 (Involuntary Petition), B206 – Summary, B206A/B, B206D, B206E/F, B206G, B206H (Schedules), and B207 (SOFA). In addition, the Committee reviewed the draft Chapter 15 Petition for Recognition of Foreign Representative (B401) and the Proof of Claim (B410).

C. FMP Progress Since the Fall 2013 Advisory Committee Meeting

1. Non-individual and other forms not yet published

a. Overview

Before the spring 2012 meeting of the Advisory Committee, the FMP adopted the following guidelines for drafting the non-individual debtor forms:

- Eliminate requests for information that pertains only to individuals.
- To the extent possible, parallel how businesses commonly keep their financial records.

- Include information identifying where and how the requested information departs from information maintained according to standard accounting practices.

- Provide better instructions about how to value assets listed in the schedules, and provide a valuation methodology that will allow people who commonly sign schedules to respond without needing expert asset valuations.

- Revise the secured debt schedule to clarify when debts are cross-collateralized and the relative priority of secured creditors.

- Require responsive information to be set out in the forms themselves and not simply included as attachments.

- Use a more open-ended response format, as compared to the draft individual debtor forms.

- Keep interdistrict variations to a minimum, particularly with respect to the mailing matrix.

Drafting of the modernized non-individual forms was done using an iterative approach. A drafting group of the FMP prepared drafts of the non-individual forms. Then, with assistance of Beth Wiggins and Molly Johnson from the Federal Judicial Center, research was done on ways the non-individual forms could be improved. They obtained input from the same groups of professionals who reviewed the individual forms, groups of chapter 11 attorneys, the National Association of Bankruptcy Trustees, representatives of the U.S. Trustee Program, a Western District of Michigan group put together by Judge Hughes, an Eastern District of California group put together by Judge Klein, and form software vendors.

b. Readying non-individual forms and other forms for publication

Consistent with the current fiscal constraints and the advanced stage of the FMP, work since the fall 2013 meeting has been done telephonically. During the fall of 2013, small FMP working groups finalized the non-individual forms that the Advisory Committee had reviewed at the fall 2013 meeting. This work was done as follows:

- Carolyn Bagin, the consultant assisting in developing the modernized forms, compiled a list of the suggestions, including those made by the Advisory Committee at the fall meeting. She made the noncontroversial changes and created a tracking chart showing what had been changed and what still needed to be discussed.

- Review of the proposed changes was assigned to **Judges Wedoff, Perris, Harris, and Wizmur, Chris Kohn, and Molly Johnson**.

- In addition, the group revised and finalized the instructions related to the non-individual forms.

The modernized non-individual forms, instructions, and proof of claim form are set forth in the appendix of materials for this meeting.

Since the fall 2013 meeting, the FMP has also drafted modernized versions of the following additional forms: B312, B313, B314, B315, B416A, B416B, B416D, and B424.

In modernizing forms B25A, B25B, B25C, and B26, the group decided that it would be better to take more time to consider substantive changes to the forms and to discuss the redrafted forms with some potential users before publication. Consequently, the non-individual forms submitted for publication to this Committee do not include those forms.

The FMP and the Forms Subcommittee request that this Committee approve publication of the modernized non-individual forms and instructions, the modernized proof of claim, the modernized Chapter 15 Petition for Recognition of Foreign Representative, and the other modernized forms not previously published. The numbers of the forms and instructions to be published are set forth in the conclusion to this report.

2. Individual Debtor Forms

a. Overview

In August 2013, the Standing Committee published and requested comment on the modernized individual case commencement forms and republished the means test forms (B22A-1, B22A-2, B22B, B22C-1, and B22C-2). The FMP substantively revised the Form B22 means test forms, first published in 2012, as a result of the comments received. In addition, the drafters created a new Official Form B22A-1Supp that can be used by those claiming means test exemptions based on certain types of military service. This permitted uniform line numbering. The provision, based on *Hamilton v. Lanning,* 560 U.S. 505 (2010), that requires disclosure of changes that are virtually certain to occur post-bankruptcy, was revised to provide that debtors must identify changes during the projected life of the plan, not just the twelve months after filing.

The members of the FMP were asked to review the comments received during the publication period. In addition, individual debtor form teams were assigned to review comments directed at specific forms and to recommend to the FMP whether the form should be revised. The following members of the FMP were assigned to the individual form review teams:

B101, B101A, B101B, B104, B105: Waldron, Perris, Wannamaker, Healy

B106Sum, B106A/B, B106C, B106D, B106E/F, B106G, B106H, B106Dec: Kohn, Michaux**,** Harris

B107, B112, B119, B121, B318, B423, B427: Harris, Lynch, Johnson, Ketchum

B22A-1, B22A-1Supp, B22B, B22C1, B22C2: Wedoff, Wizmur, Myers

Twenty-five formal comments on the forms were submitted by the February 18, 2014, deadline, and one other letter was informally submitted to the working group. The comments contained many specific suggestions. The overall evaluation of the draft forms was

mixed—some of the comments were positive, some were negative, and many made constructive suggestions for specific changes.

b. General Comments

Many of the general comments had been considered by the Standing Committee and this Committee last year in connection with the publication of the initial group of modernized forms. There was nothing in the current comments that caused the FMP to revisit the earlier decisions on the general comments. The general comments raised again, and the resolution last year with respect to similar comments, consisted of the following:

1. Should the forms be modernized using the approach selected? The FMP considered this most fundamental question—whether the project should proceed notwithstanding the negative commentary. After reviewing the reasons for the project and the guiding principles behind the redesign, the group decided that the project should proceed.

2. Will the modernized forms encourage more pro se filings? Do the revised forms unduly cater to pro se filers? Whether the plain English and ease of use of the modernized forms will encourage more filing without the assistance of counsel has been the subject of discussion since the beginning of the FMP. Comprehensive instructions that explain the magnitude of what the bankruptcy filing will require and that provide ample warnings about the significance of the forms, and the possible consequences of inadequate filings, should discourage, not encourage, pro se filings. In addition, members of the FMP believe that it is important that forms be understandable to all debtors, including those who are represented, because debtors are required to sign the forms under penalty of perjury. The comments did not change those views.

A few of the comments raised a concern that information provided, particularly in the instructions, crosses the line into providing legal advice. The FMP concluded that eliminating

all instructions that provided legal statements, and some would argue legal advice, would reduce the value of the instructions in explaining both the meaning of, and the information necessary to complete, the forms. For example, the instructions contain a glossary that defines some of the technical terms found in the forms. To eliminate the glossary would reduce the chances that the debtor would understand the terms when they appear in the forms. The instructions were revised, however, to clarify that the person completing the forms is responsible for doing so properly. The FMP added the following to the instructions: "These instructions are not intended to provide, and should not be understood to provide, legal advice. They are not designed to fully explain, or be relied upon in interpreting, the law."

3. Are the new forms unduly long? The increase in the page length is a function of several factors. First, in an effort to increase accuracy and ease of use and to create a form with answers that can populate a usable database of answers, more specific questions are posed, and the debtor is often prompted to provide an answer. Second, rather than providing a dense set of instructions at the beginning of the form and then blank space for the answers, these forms provide instructions where the debtor is likely to need them. Third, more space is provided to answer some of the questions. Fourth, examples are often included to help the debtor understand what information is being requested. The group felt that these changes were likely to prompt more accurate, usable information. The forms often direct the debtor to skip inapplicable questions or sections. The ability of debtors to truncate answers—when the questions either do not apply or have been fully answered—may reduce the length of many of the filed forms. The modernized forms, coupled with proposed revised Bankruptcy Rule 9009, are designed so that a debtor can truncate the completed forms by eliminating unnecessary materials and reproducing only the pertinent answers.

c. Improvements in Wording, Format, and Consistency

The comments pointed out some inconsistency in format, raised some questions regarding consistency of content among some of the forms, and suggested some minor corrections of typographical errors. These comments were addressed during the course of finalizing the forms. They are not separately discussed in these materials.

d. Comments on Specific Forms

The FMP had several phone calls to discuss the comments and what changes should be made in response to the comments. Some comments apply to multiple forms and the instructions. When that is the case, the comment is discussed only once in this summary.

(1) **Means Test Forms - B22A-1, B22A-1Supp, B22B, B22C1, B22C2**

Commenters generally had a positive response to the revisions of the means test forms. The chapter 7 means test form was divided into three forms: B22A-1 Chapter 7 Statement of Your Current Monthly Income, B22A-1Supp Statement of Exemption from Presumption of Abuse Under § 707(b)(2), and B22A-2 Chapter 7 Means Test Calculation. All chapter 7 debtors will file the B22A-1. Only those few debtors who claim an exemption from the means test will file the B22A-1Supp. Above-median-income debtors will complete the B22A-2 Chapter 7 Means Test Calculation. The chapter 11 means test form, B22B, remains a single form. The chapter 13 means test form, like the chapter 7 form, has been divided into multiple parts. B22C-1 is the Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period. B22C-2 is the Chapter 13 Calculation of Your Disposable Income and is completed only by above-median-income debtors. The National Conference of Bankruptcy Judges, one of the commenters, thought that the reorganization and revision of the forms made them easier to read

and understand, making them easier for debtors to complete and more transparent to creditors and trustees.

Several refinements to the forms were made as a result of the comments, including:

1. The language in the box at the upper right hand corner stating that "The presumption of abuse is determined by Form 22A-2" was revised to read, "The presumption of abuse *will be calculated under* [rather than 'is determined by'] Form 22A–2."

2. The instructions regarding asking for help at the clerk's office was revised to make it clear that the clerk's office could help a filer locate the means test data, not help in completing the form. In addition, the applicable URL was moved to the instructions, which can be changed more easily than the form. The new language on the revised form reads, "To find the IRS standards, go online using the link specified in the separate instructions for this form. This information may also be available at the bankruptcy clerk's office."

3. On line 33 of Form B22A-2, the comments pointed out that the drafters had made a mistake, which the FMP corrected by removing the instruction "Do not deduct mortgage payments previously deducted as an operating expense in Line 9."

4. In response to the comment that the draft instruction regarding when chapter 7 relief can be denied under the means test was incorrect, the FMP revised the instruction to read, "Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors an amount that, under the Bankruptcy Code, would be a sufficient portion of their claims."

5. One commenter pointed out that an error had been made on Form B22B by failing to include space for a marital deduction if the debtor has a non-filing spouse. This was corrected by adding space for the marital deduction on lines 12-14 of the revised form.

6. Part 3 of Form B22C-2 was added in response to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010), which adopted a forward-looking approach to determining a chapter 13 debtor's projected disposable income. The Court held that changes to income or expenses reported elsewhere on the B22C forms that are certain or virtually certain to occur must be considered by the court. One comment suggested that debtors should be required to report such changes only if they occur within one year of the filing. The FMP rejected the suggestion because the one-year approach had been included in an earlier version of proposed changes to the form, and comments, which the Committee decided had merit, objected to the one-year limit on the ground that *Lanning* did not contain such a limit.

7. One comment suggested including additional detail regarding tax calculations and employer retirement deductions. The same commenter suggested dividing projected changes in income and expenses between Forms B22C-1 and B22C-2. The suggestions would add length and complexity to the forms, and the drafters did not think there was sufficient demand for the information to justify the added detail.

Some of the comments raised issues that have previously been debated and resolved for purposes of the current forms. The modernized forms continued the practice that has existed with respect to:

1. Whether income of a nondebtor spouse not used for household expenses of the debtor or the debtor's dependents is included in current monthly income as defined by § 101(10A).

2. Whether a debtor who completes the exemption form (B22A-1Supp) must also complete the Statement of Your Current Monthly Income (B22A-1).

3. Whether the means test exemption for reservists or national guard members is temporary.

4. Whether space should be provided for a debtor to deduct additional expenses beyond those already provided.

5. Whether business expenses should be deducted before, rather than after, calculation of the applicable commitment period.

6. Whether a filer should be given the option to use a different method for determining the number of dependents, provided that the filer explains if and why a different method is selected. The FMP concluded that the current form follows the IRS standards. Furthermore, if applicable law, including case law, requires use of a different method, the filer can calculate the number of dependents using applicable law.

7. Whether taxes and insurance included in the mortgage payment should be identified on line 9.b. (monthly amounts due for debts secured by debtor's residence) rather than on line 33 (deductions for debt payments). The deduction on line 9.b. is limited by the IRS-based housing allowance. Reporting taxes and insurance on this line would reduce that debtor's available housing allowance.

8. Whether vehicle ownership expenses should be a predetermined allowance based on the IRS Standards rather than the debtor's actual expense.

9. Whether the debtor should be allowed to deduct ongoing retirement plan contributions as specified in § 541(b)(7). The case law is divided on this point. The suggestion would involve a change in existing practice.

(2) Individual Petition and Related Forms - B101, B101A, B101B, B104, B105

A few changes were made to the petition in response to comments. First, line 13 was revised to remind debtors that, if they are a small business, they must attach their most recent balance sheet, state of operations, cash-flow statement, and federal income tax return, or follow the procedure in § 1116(1)(B) if any of the documents do not exist. Second, the language regarding fee waivers on line 8 was clarified to explain that a judge has discretion regarding whether to waive the fees. Third, the description of sole proprietorship on line 12 was revised to clarify that it is a business operated by the debtor, not one owned by the debtor, in order to avoid implying that a sole proprietorship is a separate legal entity. Fourth, the statement made by a chapter 7 debtor under penalty of perjury that he or she is aware of his or her options to proceed under chapters 7, 11, 12, and 13 has been revised so that the debtor states that he or she is aware that he or she may proceed only under the chapter(s) for which the debtor is eligible.

The eviction judgment forms (B101A and B101B) have been revised in response to the comment of the NCBJ, which pointed out that B101A should contain two parts -- one that allows the debtor to indicate that he or she has a prepetition eviction judgment against him or her and

the other that provides a way for the debtor to satisfy the requirements for staying in the property for the first thirty days postpetition. As originally drafted, B101A contained the second part, but not the first. The debtor's certifications in both the B101A and B101B have been revised to clarify that the debtor is required to pay only the amount in default, not the entire amount.

(3) Schedules - B106Sum, B106A/B, B106C, B106D, B106E/F, B106G, B106H, B106Dec

B106A/B: Property. There were several comments about Schedule A/B Property that the FMP considered. Many of the comments raised points previously considered during the drafting process. The following is a summary of some of the more significant comments and the response to them.

1. Terminology. At least one commenter thought that the terms used were confusing, but the FMP disagreed.

2. There were multiple comments about the instruction to separately list and describe property worth more than $500. This number, although not in the Code, was inserted to avoid listing de minimis property items. The commenters pointed out that the Code does not contain a minimum. The FMP thought that the comments were well-taken and deleted the $500 minimum value.

3. Several commenters suggested that Schedule A/B include information about liens on and exemptions claimed with respect to particular property. The FMP had considered this previously and decided not to include lien information, relying in part on the availability of technology that

integrates the asset, liability, and exemption information reported on different schedules. The comment did not cause a change of mind.

4. In the description of vehicles, the draft form described the mileage of the vehicle in broad categories. Based on the comment that actual mileage would be more helpful, the FMP revised line 3 to ask the approximate mileage of each of the vehicles.

5. One comment suggested that the debtor identify who is the owner of all property, not just the real property and vehicles. The FMP rejected this suggestion because the real property and vehicles are likely to be among the debtor's most valuable assets and therefore additional information is appropriate. A line was added requesting that, with respect to real property, the debtor describe the nature of the debtor's interest, if known. In those instances when the trustee and creditors may want more information about other assets, they can ask the debtor.

6. One commenter suggested adding a space for the debtor to value any digital currency. This was rejected as being something that arises relatively infrequently.

7. In response to a suggestion, line 49 was expanded to include additional types of assets; it was changed from "Farm and fishing equipment and implements" to "Farm and fishing equipment, implements, machinery, fixtures, and tools of the trade."

Some of the comments received were suggestions for changes from current practice rather than comments on the modernization of the forms. Included in this category were:

1. Comment that local property identification number should be required.

2. Comment that space should be added so that the filer can explain how they determined value.

3. Comment that information should be added about counsel handling debtor's claims and lawsuits.

4. Comment that the form provide account identification information for deposits of money.

B106C - Schedule C: The Property You Claim as Exempt. Ever since the United States Supreme Court decided *Schwab v. Reilly*, 560 U.S. 770 (2010), there has been controversy about how the schedule of exempt property should be phrased and organized. The Committee published, but withdrew, an amendment of Official Form B6C, the schedule of exempt property, in response to *Schwab*. The Committee chair requested that the FMP further consider an amendment to Form B6C that would more directly address the *Schwab* decision while accounting for the concerns raised in comments to the proposed revision of that form after the decision. After the FMP drafted the modernized version of the schedule of exempt property (B106C), the Standing Committee raised concerns about whether the draft adequately incorporated the decision. In response to those concerns, a Joint Subcommittee recommended revising the exemption schedule to include two checkboxes: one checkbox that would allow the debtor to specify a dollar amount for the exemption, and a second checkbox that would allow the debtor to exempt "100% of fair market value *up to the applicable statutory limit*." As explained in the minutes from the spring 2013 meeting of this Committee, the italicized language would allow the debtor to easily follow *Schwab* without prompting unnecessary objections from case trustees. The published Schedule C (B106C) contained this as one of two options that the debtor

could select for the amount of the exemption. The other option required the debtor to fill in a dollar amount.

As with the prior attempt to address *Schwab*, the draft change was controversial. Several of the comments were critical, but for different reasons. The National Association of Consumer Bankruptcy Attorneys (NACBA) objected that the form as drafted would not provide finality on exemptions. It suggested that Schedule C and Rule 4003(b) be amended in a way that would make it clear whether the debtor was claiming as exempt the entire value of the debtor's interest in the property and requiring interested parties to object by the deadline for objections to exemptions, even if the objection was based on valuation of the asset claimed exempt. The National Conference of Bankruptcy Judges (NCBJ) thought that the form was confusing and would lead to increased exemption litigation. It recommended that the second option be changed to "100% of fair market value *(for exemptions unlimited in dollar amount).*" It also thought that there were inconsistencies between the instructions and the form. The National Association of Bankruptcy Trustees (NABT) objected to the second option ("100% of fair market value up to the applicable statutory limit") for many of the same reasons that it had opposed the 2011 proposed amendment of Schedule C. It agreed with the change suggested by the NCBJ.

The FMP thought that the substance of the objections went beyond modernizing the forms and has been considered previously by the Committee. If there are to be further changes, the FMP suggests that the matter be returned to the Consumer Subcommittee for consideration.

One other substantive comment regarding Schedule C involved eliminating whether Debtor 1, Debtor 2, or both debtors own particular property claimed exempt. This information is

contained in Schedule A/B for real property and vehicles, and the FMP did not believe that the space required to obtain ownership information on Schedule C was justified.

NABT suggested including additional columns on Schedule C for full market value of the property, liens against the property, and net value to the estate. The FMP rejected this suggestion in part because it seeks information not on the current form and requires the debtor to repeat information that is available elsewhere on the forms. This Committee may want to consider this suggestion in the future.

B106D - Creditors Who Have Claims Secured by Property and **Form 106E/F - Creditors Who Have Unsecured Claims**. The NCBJ comment pointed out that the word "major" in the instruction to list creditors in alphabetical order of the *major* creditor who holds each claim is unclear. As suggested, the word was deleted. Another commenter suggested that Schedules D and E/F should not require that creditors be listed alphabetically because of difficulties encountered by *pro se* debtors when they add omitted creditors or change creditors from secured to unsecured. The FMP responded by changing the instruction on both forms to read, "As much as possible, list the claims in alphabetical order according to the creditor's name."

The NCBJ suggested that requiring the debtor to identify community claims was confusing. Several states are community property states, which has an impact in bankruptcy. In order to make the language on Schedule D clearer, it was changed to "Check if this is a community debt" instead of asking whether the claim related to a community debt.

The NCBJ suggested adding a check box for "None" at the beginning of Part 2 so that all debtors would complete this part. The FMP rejected this suggestion because it would require some debtors to file a basically blank page, which the design of the forms avoids.

Another comment objected to the instruction to list creditors holding multiple claims once for each claim and to list the last 4 digits of the account number on B106E/F. This information helps those conducting claims audits and assists creditors in identifying the debtor. Some creditors are abandoning the practice of using the social security numbers to identify account holders, so sometimes they need account numbers. The current forms give the debtor the option of including account numbers for unsecured claims. The members of the FMP thought that requiring the last 4 digits of the account number is not unduly burdensome given the benefit.

The Bankruptcy Clerks Advisory Group (BCAG) suggested the deletion in Part 4 of the explanation that certain totals from Schedule E/F are needed for statistical reasons. The FMP rejected this suggestion because Congress requires the collection and submission to it of the data, and debtors should know that the information is requested for statistical reasons.

B106G - Schedule G: Executory Contracts and Unexpired Leases and **B106H - Schedule H: Your Codebtors**. At the suggestion of NCBJ, changes were made to clarify the wording at the beginning of each form. The instruction in point 2 of Schedule G to state what each executory or lease is for was rephrased. On Schedule H, a description of the term "codebtor" was moved from line 3 to the beginning of the introductory instruction. In addition, Schedule G was added on line 3, column 2, as one of the possible locations where the creditor is listed.

B106Dec - Declaration About an Individual Debtor's Schedules. In response to comments from the NCBJ and the US Trustee Program, the criminal penalty explanation was revised to say that individuals who commit one of the enumerated crimes related to the schedules can be fined up to $250,000, rather than $500,000, and can be imprisoned for up to 20 years rather than 5 years.

B106 Committee Note. This note was revised to be consistent with changes made to the forms.

(4) Form B107 - Statement of Financial Affairs for Individuals Filing for Bankruptcy (SOFA)

Some of the comments on this form were substantive, while others were stylistic. The following summarizes substantive comments and the responses to them:

1. In response to comments about the omission of debtor's marital status from the modernized forms, new question 1 was added to the SOFA that asks the debtor's current marital status. It does not ask whether the debtor has previously been married and does not ask for the former spouse's name. If either of those might be significant, the trustee can ask the debtor about them without having the information on forms in the public record.

2. The NABT commented that line 5, which asks about whether the debtor's debts are primarily consumer debts, fails to recognize that the response for Debtor 1 and Debtor 2 in a jointly administered case could be different, in which case only one of them would quality for an exemption from the means test. As a result of this comment, line 6 (formerly line 5) was

changed from “My debts are not primarily consumer debts” to “Neither Debtor 1 nor Debtor 2 has primarily consumer debts.”

3. At the suggestion of NCBJ, on line 17, an example of a transfer made as security was inserted in order to clarify what information is requested.

4. On line 21, the instruction that the debtor not include information about storage units that are part of the building where the debtor lives was deleted because the NCBJ suggested that such information should be provided.

5. At the suggestion of the NCBJ, and in order to be consistent throughout the forms, a warning to the debtor about the consequences of a false statement was added.

Comments not mentioned above, or suggestions for changes not made, were rejected by the FMP as either unnecessary or not an improvement. One rejected change merits explanation, because it was rejected for reasons of consistency. The NCBJ suggested rewriting line 26 in a way that would move the “Yes” checkbox to before the “No” checkbox. The suggestion would change the order of the checkboxes established throughout the entire set of forms. “No” comes before “Yes” because, in most cases, if the respondent has nothing to add, he or she can move on quickly and not have to read extra material.

(5) Form B112 - Statement of Intention for Individuals Filing Under Chapter 7

Two comments observed that the word "give" on the draft form is not the equivalent of "surrender," which is the word used in the pertinent statutes. The FMP agreed with this observation and made the appropriate change.

The options regarding what a debtor intends to do were clarified by changing the wording format of the debtor's options. The revised options are:

- ❑ Surrender the property to the creditor.
- ❑ Retain the property and redeem it.
- ❑ Retain the property and enter into a *Reaffirmation Agreement*.
- ❑ Retain the property and explain:

The Committee Note was made more precise about the debtor's obligation to enter into a Reaffirmation Agreement if the debtor wants to reaffirm a debt.

(6) Form B119 - Bankruptcy Petition Preparer's Notice, Declaration, and Signature

In response to a comment that a petition preparer sign each document prepared, the FMP revised Form B119 to make the declaration part of each document identified as having been prepared by the petition preparer. Form B119 follows current practice of providing a specific declaration that petition preparers can use with multiple documents.

The FMP rejected the suggestion that the warning to petition preparers regarding criminal consequences should point out that such consequences can apply even if the bankruptcy case is

dismissed. As revised, the warning is broad enough to cover cases that are dismissed because of a petition preparer's knowing attempt to disregard the Bankruptcy Code or applicable rules.

(7) **Form B121 - Statement About Your Social Security Numbers**

Several changes were made to the introductory instructions in response to the comments. The following sentence was moved from the second paragraph to the first paragraph: "Please consult local court procedures for submission requirements." In the second paragraph, the last sentence was deleted in order to eliminate a potential misimpression about the extent to which the debtor's full social security number will be made available to creditors. The warning regarding potential criminal penalties was rewritten to make it consistent with the other warnings in the individual case commencement documents.

(8) **Form B318 - Order of Discharge; Form B423 - Certification About a Financial Management Course**, and **Form B427 - Cover Sheet for Reaffirmation Agreement**

The NCBJ suggested several changes in the discharge order, including that the information regarding the discharge be merged, rather than having separate notices to creditors and to the debtor. The FMP agreed with that suggestion and has redrafted the discharge order to make clear that the information provided pertains to both debtors and creditors. The NABT requested that information be provided pointing out the limited impact of discharge on case administration and the debtor's on-going duties to cooperate in administration. The FMP thought that the NABT's request involved providing legal advice beyond the rudimentary legal information provided in the forms and instructions.

BCAG suggested that the financial management course certification (B423) explain what happens if the course provider advises the clerk of court of the debtor's completion. This change was made. Stylistic changes were made as suggested.

Commenters suggested clarifying the filing instructions for the cover sheet (B427) and related reaffirmation agreement and changing question 11 regarding debtor's counsel's role in negotiating the reaffirmation agreement. The current form asks: "Was debtor represented by counsel during the course of negotiating this reaffirmation agreement?" The modernized form asks, "Did counsel represent the debtor in negotiating the reaffirmation agreement?" If the answer is "yes" on either, the forms then ask whether counsel executed a declaration or affidavit. The NCBJ's comment pointed out the varying case interpretations of the meaning of "representing" the debtor during a negotiation and counsel's duties. Neither the current form, nor the modernized version, take a position on the law. They simply ask debtor to tell the court what role counsel has had in the negotiation process. Only stylistic changes were made in the form.

(9) **Instructions**

Numerous comments were submitted regarding the instructions. Commenters were divided regarding whether separate instructions of the type published were appropriate. Bankruptcy is complex and no one should be led to believe that it is a simple matter of following instructions and filling out forms. Some who submitted comments thought that the instructions improperly gave legal advice. On the other hand, some commenters recognized that there is merit to providing simpler instructions for unrepresented parties. The FMP discussed the concerns and decided that the instructions should make clear that they are not a substitute for

legal representation, are not designed to fully explain the law, and should not be relied on in ascertaining the law. This admonition was inserted at the beginning of the instructions on p. 2, and a version of it was included in the materials prefatory to the glossary (p. 41).

The warnings on p. 3 were revised to be consistent with similar warnings contained in other places on the forms.

Information about bankruptcy petition preparers was revised to make it clear that they can only type documents; they cannot tell a debtor how to complete the forms and cannot provide legal advice.

The instructions had included information for abused debtors and those with restraining orders that they could avail themselves of the bankruptcy process while keeping certain information private. Based on the concern that, in doing so, the FMP had created a misleading impression, this section of the instructions was rewritten to clarify that bankruptcy filing information is public unless protected from public disclosure under Bankruptcy Rule 9037.

The FMP accepted many of the stylistic and substantive suggestions of ways to improve the instructions. For example, on p. 6 it clarified that a debtor who had taken the credit counseling class, but did not file the credit counseling certificate at case commencement, had only 14 days to get the certificate filed.

Some of the instructions were revised as a result of changes made to the forms during the comment period, as a result of changes that occurred since the forms were drafted, or as a result of anticipated changes. For instance, Form B101A was redesigned, so the instructions related to

that form were changed. The instructions regarding required documents in a chapter 13 case were revised to accommodate the possibility of a national chapter 13 plan form.

A debtor's bankruptcy options were revised to make it clear that not all of the referenced chapters may be available to all debtors and to make clear that, in chapter 7, the debtor loses his or her right to any property that is not exempt.

Most of the comments regarding specific forms have already been addressed earlier in this report. Stylistic comments and changes were made throughout the instructions in response to the comments received.

Some questioned the value of the glossary in the instructions. The FMP believes that the glossary will give debtors a place to turn when trying to figure out the meaning of technical terms they will encounter when completing their bankruptcy forms. The glossary was revised to make the form of the definitions more consistent, as well as to provide a warning about not relying on the instructions for legal advice. A few new terms were added, *e.g*. judgment lien, statutory lien. Some definitions were revised, *e.g*. exempt property, discharge.

D. Conclusion

The FMP and the Subcommittee on Forms request that this Committee recommend that the Standing Committee approve the following forms published in August 2013, with the forms to be effective December 1, 2014: B17A, B17B, B17C,[1] B22A-1, B22A-1Supp, B22A-2, B22B, B22C-1, and B22C-2. These forms along with Official Forms 3A, 3B and 6I

[1] No comments were submitted on Forms 17A (Notice of Appeal and Statement of Election), 17B (Optional Appellee Statement of Election to Proceed in District Court), and 17C (Certificate of Compliance With Rule 8015 (a)(7)(B) or 8016(d)(2)).

(which were issued as modernized forms in 2013) will be renumbered at the same time as the bulk of the forms become effective on December 1, 2015.

The FMP and the Subcommittee on Forms request that this Committee recommend that the Standing Committee approve the following new forms, with the forms to be effective December 1, 2015, or as soon thereafter as technologically possible: B101, B101A, B101B, B104, B105, B106Sum, B106A/B, B106C, B106D, B106E/F, B106G, B106H, B106Dec, B107, B112, B113, B119, B121, B318, B423, and B427.

The FMP and the Subcommittee on Forms request that this Committee recommend that the Standing Committee publish the following forms for public comment: B106J, B106J-2, B201, B202, B204, B205, B206Sum, B206A/B, B206D, B206E/F, B206G, B206H, B207, B309A, B309B, B309C, B309D, B309E, B309F, B309G, B309H, B309I, B401, B410, B410A, B410S1, B410S2, B11A (Abrogated), B11B (Abrogated), B312, B313, B314, B315, B424 and the instructions related to the non-individual debtor forms.

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APPENDIX A.1

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Modernized Official Forms Numbering Conversion Chart – Draft – 03312014			
B 1	Voluntary Petition	B101	Voluntary Petition for Individuals Filing for Bankruptcy *(incorporates exhibits – carves out eviction judgment statement as new form B101AB)*
		B101A	Initial Statement About an Eviction Judgment Against You
		B101B	Statement About Payment of an Eviction Judgment Against You
		B201	Voluntary Petition for Non-Individuals Filing for Bankruptcy
	Exhibit A	B201A	Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy Under Chapter 11
	Exhibit C	B101 B201	*Hazardous Property or Property That Needs Immediate Attention -- incorporated in Forms B101 and B201*
	Exhibit D	B101	*Individual Debtor's Statement of Compliance with Credit Counseling Requirement – Incorporated in Form B101*
	[Chapter 15 questions from Petition]	B401	Petition for Recognition of Foreign Proceeding
B 2	Declaration under Penalty of Perjury on Behalf of a Corporation or Partnership	B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*
B 3A	Application and Order to Pay Filing Fee in Installments	B103A	Application for Individuals to Pay the Filing Fee in Installments
B 3B	Application for Waiver of Chapter 7 Filing Fee	B103B	Application to Have the Chapter 7 Filing Fee Waived

Current No.	Current title	New No.*	New title
B 4	List of Creditors Holding 20 Largest Unsecured Claims	B104	For Individual Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(individuals)*
		B204? B404?	For Chapter 11 Cases: The List of Creditors Who Have the 20 Largest Unsecured Claims Against You Who Are Not Insiders *(non-individuals)*
B 5	Involuntary Petition	B105	Involuntary Petition Against an Individual
		B205	Involuntary Petition Against a Non-Individual
B6	Cover Sheet for Schedules	**No coversheet created**	
B6	Summary of Schedules (Includes Statistical Summary of Certain Liabilities)	B106 -- Summary	A Summary of Your Assets and Liabilities and Certain Statistical Information (*individuals)*
		B206 -- Summary	A Summary of Your Assets and Liabilities (*non-individuals)*
B 6A	Schedule A - Real Property	B106A/B	Schedule A/B: Property (*combines real and personal property, individuals)*
B 6B	Schedule B - Personal Property	B206A/B	Schedule A/B: Property (*combines real and personal property, non-individuals)*
B 6C	Schedule C - Property Claimed as Exempt	B106C	Schedule C: The Property You Claim as Exempt (*individuals)*
B 6D	Schedule D - Creditors Holding Secured Claims	B106D	Schedule D: Creditors Who Hold Claims Secured By Property (*against individuals*)
		B206D	Schedule D: Creditors Who Hold Claims Secured By Property *(against non-individuals)*
B 6E	Schedule E - Creditors Holding Unsecured Priority Claims	B106E/F	Schedule E/F: Creditors Who Have Unsecured Claims *(against individuals, combines priority and non-priority)*
B 6F	Schedule F - Creditors Holding Unsecured Nonpriority Claims	B206E/F	Schedule E/F: Creditors Who Have Unsecured Claims (*against non-individuals, combines priority and non-priority)*

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

Current No.	Current title	New No.*	New title
B 6G	Schedule G - Executory Contracts and Unexpired Leases	B106G	Schedule G: Executory Contracts and Unexpired Leases (*individuals)*
		B206G	Schedule G: Executory Contracts and Unexpired Leases (*non-individuals)*
B 6H	Schedule H - Codebtors	B106H	Schedule H: Your Codebtors (*individuals)*
		B206H	Schedule H: Your Codebtors (*non-individuals)*
B 6I	Schedule I - Current Income of Individual Debtor(s)	B106I	Schedule I: Your Income (*individuals – published as 6I)*
		B206I	Schedule I: Your Income (*non-individuals)*
B 6J	Schedule J- Current Expenditures of Individual Debtor(s)	B106J	Schedule J: Your Expenses (*individuals- published as 6J)*
		B206J	Schedule J: Your Expenses (*non-individuals)*
B 6	Declaration Concerning Debtor's Schedules	B106 -- Declaration	Declaration About an Individual Debtor's Schedules
		B202	Declaration Under Penalty of Perjury On Behalf of a Corporation or Partnership *(For petition, schedules, SOFA, etc)*
B 7	Statement of Financial Affairs	B107	Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
		B207	Statement of Your Financial Affairs *(non-Individuals)*
B 8	Chapter 7 Individual Debtor's Statement of Intention	B112	Statement of Intention for Individuals Filing Under Chapter 7
B 9	Notice of Commencement of Case under the Bankruptcy Code, Meeting of Creditors, and Deadlines	**No coversheet created.**	
B 9A	Chapter 7 Individual or Joint Debtor No Asset Case	B 309A	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline
B 9B	Chapter 7 Corporation/Partnership No Asset Case	B 309C	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – No Proof of Claim Deadline Set
B 9C	Chapter 7 Individual or Joint Debtor Asset Case	B 309B	(For Individuals or Joint Debtors) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set
B 9D	Chapter 7 Corporation/Partnership Asset Case (12/11)	B 309D	(For Corporations or Partnerships) Notice of Chapter 7 Bankruptcy Case – Proof of Claim Deadline Set

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Current No.	Current title	New No.*	New title
B 9E	Chapter 11 Individual or Joint Debtor Case	B 309E	(For Individuals or Joint Debtors) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-E)*
B 9E(Alt.)	Chapter 11 Individual or Joint Debtor Case		
B 9F	Chapter 11 Corporation/Partnership Case	B 309F	(For Corporations or Partnerships) Notice of Chapter 11 Bankruptcy Case *(former Alt version combined with Form B309-F)*
B 9F(Alt.)	Chapter 11 Corporation/Partnership Case		
B 9G	Chapter 12 Individual or Joint Debtor Family Farmer	B 309G	(For Individuals or Joint Debtors) Notice of Chapter 12 Bankruptcy Case
B 9H	Chapter 12 Corporation/Partnership Family Farmer	B 309H	(For Corporations or Partnerships) Notice of Chapter 12 Bankruptcy Case
B 9I	Chapter 13 Case	B 309I	Notice of Chapter 13 Bankruptcy Case
B 10	Proof Of Claim	B 410	Proof Of Claim
B 10A	Proof Of Claim, Attachment A	B 410A	Proof Of Claim, Attachment A
B 10S1	Proof Of Claim, Supplement 1	B 410S1	Proof Of Claim, Supplement 1
B 10S2	Proof Of Claim, Supplement 2	B 410S2	Proof Of Claim, Supplement 2
B 11A	General Power of Attorney	B 4110A	*Reissued as Director's Form*
B 11B	Special Power of Attorney	B 4110B	*Reissued as Director's Form*
B 12	Order and Notice for Hearing on Disclosure Statement	B 312	
B 13	Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof	B 313	
B 14	Ballot for Accepting or Rejecting Plan	B 414	
B 15	Order Confirming Plan	B 315	
B 16A	Caption	B 416A	
B 16B	Caption (Short Title)	B 416B	

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Current No.	Current title	New No.*	New title
B 16C	[Abrogated]	N/A	
B 16D	Caption for Use in Adversary Proceeding other than for a Complaint Filed by a Debtor	B 416D	
B 17	Notice of Appeal under 28 U.S.C. §158(a) or (b) from a Judgment, Order or Decree of a Bankruptcy Court	B 417A	Notice Of Appeal And Statement Of Election
		B417B (new)	Optional Appellee Statement Of Election To Proceed In District Court
		B417C (new)	Certificate of Compliance With Rule 8015(a)(7)(B) or 8016(d)(2)
B 18	Discharge of Debtor	B 318	Discharge of Debtor in a Chapter 7 Case
B 19	Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer	B119	Bankruptcy Petition Preparer's Notice, Declaration and Signature
B 20A	Notice of Motion or Objection	B 420A	Notice of Motion or Objection
B 20B	Notice of Objection to Claim	B 420B	Notice of Objection to Claim
B 21	Statement of Social Security Number	B 121 *updated from B102*	Your Statement About Your Social Security Numbers
B 22A	Statement of Current Monthly Income and Means Test Calculation (Chapter 7)	B 108-1	Chapter 7 Statement of Your Current Monthly Income and Means-Test Calculation *(published as 22A-1)*
		B 108-1Supp	Chapter 7 means test exemption attachment (*published as 22A-1Supp*)
		B 108-2	Chapter 7 Means Test Calculation *(published as 22A-2)*
B 22B	Statement of Current Monthly Income (Chapter 11)	B 109	Chapter 11 Statement of Your Current Monthly Income *(published as 22B)*
B 22C	Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Chapter 13)	B 110-1	Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period *(published as 22C-1)*
		B 110-2	Chapter 13 Calculation of Your Disposable Income *(published as 22C-2)*
B 23	Debtor's Certification of Completion of Instructional Course Concerning Financial Management	B 423	Certification About a Financial Management Course *(was B 113)*

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Current No.	Current title	New No.*	New title
B 24	Certification to Court of Appeals	B 424	
B 25A	Plan of Reorganization in Small Business Case under Chapter 11	B 425A	
B 25B	Disclosure Statement in Small Business Case under Chapter 11	B 425B	
B 25C	Small Business Monthly Operating Report	B 425C	
B 26	Periodic Report Regarding Value, Operations and Profitability of Entities in Which the Debtor's Estate Holds a Substantial or Controlling Interest	B 426	
B 27	Reaffirmation Agreement Cover Sheet	B427	Cover Sheet for Reaffirmation Agreement
DIRECTOR FORMS			
B 13S	Order Conditionally Approving Disclosure Statement, Fixing Time for Filing Acceptances or Rejections of Plan, and Fixing the Time for Filing Objections to the Disclosure Statement and to the Confirmation of the Plan, Combined with Notice Thereof and of the Hearing on Final Approval of the Disclosure Statement and the Hearing on Confirmation of the Plan	B 1300S	
B 15S	Order Finally Approving Disclosure Statement and Confirming Plan	B 1500S	
B 18F	Discharge of Debtor After Completion of Chapter 12 Plan	B 1800F	
B 18FH	Discharge of Debtor Before Completion of Chapter 12 Plan	B 1800FH	
B 18J	Discharge of Joint Debtors (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18JO)*
B 18JO	Discharge of One Joint Debtor (Chapter 7)	B 318	Order of Discharge *(combined with Forms 18 and 18J)*
B 18RI	Discharge of Individual Debtor in a Chapter 11 Case	B 1800RI	
B 18W	Discharge of Debtor After Completion of Chapter 13	B 1800W	

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Current No.	Current title	New No.*	New title
	Plan		
B 18WH	Order Discharging Debtor Before Completion of Chapter 13 Plan	B 1800WH	
B 104	Adversary Proceeding Cover Sheet	B 1040	
B 131	Exemplification Certificate	B 1310	
B 132	Application for Search of Bankruptcy Records	B 1320	
B 133	Claims Register	B 1330	
B 200	Required Lists, Schedules, Statements and Fees	B 2000	Need? Already incorporated into instruction packet?
B 201A	Notice to Individual Consumer Debtor	B 2010	Notice Required by 11 U.S.C. § 342(b) for Individuals Filing for Bankruptcy *Does this need to be a stand-alone form anymore. It is incorporated into the instruction booklet for individual debtors*
B 201B	Certification of Notice to Individual Consumer Debtor(s)	B 101	Not needed because certification is in petition
B 202	Statement of Military Service	B 2020	
B 203	Disclosure of Compensation of Attorney for Debtor	B 2030	Attorney's Disclosure of Compensation
B 204	Notice of Need to File Proof of Claim Due to Recovery of Assets	B 2040	
B 205	Notice to Creditors and Other Parties in Interest	B 2050	
B 206	Certificate of Commencement of Case	B 2060	
B 207	Certificate of Retention of Debtor In Possession	B 2070	
B 210A	Transfer of Claim Other Than for Security	B 2100A	
B 210B	Notice of Transfer of Claim Other Than for Security	B 2100B	
B 230A	Order Confirming Chapter 12 Plan	B 2300A	
B 230B	Order Confirming Chapter 13 Plan	B 2300B	
B 231A	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 12 Plan	B 2310A	
B 231B	Order Fixing Time to Object to Proposed Modification of Confirmed Chapter 13 Plan	B 2310B	

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Current No.	Current title	New No.*	New title
B 240A	Reaffirmation Documents	B 2400A	
B 240B	Motion for Approval of Reaffirmation Agreement	B 2400B	
B 240C	Order on Reaffirmation Agreement	B 2400C	
B 240A/B ALT	Reaffirmation Agreement	B 2400A/B ALT	
B 240C ALT	Order on Reaffirmation Agreement	B 2400C ALT	
B 250A	Summons in an Adversary Proceeding	B 2500A	
B 250B	Summons and Notice of Pretrial Conference in an Adversary Proceeding	B 2500B	
B 250C	Summons and Notice of Trial in an Adversary Proceeding	B 2500C	
B 250D	Third-Party Summons	B 2500D	
B 250E	Summons to Debtor in Involuntary Case	B 2500E	
B 250F	Summons in a Chapter 15 Case Seeking Recognition of a Foreign Nonmain Proceeding	B 2500F	
B 253	Order for Relief in an Involuntary Case	B 2530	
B 254	Subpoena for Rule 2004 Examination	B 2540	
B 255	Subpoena in an Adversary Proceeding	B 2550	
B 256	Subpoena in a Case Under the Bankruptcy Code	B 2560	
B 260	Entry of Default	B 2600	
B 261A	Judgment by Default	B 2610A	
B 261B	Judgment by Default	B 2610B	
B 261C	Judgment in an Adversary Proceeding	B 2610C	
B 262	Notice of Entry of Judgment	B 2620	
B 263	Bill of Costs	B 2630	
B 264	Writ of Execution to the United States Marshal	B 2640	

*1XX = Individual Fling Package 2XX = Non-Individual Filing Package 3XX = Orders and Court Notices
4XX = Add. Official Forms XXXX = director's forms

Current No.	Current title	New No.*	New title
B 265	Certification of Judgment for Registration in Another District	B 2650	
B 270	Notice of Filing of Final Report of Trustee, of Hearing on Applications for Compensation [and of Hearing on Abandonment of Property by the Trustee]	B 2700	
B 271	Final Decree	B 2710	
B 280	Disclosure of Compensation of Bankruptcy Petition Preparer	B 2800	Disclosure of Compensation of Bankruptcy Petition Preparer
B 281	Appearance of Child Support Creditor or Representative	B 2810	
B 283	Chapter 13 Debtor's Certifications Regarding Domestic Support Obligations and Section 522(q)	B 2830	

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TAB 7B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: PROPOSED NEW SCHEDULE 106J-2

DATE: MARCH 26, 2014

Among the first forms to be revised as part of the Forms Modernization Project were Schedules I, *Your Income,* and J, *Your Expenses,* for individual debtors. The forms became effective on December 1, 2013. Schedules I and J are primarily used by a debtor or by joint debtors to report income and expenses as of the petition date, and to calculate net income of the debtor or joint debtors. Because it is common in a joint debtor case for each individual to have an income, Schedule I is designed with two income reporting columns (Debtor 1 and Debtor 2). Schedule I, line 12, adds the income of Debtor 1 and Debtor 2 to calculate "combined monthly income" for the family unit.

Schedule J, *Your Expenses,* has a single column which totals "monthly expenses" at line 22. A single column is all that is needed if there is only one debtor, and it is sufficient for joint debtors who lived together. If the joint debtors maintain separate households, Debtor 2 is instructed to file a separate Schedule J to report the expenses for the separate household. Debtor 2 is also instructed to check a box at the top of the form to indicate that the listed expenses are for the separate household.

Net Income.

Schedule J also calculates net income. The calculation is done on line 23, which is broken into three parts as follows:

23 **Calculate your monthly net income.**		
23a.	Copy line 12 (*your combined monthly income*) from *Schedule I.*	$_____
23b.	Copy your monthly expenses from line 22 above.	– $_____
23c.	Subtract your monthly expenses from your monthly income. The result is your *monthly net income*.	$_____

The above calculation correctly calculates net income for single debtors and for joint debtors who report total family expenses on Schedule J. The form will not correctly calculate net family income, however, in a joint debtor, separate household situation. In that case, because the expenses of Debtor 2 are listed on a separate filing, only the expenses of Debtor 1 will be subtracted from the combined income of Debtor 1 and 2.

With the approval of the Chairs of the Advisory Committee and Forms Subcommittee, the Administrative Office revised the separate instructions for Schedule J to address the joint debtor, separate household situation. The separate instructions state:

> If you are filing jointly and Debtor 1 and Debtor 2 keep separate households, fill out a separate *Schedule J* for each debtor. Check the box at the top of page 1 of the form for Debtor 2 to show that a separate form is being filed. The total from line 22 of Debtor 2's *Schedule J* should be added into the total expenses for Debtor 1 at line 22 on Debtor 1's *Schedule J*. Lines 23a, 23b, and 23c do not need to be completed on Debtor 2's *Schedule J* because total expenses and net income will be calculated on Debtor 1's *Schedule J*.

Form vendors have implemented the directions in the separate instructions. There is a concern, however, that filers not using form preparation software may not read the separate instructions.

In discussing this issue with technology staff from the AO, there was preference for a uniquely designated version of Schedule J to be used by Debtor 2 in a separate household situation. Proposed Official Form 106J-2, *Expenses for Separate Household of Debtor 2*, was considered by the Forms Subcommittee and the Forms Modernization Project during a joint conference call on January 17, 2014. An amendment to line 1 of Schedule J tells the filer to use Official Form 106J-2 if Debtor 2 in a joint case maintains a separate household, and introductory language on Schedule J-2 explains that the form is to be used only if Debtor 2 in a joint debtor case maintains a separate household. Additional directions at line 22b of Schedule J and line 22 of Schedule J-2 explain how to calculate net income when both forms are used.

Proposed 106J and 106J-2 are included in the Appendix to the agenda materials. **The Forms Subcommittee now recommends that proposed Official Forms 106J and 106J-2 be published for public comment this summer.**

TAB 7C

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: SUGGESTION TO ABROGATE OFFICIAL FORMS 11A, 11B, 12, 13, 14 and 15

DATE: MARCH 19, 2014

At its June 2013 meeting the Forms Modernization Project (the "FMP") discussed abrogating Official Forms 11A, 11B, 12, 13, 14 and 15 and reissuing the forms as Director's Forms. More specifically, the forms are: Official Forms 11A, General Power of Attorney; 11B, Special Power of Attorney; 12, Order and Notice for Hearing on Disclosure Statement; 13, Order Approving Disclosure Statement and Fixing Time for Filing Acceptances or Rejections of Plan, Combined with Notice Thereof; 14, Ballot for Accepting or Rejecting Plan, and 15, Order Confirming Plan. The issue was further discussed at a joint call of the FMP and the Forms Subcommittee on January 17, 2014.

The main reason for considering a reissuance of the forms as Director's Forms is to permit parties to retain the ability to revise these forms despite the amendments to Rule 9009. In addition, reissuing Official Forms 12, 13, 14 and 15 as Director's Forms would make sense topically in that the form orders for approving a disclosure statement and confirmation for small business chapter 11 cases are Director's Forms.

There are several issues related to the abrogation of these forms. First, the Subcommittee considered revised amended Rule 9009 and determined that it does not appear to prohibit any alterations needed for Official Forms 12, 13, 14 and 15. Second, to accommodate the abrogation of Official Forms 14 and 15, Rules 3017(d), 3018(c) and 3020(c)(1) would have to be amended

as they each contain a reference to "the appropriate Official Form." The "appropriate Official Form" is Official Form 14 for Rules 3017(d) and 3018(c), and Official Form 15 for Rule 3020(c)(1). Any revision to these rules would not be effective until after the effective date for amended Rule 9009. Based on these factors, **the Subcommittee recommends that Official Forms 11A and 11B be abrogated and reissued as Director's Forms and that Official Forms 12, 13, 14 and 15 be retained as Official Forms.** The Forms Modernization Project reviewed the instructions on Official Forms 12 through 15 to ensure that any alterations would be permissible under amended Rule 9009.

A final issue is the method of publishing the abrogation of Official Forms 11A and 11B and the reissuance of those forms as Director's Forms. The Subcommittee considered this **and recommends publication of the abrogated forms with the non-individual forms in August 2014 with a reference to the abrogation.** The Official Form number and title will remain with a notation that the form has been abrogated, along with a committee note to explain that the form has been abrogated and reissued as a Director's Form. This was done in the past with Official Form 16C, which was abrogated in 2003. Notices of abrogation for Official Forms 11A and 11B are included in the Appendix to these materials. Official Forms 12, 13, 14 and 15, renumbered as Official Forms 312, 313, 314 and 315, are also included in the Appendix.

TAB 7D

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Update Form 3A early with old and new filing fee schedule
Carl barnes
to:
Scott_Myers, James_Wannamaker
03/27/2014 10:58 AM
Hide Details
From: "Carl barnes" <cbarnes@bestcase.com>

To: <Scott_Myers@ao.uscourts.gov>, <James_Wannamaker@ao.uscourts.gov>

History: This message has been replied to and forwarded.

3 Attachments

image001.png image003.png image002.png

Hi Scott,

With the filing fees changing June 1 that means the new Form 3A must change so that it has the new fees. It currently looks like this:

Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

- ❑ Chapter 7..... *Fee*: **$306**
- ❑ Chapter 11..... *Fee*: **$1,046**
- ❑ Chapter 12..... *Fee*: **$246**
- ❑ Chapter 13..... *Fee*: **$281**

I would like to suggest that the form be updated early and changed to show the old fees and the new fees, something like this:

1. Which chapter of the Bankruptcy Code are you choosing to file under?		Fee 5/31/14 or before	Fee 6/1/14 and after
	❑ Chapter 7	$306	$335
	❑ Chapter 11	$1046	$1717
	❑ Chapter 12	$246	$275
	❑ Chapter 13	$281	$310

IMO this has some advantages. All users see the new fee schedule early and know the cost of delaying filing. The new form can be released early and used early, the old form should still be valid until June 1. It might avpid some confusion during the overlap since a form filed 5/30 would not be processed until June when the new rates are in effect.

I would suggest this new form be released May 1 to coincide with the UST release of new IRS Means Test Tables. 100% of users will have to update then anyway. They already have to update April 1 for Census Income. I ran a quick analysis of our filings and Installment cases are about 12% of cases nationwide so it's fairly minor except a few districts like TNW 85% and TNM 50%.

I would like to avoid required updates three months in a row (April, May and June) when it can be done in two. In December Form 3A can be revised again to remove the old fee schedule.

Carl Barnes
Best Case, LLC – Dev Team
800-492-8037 x108

PS: At this time, and in the future, it would be useful to have the date the case was filed appear on Form 3A since that is the date that determines the fee schedule. Maybe like this:

1. Which chapter of the Bankruptcy Code are you choosing to file under?	Date Filed:	Fee 5/31/14 or before	Fee 6/1/14 and after
	❑ Chapter 7	$306	$335
	❑ Chapter 11	$1046	$1717
	❑ Chapter 12	$246	$275
	❑ Chapter 13	$281	$310

My third suggest would be to remove the fee schedule from Form 3A and so the rest becomes moot. It was never there until the 12/2013 update.

TAB 8

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TAB 8A

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: AMENDMENTS TO RULE 9006(f)

DATE: MARCH 15, 2014

During its fall 2013 meeting, the Advisory Committee discussed a proposal by the Standing Committee's CM/ECF Subcommittee (formed to coordinate efforts across advisory committees) that would eliminate the three-day extension to time periods when service is effected electronically. In the Bankruptcy Rules, Rule 9006(f) contains the three-day extension, which parallels similar provisions in the Appellate, Civil, and Criminal Rules. Several members of the Advisory Committee expressed support for the CM/ECF Subcommittee's proposal, and one member of the Advisory Committee suggested eliminating the three-day extension outright, regardless of the method of service.

During its January 15 conference call, this Subcommittee considered the scope of the proposed amendment to Rule 9006(f). **It recommends that elimination of the three-day rule be limited to electronic service in order to be consistent with the amendments being proposed for similar provisions in the other sets of rules. In addition, the Reporter recommends that the Advisory Committee give its final approval to a minor wording amendment to Rule 9006(f) that was published last summer.**

This memorandum first addresses the Subcommittee's reasons for recommending that Rule 9006(f) be amended to remove only electronic service from the rule. It then discusses the response to the publication last summer of the amendment to Rule 9006(f).

The Amendment to the Civil Rules

At the January 2014 meeting of the Standing Committee, the Civil Rules Committee—following up on the work of the CM/ECF Subcommittee—proposed publication of an amendment eliminating electronic service from Civil Rule 6(d). The proposal generated significant discussion among members of the Standing Committee. The discussion divided into three views: (i) electronic service should not trigger the three-day extension; (ii) no mode of service should trigger the three-day extension; (iii) only service by mail (and perhaps service by leaving papers with the clerk) should trigger the three-day extension. Some members of the Standing Committee observed that email is widely available and that the three-day extension was unnecessary due to the general reliability and instantaneous nature of electronic service. Other members of the Standing Committee raised concerns about pro se litigants with no access, or limited access, to computers. Some members of the Standing Committee questioned why any mode of service should trigger a three-day extension. In response, it was pointed out that many litigants—especially pro se litigants—rely on the mail, which, although generally reliable, may require several days. It was also pointed out that pro se litigants who receive service of documents through the clerk may come to the courthouse only occasionally to check for service. In those circumstances, additional time after service would be appropriate.

Despite the wide-ranging discussion, the Standing Committee ultimately unanimously approved the Civil Rules Committee's request to publish an amendment to Rule 6(d) that is limited to removing electronic service from the rule. It was anticipated that other Advisory Committees would recommend parallel amendments to their rules this spring.

An Amendment to Rule 9006(f)'s Three-Day Extension

The amendment to Rule 9006(f) that was previewed at the fall Advisory Committee meeting, like the Civil Rule, was limited to eliminating electronic service from the rule. Because of the suggestion at that meeting that the three-day extension had become unnecessary for all or most means of service, the Subcommittee considered whether the Bankruptcy Rule should be amended more broadly. It considered the benefits that could result from a more far-reaching amendment that completely eliminates Rule 9006(f)—and therefore the three-day extension for all modes of service. If published at the same time as the narrower amendment to Civil Rule 6(d), the difference in approaches might spark useful discussion in the public comment period as to which of the two is preferable. The Subcommittee discussed reasons why a more far-reaching approach might be preferable. First, it would comport with the "days mean days" logic of the Time Computation Project. Second, as expressed by some members of the Standing Committee, it is likely that relatively few circumstances will arise when parties will suffer prejudice without the three-day extension.

The Subcommittee concluded, however, that a more far-reaching approach should not be unilaterally pursued. The Advisory Committee's practice has been to conform, whenever possible, the Bankruptcy Rules to parallel provisions in the Civil Rules. Indeed, as discussed below, in August 2013 the Advisory Committee published a conforming amendment to Rule 9006(f) to match a parallel amendment to Civil Rule 6(d). The Subcommittee was unable to identify any bankruptcy-specific reason for a departure from the Civil Rules' approach to calculating time after being served. This is particularly so in light of the decision, as part of the Time Computation Project, to have uniformity among all sets of federal rules with respect to calculating time. Since it appears that the Criminal and Appellate Rules Advisory Committees

will also be proposing amendments that parallel the amendment to Civil Rule 6(d), the Subcommittee concluded that it would be preferable for Bankruptcy Rule 9006(f) to be consistent with the approach of the other sets of rules.

The Subcommittee therefore recommends that the Advisory Committee propose the following amendment and Committee Note for publication:

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R. CIV. P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served[1] and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) F.R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow three added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which three days will still be added.

[1] This wording anticipates adoption of the proposed amendment published in August 2013.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow three added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the three added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the three added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the three added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding three days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow three added days means that the three added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means" of delivery under subparagraph (F).

Amendment to Rule 9006(f) Published in 2013

In August 2013 an amendment to Rule 9006(f) was published for public comment. Paralleling an amendment to Civil Rule 6(d), which was published at the same time, the amendment would change the words "after service" to "after being served," so that the rule would begin, "When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served, ..." The amendment is intended to clarify that only the party that is served by mail or under the specified provisions of Civil Rule 5—and not the party

making service—is permitted to add three days to any prescribed period for taking action after service is made.

No comments were submitted in response to the publication. The Reporter recommends that the Advisory Committee give its final approval to this amendment. She leaves to the Committee's determination whether to submit this change to the Standing Committee at the May 2014 meeting or hold it in the bullpen so that it can be submitted at the same time as the amendment to Rule 9006(f) that is currently being proposed. She is informed that the Civil Rules Committee will likely submit its similar amendment to the Standing Committee for final approval this year.

TAB 8B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTED CHANGE TO THE PROCEDURES FOR REVIEWING PROFESSIONAL FEES IN CHAPTER 11 CASES

DATE: MARCH 24, 2014

Dan Dooley, who owns a workout and turnaround consulting firm, has submitted a suggestion (13-BK-H) to alter the procedures for reviewing professional fees in chapter 11 cases. Instead of requiring (as is the case now) that professionals submit detailed task descriptions, which are typically filed several weeks after the work performed, the suggestion would demand less detailed but more timely fee applications. It would require professionals to report, on a weekly basis, brief summaries of the primary activities accomplished and the total fees billed. Mr. Dooley believes that these reports would increase the visibility of professional fees and permit bankruptcy courts to inquire about the advisability of professionals' activities in "real time"—thereby leading to greater control of fees in chapter 11.

The Subcommittee discussed the suggestion during a January 15, 2014, conference call. The Subcommittee concluded that, although well intentioned, the suggested alternative process for fee applications in chapter 11 cases would not be superior to the current provisions governing fee applications. **Accordingly, the Subcommittee recommends that no further action be taken on the suggestion.**

The Suggestion

The suggestion criticizes the current process for fee review in chapter 11 cases. Mr. Dooley observes that there is a public perception, in both "mega" and smaller cases, that chapter

11 fees are excessive and poorly controlled by the courts. In his view, the process for reviewing fees does not work for two reasons. First, professionals generate lengthy, overly detailed reports that are difficult for a court to review without getting lost in minutiae. Second, a court's ability to control excessive fees is further hampered by the delay between when a professional's services are rendered and when a fee application is filed.

Mr. Dooley suggests simplifying the fee application process and shrinking the time between when professional services are rendered and when they are reported to the court. Each week, a professional would file a short ("two-page maximum") report describing the professional's primary activities and the work accomplished during the prior week. These reports would be limited to the name of the professional time keeper, the job title, the hours billed, the billing rate, and the total amounts requested. No finer time detail would be required. A summary of expenses, categorized by type of expense, would be included.

Evaluation of the Suggestion

Rule 2016 requires professionals seeking compensation from the estate for services, or reimbursement for necessary expenses, to submit an application setting forth "a detailed statement of . . . the services rendered, time expended and expenses incurred." By emphasizing less detail in fee applications, Mr. Dooley's suggestion would mark a significant departure from the approach to fee applications embodied in Rule 2016. The Subcommittee recognizes that the level of detail in chapter 11 fee applications complicates the task of carefully reviewing them. But that detail allows courts (and the U.S. Trustee) to probe for improper billing practices by professionals and to deny compensation for failure to provide sufficient detail.

The suggestion would also conflict with local rules adopted by individual bankruptcy courts to govern fee applications and the fee guidelines of the U.S. Trustee Program. The general tenor of these other provisions regulating fee applications is to require more detail and to flesh out the procedures of Rule 2016. Perhaps some courts might find it helpful to receive (in addition to a full fee application) a short, weekly summary of professional services rendered in a chapter 11 case. Nothing in current Rule 2016, however, prohibits courts from requesting such a summary. Therefore, the Subcommittee does not believe that the suggested rulemaking is appropriate.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTION OF NEED FOR AMENDMENTS TO OFFICIAL FORMS 9F AND 9F (ALT)

DATE: MARCH 14, 2014

Bankruptcy Judge Stuart Bernstein (S.D.N.Y.) submitted Suggestion 13-BK-I, which concerns Official Forms 9F and 9F (Alt). Those forms are used for providing notice to creditors in a chapter 11 corporate or partnership case of the case's commencement, the date for the meeting of creditors, the deadline for filing a proof of claim, the deadline for filing a complaint to determine the dischargeability of certain debts, and the existence of the automatic stay. The only difference between the two forms is that Form 9F states that notice of the deadline for filing a proof of claim will be sent at a later time, whereas Form 9F (Alt) provides space for two dates to be inserted (one for governmental units and one for all other creditors).

The reverse side of each form provides "Explanations" of terms and procedures relevant to the subjects of the form. Judge Bernstein's suggestion relates to the explanation about the "Discharge of Debts." It states:

> Confirmation of a chapter 11 plan may result in a discharge of debts, which may include all or part of your debt. *See* Bankruptcy Code § 1141(d). A discharge means that you may never try to collect the debt from the debtor, except as provided in the plan. If you believe that a debt owed to you is not dischargeable under Bankruptcy Code § 1141(d)(6)(A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the "Deadline to File a Complaint to Determine Dischargeability of Certain Debts" listed on the front side. The bankruptcy clerk's office must receive the complaint and any required filing fee by that deadline.

Judge Bernstein suggested that the penultimate sentence of the quoted explanation be narrowed to refer only to debts owed to a domestic governmental unit. Under his proposal, the sentence would read, "If you believe that you hold a debt owed to a domestic governmental unit that is not dischargeable under Bankruptcy Code § 1141(d)(6)(A), you must start a lawsuit by filing a complaint in the bankruptcy clerk's office by the 'Deadline to File a Complaint to Determine Dischargeability of Certain Debts' listed on the front side." The suggestion is based on Judge Bernstein's interpretation of § 1141(d)(6)(A) in the recent decision of United States *ex rel.* Minge v. Hawker Beechcraft Corp. (*In re* Hawker Beechcraft, Inc.), 493 B.R. 696 (Bankr. S.D.N.Y. 2013). The relevant parts of that decision are discussed below in order to set forth the rationale for Judge Bernstein's suggestion.

The Subcommittee discussed this Suggestion during its conference call on January 15. **It recommends that the Suggestion be held in the dugout until the issue of statutory interpretation raised by Judge Bernstein receives further consideration by the courts.**

The *Hawker* Decision

Plaintiffs (or relators) Minge and Kiehl brought a *qui tam* lawsuit under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against the debtor and others in 2007. They sought $2.3 billion in treble damages and a civil penalty of $3.8 million, as well as costs and attorney's fees, based on the defendants' alleged misrepresentations in certifications submitted to the U.S. government. 493 B.R at 699.

The debtor filed for bankruptcy in 2012, thereby staying the *qui tam* action. Plaintiffs subsequently commenced an adversary proceeding in the bankruptcy court to determine the dischargeability of their claims against the debtor. The proceeding was commenced approximately 90 days after the first date set for the meeting of creditors. Plaintiffs argued that

their claims were excepted from discharge under § 1141(d)(6)(A) of the Code. *Id.* at 700. That provision states that the confirmation of a chapter 11 plan of a corporate debtor does not discharge any debt:

> of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit, or owed to a person as the result of an action filed under subchapter III of chapter 37 of title 31 [the False Claim Act] or any similar State statute.

The debtor sought dismissal of the adversary proceeding on the ground, among others, that it was untimely. The debtor relied on Rule 4007(c), which provides that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." Generally, an action to determine the dischargeability of a debt may be brought at any time, even after the bankruptcy case has concluded. Rule 4007(b) provides that a "complaint other than under § 523(c) may be filed at any time." Section 523(c), however, provides a special rule for actions to determine that a debt is nondischargeable under § 523(a)(2), (4), or (6). Debts of that type will be discharged unless the creditor brings an action to have the debt determined to be nondischargeable during the time period specified in Rule 4007(c).

Judge Bernstein ruled that, to the extent that the plaintiffs' claims were based on debts owed to a domestic governmental unit, they were governed by Rule 4007(c) and the complaint to determine their dischargeability was untimely. Those debts would therefore be discharged. To the extent, however, that the claims were based on debts owed to a person as the result of a False Claim Act ("FCA") action, Judge Bernstein held that there was no deadline for seeking the

determination of dischargeability, so plaintiffs' adversary proceeding was not untimely.[1] *Id.* at 712.

Judge Bernstein reached this result by carefully parsing the wording of § 1141(d)(6)(A). He concluded that the provision covers the following types of debts: (1) debts owed to a domestic governmental unit that fall within § 523(a)(2)(A) or (B)[2], and (2) debts owed to a person as the result of an FCA action. *Id.* at 710. A governmental unit is not included within the definition of "person," so the two provisions are mutually exclusive. Critical to the result in the case was Judge Bernstein's determination that the language—"specified in paragraph (2)(A) or (2)(B) of section 523(a)"—applies only to debts owed to domestic governmental units and not to debts owed to persons. He relied on the grammar and syntax of § 1141(d)(6)(A) to conclude that the reference to § 523(a)(2) does not apply to the second kind of debts listed. He noted that the two phrases are separated by a comma and a coordinating conjunction, thus suggesting that they are independent and that both modify the word "debt" in the introductory clause. He further relied on the parallel use of "owed to" in the two phrases. Finally, he observed that the House report discussing the 2005 addition of § 1141(d)(6)(A) supported his interpretation. It explained:

> "Section 708 amends section 1141(d) of the Bankruptcy Code to except from discharge in a corporate chapter 11 case a debt specified in subsections 523(a)(2)(A) or (B) of the Bankruptcy Code owed to a domestic governmental unit. *In addition*, it excepts from discharge a debt owed to a person as the result

[1] Judge Bernstein held that debts arising from violation of the FCA are owed to the United States, even though the relator in a *qui tam* action has standing to pursue the claim on behalf of the government and is entitled to a portion of any recovery. 493 B.R. at 711-712. He held, however, that the relator's claim for attorney's fees, costs, and expenses, which may be recovered from the defendant in a successful *qui tam* action, as well as any retaliation claim under the FCA against an employer, is owed to the relator himself. *Id.* at 712.

[2] Those provisions except from discharge debts for money, property, services, or credit obtained by false pretenses, false representations, or actual fraud, or obtained by the use of a materially false written statement about the debtor's financial condition that the creditor reasonably relied upon and that the debtor made with intent to defraud.

> of an action filed under subchapter III of chapter 37 of title 31 of the United States Code or any similar state statute."

Id. (quoting H.R. Rep. No. 109-31 at 102 (2005)) (emphasis added in opinion).

Should Forms 9F and 9F (Alt) Be Amended?

The Subcommittee noted that if Judge Bernstein's interpretation is correct, the two forms are overly broad in stating that an action to determine the dischargeability of a claim under § 1141(d)(6)(A) must be commenced by the stated deadline—60 days after the first date scheduled for the meeting of creditors. The type of debt described in that provision that is owed to a "person" would not be subject to any deadline because it would not be governed by § 523(c).

The Subcommittee, however, made no determination about the correctness of Judge Bernstein's interpretation. Members did observe that the language of § 1141(d)(6)(A) can also support an alternative reading. Because there are two possibly parallel structures in the provision, the intended meaning could either be

(1) any debt . . .

of a kind specified in § 523(a)(2) that is owed to a domestic governmental unit	OR	owed to a person as a result of an FCA action

[Judge Bernstein's interpretation]

or (2) any debt of a kind specified in § 523(a)(2) . . .

that is owed to a domestic governmental unit	OR	owed to a person as a result of an FCA action

[the interpretation on which the explanation in Forms 9F and 9F (Alt.) is based]

While the comma before "or owed to a person" makes the first structure appear to be the intended one, it is possible that the comma was inserted to make clear that the requirement that the debt arise from an FCA action does not apply to debts owed to governmental units.[3] It may be that Congress intended to except from discharge the specified fraud claims held by governmental units or held by persons because they brought an FCA action and are permitted to share in the government's recovery. On the other hand, the legislative history Judge Bernstein cited supports his reading of the provision. By referring "in addition" to a claim owed to a person as a result of an FCA action without including any reference to § 523(a)(2), the House report suggests that claims of persons need not be of a kind specified in that Code provision in order to fall within the discharge exception.

Ultimately, the Subcommittee concluded that it did not need to resolve the intellectual puzzle that is presented by § 1141(d)(6)(A) because any action on the Suggestion should be deferred. Two reasons support that recommendation. First, the district court recently granted the *Hawker* plaintiffs leave to appeal Judge Bernstein's decision. United States *ex rel.* Minge v. Hawker Beechcraft Corp. (*In re* Hawker Beechcraft, Inc.), 2013 WL 6673607 (S.D.N.Y. Dec. 18, 2013). The plaintiffs are challenging three of Judge Bernstein's holdings: (1) that § 523(c) applies to the claim of a governmental unit excepted from discharge under § 1141(d)(6)(A); (2) that plaintiffs failed to comply with the Rule 4007(c) deadline; and (3) that the only debts owed to a "person" as a result of the plaintiffs' *qui tam* action are their claims for attorney's fees, expenses, and costs. Because the district court's decision might either render Judge Bernstein's

[3] Judge Bernstein reasoned that if Congress had intended the § 523(a)(2) requirement to apply to debts owed to a person, it would have written "owed to a domestic governmental unit or person." But in that case the provision would read, "any debt—of a kind specified in paragraph (2)(A) or (2)(B) of section 523(a) that is owed to a domestic governmental unit or [a] person as the result of an action filed under subchapter III of chapter 37 of title 31 or any similar State statute." There would then be ambiguity about whether the "as the result of" phrase applies to governmental units as well as to persons.

interpretation of § 1141(d)(6)(A) moot or in error, the Subcommittee thought that it would be premature at this point to consider changes to Forms 9F and 9F (Alt) in response to the Suggestion.

Second, the *Hawker* decision's interpretation of § 1141(d)(6)(A) appears to be a matter of first impression. The Reporter was unable to find any other decision interpreting the provision. Because § 1141(d)(6) was added to the Code in 2005, the Subcommittee thought that the absence of authority suggested that the issue raised by Judge Bernstein is one that rarely arises. Given the narrowness and complexity of the question and the possibility that the district court will interpret the statute differently, the Subcommittee recommends that Judge Bernstein's suggestion be held in the dugout at least until the issue in the *Hawker* case is resolved and perhaps until the issue is more fully considered by other courts.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: ELIMINATION OF NOTICE OF THE ENTRY OF A CONFIRMATION ORDER IN SMALL-BUSINESS CHAPTER 11 CASES

DATE: MARCH 24, 2014

At its fall 2013 meeting, the Advisory Committee considered a suggestion (12-BK-B) regarding notice of the entry of an order confirming a chapter 13 plan. The suggestion urged that Rule 2002(f)(7), which requires notice to creditors of the entry of confirmation orders in cases under chapters 9, 11, and 12, should be amended to require notice in chapter 13 cases as well. The Subcommittee on Consumer Issues saw potential value in the increased notice that would be provided by the suggested amendment, particularly in light of the Supreme Court's emphasis in *United Student Aid Funds, Inc. v. Espinosa*, 130 S. Ct. 1367 (2010), on the importance of a confirmation order. But that Subcommittee found no concerns, or signs of confusion, expressed in the caselaw on account of chapter 13's omission from Rule 2002(f)(7). The Consumer Subcommittee concluded that an amendment to include chapter 13 was unnecessary and recommended that the Advisory Committee take no further action on the suggestion. The Advisory Committee adopted that recommendation.

During the discussion about the chapter 13 suggestion, a member of the Advisory Committee questioned why notice of the entry of a confirmation order is required in small-business chapter 11 cases. The Chair of the Advisory Committee referred the issue to the Subcommittee on Business Issues for further evaluation.

The Subcommittee discussed the suggestion during its January 15, 2014, conference call. The Subcommittee concluded that the application of Rule 2002(f)(7) to small-business chapter 11 cases had not caused any concern or confusion, and that altering the rule would not confer a significant benefit. **Accordingly, the Subcommittee recommends that no further action be taken on the suggestion at this time.**

Discussion

Rule 2002(f) requires the clerk (or some other person as the court may direct) to "give the debtor, all creditors, and indenture trustees notice by mail" of various milestones in a bankruptcy case. One of those milestones is the "entry of an order confirming a chapter 9, 11, or 12 plan." Rule 2002(f)(7). The rule does not distinguish among chapter 11 cases, so that notice of the entry of a confirmation order is required in a large chapter 11 case as well as a small-business chapter 11 case.

In evaluating whether to remove small-business chapter 11 cases from Rule 2002(f)(7), the Subcommittee considered two issues. The first is whether there is any evidence of concern or confusion about the current rule. The second is whether amending Rule 2002(f)(7) would provide some significant benefit to the small-business chapter 11 process that would offset any potential costs.

The Subcommittee did not find case law or academic literature discussing the inclusion of small-business cases in Rule 2002(f)(7). On that score, the current rule does not appear to have caused any notable problems. That may be because it is the failure to give notice that might be expected to cause disputes that generate judicial opinions. In other words, the silence in judicial and academic writing may reflect a lack of a problem with the current rule, or it may

reflect the unlikelihood that concerns about the rule (such as the added costs of notice) would garner attention.

The Subcommittee, however, also did not see a significant potential for improvement by altering Rule 2002(f)(7). The goal of the Code's small-business chapter 11 provisions is to reduce the cost and increase the speed of the chapter 11 process for small-business debtors. The small-business provisions simplify the chapter 11 plan process. For example, they eliminate the need for a separate disclosure statement if the plan is deemed to provide adequate information. *See* 11 U.S.C. § 1126(f)(1). The Code also imposes a short window of time for the confirmation hearing in a small-business case after the plan is filed and restricts the court's ability to extend that time. *See id.* §§ 1129(e), 1121(e)(3). The emphasis on speed in the small-business chapter 11 provisions increases the likelihood that notice of important case landmarks will not reach a creditor. Rule 2002(f)(7) may serve as a safety-valve in those circumstances. An analogy to chapter 12 cases may be instructive. When notice of confirmation of a chapter 12 plan was added to Rule 2002(f)(7) in 1991, the need for careful notice provisions due to the statutory command for speedy adjudication in chapter 12 cases appears to have played a role in the Advisory Committee's thinking.

The Subcommittee recognized that the requirement to give notice of the entry of a confirmation order under Rule 2002(f)(7) may be redundant. The creditor who objects to confirmation is likely to receive notice of the entry of the confirmation order as a "contesting party" under Rule 9022. There is also Rule 3020(c), which separately provides for notice of the entry of a confirmation order in chapter 11 cases. In addition to the parties listed in Rule 2002(f)(7), Rule 3020(c) requires notice to be served on "equity security holders, other parties in interest, and, if known, . . . any identified entity subject to an injunction provided for in the plan

against conduct not otherwise enjoined under the Code." Fed. R. Bankr. P. 3020(c)(2). But the Subcommittee found no evidence that these provisions have caused problems or excessive costs. Indeed, the Subcommittee understands that relatively few small-business chapter 11 cases reach confirmation, so the volume of notices of the entry of a confirmation order in those cases is not great.

If the Advisory Committee pursues an extensive reexamination of noticing procedures in bankruptcy, it may be appropriate to revisit this issue. But the Subcommittee did not view the matter as sufficiently pressing on its own to call for rulemaking at this time.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: TIME LIMIT FOR CERTIFICATION OF DIRECT APPEALS

DATE: MARCH 10, 2014

In a recent Seventh Circuit opinion written by Judge Easterbrook, the court concluded that there is no time limit in either the relevant statute or rule for a court on its own initiative or all of the parties jointly to certify a bankruptcy decision for direct appeal to the court of appeals. Peterson v. Somers Dublin Ltd., 729 F.3d 741, 745-46 (7th Cir. 2013). Judge Easterbrook wrote that "[p]robably none is necessary," but "whether or not a time limit would be a good idea," none exists, and the court could not impose one. *Id.* at 746.

At the fall 2013 meeting of the Advisory Committee, the question whether the bankruptcy appellate rules should provide a deadline for such certifications was referred to this Subcommittee for consideration and a recommendation. **After considering the issue during its conference call on January 29, the Subcommittee recommends that no action be taken.**

28 U.S.C. § 158(d)(2) and New Rule 8006

In 2005 Congress added subsection (d)(2) to 28 U.S.C. § 158 to authorize courts of appeals to review directly final and interlocutory judgments, orders, and decrees of bankruptcy courts under certain circumstances. The statute requires first that a certification be made that one of the following circumstances exists: (1) the matter being appealed involves a matter of law for which there is no controlling decision of the Supreme Court or the court of appeals for the circuit in question, *or* it involves a matter of public importance; (2) there are conflicting decisions that

must be resolved; *or* (3) an immediate appeal may materially advance the progress of the case or the proceeding. Then the appellant must petition the court of appeals for permission to take a direct appeal, and the court of appeals must grant permission. 28 U.S.C. § 158(d)(2)(A).

The certification may be made by the bankruptcy court, the district court or bankruptcy appellate panel, or all the appellants and appellees acting jointly. *Id.* A court may act on its own initiative or at the request of a party. If a majority of appellants and a majority of appellees request the court to make a certification, the court is required to make the certification. *Id.* at § 158(d)(2)(B). A request for certification must be made no later than 60 days after the entry of the judgment, order, or decree. *Id.* at § 158(d)(2)(E).

New Rule 8006, which if approved by the Supreme Court will to go into effect on December 1 of this year, prescribes the procedures for taking a direct appeal. It will replace current Rule 8001(f). Rule 8006 provides for the certification by all appellants and appellees (subdivision (c)), by the court on its own motion (subdivision (e)), and by the court on request (subdivision (f)). Subdivision (f)(1) requires that a request for certification by a party or by a majority of appellants and a majority of appellees be filed with the clerk within 60 days after the entry of the judgment, order, or decree. The rule does not impose any time limit for making a certification under subdivisions (c), (e), or (f).

Consideration by the Subcommittee

No one has suggested to the Advisory Committee that the absence of a time limit for making certifications under § 158(d)(2) has caused any problems.[1] The Reporter called it to the

[1] Judge Easterbrook did point out in *Peterson* that the Third Circuit had incorrectly concluded that the outer limit for a joint certification by the parties is 60 days, erroneously relying on the time limit for party requests to the court. 729 F.3d at 745 (citing *In re* American Mortgage Holdings, Inc., 637 F.3d 246, 254 (3d Cir. 2011)). The Third Circuit in *American Mortgage* held that a joint certification filed 41 days after the bankruptcy court entered judgment was timely and supported its conclusion with this citation: "*See* 28 U.S.C. § 158(d)(2)(E) . . . ."

Committee's attention at the fall meeting only because the Seventh Circuit opinion pointed out that no time limit is imposed, and Judge Easterbrook spent some time discussing its absence. He, however, did not conclude that one is needed.

Although the *Peterson* opinion drew a distinction between certifications by party request and those made by the court on its own motion or jointly by all appellants and appellees, in fact under the statute all types of certification are treated the same. There is no time limit for any certification to be made. While parties must make their requests for a certification no later than 60 days after the judgment, order, or decree is entered, the statute imposes no time limit for the court to act on such requests.

Judge Easterbrook reasoned in *Peterson* that if "parties take too long [to certify a direct appeal], the court of appeals can deny the petition for interlocutory review." 729 F.3d at 746. The Subcommittee concluded that that solution seems to be the best way to deal with the timing of certification. Congress chose not to impose a time limit for certification itself, only for party requests for the court to certify. Circumstances can differ from case to case, so determining an appropriate deadline for all certifications would be challenging. The Subcommittee therefore concluded that there is no need for Rule 8006 to impose a time limit for certifications under 28 U.S.C. § 158(d)(2).

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: ISSUANCE OF MANDATE BY DISTRICT COURT OR BAP UPON CONCLUSION OF APPEAL

DATE: MARCH 13, 2014

Among the comments that the National Conference of Bankruptcy Judges ("NCBJ") submitted in response to the publication of the Part VIII rules was the suggestion that a provision similar to Federal Rule of Appellate Procedure ("FRAP") 41 for issuance of a mandate by the district court or bankruptcy appellate panel ("BAP") be added to the Bankruptcy Rules. In commenting on published Rule 8024 (Clerk's Duties on Disposition of the Appeal), the NCBJ said:

> The proposed rule carries forward a problem in current rule 8016. It fails to address when jurisdiction revests in the bankruptcy court after an appeal. The Federal Rules of Appellate Procedure resolve this problem for appeals from the district court to the court of appeals by providing for the issuance of a mandate by the appellate court.

The Advisory Committee decided to give final approval to the revised Part VIII rules without acting on the NCBJ's suggestion, but it left the matter open for further consideration at a later time.

The Subcommittee discussed the NCJB's suggestion for the addition of a mandate provision during its conference calls on July 30, 2013, and January 29, 2014. **The Subcommittee recommends that no further action be taken on the suggestion.**

Background

In the courts of appeals, FRAP 36(b) requires the clerk to serve a copy of the court's opinion—or the judgment if there is no written opinion—on all parties. In addition, FRAP 41provides for the issuance of a mandate by the court of appeals. The mandate generally consists of a certified copy of the judgment; a copy of the court's opinion, if any; and any directions about costs. FRAP 41(c) provides that the mandate is effective when it is issued, although subdivision (d) provides for a stay of the mandate if a timely petition for rehearing is filed or a petition for certiorari is filed.

Under the Bankruptcy Rules, new Rule 8024(b)[1] requires the clerk of the district court or BAP, immediately upon the entry of a judgment in a bankruptcy appeal, to transmit a notice of the judgment's entry to each party to the appeal, to the United States trustee, and to the bankruptcy clerk, together with a copy of any opinion, and to note the date of the transmission on the docket. There is no provision equivalent to FRAP 41 in the existing or new Part VIII rules.

The Wright & Miller treatise explains the significance of the mandate as follows:

> The mandate is directed to the court below, which upon receipt of the mandate can take whatever further proceedings are appropriate or necessary in light of the mandate. Until the mandate issues, however, the case ordinarily remains within the jurisdiction of the court of appeals and the district court lacks power to proceed further with respect to the matters involved with the appeal.

16AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3987 (4th ed. 2013) (footnotes omitted).

In Payne v. Clarendon Nat'l Ins. Co. (*In re* Sunset Sales, Inc.), 195 F.3d 568, 571 n.1 (10th Cir. 1999), the Tenth Circuit noted the absence from the Bankruptcy Rules of a provision addressing the issuance of a mandate by the BAP. It instead relied on the Tenth Circuit BAP's

[1] "New Rule 8024" is part of the revised Part VIII rules that will take effect on December 1, 2014, if they are approved by the Supreme Court this spring and Congress takes no action to the contrary.

Local Rule 8016-3(a) [now 8016-6], which is modeled on FRAP 41.[2] The court explained that "'Issuance of the mandate formally marks the end of appellate jurisdiction. Jurisdiction returns to the tribunal to which the mandate is directed, for such proceedings as may be appropriate.'" *Id.* at 571 (quoting Johnson v. Bechtel Assocs. Professional Corp., 801 F.2d 412, 415 (D.C. Cir. 1986)).

The NCBJ stated that the absence of a mandate provision in the existing rules does not seem to be causing significant problems. Nevertheless, the NCBJ suggested that requiring the issuance of a mandate by the appellate court would provide a clearly determined point at which jurisdiction passes from that court to the bankruptcy court.

The Subcommittee's Consideration of the Suggestion

The Subcommittee considered the possibility of amending new Rule 8024 to add a mandate procedure similar to FRAP 41. It preferred placing such a provision in that rule, rather than proposing a separate new rule, in order to avoid disrupting the new numbering scheme of the Part VIII rules.

The Subcommittee reviewed a draft of an amendment to new Rule 8024 that the Reporter had prepared. The draft amendment was modeled on FRAP 41 and addressed the contents of a mandate, when a mandate is issued, the effective date of a mandate, and staying a mandate. In light of the proposed addition of a mandate procedure, the draft deleted from Rule 8024(b) the duplicative requirement that the district or BAP clerk transmit to the bankruptcy clerk notice of the entry of a judgment and a copy of any opinion.

[2] The Eighth Circuit BAP also has a local rule providing for the issuance and stay of a mandate. *See* Local Rule 8016A(b) and (c) (Duties of the Clerk of the Bankruptcy Appellate Panel). The First and Ninth Circuit BAPs provide for the issuance and stay of a mandate in other documents. *See* Practice Guide for Appeals to the Bankruptcy Appellate Panel for the First Circuit at 8; Appeals Before the Bankruptcy Appellate Panel of the Ninth Circuit at 43.

The Subcommittee's review of the draft and careful consideration of the issue led it to conclude for several reasons that creation of a mandate procedure for bankruptcy appeals should not be pursued. First, members noted that the Bankruptcy Rules have never provided for the issuance of a mandate by the district court or BAP in a bankruptcy appeal. Indeed, as one bankruptcy judge has pointed out, the original drafters of the Bankruptcy Rules were clearly aware of FRAP 41, but chose not to adopt that procedure. *See In re* Capitol Hill Group, 330 B.R. 1, 3 n.5 (Bankr. D.D.C. 2005) ("Rule 8017(b) [soon to be Rule 8025(b)] itself is evidence that the [Advisory] Committee had in mind F.R. App. P. 41 when it elected to dispense with a delay of the issuance of the mandate as the vehicle for staying the effectiveness of a district court's ruling."). Despite the longevity of the no-mandate procedure, the Subcommittee had no evidence that problems have arisen as a result the absence of an appellate court mandate.

Second, one member of the Subcommittee persuasively challenged the view that issuance of a mandate would provide a definite point at which jurisdiction is transferred back to the bankruptcy court from the appellate court. She stated that, insofar as a mandate of a court of appeals is concerned, its significance is not jurisdictional, but rather is a matter of administrative coordination between the court of appeals and the district court. Courts of appeals sometimes recall the issuance of a mandate, *see* Calderon v. Thompson, 523 U.S. 538, 549 (1998) (noting the "inherent power" of courts of appeal to recall their mandates), so requiring a mandate will not always result in a clearly defined moment at which jurisdiction is transferred back to the trial court.

Finally, the Subcommittee concluded that, if Rule 8024 were amended to include a mandate procedure, two other rules would have to be revised. The first is new Rule 8025, which governs the stay of a district court or BAP judgment in a bankruptcy appeal. Rule 8025(a) and

(b) are the Bankruptcy Rules' substitutes for FRAP 41(b) and (d). Rather than providing for a stay of the mandate for a period after the appellate court enters a judgment and while a further appeal is sought or is pending, Rule 8025 provides for the stay of the district court's or BAP's judgment. The rule in large part serves the same function as the stay-of-mandate provisions derived from FRAP 41 that would be added to Rule 8024.

The Subcommittee concluded that there would be no reason to add the proposed mandate provisions to Rule 8024 and to also retain Rule 8025 in its current form. Instead, consideration would have to be given to whether Rule 8025 should be abrogated in its entirety (after going into effect in 2014) or whether some parts of it should be retained.

The other impacted rule is new Rule 8021, which governs the assessment of costs on appeal. It is modeled on FRAP 39. Because the existing and new Part VIII rules do not provide for the issuance of a mandate by the district court or BAP, FRAP 39(d) was not incorporated into Rule 8021. That provision of FRAP 39 requires a party seeking the taxing of costs to file an itemized and verified bill of costs in the appellate court within 14 days after judgment and requires any objections to be filed in the appellate court within 14 days after service of the bill of costs. The appellate clerk then includes an itemized statement of costs in the mandate. New Rule 8021—like current Rule 8014—instead requires the bill of costs and any objections to be filed in the bankruptcy court.

If a mandate provision were added to Rule 8024, revision of the procedure for taxing costs on appeal under Rule 8021 would have to be considered. Rule 8021 could be amended to parallel FRAP 39—moving to the district court or BAP the filing of the bill of costs on appeal and any objections. Alternatively, proposed Rule 8024(d) could be revised to eliminate from the mandate any directions about costs.

In the end, lacking any reason for concern about existing procedures, the Subcommittee concluded that any benefit from adopting bankruptcy provisions similar to FRAP 41 would be outweighed by the possible disruption caused by amending several Part VIII rules so shortly after they have been completely revised. It therefore recommends against taken any further action on the NCBJ suggestion.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

SUBJECT: SUGGESTIONS REGARDING NEW RULE 8023

DATE: MARCH 11, 2014

The National Conference of Bankruptcy Judges ("NCBJ") made two suggestions regarding new Rule 8023[1] as part of its written comments that were submitted in response to the publication of the revised Part VIII rules. Rule 8023 governs the voluntary dismissal of appeals in the district court and bankruptcy appellate panel ("BAP"). As approved by the Judicial Conference, it provides as follows:

> **Rule 8023. Voluntary Dismissal**
>
> The clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

The NCBJ recognized that the proposed rule was derived from current Rule 8001(c)(2), but it stated that it perpetuates two "arguable weaknesses" in the current rule. First, Rule 8023 fails to take into account that one of the parties to the appeal being voluntarily dismissed might be the bankruptcy trustee, who, according to the NCBJ, "is obliged under Fed. R. Bankr. P. 9019 to obtain court approval of any compromise." The NCBJ raised the concern that, by its silence, Rule 8023 could be read as overriding Rule 9019.

[1] "New Rule 8023" refers to the revised rule that will take effect on December 1, 2014, if it is approved by the Supreme Court this spring and Congress takes no action to the contrary.

Second, Rule 8023 does not account for the possibility that the matter on appeal may be an objection to discharge under § 727(a). In the bankruptcy court, Rule 7041does not allow a complaint objecting to the debtor's discharge to be dismissed at the plaintiff's instance without notice to the trustee, U.S. trustee, and others specified by the court and a court order containing terms and conditions that the court deems proper. Rule 8023 contains no similar limitation on the voluntary dismissal of the appeal of such proceedings.

The NCBJ stated that "these problems exist under the current rules and do not appear to be disrupting bankruptcy administration" and that "a number of different approaches might be considered in addressing the problems." It suggested that, while the need to address the issues was not sufficiently critical to hold up adoption of the revised Part VIII rules, they should be addressed by the Advisory Committee in the near future.

The Subcommittee considered these suggestions during its conference calls on July 30, 2013, and January 29, 2014. **It recommends an amendment to Rule 8023, to be held in the bullpen for the time being, to address the situation in which bankruptcy court approval of the settlement of an appeal is required. The Subcommittee recommends that no amendment be pursued regarding the dismissal of appeals in which denial of the discharge is sought.**

The Relationship Between Rules 8023 and 9019

Rule 9019(a) authorizes the court, on motion of the trustee, to approve a compromise or settlement after notice and hearing. The rule specifies to whom notice must be given. Although the rule addresses the court's authority and is permissive ("the court may approve"), it has been interpreted as requiring a trustee or debtor in possession to obtain court approval of any settlements entered into on behalf of the estate. *See, e.g.,* American Prairie Constr. Co. v. Hoich,

594 F.3d 1015, 1024 (8th Cir. 2010) ("It is a recognized principle of bankruptcy law that a bankruptcy court is required to approve any compromise or settlement proposed in the course of a Chapter 11 reorganization before such compromise or settlement can be deemed effective."); Levey v. Systems Division, Inc. (*In re* Teknek, LLC), 563 F.3d 639, 651 (7th Cir. 2009) ("the trustee is required to get the bankruptcy court's approval before settling claims"); Reynolds v. Comm'r, 861 F.2d 469, 473 (6th Cir. 1988) ("In bankruptcy proceedings, as distinguished from ordinary civil cases, any compromise between the debtor and his creditors must be approved by the court as fair and reasonable."); 10 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 9019.01 (16th ed. 2013) (When "the representative of the estate and an adverse party [settle litigation,] . . . the settlement must be approved by the court."); Reynaldo Anaya Valencia, *The Sanctity of Settlements and the Significance of Court Approval: Discerning Clarity from Bankruptcy Rule 9019*, 78 OR. L. REV. 425, 439 (1999) (stating as the majority rule that compliance with Rule 9019 is mandatory).

The Subcommittee noted that determining the effect that Rule 9019(a) has on the settlement and voluntary dismissal of an appeal to which the trustee is a party raises the broader issue of the relationship between the Part VIII and Part IX rules. Part IX contains the General Provisions of the Bankruptcy Rules. Some of those rules by their nature do not apply to appeals—such as Rules 9015 (Jury Trials) and 9023 (New Trials; Amendment of Judgments). Others seemingly do apply—such as Rule 9001(General Definitions) and 9006 (Computing and Extending Time). Part IX contains no carve-out for Part VIII, so the Subcommittee concluded that, except when a rule addresses only a trial court procedure or there is a more specific provision in Part VIII, Part IX applies to bankruptcy appeals in a district court or BAP.

Even if Rule 9019 applies on its own accord to appeals that are settled while pending in the district court or BAP, the NCBJ's suggestion indicates that it would be helpful to clarify in Rule 8023 that Rule 9019(a) may apply and limit the right of parties to voluntarily dismiss appeals. A member of the Subcommittee suggested that Rule 8023 be amended by inserting "Subject to Rule 9019, " at the beginning of the rule. Inclusion of the phrase would remind parties seeking a voluntary dismissal of an appeal, as a result of a settlement to which the trustee is a party, of the need to obtain bankruptcy court approval.

The Subcommittee considered how to deal with a division in the case law about the jurisdiction of a bankruptcy court to approve the settlement of a proceeding that is on appeal. Some appellate courts have refused to enforce such a settlement, finding the bankruptcy court's approval void due to the court's lack of jurisdiction. In Levey v. Systems Division, Inc. (*In re* Teknek, LLC), 563 F.3d at 651, the Seventh Circuit held:

> [A]lthough the matter on appeal is technically a separate adversary proceeding from the matter at issue in the trustee's settlement, the relationship is so close that it is obvious that the bankruptcy court lacked jurisdiction to approve the settlement. Therefore, the bankruptcy court's purported approval of the settlement is null and void. Moreover, because the trustee is required to get the bankruptcy court's approval before settling claims, the settlement itself is apparently of no effect. *See* Fed. R. Bankr. P. 9019 . . . .

The First Circuit BAP came to a similar conclusion in Aetna Cas. & Surety Co. v. Markarian (*In re* Markarian), 228 B.R. 34, 47 (B.A.P. 1st Cir. 1998). It denied the appellant's motion to vacate its opinion and order and dismiss his appeal *nunc pro tunc*, despite the bankruptcy court's prior approval of a settlement between the parties. The BAP held that the bankruptcy court lacked jurisdiction to approve the settlement because the matter was on appeal. The panel reasoned that the settlement was therefore void, and a case or controversy still existed when it entered its opinion and order. *See also In re* FBI Distrib. Corp., 267 B.R. 655 (B.A.P.

1st Cir. 2001) ("Since the filing of a notice of appeal is an event of jurisdictional significance, the bankruptcy court no longer has control over those aspects of the case involved in the appeal. Accordingly, the parties could not have filed a motion for approval of the Settlement in the bankruptcy court because that court has no jurisdiction to consider approval of the Settlement.").

Other courts, however, have distinguished approval of the settlement of an appeal from resolution of the merits of the appeal. In Korngold v. Loyd (*In re* Southern Medical Arts Cos.), 343 B.R. 250 (B.A.P. 10th Cir. 2006), the BAP acknowledged the rule that the Seventh Circuit and First Circuit BAP relied on—that a trial court loses jurisdiction over all matters within the subject matter of an appeal—but it applied the rule narrowly. It concluded that the substance of the appeal was "distinct and separate from the issue of whether a compromise may be reached between a creditor and a trustee." *Id.* at 254. It also held that it was not fatal to the bankruptcy court's jurisdiction that the Motion to Compromise Controversy was erroneously filed in the adversary proceeding that had been appealed, rather than in the main case. The BAP went on to uphold the bankruptcy court's approval of the settlement. *See also In re* Washington Mutual Inc., 461 B.R. 200 (Bankr. D. Del. 2011) (stating that there is a "fundamental difference" between approving the settlement of claims and ruling on the merits of claims).

The Subcommittee concluded that this jurisdictional issue does not need to be resolved by the Committee or addressed in Rule 8023. A reminder in the rule of the possible need to comply with Rule 9019 would be helpful, whether or not parties seeking approval of the settlement of an appeal must first obtain a remand from the appellate court. Accordingly, the Subcommittee recommends that the Rule 8023 be proposed for amendment as follows:

Rule 8023. Voluntary Dismissal

Subject to Rule 9019, ~~T~~the clerk of the district court or BAP must dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the district court or BAP.

COMMITTEE NOTE

The rule is amended to provide a reminder that, when dismissal of an appeal is sought as the result of a settlement by the parties, Rule 9019 may require approval of the settlement by the bankruptcy court.

Because Rule 8023 and the other new appellate rules will go into effect on December 1 of this year and the change is minor, the Subcommittee recommends that, if the Committee approves the proposed amendment, it be placed in the bullpen. A period of experience with the new Part VIII rules may suggest the need for additional amendments to which this amendment could be added.

Incorporation of Rule 7041's Limitation Into Rule 8023

The other issue raised by the NCBJ is whether a limitation similar to the Rule 7041's restriction on voluntary dismissals of complaints objecting to the debtor's discharge should be included in Rule 8023. In addition to making Civil Rule 41 generally applicable in adversary proceedings, Rule 7041 provides that "a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and

such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper." According to the original Committee Note, this restriction was adopted out of concern that a plaintiff who sought denial of a discharge "may have been induced to dismiss by an advantage given or promised by the debtor or someone acting in his interest." The Collier treatise elaborates that "by filing a complaint objecting to discharge, the plaintiff takes on the responsibility of pursuing the action for the benefit of all creditors. . . . Thus, no matter at what time it may occur, after the filing of a complaint objecting to discharge there may not be a dismissal without notice to [the specified entities]." 10 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 7041.01 (16th ed. 2013).

The Subcommittee concluded that, while the concern that underlies the limitation in Rule 7041 could be relevant when the party objecting to discharge seeks dismissal on appeal, any concern is likely to be diminished at that stage of the litigation. If the plaintiff won in the bankruptcy court and the debtor appealed, a dismissal of the appeal would leave the order denying discharge undisturbed. The concern would potentially arise when the plaintiff is the appellant who then seeks to dismiss the appeal. Although the dismissal could be the result of collusion, there would already be a bankruptcy court determination that the objection to discharge is without merit. In that posture, any concern about abandonment of the objection by the plaintiff would not be much greater than in the case of a losing plaintiff who decides not to appeal a decision rejecting the objection to discharge.

The Subcommittee recommends that this suggestion not be pursued further.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

SUBJECT: SUMMARY OF COMMENTS AND RECOMMENDATION ON THE ELECTRONIC SIGNATURE AMENDMENT TO RULE 5005

DATE: MARCH 16, 2014

At the spring 2013 meeting, the Advisory Committee voted to propose for publication an amendment to Rule 5005(a) to govern electronic signatures. As proposed, this national rule would replace local rules and would permit the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. That scanned signature could be used with the same force and effect as an original signature, and retention of the original document with the wet signature would not be required.

After the Advisory Committee meeting, the proposed amendment to Rule 5005(a) was considered by the Standing Committee's CM/ECF Subcommittee. That subcommittee suggested that the rule provide an additional means of ensuring the integrity of a scanned signature, and it proposed two alternatives: (1) to deem the filing attorney's act of filing the document and the scanned signature to certify that the signature was part of the original document, and (2) to require the acknowledgment of a notary public that the scanned signature was part of the original document. At its June meeting, the Standing Committee approved the Rule 5005(a) amendment for publication with the alternative provisions included. The publication package contained a note that called attention to the alternative provisions and specifically sought comment on

whether one of the provisions was preferable. The amendment, as published, is attached to this memorandum as Attachment A.

Comments Received

Nineteen comments were submitted on the Rule 5005(a) amendment. Everyone who commented on the alternatives preferred Alternative 1. Most of those comments explained the reasons for the preference without commenting more broadly on the desirability of the overall amendment. Seven comments expressed opposition to adoption of the amendment. Included in that group is the detailed comment submitted by the Deputy Attorney General. Among the reasons for opposition were that current procedures work fine and scanning of signatures would be more complicated, scanned documents will require greater electronic storage capacity, there is or soon will be superior technology that will assure the validity of electronic signatures, and elimination of the retention requirement will make prosecutions and civil enforcement actions for bankruptcy fraud and abuse more difficult. Four of the comments gave suggestions for revising the wording or scope of the amendment.

A summary of each of the comments is included in Attachment B. They were all considered by the Subcommittee during its March 5 conference call. This memorandum discusses the comments by topic and provides the reasons for the Subcommittee's **recommendation that the Advisory Committee not proceed with the proposed amendment to Rule 5005(a).**

Alternative 1 vs. Alternative 2

Comments submitted by the following individuals or groups expressed opposition to Alternative 2: Bankruptcy Judges Margaret M. Mann, Diane Finkle, and Terrence L. Michael; Bankruptcy Clerks Dana McWay and Scott W. Ford; the National Association of Consumer

Bankruptcy Attorneys, the Bankruptcy Clerks Advisory Group, the National Conference of Bankruptcy Judges, Community Legal Services of Philadelphia, the Department of Justice; and attorneys Michael W. Gallagher, Craig Goldblatt (on behalf of several mortgage servicers), and Penelope Souhrada. No one commented favorably on Alternative 2.

Many of the comments stated that requiring the acknowledgment of a notary public would be at odds with 28 U.S.C. § 1746, which dispenses with notarization. Several also stated that the requirement would entail additional delay and expense and would be infeasible because many law offices no longer have notaries readily available. Clerks commented that Alternative 2 would impose additional work on the clerk's office, as they would be required to perform a new quality assurance step for each filing covered by the rule. The general view expressed was that Alternative 2 would be awkward, cumbersome, and a step backwards.

The Advisory Committee did not propose the notarization requirement, and some of its members questioned its feasibility when it was added to the proposed amendment. Based on the comments, the Subcommittee concluded that, if the Committee does decide to seek final approval of the amendment, Alternative 2 should not be included in the rule.

More Trouble, More Storage Space

The chief complaints of those opposing the proposed amendments were that having to scan signature pages (or entire documents) would be more trouble than the current procedures for electronic signatures and that the use of scanned pages would require more electronic storage capacity on the courts' CM/ECF systems. One or both of these concerns were expressed by attorneys Scott Racop, Warren Agin, Penelope Souhrada, and Pam Bassel; Judge Terrence L. Michael; and Clerk Michael Willliams.

Commenters who said that using scanned signature pages would require more work than current procedures require appeared to be accustomed to using an s/ electronic signature for debtors, and they did not express any dissatisfaction with having to retain documents with an original signature. They said the current procedures work well and have streamlined the filing of documents in bankruptcy courts. A couple of these comments stated that some debtors' attorneys do not have scanners or do not know how to merge scanned and electronically created documents. One clerk questioned whether software packages allow the use of scanned pages and asserted that a majority of attorneys probably do not know how to file documents using the CM/ECF system. An attorney stated that filing a 50-page petition and related documents would require the scanning of a number of signature pages, which would be a burden on the filing attorney and the court. One comment stated that the clerk's office in her district has been discouraging the uploading of scanned signatures for years.

Some of the concerns that were expressed about the courts' need for increased storage capacity seemed to be based on the belief that entire documents would have to be scanned, rather than just their signature pages. Some noted that scanned documents are not searchable and will take longer to upload and download.

Prospects for Improved Technology

Three comments expressed opposition or questions about the proposed amendment from a technological point of view. Attorney Warren Agin was critical that the rule fails to accommodate the use of "true electronic signatures – electronic documents signed using a click-through process or using a Signature Capture Pad." The Department of Justice commented that the use of a scanned signature page may soon be obsolete. It noted that thumbprint readers and other biometric devices are already available and may soon become sufficiently inexpensive to

eliminate traditional signatures altogether. The Department suggested that the proposed amendment is premature and that rulemaking should await the availability of technology that will "solve the twin goals of eliminating paper retention requirements and ensuring that bankruptcy fraud prosecutions proceed unimpeded." Finally, the National Association of Bankruptcy Trustees questioned whether the use of scanned signatures, inserted in the petition and other documents, "will be compatible with the contemplated technology changes for NextGen and the integrity of the .pdf document metadata."

Adverse Impact on Law Enforcement

The main basis for the Department of Justice's opposition to the proposed rule is that, by eliminating the requirement for retaining original signatures, it would adversely affect the Department's ability to successfully prosecute bankruptcy crimes and to pursue civil enforcement actions for bankruptcy fraud and abuse. The Deputy Attorney General's comment was informed by a poll of federal prosecutors across the country who are involved in prosecuting white collar crime. Ninety-two percent of respondents indicated that they saw no problem that needs fixing, and 57% said that eliminating the retention of original signatures would make their job of prosecuting bankruptcy crimes more difficult. They expressed concern that debtors' repudiation of signatures is more likely with electronic signatures and that proving that a signature belongs to the defendant will be more difficult. Circumstantial proof of authenticity will be required because the FBI will not provide conclusive expert testimony on handwriting analysis without the original signatures. The Deputy Attorney General also stated that "a scanned signature is easily appended to a[] . . . document [amended by a lawyer after it was signed by a debtor] and difficult to disprove."

The Department of Justice's comment distinguished the proposed amendment from the IRS's use of electronic signatures. The IRS practice is supported by a federal statute, 26 U.S.C. § 6061(b)(2), which provides that an electronic signature on a return "shall be treated for all purposes (both civil and criminal, including penalties for perjury) in the same manner as though signed or subscribed." The Department commented that there is no equivalent statute for bankruptcy and argued that it would be premature for it to endorse such legislation at this time. It also noted that other federal agencies, such as the SEC, require the retention of original signatures for a period of time.

Although some of the views expressed in this comment were shared with the Advisory Committee by Chris Kohn at the spring 2013 meeting, the support of attorneys' retention of original signatures is not entirely consistent with the Department's earlier views. In connection with the development of NextGen, the Department made a report to the Additional Stakeholders Functional Requirements Group regarding the use of electronic signatures. It recommended that "to the extent that original wet-signature documents are legally required, they should be held by the clerk of court, rather than counsel, absent *a nationwide rule* to the effect that electronic (PDF) copies of such documents in the courts' official ECF system constitute legally sufficient 'best evidence' in the absence of an original hard copy" (emphasis added). Based on this recommendation, in August 2012 the Committee on Court Administration and Case Management ("CACM") requested the various rules committees to consider creating "a federal rule regarding electronic signatures and the retention of paper documents containing original signatures." CACM's preferred approach was the promulgation of a national rule specifying that an electronic signature in the CM/ECF system is *prima facie* evidence of a valid signature.

Is There A Need for A Change?

The Department of Justice comment questioned the need for a change in the procedure regarding electronic signature, as did two other comments. The Deputy Attorney General argued that the impact on law enforcement would outweigh the reasons given for the proposed amendment. He stated that any concern that the retention requirement could be inconsistent with a lawyer's duty to the client is unwarranted, that having different retention periods among the districts is no different than other local rule differences, and that the burden on attorneys to retain documents is a fairly constant one, as older documents can be destroyed each year as their retention period expires. Judge Terrence Michael commented that the current system works well and that there is no need for change. Finally, the National Association of Bankruptcy Trustees stated that the debtor's signatures on case-opening documents are verified at the § 341 meeting, so no additional signature authentication requirements are needed for them. It noted that documents subsequently filed are not subject to that authentication, but that many courts require wet signatures on amended schedules and amended covers sheets.

The Subcommittee's March 2013 memo to the Advisory Committee summarizes the reasons that the Rule 5005(a) amendment was proposed:

> This issue of the retention of documents that are filed electronically with the debtor's signature was initially brought to the Advisory Committee by the Forms Modernization Project. It raised the issue in response to concerns expressed by debtors' attorneys about their need to retain petitions, schedules, and other individual-debtor filing documents that will be lengthier in the proposed restyled format. Representatives of the Department of Justice also expressed concerns about the retention of original documents by debtors' attorneys and the lack of uniformity regarding the retention period. The Department made a recommendation to the Next Gen's Additional Stakeholders Functional Requirements Group that documents bearing wet signatures, signed under penalty of perjury, be retained by the clerk of court for five years—the statute of limitations for fraud and perjury proceedings—unless a national rule were adopted declaring that electronic copies of such documents in the court's ECF

system constitute legally sufficient best evidence in the absence of an original signed document.

The CACM request provided yet another reason for the Committee's pursuit of the rule amendment, which was later supported by the Standing Committee's CM/ECF Subcommittee.

The Subcommittee concluded that the comments shed new light on the factors that prompted the amendment. Comments from attorneys did not indicate dissatisfaction with current procedures. No comment expressed relief that retention would no longer be required, and some attorneys said that the current procedures work well. While the concerns of the Department of Justice about existing procedures for the retention of documents with wet signatures had prompted the Committee's pursuit of an amendment to Rule 5005(a), the Department's current position is one of opposition to the proposed amendment. The Subcommittee attached significant weight to the Department's views and concluded that, given the lack of indication of a need for change, the Committee should not proceed further with the amendment.

Suggestions for Revisions in Wording or Scope

Four of the comments suggested changes to either the wording of the rule or the scope of its coverage. They are set forth here. Should the Committee disagree with the Subcommittee's recommendation and decide to proceed with the amendment to Rule 5005(a), these comments will require further consideration by the Subcommittee or the Committee as a whole and perhaps will require republication.

(1) The National Conference of Bankruptcy Judges suggested that Alternative 1 be reworded as follows: "By filing the document and signature page, the registered user ~~certifies~~ declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the scanned signature was part of the original document and that the signature was signed by the person whose name appears there."

(2) Clerk Dana McWay commented that the proposed amendment would cause problems for the electronic proof of claim (ePOC) program, which allows the submission of electronic proofs of claim by claimants who are not registered users of CM/ECF. Forty-three bankruptcy courts currently use the program. She suggested that the rule or committee note make clear that the new requirements do not apply to automated programs such as ePOC that streamline the court's work.

The comment calls attention to the fact that the proposed rule assumes that only a registered user can file a document electronically. The existence of ePOC demonstrates that the assumption is incorrect. Neither proposed Rule 5005(a)(3)(A) or (B) covers this situation since a registered user is not involved in filing a claim via ePOC.

(3) Clerk Michael Williams pointed out another possible gap in the proposed amendment. He said that Rule 5005(a)(3)(B) would allow an attorney representing someone who happens to be a registered user of CM/ECF to electronically file a document signed by the client without also filing a scanned signature page. Mr. Williams is correct that subparagraph (B) does not apply because the client's signature would not be that of a non-registered user. Subparagraph (A) literally applies since the document would have the signature of a registered user, but this situation is not contemplated by the rule because that person's user name and password are not being used in the filing.

(4) Attorney Pam Bassel commented that the proposed rule should not apply when the non-registered user is an attorney who is signing the document as an attorney or a trustee. She said that in some law offices only one attorney is a registered user. The other attorneys may orally or by email authorize the registered user to sign their names without there ever being a wet

signature. The filer would therefore not be able to certify that the non-registered attorney actually signed the document.

Attachment A

Rule 5005. Filing, Electronic Signatures, and Transmittal of Papers

(a) FILING and SIGNATURES.

(1) *Place of Filing*.

* * * * *

(2) *Filing by Electronic Means.* A court may by local rule permit or require documents to be filed~~, signed, or verified~~ by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A document filed by electronic means in compliance with a local rule constitutes a written paper ~~for the purpose of applying~~ under these rules~~, the Federal Rules of Civil Procedure made applicable by these rules,~~ and § 107 of the Code.

(3) *Signatures on Documents Filed by Electronic Means.*

(A) *The Signature of a Registered User*. The user name and password of an individual who is registered to use the court's electronic filing system serves as that individual's signature on any electronically filed document. The signature may be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

(B) *Signature of Other Individuals*. When an individual other than a registered user of the court's electronic filing system is required to sign a document that is filed electronically, the registered user shall include in a

single filing with the document a scanned or otherwise electronically replicated copy of the document's signature page bearing the individual's original signature. **[Alt. 1: By filing the document and signature page, the registered user certifies that the scanned signature was part of the original document.] [Alt. 2: The document and signature page shall be accompanied by the acknowledgment of a notary public that the scanned signature was part of the original document.]** Once a document has been properly filed under this rule, the original document bearing the individual's original signature need not be retained. The electronic signature may then be used with the same force and effect as a written signature under these rules and for any other purpose for which a signature is required in proceedings before the court.

* * * * *

Attachment B

COMMENTS SUBMITTED ON PROPOSED AMENDMENTS TO RULE 5005

Comment BK-2013-0001-0003. Scott Racop (Attorney, Terre Haute, Ind.): The current use of electronic signatures (/s/) works well and has streamlined the filing of documents in the bankruptcy court. Requiring the scanning of actual signatures or the use of a notary public will be a step backwards. Scanned documents have a larger footprint and will require courts to have much greater electronic storage capacity.

Comment BK-2013-0001-0005. Traci Cotton: Will a registered user still have to retain hard copies of documents filed with the registered user's electronic signature? If so, that requirement should be eliminated for registered users as well as nonregistered users.

Comment BK-2013-0001-0026. Judge Margaret M. Mann (Bankr. S.D. Cal.): The first alternative presented in the published rule is preferable. Obviating the notary requirement will reduce the cost and burden on bankruptcy administration and litigation. There is no clear justification for adding burdens to the bankruptcy process. The validity of signatures can still be challenged, and sanctions can be imposed for the improper submission of documents. Requiring affidavits is also at odds with 28 U.S.C. § 1746.

Comment BK-2013-0001-0037. Judge Diane Finkle (Bankr. D.R.I.): I support the amendment, but not Alternative 2. Requiring a notarized signature would present problems for debtors who need to file bankruptcy at the last minute before a foreclosure sale. Alternative 1 is a good middle course. The rule places an appropriate burden on the attorney and will prevent the practice sometimes seen of a debtor not signing the petition and schedules until the meeting of creditors.

Comment BK-2013-0001-0040. Warren Agin (Chapter 7 trustee): The proposed rule will require a lot of extra work as compared to the current practice of using /s/ preceding a printed name and retaining the original document with the wet signature. Having the attorney certify the signature could be problematic if the debtor later disclaims the signature. Also the rule doesn't explain how you file the notarization. Perhaps the rule should give the filing attorney a choice: scan and toss or use the /s/ and retain the original. More amazing is the rule's failure to accommodate the use of true electronic signatures—electronic documents signed using a click-through process or a signature capture pad. Technology is available to use truly enforceable electronic signatures, although perhaps bankruptcy attorneys aren't using that technology yet. Vendors will incorporate the available technology into their products if the rules accommodate it.

Comment BK-2013-0001-0042. Henry Sommer, on behalf of the National Association of Consumer Bankruptcy Attorneys: NACBA strongly prefers Alternative 1. Requiring a notary would be a big step backward from 28 U.S.C. § 1746, which largely dispensed with notarization. It would also require unnecessary time and expense since many law offices no longer have notaries readily available.

Comment BK-2013-0001-0056. Scott W. Ford, on behalf of the Bankruptcy Clerks Advisory Group: BCAG prefers Alternative 1. Alternative 2 would require a great deal more work on the part of the clerk's office to confirm that the document is accompanied by a notary signature. BCAG notes that the proposed rule is a significant departure from the current practice of many courts.

Comment BK-2013-0001-0058. Michael W. Gallagher (Attorney): Alternative 2 would be a complete nightmare. Many law offices no longer have notaries on hand. Requiring notarization would be a strange and massive step backwards.

Comment BK-2013-0001-0059. Judge A. Benjamin Goldgar (Bankr. N.D. Ill.), on behalf of the National Conference of Bankruptcy Judges: NCBJ prefers the first alternative with modifications. Instead of providing that the registered user "certifies" that the scanned signature was part of the original document, it should state: "By filing the document and signature page, the registered user declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the scanned signature was part of the original document and that the signature was signed by the person whose name appears there."

Comment BK-2013-0001-0065. Judge Terrence L. Michael (Bankr. N.D. Ok.): I, along with Judge Tom Cornish (Bankr. E.D. Ok.), oppose the proposed amendments to Rule 5005. The current local practice—use of s/ on the electronic copy of a document and retention of the original document with wet signature for a period of years—works well, and there is no need for change. Requiring the use of a scanned signature page will cause logistical problems. Scanned documents consume more memory than electronic documents and are not searchable in the same manner. Many practicing attorneys are not experts in either scanning or merging scanned and electronic documents. The result will be more time demands on the court's IT staff and a less accessible court record. Alternative 2 is inconsistent with 28 U.S.C. § 1746, which allows non-notarized verified statements. Finally, contrary to the Committee Note, it is not clear why retention of original documents by attorneys causes any conflict of interest. If documents are signed fraudulently, no privilege attaches to them.

Comment BK-2013-0001-0067. Dana C. McWay (Clerk of Court, E.D. Mo.): Alternative 2 would impose an additional burden on the clerk's office—a new quality assurance step for each pleading to which the rule applies. More work should not be added to the clerk's office staff during this time of reduced budgets and staff if an alternative is available. The proposed amendments would also cause problems for the electronic proof of claim (ePOC) program, which many courts use to reduce the number of paper proofs of claim that are filed. The program allows the submission of electronic claims by claimants who are not registered users of CM/ECF. The rule or Committee Note should make clear that the new requirements do not apply to automated programs such as ePOC that streamline the courts' work.

Comment BK-2013-0001-0072. Michael Williams (Clerk of Bankruptcy Court): The proposed amendments to Rule 5005 will cause problems for the filing attorney, other

users, and the courts. Filing attorneys will have to buy or obtain access to scanners, although some might get creative and take pictures with their phone and then convert their jpeg to PDF with bad results. Currently, filing a petition can be accomplished through petition preparation software, but it is not clear that the software will allow the substitution of a scanned petition packet. A majority of attorneys probably don't know how to file a petition using the CM/ECF system. A scanned petition will be many times the size of electronically created ones, thus requiring more storage capacity and time to upload and download. The scanned documents will also not be searchable. Use of scanned documents will be more costly for the courts, as they will have to increase storage capacity and spend more time dealing with larger documents. It would be better to provide that the scanned signature page can be filed as an additional page or attachment to an electronic document. Combining a scanned PDF with an electronically created PDF is beyond the knowledge of most users. Finally, Rule 5005(a)(3)(B) would allow an attorney representing someone who happens to be a registered user of CM/ECF to file without a scanned signature page.

Comment BK-2013-0001-0089. Scott W. Ford (Clerk of Court, Bankr. N.D. Ala.): Alternative 1 is preferable. Requiring the acknowledgement of a notary would create another item for the clerk's office to review and quality control and seems unnecessary.

Comment BK-2013-0001-0121. Peter D. Schneider, on behalf of Community Legal Services of Philadelphia: Alternative 2 is clumsy, awkward, and unnecessary. Many law offices do not have notaries on site. Alternative 1 is far preferable.

Comment BK-2013-0001-0124. Craig T. Goldblatt, on behalf of Bank of America, Wells Fargo Bank, JP Morgan Chase Bank, and Citibank: Of the two alternatives, these mortgage servicers strongly prefer Alternative 1. This alternative is consistent with the ethical obligations of attorneys and the obligations undertaken when registering with ECF; it also avoids imposing undue burden. Alternative 2 would be cumbersome and impose additional costs and delays. It is also inconsistent with 28 U.S.C. § 1746 and may impose duties on notaries that they do not usually undertake.

Comment BK-2013-0001-0128. Deputy Attorney General James M. Cole, U.S. Department of Justice: The Department opposes eliminating the requirement that original documents be retained for a defined period of time. This view is based, among other things, on the results of a survey of federal prosecutors across the U.S. Ninety-two percent of respondents perceived no problem with current procedures, and 57% indicated that eliminating the retention requirement would adversely affect the ability to prosecute bankruptcy crimes. There is a concern that electronic signatures are more easily replicated and more susceptible to abuse.

Enforcement problems. The FBI adheres to a policy of not providing conclusive expert testimony on handwriting analysis without the original signature. If the amendments to Rule 5005 were adopted, prosecutors would have to rely on circumstantial evidence to demonstrate that an electronic signature belonged to the defendant. The Department believes that the burdens and costs of making this proof outweigh any benefits of altering

the status quo. U.S. trustees also rely on wet signatures in civil enforcement actions to address bankruptcy fraud and abuse. Having the original signature may make it easier to demonstrate that a particular document was actually signed. A scanned signature, however, is easily appended to an amended document not seen by the debtor and will be harder for a debtor to disprove. Enforcement problems are not fully solved by the practice of asking debtors to affirm the authenticity of signatures at the meeting of creditors because (1) Rule 5005 applies to signatures of persons other than debtors and (2) debtors file signed documents after the § 341 meeting.

Comparison with IRS model. While the IRS has relied on electronic signatures for many years, its procedure rests on a combination of Fed. R. Evid. 902(10) and 26 U.S.C. §§ 6061 and 6064. Together those authorities allow an electronic signature to be presumptively genuine and authentic. A similar procedure in bankruptcy would require statutory authorization. The Department believes that it is premature to seek such legislation now. Other agencies that accept electronic signatures (e.g., the SEC) continue to require the retention of original signatures.

Reasons given for the proposed amendment. The reasons given for making a change are outweighed by the impact on law enforcement. First, the concern about the possible violation of a lawyer's duty to the client seems unwarranted. No privilege attaches to publicly filed documents, and canons of professional responsibility prevent an attorney from assisting a client in committing fraud. Second, having different retention periods in local rules is no different than variances in other local rules that attorneys successfully deal with. Finally, while retaining paper documents can create a burden on some debtors' attorneys, the quantity of paper required to be retained should remain fairly constant.

Developments in technology. The change proposed by the amendment may soon become obsolete. Before long thumbprint readers and other biometric devices may become sufficiently inexpensive to replace the traditional signature. New technology may allow eliminating paper retention requirements while ensuring that bankruptcy fraud prosecutions proceed unimpeded. Meanwhile it is premature to eliminate original signatures.

Alternative 1: The Department supports the principle found in Alternative 1, although attorney certification is not a sufficient substitute for retention of the original signature. Alternative 2 would entail additional time and expense and would be impractical for debtor who must file for bankruptcy relief under exigent circumstances. The Department does not support it.

Comment BK-2013-0001-0140. Penelope Souhrada: Would this rule require scanning and filing every signature page in a 50-page petition? If so, this would be a burden for filers and courts. Additional electronic storage capacity will be required. Retaining original documents with the wet signature is not too burdensome, and it provides protection for attorneys. Alternative 2 would be truly burdensome.

Comment BK-2013-0001-0141. Pam Bassel (Chapter 13 trustee, Fort Worth, Tex.): (1) Scanning or replicating a signature takes additional storage space on the clerk's computer system. The clerk's office has been discouraging the uploading of this kind of signature for years. (2) The rule should not apply when the signatory is an attorney and is signing the document as an attorney or when the signatory is a trustee. Some law practices have one registered user in whose name all documents are filed. Other lawyers authorize their signatures to be used, perhaps orally or by email but without an actual wet signature. In this circumstance the filer will not be able to certify that the attorney (who is not a registered user) actually signed the document. (3) Besides creating the exception just noted, the first option of subparagraph (B) should be deleted (scanning the signature), and Alternative 1 should be used. The term "original signature" should also be clarified to indicate that it includes both original inked signatures and other methods of signing a document (such as a signature sent by fax or electronic means).

Comment BK-2013-0001-0151. Raymond Obuchowski, on behalf of the National Association of Bankruptcy Trustees: Chapter 7 trustees confirm the authenticity of the debtor's signatures on the petition, schedules, and declarations at the meeting of creditors. Therefore there is no need to create additional signature authentication requirements for those documents. Subsequent filings by pro se chapter 7 debtors or other non-registered users are not subject to such authentication, although many courts require wet signatures on amended schedules or amended cover sheets. NABT questions whether the use of scanned signatures, inserted electronically in the petition and other documents will be compatible with Next Gen and with the integrity of the PDF document metadata.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS-BORDER INSOLVENCY

RE: PROPOSED CHAPTER 15 PETITION FORM

DATE: MARCH 25, 2014

This memorandum discusses the Subcommittee's consideration of a new form for chapter 15 petitions. The creation of the form arose from the ongoing work of the Forms Modernization Project. While drafting a new voluntary petition form for non-individual debtors, the FMP received comments suggesting that a separate chapter 15 petition form should be drafted. In particular, the U.S. Trustee Program recommended the creation of a separate form to allow the deletion of information on the voluntary petition form that is relevant only to chapter 15 cases.

The Subcommittee discussed the petition form during a conference call on July 11, 2013, and—after gathering additional information about chapter 15 practice—during a second conference call on August 5, 2013. The Subcommittee ultimately decided to endorse creating a separate chapter 15 petition form, which the FMP took the lead in drafting with input from the Subcommittee. The draft chapter 15 petition form, designated as B401, was presented to the Advisory Committee for preliminary discussion at its fall 2013 meeting.

The Subcommittee sought further input from a group of outside reviewers with expertise in chapter 15 cases. These reviewers—from judicial, academic, and practice backgrounds—noted a number of suggested changes to the draft form. The Subcommittee discussed these suggested changes during its February 3, 2014, conference call. In the Subcommittee's view, it

is now appropriate to go forward with publication of the form. **Accordingly, the Subcommittee recommends that the Advisory Committee seek publication of the chapter 15 petition form.**

The Chapter 15 Petition Form

The FMP's draft chapter 15 petition form was circulated to a group of reviewers with experience in chapter 15 proceedings. Molly Johnson and Beth Wiggins of the FJC compiled the reviewers' comments. On the whole, the reviewers' comments are positive and helpful, and the Subcommittee found a number of their suggested changes to be improvements that were incorporated into a revised draft. These are the principal differences from the draft form presented to the Advisory Committee in fall 2013:

Line 2: Because a foreign debtor may not have a federal Employer Identification Number, Social Security Number, or Individual Taxpayer Identification Number, several reviewers suggested that the form should either (i) indicate that one of these particular identifiers must be provided only if available or (ii) request that the debtor provide some unique identification number available to it. Because the Subcommittee agreed that having a unique identifier of some kind is useful, particularly in cases with complicated multi-debtor groups, it preferred the second option. The Subcommittee therefore altered Line 2 so that it requests some unique identifier if one is available and requires a description of that identifier (if it is something other than a federal Employer Identification Number, Social Security Number, or Individual Taxpayer Identification Number).

Line 3: The draft form asked for the "Foreign representative's name." Reviewers noted that in many cases, more than one foreign representative may be appointed. To accommodate these situations, this portion of the form was reworded.

Line 5: The draft provided two checkboxes ("Foreign main proceeding" and "Foreign nonmain proceeding") and instructed that only *one* should be checked. But it is common for a foreign representative to seek relief in the alternative—that is, recognition of a foreign proceeding as a foreign main or alternatively as a foreign nonmain proceeding. A third checkbox to reflect this possibility was added.

Line 7: The draft form asked whether the petition related to "the only foreign proceeding with respect to the debtor known to the foreign representative." The checkbox for "No" was followed by a parenthetical directing the attachment of a "statement identifying all foreign proceedings with respect to the debtor known to the foreign representative." The comments suggested that the form should track more closely the language of Rule 1004.2(a), which requires the petition in chapter 15 cases to identify each country in which "a foreign proceeding by, regarding, or against the debtor is pending." (The current voluntary petition form uses that language.) The Subcommittee agreed that it would be preferable to retain the language in the current voluntary petition in light of Rule 1004.2.

Line 9: The draft form requested an address for the debtor's center of main interests (COMI). Although the Code does not define what constitutes the debtor's COMI, the Subcommittee took note that the Code and the Bankruptcy Rules refer to the *country* where the debtor has its COMI rather than a particular address,[1] and the request for an address might seem

[1] *See, e.g.*, Code § 1517(b) (providing for the recognition of a foreign proceeding as a foreign main proceeding "if it is pending in *the country* where the debtor has the center of its main interests." (emphasis added)); Rule 1004.2 ("A petition for recognition of a foreign proceeding

odd to practitioners. The draft petition form also requested a separate address for the debtor's registered office, if different from its COMI. Although the Subcommittee did not view the draft form to be misleading, the Subcommittee thought it better for this part of the form to request (i) the country where the debtor has the center of its main interests (without an address) and (ii) the location of its registered office (with an address).

Line 11: A comment noted that the types of non-individual debtors on the draft form reflected U.S. business associations (e.g., LLCs and LLPs) that might not exist in other countries. The Subcommittee decided to rework this part of the form to provide two checkboxes—one for non-individual debtors (with space to specify that the debtor is a corporation, partnership, or some other entity), and one for individual debtors.

Line 12: The second venue option on the draft form stated that venue was justified because of "an action or proceeding" pending against the debtor in a federal or state court in the district. The Subcommittee agreed with reviewers suggesting that the form should prompt the foreign representative to identify the action or proceeding.

The Subcommittee anticipates that publication of the form would be in tandem with publication of amendments to several of the Bankruptcy Rules applicable in chapter 15 cases. These proposed amendments are the subject of a separate recommendation by the Subcommittee. If approved for publication, the petition form and amendments would be published for public comment in August 2014. At the earliest, the form would go into effect in December 2015, and the amendments to the rules would go into effect in December 2016.

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under chapter 15 of the Code shall state *the country* where the debtor has its center of main interests." (emphasis added)).

TAB 10C

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS-BORDER INSOLVENCY

RE: SUGGESTED AMENDMENTS TO THE BANKRUPTCY RULES GOVERNING CHAPTER 15 PROCEEDINGS

DATE: MARCH 25, 2014

Judge Barry S. Schermer (Bankr. E.D. Mo.) submitted a suggestion (13-BK-F) to amend portions of the Bankruptcy Rules that apply to chapter 15 proceedings. Judge Schermer's suggestion highlights areas in which Bankruptcy Rules 1010, 1011, and 2002 are ambiguous, inconsistent, or counterproductive. The Subcommittee discussed the suggestion during a conference call on July 11, 2013, and decided to gather additional information about chapter 15 practice. The suggestion was then given further consideration during conference calls on August 5, 2013, and February 3, 2014.

The central issue Judge Schermer raised was the subject of a previous proposal for rulemaking that was approved for publication by the Advisory Committee but later withdrawn. In light of that history, the Subcommittee undertook an initial review of the case law, which did not reveal significant concern or confusion about the chapter 15 provisions in Rules 1010, 1011, or 2002. Upon further investigation into current chapter 15 practice, however, the Subcommittee concluded that the defects in these rules are significant and call for corrective rulemaking. The Subcommittee has learned that the rules as currently drafted are not helpful in guiding chapter 15 cases and, indeed, are often ignored for that reason. **The Subcommittee therefore recommends**

that the Advisory Committee seek publication of amendments to Rules 1010, 1011, and 2002, and publication of new Rule 1012.

The Subcommittee anticipates that publication of these amendments would be in tandem with the publication of a new form for chapter 15 petitions, which is the subject of a separate recommendation by the Subcommittee. If approved for publication, the petition form and amendments would be published for public comment in August 2014. At the earliest, the form would go into effect in December 2015, and the amendments to the rules would go into effect in December 2016.

The Chapter 15 Rules

Chapter 15 was added to the Bankruptcy Code in 2005 to govern cross-border insolvency cases. A chapter 15 case is commenced when a foreign representative files a petition for recognition of a foreign proceeding. *See* Code § 1504. Chapter 15 defines two categories of foreign proceedings. A "foreign main proceeding" is a foreign proceeding pending in the country where the debtor has the "center of its main interests." § 1502(4). A "foreign nonmain proceeding," on the other hand, is a foreign proceeding (other than a foreign main proceeding) pending in a country "where the debtor has an establishment." § 1502(5). Code § 1517(c) requires that a petition for recognition be decided "at the earliest possible time" after notice and a hearing. Upon recognition of a foreign main proceeding, the automatic stay under Code § 362 applies to the debtor and the property of the debtor in the United States. § 1520(a). With a foreign nonmain proceeding, however, the foreign representative must apply for a grant of "any appropriate relief," including a stay of actions against the debtor and the property of the debtor. § 1521(a).

There are certain oddities in the Bankruptcy Rules' treatment of the two types of foreign proceedings. Rule 1010 requires the clerk to issue a summons for service when a petition for the recognition of a foreign *non*main proceeding is filed—but not when a petition for the recognition of a foreign main proceeding is filed. Yet Rule 1011, which governs responses to a petition for recognition of a foreign proceeding, appears to contemplate that service of the summons will be made in all cases. Rule 1011(b) provides that "[d]efenses and objections to the petition shall be presented in the manner prescribed by Rule 12 F.R. Civ. P. and shall be filed and served within 21 days *after service of the summons*." (emphasis added). Thus, under Rule 1011(b), service of the summons triggers the time period for responding to a petition for recognition of a foreign main or nonmain proceeding, but no summons issues with a foreign main proceeding under Rule 1010.

Rule 2002(q), which governs notice of the hearing on a petition for recognition of a foreign proceeding, further complicates the picture. That rule requires service on certain parties (including the debtor and parties to litigation involving the debtor) of at least 21 days' notice of the hearing on a recognition petition. Although Rule 2002(q) requires that the notice must state whether the petition "seeks recognition of a foreign main or foreign nonmain proceeding," the same notice is required in either case. But the rule does not explicitly address when the court should give notice of the hearing. This raises the concern that if the court must wait until the expiration of the response times under Civil Rule 12 (generally 21 days), as possibly indicated by Rule 1011(b), then an unnecessary delay may occur between the petition's filing and the recognition hearing date. That delay would be contrary to the Code's requirement of prompt adjudication of a petition for recognition.

Judge Schermer offers two possible changes to these rules. First, he suggests that the chapter 15 summons requirement in Rule 1010 could be removed altogether, with conforming revisions to Rule 1011. Second, he suggests that provisions regarding service and responses could be placed in Rule 2002(q) or in a new rule.

The Subcommittee's Considerations

Rules 1010, 1011, and 2002 derive from Interim Rules promulgated after the 2005 Code amendments. Those rules inserted chapter 15-related provisions into Rules 1010 and 1011—rules that previously governed only involuntary cases. The initial draft of Interim Rule 1010 required service of a summons in all cases under chapter 15, but its scope was narrowed by the Advisory Committee. Service was deemed necessary only upon those entities against whom relief was being sought. It appears the Advisory Committee decided to exclude foreign main proceedings from Interim Rule 1010, because "those parties [who would be served under the rule] were all subject to the automatic stay by virtue of § 1520 of the Code." Memorandum from the Reporter to the Advisory Committee on Bankruptcy Rules, July 31, 2006, at 8. With a foreign nonmain proceeding, however, the Code requires a separate application for relief, and therefore service on those parties was deemed necessary. The distinction drawn by the Advisory Committee at that time seems to be based on the assumption that a petition for recognition would be granted in very short order, because the automatic stay provision of § 1520(a) applies only "[u]pon recognition" of a foreign main proceeding. In other words, it is the entry of a recognition order under § 1517, and not the filing of the petition for recognition, that triggers the automatic stay with respect to a foreign *main* proceeding. Before recognition is granted, an

application for provisional relief is necessary with respect to any foreign proceeding—main or nonmain. *See* § 1519.

The Interim Rules were published in 2006 for adoption as national rules, and no comments on Rules 1010, 1011, or 2002(q) were received. At the same time, the Advisory Committee considered more comprehensive changes to the Bankruptcy Rules dealing with chapter 15 proceedings. During its evaluation of those changes, the Advisory Committee was urged to remove the reference to foreign nonmain proceedings in Rule 1010. Dan Glosband, one of the drafters of the UNCITRAL Model Law that became chapter 15, suggested that the distinction between foreign main and nonmain proceedings did not justify different treatment under the service provision of Rule 1010. The Advisory Committee's Reporter agreed and proposed that the Interim Rule be altered by deleting the limitation to foreign nonmain proceedings. The amended rule would instead have required issuance of a summons for service upon the filing of a petition for recognition of any foreign proceeding, with service limited to the debtor and other entities as the court may direct. At its fall 2006 meeting, the Advisory Committee agreed to seek publication of the suggested change to Rule 1010.

At its spring 2007 meeting, however, the Advisory Committee voted to seek final approval of the Interim Rules as published without modification and to delay further action on the more comprehensive chapter 15 rule amendments, including the proposed change to Rule 1010.[1] When the Advisory Committee later considered a revised package of chapter 15-related amendments, the change to Rule 1010 was not included. Although there was no explicit discussion of Rule 1010 when the revised package was put forward, it appears that the limited

[1] The Advisory Committee's decision was reached in an email vote shortly after the spring 2007 meeting.

number of chapter 15 cases at the time persuaded the Advisory Committee to slow the pace of rulemaking in the area. In a memorandum to the Advisory Committee, the Subcommittee on Technology and Cross-Border Cases noted that there were fewer than 100 chapter 15 cases filed in 2006, and most of them had been filed in the Southern District of New York. Finding no evidence that the bar there or elsewhere had encountered trouble with the Interim Rules, the Subcommittee decided not to recommend further action on the more expansive chapter 15-related amendments. *See* Memorandum from Subcommittee on Technology and Cross-Border Cases to Advisory Committee on Bankruptcy Rules, July 26, 2007.

All of this suggests that the oddities Judge Schermer has noted were recognized when the rules were adopted. The Subcommittee was initially uncertain, however, whether these oddities have generated sufficient disruption or confusion to warrant rulemaking. Accordingly, the Subcommittee considered, but ultimately rejected, two reasons against engaging in rulemaking.

First, the small number of chapter 15 cases apparently persuaded the Advisory Committee in 2007 not to take further action on the proposed amendment to Rule 1010, and the number of chapter 15 cases has not increased appreciably over the last five years. Those cases remain concentrated in a small handful of districts. There were only 64 chapter 15 cases filed in the year ending March 2013, with 30 in the Southern District of New York (20) or Delaware (10) and 11 in Alaska.[2] More were filed in the previous year, but the number was similarly small.

[2] U.S. Bankruptcy Courts—Business and Nonbusiness Cases Commenced, by Chapter of the Bankruptcy Code, During the 12-Month Period Ending March 31, 2013, *available at* http://www.uscourts.gov/uscourts/Statistics/BankruptcyStatistics/BankruptcyFilings/2013/0313_f2.pdf.

For the year ending March 2012, there were 116 chapter 15 filings, with 85 in the Southern District of New York (36) or Delaware (49).[3]

Second, the case law does not include much analysis of Rules 1010 and 1011. This may be because notice of the hearing on the petition for recognition under Rule 2002(q), which is served before recognition of both foreign main and nonmain proceedings, is a more significant case event than the filing of the petition. And the particular gap in the rules about which Judge Schermer expresses the greatest concern—that the court and the parties will be confused about when to give notice of the recognition hearing under Rule 2002(q) in light of Rule 1011—does not seem to be one that generates problems in a typical chapter 15 case.

Nevertheless, the Subcommittee took the view that the silence of the case law may not be an accurate barometer of confusion for the very reason that there are relatively few chapter 15 cases. Even if these discrepancies in the rules do not result in published opinions discussing them, they may cause counsel or courts to engage in inefficient practices to work around them.

The Subcommittee therefore sought the input of practitioners and courts that have handled chapter 15 cases. The consensus view from these discussions is that provisions of Rules 1010, 1011, and 2002 are impractical and inconsistent—and therefore more honored in the breach than the observance. In particular, the Subcommittee could see no sound reason for Rule 1010(a)'s requirement to issue a summons when a petition for recognition of a foreign nonmain proceeding (but not a foreign main proceeding) is filed. Indeed, it appears that the usual practice is not to issue a summons at all, at least in the Southern District of New York, where the plurality of chapter 15 cases are filed. Those who routinely deal with chapter 15 cases have found alternative procedures for the defects in the Bankruptcy Rules, and this might ordinarily suggest

[3] Federal Judicial Caseload Statistics, March 31, 2012, at 106 (tbl. F-2).

that the rules, while flawed, would not require amendment. But there are important considerations weighing against leaving the current chapter 15 rules untouched.

First, the current rules are a potential stumbling block for those practitioners and courts without frequent exposure to chapter 15 cases. Although the plurality of chapter 15 cases have been filed in the S.D.N.Y., many other districts see filings on occasion and are unlikely to be familiar with custom-built procedural fixes for the rules.[4] In other words, the infrequency of chapter 15 case filings weighs in favor of, and not against, amending the rules.

Second, the current rules do not adequately take account of the importance of requests for provisional relief in chapter 15 cases. As the Subcommittee learned from its inquiries, in the early stages of chapter 15 proceedings, requests for provisional relief are often where the merits of the recognition question are effectively decided. The current rules, which provide little guidance concerning provisional relief, should allow a court to harmonize that stage of chapter 15 proceedings with the recognition hearing procedures.

Amendments to Rules 1010, 1011, and 2002, and Creation of Rule 1012

The Subcommittee recommends the following amendments to the Bankruptcy Rules. Those amendments involve: (i) removing the chapter 15-related provisions from Rule 1010 and Rule 1011; (ii) creating a new Rule 1012 to deal with responses to a chapter 15 petition; and (iii) altering Rule 2002(q) to require that a hearing on recognition be scheduled promptly and to address circumstances in which a request for provisional relief overlaps with the recognition question.

[4] In the year ending March 2013, chapter 15 cases were filed in 16 districts outside the S.D.N.Y.

Two features of Rules 1010 and 1011 seem most ripe for change. The first is the distinction drawn in Rule 1010(a) between the commencement of proceedings seeking recognition of foreign main and foreign nonmain proceedings. As discussed earlier, the distinction in the rule appears to have been justified on the ground that the automatic stay applies upon the filing of a petition to recognize a foreign main proceeding, and therefore separate notice was not required in those cases. But that is not what the Code provides. *See* Code § 1520(a)(1) (providing that the automatic stay applies "[u]pon recognition" of a foreign main proceeding, and not upon the filing of a petition seeking recognition). The second, and related, problem is the issuance of the summons. The summons serves no evident purpose, other than as a trigger for the deadline to present responses to a petition under Rule 1011(b). That function would be better served by a separate rule regarding responses to the petition for recognition.

The simplest route for amending the rules would be to remove the chapter 15 provisions from Rules 1010 and 1011. There is little risk that removing these provisions would cause much disruption, because they sit awkwardly in rules that otherwise deal with involuntary petitions, and, in any event, these chapter 15 provisions are often ignored in practice. Provisions for responses to a petition for recognition of a foreign proceeding would be set out in a new Rule 1012.

Rule 2002(q) would then be amended in two respects. The first change to the rule would make it clear that the court must set a date for the recognition hearing at an early time, in keeping with Code § 1517(c), and provide for notice of the hearing. The other change would acknowledge the potential for substantial overlap between a hearing on a request for provisional relief and the merits of the recognition question. The rule as amended would permit the court to combine those proceedings, much as Civil Rule 65(a) permits a court to consolidate the hearing

on a motion for a preliminary injunction with a trial on the merits, and shorten the notice period accordingly. The Subcommittee considered whether a notice period shorter than the 21 days currently provided by Rule 2002(q) might impose a real burden on foreign parties. The Subcommittee ultimately took the view that those parties not already before the court with respect to the request for provisional relief may not see much benefit in a longer notice period for the recognition hearing if the merits of the recognition question have already been effectively decided in the hearing on provisional relief.

The amended rules are set forth below.

RULE 1010. SERVICE OF INVOLUNTARY PETITION AND SUMMONS~~; PETITION FOR RECOGNITION OF A FOREIGN NONMAIN PROCEEDING~~

(a) *Service of Involuntary Petition and Summons~~; Service of Petition for Recognition of Foreign Nonmain Proceeding~~*. On the filing of an involuntary petition ~~or a petition for recognition of a foreign nonmain proceeding~~, the clerk shall forthwith issue a summons for service. When an involuntary petition is filed, service shall be made on the debtor. ~~When a petition for recognition of a foreign nonmain proceeding is filed, service shall be made on the debtor, any entity against whom provisional relief is sought under § 1519 of the Code, and on any other party as the court may direct.~~ The summons shall be served with a copy of the petition in the manner provided for service of a summons and complaint by Rule 7004(a) or (b). If service cannot be so made, the court may order that the summons and petition be served by mailing copies to the party's last known address, and by at least one publication in a manner and form directed by the court. The summons and petition may be served on the party anywhere. Rule

7004(e) and Rule 4(*l*) F.R.Civ.P. apply when service is made or attempted under this rule.

* * * * *

COMMITTEE NOTE

Subdivision (a) of this rule is amended to remove provisions regarding the issuance of a summons for service in certain chapter 15 proceedings. The requirements for notice and service in chapter 15 proceedings are found in Rule 2002(q).

RULE 1011. RESPONSIVE PLEADING OR MOTION IN INVOLUNTARY ~~AND CROSS-BORDER~~ CASES

(a) *Who May Contest Petition*. The debtor named in an involuntary petition~~, or a party in interest to a petition for recognition of a foreign proceeding,~~ may contest the petition. In the case of a petition against a partnership under Rule 1004, a nonpetitioning general partner, or a person who is alleged to be a general partner but denies the allegation, may contest the petition.

* * * * *

(f) *Corporate Ownership Statement*. If the entity responding to the involuntary petition ~~or the petition for recognition of a foreign proceeding~~ is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

COMMITTEE NOTE

This rule is amended to remove provisions regarding chapter 15 proceedings. The requirements for responses to a petition for recognition of a foreign proceeding are found in Rule 1012.

RULE 1012. RESPONSIVE PLEADING IN CROSS-BORDER CASES

(a) *Who May Contest Petition*. The debtor or any party in interest to a petition for recognition of a foreign proceeding may contest the petition.

(b) *Objections and Responses; When Presented*. Objections and other responses to the petition for recognition of a foreign proceeding shall be presented no later than 7 days before the date set for the hearing on the petition, unless the court prescribes some other time and manner for responses.

(c) *Corporate Ownership Statement*. If the entity responding to the petition for recognition of a foreign proceeding is a corporation, the entity shall file with its first appearance, pleading, motion, response, or other request addressed to the court a corporate ownership statement containing the information described in Rule 7007.1.

COMMITTEE NOTE

This rule is added to govern responses to petitions for recognition in cross-border cases. It incorporates provisions formerly found in Rule 1011. Subdivision (a) provides that the debtor or a party in interest may contest the petition. Subdivision (b) provides for presentation of responses no later than 7 days before the hearing on the petition, unless the court directs otherwise. Subdivision (c) governs the filing of corporate ownership statements by entities responding to the petition.

RULE 2002. NOTICES TO CREDITORS, EQUITY SECURITY HOLDERS, ADMINISTRATORS IN FOREIGN PROCEEDINGS, PERSONS AGAINST WHOM PROVISIONAL RELIEF IS SOUGHT IN ANCILLARY AND OTHER CROSS-BORDER CASES, UNITED STATES, AND UNITED STATES TRUSTEE

* * * * *

(q) *Notice of Petition for Recognition of Foreign Proceeding and of Court's Intention to Communicate with Foreign Courts and Foreign Representatives.*

(1) *Notice of Petition for Recognition.* Upon the filing of a petition for recognition of a foreign proceeding, the court shall schedule a hearing on the petition to be held promptly. The clerk, or some other person as the court may direct, shall forthwith give the debtor, all persons or bodies authorized to administer foreign proceedings of the debtor, all entities against whom provisional relief is being sought under §1519 of the Code, all parties to litigation pending in the United States in which the debtor is a party at the time of the filing of the petition, and such other entities as the court may direct, at least 21 days' notice by mail of the hearing ~~on the petition for recognition of a foreign proceeding~~. The notice shall state whether the petition seeks recognition as a foreign main proceeding or foreign nonmain proceeding and shall include the petition and any other document the court may require. If the court chooses to consolidate the hearing on the petition with the hearing on a request for provisional relief, a shorter notice period may be provided as appropriate, with notice to the entities listed in this subdivision.

* * * * *

COMMITTEE NOTE

Subdivision (q) is amended to clarify the procedures for giving notice in cross-border proceedings. The amended rule provides, in keeping with Code § 1517(c), for the court to schedule a hearing to be held promptly on the petition for recognition of a foreign proceeding. The amended rule contemplates that a hearing on a request for provisional relief may sometimes overlap substantially with the merits of the petition for recognition. In that case, the court may choose to consolidate the hearing on the request for provisional relief with the hearing on the petition for recognition, see Rule 65, Fed. R. Civ. P., and accordingly shorten the usual 21-day notice period.

TAB 11

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Proposed Change to FRBP 3002.1 Regarding Treatment of Payment Change Notices on Home Equity Account
Mike.T.Bates
to:
Rules_Support
02/19/2014 09:55 AM
Cc:
Scott_Myers, dms
Hide Details
From: <Mike.T.Bates@wellsfargo.com>

14-BK-A

To: <Rules_Support@ao.uscourts.gov>

Cc: <Scott_Myers@ao.uscourts.gov>, <dms@trustee13.com>

Judge Wedoff and Members of the Bankruptcy Rules Advisory Committee:

As you may recall, the topic of how to handle the sending of Notices of Payment Change ("NPCs") under FRBP 3002.1(b) was the topic of some conversation at a Working Group Session on Rule 3002.1 in Portland in October 2012. As a result of our discussion at the Working Group Session, the Rules Committee asked Deb Miller and me to work on a proposed change to Rule 3002.1 regarding the sending of NPCs on home equity loans and lines of credit (collectively "HELOC Accounts") under Rule 3002.1(b). Deb and I worked with representatives from other servicers on this issue and collectively we came up with a proposed solution to address many of the issues discussed at the Working Session. Our proposal is as follows:

1. In districts served by non-conduit trustees, a claim holder may rely on the current notices available under applicable non-bankruptcy law to provide notice of monthly payment changes to debtors. In such districts, a claim holder shall not be required to send monthly NPCs to the trustee, debtor's counsel or file NPCs with the court.

2. In districts served by conduit trustees:

a) A claim holder may, in lieu of sending monthly NPCs on HELOC Accounts, provide the trustee with a monthly electronic file that provides the following information: (a) debtor name; (b) case number; (c) the amount of the last monthly payment; and (d) the amount of the new monthly payment.

b) If the amount of a monthly payment on a HELOC Account increases or decreases by $25 or less, then a claim holder may rely on the current notices available under applicable non-bankruptcy law to provide notice of the monthly payment change to a debtor. The claim holder

need not send a NPC as required under FRBP 3002.1(b). In such instances, if the claim holder is providing the electronic file to the trustee as discussed in Paragraph 2(a) above, then the claim holder shall include such payment changes on the electronic file.

c) If the amount of a monthly payment on a HELOC Account increases or decreases by more than $25, then a claim holder shall send a NPC as required under FRBP 3002.1(b). In such instances, if the claim holder is providing the electronic file to the trustee as discussed in Paragraph 2(a) above, then the claim holder shall include such payment changes on the electronic file.

In addition to the above changes, we would also recommend a small change to the wording used in Part 2 of Form B-10 (Supplement 1). The beginning sentence currently reads as follows:

> "Will the debtor's principal and interest payment change based on an adjustment to the interest rate in the debtor's variable rate note?"

We are proposing to change this language to read as follows:

> "Will the debtor's principal and interest payment change based on an adjustment to the interest rate on the debtor's variable rate account?"

We are recommending this change because using the generic word "account" more accurately describes both loan accounts (which are evidenced by a note) and line of credit accounts (which are represented by some type of line agreement, but not a note).

We appreciate the Rules Committee's consideration of this proposal. Thank you.

Mike Bates
Senior Company Counsel
Wells Fargo Law Department
(515) 557-1358
(515) 557-8209 - fax
MAC# N0001-09A

TAB 12

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Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1006(b) Courts may require a minimum initial payment with fee installment requests	Suggestion 12-BK-I Judge John Waites on behalf of the Bankruptcy Judges Advisory Group	6/12 - Consumer Subcommittee considered 9/12 - Committee discussed, referred to subcommittee for further consideration 11/12 - Subcommittee considered 4/13 - Committee considered 6/13 - subcommittee considered 9/13 - Committee agenda	
Rule 1006, **New Form** Waiver of additional fees	Suggestion 11-BK-N Attorney David S. Yen	3/12 - Committee discussed, referred to Consumer Subcommittee 7/12 - Subcommittee considered 9/12 - Committee discussed, referred to subcommittee for further consideration 11/12 - Subcommittee considered 4/13 - Committee discussed 7/13 - Consumer and Forms subcommittees considered 9/13 - Committee agenda 1/14 – Subcommittee considered 4/14. Committee agenda	
Rule 1007(a)(1), (a)(2) Conform to relettered schedules	Committee proposal	6/13 - Consumer Subcommittee considered 9/13 - Committee agenda	12/1/15
Rules 1010, 1011, 2002(q) Chapter 15 amendments	Suggestion 13-BK-F Judge Barry S. Schermer	7/13 - Cross Border Insolvency Subcommittee considered 9/13 - Committee agenda	
Rule 1014 Cases filed in different districts by a debtor and certain affiliates	Suggestion 10-BK-J Judge Linda Riegle	4/11- Committee discussed, referred to Business Subcommittee 6/11, 8/11 - Subcommittee considered 9/11 - Committee approved publication 11/11 - Referred to Subcommittee for further consideration 4/13 – Committee recommended final approval.	12/1/14
Rule 1015(b) Change “husband and wife” to “spouses”	Suggestion 13-BK-G Gary Streeting	9/13 - Committee agenda 1/14 – Subcommittee considered 4/14 – Committee agenda	
Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, 9009 Amendments in connection with a chapter 13 form plan	Committee proposal	9/11 - Committee discussed 3/12 - Working group considered 3/12 - Committee discussed 8/12 - Working Group considered 9/12 - Committee discussed 11/12, 1/13, 2/13 - Working Group considered 1/13 - Form Plan Mini-Conference considered 4/13 - Consumer and Forms Subcommittees considered 4/13 - Committee approved publication of revised amendments 6/13 - Standing Committee approved publication 8/13 - Published for comment	12/1/15

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
		12/13 through 3/14 – Working Group considered 4/14 – Committee considered.	
Rule 2002(h) In chapter 13, limit notices to creditors who have not filed a claim	Suggestion 12-BK-M Judge Scott W. Dales	4/13 - Committee discussed, referred to Consumer Subcommittee 6/13 - Subcommittee considered 9/13 - Committee agenda	
Rule 2002(n) Is full Rule 1005 caption with debtor's names for 8 years needed on all Rule 2002 notices?	Staff	6/13 - Consumer Subcommittee discussed, deferred further action	
Rule 2014 Specify relevant connections that must be described	Suggestion 13-BK-C ABI Ethics Task Force	4/13 - Committee discussed, referred to Attorney Conduct Subcommittee 7/13 - Subcommittee considered 9/13 - Committee agenda	
Rule 2016 Require weekly reports and fee applications by professionals	Suggestion 13-BK-H Dan Dooley	9/13 - Committee agenda	
Rule 3002(a) Require secured creditors to file proofs of claim	Suggestion (11-BK-B) Judge A. Benjamin Goldgar	7/11 - Consumer Subcommittee discussed 9/11 - Committee discussed, referred to Consumer Subcommittee 12/11, 2/12 - Subcommittee considered 3/12 - Committee considered, deferred further action, referred to Subcommittee on Business Issues and Chapter 13 Form Plan 7/12 - Subcommittee considered 9/12 - Committee discussed, referred to Form Plan Working Group (See chapter 13 amendments to Rule 2002 etc.)	
Rule 3002.1 Application of rule when no cure in plan	Suggestion 12-BK-K Laila Gonzalez Suggestion 13-BK-E Judge Carol Doyle	9/12 - Mortgage Forms Mini-conference 4/13 - Assigned to Consumer and Forms Subcommittees 7/13 - Subcommittee considered 9/13 - Committee agenda	
Rule 3002.1 Where to file notices when no proof of claim	Suggestion 12-BK-G Judge Thomas Saladino	9/12 - Mortgage Forms Mini-conference	
Rule 3007(a) Disposition of objections to claims by negative notice	Suggestion 09-BK-H Judge Margaret Dee McGarrity on behalf of the Bankruptcy Judges Advisory Group	1/10 - Consumer Subcommittee considered 4/10 - Committee discussed, referred to Consumer Subcommittee 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Consumer	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
	Comment 11-BK-12 Judge Eric L. Frank	Subcommittee 12/10 - Subcommittee considered 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Consumer Subcommittee considered 3/12 - Committee considered, referred to Chapter 13 Form Plan Working Group 7/12 - Working Group considered 9/12 - Committee considered comment on negative notice, referred to Consumer Subcommittee 11/12 - Subcommittee considered 4/13 - Committee considered 6/13 - Subcommittee considered 9/13 - Committee agenda	
Rule 3007(a) Clarify service requirements for objections to claims	Suggestion (09-BK-N) Judge Michael E. Romero on behalf of the Bankruptcy Judges Advisory Group	4/10 - Committee discussed, referred to Consumer Subcommittee 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Consumer Subcommittee 12/10 - Subcommittee considered 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Consumer Subcommittee considered 3/12 - Committee considered, referred to Chapter 13 Form Plan Working Group 7/12 - Working Group considered 9/12 - Committee discussed, referred to Chapter 13 Form Plan Working Group, included in amended Rule 3012 (See negative notice amendment to Rule 3007)	12/1/15
Rule 4004(c)(1) Clarification	Committee Proposal	9/11 - Committee discussed, referred to Consumer Subcommittee 12/11 - Subcommittee considered 3/12 - Committee approved 6-12 - Standing Committee approved 9/12 - Judicial Conference approved 4/13 - Supreme Court approved	12/1/13
Rule 5005(a) Electronic Signatures	Forms Modernization Project	8/11 - Forms Modernization Project considered 9/11 - Committee discussed 1/12 - Subcommittee on Technology and Cross Border Insolvency considered 3/12 - Committee considered 7/12 - Subcommittee considered 1/12 - Standing Committee discussed 7/12 - Subcommittee considered 9/12 - Committee considered, referred to subcommittee 12/12, 2/13 - Subcommittee considered 4/13 - Committee approved for publication as revised 6/13 - Standing Committee approved for publication as further revised 8/13 - Published for comment	12/1/15

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 5009(b) Conform rule to amendment to Rule 1007(b)(7)	Committee Proposal	12/10 - Considered by Consumer Subcommittee 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee approved 6-12 - Standing Committee approved 9/12 - Judicial Conference approved 4/13 - Supreme Court approved	12/1/13
Rule 7001(1) Compelling the debtor to deliver the value of property to the trustee	Suggestion 12-BK-D Judge S. Martin Teel, Jr.	3/12 - Committee discussed, referred to the Consumer Subcommittee 6/12 - Subcommittee considered 9/12 - Committee discussed, referred to subcommittee for further consideration 11/12 - Subcommittee considered 4/13 - Committee considered, took no further action	
Rules 7004(e), 7012, 9006(f) Provide that the deadline for responding to a summons runs from the date of service, not the date of issuance	Suggestion 11-BK-F Chief Judge Peter W. Bowie	9/11 - Committee discussed, referred to Business Subcommittee 12/11 - Subcommittee considered 3/12 - Committee approved publication of revised amendment to Rule 7004(e) 6/12 - Standing Committee approved publication 8/12 - Rule 7004(e) published for comment 4/13 - Committee considered comments, approved with revised Committee Note 6/13 - Standing Committee approved Rule 7004(e) 9/13 - Judicial Conference agenda	12/1/14
Rules 7008, **7054** Finding that there is a gap in the procedure for requesting allowance of attorney's fees in adversary proceedings	Charlie Y, Inc., v. Carey B.A.P. 9th Cir. (Mar. 4, 2011)	4/11 - Committee discussed. referred to Consumer and Business Subcommittees 7/11 - Consumer Subcommittee considered 7/11 - Business Subcommittee considered 9/11 - Committee approved publication 1/12 - Standing Committee approved publication as revised 8/12 - Published for comment 4/13 - Committee considered comments, approved 6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/14
Rules 7008, 7012(b), 7016, 9027, 9033(a) Impact of decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011)	Committee proposal Suggestion 11-BK-I Judge Eric P. Kimball Suggestion 11-BK-K Judges Black, Goldgar, and Doyle Suggestion 11-BK-L Judge Arthur Gonzalez	9/11 - Committee discussed, referred to Business Subcommittee 3/12 - Subcommittee considered 3/12 - Committee approved publication 6/12 - Standing Committee approved publication 8/12 - Published for comment 2/13 - Subcommittee considered comments 4/13 - Committee approved 6/13 - Standing Committee approved 9/13 - Judicial Conference agenda 9/13 - Status report	12/1/14
Rules 7008, 7012 Provide for consent to final adjudication	Comment 12-BK-037 National Bankruptcy Conference	2/13 - Business Subcommittee discussed, deferred for future consideration	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
by the bankruptcy judge on part of the proceeding			
Rules 7008, 7012 Provide for treating Stern issues in pre-answer motions	Comment 12-BK-037 National Bankruptcy Conference	2/13 - Business Subcommittee discussed, deferred for future consideration	
New Rules 8001 - 8028 Revise Part VIII of the rules to modernize and more closely follow the Appellate Rules	Eric Brunstad Committee proposal	3/08 - Referred to Privacy, Public Access and Appeals Subcommittee 5/08, 8/08 - Subcommittee discussed 10/08 - Committee discussed 3/09 - Considered at open subcommittee meeting 3/09 - Committee discussed 6/09 - Subcommittee discussed comments at open meeting 9/09 - Subcommittee discussed comments at 2nd open meeting 10/09 - Report to committee 12/09 - Comments at 2nd open meeting incorporated in draft 2/10 - Subcommittee considered 4/10 - Committee received progress report 8/10, 9/10 - Subcommittee calls 9/10 - Report on Committee agenda 12/10, 2/11 - Subcommittee calls 4/11 - Discussed during joint meeting with Appellate Rules Committee 7/11 - Drafting group reviewed and revised the draft 9/11 - Committee discussed 12/1 - Report to Standing Committee 1/12, 3/12 - Subcommittee considered 3/12 - Committee approved publication of new Rules 6/12 - Standing Committee approved publication 8/12 - Published for comment 2/13, 3/13 - Subcommittee considered comments 4/13 - Committee approved as revised (continued below)	12/1/14
New Rules 8001 - 8028 (Continued)		6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/14
New Rule 8002 Permit district court to reopen time to file an appeal for someone who did not receive timely notice of the entry of the judgment, like FRAP 4(a)(6)	Comment 12-BK-033 Judge Christopher M. Klein	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8002 Clarify when judgment is entered,	Comment 12-BK-033 Judge Christopher M. Klein	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
like FRAP 4(a)(7)		9/13 - Committee agenda	
New Rules 8003(c)(1), 8004(c)(1) Discrepancy on who serves notice of appeal and interlocutory appeal	Comment 12-BK-008 National Conference of Bankruptcy Judges Comment 12-BK-036 Clerk (1st Cir. BAP)	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8004 Requirement for both a motion for leave to appeal and a notice of appeal	Committee proposal	7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8005 Withdrawal of election to have appeal heard by district court	Comment 12-BK-033 Judge Christopher M. Klein	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8006 Provide for the bankruptcy court to comment on the suitability for direct appeal when joint certification by all appellants and appellees	Comment 12-BK-033 Judge Christopher M. Klein	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8008, Rules 9023, 9024 Indicative rulings	Committee proposal	8/08 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/08 - Committee tentatively approved publication of new Rule 8007.1 and Rule 9024 amendment 3/09 - Rules 8007.1 and 9024 assigned to the Bull Pen 3/12 - Committee approved publication of revised Rules 9023 and 9024 amendments 6/12 - Standing Committee approved publication 8/12 - Published for comment 4/13 - Committee approved 6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/14
New Rule 8009 Allow the BAP or district court to deem the record of the proceeding in the bankruptcy court to be the record on appeal	Comment 12-BK-005 Judge Robert J. Kressel Comment 12-BK-015 Judge Barry S. Schermer Comment 12-BK-040 Bankruptcy Clerks Advisory Group	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8010(b)(1)	Comment 12-BK-008	3/13 - Appeals subcommittee considered, deferred for future	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Transmission of the record	National Conference of Bankruptcy Judges Comment BK-034 Oregon State Bar Debtor-Creditor Section Comment 12-BK-040 Bankruptcy Clerks Advisory Group	consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8010(b)(4) Appellee may provide copies	Comment 12-BK-014 Judge Dennis Montali	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8011 Filing rule should be the same for briefs and appendices, when received	Comment 12-BK-005 Judge Robert J. Kressel Comment 12-BK-026 Judge S. Martin Teel, Jr.	3/13 - Appeals subcommittee considered, deferred for future consideration 7/13 - Appeals subcommittee considered 9/13 - Committee agenda	
New Rule 8020 Reference to "order" includes local rules	Comment 12-BK-033 Judge Christopher M. Klein	3/13 - Appeals subcommittee considered, deferred for future consideration	
New Rule 8023 Include Rule 7041 and 9019 safeguards for dismissal of appeals	Comment 12-BK-008 National Conference of Bankruptcy Judges	3/13 - Appeals subcommittee considered 7/13 - Appeals subcommittee considered, deferred for future consideration	
New Rule 8024 Specify when jurisdiction revests in the bankruptcy court after an appeal	Comment 12-BK-008 National Conference of Bankruptcy Judges	3/13 - Appeals subcommittee considered 7/13 - Appeals subcommittee considered, deferred for future consideration	
8000 Rules Abolish BAPs, assign appeals to courts with low caseloads	Judge William G. Young	4/13 - Committee discussed	
Rule 9006(d) Delete as superfluous, not properly located in the Rules, and may create confusion **Rules 9013, 9014**	Suggestion 10-BK-D Judge Raymond T. Lyons Committee proposal	8/10 - Considered by the Subcommittee on Business Issues 9/10 - Committee approved amendments to Rules 9006, 9013, 9014 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee approved 6-12 - Standing Committee approved 9/12 - Judicial Conference approved 4/13 - Supreme Court approved	12/1/13
Rule 9006(f) Conform to	Judge Arthur Harris	4/13 - Committee approved publication 6/13 - Standing Committee approved publication	12/1/15

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
amendment to civil Rule 6(d)		8/13 - Published for comment	
Rule 9006(f) Eliminate the 3-day extension if electronic service	Intercommittee - CM/ECF Subcommittee	9/13 - Committee agenda	
Rules 9027, 9033 Service of notice by mail	Comment 12-BK-040 Bankruptcy Clerks Advisory Group	2/13 - Business subcommittee discussed, deferred for future consideration	
Rule 9033 The clerk should serve, not mail, proposed findings of fact and conclusions of law	Comment 12-BK-008 National Conference of Bankruptcy Judges	2/13 - Business subcommittee discussed, deferred for future consideration	
New Rule Treatment of *Stern* issues in bankruptcy appeals	Suggestion 12-BK-H Professor Alan Resnick	7/12 - Subcommittee on Privacy, Public Access and Appeals considered 9/12 - Committee considered, deferred for future consideration	
Official Form 1 Add checkboxes for 11 U.S.C. § 1116(1) documents	Suggestion 13-BK-B Judges Eric L. Frank and Bruce I. Fox	4/13 - Committee discussed, referred to Forms Subcommittee 7/13 - Subcommittee considered 9/13 - Committee agenda	
Official Form 3B Exclude non-cash government assistance	Suggestion 12-BK-A Judge Michael J. Kaplan	3/12 - Committee considered, incorporated in Forms Modernization version of the form	12/13
Official Form 6C Extent of claimed exemption, *Schwab v. Reilly,* 130 S. Ct. 2652 (2010),	Judge Eugene Wedoff	7/09 - Consumer Subcommittee considered 10/09 - Committee discussed 4/10 - Committee discussed 6/10 - Supreme Court decision 8/10 - Consumer and Forms Subcommittees considered 9/10 - Committee considered, referred to Consumer and Forms Subcommittees 10/10 - Subcommittees considered 4/11 - Committee approved 4-column version for publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 2/12 - Consumer and Forms Subcommittees considered comments 3/12 - Committee considered, withdrew the amendment without expressing an opinion on the emerging practice of writing in *Schwab* language on the current version of the form, referred to Forms Modernization 7/12 - Consumer and Forms Subcommittees considered 9/12 - Committee considered, included in new Form 106D 1/13 - Standing Committee suggested revising draft form 2/13 - Joint subcommittees considered 4/13 - Committee approved publication of revised form (see Forms Modernization)	12/15

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Forms 6I, 6J Separate debtors' business income and expenses from personal income and expenses	Suggestion 12-BK-F Robert B. Katz, Esq.	Referred to Forms Modernization Project	
Official Form 6 - Summary Conform to Amendments to Forms 6I and 6J		6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/13
Official Form 7 Add debtor's age	Suggestion 13-BK-A David W. Ostrander	4/13 - Committee discussed, referred to Forms and Privacy Subcommittees 7/13 - Subcommittees considered 9/13 - Committee agenda	
Official Forms 9C, 9D, 9E, 9E(Alt.), 9F, 9F(Alt.), 9G, 9H, 9I Encourage creditors to obtain proof of claim form courts' website	Suggestion 12-BK-B Matthew T. Loughney for Bankruptcy Noticing Working Group	3/12 - Committee discussed, referred to Forms Modernization	
Official Forms 9F, 9F(Alt.) Debts owed to a domestic governmental unit that are not dischargeable	Suggestion 13-BK-I Judge Stuart Bernstein	9/13 - Committee agenda	
Official Form 10 Provide a space for designating the amount of a general unsecured claim	Suggestion 11-BK-D Sabrina L. McKinney	9/11 - Committee discussed, referred to Forms and Consumer Subcommittees 1/12 - Subcommittees considered 3/12 - Committee considered, referred to Forms Modernization	
Official Form 10 Include section for § 503(b)(9) claims	Comment on Forms Modernization Form Craig Johnson Garden City Group, claims agents		
Official Forms 10(Attach. A) 10(Suppl. I) 10(Suppl. 2)	Committee proposal	7/11 - Consumer and Forms subcommittees discussed 9/11 - Committee discussed, referred to Consumer and Forms Subcommittees 1/12 - Subcommittees considered	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Input on new mortgage forms, desirability of including a complete loan history **Rule 9009** Specify how Official Forms may be modified		3/12 - Committee considered 7/12 – Consumer and Forms Subcommittees discussed 9/12 - Mortgage Forms Mini-Conference 9/12 - Committee discussed 12/12 - Consumer and Forms Subcommittees considered (see Form Plan Working Group for Rule 9009) 4/13 - Committee discussed 8/13 - Mortgage Loan History Working Group formed 9/13 - Status report	
Official Form 10(Attach. A) Treatment of escrow shortage	Suggestion 12-BK-C Judge Barry S. Schermer	3/12 - Committee discussed, referred to Mortgage Forms Mini-Conference 7/12 - Consumer and Forms Subcommittees considered 9/12 - Mortgage Forms Mini-Conference 9/12 - Committee discussed 12/12 - Consumer and Forms Subcommittees considered 4/13 - Committee discussed 8/13 - Mortgage Loan History Working Group formed 9/13 - Status report	
Official Form 14 Add checkbox for other parties	Suggestion 13-BK-D David Tilem	7/13 - Business Subcommittee considered 9/13 - Committee agenda	
Official Forms 17A, 17B (new), 17C (new) Forms for new Part VIII rules	Committee Proposal	3/13 - Privacy, Public Access and Appeals Subcommittee considered 4/13 - Committee approved publication 6/13 - Standing Committee approved publication 8/13 - Published for comment	
Official Form 22A Technical amendments to § 109(h)	Committee Proposal	3/12 - Committee discussed, oral reports at future meetings 9/12 - Committee discussed 4/13 - Committee considered, no further reports unless a split of authority among courts develops	
Official Form 22A-1Supp Create a separate form for qualified military service exclusion	Unpublished 2.15.13 comment Carl Barnes, Best Case Software	3/13 - Forms Modernization considered 4/13 - Committee approved publication of new Form 22A-1Supp 6/13 - Standing Committee approved publication 8/13 - Published for comment	12/1/14
Official Forms 22A,	William J. Neild	4/10 - Committee discussed, referred to Subcommittee on Consumer	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
22C Deducting telecommunications expenses by debtor who is not self-employed	Comment 09-BK-032	Issues 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Forms Subcommittee 2/11- Subcommittee considered 4/11 - Committee approved, referred to Forms Subcommittee for final review 2/11 - Subcommittee reviewed 6/11 - Standing Committee approved publication 8/11 - Published for comment 2/12 - Subcommittee on Consumer Issues considered comments 3/12 - Committee approved, incorporated in the Forms Modernization version of Forms 22A and 22C	
Official Forms 22A, 22C Change in IRS allocation of internet services in National Standards and Local Standards	Mark Redmiles	9/11 - Committee discussed, referred to Subcommittee on Consumer Issues 12/11, 2/12 - Subcommittee considered 3/12 - Committee considered, incorporated in the Forms Modernization versions of Forms 22A and 22C	
Official Forms 22A, 22C Allow below-median income debtors to file shortened versions of the forms	Suggestion 11-BK-C Wendell J. Sherk	9/11 - Committee considered, referred to Forms Modernization Project 3/12 - Included in the Forms Modernization versions of Forms 22A and 22C	
Official Form 22C Calculation of projected disposable income under § 1325(b)(1), *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).	Committee Proposal	4/10 - Committee discussed 6/10 - Supreme Court decision 8/10 - Consumer and Forms Subcommittees considered 9/10 - Committee approved, referred to subcommittees for final review 2/11- Subcommittees reviewed 6/11 - Standing Committee approved publication 8/11 - Published for comment 2/12 - Consumer and Forms Subcommittees considered comments 3/12 - Committee approved, incorporated in the Forms Modernization version of 22C 8/12 - Published for comment	12/1/14

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
		4/13 - Committee eliminated 12-month limitation, approved republication, (see Official Forms 22A, 22B, 22C, Forms Modernization, below)	
Official Form 23 Conform to amendment to Rule 1007(b)(7)	Committee proposal	9/10 - Committee discussed, referred to Forms Subcommittee for final review 2/11- Subcommittee reviewed 4/11 - Held in the Bullpen 4/13 - Committee removed from Bullpen, approved 6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/13
Official Form 27 Conform to Amendments to Forms 6I and 6J	Staff	6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/13
Official Form 113 Form chapter 13 plan	Suggestion 10-BK-G Judge Margaret Mahoney Comment 10-BK-M States' Association of Bankruptcy Attorneys (SABA)	2/11 - Consumer and Forms Subcommittees discussed 4/11 - Assigned to Forms Subcommittee, with direction to present a proposal for advancing the recommendation at the September meeting 6/11 - Working group appointed 6/11, 8/11 - Working group considered 8/11 - Judge Wedoff requested information on local model chapter 13 plans 9/11 - Committee discussed 1/12, 2/12 - Working group considered 3/12 - Committee discussed 7/12, 8/12 - Working Group considered 9/12 - Committee considered, referred to Working Group for further consideration 11/12, 1/13, 2/13 - Working Group considered 1/13 - Form Plan Mini-Conference considered 4/13 - Consumer and Forms Subcommittees considered 4/13 - Committee approved publication of revised form 6/13 - Standing Committee approved publication 8/13 - Published for comment 9/13 - Status report	12/1/15
Official Forms Forms Modernization	Judge James D. Walker, Jr.	9/06 - Committee will coordinate a study with the Administrative Office 8/07 - Discussion of how to organize the study	12/1/15

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Project, alternatives to paper-based format for forms; renumber Official Forms	Comment 06-BK-011 Judge Marvin Isgur Patricia Ketchum	9/07 - Committee discussed and authorized chair to create group 1/08 - Organizational meeting for Forms Modernization Project 2008/2009/2010/2011/2012 - Forms Modernization Project continues work, meetings in January, June 9/10 - Statement of Financial Affairs drafting session 9/10 - Progress report on agenda 10/10 - Form 22 drafting session 4/11 – Progress report 9/11 - Committee approves publishing new individual financial forms 3/12 - Committee approved publication of revised Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, 22C-2 6/12 - Standing Committee approved publication 8/12 - Published for comment 9/12 - Committee considered remaining individual forms 8/12 to 4/13 - Drafting calls for non-individual forms 1/13 - Preliminary review by Standing Committee of remaining individual forms (See subtopics below)	(see below)
Official Forms 106A-106H Reletter to more closely follow existing forms	Judge Harris Ms. Michaux	4/13 - Committee approved renumbering new schedules as 106A/B, 106E/F, etc (see Forms Modernization, individual forms)	12/1/15
Official Forms 3A, 3B Forms Modernization		(See Forms Modernization Project above) 8/12 - Published for comment 3/13 - Working Group considered comments 4/13 - Committee approved as revised 6/13 - Standing Committee approved 9/13 - Judicial Conference agenda	12/1/13
Official Forms 22A,		(See Forms Modernization Project above)	12/1/14

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
22B, 22C Forms Modernization		8/12 - Published for comment 3/13 - Working Group considered comments 4/13 - Committee approved republication as revised, including Form 22A-1Supp. 6/13 - Standing Committee approved republication 8/13 - Republished for comment	
Official Forms (individual forms) Forms Modernization		(See Forms Modernization Project above) 1/13 - Preliminary review by Standing Committee 3/13 - Working Group discussed 4/13 - Committee approved publication of Forms 101, 101A, 101B, 104, 105, 106Sum, 106A/B, 106C, 106D, 106E/F, 106G, 106H, 106Dec, 107, 112, 119, 121, 318, 423, and 427, as revised 6/13 - Standing Committee approved publication 8/13 - Published for comment	12/1/15
Official Forms (non-individual forms) Forms Modernization		(See above) 8/12 to 8/13 - Drafting and review calls for non-individual forms 3/13 - Working Group discussed 9/13 - Preliminary review of Forms 201, 202, 204, 205, 206Sum, 206A/B, 206D, 206E/F, 206G, 206H, 207, 410	12/1/15
Official Form 401 Separate chapter 15 petition	Forms Modernization Suggestion 09-BK-G Kathleen Crosser Suggestion 07-BK-F Judge Laura Isicoff	7/13 - Forms Modernization considered 9/13 - Committee agenda	12/1/15
Director's Forms 254, 255, 256, 257 (new), Rule 9016 Impact of proposed amendments to Civil Rule 45	Committee proposal	4/11 - Committee discussed, deferred until after civil rules are published 8/11 - Rules 37 and 45 published 9/11 - Bull Pen 12/11 - Subcommittee on Business Issues considered 3/12 - Committee considered, took no further action, Forms 254, 255, 256 to be updated before 9/13 meeting 7/13 - Subcommittee on Forms reviewed revised Forms 254, 255, and 256, and new Form 257 8/13 - Revised Forms posted 9/13 - Committee agenda	12/1/13