ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Denver, CO
October 2-3, 2008

ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of October 2 - 3, 2008
Denver, Colorado

Agenda

Introductory Items

1. Greetings, Introduction of new member(s), and Appreciation of departing Reporter and members. (Judge Swain)

2. Approval of minutes of St. Michaels meeting of March 27-28, 2008 (Judge Swain)

   - Draft minutes.

3. Oral reports on meetings of other Committees:

   (A) June 2008 meeting of the Committee on Rules of Practice and Procedure, including final Time Computation changes. (Judge Swain and Professor Gibson)

   - Draft minutes of the Standing Committee.

   (B) April 2008 meeting of the Advisory Committee on Appellate Rules Committee. (Judge Swain)

   (C) June 2008 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Hopkins and Judge Conti)

   (D) April 2008 meeting of Advisory Committee on Civil Rules. (Judge Wedoff)

   (E) May 2008 meeting of Advisory Committee on Evidence. (Judge Hopkins)

   (F) Bankruptcy CM/ECF Working Group. (Judge Perris)

   (G) Progress report from the Sealing Committee (Judge Hopkins and Professor Gibson)

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues. (Judge Wedoff and Professor Gibson)

   (A) Recommendation concerning the 9th Circuit Bankruptcy Appellate Panel's decision in Drummond v. Wiegand, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008), that chapter 13 business debtors may not subtract business expenses from gross

receipts in determining current monthly income on Official Form 22C. (Professor Gibson)

- Memo by Professor Gibson.
- Copy of the opinion in Drummond v. Wiegand.

(B) Recommendation concerning use of the terms "household" and "family" on Official Forms 22A and 22C. (Judge Wedoff and Professor Gibson)

- Memo by Professor Gibson.

(C) Recommendation concerning a possible national rule on post-petition mortgage fees in chapter 13 cases. (Judge Wedoff and Professor Gibson)

- Memo by Professor Gibson.

(D) Status of consideration of possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code. (Professor Morris)

- Update of Memo of March 3, 2008, by Professor Morris.

5. Report by the Subcommittee on Technology and Cross Border Insolvency. (Judge Coar and Professor Morris)

Recommendation in response to suggestion by Judge Laurel Isicoff to create a new Official Form to be used as a petition in chapter 15 cases. (Professor Morris)

- Memo by Professor Morris.

6. Report of Subcommittee on Attorney Conduct and Health Care. (Judge Schell and Professor Morris)

Recommendation on requests by the Bankruptcy Judges' Advisory Group (BJAG) and Judge Robert Kressel for further consideration of the December 1, 2007, amendment to Rule 6003. (Professor Morris)

- Memo by Professor Morris.
- Suggestion 08-BK-D by the BJAG.
- Comment by Judge Kressel.
- Rule 6003 blog by Catherine Vance

7. Report of Subcommittee on Privacy, Public Access, and Appeals. (Judge Pauley and Professor Gibson)

(A) Recommendation on a possible new rule or rules to authorize indicative rulings. (Professor Gibson)

Memo by Professor Gibson.

(B) Recommendation on suggestion by Mr. Brunstad that Part VIII of the bankruptcy rules be rewritten to more closely follow the Federal Rules of Appellate Procedure. (Mr. Brunstad and Professor Gibson)

- Memo and status report by Mr. Brunstad or Professor Gibson.

8. Report of Subcommittee on Business Issues. (Judge Hopkins)

9. Report of Subcommittee on Forms. (Judge Perris, Mr. Myers)

Oral report on proposed amendment to Form 201 to advise debtors that notices to joint debtors at the same address will be mailed in a single envelope addressed to both of the debtors. (Mr. Myers)

- Proposed amendment.

Discussion Items

10. Oral report on status of the Bankruptcy Forms Modernization Project. (Judge Perris)

11. Oral report on planning for the future of the CM/ECF system. (Judge Perris)

12. Suggestion by Chief Judge Vincent Zurzolo that Rule 9014(b) be amended to permit service on the debtor's attorney of a motion initiating a contested matter through CM/ECF in the manner provided in Civil Rule 5(b) rather than requiring service in the manner provided in Rule 7004 for service of a summons and complaint. (Professor Gibson)

- Memo by Professor Gibson.
- Comment by Chief Judge Zurzolo.

13. Request by the Committee on Codes of Conduct for further study of policy issues concerning conflict screening. (Professor Gibson)

- Memo by Professor Gibson.
- Letter by Judge Gordon Quist, chair of the Committee on Codes of Conduct.
- Referral by Judge Lee Rosenthal, chair of the Standing Committee.

14. Suggestion by the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019. (Professor Gibson)

- Memo by Professor Gibson discussing the case law on Rule 2019.

15. Discussion of issues presented by Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008): (1) whether Rules should permit application for denial or revocation of a discharge based on the debtor's fraud discovered by a party in a gap period after the deadline for objecting to discharge and before the granting of the discharge and (2) Chief Judge Frank Easterbrook's concurrence concerning the impact of the designation of objections to discharge as adversary proceedings on appellate jurisdiction. (Professor Gibson)

- Memo by Professor Gibson.
- The 7th Circuit's decision in Zedan.

16. Discussion of Judge Paul Mannes' suggestion that Rule 3003 be amended to require chapter 11 debtors to give notice to creditors which are scheduled as disputed, contingent, or unliquidated. (Professor Gibson)

- Memo by Professor Gibson.
- Suggestion 08-BK-C by Judge Mannes.

17. Discussion of suggestions by Judge Eugene Wedoff and attorney Philip Martino for promulgation of a rule regarding applications for payment of administrative expenses. (Professor Gibson)

- Memo by Professor Gibson.
- Suggestion by Mr. Martino.

18. Discussion of suggestions by Judges Paul Mannes, Randall Newsome, and Robert Kressel for revision of Director's Form 240, Reaffirmation Agreement. (Professor Morris)

- Memo by Professor Morris.
- Suggestion 08-BK-A by Judge Mannes.
- Suggestion by Judge Newsome.
- Suggestion by Judge Kressel.

19. Discussion of Judge Colleen Brown's suggested revision of Official Form 3B, Application for Waiver of Chapter 7 Filing Fee. (Professor Gibson)

- Memo by Professor Gibson.
- Suggestion by Judge Brown.

20. Discussion of suggestions by the courts in the Southern District of New York and the Eastern District of Pennsylvania that a space be added to Official Form 10 for the portion of a claim which is a general unsecured claim. (Mr. Wannamaker and Mr. Myers)

- Memo by Mr. Wannamaker.

21. Discussion of suggestion by the Executive Office for United States Trustees for amendments to Rules 1017(e) and 4004(c). (Professor Gibson)

- Memo by Professor Gibson.
- Suggestion by the Executive Office.

22. Discussion of the Executive Committee's request that Conference Committees review the draft Best Practices Guide to Using Subcommittees of Judicial Conference Committees and report on the status of subcommittees. (Judge Swain and Professor Gibson)

- Judge Scirica's memorandum and the draft Best Practices Guide.

Information Items

23. Rules Docket.

24. Posting a list of suggested rules amendments on the Internet. (Mr. Ishida and Mr. Myers)

- Memo by Mr. Myers.

25. Preparation of letters reporting the Committee's resolution of suggestions. (Mr. Ishida and Mr. Wannamaker)

26. Status of legislation exempting certain National Guardsmen and Reservists from the means test. (Professor Gibson)

- Memo by Professor Gibson.
- Proposed amendments to Form 22A providing for the exemption.
- Proposed amendments incorporated in Form 22A.

27. Notice to local courts concerning the need to repeal or amend local rules adopting the Interim Rules. (Judge Swain)

- Notice sent to the courts will be distributed separately.

28. Notice to local courts concerning the need to review local rules in light of the upcoming time computation amendments. (Judge Swain)

- Draft notice to the courts will be distributed separately.

29. *Bull Pen*: All of the proposed rules amendments currently in the *Bull Pen* are addressed above.

30. Oral report on appointment of chairs of the Business and Forms Subcommittees and composition of subcommittees. (Judge Swain)

31. Future meetings:

    March 26-27, 2009, at Estancia La Jolla Hotel & Spa in San Diego.
    Possible locations for the fall 2009 meeting.

32. New business:

33. Adjourn.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
CHAIRS and REPORTERS
July 1, 2008

Honorable Lee H. Rosenthal United States District Judge United States District Court 11535 Bob Casey U.S. Courthouse 515 Rusk Avenue Houston, TX 77002-2600	Prof. Daniel R. Coquillette Boston College Law School 885 Centre Street Newton Centre, MA 02459
Honorable Carl E. Stewart United States Circuit Judge United States Court of Appeals 2299 United States Court House 300 Fannin Street Shreveport, LA 71101-3074	Prof. Catherine T. Struve University of Pennsylvania Law School 3400 Chestnut Street Philadelphia, PA 19104
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Prof. Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Prof. Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215
Honorable Richard C. Tallman United States Circuit Judge United States Court of Appeals Park Place Building, 21st Floor 1200 Sixth Avenue Seattle, WA 98101	Professor Sara Sun Beale Duke University School of Law Science Drive & Towerview Rd. Box 90360 Durham, NC 27708-0360
Honorable Robert L. Hinkle Chief Judge, United States District Court United States Courthouse 111 North Adams Street Tallahassee, FL 32301-7717	Prof. Daniel J. Capra Fordham University School of Law 140 West 62nd Street New York, NY 10023

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair:	**Reporters:**
Honorable Laura Taylor Swain United States District Judge United States District Court Daniel Patrick Moynihan U. S. Courthouse 500 Pearl Street - Suite 755 New York, NY 10007	Professor Jeffrey W. Morris University of Dayton School of Law 300 College Park Dayton, OH 45469-2772 --- Professor S. Elizabeth Gibson Burton Craige Professor of Law 5073 Van Hecke-Wettach Hall University of North Carolina at Chapel Hill C.B. #3380 Chapel Hill, NC 27599-3380
Members:	
Honorable R. Guy Cole, Jr. United States Circuit Judge United States Court of Appeals 127 Joseph P. Kinneary United States Courthouse 85 Marconi Boulevard Columbus, OH 43215	Honorable Irene M. Keeley Chief Judge United States District Court 500 West Pike Street, 2nd Floor Clarksburg, WV 26301
Honorable Richard A. Schell United States District Judge United States District Court United States Courthouse Annex Chase Bank Building 200 North Travis Street Sherman, TX 75090	Honorable William H. Pauley III United States District Judge United States District Court 2210 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1581
Honorable Eugene R. Wedoff Chief Judge United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Elizabeth L. Perris Chief Judge United States Bankruptcy Court 700 Congress Center 1001 Southwest Fifth Avenue Portland, OR 97204-1145

ADVISORY COMMITTEE ON BANKRUPTCY RULES (CONTD.)

Honorable David H. Coar United States District Court 1478 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	Honorable Jeffery P. Hopkins United States Bankruptcy Court Atrium Two, Suite 800 221 East Fourth Street Cincinnati, OH 45202
Dean Lawrence Ponoroff Tulane University School of Law Weinmann Hall 6329 Freret Street New Orleans, LA 70118-6231	J. Michael Lamberth, Esquire Lamberth, Cifelli, Stokes & Stout, P.A. 3343 Peachtree Road, N.E., Suite 550 Atlanta, GA 30326
G. Eric Brunstad, Jr., Esquire Bingham McCutchen LLP One State Street Hartford, CT 06103	John Rao, Esquire National Consumer Law Center 77 Summer Street, 10th Floor Boston, MA 02110
J. Christopher Kohn, Esquire Director, Commercial Litigation Branch Civil Division, U.S. Dept. of Justice (ex officio) P.O. Box 875, Ben Franklin Station Washington, DC 20044-0875 (1100 L Street, N.W., 10th Flr, Rm 10036 Washington, DC 20005)	
Advisors and Consultants: James J. Waldron Clerk, United States Bankruptcy Court Martin Luther King, Jr. Federal Building and United States Courthouse Third Floor, 50 Walnut Street Newark, NJ 07102-3550	 Mark A. Redmiles, Deputy Director Executive Office for U. S. Trustees 20 Massachusetts Avenue, N.W., Suite 8000 Washington, DC 20530
Patricia S. Ketchum, Esquire 113 Richdale Avenue #35 Cambridge, MA 02140	

ADVISORY COMMITTEE ON BANKRUPTCY RULES(CONTD.)

Liaison Member:	**Liaison from Committee on the Administration of the Bankruptcy System:**
Honorable James A. Teilborg United States District Judge United States District Court 523 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146	Honorable Joy Flowers Conti United States District Court 5250 United States Post Office and Courthouse 700 Grant Street Pittsburgh, PA 15219-1906
Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544	

ADVISORY COMMITTEE ON BANKRUPTCY RULES

SUBCOMMITTEE/LIAISON ASSIGNMENTS 2008

Subcommittee on Attorney Conduct and Healthcare Judge Richard A. Schell, Chair Judge William H. Pauley, III Judge David H. Coar John Rao, Esq. J. Michael Lamberth, Esq. Mark Redmiles, Esq, *EOUST liaison*	**Subcommittee on Privacy, Public Access and Appeals** Judge William H. Pauley, III, Chair Judge Elizabeth L. Perris Judge Richard A. Schell G. Eric Brunstad, Jr., Esq. Mark Redmiles, Esq, *EOUST liaison*
Subcommittee on Business Issues Judge Jeffery P. Hopkins, Chair Judge Eugene R. Wedoff Judge David H. Coar J. Christopher Kohn, Esq. J. Michael Lamberth, Esq. James J. Waldron, *ex officio* Mark Redmiles, Esq, *EOUST liaison*	**Subcommittee on Style** Dean Lawrence Ponoroff, Chair Judge Irene M. Keeley Judge Elizabeth L. Perris J. Michael Lamberth, Esq.
Subcommittee on Consumer Issues Judge Eugene R. Wedoff, Chair Judge R. Guy Cole Judge William H. Pauley III Judge Jeffery P. Hopkins John Rao, Esq. G. Eric Brunstad, Esq. James J. Waldron, *ex officio* Mark Redmiles, Esq, *EOUST liaison*	**Subcommittee on Technology and Cross Border Insolvency** Judge David H. Coar, Chair Judge R. Guy Cole, Jr. Judge Irene M. Keeley Judge Richard A. Schell Dean Lawrence Ponoroff G. Eric Brunstad, Esq. Mark Redmiles, Esq, *EOUST liaison*
Subcommittee on Forms Judge Elizabeth L. Perris, Chair J. Christopher Kohn, Esq. John Rao, Esq. James J. Waldron, *ex officio* Mark Redmiles, Esq, *EOUST liaison* Patricia S. Ketchum, Esq., *Consultant*	**Forms Modernization Project** Judge Elizabeth L. Perris, Chair Judge Jeffery P. Hopkins J. Christopher Kohn, Esq. John Rao, Esq. J. Michael Lamberth, Esq. James J. Waldron, *ex officio* Patricia S. Ketchum, Esq., *Consultant*

SUBCOMMITTEE/LIAISON ASSIGNMENTS 2007-2008 - Cont.

CM/ECF Working Group Judge Elizabeth L. Perris ---------- **Civil Rules Liaison:** Judge Eugene R. Wedoff ---------- **Evidence Committee Liaison:** (open)	**Sealing Committee Liaison:** Judge Jeffery P. Hopkins ---------- **Time Computation Project Liaison:** Judge Eugene R. Wedoff

LIAISON MEMBERS

Appellate:	
Judge Harris L Hartz	(Standing Committee)
Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Jeffery P. Hopkins	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej Chief Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	James N. Ishida Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Jeffrey N. Barr Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544	Timothy K. Dole Attorney-Advisor Office of Judges Programs Administrative Office of the United States Courts Washington, DC 20544
Ms. Gale Mitchell Administrative Specialist Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544	Adriane Reed Program Assistant Rules Committee Support Office Administrative Office of the United States Courts Washington, DC 20544
James H. Wannamaker III Senior Attorney Bankruptcy Judges Division Administrative Office of the United States Court Washington, DC 20544	Scott Myers Attorney Advisor Bankruptcy Judges Division Administrative Office of the United States Courts Washington, DC 20544

FEDERAL JUDICIAL CENTER

Joe Cecil (Committee on Rules of Practice and Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Robert J. Niemic (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Thomas E. Willging (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

TAB 1

Item 1 will be an oral report.

TAB 2

ADVISORY COMMITTEE ON BANKRUPTCY RULES

Meeting of March 27-28, 2008
St. Michaels, MD

Draft Minutes

The following members attended the meeting:

District Judge Laura Taylor Swain, Chair
Circuit Judge R. Guy Cole, Jr.
District Judge William H. Pauley, III
District Judge Richard A. Schell
Bankruptcy Judge Jeffery P. Hopkins
Bankruptcy Judge Kenneth J. Meyers
Bankruptcy Judge Elizabeth L. Perris
Bankruptcy Judge Eugene R. Wedoff
Dean Lawrence Ponoroff
G. Eric Brunstad, Jr., Esquire
J. Christopher Kohn, Esquire
J. Michael Lamberth, Esquire
John Rao, Esquire

The following persons also attended the meeting:

Professor Jeffrey W. Morris, reporter
Professor S. Elizabeth Gibson, assistant reporter
District Judge Thomas S. Zilly, former chair
Bankruptcy Judge Thomas A. Small, former chair
Bankruptcy Judge Paul Mannes, former chair
Bankruptcy Judge Eric Frank, former member
Bankruptcy Judge Christopher M. Klein, former member
Bankruptcy Judge Mark B. McFeeley, former member
Professor Alan Resnick, former member
District Judge James A. Teilborg, liaison from the Committee on Rules of Practice and Procedure (Standing Committee)
District Judge Joy Flowers Conti, liaison from the Committee on the Administration of the Bankruptcy System (Bankruptcy Administration Committee)
District Judge Lee H. Rosenthal, chair of the Standing Committee
Peter G. McCabe, secretary of the Standing Committee
Patricia S. Ketchum, advisor to the Committee
Mark Redmiles, Deputy Director, Executive Office for U.S. Trustees (EOUST)
Lisa Tracy, Counsel to the Director, EOUST
James J. Waldron, Clerk, U.S. Bankruptcy Court for the District of New Jersey
James Ishida, Rules Committee Support Office, Administrative Office of the U.S. Courts (Administrative Office)

James H. Wannamaker, Bankruptcy Judges Division, Administrative Office
Stephen "Scott" Myers, Bankruptcy Judges Division, Administrative Office
Robert J. Niemic, Federal Judicial Center
Phillip S. Corwin, Butera & Andrews

The following members were unable to attend:

District Judge David H. Coar
District Judge Irene M. Keeley

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

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

Introductory Matters

The Chair welcomed the members, advisers, staff, and guests, including several former members and former chairs, to the meeting. She introduced Professor Elizabeth Gibson as the Committee's new Assistant Reporter, and the members and guests each introduced themselves.

1. Approval of Minutes of Jackson Hole meeting of September 6-7, 2007.

The Chair asked for a motion to approve the minutes of the Jackson Hole meeting held September 6-7, 2007. **A motion to approve the minutes passed without opposition.**

2. Oral reports on meetings of other Rules Committees.

(A) January 2008 meeting of the Committee on Rules of Practice and Procedure (Standing Committee).

The Chair said the Standing Committee accepted this Committee's recommendations from the Jackson Hole meeting.

(B) November 2007 meeting of the Advisory Committee on Appellate Rules Committee.

The Chair said that the Appellate Rules Committee continues to consider adopting a rule to deal with indicative rulings. She said that proposed Federal Rule of Appellate Procedure 12.1 would provide a mechanism for discretionary remand by the appellate court upon receiving

notice that the district court would be inclined to grant a motion to vacate, but for the filing of the appeal.

(C) January 2008 meeting of the Committee on the Administration of the Bankruptcy System.

Judge Conti said that the Bankruptcy Committee reviewed the current fee structure in consideration of possible increases to enhance revenue. She said that although no increase was currently contemplated, a possible source for additional fees in the future was a fee to process claims transfers in bankruptcies of publicly traded companies or companies with assets over $50,000,000.

Judge Conti said one of the major endeavors of the Bankruptcy Committee over the next five years will be long range planning. She said the Bankruptcy Committee continued to recommend the FEGLI fix as one of its highest priorities, and that the case weight study and biennial judgeship survey are coming this year.

With respect to the EOUST's request for mandatory data-enabling of the existing Official Forms, Judge Conti said that the Bankruptcy Committee had recommended going forward as soon as possible with enhancements to the DXTR system as a method of providing many of the data elements requested by the Executive Office for United States Trustees.

The Chair elaborated on how the DXTR system works, and said this Committee maintains great interest in the Bankruptcy Committee's data-enabled forms decision because it implicates this Committee's Forms Modernization project. She noted that in considering the data-enabled forms request, the Bankruptcy Committee expressed support for the Forms Modernization Project as a forum for looking at future technology.

(D) November 2007 meeting of Advisory Committee on Civil Rules.

Judge Wedoff reviewed two major issues considered by the Civil Rules Committee: the report of the Discovery Subcommittee on expert witnesses, and further consideration of Rule 56.

He said that with respect to expert witnesses, four separate issues were discussed. The first issue was what should be done with experts, such as treating physicians, who are not required to provide reports. The Subcommittee recommended that the only disclosure required be by the attorney for the party tendering the expert. The second and third issues were whether disclosure of draft reports, and attorney communications about such reports, should be required. On these issues, the Subcommittee recommended disclosure only upon a showing that would require disclosure of attorney work product. Finally, Judge Wedoff said that the Subcommittee identified a problem with work papers. The Subcommittee did not have a good way to distinguish between draft reports that don't need to be disclosed, and work papers that might need to be disclosed. Judge Wedoff said the there was considerable discussion by the full Civil Rules Committee and that the expert witness issues were given back to the Discovery Subcommittee for further consideration.

Judge Wedoff recapped that at its April 2007, meeting, the Civil Rules Committee recommended publishing substantial changes to Rule 56, but because of the volume of interest in the matter, the Standing Committee deferred consideration of the proposal for a year. This gave the Civil Rules Committee the opportunity to reconsider its proposed changes at its November meeting at which time it recommended a number of small changes to its original proposal. Judge Wedoff said the proposal would be discussed again at the Civil Rules Committee's upcoming meeting and he expected a recommendation would be made that rule be published for comment in the fall.

Judge Swain elaborated that the Rule 56 proposal sets a presumptive briefing structure for summary judgment motions, which Judge Wedoff had previously noted could be unworkable in bankruptcy cases. However, changes in the proposal since the last meeting would allow the court to alter the presumptive structure by order.

(E) November 2007 meeting of Advisory Committee on Evidence.

Judge Meyers reported that the Evidence Committee is considering restyling the rules.

(F) Bankruptcy CM/ECF Working Group.

Judge Perris said that the item of greatest interest to this Committee was that the CM/ECF Working Group was looking at how the record for an appeal gets assembled. She said that an approach under consideration would be to simply extract the record directly from the originating court's docket. She said that depending on how the proposal developed, changes in rules (for example, the number of copies of papers required) may be needed.

(G) Sealing Subcommittee.

The Assistant Reporter said that the Sealing Committee was formed to consider when it is appropriate to seal all or part of the court record. She said that at its January meeting, the Sealing Committee addressed the scope of its work, and considered whether (1) it should just look at issues related to sealing an entire case file; or (2), in addition, look at sealing particular filings in the case; or (3), also look as sealing things that are not filed (such as discovery). Ultimately, the Sealing Committee decided to limit its review to the entire case issue. The Assistant Reporter said that the Federal Judicial Center will do an empirical study and report back at the next meeting about how often the issue occurs.

(H) Time Computation Project.

Judge Wedoff said that the Standing Committee's Time Computation Subcommittee considered the comments to all the time computation amendments and that it continued to recommend the amendments as proposed. He said that the Time Computation Subcommittee would also recommend statutory amendments to Congress to conform statutory time periods to the proposed rules amendments. He said that two proposals had generated significant discussion: (1), a proposal to amend the committee notes to specifically address conflicts with local rules; and (2), a proposal to exempt state holidays from the usual counting rule that applies to holidays

and weekends in backward-looking time periods. Judge Wedoff said the Subcommittee considered but ultimately rejected both proposals.

3. Request that Subcommittees Classify Recommendations.

The Chair asked that each subcommittee classify any recommended changes in the rules and forms as either for immediate action or to hold until a package of amendments is ready.

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues

(A) Comments on published rules and forms amendments, including Rules 4008 and 1017.1 and Exhibit D to Official Form 1, and recommended actions.

Judge Wedoff reminded the Committee of the substance of proposed Rule 1017.1, and explained the proposed amendment to Exhibit D of Form 1. Rule 1017.1, he said, would "deem satisfactory" the debtor's certification of exigent circumstances warranting a postponement of the obligation to obtain a credit counseling briefing so long as no action was taken by the court or a party in interest within 14 days after commencement. The debtor's certification would be made in Exhibit D of Form 1.

Judge Wedoff said that after considering the comments, the Consumer Subcommittee recommended that proposed Bankruptcy Rule 1017.1 be withdrawn. He said that there were a number of comments that illustrated problems with the rule as published, but that the primary reason for withdrawal is that the subcommittee members no longer thought the rule was necessary. According to the comments, and the experience of the bankruptcy judges on the Subcommittee, the harm the statute was designed to prevent rarely, if ever, comes up. Judge Wedoff explained that to take advantage of the exigent circumstances exception under 11 U.S.C. § 109(h)(3), the debtor must truthfully certify that he or she sought credit counseling during the 5 days before filing, but was unable to obtain it. Because of the existence of Internet and phone providers nationally, however, the Consumer Subcommittee concluded that this situation was mostly theoretical and almost never occurs.

Mr. Rao suggested that the issue might come up if the debtor wanted an "in person" counseling session, and he pointed out it was possible for Internet and phone service to be unavailable for extended periods of time, such as in a natural disaster. He nevertheless supported withdrawing the rule because he thought the situation was sufficiently rare that a rule was unnecessary. Several members thought that incarcerated debtors, especially in joint cases, might present facts for exigent circumstances, but other members said such cases more often present statutory access problems that no deadline extension can solve. After additional discussion, Judge Wedoff moved to withdraw Rule 1017.1, **and the motion carried without opposition.**

Judge Wedoff said that in light of its recommendation to withdraw Rule 1017.1, the Subcommittee also recommended removing the reference to the rule in option 3 of Exhibit D.

He then moved that Exhibit D as set forth in the agenda materials be approved with a re-ordering of the clauses in the last sentence as follows: "Your case may also be dismissed if the court is not satisfied with your reasons for filing your bankruptcy case without first receiving a credit counseling briefing." Another member suggested adding the word "to" after "warns" in the penultimate sentence of the committee note. **The motion to recommend Exhibit D and its committee note with the suggested changes for final adoption, with an anticipated December 1, 2008, effective date, carried without opposition.**

Judge Wedoff said that no negative comments were received concerning the proposed amendment to Rule 4008(a) that would require the use of an official form reaffirmation agreement coversheet. He moved that the amendment be recommended for final approval, with a December 1, 2009 effective date. **The motion carried without opposition.**

(B) Rule 2016 issues relating to the delivery and filing of petition preparer declarations pursuant to 11 U.S.C. §110(h)(2).

Judge Wedoff referred to the Reporter's memo at pages 29-32 of the agenda materials and the proposed changes to Rule 2016 at page 31. He said that last September, the Subcommittee recommended a simple change correcting a reference in the rule from 11 U.S.C. §110(h)(1) to § 110(h)(2). The change was needed because § 110(h)(1) was re-designated as §110(h)(2) by the 2005 amendments to the Bankruptcy Code. Upon further review, however, it became apparent that the fix would be more complicated because the 2005 amendments also required that the petition preparer's declaration be filed with the petition (rather than within 10 days of filing, as had been the case before the 2005 amendments). The Subcommittee's solution was to require the petition preparer to deliver the declaration to the debtor before the petition was filed, so that the debtor could file the declaration along with the petition. After a short discussion, **a motion to recommend approval of the proposed change to 2016 as final without publication as a technical change carried without objection.** A December 1, 2009 effective date is anticipated.

(C) Proposed new Rule 5009(b).

Judge Wedoff said that at its last meeting, the Advisory Committee approved an amendment to Rule 5009, adding a new subdivision (b) that requires the clerk to give notice to the debtor that the case will be closed without entry of a discharge unless the debtor timely files the statement required by Rule 1007(b)(7). He said the Subcommittee was simply seeking confirmation of that decision and that it recommended forwarding the amendment to the Standing Committee at this time. The Chair added that the recommendation was held back from the Standing Committee pending the resolution of issues concerning the package of cross border changes to several rules, including Rule 5009. **Judge Wedoff's motion to forward proposed new subdivision (b) of Rule 5009 to the Standing Committee for publication was seconded and approved without opposition. Further, a motion to remove the last words of the committee note -- "under § 350" -- carried without opposition.** A December 1, 2010, effective date is anticipated.

(D) Status of consideration of possible amendment of the rules to establish a procedure to govern "automatic dismissals" under § 521(i) of the Code.

Judge Wedoff referred the Advisory Committee to the Reporter's memo at page 36-39, and he said that since there had been little case law development in this area that the Subcommittee recommended no rule amendment at this time. He said the Subcommittee would continue to monitor developments, and would report back at the next committee meeting.

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

(A) (1) Amendment of Rule 1018 to clarify the scope of provisions and applicability of Rule 7065 to actions for injunctive relief under §§ 1519(e) and 1521(e).

The Reporter referred the Committee to his memo at pages 58-63 of the agenda materials. He said as an initial matter, the Subcommittee considered but rejected a suggestion that Rule 1018 be amended and limited to involuntary cases and that a new Rule 1018.1 be proposed that would apply only in chapter 15 cases. The Subcommittee next considered the need to amend Rule 1018 to clarify that the rule applies to matters relating directly to contests over involuntary petitions and petitions filed under chapter 15 and not to other matters relating to the contested petitions. He said the rule had been interpreted to reach other matters, and the Subcommittee concluded that the rule should be more limited in its scope, and that it recommended publishing the rule as set out pages 59-60 of the agenda materials. **After discussing the matter, the Committee agreed with the Subcommittee and recommended publishing the proposed changes to Rule 1018. A December 1, 2010, effective date is anticipated.**

(2) Possible amendments of Rules 1014 and 1015 to resolve a potential problem that can arise when two or more cases are pending simultaneously.

The Reporter explained that the proposed amendments to Rules 1014 and 1015 would include petitions for recognition of a foreign proceeding in the procedures for consolidation and joint administration, or for determining which case should go forward, when multiple petitions concerning the same debtor are filed. **A motion to approve a recommendation to publish the proposed amendments as set out at pages 61-63 of the agenda materials carried without opposition. A December 1, 2010, effective date is anticipated.**

(B) Approval of transmission of the chapter 15-related amendments package (amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012) to the Standing Committee with a request that they be published for comment.

The Reporter said that the Committee previously approved several chapter 15-related rule changes and that the Subcommittee on Technology and Cross Border Insolvency recommends publishing the changes (amendments to Rules 5009 and 9001 and new Rules 1004.2 and 5012) for comment in August 2008. He briefly described the changes, which were set out in the agenda materials at pages 64-69. He said Rule 1004.2 is a new rule that requires an

identification of the debtor's center of main interests on the petition and establishes a procedure for challenging that identification. Rule 5009(c) requires the foreign representative to file a final report in a chapter 15 case and sets out the scope of that report. New Rule 5012 governs agreements for the coordination of the chapter 15 case and the foreign proceeding. Finally, Rule 9001 is amended to reflect the addition to the Bankruptcy Code of § 1502.

Members suggested several stylistic changes that the Reporter incorporated into a handout distributed on Friday. With respect to the change to Rule 5009(c), members discussed who should receive the final report, and who should merely receive notice of the report, and how the clerk would know when all requirements had been met so that the case could be closed. Members agreed that the closing report should be transmitted to the U.S. trustee, that notice of the report should be transmitted to parties in interest, and that the filing of a certificate of service that notice had been sent would trigger case closing. Because there were several wording issues with Rule 5009(c), however, a member suggested that drafting changes be left to the Style Subcommittee and that the rule be redistributed to the Committee for final approval. **A motion to recommend publishing Rules 1004.2, 5009(c), 5012, and 9001 carried without opposition, with the understanding that changes to Rule 5009(c) would be made by the Style Subcommittee and sent back to the Committee for final approval. The Committee approved the final version of 5009(c) by email vote, after the meeting.** A December 1, 2010, effective date is anticipated.

6. Report of Subcommittee on Privacy, Public Access, and Appeals.

(A) (1) Comments on the published separate document amendments to Rules 7052, 7058, and 9021 and recommended actions.

The Reporter said that only one comment was received concerning the separate document amendments to Rules 7052, 7058, and 9021: Judge Brandt's suggestion that "shall be read as a reference to" could be replaced by "means." The Reporter said that the Subcommittee recommended the lengthier published version because it was established historically from Rule 9021. One member suggested adding a discussion in the committee notes explaining that the separate document requirement still applied in adversary proceedings, but no change was made. After additional discussion, **a motion approving all three rules as published for transmission to the Standing Committee with a recommendation for final approval carried without objection**. A December 1, 2009, effective date is anticipated.

(2) Comments on the published time computation amendments to Rules 8002, et al., and recommended actions.

The Reporter said that there had been considerable comment from the bench and bar concerning the proposed change of the appeal time period in Rule 8002 from 10 to 14, or possibly 30 days. Comments were received not only from individual bankruptcy judges, clerks and attorneys, but several prominent organizations, including the National Bankruptcy Conference, the American Bar Association, the American Bankruptcy Institute, the Commercial Law League of America, and many state bar associations and sections of state bar associations.

A summary of the comments received on the proposed change to Rule 8002 can be found in the agenda materials at pages 72-89.

The Reporter said although there was some support for going to 30 days, most of the comments advocated for either 10 or 14 days. In general, those favoring 10 days were attorneys, and those favoring 14 days (or more) were clerks and judges, although there was substantial overlap.

The Reporter said the primary argument for keeping the appeal period at 10 days was the policy that appeals in bankruptcy should move quickly to facilitate the debtor's reorganization. Another argument for 10 days was that bankruptcy practitioners are used to the existing deadline, and don't see the need for a change.

The Reporter said the primary argument in favor of 14 days was to make the time period consistent the time amendment changes to all other rules (i.e. periods less than 30 days should be multiples of seven days). After considering the arguments for each side, the Subcommittee continued to recommend changing the period to 14 days on the ground that the time increase was not very long, because it would help to mitigate the difficulty government agencies and other complex institutions often face in ensuring attention at the appropriate levels to the appealable ruling within the time limit, and because having an exception to the "multiples of seven" rule would be a trap to the occasional bankruptcy practitioner.

Professor Resnick and several members reiterated the arguments in favor of keeping the appeal period at 10 days, emphasizing the number of attorney organizations that came out against a longer period and noting in particular that increasing the appeal deadline extends uncertainty in situations where no appeal will be taken. Other members, including attorney members, argued that the existing 10-day deadline actually increases uncertainty, because it is so short that it encourages unnecessary protective notices of appeal. **After extended discussion the Committee approved a motion to forward Rule 8002 to the Standing Committee for final approval as published, with an appeal period of 14 days, by a vote of 10-3.** A December 1, 2009, effective date is anticipated.

(3) Comments on the published time computation amendments to Rule 9006 and recommended actions. *[The Committee's post-meeting approval by email of the published time amendment changes to bankruptcy rules other then Rules 8002 and 9006(a), is reported at the end of this subsection.]*

The Reporter said that there were a substantial number of comments regarding the amendments to Rule 9006(a), most of which have been considered by the Standing Committee's Time Computation Subcommittee. He said that many of the comments overlapped with the related proposed amendment to Rule 8002(a) (discussed above). A summary of the comments directly generally at Rule 9006(a) was included in the March 3, 2008 memorandum at pages 90-123 of the agenda materials.

The Reporter said that said that one non-controversial amendment to Rule 9006(a) was to fix an incorrect cross-reference in subdivision (a)(3) from a reference to Rule 6(a)(1) to 9006(a)(1), and that he recommended that such a change be made.

As to other changes, the Reporter said that Time Computation Subcommittee considered adding changes to the Committee Note to further address potential conflicts with local rules because of the adoption of a "days are days" computation method. He noted that the national rules supersede local rules, but that several comments expressed concern that some local rules may not be changed, and the result would be the significant shortening of periods under those rules by the inclusion of intermediate weekends and holidays under the new computation system. He said that Time Computation Subcommittee considered the matter and concluded that no special protections should be provided for local rules provisions. If certain time limits in the local rules become too short, those rules will need to be amended in a manner consistent with the national rule. He said that the Time Computation Subcommittee did consider adding a more explicit statement regarding the impact of the new system on local rules to the Committee Note, but that it ultimately made no change.

The Reporter said a number of comments, including one from former reporter Professor Alan Resnick, recommended exempting short time periods from the "days are days" computation method. He said that the concern was that -- both with the local rule issue, but especially with respect to short statutory time periods, (i.e., seven days or less) -- changing to a system that counts weekends and holidays would effectively make such periods shorter than they were when originally implemented.

The Reporter said that rather than exempting statutory time periods from the "days are days" approach, the Standing Committee and the Time Computation Subcommittee were working with congressional staff to change short time periods to seven-day multiples. He said that the Committee would later consider, at Agenda Item 6(B), a proposed recommendation that Congress change several existing bankruptcy related five-day statutory deadlines to seven days so that adoption of proposed 9006(a) does not result in a *de facto* shortening of those deadlines.

The Chair asked Judge Rosenthal, chair of the Standing Committee, to report on the current status of the Time Computation Subcommittee's request to amend short deadlines. Judge Rosenthal said that congressional staff has been very cooperative so far, and that they were working to ensure that recommended statutory time period changes and the rule changes occur seamlessly. She said that they were no guarantees, but her sense was that this request was not controversial and that Congress would enact the requested conforming statutory time amendments effective December 1, 2009, the date Rule 9006(a) is scheduled to go into effect.

Professor Resnick spoke in favor of exempting deadlines of less than seven days from the "days are days" computation method. He said that even if the Standing Committee successfully coordinated with Congress to get the statutory deadlines listed in Agenda Item 6(B) changed, he worried that there would be conflict between the effective dates of the statutory changes and 9006(a), that some periods may have been missed in the recommendation at Agenda Item 6(B), that there might be possible UCC time periods that have been overlooked, and that there would be lots of short time periods proposed by future congresses.

Several members supported Professor Resnick's suggestion to exempt periods of seven days or less from the "days are days" calculation method. Other members opposed such a two-

tiered approach because they thought it would undermine the intent of the rule, which was to eliminate the confusion inherent in having exceptions to the general counting rule and to encourage future drafters to use more uniform time periods.

Finally the Reporter elaborated on an issue mentioned earlier by Judge Wedoff. The Reporter said the Time Computation Subcommittee considered, but ultimately rejected, amending the general counting system for backward looking periods when the last day backwards fell on a state holiday. He explained that as published, when calculating backward looking time periods, (e.g., a filing is due at least 5 days prior to a scheduled hearing), the rule requires counting in the same direction to determine the applicable deadline. So, if the fifth day prior to a scheduled hearing is a Saturday, then Friday becomes the deadline for the filing of the document.

The Reporter said that when little known state holidays come into play, the backward looking time calculation could be a trap. For example, Illinois recognizes Casmir Pulaski Day as a state holiday. If the fifth day prior to a scheduled hearing fell on a Thursday that also happened to be Casimir Pulaski Day, then in a federal court in Illinois, the document would be due on Wednesday, irrespective of the fact that the court would most likely be open on the holiday. The Reporter added that little known state holidays do not create problems when the time computation is forward looking, because in those circumstances, the person subject to the deadline would wind up with an extra day.

The Reporter said that although some were in favor of a change to the rule that would address the "Casimir Pulaski Day" problem, that ultimately, the Time Computation Subcommittee did not think the problem was significant enough to create an exception to the general backward counting rule.

Judge Wedoff said that he was in favor of creating an exception, and suggested that if the Committee voted in favor of making the change to the bankruptcy version of the rule, that at least the Standing Committee would then have the benefit of knowing that one advisory committee thought the change was needed. Judge Rosenthal counseled against such a recommendation, however, unless it was based on the premise that bankruptcy was somehow different from other federal practice in this context.

After additional discussion, **a motion to approve the version of 9006(a), as set forth in the agenda materials beginning at page 94, correcting the typo at line 53 on page 96 (i.e., substituting Rule 9006(a) for 6(a)), for forwarding to the Standing Committee for approval as final, carried on a 7 to 5 vote. The Committee will, however, provide, and Judge Rosenthal indicated that the Standing Committee will consider in connection with its final determination on the backward-counted holidays issue, a list of the backward-counted deadlines in the Bankruptcy Code and Rules and other relevant statutes.** A December 1, 2009 effective date is anticipated.

Time Amendments to Rules other than Rules 8002 and 9006(a).

After the meeting, by email vote, the Committee approved the published time amendment changes to Rules 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1, 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8003, 8006, 8009, 8015, 8017, 9027, and 9033. A December 1, 2009 effective date is anticipated.

(4) Possible amendments to Rules 7052, 9015, and 9023 to "decouple" the time provisions set by the three Bankruptcy Rules from Civil Rules 50, 52, and 59 in connection with proposed amendments to the Civil Rules extending 10-day periods after entry of judgment to 30 days.

The Reporter said that as part of the Time Computation Project, the Civil Rules Committee proposed changing the 10-day deadlines in Civil Rules 50, 52, and 59 to 30 days, rather than 14 days. Each of the rules applies to post judgment motions. The Reporter said that the proposed changes present a problem for this Committee, because those civil rules are incorporated into the Bankruptcy Rules 9015, 7052, and 9023. Given this Committee's decision to limit the appeal deadline to 14 days (see Agenda Item 6(A)(2)), the Reporter said there was a need to "decouple" Bankruptcy Rules 9015, 7052, and 9023 from Civil Rules 50, 52, and 59.

The Reporter said the memo at pages 124-131 contained two stylistic versions to decouple the civil rules: a "Full Text" incorporation, which uses the language from the relevant civil rule but uses 14 days instead of 30 days; and a "Streamlined Option," which generally takes the approach that the relevant civil rule applies in bankruptcy cases, but includes language that requires filing the relevant motion within 14 days rather than 30 days. After considering the two approaches, **the Committee recommended approval, as a technical amendment without need for publishing, the streamlined versions of Rules 7052, 9015, and 9023 set out at pages 129-131 of the agenda materials, with the following changes: all instances of "must" were changed to "shall"; subparagraph (b) in Rule 9015 was changed to (c), with a conforming change to the committee note; Rule 9023 was revised to add "or to alter or amend a judgment" after "A motion for a new trial"; and the title of Rule 9023 was changed to conform to restyled Civil Rule 59, "New Trial; Altering or Amending a Judgment."** A December 1, 2009 effective date is anticipated.

(B) Recommendation in response to request from the Standing Committee's Time Computation Subcommittee for the Advisory Committee's view on which, if any, bankruptcy-related short statutory deadlines should be amended to offset the change in time computation under Rule 9006(a), i.e., the inclusion of weekends and holidays in the computation of periods of less than 8 days.

The Reporter said that an ad hoc group of committee members convened to review statutory deadlines that could be affected by adoption of proposed Rule 9006(a). He said that although the there were a lot of statutory deadlines, (he noted 235 deadlines in Title 11 alone), that only deadlines less than eight days would be affected by the proposed change to Rule 9006(a), as existing Rule 9006 only excludes weekends and holidays from computation of

periods of less than 8 days. The Ad Hoc Group ultimately identified 16 deadlines that could be effectively shortened by the adoption of the new counting rule.

After reviewing the deadlines, the Ad Hoc Group decided not to recommend changing any of the four seven-day periods it identified, because increasing those periods would require going to the next multiple of seven, to 14 days. Although staying at seven days would effectively shorten the deadline under the "days are days" approach by two days (instead of counting intervening weekends for a total of nine days, seven days would *really* be seven days) the Ad Hoc Group did not think it was appropriate to increase those deadlines to 14 days.

The Reporter said that Ad Hoc Group did recommend changing the five-day periods to seven days, because under proposed Rule 9006(a), the change would bring the statutes into conformity with the seven-day approach, and would also effectively keep the time period the same as it is now. The Reporter said that all proposed changes were all set out at pages 135-136 of the agenda materials. **Motion to approve the Ad Hoc Committee's recommendation that Congress change, effective December 1, 2009, the five-day deadlines in the following statues to seven days carried without opposition: 11 U.S.C. §§ 109(h)(3)(A)(ii); 322(a); 332(a); 342(e)(2); 521(e)(3)(B); 521(i)(2); 704(b)(1)(B); 764(b), and 749(b).**

(C) Recommendation in response to suggestion by the bankruptcy clerk of court in the Southern District of New York that Rule 9006(a)(1) be amended to exclude weekends and holidays in computing the five-day period set by section 704(b)(1)(B) of the Code for the clerk's duty to provide creditors with a copy of the United States trustee's statement concerning presumption of abuse.

The Reporter said 11 U.S.C. § 704(b)(1)(B) is one of the five-day deadlines included in the list of such deadlines at Agenda Item 6(B) that the Committee recommends Congress change to seven days. He said that changing the statutory period to seven days addresses the concern raised by the bankruptcy clerk for the Southern District of New York that proposed Rule 9006(a) would make it impractical to timely provide creditors a copy of the United States trustee's statement concerning abuse under § 704(b)(1)(B). The Committee took no action.

(D) Recommended response to John Shaffer's suggestion to amend Rule 8006 to address the consequence of premature filing of an appellant's designation of items to be included in the record and its statement of issues.

The Assistant Reporter said that the Subcommittee considered a comment from former member John Shaffer regarding a possible ambiguity in Rule 8006. In the case of an interlocutory appeal, Rule 8006 requires the appellant to file its designation of items to be included in the record and its statement of issues within 10 days from the entry of an order by the district court or the BAP granting leave to appeal. The rule then permits the appellee "10 days after the service of the appellant's statement" to file and serve a designation of additional items to be included in the record.

Mr. Shaffer was concerned that if an appellant prematurely serves its designation and statement before leave to appeal has been granted, the literal wording of the rule starts the clock

for the appellee's designation, and could cause the appellee to expend time and money before learning whether an appeal will be allowed. Mr. Shaffer also thought that the appellant's premature designation and statement might cause the bankruptcy clerk's office to transmit the record to the appellate court, leading to the docketing of the appeal and the commencement of the briefing period – work which would be unnecessary if leave to appeal is not granted.

In discussing the matter, Subcommittee members questioned whether the issue should be first be considered by the Advisory Committee on Appellate Rules because of similar wording in Appellate Rule 10(b)(3)(B). The Assistant Reporter said that she talked with the reporter for the Advisory Committee on Appellate Rules who indicated that the issue does not seem to come up often in appellate practice, and that the Appellate Rules Committee was not likely to take any action.

The Assistant Reporter said that in an effort to determine whether the issue happens often bankruptcy practice, Jim Waldron polled his fellow bankruptcy clerks. There were 55 responses to the poll. Most bankruptcy clerks had never encountered the problem. Those who had encountered the problem said it was infrequent, and that they generally dealt with it by waiting for a ruling on the motion for leave to appeal before forwarding any papers to the appellate court. Several clerks said they also inform the appellee that the time for filing its designation would not begin to run until leave was granted.

The Assistant Reporter said that the Subcommittee fully discussed the issue by teleconference and, because the problem seems to occur infrequently and seems to be handled well when it does occur, unanimously decided not to recommend an amendment of Rule 8006 at this time. A member of the Subcommittee suggested, however, that the issue could be revisited in any future comprehensive review of the Part VIII rules that the Committee might authorize.

A motion to approve the Subcommittee's recommendation that no change to Rule 8006 be made at this time carried without opposition, with the understanding that the issue could be addressed in the context of any comprehensive review of the appellate rules authorized by the Committee.

(E) Recommendations in response to (1) erroneous cross-reference in proposed amendment to Rule 9006(a) and (2) suggestion by the bankruptcy clerk of court in the Middle District of North Carolina that the cross-reference to Civil Rule 5(b)(2)(C) and (D) in Rule 9006(f) be updated in light of the restyling and renumbering of the Civil Rule, in order to preserve 3-day grace period for both service by mail and by electronic means.

The Reporter directed the Committee's attention to his memo at pages 162-163 of the agenda materials and said the memo described two technical changes needed for Rule 9006. The Chair noted that the Committee already approved the first technical change (correcting an erroneous cross-reference in the proposed amendment to Rule 9006(a)) at Agenda Item 6(A)(3). The Reporter said the second change, expanding the two cross-references in Rule 9006(f) to the subparagraphs of Civil Rule 5(b)(2) was needed because the civil rule had been restyled. **A**

motion approving the proposed change to 9006(f) without publishing as a technical change with a recommended effective date of December 1, 2009 carried without opposition.

7. Report of Subcommittee on Forms.

(A) Comments on published forms amendments, including Official Forms 8 and 27, and recommended action.

The Reporter said that the Forms Subcommittee considered several comments received after publishing Official Forms 8 and 27 in August 2007. Form 8 is the debtor's statement of intention in which debtors must set out their intentions as to personal property that is either subject to a lien or security interest, or that the debtor holds under a lease. Proposed new Official Form 27 is the cover sheet for reaffirmation agreements.

The Reporter said that the Subcommittee made a number of formatting and language changes to the published version of Form 8 in response to the comments, to streamline the form and make it easier to understand. Among other things, the Reporter said, the Subcommittee considered but rejected a suggestion that the form include a certificate of service, deleted the petition-preparer declaration on page 2 as unnecessarily duplicative of Form 19, (which must be filed with any paper prepared by a petition-preparer), and added a continuation page. **After discussing the changes, the Committee voted to recommend Form 8 for final approval as set out in the agenda materials at pages 173-175, with a recommended effective date of December 1, 2008. After the meeting, the Committee approved the committee note describing the changes to Form 8 by email vote.**

The Reporter and Judge Perris described a number of formatting and wording changes made to Form 27 as a result of the comments. Members made several additional suggestions, which were incorporated into a handout distributed on Friday, the second day of the meeting. **After additional discussion on Friday, the Committee voted to recommend Form 27 for final approval as set forth in the Friday handout, with minor additional changes. After the meeting, the Committee approved additional formatting changes and a committee note to Form 27 by email vote.**

(B) Recommendation in response to suggestion by Bankruptcy Judge Joyce Bihary of the Northern District of Georgia for the issuance of forms for § 522(q) and/or Domestic Support Obligation certification before chapter 13 discharge.

The Assistant Reporter said that as a result of Judge Joyce Bihary's inquiry of whether the Committee was considering a national form to implement the domestic support obligation (DSO) certificate required by 11 U.S.C. § 1328(a), she surveyed the various local forms and rules that have been developed to address some aspect of the requirements for a chapter 13 debtor's eligibility for discharge. She said that approximately 40 districts have adopted such local forms, and, although wording varied, they fell into three basic categories: (1), a DSO-only type of form; (2), a comprehensive form that requires the debtor to certify all of the eligibility requirements of § 1328 have been satisfied; and (3), something in between, generally a DSO certification as well as a certification or statement regarding the inapplicability of § 522(q)(1).

After considering the various local forms that have been developed, the Subcommittee recommended that the Administrative Office adopt proposed Director's Form 283 as set out at pages 185-186 of the agenda materials. The Assistant Reporter said this was a "middle ground" version in that it addressed the DSO certification and the statement regarding the applicability of 522(q), but that it also required the debtor to supply current address information for the debtor and the debtor's employer.

Members discussed several aspects of the proposal, including: (i), whether to include the bracketed language as "Part II"; (ii) whether the statutory definition of a domestic support obligation should be incorporated into language on the first page of the form, or if including the statutory definition and reference in the "Information" section of the form was sufficient; and (iii), whether the form should be an official form rather than a director's form. **After discussing the various suggestions, a majority of the Committee (eight members) voted in favor of recommending that the Administrative Office promulgate Form 283 as a Director's form, as set forth in the agenda materials, including Part II (but without the brackets).** The four dissenting members favored adopting the form as a director's form, but would have included the statutory definition for a DSO on page one, instead of, or in addition to the DSO definition and statutory reference on page two. No member supported making the form an official form.

The Chair also asked the Administrative Office staff to review all the forms for consistent certifications.

(C) Recommendation regarding possible amendment to Official Form 10 or Rule 3001 to restrict disclosure of sensitive information contained in the debtor's medical records by advising creditors holding health care claims to submit only the minimally necessary information. The proposal was part of Comment 06-BK-016 submitted by Bankruptcy Judge Colleen Brown of the District of Vermont.

The Reporter reviewed Comment 06-BK-016, submitted by Bankruptcy Judge Colleen Brown (D. Vt.) which included a suggestion that the Committee consider amendments to the rules and forms to prevent the disclosure of personal information on proofs of claim and attached documentation provided to support claims. Judge Brown noted in particular that claims filed by health care providers frequently include information about services and medical tests that essentially disclose the nature of the illness or condition of the patient.

The Reporter said that Judge Brown's suggestion was initially given to the Subcommittee on Privacy, Public Access and Appeals to consider possible rule changes. That Subcommittee, however, suggested instead that the Forms Subcommittee consider whether Official Form 10 or the instructions to that form could be amended to advise creditors to submit only minimally necessary information. The Advisory Committee concurred, and the matter was given to the Forms Subcommittee.

The Forms Subcommittee met by teleconference to consider the matter, and after considerable deliberation, recommended amending instructions 2 and 7 on the back of Form 10, and box 7 on the front of the form, as set forth in the materials at pages 188-189. **A motion**

made to recommend adopting the health care-related changes to Form 10, as proposed by the Forms Subcommittee, passed without opposition, except that the word "unnecessary" in the new material added to instruction 2 was deleted. The Committee also recommended that the change take effect as a technical change on December 1, 2008, without publication.

(D) Recommended changes to definitions on back of Official Form 10: proposed new definition of "creditor" (approved at September 2007 Jackson Hole meeting); proposed revision of definition of "claim" to conform to the change in the definition of "creditor."

Mr. Myers referred the Committee to the memo at pages 194-195 of the materials and explained that, at the Jackson Hole meeting, the Committee approved revising the definition of "creditor" on the back of Form 10 to more closely follow the statutory definition as follows:

> **Creditor**
> A creditor is a person, corporation, or other entity owed a debt by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C. § 101(10).

Mr. Myers said that, although Committee approved the proposed revision at the Jackson Hole meeting, it decided not to forward the recommendation to the Standing Committee until other changes to the form were needed. The Committee had also asked the Forms Subcommittee to propose a similar change for the related definition of "Claim" on the back of Form 10. Mr. Myers said that the Subcommittee discussed the matter and that it recommends that the definition of "Claim" set forth below. He said the Subcommittee also proposes that both the "creditor" and "claim" definitions go forward to the Standing Committee along with the health care-related changes discussed at Agenda Item 7(C):

> **Claim**
> A claim is a creditor's right to receive payment on a debt owed by the debtor that arose on or before the date of the bankruptcy filing. See 11 U.S.C.§101(5). A claim may be secured or unsecured.

The Committee approved a motion to recommend revising the definitions of "creditor" and "claim" on the back of Form 10, and to recommend that the revisions be made effective December 1, 2008 as a technical change without publication along with the health care-related changes to the form discussed at Agenda Item 7(C).

(E) Recommended response to suggestion by the chief deputy clerk of the bankruptcy court for the District of New Mexico that the debtor's phone number be deleted from Official Form 9F, the meeting of creditors notice for chapter 11 corporate/partnership debtors.

The Reporter said that among several amendments to most versions of Official Form 9 that became effective on December 1, 2007, was the deletion of the language that required debtors to state their telephone numbers. He said that the deletion was consistent with the

Judicial Conference privacy policy, and was approved by the Advisory Committee. In the case of Official Form 9F ("Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors, and Deadlines in cases filed under chapter 11 by a corporation or a partnership"), however, the deletion was inadvertently overlooked. The Reporter said that the Subcommittee recommends that Official Form 9F be revised to delete the request for the debtor's telephone number. **The Committee approved a motion to recommend deletion of the request for the debtor's telephone number on Official Form 9F as a technical change not requiring publication, with a recommended December 1, 2008, effective date.**

(F) Recommendation regarding possible revision of the statement on filing deadlines at the bottom of Official Form 23 in light of comment from the bankruptcy court for the Southern District of New York on the application of the debtor education requirement to certain individual debtors in chapter 11 cases.

Mr. Myers said that Mark Diamond, an attorney and the operations manager of the bankruptcy court in the Southern District of New York, reported an inconsistency with the "Filing Deadlines" note at the bottom of Official Form 23. The form, entitled Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management, was amended on December 1, 2007.

Mr. Myers explained that the pending amendment to Rule 1007(c) that will go into effect on December 1, 2008, includes a deadline for filing the certificate in a chapter 11 case in which the debtor requests a hardship discharge under § 1141(d)(5)(B) of the Code. The note at the bottom of Form 23, however, does not include the same deadline.

Although an individual receiving a hardship discharge in chapter 11 would be rare, to avoid confusion, the Forms Subcommittee recommended changing the footnote to track the language in the pending rule. The suggested fix conforms to the language of pending Rule 1007(c) by adding a reference to § 1141(d)(5)(B) and removing the words "entry of." As revised, the note would read:

> *Filing Deadlines*: In a chapter 7 case, file within 45 days of the first date set for the meeting of creditors under § 341 of the Bankruptcy Code. In a chapter 11 or 13 case, file no later than the last payment made by the debtor as required by the plan or the filing of a motion for ~~entry of~~ a discharge under <u>§ 1141(d)(5)(B) or</u> § 1328(b) of the Code. (See Fed. R. Bankr. P. 1007(c).)

After discussion, the Committee approved the change to Form 23 as set forth above, and recommended that it go into effect without publication on December 1, 2008 as a conforming change, the same time as the proposed amendment to Rule 1007(c).

(G) Judicial Conference approval of amendments to Official Forms 1, 22A, 22B, and 22C. (Information item.)

Mr. Myers referred the Committee to the agenda materials at pages 203 and 204 for a description of changes to Form 1 and Forms 22A and 22C, which went into effect on January 1,

2008, after approval by the Committee, the Standing Committee and the Judicial Conference by email vote. Form 22B went into effect at the same time.

(H) Amendments to Director's Procedural Forms 200, 254, 255, and 256. (Information item.)

Mr. Wannamaker recapped changes (described at pages 205 and 206 of the agenda materials) to the Director's Procedural Forms 200, 254, 255, and 256 that became effective since the Committee's September 2007 meeting.

Discussion Items

8. Status of the Bankruptcy Forms Modernization Project and its organizational meeting on January 31, 2007.

Judge Perris reported that at its organizational meeting, the group divided its work among two subgroups. She said that one subgroup, the "Analytical" Subgroup, has begun to inventory the informational elements requested on the petition and schedules. The Analytical Subgroup has had several conference calls, and has already done its initial analysis of the petition and schedules. She said the next step will be to put the information into spreadsheets, categorizing it, filtering it and thinking about how to restate it. She said a primary focus of the Analytical Subgroup at this point is to identify overlapping information requests and eliminate redundancies.

Judge Perris reported that the other subgroup, the Technology Subgroup, has also had several conference calls since the January meeting, and that it is currently surveying available technologies for inputting, outputting and manipulating information currently collected on the forms. She said the Forms Modernization Project Group is also planning to make presentations at several upcoming FJC events and at the clerk operations forum as part of the effort to solicit input from the bankruptcy community.

9. Planning for the future of the CM/ECF system.

As an informational item, Judge Perris told the Committee that the Administrative Office is in the initial stages of forming a group to assess plans for the future of CM/ECF. She said that she would be acting as liaison from the Committee, and that she would report on the group's activity at the next Committee meeting.

10. Suggestion by Bankruptcy Judge Laurel M. Isicoff of the Southern District of Florida to create a new Official Form to be used as a petition in chapter 15 cases.

The Reporter said that the Hon. Laurel Myerson Isicoff (Bankr. S.D. Fla.) has suggested that a new form be developed, in place of Official Form 1, to commence a case under chapter 15 of the Bankruptcy Code. Judge Isicoff reported that recently, a trustee in an individual debtor bankruptcy case pending in the United Kingdom initiated a chapter 15 case in her court. The

debtor in UK case had relocated to the United States, and the trustee intended to liquidate some of the debtor's jewelry he asserted was an asset of the estate in the UK case.

Judge Isicoff believes that the UK trustee's use of Official Form 1 to commence the chapter 15 case creates several problems. First, it creates the appearance of a "case." Judge Isicoff argues that this is inconsistent with § 1511 of the Code, which authorizes the foreign representative to initiate a bankruptcy case "upon recognition" of the foreign proceeding.

Judge Isicoff reported that the UK trustee initially filed a pleading called a "Petition for Recognition," as required § 1515, but that the filing was rejected in the absence of a Form 1 Voluntary Petition to accompany the pleading. She suggests that since Official Form 1 merely contains a check box for chapter 15, it creates confusion about whether a "Petition for Recognition" pleading is needed.

Judge Isicoff believes that using Official Form 1 to file a chapter 15 case against an individual also creates new difficulties for the individual. In the case before Judge Isicoff, the debtor was unable to use a credit card because the credit reporting agencies reported the filing of a petition under the debtor's name. This might not be justified if, for example, the credit card was issued after the UK filing. Judge Isicoff maintains that future problems could be avoided if a form other than Official Form 1 was used to initiate a chapter 15 case.

After a brief discussion, **the Chair referred the matter to the Subcommittee on Technology and Cross Border Insolvency to consider whether a new form should be created to commence chapter 15 proceeding, or whether existing Official Form 1 is (or could be if amended) sufficient, to address the matter.**

11. Suggestion by Mr. Brunstad that Part VIII of the bankruptcy rules be rewritten to more closely follow the Federal Rules of Appellate Procedure.

Mr. Brunstad said that, although Part VIII of the bankruptcy rules is based on the Federal Rules of Appellate Procedure ("FRAP"), it has become somewhat dated because it does not reflect the many amendments that have been made to FRAP over time. He suggested that many of the FRAP amendments would be beneficial in bankruptcy appeals and he proposed that a subcommittee review and rewrite the bankruptcy appellate rules. **The Chair referred the matter to the Subcommittee on Privacy, Public Access, and Appeals.**

12. Memorandum by the Director of the Administrative Office pursuant to Rule 5003(c) authorizing clerks to keep their files and indices of judgments and orders in electronic form, using any automated means that the court determines will meet the needs of the users of those records and that the clerk's office can support.

As an information item, Mr. Wannamaker reviewed Director Duff's January 16, 2008 memorandum authorizing clerks to keep their indices of civil judgments and orders in electronic form.

13. Regulations proposed by the Executive Office for United States Trustees for final reports in chapter 7, chapter 12, and chapter 13 cases and approval of credit counseling agencies.

The Assistant Reporter referred the Committee to the agenda materials at pages 213-233 for a description of the EOUST's proposed regulations for final reports in chapter 7, 12, and 13 cases, and for approval of credit counseling agencies.

With respect to closing reports, the Assistant Reporter said that case trustees currently use hundreds of different closing forms throughout the United States, and EOUST's proposed closing reports (mandated by BAPCPA) would make the process uniform and facilitate closing. She also advised members that the comment period on the proposed forms ends April 4, 2008.

The Assistant Reporter also described the proposed regulations concerning approval of credit counseling agencies, which she said were out for public comment until April 1, 2008.

On behalf of the EOUST, Mark Redmiles reiterated that the deadline for comments concerning the closing reports was April 4. He noted that the reports would be filed as "data-enabled" forms to facilitate the EOUST's ability to pull the information from the forms.

14. Suggestion by the Loan Syndication and Trading Association and the Securities Industry and Financial Markets Association to repeal Rule 2019.

The Assistant Reporter said that the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association (collectively the "LSTA") have proposed that Rule 2019 be repealed. She said that Rule 2019, titled "Representation of Creditors and Equity Security Holders in Chapter 9 Municipality and Chapter 11 Reorganization Cases," comes into play in chapter 9 and 11 cases with respect to entities and committees (other than committees appointed under § 1102 or § 1114) that represent more than one creditor or equity holder. She said the LSTA generally objects to detailed reporting requirements concerning the members of an ad hoc committee including details about how and when holder claims or equities were acquired and at what price, as well as information about the organizational structure of the ad hoc committee itself.

The Assistant Reporter said that in contrast to the LSTA, it was her understanding that other organizations, including the National Bankruptcy Conference, were considering whether to recommend that Rule 2019 be expanded to cover official committees or whether the rule should be otherwise amended. Several members indicated that other organizations that they are involved in might want to take a position on Rule 2019 elimination or expansion as well.

After additional discussion, LSTA's suggestion was tabled until the next meeting in anticipation of suggestions from other interested organizations. Members were encouraged to discuss the matter with other organizations they participate in. **The Chair asked the Assistant Reporter to provide a review of the case law on Rule 2019 for the next meeting.**

Information Items

15. Comment circulated to Congress in February 2008 regarding the deadline set out in H.R. 3609 – mortgage foreclosure legislation – for filing a notice of fees charged pursuant to a chapter 13 debtor's home mortgage.

The Chair gave a report about the status of legislation before Congress that would amend § 1322(c)(3) of the Bankruptcy Code to disallow certain fees on the debtor's home mortgage while case is pending unless certain notice is given. She said there was a problem in the way the proposed legislation calculated the notice period, and that Administrative Office's legislative affairs office has forwarded a proposed fix to congressional staff.

16. Rules Docket.

Mr. Wannamaker asked the members to review the Rules Docket and let him know if any changes were needed.

17. New posting of list of suggested rules amendments on the Internet

Mr. Ishida said that the Rules Support Office recently begun posting suggestions for changes to the bankruptcy rules and forms on the court's public website at:

http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm.

He asked members to review the webpage and provide any suggestions. He said that he anticipated that the status of suggestions and official responses would be posted on the chart so that the public could easily learn what action had been taken. He said that he also anticipated that keeping historical suggestions and responses posted publicly would help refine future suggestions, as interested parties would have the benefit of easily learning Committee reaction to prior similar suggestions.

18. Bull Pen:

All of the proposed rules amendments in the *Bull Pen* were addressed in prior agenda items.

19. Future Meetings.

The Chair reminded the Committee that the next meeting was scheduled for October 2-3, 2008, at the Hotel Teatro in Denver, Colorado. **The Chair asked members to make suggestions for the spring 2009 meeting by email.**

20. New business:

(A) Use of the term "family size" rather than "household size" in determining the National Standard deduction for food, clothing and other items on Line 19A of Official Form 22A.

Judge Wedoff reviewed his March 6 memo from the materials. He explained that in the last revisions to the means test forms, the Committee approved using "household" rather than "family" size in determining applicable median income to conform with the term used in 11 U.S.C. § 707(b)(7). He noted, however, unlike the Internal Revenue Manual, the means-test forms do not have an IRS dependency limitation built into the calculation of household size. Because there was no dependency limitation, he thought the forms could produce anomalous results in some instances (for example, a college age debtor living at home with his two parents and asserting a household of "three"), and he suggested the Consumer Subcommittee review the matter. **The Chair agreed with the suggestion and referred the matter to the Consumer Subcommittee.**

(B) Suggested changes to Rule 6003.

The Reporter reviewed his memo, which sets out two issues that have been raised concerning Rule 6003: (1) Judge Robert Kressel's query as to whether the time period should start from the "order for relief" instead of the "filing of the petition;" and (2) informal comments from BJAG members that Rule 6003 as written might prevent the debtor-in-possession from hiring counsel prior to the first 20 days of the case. As to Judge Kressel's comment, because the purpose of the rule was simply to relieve some of the time pressures at the beginning of the case, no member thought it was necessary to tie the beginning of the period to the order for relief in involuntary cases.

With respect to the second issue, the Reporter said that when Rule 6003 was initially recommended, the expectation was that an application to employ counsel in chapter 11 would be filed on the first day of a chapter 11 case, that counsel would serve until employment was approved, and that approval would be effective from the date of the application or from commencement of the case, as the court determined.

The Committee discussed the matter and the general consensus was that the rule allows for employment of debtor-in-possession counsel from the beginning of a chapter 11 case. Members agreed with the Reporter that the rule only limits when the order approving employment can be entered, not when it is effective. Some members also pointed out that the rule has an exception "to avoid immediate an irreparable harm," which seems to allow for immediate entry of the order if the court agrees with the argument that a debtor cannot file at all unless counsel first has an order approving employment in hand.

There was some agreement with the Reporter's observation that a more explicit statement in the committee note that the rule is not intended to prevent counsel from acting on behalf of the debtor-in-possession before an employment order is entered might have been helpful. However, it is not possible to amend or add to a committee note without amending the rule. In the absence

of a formal request or suggestion for a rule change or clarification from BJAG or another party in this respect, the Committee did not undertake to develop a statement on the issue.

The Committee voted to table the issue pending the BJAG's determination as to whether it will request any Committee action. The Committee noted in this connection that, if the BJAG requested action or comment, the Committee's response could be posted on the new area of the judiciary's rulemaking website that provides links to written suggestions and responses to those suggestions.

21. Adjourn

The Chair again (see addendum below) thanked Judges Zilly, Klein, and McFeeley for their service to Committee over their terms, and she thanked the current members and the guests for their participation in a great meeting, and adjourned the meeting.

Addendum: Judges Zilly, Klein, and McFeeley Honored at the "Zillybration"

The Chair asked that the minutes reflect some of the comments made at the committee dinner honoring the Committee's three outgoing members, former chair of the Committee, Judge Thomas S. Zilly, former chair of the Subcommittee on Forms, Judge Christopher M. Klein, and former chair of the Subcommittee on Technology and Cross Border Insolvency, Judge Mark B. McFeeley. In addition to the committee membership, assigned staff and committee liaisons, two former chairs (Judge Thomas Small, and Judge Paul Mannes), former reporter and committee member Professor Alan Resnick, and former member Judge Eric L. Frank attended the celebration.

Speakers at the Zillybration included Standing Committee Chair Judge Lee Rosenthal, Judge Thomas Small, reporter Professor Jeffrey Morris, former reporter and committee member Professor Alan Resnick, Judge Eugene Wedoff, Peter McCabe, James Wannamaker, Scott Myers, Patricia Ketchum and Committee Chair Judge Laura Taylor Swain.

The speakers shared many anecdotes about the three retiring members, and all praised the extraordinary accomplishments undertaken by the Committee over the past several years. Of particular note, Judge Zilly led, and Judges Klein and McFeeley played vital roles in, an intensive team effort by the Committee to draft and approve an extensive set of Interim Rules and Forms in the 180 days between the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) and the act's effective date on October 17, 2005. Because the usual rules process takes at least three years, the Interim Rules were adopted by the courts as local rules.

Despite the expedited process and the ambiguity of many BAPCPA provisions, the Interim Rules have served the bankruptcy community well and required only limited fine tuning for adoption as permanent rules. The permanent rules were approved by the Supreme Court and sent to Congress a few days before the Committee meeting, and will take effect on December 1, 2008 unless Congress acts to the contrary.

The following rules amendments (and new rules) were proposed during Judge Zilly's term as chair:

Thirty-nine Interim Rules (for BAPCPA) proposed in 2005 were approved by the Committee on Rules of Practice and Procedure (the Standing Committee) in August 2005 and adopted by the courts as local rules, effective October 17, 2005.

One Interim Rule was amended in 2006 in response to practice under BAPCPA.

Nine rules amendments were proposed in 2005 and were published for comment in August 2005. Eight of the nine amendments became effective on December 1, 2007.

Forty amendments proposed in 2006 were published for comment in August 2006. All 40 will be effective on December 1, 2008 if approved by the Supreme Court and unless Congress acts to the contrary.

Thirty-nine amendments proposed in 2007 were published for comment in August 2007. Comments for these amendments were considered by the Advisory Committee in March 2008.

Four technical amendments were proposed in 2007 and approved by the Judicial Conference in September 2007. The technical amendments will be effective on December 1, 2008 if approved by the Supreme Court and unless Congress acts to the contrary.

In addition, Judge Zilly shepherded 12 other rules amendments (proposed during Judge Small's tenure as chair) through the remainder of the rules process. Eight of the nine amendments published in August 2003 became effective on December 1, 2005, and four amendments published in August 2004 (including two separate amendments to Rule 5005) became effective on December 1, 2006.

The following form amendments were proposed during Judge Zilly's term as chair:

Nineteen amendments to the Official Forms (and new forms) were proposed on an expedited basis in 2005 in response to the enactment of BAPCPA. The amended forms were approved by the Judicial Conference and took effect on October 17, 2005.

Three of the new Official Forms were amended by the Judicial Conference in October 2005.

Eight amendments to the Official Forms were proposed on an expedited basis in 2006 in response to practice under BAPCPA and comments on the 2005 amendments. The amended forms were approved by the Judicial Conference in September 2006 and took effect on October 1, 2006.

Twenty-five forms amendments (including new forms) were published for comment in August 2006 (including the BAPCPA forms amendments). Fifteen of the forms became

effective on December 1, 2007 (including 2 forms which were combined), three became effective on January 1, 2008, and six are scheduled to take effect on December 1, 2008.

In addition, two technical forms amendments proposed during Judge Small's tenure became effective on December 1, 2004.

Throughout the years of drafting and revising the forms and rules to implement the 2005 bankruptcy legislation, Judges Zilly, Klein and McFeeley remained cheerful (and sane) despite the long hours of meetings and conference calls, the often tedious process of proofreading hundreds of pages of documents, and countless discussions of how the committee should proceed. They were considerate of both the other committee members and the staff, and they steadfastly kept the "train" running on schedule. Their efforts are greatly appreciated and will be much missed.

The Committee presented each departing member with a certificate of appreciation. Judge Zilly was also presented with a unique leather bound volume of the Rules, Rule amendments, and Forms developed under his leadership.

Respectfully submitted,

Stephen "Scott" Myers

TAB 3

Item 3 will be an oral report.

~~~~~~~~~~

Draft minutes of the June 2008 meeting of the Standing Committee
~~~~~~~~~~

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 9-10, 2008
Washington, DC
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, DC, on Monday and Tuesday, June 9 and 10, 2008. All the members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Professor Daniel J. Meltzer
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General Mark R. Filip attended part of the meeting as the representative of the Department of Justice. In addition, the Department was represented throughout the meeting by Ronald J. Tenpas, Assistant Attorney General for the Environment and Natural Resources Division.

Also participating in the meeting were committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Carl E. Stewart, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that Professor Morris was completing his service as reporter to the Advisory Committee on Bankruptcy Rules, noting that he would be honored formally at the January 2009 committee meeting. She pointed out that Professor Morris had made extraordinary contributions to the rules process during the hectic periods preceding and following enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The far-reaching legislation, she noted, had required him to devote an enormous amount of time and effort to researching, analyzing, and drafting a great many new rules and forms. She said that Professor Morris truly had accomplished the work of several people, and the committee would greatly miss him.

Judge Rosenthal presented a resolution signed by the Chief Justice to Judge Kravitz recognizing his service as a member of the committee from 2001 to 2007. She noted that he had been at the center of several important projects during that time, had coordinated development of the time-computation amendments now before the committee for final approval, and had served as the committee's liaison to the Advisory Committee on Criminal Rules. And she was delighted that Chief Justice Roberts had appointed him as the new chair of the civil rules committee.

Judge Kravitz, in turn, presented Judge Rosenthal with a resolution from the Chief Justice recognizing her service as chair of the civil advisory committee from 2003 to 2007. During her tenure, she had shepherded many landmark rules changes dealing with such important matters as class actions, electronic discovery, and restyling of the civil rules.

Judge Rosenthal asked the committee to recognize the many contributions of the late Judge Sam Pointer, who had served as chair of the Advisory Committee on Civil Rules from 1990 to 1993. Among other things, he had coordinated the major package of amendments to the civil rules needed to implement the Civil Justice Reform Act of 1990. She noted that Judge Pointer had also led the committee's initial efforts to restyle the Federal Rules of Civil Procedure. He consistently had set high standards in everything he did and had been a very influential leader of the federal judiciary.

Judge Rosenthal noted that Chief Judge Anthony Scirica, former chair of the standing committee, had just been elevated by the Chief Justice to the position of chair of the Executive Committee of the Judicial Conference. She said that the appointment would serve the rules process and the entire federal judiciary very well.

Judge Rosenthal reported that the March 2008 session of the Judicial Conference had been uneventful for the rules process, as no rules matters had been placed on the discussion calender. She noted that she and Professor Coquillette had had very

productive meetings with both Chief Justice Roberts and Administrative Office Director James Duff. Both are very appreciative of the work of the rules committees. The Chief Justice, she said, was supportive of the effort to restyle the evidence rules and was keenly aware of the need for the rules committees to address problems regarding cost and delay in civil cases, victims' rights in criminal cases, and privacy and security concerns in court records.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 14-15, 2008.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej reported briefly on two pieces of legislation affecting the rules process, both of which have been opposed consistently by the Judicial Conference. First, legislation had been introduced in the last several congresses, at the behest of the bail bond industry, to limit the authority of a judge to revoke a bond for any condition other than failure of the defendant to appear in court as directed. The legislation had not moved in the past, but had now passed the House of Representatives and been introduced in the Senate.

Second, protective-order legislation had been reintroduced by Senator Kohl. It would require a judge, before issuing a protective order under FED. R. CIV. P. 26(c), to make findings of fact that the discovery sought: (1) is not relevant to protect public health or safety; or (2) if relevant, the public interest in disclosing potential health or safety hazards is outweighed by a substantial interest in keeping the information confidential, and the protective order is narrowly drawn to protect only the privacy interest asserted. Mr. Rabiej noted that the Senate Judiciary Committee had reported out the bill, but it had not been taken up by the full Senate. It has also been introduced in the House.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a detailed written report on the various activities of the Federal Judicial Center (Agenda Item 4). He also reported on the Center's extensive research on local summary judgment practices in the district courts as part of the committee's discussion of the proposed revision of FED. R. CIV. P. 56 (summary judgment).

REPORT OF THE TIME-COMPUTATION SUBCOMMITTEE

Amendments for Final Approval by the Judicial Conference

Judge Rosenthal and Judge Huff, chair of the time-computation subcommittee, explained that the committee was being asked to approve:

(1) a uniform method for computing time throughout the federal rules and statutes, as prescribed in the proposed revisions to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a);
(2) conforming amendments to the time provisions set forth in 95 individual rules identified by the respective advisory committees; and
(3) a proposed legislative package to amend 29 key statutes that prescribe time periods.

Judge Rosenthal explained that the time-computation project had proven to be more complicated than anticipated, and the subcommittee and advisory committees had worked very well together in resolving a number of difficult problems. In the end, she said, the package that the committees had produced is very practical and elegant.

Judge Huff stated that the purpose of the amendments is to simplify and make uniform throughout all rules and statutes the method of calculating deadlines and other time periods. She noted that the public comments had been generally positive and had helped the committees to refine the final product. She noted that the subcommittee and the advisory committees had identified the 29 most relevant and significant statutory deadlines that should be adjusted to conform to the proposed new rules. She pointed out, too, that local rules of court will also have to be amended to conform to the new national rules. The rules committees will work with the courts to accomplish this objective.

Professor Struve reported that there had not been a great deal of public reaction to the published amendments. The comments, she said, had been mixed but mostly positive and very useful. She noted that a few changes had been made following the comment period. For example, the definition of the term "state" had been deleted from proposed FED. R. APP. P. 26(a) and FED. R. CIV. P. 6(a) because it would be added elsewhere.

She reported that the principal issues discussed by the subcommittee following the public comment period concerned the interaction between the backward time-counting provision in the proposed rules and the definition of a "legal holiday," which includes all official state holidays. For example, in counting backwards to ascertain a filing deadline, the proposed rule specifies that when the last day falls on a weekend or holiday, one must continue to count backwards to the day before that weekend or holiday. The problem, as the public comments pointed out, is that the definition of a "legal holiday" may cause a

trap for the unwary because some state holidays are obscure and not generally observed either by courts or law firms. A filer unaware of an obscure state holiday, for example, might file a paper on the holiday itself only to learn at that time that the filing is untimely.

Professor Struve explained that the subcommittee had considered potential fixes for the problem. One would be to provide that a state holiday is a "legal holiday" for forward-counting purposes, but not for backward-counting purposes. She said, though, that the subcommittee had rejected the fix because a majority of members believed that it would make the rule too complex. On the other hand, the Advisory Committee on Bankruptcy Rules has complained that the rule will cause serious problems in bankruptcy practice and that state holidays must be excluded from the backwards-counting provision – either across-the-board for all the rules, or at least in the bankruptcy rules.

Professor Struve emphasized that the advisory committees were recommending changes in the specific deadlines contained in many individual rules to make the net result of time-computation changes essentially neutral as to the actual amount of time allotted for parties to take particular actions.

Professor Struve noted, for example, that the 10-day appeal deadline in FED. R. BANKR. P. 8002 would be revised to 14 days. In addition, she said, the civil and appellate advisory committees had worked together to address post-judgment tolling motions filed under FED. R. CIV. P. 50, 52, or 59. They decided to lengthen the deadline for filing such motions from 10 days to 28 days.

CIVIL RULES TIME COMPUTATION

Judge Kravitz stated that, as published, the Advisory Committee on Civil Rules had recommended extending the deadline to file a post-judgment motion under FED. R. CIV. P. 50 (judgment as a matter of law), 52 (amended or additional findings), or 59 (new trial) from 10 days to 30 days. But the Advisory Committee on Appellate Rules pointed out that extending the deadline to 30 days could cause problems because FED. R. APP. P. 4 (appeal as of right – when taken) imposes the same 30-day deadline to file an appeal in a civil case not involving the federal government. Accordingly, as the deadline to file a notice of appeal looms, an appellant may not know until the last minute whether a post-judgment tolling motion will be filed.

As a result, he said, the civil rules advisory committee considered scaling back the proposed deadline for filing a post-trial motion from 30 days to 21 days or 28 days. The committee concluded that 21 days was simply not a sufficient increase from 10 days, and that a substantial increase is in fact needed to help the bar. Therefore, the committee decided upon 28 days, even though that might seem like an odd time period. Yet it would give the appellant at least two days before a notice of appeal must be filed to learn

whether any other party has filed a post-judgment motion tolling the time to file a notice of appeal. The appellate rules committee found this change acceptable.

Judge Kravitz reported that the Advisory Committee on Civil Rules had found only one statute that needs to be amended to conform with the proposed rule changes.

CRIMINAL RULES TIME COMPUTATION

Judge Tallman reported that the Advisory Committee on Criminal Rules was recommending several changes in individual rules to extend deadlines from 10 days to 14, a change that is essentially merits-neutral. He noted that Congress had deliberately established very tight deadlines in some statutes, some as short as 72 hours, and he suggested that it might be difficult to persuade Congress to change these statutes.

APPELLATE RULES TIME COMPUTATION

Professor Struve stated that some public comments had suggested eliminating or revising the "three-day rule," which gives a party additional time to file a paper after service. She said that the advisory committee thinks the suggestion is well worth considering and had placed it on its agenda. But it had decided not to recommend elimination as part of the current time-computation package.

BANKRUPTCY RULES TIME COMPUTATION

Judge Swain stated that the proposed amendments to the bankruptcy rules include a recommendation to extend from 10 days to 14 days the deadline in FED. R. BANKR. P. 8002 (time for filing notice of appeal) to file an appeal from a bankruptcy judgment. She noted that the proposal had been controversial because it would change a century-old tradition of a 10-day appeal period in bankruptcy. She noted that the advisory committee had made special efforts to reach out to the bar on the issue.

Judge Swain pointed out that the proposed rules pose special challenges for the bankruptcy system in dealing with backward-counting deadlines because the Federal Rules of Bankruptcy Procedure rely heavily on a notice and hearing process and use a good deal of backwards counting. Moreover, because of the national nature of bankruptcy practice, it is not expected that bankruptcy practitioners would be aware of all state legal holidays.

The advisory committee, she said, was strongly of the view that state holidays should not be included in backwards counting. She recognized the importance of having uniformity among all the rules, and urged that state holidays be excluded from backwards

counting in all the rules. If this approach is not possible, an exception to uniformity should be made in this particular instance for the bankruptcy rules.

Professor Morris explained that the Bankruptcy Code specifies more than 80 statutory deadlines. Another 230 time limits are set forth in the Federal Rules of Bankruptcy Procedure, including 18 that require counting backwards. Accordingly, he said, backward-counting deadlines are dramatically more common in bankruptcy than in the other rules. State holidays, he explained, pose no problem in counting forward because they give parties an extra day. But in counting backwards, a filing party is given less time to file a document if a deadline falls on any state holiday. Judges, he said, can usually deal with inadvertent mistakes made in backwards counting. But when a deadline is statutory, a court is less likely to be generous.

He suggested adopting the approach set forth in Judge Swain's memorandum of June 4, 2008, to the standing committee recommending that FED. R. BANKR. P. 9006(a)(6)(C) be added to define a state holiday as a "legal holiday" only in counting forward. The advisory committee would also state in the committee note to the rule that this limiting provision would apply only in the bankruptcy rules.

A member emphasized the importance of uniformity among all the rules and stated that he was concerned about having different standards in the different sets of rules. Nonetheless, he said, the bankruptcy advisory committee had made persuasive points. He wondered whether there might be another solution, such as to make distinctions among different types of state holidays. Some, he said, are important, with government offices, courts, and law firms closed throughout the state. Others, however, are hardly known at all. He suggested that the rule might be revised to provide that only those state holidays that are listed in local court rules be included in the definition of "legal holidays."

Another member agreed that the rule would clearly create a trap for the unwary. He argued that the proposal to exclude state holidays from backward counting is not too complicated, and it should be implemented across the board in all the rules, not just in the bankruptcy rules. Several other participants concurred.

A member argued, though, that the proposed rule is clear, and states do in fact announce all their official holidays. The main problem appears to be that state officials cannot act on days when their offices are closed. If they file a paper on the following day, it will be untimely under the rule. As a practical matter, they will have to file a day early.

A member noted that the committee simply cannot achieve national uniformity in this area and suggested that state holidays be dealt with by local rules. Another responded, though, that reliance on local rules would not address the concerns of the Advisory Committee on Bankruptcy Rules that many bankruptcy lawyers have a national

practice and represent far-flung creditors. Lawyers and creditors are largely unaware of state holidays and state issues. Judge Swain added that many creditors in bankruptcy cases do not have counsel. Their involvement is often limited to filing a proof of claim. It would be unreasonable to expect them to be aware of local court rules referring to state holidays.

Several participants recommended extending the bankruptcy committee's proposed exclusion of state holidays in backwards counting to all the rules. Judge Huff and Professor Struve pointed out that the agenda book contained the text of an alternate rule that would accomplish that objective by including state holidays only in counting forwards. They said that it would be an excellent starting point for revising the rule.

The committee without objection by voice vote approved the proposed amendments to FED. R. APP. P. 26(a), FED. R. BANK. P. 9006(a), FED. R. CIV. P. 6(a), and FED. R. CRIM. P. 45(a) for approval by the Judicial Conference, using the alternate rule language set forth in the agenda book, together with a committee note incorporating language from the bankruptcy committee's memorandum of June 4, 2008, except for its last sentence, and some improved language by Professor Cooper regarding the inaccessibility of the clerk's office. Judge Rosenthal added that the text would be subject to final review by the style subcommittee and recirculation to the standing committee.

Following approval of the uniform time-computation rule, Judge Rosenthal turned the discussion to the specific time adjustments in individual rules proposed by the advisory committees to account for the changes in the time-computation method.

One member argued that the proposed amendments to FED. R. CIV. P. 50 (motion for judgment as a matter of law), 52 (motion for amended or additional findings), and 59 (motion for a new trial) go well beyond conforming the three rules to the new time-computation methodology. Rather, they would substantially expand the time for filing post-judgment motions and add cost and delay to civil litigation. She suggested that trial judges may not support extending the time because they want to resolve their cases promptly and have post-trial motions made without delay. In addition, if a lawyer does not have enough time to fully prepare a polished post-trial motion, the matter can be fixed later, and the parties will still enjoy their full appellate rights. Extending the time to file motions from 10 days to 28 days will slow down the whole litigation process.

Judge Kravitz pointed out, though, that trial judges often bend the rules to give lawyers more time to file post-trial motions, especially after a long trial when the lawyers are exhausted and a transcript is not yet available. Judges, for example, may hold up the entry of judgment. Or they may let lawyers file a skeletal post-judgment motion to meet the deadline and then have them supplement it later. The problem, he said, is that 10 or

14 days is simply not enough time in many cases for a lawyer to prepare an adequate motion. Under the rules, moreover, the court cannot extend the deadline, even though some judges routinely do so by procedural maneuvers. In addition, there is case law holding that issues not raised in the original filing cannot be raised later. All in all, Judge Kravitz concluded, it is unreasonable to require lawyers to file quick post-trial motions, especially in large cases. Extending the deadline to 28 days may result in some delays, but on balance, the advisory committee believes that it is the right thing to do.

A member asked whether trial judges could impose a deadline shorter than the 28 days specified in the proposed rule. Professor Cooper responded that the matter had not been considered by the advisory committee. But it had considered amending FED. R. CIV. P. 6(b) (extending time) to allow judges to extend the time for filing post-trial motions. It was concerned, though, about the interplay between the civil and appellate rules and the jurisdictional nature of the deadline for filing a notice of appeal. Therefore, it declined to take any steps that might be applied ineptly in practice and lead to a loss of rights.

Judge Kravitz explained that scholars are concerned that permitting a judge to extend the time to file post-motion judgments would not fully protect the parties, given the jurisdictional and statutory nature of the time to appeal. A party might still lose its right to appeal if it fails to meet the jurisdictional deadline, even though the trial judge has extended the time to file a post-judgment motion.

A member suggested that 10 or 14 days to file a post-trial motion should be sufficient for lawyers in most cases. He asked how often the short deadline actually presents problems for lawyers. If not frequent, the procedural devices that trial judges now use to give lawyers more time may be sufficient to address the problems.

Judge Kravitz responded that the advisory committee had concluded that it was common for lawyers to need additional time, especially in circuits where the case law holds that claims are waived if not raised in the original motion. He said that he had presided over a number of cases in which the parties needed a transcript to file a motion. He pointed out that there had been no negative public comments on extending the deadline from 10 days to 28 days, either from judges or the bar. Professor Struve added that the E.D.N.Y. Committee on Civil Litigation had been critical of the time-computation project in general, but had come out strongly in favor of this particular extension.

A member added that lawyers are uncomfortable with the devices that trial judges now use, such as deferring entry of judgment or allowing a bare-bones post-judgment motion. The 10-day deadline, he said, is notoriously inadequate because many issues require careful briefing, even after a relatively short trial. Moreover, there may be a

change in counsel after the trial, making the current deadline virtually impossible to meet. The proposed extension to 28 days, he said, is badly needed and will not cause unreasonable delays.

The lawyer members of the committee all agreed that the current 10-day deadline is much too short. They said that it is not safe for lawyers to rely on procedural maneuvering, such as delaying the entry of judgment. Lawyers, moreover, are bound by what they write in the original filing, and they may need a transcript to prepare a proper motion. One added that it is not uncommon for appellate counsel to be brought in after the trial and have to be brought up to speed by exhausted trial counsel.

A member pointed out that notices of appeal are normally filed only after disposition of a post-judgment motion, usually a Rule 59 motion for a new trial. Under the proposed extension, more parties may file prophylactic notices of appeal before any post-judgment motions are filed. This practice may impose some administrative burdens on the court of appeals, but Professor Struve suggested that it would likely arise only in multi-party cases. Judge Kravitz added that even 28 days may not be sufficient for lawyers to prepare post-judgment motions in some cases. Therefore, the proposed change may not altogether end the procedural devices that are now being used.

A member suggested that the committee consider the fundamental purpose of post-trial motions. As originally conceived, they were designed to allow a trial judge to promptly fix errors in the trial record. But they have evolved into full-blown motions to reconsider a whole host of issues raised at pretrial, by motion, and at trial and to relitigate all the decisions made by the trial judge in the case. In all, post-trial motions lead to a misuse of judicial time.

Judge Rosenthal stated that the advisory committees, and district judges generally, are troubled by the procedural subterfuges now used to circumvent the current rule. They are not worried about waiting a few more days if the result is better-prepared motions.

A motion was made to adopt all the proposed rule changes in the time-computation package.

Judge Tallman pointed out that FED. R. CRIM. P. 5.1 (preliminary hearing) and 18 U.S.C. § 3060(b) both specify that a preliminary hearing must be held within 10 days of the defendant's first appearance if the defendant is in custody. He explained that the proposed amendment to Rule 5.1 would extend the deadline to 14 days, but the statute will also have to be amended to keep the two consistent. If Congress does not extend the statutory deadline to 14 days, it would make no sense to amend the rule.

A member asked whether the committee should approve the rule contingent upon Congress amending the statute. Judge Rosenthal reported that representatives of the rules committees had already discussed a timetable with congressional staff to synchronize the effective date of the new rules with the needed statutory changes. She said that staff had been very sympathetic to the objective, and it did not appear that there would be significant obstacles to accomplishing this objective. There is certainly no guarantee of success, but the committees are hopeful. Professor Coquillette added that the problem of synchronization could also be addressed by delaying the effective date of all the rules, or selected rules, to coincide with the statutory changes.

A member noted that under the Rules Enabling Act, rule changes supersede inconsistent statutes (except for changes to the bankruptcy rules). So even if Congress were not to act, the revised rules would override the inconsistent statutes. Judge Rosenthal responded that the committee, as a matter of comity with the legislative branch, tries to avoid reliance on the supersession clause of the Act. It also seeks to avoid the confusion that results when a rule and a statute are in conflict. The member agreed, but noted that if Congress simply does not act in time, as opposed to refuses to act, the extended deadlines in the new rules would govern in the interim until Congress acts.

The committee without objection by voice vote approved all the proposed time-computation amendments for approval by the Judicial Conference.

The committee without objection by voice vote approved the advisory committees' recommendations that the Judicial Conference seek legislation to adjust the time periods in 29 statutes affecting court proceedings to conform them to the proposed changes in the time-computation rules.

Judge Rosenthal asked the committee to concur in her view that the changes made in the time-computation amendments following publication were not so extensive as to require republication of the proposals.

The committee without objection by voice vote agreed that there was no need to republish any of the proposed time-computation amendments.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 13, 2008 (Agenda Item 7).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. APP. P. 4, 5, 6, 10, 12, 15, 19, 25, 26, 27, 28.1, 30, 31, 39, and 41

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Appellate Procedure.

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

Professor Struve reported that the proposed amendment to FED. R. APP. P. 4(a)(4)(B)(ii) (effect of a motion on a notice of appeal) would resolve an inadvertent ambiguity that resulted from the 1998 restyling of the Appellate Rules. The current rule might be read to require an appellant to amend a prior notice of appeal if the district court amends the judgment after the notice of appeal is filed, even if the amendment is in the appellant's favor. She reported that the public comments on the proposed amendment had raised some additional issues, which had been placed on the future agenda of the advisory committee.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. APP. P. 12.1

Judge Stewart explained that the proposed new Rule 12.1 (remand after an indicative ruling by the district court) was designed to accompany new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal). It had been coordinated closely with the Advisory Committee on Civil Rules.

Judge Stewart reported that the Department of Justice had expressed concern about potential abuse of the indicative ruling procedure in criminal cases. As a result, the advisory committee modified the committee note after publication by editing the note's discussion of the scope of the rule's application in criminal cases. Professor Struve added that the Advisory Committee on Criminal Rules might wish to consider a change in the

criminal rules to authorize indicative rulings explicitly. Accordingly, the appellate advisory committee had included language in the committee note to anticipate that possible development.

A member questioned the language that had been added to the second paragraph of the committee note stating that the advisory committee anticipates that use of indicative rulings "will be limited to" three categories of criminal matters – newly discovered evidence motions under FED. R. CRIM. P. 33(b)(1), reduced sentence motions under FED. R. CRIM. P. 35(b), and motions under 18 U.S.C. § 3582(c). He worried that the language might be too restrictive and recommended that it be revised to state that "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for [those matters]."

Professor Struve explained that the advisory committee had been reluctant to limit the rule to the three situations suggested by the Department of Justice because there may be other situations when indicative rulings are appropriate. A member added that the procedure could be useful in handling § 2255 motions, as appellate courts have said that a district court should rarely hear a § 2255 motion when an appeal is pending. He noted that a three-judge panel of his court recently had permitted use of the indicative ruling procedure in a § 2255 case. But Mr. Tenpas responded that the Department was particularly concerned about systematic use, and abuse, of the procedure by pro se inmates in § 2255 cases.

A member pointed out that the principal safeguard against abuse is that the court of appeals has discretion to deny any request for an indicative ruling and may refuse to remand a matter to the trial court. The discretion vested in the court of appeals safeguards against excessive use of the procedure.

Judge Stewart and Professor Struve agreed that the recommended substitute language for the committee note, "the Committee anticipates that Rule 12.1 will be used primarily, if not exclusively, for . . ., " would be acceptable. A motion was made to approve the proposed new rule, with the revised note language.

The committee without objection by voice vote approved the proposed new Rule 12.1 for approval by the Judicial Conference.

FED. R. APP. P. 22(b)(1)

Judge Stewart explained that the proposed amendment to FED. R. APP. P. 22(b)(1) (certificate of appealability) would conform the rule to changes being proposed by the Advisory Committee on Criminal Rules in Rule 11 of the Rules Governing § 2254 Cases and § 2255 Proceedings. The amendment would delete from Rule 22 the requirement

that the district judge who rendered the judgment either issue a certificate of appealability or state why a certificate should not issue, because the matter is more appropriately handled in Rule 11. Professor Struve added that approval of the amendment would be contingent on approving the tandem amendments proposed by the criminal rules committee.

A member questioned the language of the proposed amendment stating that "(t)he district clerk must send the certificate and the statement . . . to the court of appeals," suggesting that the district clerk should be required to send the certificate only when it has been issued by a district judge. The certificate may be also issued by the court of appeals or a circuit justice, but a district clerk should bear no noticing obligation in those situations. The limitation on the clerk's obligation may be implicit in the rule, but it would be preferable to substitute language such as, "If the district court issues the certificate, the district clerk must send . . . ."

Professor Struve explained that the principal concern of the advisory committee had been to make sure that the certificate is included in the case file. She noted, though, that under CM/ECF, the courts' comprehensive electronic records system, there should be few problems with filing and transmitting documents. Nevertheless, the district clerk should have no obligation to handle a certificate issued by a circuit judge.

Judge Rosenthal suggested that the committee defer further consideration of the proposed amendment to FED. R. APP. P. 22(b)(1) until after the committee considers the parallel rule amendments proposed by the Advisory Committee on Criminal Rules.

Later in the meeting, the committee approved the parallel rule amendments proposed by the Advisory Committee on Criminal Rules. At that time, it approved without objection by voice vote the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference. **(See page 46.)**

FED. R. APP. P. 26(c)

Judge Stewart explained that the proposed amendments to FED. R. APP. P. 26(c) (additional time allowed after mail and certain other service) would clarify the method of computing the additional three days that a party is given to respond after service. The amendment would make the language of the rule parallel to that of FED. R. CIV. P. 6(d). He also pointed out that the advisory committee had received a comment from Chief Judge Frank Easterbrook recommending that the "three-day rule" be eliminated entirely, and the committee would place the matter on its agenda for a full discussion.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 1(b)

Professor Struve explained that proposed new FED. R. APP. P. 1 (definition) would define the term "state" throughout the Federal Rules of Appellate Procedure to include the District of Columbia and any U.S. commonwealth or territory. The definition, she explained, is consistent with a proposed amendment to FED. R. CIV. P. 81(d).

FED. R. APP. P. 29(a)

The proposed amendments to FED. R. APP. P. 29(a) (when an amicus curiae brief is permitted) would eliminate the current language referring to a state, territory, commonwealth, or the District of Columbia because new FED. R. APP. P. 1(b) would make it unnecessary.

The committee without objection by voice vote approved the proposed amendments for publication.

FORM 4

Professor Struve reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) had already been updated informally to conform to the new privacy rules that took effect on December 1, 2007, and had been posted by the Administrative Office on the Judiciary's web-site. The proposed revisions to the form would delete the full names of minor children and the home address and full social security number of the applicant. She explained that the advisory committee had also concluded that the term "minor" could be ambiguous because the definition varies from state to state, and pro se petitioners who normally fill out Form 4 should not be placed in the position of worrying about who is a "minor." Instead, the committee decided to substitute the language "under 18."

The committee without objection by voice vote approved the proposed amendments in the official form for publication.

Informational Item

Judge Stewart reported that the advisory committee was continuing to monitor case law developments following *Bowles v, Russell,* 551 U.S. ___ (2007), regarding the jurisdictional and statutory dimensions of the time limits to appeal.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professors Morris and Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachments of May 14, 2008 (Agenda Item 10).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. BANKR. P. 1007, 1011, 1019, 1020, 2002, 2003, 2006, 2007, 2007.2, 2008, 2015, 2015.1 2015.2, 2015.3, 2016, 3001, 3015, 3017, 3019, 3020, 4001, 4002, 4004, 6003, 6004, 6006, 6007, 7004, 7012, 8001, 8002, 8003, 8006, 8009, 8015, 8017, 9006, 9027, and 9033

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Bankruptcy Procedure.

FED. R. BANKR. P. 1017.1

Judge Swain noted that proposed new FED. R. BANKR. P. 1017.1 (individual debtor's exemption from the pre-petition credit counseling requirement) would have revised the process for granting an extension of time for the debtor to complete the credit-counseling required by the 2005 amendments to the Bankruptcy Code. It had been published for public comment in August 2007, but the comments had shown that a rule is unnecessary because very few cases arise in which there is a request for an extension. Therefore, the advisory committee decided to withdraw it from further consideration.

FED. R. BANKR. P. 4008

Judge Swain noted that the proposed amendment to Rule 4008 (discharge and reaffirmation hearing) would require that a new official form cover sheet be filed with a reaffirmation agreement. (See OFFICIAL FORM 27 below.)

FED. R. BANKR. P. 7052, 7058, and 9021

Judge Swain explained that the new rule and the proposed rule amendments deal with clarifying the requirement that a judgment be set forth in a separate document. New FED. R. BANKR. P. 7058 (entry of judgment) would make FED. R. CIV. P. 58 (entering judgment) applicable in adversary proceedings. FED. R. BANKR. P. 7052 (findings by the court) and 9021 (entry of judgment) are conforming amendments to accompany new Rule 7058.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 1, 8, and 27

Professor Morris reported that the amendments to Exhibit D of OFFICIAL FORM 1 (individual debtor's statement of compliance with the credit counseling requirement) and OFFICIAL FORM 8 (individual Chapter 7 debtor's statement of intention) would become effective on December 1, 2008. New OFFICIAL FORM 27 (reaffirmation agreement cover sheet) would take effect on December 1, 2009, to coordinate it with the proposed revision to Rule 4008 that would require the form to be filed with a reaffirmation agreement. The form will give the court basic information about what is contained in the agreement. He noted that the advisory committee had received comments on the form and had made minor changes after publication.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

TECHNICAL CHANGES

FED. R. BANKR. P. 2016, 7052, 9006(f), 9015, and 9023

Professor Morris reported that the advisory committee recommended that the proposed amendments to the five rules be approved and sent to the Judicial Conference for final approval without publication because they involve only technical changes, such as correcting cross-references or implementing provisions in the other sets of rules.

He said that the proposed amendment to FED. R. BANKR. P. 2016 (compensation for services rendered and reimbursement of expenses) merely corrects a cross-reference to a subsection of the Bankruptcy Code changed by the 2005 omnibus bankruptcy legislation.

The amendment to FED. R. BANKR. P. 9006(f) (additional time allowed after service by mail or certain other means) would correct a cross-reference to subparagraphs in FED. R. CIV. P. 5 (service), which had been renumbered as part of the civil rules restyling project.

The other three amendments would implement the proposed new 14-day deadline to file a notice of appeal from a bankruptcy judgment. Professor Morris explained that the proposed 28-day time to file a post-judgment motion in civil cases would not work in bankruptcy cases because the deadline to file a notice of appeal, currently 10 days, will be 14 days once the time-computation amendments take effect.

The committee without objection by voice vote approved the proposed amendments to the rules for approval by the Judicial Conference.

OFFICIAL FORMS 9F, 10, and 23

Professor Morris reported that the proposed amendments to the forms were technical in nature and did not merit publication. He explained that the advisory committee inadvertently had retained a requirement in OFFICIAL FORM 9F (initial notice in a Chapter 11 corporation or partnership case) that debtors provide their telephone numbers. That item of personal information has been removed from the other forms.

The change in OFFICIAL FORM 10 (proof of claim) would remind persons filing claims based on health-care debts that they should limit the disclosure of personal information. Two changes in the definition section of the forms would tie the words "creditor" and "claims" more closely to the definitions set forth the Bankruptcy Code.

The proposed amendment to OFFICIAL FORM 23 (debtor's certification of completing the required post-petition financial-management course) would add a reference to § 1141(d)(5)(B) of the Bankruptcy Code.

The committee without objection by voice vote approved the proposed amendments to the forms for final approval by the Judicial Conference.

Amendments for Publication

Professor Morris explained that the proposed amendments and new rule would implement new Chapter 15 of the Bankruptcy Code, added by the 2005 legislation.

FED. R. BANKR. P. 1004.2

Under proposed new FED. R. BANKR. P. 1004.2 (Petition in Chapter 15 cases), an entity must state on the face of the petition the country of the debtor's main interests.

FED. R. BANKR. P. 1014 and 1015

FED. R. BANKR. P. 1014 (dismissal and change of venue) and 1015 (consolidation or joint administration of cases) both deal with multiple cases involving the same debtor. A question had been raised as to whether these rules are applicable in Chapter 15 cases. The advisory committee would resolve the ambiguity by making the two rules specifically applicable.

FED. R. BANKR. P. 1018

The amendments to FED. R. BANKR. P. 1018 (contested involuntary and chapter 15 petitions, etc.) would clarify the scope of Rule 1018 to the extent it governs proceedings contesting an involuntary petition or Chapter 15 petition for recognition. There is some confusion now as to the applicable procedures in injunctive actions. The amendments clarify that the rule applies to contests over the involuntary petition itself, and not to matters that arise in or are merely related to a Chapter 15 case or an involuntary petition. Such other matters are governed by other provisions of the Rules, as explained in the proposed committee note.

FED. R. BANKR. P. 5009

FED. R. BANKR. P. 5009 (case closing) would require a foreign representative to file and notice a final report in a Chapter 15 case describing the nature and results of the representative's activities in the United States court. In the absence of timely objection, a presumption will arise that the case has been fully administered and may be closed. Another amendment would require the clerk to send a notice to individual debtors in Chapter 7 and Chapter 13 cases that their case will be closed without a discharge if they have not timely filed the required statement that they have completed a financial-management course.

FED. R. BANKR. P. 5012

New FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in Chapter 15 cases) would establish a motion procedure in Chapter 15 cases for obtaining approval of an agreement or "protocol" under § 1527(4) of the Code for the coordination of Chapter 15 proceedings with foreign proceedings.

FED. R. BANKR. P. 9001

The amendment to FED. R. BANKR. P. 9001 (general definitions) would incorporate into the rule the definitions set forth in § 1502 of the Code, added by the 2005 bankruptcy legislation.

The committee without objection by voice vote approved the proposed amendments to the rules for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachments of May 9, 2008 (Agenda Item 6).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CIV. P. 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81
SUPPLEMENTAL RULES B, C, and G
FORMS 3, 4, and 60

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Civil Procedure, the Supplemental Rules, and the illustrative Civil Forms.

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee had published a proposed amendment to FED. R. CIV. P. 8(c) (affirmative defenses) that would remove a "discharge in bankruptcy" from the list of defenses that a party must affirmatively state in responding to a pleading. The Bankruptcy Code makes the exception unnecessary as a matter of law because a discharge voids a judgment to the extent that it determines the debtor's personal liability on the discharged debt. He said, though, that the Department of Justice had voiced opposition to the change. As a result, the advisory committee decided to postpone seeking final approval of the change in order to discuss the matter further with the Department.

FED. R. CIV. P. 13(f)

Judge Kravitz reported that FED. R. CIV. P. 13(f) (omitted counterclaim) would be deleted from the rules as largely redundant and misleading. Instead, an amendment to a counterclaim would be governed exclusively by FED. R. CIV. P. 15 (amended and supplemental pleadings).

FED. R. CIV. P. 15(a)

The amendments to FED. R. CIV. P. 15 (amended and supplemental pleadings) would revise the time when a party's right to amend its pleading once as a matter of course ends.

FED. R. CIV. P. 48(c)

Judge Kravitz said that new FED. R. CIV. P. 48(c) (polling the jury) is based on FED. R. CRIM. P. 31(d), but has minor revisions in wording to reflect that the parties in a civil case may stipulate to a non-unanimous verdict.

A member noted that the proposed amendment referred to "a lack of unanimity or assent" on the part of the jury and asked whether "unanimity" and "assent" are different requirements. Professor Cooper responded that they are, in fact, different concepts. If the parties in a civil case stipulate to accepting a less-than-unanimous verdict, only the "assent" of the jury is required, not "unanimity." Professor Cooper added that Professor Kimble had suggested restyling the language to read: "a lack of unanimity or a lack of assent."

FED. R. CIV. P. 62.1

Judge Kravitz reported that proposed new FED. R. CIV. P. 62.1 (indicative ruling on a motion for relief that is barred by a pending appeal) was the most important rule in the package being forwarded to the Judicial Conference for approval. He noted that the language had been refined following the public comment period to emphasize that the remand from the court of appeals to the district court is for the limited purpose of deciding a motion.

A member suggested that the rule's language was awkward in referring to "relief that the court lacks authority to grant because of an appeal that has been docketed and is pending." He suggested rephrasing the rule to read: "because an appeal has been docketed and is pending." Professor Cooper responded that there are several situations in which docketing of an appeal does not oust the district court's jurisdiction. The advisory committee, moreover, had tried to avoid getting into the morass over whether docketing an appeal is jurisdictional.

FED. R. CIV. P. 81(d)

Judge Kravitz pointed out that the proposed amendment to FED. R. CIV. P. 81(d) (law applicable) would define a "state" for purposes of the Federal Rules of Civil

Procedure, where appropriate, as the District of Columbia and any U.S. commonwealth or territory.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 56

Judge Kravitz reported that the advisory committee had made additional refinements in the proposed amendments to FED. R. CIV. P. 56 (summary judgment) as a result of the comments made by standing committee members at the January 2008 meeting. In addition, the committee note had been shortened significantly.

Judge Kravitz explained that the project to revise FED. R. CIV. P. 56 had been challenging and, understandably, it had taken a great deal of time to complete. He extended special thanks to Judge Michael Baylson for his excellent leadership and insight in chairing the subcommittee that had developed the summary judgment proposal. He also thanked Professor Cooper, Andrea Kuperman, Joe Cecil, James Ishida, and Jeffrey Barr for their significant research efforts in support of the project.

Judge Kravitz explained that actual summary judgment practice has grown apart from the current text of Rule 56. The deficiencies of the current national rule have left space that has been filled by experimentation at the local level. Accordingly, he said, in fashioning a new national rule, the advisory committee had enjoyed the unique opportunity of drawing upon the best practices contained in local court rules.

Judge Kravitz reported that the bar is largely supportive of moving towards a more uniform national summary judgment practice under Rule 56. He noted that the advisory committee had conducted two mini-conferences on the proposed amendments with lawyers, law professors, and judges, and he had spoken personally to several bar groups. At the same time, however, he said that there may be resistance to the proposed rule from courts that do not presently use the three-step process embodied in the new rule.

He explained that the proposed rule would provide a uniform framework for handling summary judgment motions throughout the federal courts, but it would also give judges flexibility to prescribe different procedures in individual cases. The procedure that the new rule lays out will work well in most cases, he said, but trial judges will be free to depart from it when warranted in a particular case.

Judge Kravitz emphasized that there is nothing radical about the three-step, point-counterpoint procedure prescribed in the proposed rule. Clearly, a party should be required to give citations to the record to support its assertion that an issue is disputed or not. That, he said, is precisely what the amendments are designed to accomplish.

Judge Kravitz emphasized that the advisory committee had adhered to two basic principles in drafting the rule. First, it decided not to change the substantive standards governing summary judgment motions. Second, it decided that the revised rule must be neutral – not favoring either plaintiffs or defendants. He pointed out that the last time the advisory committee had proposed making changes to Rule 56, in the early 1990s, it had attempted to make substantive changes, and the effort had failed.

Judge Kravitz reported that the advisory committee had also worked with the Federal Judicial Center to verify empirically that the proposed rule would not run afoul of either of the two fundamental principles.

Mr. Cecil explained that 20 districts now require the point-counterpoint procedure in their local rules. The Center had compared summary judgment practice in those districts with practice in two other categories of districts: (1) the 34 districts that require movants to specify all the undisputed facts in a structured manner, but do not require any particular form of response from opponents; and (2) the remaining districts that have no local rule requiring either party to specify undisputed facts.

The Center's research, he said, had uncovered little meaningful difference among the three categories of districts, except in two respects. First, in districts having a point-counterpoint process, judges take somewhat longer to decide summary judgment motions. Those districts, however, generally have lengthier disposition times. Therefore, the longer times cannot be ascribed to the point-counterpoint procedure. Second, in districts that do require a structured procedure, motions for summary judgment are more likely to be decided. But there appears to be no difference as to the outcome of the motions – whether they are granted or denied. Mr. Cecil cautioned, however, that the current court data concerning termination by summary judgment may not be sufficiently reliable.

Judge Kravitz proceeded to highlight those provisions of the proposed rule that either have prompted comment from bench and bar or have been changed by the advisory committee since the January 2008 standing committee meeting.

RULE 56(a)

Judge Kravitz pointed out that proposed Rule 56(a) specifies that a court "should" grant summary judgment if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. He said that the advisory

committee had heard a great deal about whether the appropriate verb should be "should," "must," or "shall." He noted that the rule had used the term "shall" until it was changed to "should" as part of the 2007 general restyling of the civil rules.

He said that the advisory committee, after lengthy consideration, had decided that it would be best to retain the language of the rule currently in effect, *i.e.,* "should." Professor Cooper added that there continues to be some nostalgic support for returning to "shall," but that usage would violate fundamental rules of good style. Therefore, he said, the choice lies between "should" and "must." Earlier drafts of the committee note, he said, had undertaken to elaborate on the contours of "should," but the advisory committee decided that it would be improper to risk changing the meaning of a rule through a note. Thus, the 2007 committee note to the restyled Rule 56 remains the final word on the subject.

Professor Cooper added that the verb "should" is clearly appropriate when a motion for summary judgment addresses only part of a case. Under certain circumstances, he explained, it is wise as a practical matter for a judge to let the whole case proceed to trial, rather than grant partial summary judgment. He suggested that one possible approach might be to use "must" with regard to granting summary judgment on a whole case, but "should" for granting a partial summary judgment. That formulation, however, appears unnecessarily complicated.

Judge Kravitz noted a Seventh Circuit case suggesting that summary judgment must be granted when warranted on qualified immunity grounds, although the decision appears to have more to do with qualified immunity than summary judgment. He explained that the advisory committee tries to avoid providing legal advice in the committee notes. The committee, moreover, did not want to mention qualified immunity in the note as an example of a particular substantive area in which summary judgment may come to be indeed mandatory when the proper showing is made, for fear that it might miss other substantive areas.

Judge Kravitz noted that, at the January 2008 standing committee meeting, a member had pointed out a discrepancy between proposed Rule 56(a), which specifies that summary judgment "should" be granted in whole or in part, and Rule 56(g), specifying that partial summary judgment "may" be granted. He reported that the discrepancy had been fixed and the two provisions now work well together.

A member expressed concern that using the word "should" in Rule 56(a) would signal to the bar that the committee is retrenching from the substantive standard that had prevailed before the restyling of the civil rules, thereby making summary judgment less readily available. For decades, he said, Rule 56 had specified that a judge "shall" grant summary judgment if a party is entitled to it. In the restyling effort, though, the verb "shall" was changed to "should" as part of the policy of eliminating the use of "shall"

throughout the rules. At the time, the committee specified that no substantive change had been intended.

He recommended that the committee signal to the bar once again that no substantive change had been intended by the change to "should." Accordingly, a judge should have no discretion to deny summary judgment when a party is entitled to it as a matter of law.

Another member suggested that the relevant sentence in proposed Rule 56(a) is incoherent because it specifies that a court "should" grant summary judgment if a party is "entitled" to it. If a party is "entitled" to summary judgment, by definition the grant of summary judgment is mandatory. Other members endorsed this view.

A member argued that the appropriate verb to use in the rule is "must." In his state, for example, the state court trial judges are concerned that the intermediate appellate courts frequently reverse their grants of summary judgment. The consequence is that they are chilled from granting summary judgment, believing that it is safer to just let a case proceed to trial. Another member noted that some trial judges in his federal circuit grant summary judgment even when there is clearly a credibility dispute between the parties because they believe that they know how a case will turn out in the end.

Judge Kravitz explained that the advisory committee believes that the substance of the proposed rule is identical to the way it was before December 1, 2007, when "should" replaced "shall." There was no intention to make any substantive change. He pointed out that the committee note, for example, states that discretion should seldom be exercised. That point, he said, would continue to be emphasized in the materials that are published. A judge would exercise discretion to deny summary judgment only in a rare case.

He added that under prevailing summary judgment standards, a trial judge who decides a summary judgment motion must resolve all reasonable inferences in favor of the non-moving party. That, he said, leaves a good deal of latitude to the judge, even before deciding whether the moving party is "entitled" to summary judgment as a matter of law. He suggested that even if the rule were to specify that summary judgment "must" be granted if the moving party is "entitled" to it, the trial judge would have some flexibility in determining whether the moving party is "entitled."

A member complained that a number of trial judges avoid granting summary judgment, no matter how strong the moving party's entitlement to it. But there is no empirical evidence on the point because the cases go to trial, and there is no way to appeal the denial of summary judgment. To avoid the stark choice between "should" and "must," he suggested that the language might be revised to specify that "summary judgment is required if . . .," or "summary judgment is necessary if . . . ."

Judge Kravitz responded that the advisory committee had indeed considered an alternative formulation along these lines, but had abandoned the effort because it would change the substantive standard for granting summary judgment. He added that while the civil defense bar is nervous about the 2007 change from "shall" to "should," the plaintiffs' bar is concerned about other aspects of the proposed rule and would be strongly opposed to changing "should" to "must."

A member suggested that the committee publish the rule for comment as currently drafted and solicit comments from the bar. She also observed that the proposed rule would explicitly authorize a court to grant partial summary judgment, and it would not make sense to specify that a judge "must" grant partial summary judgment.

Judge Kravitz pointed out that it was clear from the discussion that several committee members believe that a substantive change had been made inadvertently during the course of the restyling process. But he pointed out that the term "shall" had been interpreted in the pertinent Rule 56 case law as not requiring a judge to grant summary judgment in every case even though a party may be "entitled" to it.

He also noted that the committee would have to republish the rule for further public comment if it were to: (1) publish the proposal using "should"; (2) receive many negative public comments on the choice; and (3) then decide to revert to "must." He suggested that it might make more sense – although he did not specifically advocate the idea – to publish the rule using "should" and "must" as alternatives and specifically invite comment on the two.

A member observed that the bar had been informed that the change from "shall" to "should" during the restyling process was merely a style change. Therefore, the change from "should" back to "shall" would also be a mere style change.

Judge Kravitz noted that a change from "should" to "must" would clearly be more than a style change. He explained that the style subcommittee had made clear that "shall" is an inherently ambiguous word that should be changed wherever it appears. Therefore, in drafting the proposed revisions to Rule 56, the advisory committee had carefully researched how courts had interpreted the word "shall" in Rule 56. It concluded that "shall" had largely been read to mean "should" within the context of Rule 56.

Professor Kimble added that "shall" is so ambiguous that it can mean just about anything. It has been interpreted to mean "must," "should," and "may" in different circumstances. A cardinal principle of sound drafting, he said, is that ambiguous terms must be avoided. He said that "shall" should indeed normally mean "must," but in actual usage it often does not.

A member stated that she had always assumed that "shall" meant "must" and had been surprised to learn about the inherent ambiguity of "shall." She said that if the committee wants to solicit public comment on the choice between "should" and "must," it should make clear in the publication exactly what the committee intends for the rule to mean as a matter of substance, describe the underlying issues, and ask for specific advice on those issues.

Judge Kravitz stated that the advisory committee will certainly highlight the issue for public comment. He reiterated that there are sound reasons for giving a trial judge discretion regarding partial summary judgment. One common problem, he noted, is that parties often move for summary judgment on the whole action, but may only be entitled to it on one count. In some cases, granting partial summary judgment may be warranted, but it may make more sense for the judge to go ahead and try the whole case.

A participant observed that these issues are critically important because few civil cases now go to trial. Summary judgment today lies at the very heart of civil litigation and is key as to how counsel perceive and evaluate a case. He recommended publishing the proposed rule using the alternative formulations of "should" and "must" and inviting specific comments on the alternatives. Judge Kravitz noted, by way of example, that the recent electronic discovery amendments had also been published with alternative formulations.

A member stated that, on initial reading, the change from "shall" to "should" did not appear to be substantive. But, on further reflection, the matter is not so clear. He pointed out that the 2007 change from "shall" to "should" is perceived by some as a substantive change, even though the committee is convinced that it is not. For that reason the proposal should be published with "should" and "must" in the alternative to solicit thoughtful comments. Several other members concurred.

A member suggested that some judges may refuse to grant summary judgment, even when warranted, because they are overworked. They can simply deny summary judgment with a one-line order and proceed to trial. But under the committee's proposal, the trial judge "should" give reasons for denying summary judgment. The requirement to give reasons may impact the willingness of some judges to grant summary judgment. Judge Kravitz added that the Federal Judicial Center's research shows that a disturbing number of summary judgment motions are still undecided when cases go to trial.

Judge Kravitz observed that it would be complicated to draft a provision specifying that a trial judge "must" grant complete summary judgment, but "should" grant partial summary judgment. It may be that some other formulation could avoid the drafting problems, but he suggested that it would be better just to tackle the issue head on and use either "should" or "must." He also noted that the choice of words could affect

appellate review of summary judgment determinations because the word "must" conjures up the prospect of mandamus.

A member stated that if the committee were to change the verb to "must," it would clearly be a substantive change. Judge Kravitz responded that the committee would have to conclude that "shall" had meant "must" all along, that it would not be a substantive change, and that the committee had made a mistake in the restyling process.

A member argued, however, that most lawyers and judges believed that "shall," formerly used in Rule 56, had meant "must." Therefore, the 2007 restyling change to "should" was substantive. Judge Kravitz responded, though, that research had revealed cases where courts of appeals had held that district courts had discretion not to grant summary judgment, even though the operative language of the rule was "shall."

A motion was made to publish the Rule 56(a) amendments for comment in a form that sets out and highlights "should" and "must" as alternatives and also solicits comment on the concept of treating complete summary judgment differently from partial judgment in this regard.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(a) for publication, subject to further refinement in language.

RULE 56(b) and (c)(1)-(2)

A member observed that the term "response" appears in several places in proposed Rule 56(b) and (c), but it is confusing because Rule 56(c) intends it to include only a factual statement, and not the response in full. He recommended that the language be modified to make it clear that a "response" does not include a brief.

A member noted that proposed Rule 56(c)(2)(A) specifies that a party must file a motion, response, and reply. Then Rule 56(c)(2)(B) refers to a response that includes a statement of facts. He suggested that the language state that the party must file a response and a separate statement of facts, rather than have the statement included in the response.

A participant noted that proposed Rule 56(b)(2) states that "a party opposing the motion must file a response within 21 days after the motion is served or a responsive pleading is due, whichever is later." But the filing of the summary judgment motion means that an answer is not due. Thus, there will never be a responsive pleading "21 days after . . . a responsive pleading is due."

Professor Cooper explained that the impetus for the provision had come from the Department of Justice. The Department pointed out that a plaintiff may serve a summary judgment motion together with the complaint. This is common, for example, in collection actions. The Department has 60 days to answer a complaint. Under the proposed rule, however, it would have to respond to a plaintiff's summary judgment motion before its deadline for filing an answer to the complaint. For that reason, the advisory committee added the language "or a responsive pleading is due, whichever is later." What the committee meant to say was something like: "or if the party opposing summary judgment has a longer time to file an answer to the complaint." Mr. Tenpas concurred, noting that the Department did not want to be required to respond to a motion for summary judgment before even being required to answer the complaint. He suggested that perhaps the provision could be fixed by saying, "or a responsive pleading is due from that party."

A participant pointed out that the problem is that the provision was intended to cover summary judgment motions filed by plaintiffs, but as written it covers all parties. Several participants suggested improvements in language, including breaking out the provision into parts to specify how it will operate in each situation. Judge Rosenthal recommended that Professor Cooper and Judge Kravitz consider the suggestions and return to the committee with substitute language.

Judge Kravitz explained that Rule 56(c) spells out the primary feature of the revised rule – its three-step, point-counterpoint procedure. He reported that the advisory committee had made a number of improvements since the last standing committee meeting, and he thanked Professor Steven Gensler, a member of the advisory committee, for devising a more logical, clearer format for the rule.

Judge Kravitz pointed out that one of the criticisms of the three-step process comes from lawyers who have had to defend complex cases where a moving party may list 500 or so facts in a summary judgment motion. It is just too difficult, he said, for the opposing party to go through them all and respond to each. Most local rules, moreover, do not give a party the right to admit a fact solely for purposes of the summary judgment motion. Accordingly, the proposed rule specifies that a party need not admit or deny every allegation of an undisputed fact, but may admit a fact solely for purposes of the motion. This, he said, was an important improvement.

He also noted that the words "without argument" had been deleted from proposed Rule 56(c)(5) because they were confusing and unnecessary. The committee note, moreover, explains that argument belongs in a party's brief, not in its response or reply to a statement of fact.

A member reported that, in his experience, the procedure contemplated in proposed Rule 56(c) is essentially standard practice in many districts already. He pointed out, though, that the proposed language of Rule 56(c)(2)(B) was confusing in part because it specifies that a party opposing a motion "must file a response that includes a statement." The "response" and the "statement" accepting or disputing specified facts are two separate things. Another member agreed and pointed out that the confusion results in part because the rule requires a moving party to file three documents and the opposing party to file two.

Another explained that a party opposing a motion must actually file four things: (1) a statement opposing the motion for summary judgment; (2) a "counterpoint" response, *i.e.,* a response to each of the undisputed facts enumerated by the moving party; (3) a statement pointing out any other facts that the opposing party contends are disputed; and (4) a brief. It is not intended, though, that the opposing party actually file four separate documents. But it would be useful for the rule to flag for opposing parties that the second and third items are separate concepts.

Another member agreed that the current formulation needs to be refined and suggested devising a new term that would denominate the whole package that the moving party must file and the whole package that the responding party must file. Lawyers should be given clear directions as to exactly what they are expected to provide.

A motion was made to approve proposed Rule 56(b) and 56(c)(1-2) for publication, subject to Judge Kravitz, Professor Cooper, and the Rule 56 Subcommittee making further improvements in the language consistent with the committee's discussion.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(b) and (c)(1-2) for publication, subject to further refinement in language.

RULE 56 (c)(3)-(6)

A member noted that proposed Rule 56(c)(3) specifies that "a party may accept or dispute a fact" for purposes of the motion only. It makes perfect sense for a party to accept a fact for purposes of the motion only, but for what purpose would a party ever dispute a fact for purposes of the motion only? Judge Kravitz responded that the advisory committee had focused only on "accepting" a fact for purposes of the motion, and had not considered "disputing" a fact for purposes of the motion.

A member noted that, under proposed Rule 56(c)(4), the court may consider other materials in the record to grant summary judgment "if it gives notice under Rule 56(f)."

He suggested that the reference to Rule 56(f) is unnecessary because that rule itself covers the notice that the court must give.

In addition, he noted that proposed Rule 56(c)(6) states that an affidavit or declaration must "set out facts that would be admissible in evidence." The affidavit itself, though, would be admissible in evidence only if the affiant were testifying at trial. The language may cause some confusion because an affidavit submitted in support of or in opposition to summary judgment need not itself be admissible in evidence, but the facts do have to be admissible. Courts often receive affidavits that set out hearsay, but hearsay evidence is not enough to defeat summary judgment.

A participant noted that "facts" are not admissible in evidence and suggested that it would be better to say "facts that can be proven by admissible evidence." Another pointed out, though, that the language had been taken directly from the current Rule 56(e)(1), even though the terminology is not accurate. No court will be misled, and it does not appear to present a serious problem in practice that needs to be fixed. Another member recommended that no change be made because it might appear to signal a substantive change.

A member suggested that proposed Rule 56(c)(5), specifying that "a response or reply . . . may state without argument," should be revised to refer explicitly to a party's brief, where "argument" should be made. Another member suggested, though, that the rule should not go into detail as to how parties should combine their papers. It is an area where trial judges will want flexibility to prescribe procedures.

A motion was made to approve the rest of proposed Rule 56(c) for publication, with appropriate revisions in language to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to FED. R. CIV. P. 56(c)(3)-(6) for publication, subject to further refinement in language.

RULE 56(e)

Judge Kravitz explained that proposed Rule 56(e) enumerates the actions that a trial judge may take if the party opposing a summary judgment motion does not properly respond to the motion. He pointed out that if a party does not cite support to show that a particular fact is disputed, the court may deem the fact undisputed for purposes of the motion. But that by itself does not automatically entitle the moving party to summary judgment.

He noted that the advisory committee had decided not to spell out in detail what a judge should do with defective motions. There is a good deal of case law on the subject, and judges have experience in dealing with them. A member added that the committee note should explain that giving the opposing party notice and a further opportunity to respond will often be all that a court needs to do.

RULE 56(f)

A member asked whether the language of proposed Rule 56(f)(2), allowing a judge to "grant or deny the motion on grounds not raised by the motion or response," refers only to legal grounds not raised, or also to other facts not raised. Judge Kravitz responded that the language is intended to be broad and cover both.

RULE 56(g)

Judge Kravitz reported that proposed Rule 56(g) had been revised substantially since the last standing committee meeting. It would give a court substantial discretion when it does not grant all the relief requested by a motion for summary judgment.

A member pointed out that the committee note sets out several reasons why a trial court might not want to grant partial summary judgment. He suggested that the note would be more balanced if it also stated the reasons why a court should grant partial summary judgment, as set forth in Judge Kravitz's memorandum accompanying the proposed rule.

A member pointed out that the committee note refers to the trial of facts and issues at "little cost," and suggested that the words be deleted because there are always substantial costs to a trial.

Judge Kravitz observed that if the committee were to decide that there should be a revised section addressing partial summary judgment – in response to the suggestions that judges should have discretion to deny a worthy partial summary judgment motion but not a worthy summary judgment on the whole case – proposed Rule 56(g) would need to be folded into that section.

A participant suggested that the language of proposed Rule 56(g) that "any material fact – including an item of damages or other relief – that is not genuinely in dispute" is confusing. An item of damages is not a material fact. He suggested that the provision would be clearer if it referred to "any material fact, item of damages, or other relief." Judge Kravitz pointed out that the advisory committee had merely retained the language of the current rule, though it might be improved.

A member noted that proposed Rule 56(c)(3) permits a party to accept a fact for purposes of the motion only. But then proposed Rule 56(g) allows a court to treat the fact as established in the case. Would the party have to be given notice if the court is considering treating the fact as established in the case?

Judge Kravitz responded that this should not happen because the party has accepted the fact for purposes of the motion only. The judge should not be able to use the party's limited admission for any other purpose. The member speculated, though, that a party might try to prevent a trial judge from finding a fact established in the case under Rule 56(g) precisely by using the stratagem of admitting the fact for purposes of the motion only. Another member agreed, suggesting that the rule seemed to present a paradox. Judge Kravitz noted, though, that judges rarely enter a Rule 56(g) order anyway.

A member stated that it might be advisable to delete proposed Rule 56(g). Under the current proposal, if a party admits a fact for purposes of the motion only, some further procedure should be required before the judge may enter an order under Rule 56(g) finding the fact established in the case. Judge Kravitz noted that the proposed Rule 56(g) material is in the current rule, and he suggested that it remain in the rule for publication and that public comment might be solicited on whether it is still needed.

RULE 56(h)

Judge Kravitz reported that defense counsel had urged that the rule specify that sanctions be imposed when a summary judgment motion is made or opposed in bad faith. But, he said, the advisory committee had decided to avoid the inevitably controversial issue of sanctions.

A motion was made to approve for publication the remainder of proposed Rule 56, with drafting improvements to incorporate the suggestions made at the meeting.

The committee without objection by voice vote approved the proposed amendments to the remainder of FED. R. CIV. P. 56 for publication, subject to further refinement in language.

FED. R. CIV. P. 26

Judge Kravitz reported that both plaintiffs' and defendants' lawyers have voiced strong support for the proposed amendments to FED. R. CIV. P. 26(a)(2) (disclosure of expert testimony) and FED. R. CIV. P. 26(b)(4)(A) (trial preparation protection for experts' draft reports, disclosures, and communications with attorneys). He pointed out that lawyers commonly opt out of the current rule by stipulation. The proposed amendments,

he said, do not go as far as some may want in shielding all expert materials from discovery. For example, they do not place an expert's work papers totally out of bounds for discovery.

Under the current regime, he explained, lawyers engage in all kinds of devices to make sure that little or no preparatory material involving experts is created that could be discovered. Among other things, lawyers may hire two experts – one to analyze and one to testify. They may also direct experts to take no notes, prepare no drafts, or work through staff whenever possible.

Judge Kravitz noted that lawyers expend a great deal of time and expense in examining experts about their communications with lawyers and the extent to which lawyers may have contributed to their reports. But the outcome of cases rarely turns on these matters. Although some benefit may accrue to the truth-seeking function by having more information available about lawyer-expert communications, the benefits are far outweighed by the high costs of the current system.

He emphasized that it is very important for the proposed amendments to Rule 26 to be clearly written. If the rule is vague, it will not succeed in reducing the high costs of the current rule because lawyers will not feel secure about the extent of the rule's protections. It would lead to unnecessary litigation over the meaning of the text, and lawyers will continue to engage in the kinds of artificial behavior regarding their experts that the advisory committee is trying to avoid.

RULE 26(a)(2)

Judge Kravitz explained that the proposed amendments to Rule 26(a)(2)(C) would require lawyers to provide a summary of a non-retained expert's testimony. The advisory committee, he said, had deliberately used the word "summary," rather than "report," to make it clear that a detailed description is not needed. The committee, he said, was concerned about placing additional burdens on attorneys.

A member asked whether the provision is intended to cover a lay witness described by FED. R. EVID. 701. Judge Kravitz responded that a witness under Rule 701 – one who is not an expert witness – is not covered by the amendments, and a lawyer would not be required to provide a summary of the testimony of a non-expert witness.

The member added that some witnesses do not testify as experts, but nonetheless have specialized knowledge. Judge Kravitz pointed out that proposed Rule 26(a)(2)(C) does in fact cover witnesses who are both fact-witnesses and expert-witnesses, and a summary must be provided of their expert testimony.

RULE 26(b)(4)(A)

Judge Kravitz said that under current Rule 26 anything told to or shown to an expert is discoverable. But under proposed Rule 26(b)(4)(A), work-product protection would be extended both to an expert's draft reports and to the communications between a party's attorney and the expert, with three exceptions: (1) compensation for the expert's study or testimony; (2) facts or data supplied by the attorney that the expert considered in forming the opinions to be expressed; and (3) assumptions supplied by the attorney that the expert relied upon in forming the opinions to be expressed. Under current Rule 26(b)(3), work-product protection is limited to "documents and tangible things." But the work-product protection proposed in the amendment would be broader, in the sense that it would cover all lawyer-expert communications not within any of the three exceptions, even if not "documents or tangible things."

A member stated that the proposed changes are excellent. He noted that lawyers now opt out of the current rule by stipulation or play games to avoid discovery of experts' draft reports and communications. He asked whether an attorney who deposes an expert and has a copy of the expert's report may ask the expert whether the attorney who has retained him or her had helped write the report or had made any changes in it. Judge Kravitz said that the question could not be asked under the proposed rule because inquiries about lawyer-expert communications would be out of bounds for discovery. The proposal, he said, is fair because it applies to drafts and communications on both sides.

A member suggested that the key question for the jury to decide is whether it can rely on an expert's opinion because it is based on the expert's own personal expertise. Therefore, the opposition should be permitted to pursue inquiries that could establish that the expert's opinion is not really an independent assessment reflecting the expert's own expertise, but the views of the attorney hiring the expert. Judge Kravitz pointed out, though, that the expert's report itself is not in evidence. The opposition can probe fully into the basis for the expert's opinions, but it just cannot ask whether the lawyer wrote the report. Who wrote the report is not important to the jury, and the jury does not even see the report. The key purpose of the report is really to apprise the opposition of the nature of the expert's testimony.

A member stated that he always enters into stipulations opting out of the current expert-witness provisions of Rule 26 because the current rule leads to a great deal of needless game-playing, discovery, and cross-examination. He explained that he always provides an outline for an expert to use at trial in order to help organize the testimony for the witness. The testimony, though, is that of the expert, not the lawyer. Requiring the outline to be turned over creates largely irrelevant disputes over authorship and distracts from the substance of the expert's testimony. The proposed rule, he concluded, is a major

improvement over current practice and is consistent with what good lawyers on all sides are doing right now. And it does not favor one side or the other.

Professor Coquillette agreed and reported that he has often served as an expert witness in attorney-misconduct cases. Under the Massachusetts state rule, which is similar to the advisory committee's proposal, state trial judges do not allow inquiry into who wrote an expert's report. The cases go to trial, and the experts are cross-examined at the trial, but there are no long cross-examinations or interrogations. The jury bases its decision in the final analysis on what the expert says on substance. The state rule, he said, does not take away anything important from the truth-finding process.

On the other hand, in professional malpractice cases in the federal court in Massachusetts, it is routine for an expert to be deposed for an entire day. In the end, though, almost all the cases are settled without trial.

A member asked what the advisory committee had meant by using different language in the last two bulleted exceptions. One would allow discovery of facts and data that an expert "considered," while the other allows inquiry into assumptions that the expert "relied upon." Professor Cooper explained that it is legitimate for the opposition to ask whether an expert considered a particular fact provided by an attorney. But a more restrictive test is appropriate regarding "assumptions" provided by the attorney.

A participant argued that proposed Rule 26(a)(2)(B) explicitly requires an expert report to be "prepared and signed by the witness." Thus, the opposition should be able to ask whether the witness actually prepared the report and whether any part of it had been written by a lawyer. Judge Kravitz responded that the advisory committee had considered removing the word "prepared" from the rule and simply require that a report be signed by the witness. The committee note states clearly that a lawyer may provide assistance in writing the report, but the report should reflect the testimony to be given by the witness. The signature of the expert witness on the report means that he or she embraces it and offers it as his or her own testimony.

At trial, the opposing party may ask whether the expert agrees with the substance and language of the report, but it does not matter who actually drafted it. The current rule uses the word "prepared" and anticipates that a lawyer will provide assistance in drafting the report. But discovery should not be allowed into who wrote which parts of the report or who suggested which words to use. That is what has led to all the excessive costs and artificial gamesmanship that the proposed amendments are designed to eliminate.

A member stated that the proposed amendments are a great idea that will save the enormous time and expense now wasted on discovery into draft reports and lawyer-expert

communications. He said that the litigation process should not be cluttered up with the extraneous and expensive issues of who "prepared" expert reports and opinions.

A member noted that under FED. R. EVID. 705 (disclosure of facts or data underlying expert opinion) and other provisions, experts routinely rely on other people, such as lab technicians. Much expert testimony is really the assimilation of much background information, rather than the work of one person. Perhaps a better word could be used than "prepared," but it should be understood that an expert's report will often involve collaboration. An expert could not function properly without speaking with others. If the expert signs the report, and by so doing stands by its substance, it really does not matter who supplied the actual words.

Another member observed that the rule deals with discovery, not trial. But the net effect of it will be to keep some evidence away from a jury, on the theory that it involves work product worthy of protection. Generally, expert witnesses have no direct knowledge of the facts of a case. They bring their own specialized knowledge to the case, based on their professional expertise, not the lawyer's. A report is required in order for the expert to testify. It is different from a lawyer's communications with an expert. The opposition should be able to inquire into the circumstances of the production of a report that the court requires to be filed.

A member pointed out that most cases settle, and the proposed amendments will clearly reduce the costs of litigation by not allowing discovery of draft reports or inquiry into whether lawyers contributed to preparation. She noted that the three bulleted exceptions in Rule 26(b)(4)(A) draw a distinction between facts or data "considered" and assumptions "relied upon" that will likely lead to litigation over whether something was considered versus relied upon. She suggested that the distinction be eliminated and that in all cases the reference should be to matters "considered, reviewed, or relied upon."

A participant also questioned the validity of the distinction between "facts and data" and "assumptions," suggesting that the third bulleted exception be eliminated and the rule refer only to "facts and data."

The lawyer members of the committee were asked about the contents of the stipulations they use in opting out of the current rule. One responded that the stipulations he negotiates specify that neither party may ask for the drafts of experts, and no discovery will be allowed of lawyer-expert communications leading up to the expert's report. He added that his stipulations, though, allow the other party to ask whether the expert actually drafted the entire report.

Another member, however, said that his stipulations prohibit any inquiry into authorship. He emphasized that if questions of that nature were allowed, it would make

more sense just to let the draft reports themselves be discovered because they will establish more reliably whether the expert wrote the whole report. The opposing party, he said, should only be allowed to ask whether the expert's opinion is his or her own, how the expert reached that opinion, and what supports the opinion. All the questions concerning the role of counsel in preparing the report, although not technically irrelevant, are largely pointless. There is no end to the inquiries, and they lead to endless, needless expense. Therefore, in the absence of a stipulation, lawyers and experts are forced to engage in artificialities, put nothing in writing, and avoid communications. As a result, it takes the expert much longer to draft a report, adding another large expense.

Judge Kravitz reiterated that it was important to keep in mind that the central purpose of the report is to provide the other side with notice of what the expert is going to testify about at the trial. It is not to find out who wrote each word.

A member emphasized that the real debate is over how much can be asked of the witness in cross-examination. There is a trade-off between what the other side may find out during cross-examination and the sheer cost of the exercise. Judge Rosenthal added that the minimal benefits of the information that would be lost under the proposed amendments are simply not worth the expense of the current system.

A member stated that, under the current rule, if he cannot reach a stipulation with the other side to bar discovery of drafts and lawyer-expert communications, he will fight to obtain all the drafts. Unless an attorney knows what the other party can or cannot do, as set forth in a rule or stipulation, he or she will want all reports and communications. It would be best for the committee to cut off this kind of discovery entirely. The proposed amendments, he said, reflect the best of current practice. Without them, though, he will continue to negotiate stipulations.

A member stated that in testing an expert, the opposing party will probe for any inconsistencies between the expert's testimony and what is set forth in the report. The expert may explain an inconsistency by admitting that the particular point in the report had been written by the lawyer. The opposing party should not have to wait to learn about the inconsistency for the first time when the expert is on the witness stand. Inquiry into the inconsistency should be allowed during the discovery process.

In addition, a witness may be impeached by inquiry into the methodology used. It is important to know whether an attorney channeled the methodology for the expert. In other parts of the law, for example, it is common to have statements prepared by lawyers and signed by others, such as affidavits. Law-enforcement agents, for example, do not always write their affidavits in support of search warrants. Moreover, cross-examination is allowed in criminal cases. Issues of inconsistency may arise between a criminal

defendant's testimony and a suppression report written by the lawyer. There should not be a different rule for civil and criminal cases.

A member asked why, in proposed Rule 26(b)(4)(A)(iii), the protections and restrictions apply only to a witness who is "required to provide a report." A treating physician, for example, who is not required to file a report under rule 26(a)(2)(B), should be entitled to the same work-product protection. Professor Cooper explained that if the treating physician is not retained by counsel, the work-product protection is really not needed. The relationship with the lawyer for a retained expert is not the same. Therefore, the protection applies only to retained witnesses.

Judge Kravitz suggested the example of an expert witness who is a state trooper, not retained by counsel. There is no need for the lawyer's communications with the trooper to receive work-product protection because there is no special relationship between the two. Troopers and family physicians testify essentially as fact witnesses, although they give some expert advice. The professional witness, on the other hand, is part of the litigation team.

A motion was made to approve the proposed amendments to Rule 26 for publication and to solicit specific public comment on the issues identified during the committee's discussions. Judge Kravitz added that the proposed amendments were still subject to style and format improvements.

The committee, with one member opposed, by voice vote approved the proposed amendments to Rule 26 for publication.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachments of May 12, 2008 (Agenda Item 9).

Amendments for Final Approval by the Judicial Conference

TIME-COMPUTATION RULES

FED. R. CRIM. P. 5.1, 7, 12.1, 12.3, 29, 33, 34, 35, 41, 45, 47, 58, and 59
and
HABEAS CORPUS RULE 8

As noted above on pages 9 and 12, the committee approved for submission to the Judicial Conference the proposed time-computation amendments to the Federal Rules of Criminal Procedure and the Rules Governing §2254 Cases and § 2255 Proceedings.

FED. R. CRIM. P. 7, 32, and 32.2

CRIMINAL FORFEITURE

Judge Tallman reported that the proposed amendments to FED. R. CRIM. P. 7 (indictment and information), FED. R. CRIM. P. 32 (sentencing), and FED. R. CRIM. P. 32.2 (forfeiture), dealing with criminal forfeiture, had been initiated at the request of the Department of Justice. They were drafted by an ad hoc subcommittee that had enjoyed significant input from lawyers who specialize in forfeiture matters, both from the Department and the National Association of Criminal Defense Lawyers. The amendments essentially incorporate current practice as it has developed since the forfeiture rules were revised in 2000.

Judge Tallman explained that in some districts the government currently includes criminal forfeiture as a separate count in the indictment and specifies the property to be forfeited. The proposed rule would specify that the government's notice of forfeiture should not be designated as a count of the indictment. The indictment would only have to provide general notice that forfeiture is being sought, without identifying the specific property to be forfeited. Forfeiture, instead, would be handled through the separate ancillary proceeding set forth in FED. R. CRIM. P. 32.2.

Professor Beale pointed out that the proposal was not controversial and represents a consensus between the Department of Justice and private forfeiture experts. She walked the committee through the details of the amendments and pointed out that they elaborate on existing practice and eliminate some uncertainties regarding the 2000 forfeiture amendments.

A member pointed to language in the committee note cautioning against general orders of forfeiture (where the property to be forfeited cannot be readily identified), except in "unusual circumstances," and asked what those circumstances might be. Judge Tallman suggested that a general order might be appropriate when the government demonstrates that funds derived from narcotics have been used to buy other property. The defendant, in essence, tries to hide assets and the government seeks to forfeit an equivalent amount of property.

Professor Beale pointed out that other examples are found in the cases cited in the note. She noted that the 2000 amendments allowed a forfeiture order to be amended after

property has been recovered. Thus, some flexibility in forfeiting property is already accepted in the rules and in case law, although the outer boundary of forfeiture law is still somewhat ambiguous.

Judge Tallman added that the concept of forfeiture is driven by the "relation-back" doctrine, under which the sovereign acquires title to the property obtained by wrongdoing at the time of the wrong. The rule follows the money and perfects the sovereign's interest in an equivalent value of property. A participant recommended using the term "tracing" in the rule, and Judge Tallman suggested that the committee note might add the words "to identify and trace those assets."

A member pointed to an inconsistency in the proposed rule that needed to be corrected. Under proposed Rule 32.2(b)(6)(A) publication by the government is mandatory. But Rule 32.2(b)(6)(C) specifies that publication is unnecessary if any exception in Supplemental Rule G(4)(a)(i) applies.

Professor Beale suggested changing the heading of Rule 32.2(b)(6)(C) to make it clear that there are exceptions to (A)'s mandatory publication requirement. She noted that the style consultant had advised against adding a cross-reference to subparagraph (C) in Rule 32.2(b)(6)(A). A member suggested turning the proposed last sentence of (C) into a separate subparagraph (D), but Professor Kimble suggested that it would be better to pull the proposed last sentence of (C) back into (A). Professor Beale recommended that the committee approve the rule subject to further drafting improvements.

A participant noted that proposed Rule 32.2(b)(4)(C) specifies that "a party may file an appeal regarding that property under FED. R. APP. P. 4(b)" and asked whether it applies to an appeal by a third party. Professor Beale responded that the advisory committee had intended the language to refer only to the defendant or the government, not to third parties. It was suggested, therefore, that the rule might be amended to read: "the defendant or the government may file an appeal." A member noted that third parties are not atypical in forfeiture proceedings, and they need to be considered. The defendant takes an appeal from the judgment of conviction, but that obviously does not apply to a third party. So some guidance would be appropriate. Professor Struve added that third parties are not specifically mentioned in FED. R. APP. P. 4.

A member noted that the provision deals only with an appeal of the sentence and judgment. Forfeiture, on the other hand, is an ancillary proceeding governed by Supplemental Rule G. Therefore, no separate provision is needed in the criminal rules. A member added that proposed Rule 32.2(b)(4)(A) states that an order "remains preliminary as to third parties until the ancillary proceeding is concluded."

A member emphasized the need to have the rule make clear when third parties are included and when they are not. He moved to replace the term "a party" with "the defendant or the government" throughout Rule 32.2(b)(6)(A) and (B). Another member suggested that consideration be given to making a global change, such as by adding a new definition in FED. R. CRIM. P. 1 that would define the term "party" for the entire Federal Rules of Criminal Procedure. Judge Rosenthal agreed that the suggestion may have merit, but it would take considerable time to accomplish. She suggested, therefore, that the committee ask Judge Tallman, Professor Beale, the style subcommittee, and the forfeiture experts to refine the language of the amendments in light of the committee's discussion. Judge Tallman added that the advisory committee would favor changing the terminology in Rule 32(b)(6)(2)(C) from "a party" to "the defendant or the government."

Judge Rosenthal recommended that the committee approve the proposed forfeiture rules, subject to the advisory committee, working with others, further refining the exact language of the amendments.

The committee without objection by voice vote approved the proposed forfeiture amendments for approval by the Judicial Conference, subject to revisions by the advisory committee along the lines discussed at the meeting.

FED. R. CRIM. P. 41

Judge Tallman stated that the amendments to FED. R. CRIM. P. 41 (search and seizure) had been drafted to address challenges that courts are facing due to advances in technology. They would establish a two-step procedure for seizing electronically stored information. He noted that a huge volume of data is stored on computers and other electronic devices that law-enforcement agents often must search extensively after probable cause has been established.

Judge Tallman reported that the advisory committee had seen a demonstration of the latest technology at its April 2007 meeting. He noted, for example, that technology now on the market can prevent anyone from making a duplicate image of electronically stored information. Thus, agents in some cases must seize entire computers because they cannot duplicate the contents for off-site review. The Department of Justice, he said, reports that this process requires substantial additional time to execute warrants properly.

To address problems of this sort, the proposed rule sets out a two-step process. First, the data-storage device may be seized. Second, the device may be searched and the contents reviewed. The court may designate a magistrate judge or special master to oversee the search. Maximum discretion is given to judges to provide appropriate relief to aggrieved parties.

Professor Beale stated that the law on particularity under the Fourth Amendment is inconsistent and still evolving. The proposed rule, she said, is not intended to govern the developing case law on the specificity required for a warrant, but merely sets up a procedure. The warrant would authorize both seizure of the device and later review of the contents. The owner of the device may come into the court and seek return of the device or other appropriate relief.

A member stated that the rule makes a great deal of sense, but asked whether the advisory committee had considered how likely it is that a Fourth Amendment challenge will be brought to the proposed procedure. Professor Beale responded that the challenge would not be to the rule per se, but to particular orders or warrants issued under it. In other words, there will be the usual challenges to the breadth of the warrants, but the rule will not be invalidated.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

HABEAS CORPUS RULES 11 and 12

Judge Tallman explained that the Rules Governing §§ 2254 Cases and 2255 Proceedings conform to the Anti-Terrorism and Effective Death Penalty Act. The statute aims to narrow the focus of issues that might justify issuance of a writ of habeas corpus. When the district court denies a petition for a writ of habeas corpus, it enters a judgment. Under the statute, a certificate of appealability must then be entered before an appeal may be taken by the petitioner, but it is unclear how and by whom it is issued. The Act, in fact, allows it to be issued by a district judge, the court of appeals, or a circuit justice.

Judge Tallman explained that the great majority of petitioners are pro se inmates, and the rules create a potential trap for them. District judges normally will first enter a judgment denying a habeas corpus petition and then later issue a certificate of appealability. But in waiting for the certificate to issue (and often seeking reconsideration of the denial of the certificate), inmates may fail to file a timely appeal. They are generally unaware that motions for a certificate of appealability do not toll the time for filing an appeal.

Judge Tallman said that the advisory committee had attempted to draft new Rule 11 in a way that spells out as clearly as possible, both in § 2254 cases and § 2255 proceedings what inmates have to do. The judges on the committee, he said, believe that district judges should normally issue or deny the certificate at the end of the case, when the facts and issues are still fresh in the judge's mind.

Professor Beale reported that the public comments had expressed some differences of opinion on this issue. Some had suggested that it would be better to bifurcate the two court decisions and allow a district judge to decide on the certificate later than ordering entry of the judgment. But, she said, the advisory committee had concluded that it is important for the court to make the two decisions together, both to promote trial court efficiency and to avoid misleading prison inmates. The committee, however, did revise the proposal after publication to give a trial judge the option of ordering briefing on the issues before deciding on the certificate of appealability. The court may also delay its ruling, if necessary, and include the two actions in a joint ruling. Judge Tallman added that the advisory committee had tried to make it clear in the last sentence of proposed Rule 11(a) that a motion for reconsideration of the denial of a certificate of appealability does not extend the time to appeal.

A member agreed that the revisions to Rule 11 will provide better information to pro se litigants, but questioned the companion amendment to FED. R. APP. P. 22(b). The appellate rule, he suggested, assumes that the district court's decision on issuing the certificate of appealability will be made after the notice of appeal has been filed and sent to the court of appeals. But under the proposed revisions to Rule 11, the certificate of appealability will usually be issued before a notice of appeal is filed.

Judge Tallman responded that it was not necessarily true that the certificate will issue before the notice of appeal is filed. Under the governing statute, an appeal cannot be filed without a certificate of appealability. Thus, if the court of appeals receives a notice of appeal without a certificate of appealability, it must consider asking the district court to decide on issuing a certificate or granting one itself. Several participants suggested possible improvements in the language of the proposed amendment. One noted that if a habeas petitioner files a notice of appeal without a certificate of appealability, his circuit deems the notice of appeal to be a motion for a certificate of appealability.

A member pointed out that proposed Rule 11 specifies that the district court "must" issue or deny a certificate of appealability when it enters a final order. She suggested that the verb be changed to "should" in order to give district judges discretion in appropriate circumstances. Judge Tallman reported that the advisory committee had deliberately chosen the word "must," believing that a district judge could delay issuing the joint order and certificate to allow time for briefing, if necessary. He said that the advisory committee would be amenable to changing the language if the standing committee preferred to give trial judges greater discretion.

Current Rule 11 of the Rules Governing § 2254 Cases would be renumbered as Rule 12.

A motion was made to approve proposed Rule 11, retaining the verb "must."

The committee, with one objection, by voice vote approved the proposed amendments to the Rules Governing § 2254 Cases and § 2255 Proceedings for approval by the Judicial Conference.

A motion was made to approve the proposed amendment to FED. R. APP. P. 22(b)(1), with a change in language to read, "If the district court issues a certificate, the district clerk must send the certificate . . . ."

The committee without objection by voice vote approved the proposed amendment to FED. R. APP. P. 22(b)(1) for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to FED. R. CRIM. P. 6 (grand jury) had been brought to the advisory committee's attention by magistrate judges, who noted that in some districts no judge is present in the city where the grand jury sits. Therefore, a magistrate judge may have to travel hundreds of miles just to receive the return of an indictment. The proposed amendment would authorize a magistrate judge to take the return by video teleconference.

A participant questioned the language of the amendment that specifies that a judge may take the return "by video teleconference in the court where the grand jury sits." He suggested that the proper phrasing might be "from the court . . . ." Alternatively, the sentence might end after the word "teleconference." Professor Beale responded that the advisory committee wanted to have the return by the grand jury made in a courtroom in order to maintain the solemnity of the proceedings.

A member pointed out that the committee note states that the indictment may be transmitted to the judge in advance for the judge's review. She said that it is surprising that the matter is addressed in the note, rather than the rule itself, because it is essential that the indictment be sent to the judge in advance by reliable telegraphic means.

Judge Tallman agreed that the judge should have a copy of the indictment in hand. The judge would conduct the proceedings remotely by videoconference, and a deputy clerk would be physically present in the courtroom with the grand jury to receive and file the indictment.

A member pointed out that he had served as an assistant U.S. attorney in three different districts, and the practice of receiving grand jury returns varied in each. Nevertheless, there is always at least a deputy clerk present to receive and file the indictment. Judge Tallman emphasized that the thrust of the proposed rule is merely to authorize a judge's participation by video teleconference, not to regularize grand jury practices.

The committee without objection by voice vote approved the proposed amendments for publication.

Judge Rosenthal stated that there may be some advantage to deferring publication of the proposed amendment to Rule 6 because it may be an unnecessary burden to couple it for publication with the potentially controversial proposed amendments to Rule 15. She suggested that it might be better to publish the amendments to Rule 15 in August 2008, review the public reaction to them, and then publish the amendment to Rule 6 at a later date. She emphasized that no decision had been made on the matter, but asked the committee's approval to delay publication if she deems it appropriate.

The committee without objection by voice vote agreed that the chair of the committee may decide on the timing of publication of the proposed amendment.

FED. R. CRIM. P. 15

Judge Tallman stated that the proposed amendments to FED. R. CRIM. P. 15 (depositions) would authorize, in very limited circumstances, the taking of depositions outside the United States and outside the presence of the criminal defendant, when the presence of a witness for trial cannot be obtained. The procedure, for example, would be permissible when the presence of the witness in the United States cannot be secured because the witness is beyond the district court's subpoena power and the foreign nation in which the witness is located will not permit the Marshals Service to bring the defendant to the deposition.

Judge Tallman noted a recent decision of the Fourth Circuit upholding the taking of depositions in Saudi Arabia in an al-Qaeda case. The Saudi Arabian government would not permit the witnesses to come to the United States. So the district court authorized a video conference where the defendant was in Virginia and the witnesses in Saudi Arabia. The witnesses could see the defendant, and the defendant could see the witnesses. The procedures contained in the proposed amendments, he said, mirror what the Fourth Circuit approved in that case.

Judge Tallman pointed out that the advisory committee was particularly sensitive in this area because the Supreme Court had reviewed earlier proposed amendments in 2002 and had declined to transmit a proposed amendment to FED. R. CRIM. P. 26 to Congress. At that time, Justice Scalia questioned the constitutionality of this kind of procedure, but said it might be permissible if there were case-specific findings that it is necessary to further an important public policy. Judge Tallman explained that the advisory committee had tried to meet Justice Scalia's concerns. Thus, proposed Rule 15(c)(3) lists in detail all the factors that the court must find in order for a deposition to be taken without the defendant's physical presence.

Professor Beale added that the proposed rule would require a court to determine, on a case-by-case basis, what technology is available and whether the technology permits reasonable participation by the defendant. The rule, she said, clearly establishes a preference for the witness to be brought to the United States and covers only those situations where the witness cannot come.

A member stated that certain nations would regard this procedure as a serious abuse of extraterritorial judicial authority by the United States and a violation of their sovereignty. Therefore, it might be helpful to state in the committee note that the committee takes no position on whether the procedure might be legal in particular foreign nations.

A participant pointed out that the proposal was, in effect, a rule of evidence and suggested tying it to the language of FED. R. EVID. 807(b) (residual exception to the hearsay rule) and its comparative requirement. Under the proposed amendments to FED. R. CRIM. P. 15, for example, the government might have many similar witnesses available in the United States, but their presence is not a listed factor that the court must consider. FED. R. EVID. 807(b), he said, would provide a better, tougher standard. He also questioned the reference in proposed Rule 15(c)(3)(A) to "substantial proof of a material fact." Professor Beale responded that the phrase had been taken from the case law.

A member suggested that the standard in the rule need not be as narrow as FED. R. EVID. 807(b) because the testimony of the witness may not be hearsay evidence. In any event, though, she expressed doubts that the evidence produced by a deposition conducted under the proposed rule would be admissible.

Professor Beale agreed that the proposed rule does not address whether the information obtained from the witness will actually be admissible in evidence. But, she said, several circuits now have allowed district judges to craft specific arrangements in individual cases. The rule, she explained, had been drafted carefully to meet the constitutional standards and provide some structure that would make it possible in

appropriate circumstances to have the evidence admitted. Of course, there is little point in conducting the deposition if it produces evidence that cannot be admitted.

A member pointed out that there are many procedural issues that the proposed rule does not address, such as the location of the prosecutor and defense lawyer during the deposition and the transmission of exhibits. She noted that the rule only addresses the initial approval and justification for conducting the deposition at all. Judge Tallman agreed that the advisory committee had intended to leave the logistical arrangements to the individual courts. Mr. Tenpas added that it is wise for the rule to avoid the technology issues because the technology is changing rapidly. It is appropriate that the rule simply focuses on when a court may allow a deposition to be taken. The Department of Justice, he said, supports the committee's best efforts on the matter and hopes that the Supreme Court will accept the rule.

A member suggested adding another circumstance to the list of case-specific findings that support taking a deposition – the physical inability of a criminal defendant to travel to another country. Mr. Tenpas responded that that circumstance may fall within proposed Rule 15(c)(3)(D)(ii), "secure transportation . . . cannot be assured," or proposed Rule 15(c)(3)(D)(iii), "no reasonable conditions will assure an appearance."

A member asked whether the committee planned to ask specifically for public comments on the constitutional issues, especially since the Supreme Court had rejected a similar proposal in the past. Judge Rosenthal responded that the committee would solicit comments on the constitutionality of the proposed procedure, and it must be up front in the publication regarding the history of the earlier amendments submitted to the Supreme Court.

A member pointed out that in some cases the criminal defendant may request a deposition. In that event, the defendant's confrontation-clause rights are not implicated by the deposition. She suggested that the proposed rule would be useful in that situation.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. CRIM. P. 32.1

Judge Tallman stated that the proposed amendment to FED. R. CRIM. P. 32.1(a)(6) (revoking or modifying probation or supervised release) had been brought to the committee's attention by magistrate judges. The current rule, he said, provides that a person accused of a violation of the conditions of probation or supervised release bears the

burden of establishing that he or she will not flee or pose a danger, but it does not specify the standard of proof that must be met.

The Bail Reform Act specifies that a "clear and convincing evidence" standard applies at a defendant's initial appearance. Case law establishes that the same standard should be used in determining whether to revoke an order of probation or supervised release. The proposed amendment would explicitly state that the "clear and convincing evidence" standard of proof would apply in revocation proceedings.

The committee without objection by voice vote approved the proposed amendments for publication.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachments of May 12, 2008 (Agenda Item 8).

Amendments for Publication

RESTYLING THE FEDERAL RULES OF EVIDENCE FED. R. EVID. 101-415

Judge Hinkle reported that the advisory committee was restyling the Federal Rules of Evidence in the same way that the appellate, criminal, and civil rules had been restyled to make them easier to read and more consistent, but without making any substantive changes. He pointed out that the committee was requesting approval at this meeting to publish the first third of the rules, FED. R. EVID. 101-415, but not to publish them immediately. The second third of the rules would be presented for approval at the January 2009 meeting, and the final third at the June 2009 meeting. All the restyled evidence rules would then be published as a single package in August 2009.

Judge Hinkle pointed out that additional changes may be needed in the first third of the rules because the advisory committee will have to go back later in the project to revisit all the rules for consistency. He also pointed to some global issues, such as whether the restyled rules should use the term "criminal defendant" or "defendant in a criminal case." Other issues that the advisory committee had been dealing with, he noted, have been set forth in footnotes to the proposed rules. He emphasized that the proposed restyling changes had been very thoroughly vetted at the advisory committee level.

A member noted that the proposed revision of FED. R. EVID. 201(d) (judicial notice) refers to the "nature" of a noticed fact, rather than the "tenor" of the fact, as in the current rule. Professor Capra responded that the advisory committee had examined the case law and could find no discussion of what "tenor" means. As a result, it decided to use "nature," rather than "tenor," because it is easier to understand and does not represent a substantive change.

The committee without objection by voice vote approved the proposed amendments for delayed publication.

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that FED. R. EVID. 804(b)(3) is the hearsay exception for a statement against interest by an unavailable witness. The proposed amendment, he said, would extend the corroborating circumstances requirement to all declarations against penal interest offered in criminal cases. He emphasized that the Department of Justice does not oppose the change.

He noted that the current rule requires corroborating circumstances if the defendant offers a statement, but not if the government does. The anomaly results from the fact that Congress, in drafting the rule, believed that the government could never use the provision because case law under the Confrontation Clause would preclude the government from submitting evidence under the rule.

The government, however, in fact can use the rule. Therefore, the provision does not impose parallel requirements on the government and the defendant. Nevertheless, some courts have held that the government must show corroborating circumstances, even though the current rule does not contain that requirement.

Judge Hinkle said that there was never any real rationale for the different treatment in the rule. It was just an historical accident because the drafters had assumed that the government could never use the provision.

He stated that the advisory committee had decided not to make any change in the rule regarding civil cases. The amendment, thus, would address only criminal cases. In addition, there are some other current misunderstandings about the rule that the committee decided not to address as part of the current proposal.

Professor Capra stated that the proposed amendments to Rule 804(b)(3) had not yet gone through style review. He pointed out that all the hearsay rules would be restyled

together, which will require a great deal of work. Nevertheless, the advisory committee wanted to publish the substantive amendments to Rule 804(b)(3) now, with the understanding that the rule will be restyled in due course as part of the restyling process.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Item

Judge Hinkle reported that the most important matter currently affecting the evidence rules is the pending effort to get Congress to enact new FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work-product protection). The rule, he noted, had been approved unanimously by the Senate, but was still pending before the House Judiciary Committee.

Judge Hinkle noted that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). In that case, the Court held that admitting "testimonial" hearsay violates an accused's right to confrontation unless the accused has had an opportunity to cross-examine the declarant. He said that it is at least possible, in light of *Crawford* and the developing case law, that some hearsay exceptions may be subject to an unconstitutional application in some circumstances. Case law developments to date suggest that rule amendments not be necessary.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the sealing subcommittee, reported that the subcommittee had decided to confine its inquiry to cases that have been totally sealed by a judge. The Federal Judicial Center, he noted, had been searching the courts' electronic databases to identify all cases filed in 2006 that have been sealed. It divided the civil cases into five categories: (1) False Claims Act cases; (2) cases related to grand jury proceedings; (3) cases involving juveniles; (4) cases involving seizures of property; and (5) all other cases. Criminal cases are being treated separately. In addition, the Center had contacted the clerks of the courts to obtain additional information about the cases. Its initial research to date had identified 74 sealed civil cases, 238 sealed criminal cases, and 3,631 cases sealed by magistrate judges. The Center reported that some of the sealed cases were later resolved by public opinions, including some published opinions.

Judge Hartz reported that the subcommittee planned to hold an additional meeting before the next meeting of the standing committee.

REPORT ON STANDING ORDERS

Judge Rosenthal reported that the committee, with the invaluable assistance of Professor Capra, was continuing its work on reviewing the use of standing orders in the courts. She said that a survey had just been distributed to chief district judges and chief bankruptcy judges, and a good deal of helpful information had been received. Professor Capra, she added, was working on proposed guidelines to assist courts in determining which subjects should be set forth in local rules of court and which may appropriately be relegated to standing orders. In addition, the courts will be urged to post all standing orders on their court web-sites.

NEXT MEETING

The committee agreed to hold the next meeting in early to mid-January 2009, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Monday and Tuesday, January 12-13, in San Antonio, Texas.

Judge Kravitz reported that the civil rules committee was planning to hold three hearings on the proposed amendments to FED. R. CIV. P. 26 and 56 – one on the east coast, one on the west coast, and one in the middle of the country. Judge Rosenthal recommended scheduling the hearings to coincide with upcoming committee meetings. Thus, one hearing will be held on November 17, 2008, in conjunction with the fall meeting of the civil rules committee in Washington, and another will be held in San Antonio on January 14, 2009, the day after the next meeting of the standing committee. The third will be held on February 2, 2009, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 4-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: FORM 22C AND DEDUCTION OF BUSINESS EXPENSES

DATE: AUGUST 2, 2008

During its conference call on May 22, 2008, the Subcommittee considered an issue presented by the recent Ninth Circuit BAP decision in Drummand v. Wiegand (*In re* Wiegand), 386 B.R. 238 (2008). The court held that a chapter 13 debtor engaged in business may not subtract business expenses from gross receipts in determining his current monthly income. That conclusion led the court to declare that Form 22C, by instructing the debtor to make such a deduction, is inconsistent with § 1325(b)(2). The *Wiegand* case reached the same conclusion as the earlier decision in *In re* Arnold, 376 B.R. 652 (Bankr. M.D. Tenn. 2007).[1] **After careful consideration of the issue, the Subcommittee reached the conclusion that Form 22C reflects a correct interpretation of the relevant Code provisions, and it recommends that no change be made to the form in response to these decisions.**

As part of the report of income, item 3 of Form 22C requires a chapter 13 debtor to list gross receipts from the operation of a business, profession, or farm and from that figure to subtract ordinary and necessary business expenses. The resulting figure is listed as the debtor's business income and is added to other reported income to determine the debtor's current monthly income. Form 22C then uses the current monthly income figure for three purposes: (1) to

[1] After the Subcommittee's consideration of this issue, another bankruptcy court, relying on *Wiegand* and *Arnold*, held that Form 22C improperly allows deduction of business expenses in calculating current monthly income. *In re* Bembenek, 2008 WL 2704289 (Bankr. E.D. Wis. July 2, 2008).

determine the applicable commitment period; (2) to determine the appropriate method for calculating disposable income; and (3) to calculate the disposable income of an above-median-family-income debtor. The applicable commitment period is determined by comparing the debtor's annualized current monthly income to the applicable median family income, a figure calculated by the U.S. Census Bureau. If the debtor's income is less than the applicable median family income, the commitment period is three years; otherwise, it is five years. Above-median-family-income debtors must calculate their disposable income by deducting from current monthly income expenses authorized by the IRS national and local standards and certain "other necessary expenses" designated by the IRS, as well as additional expenses specified by the Bankruptcy Code.

The *Wiegand* and *Arnold* courts concluded that Form 22C is inconsistent with § 1325(b)(2) of the Code. Section 1325(b)(2)(B) provides with respect to a debtor engaged in business that disposable income is calculated by deducting from current monthly income "expenditures necessary for the continuation, preservation, and operation of [the debtor's] business." According to *Wiegand*, this provision "plainly and unambiguously requires a debtor to deduct business expenses from current monthly income." The court reasoned that "[i]f business expenses are deducted from gross receipts to determine a chapter 13 debtor's current monthly income, then there would be no need for § 1325(b)(2)(B), which provides for the same deductions." 386 B.R. at 242.

The point at which business expenses are deducted – to calculate current monthly income or disposable income – is significant for the determination of the applicable commitment period. If these expenses are deducted in determining current monthly income, a debtor's annualized

current monthly income is more likely to fall below the median family income and thus qualify the debtor for the shorter commitment period. The point at which the deduction takes place may also affect whether the debtor's disposable income is calculated pursuant to § 1325(b)(3), using the IRS standards for expenses, or under § 1325(b)(2), using actual expenses.

Judge Wedoff indicated to the Subcommittee that this issue was thoroughly discussed in the course of drafting Form 22C. There were at least a couple of reasons that the decision was made to include the business expense deduction in the calculation of current monthly income rather than disposable income. First, the Census Bureau uses net, rather than gross, income in computing median family incomes. *See* http://www.census.gov/acs/www/Downloads/2006/usedata/Subject_Definitions.pdf (pp. 47-48). Since those are the figures to which the debtor's annualized current monthly income must be compared under § 1325(b), it makes sense to calculate current monthly income in the same manner. Second, the use of gross receipts for self-employed debtors would lead to distinctions in the calculation of current monthly income based merely on the business form under which the debtor has chosen to operate. Under the *Wiegand* approach, a self-employed debtor with gross business receipts of $250,000 will be above the applicable median family income of any state, even if she has a net income of only $40,000. If that same debtor instead were operating her business as an LLC and taking a salary of $40,000, she would most likely be below her state's median family income. It is hard to imagine any reason that Congress would have intended to treat those two situations differently.[2] Thus the Advisory Committee, in approving Form 22C,

[2] Although not addressing this specific argument, the *Wiegand* court observed that the result it reached was not absurd "because the Code is replete with rules and requirements that impact sole proprietors differently than wage earners."

chose to interpret "income" as used in § 101(10A)'s definition of "current monthly income" as net, rather than gross, business income.

The Subcommittee considered an additional reason for rejecting the *Wiegand* approach. If one follows the plain meaning approach it advocates, a plain meaning interpretation of § 1325(b)(3) and § 707(b)(2)(A) and (B) would result in an above-median-family-income debtor who is self-employed never being able to deduct most business expenses.[3] Section 1325(b)(3) requires an above-median-family-income debtor to determine "amounts reasonably necessary to be expended" according to "subparagraphs (A) and (B) of section 707(b)(2)." Those paragraphs of the means test require application of "the National Standards and Local standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service . . . ." All of those IRS standards and categories relate to personal and household, not general business, expenses. Permissible business expenses are included in another section of the IRS Financial Analysis Handbook. *See* http://www.irs.gov/irm/part5/ch15s01.html . Likewise, all of the other expenses expressly allowed to be deducted under § 707(b)(2)(A) and (B) are personal and household, not business, expenditures. Thus, as the Advisory Committee previously concluded in approving Form 22C, the Subcommittee concluded that the most sensible interpretation of income for a self-employed debtor is net, not gross, income.[4]

---

[3] The same result would also be true for any self-employed chapter 7 debtor.

[4] The *Arnold* court suggested that an above-median-income, self-employed debtor could deduct business expenses as part of "other necessary expenses" in computing disposable income. It cited the IRS Financial Analysis Handbook § 5.15.1.10, which describes the allowable "other necessary expenses." Although that section imposes a necessity test that permits expenses "for the production of income," most of the expenses of running a business

Despite the logic of using net business income to determine a debtor's current monthly income, the Subcommittee recognized that such an interpretation creates a redundancy with § 1325(b)(2)(B)'s instruction to subtract business expenses from current monthly income to calculate disposable income. That provision existed prior to the changes introduced by BAPCPA and was likely overlooked by Congress when it introduced the concept of "current monthly income" and the means test into § 1325(b). Form 22C deals with this problem for above-median-family-income debtors by instructing them not to deduct a second time any business expenses deducted in item 3 to calculate business income.[5]

For the reasons stated above, the Subcommittee concluded that Form 22C reflects a correct interpretation of §§ 1325(b) and 101(10A). It also decided that because the calculation of disposable income is such a fundamental element of Form 22C, it would be difficult to draft a useful and comprehensible form that allows for alternative interpretations. Thus it recommends that Form 22C remain as it is currently written.

---

would not fall within any of the "categories specified as Other Necessary Expenses" (*see* § 707(b)(2)(A)(ii)(I)).

[5] In the case of a chapter 13 debtor who is at or below the median family income, the same prohibition against double deductions should also apply. This problem could arise in those courts that calculate projected disposable income based on current monthly income reported on Form 22C and expenses reported on Schedule J. However, until there is more consistency among the courts concerning the method of calculating projected disposable income for chapter 13 debtors who are at or below median family income, the Subcommittee does not propose changing Form 22C to address this issue.

In re Warren Wyatt WIEGAND and Camille Anita Wiegand, Debtors.

Robert G. Drummond, Chapter 13 Trustee, Appellant,

v.

Warren W. Wiegand; Camille A. Wiegand, Appellees.

BAP No. MT–07–1431–JuPaD. Bankruptcy No. 07–60620.

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted on March 18, 2008 at Helena, Montana.

Filed—April 3, 2008.

Background: Chapter 13 trustee objected to confirmation of proposed plan on ground that debtors improperly calculated their current monthly income (CMI) when they deducted business expenses from debtor-husband's self-employed income. The United States Bankruptcy Court for the District of Montana, Ralph B. Kirscher, Chief Judge, 2007 WL 2972603, overruled objection, and trustee appealed.

Holding: The Bankruptcy Appellate Panel (BAP), Jury, J., held that a Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating CMI but, rather, such deductions are to be subtracted from CMI when calculating "disposable income."

Reversed and remanded.

1. Bankruptcy ⚿3782

Bankruptcy Appellate Panel (BAP) reviews issues of statutory construction and conclusions of law de novo.

2. Bankruptcy ⚿2129

When an Official Bankruptcy Form conflicts with the Bankruptcy Code, the Code always wins.

3. Bankruptcy ⚿3713

Applicable commitment period for Chapter 13 plans is generally three years, but it is five years if the combined current monthly income (CMI) of the debtor and the debtor's spouse, multiplied by 12, is not less than the median family income in the applicable state, as adjusted for the number of household members. 11 U.S.C.A. § 1325(b)(4).

4. Bankruptcy ⚿3705

Chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating current monthly income (CMI), as instructed by Form 22C, but, rather, such deductions are to be subtracted from CMI when calculating "disposable income," as mandated by the Bankruptcy Code. 11 U.S.C.A. §§ 101(10A), 1325(b)(2)(B); Official Bankruptcy Form 22C, 11 U.S.C.A.

5. Statutes ⚿181(2), 190

If statutory language is clear, the court must apply it by its terms unless to do so would lead to absurd results.

6. Bankruptcy ⚿2021.1

Bankruptcy Appellate Panel (BAP) engages in statutory interpretation by taking a holistic approach that strives to implement the policies behind the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) and harmonize the provisions of the Bankruptcy Code.

7. Bankruptcy ⚿2021.1

Tax Code concepts for determining taxable income are inapplicable to a determination of current monthly income (CMI)

under the Bankruptcy Code. 11 U.S.C.A. § 101(10A).

8. Statutes ⇨223.1

Statutes should not be construed in a manner which robs specific provisions of independent effect.

9. Statutes ⇨206

Interpretations that would render a statutory provision surplusage or a nullity should be rejected.

10. Statutes ⇨176

Sole function of the courts is to enforce a statute according to its terms.

Robert G. Drummond, Chapter 13 Trustee, Great Falls, MT, Pro se.

D. Randy Winner, Great Falls, MT, for Appellees.

Before: JURY, PAPPAS, and DUNN, Bankruptcy Judges.

OPINION

JURY, Bankruptcy Judge.

Chapter 13 trustee [1] Robert G. Drummond appeals the bankruptcy court's order overruling his objection to confirmation of the debtors' chapter 13 plan on the ground that debtors improperly calculated their current monthly income. Debtors, following the format and instructions of Official Bankruptcy Form 22C [2] ("Form 22C"), deducted business expenses from Warren Wiegand's self-employed income, which resulted in below-median income entitling debtors to a thirty-six month applicable commitment period.

We hold that a chapter 13 debtor engaged in business may not deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating current monthly income as defined under § 101(10A).[3] Rather, such deductions are authorized under § 1325(b)(2)(B) and, therefore, are to be subtracted from current monthly income when calculating disposable income pursuant to § 1325(b)(2).[4] To the extent that Part I of Form 22C requires a business debtor to calculate current monthly income by subtracting ordinary and necessary business expenses from gross receipts, we hold that Part I of Form 22C is inconsistent with § 1325(b)(2).

We REVERSE and REMAND for further proceedings consistent with this opinion.

1. Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–5037.

2. Form 22C is titled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." Chapter 13 debtors are required to use Form 22C pursuant to Rule 1007(b)(6).

3. Section 101(10A) provides: "The term 'current monthly income'-(A) means the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6–month period ending on-(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii) . . . ."

4. Section 1325(b)(2)(B) provides: "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business."

I. FACTS

The facts are undisputed. Debtors filed their joint chapter 13 petition on May 31, 2007, and filed their Schedules, Statement of Financial Affairs and Form 22C on June 15, 2007. Debtor Warren Wiegand operated a trucking business. Debtors' original Form 22C reflected his monthly business income on line 3c as $1382, after gross receipts on line 3a of $6192 were reduced by ordinary and necessary business expenses of $5175 on line 3b.[5] Debtors' Form 22C calculated below-median income at lines 15 and 16. Therefore, they filled in the three-year commitment period box at line 17.

Debtors filed a thirty-six month chapter 13 plan which provided for monthly payments of $298. The trustee objected to confirmation of their plan on the ground that debtors incorrectly calculated their current monthly income in Part I of Form 22C, thus proposing a plan not in compliance with § 1325(b)(1).[6] The trustee argued that debtors' business deductions, which included payments on loans and home insurance, reduced their annualized current monthly income to below median, erroneously allowing them to apply the shorter three-year commitment period. Additionally, the trustee maintained that the deduction of business expenses in calculating current monthly income would render § 1325(b)(2)(B) superfluous, as it would allow debtors to deduct those expenses a second time.

The bankruptcy court overruled the trustee's objections at the plan confirmation hearing. It entered an order on September 24, 2007, followed by a Memorandum Decision dated October 9, 2007. In its written decision, the bankruptcy court examined sections of the Internal Revenue Code ("Tax Code"), United States Supreme Court case law, and Personal Income Tax Form 1040 to arrive at its conclusion that a chapter 13 business debtor may deduct ordinary and necessary business expenses from gross receipts to calculate current monthly income as defined by § 101(10A).

The trustee timely appealed.

II. JURISDICTION

The bankruptcy court had subject matter jurisdiction pursuant to 28 U.S.C. § 1334 over this core proceeding under § 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUE

Whether a chapter 13 debtor engaged in business can deduct ordinary and necessary business expenses from gross receipts for the purpose of calculating his or her current monthly income as defined by § 101(10A).

IV. STANDARD OF REVIEW

[1] We review issues of statutory construction and conclusions of law de novo.

5. Debtors filed an amended Form 22C which reflected a lower monthly business income of $1017 based on greater expenses. They also amended their Schedules I and J. After the plan confirmation hearing, for reasons not relevant to the decision here, they also amended their plan to provide for payments of $298 for three months and $135 for thirty-three months.

6. Section 1325(b)(1) provides: "If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan."

Ransom v. NBNA Am. Bank, N.A. (In re Ransom), 380 B.R. 799, 802 (9th Cir. BAP 2007).

V. DISCUSSION

[2] The primary question before us is whether a self-employed chapter 13 debtor should follow Form 22C [7] and deduct ordinary and necessary business expenses from gross receipts or follow the Code, which provides that business deductions are taken from the debtor's current monthly income to arrive at disposable income under § 1325(b)(2). The question is easily answered when Form 22C is directly at odds with § 1325(b)(2)(B), the substantive Code provision that governs the deduction of business expenses. As aptly noted by another court in addressing this same question, when an Official Bankruptcy Form conflicts with the Code, the Code always wins. *In re Arnold,* 376 B.R. 652, 653 (Bankr.M.D.Tenn.2007).

[3] Choosing between Form 22C and § 1325(b)(2) can have a significant impact on the applicable commitment period as set forth under § 1325(b)(4) [8] because, in certain instances, deducting business expenses to compute current monthly income will place some business debtors at below-median income, entitling them to the three-year, rather than five-year, applicable commitment period. Additionally, some debtors may use the deductions once to compute their monthly current income and then again, to determine their disposable income under § 1325(b)(2).

[4–6] To determine when a chapter 13 debtor should take business deductions, we start with the plain meaning rule and examine the statutory language in §§ 101(10A) and 1325(b)(2). If the statutory language is clear, we must apply it by its terms unless to do so would lead to absurd results. *United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241–42, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989). We also engage in statutory interpretation by taking a holistic approach that strives to implement the policies behind the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") and harmonize the provisions of the Code. *See Hough v. Fry (In re Hough),* 239 B.R. 412, 414 (9th Cir. BAP 1999) (noting that we not only look to the language of the statute itself, but also to "the specific context in which that language is used, and the broader context of the statute as a whole") (citation omitted).

[7] Current monthly income is defined in § 101(10A) as the "average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6–month period" before the dates specified in § 101(10A)(A)(i) & (ii).[9]

7. Part I of Form 22C requires a business debtor to arrive at his or her current monthly income by subtracting ordinary and necessary business expenses from gross receipts. Thus, the form is structured for a debtor engaged in business to use net business income rather than gross. The trustee asserts that Form 22C is wrong as inconsistent with the Code.

8. Section 1325(b)(4) sets forth the parameters for determining the applicable commitment period. Generally, it is three years. However, it is five years if the combined current monthly income of the debtor and the debtor's spouse multiplied by twelve, is not less than the median family income in the applicable state, as adjusted for the number of household members. We have found the applicable commitment period to be a temporal requirement, requiring certain debtors to have chapter 13 plans longer than three years. *Fridley v. Forsythe (In re Fridley),* 380 B.R. 538, 544 (9th Cir. BAP 2007).

9. Excluded from the definition of current monthly income are benefits received under the Social Security Act and certain other payments. § 101(10A)(B).

§ 101(10A). While the Code defines current monthly income, it does not define "income." Nonetheless, we conclude that the plain language of the statute demonstrates that the bankruptcy court's reliance on the Tax Code and Form 1040 to determine the meaning of income under § 101(10A) was misplaced. The phrase "without regard to whether such income is taxable income" in § 101(10A) reflects a clear congressional intent that Tax Code concepts for determining taxable income are inapplicable to a determination of current monthly income. Further, with the enactment of BAPCPA, Congress imported the Internal Revenue Service Standards into § 707(b)(2).[10] Yet, no such reference is made in connection with the definition of current monthly income. Finally, the statute's plain language does not make specific reference to deductions, business or personal, of any kind. *Arnold*, 376 B.R. at 654.

In contrast to the statutory definition of current monthly income, § 1325(b)(2) is plain and unambiguous with specific reference to deductions for business expenses. This section provides that disposable income means current monthly income received by the debtor less amounts reasonably necessary for support and maintenance of the debtor and the debtor's dependents. § 1325(b)(2)(A). For a debtor engaged in business, current monthly income can be further reduced by the payment of expenditures necessary for the continuation, preservation, and operation of the business. § 1325(b)(2)(B). We can conclude from the statutory language that the specificity of § 1325(b)(2)(B) controls—business deductions are to be taken from a debtor's current monthly income to arrive at the debtor's disposable income. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 128 L.Ed.2d 556 (1994) (noting that "Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another") (citation omitted).

Further, although § 1325(b)(2) was amended under BAPCPA, subsection (B) remained unchanged. Under prior law, business expenses were deducted from "income received by the debtor" to determine disposable income. Under BAPCPA, the phrase current monthly income was introduced into § 1325(b)(2), but the reduction of business expenses remained intact. We presume that business expense deductions under § 1325(b)(2)(B) continue to be a factor in arriving at a debtor's disposable income under BAPCPA. *See Diamond Z Trailer, Inc. v. JZ L.L.C. (In re JZ L.L.C.)*, 371 B.R. 412, 424 (9th Cir. BAP 2007).

[8, 9] Statutes should also "not be construed in a manner which robs specific provisions of independent effect." *County of Santa Cruz v. Cervantes (In re Cervantes)*, 219 F.3d 955, 961 (9th Cir.2000) (citation omitted). Interpretations that would render a statutory provision surplusage or a nullity should be rejected. *Id.* If business expenses are deducted from gross receipts to determine a chapter 13 debtor's current monthly income, then there would be no need for § 1325(b)(2)(B), which provides for the same deductions.

[10] We conclude that § 1325(b)(2) plainly and unambiguously requires a debtor to deduct business expenses from current monthly income. Thus, our inquiry ends. "[T]he sole function of the courts

10. This section makes specific reference to the National Standards issued by the Internal Revenue Service.

is to enforce [the statute] according to its terms." *Ron Pair Enters., Inc.*, 489 U.S. at 241, 109 S.Ct. 1026 (citation omitted). This mandate compels us to conclude that Form 22C ought to be changed to comply with the statute.[11]

We also observe that our plain meaning interpretation is not absurd because the Code is replete with rules and requirements that impact sole proprietors differently than wage earners. For example, an individual chapter 13 debtor in business may be expected to have more debt associated with his or her operation than someone who works for wages. That the "profit" from the business does not exceed what another makes in salary does not relieve the sole proprietor from the debt limits for eligibility for chapter 13 relief. It may be that Congress simply did not want those persons generating significant revenues through a business to have access to three-year chapter 13 plans.

VI. CONCLUSION

For the reasons stated herein, we REVERSE the bankruptcy court's order overruling the trustee's objection to confirmation and REMAND for further proceedings consistent with this opinion.

11. Until Form 22C is changed, one possible solution is for below-median debtors to subtract the business deductions allowed under § 1325(b)(2)(B) on Schedule J from their current income. Above-median debtors should fill out the remainder of Form 22C and utilize the Internal Revenue Service standards under §§ 1325(b)(3) and 707(b)(2)(A)(ii)(I) for "Other Necessary Expenses," as specified in the Internal Revenue Service Financial Analysis Handbook. *Arnold,* 376 B.R. at 654–55. We leave open the possibility that bankruptcy courts may take other approaches to redress the inconsistency of Form 22C with Code §§ 101(10A) and 1325(b)(2)(B).

In re Lawrence E. ORMSBY and Cindy J. Ormsby, Debtors.

Lawrence E. Ormsby, Appellant,

v.

First American Title Company of Nevada, a Nevada Corporation, Appellee.

No. 2:07–cv–00447–MCE.

United States District Court,
E.D. California.

Feb. 26, 2008.

Background: Judgment creditor filed adversary complaint, seeking determination that debt arising from prepetition Nevada state court judgment against Chapter 7 debtor was nondischargeable. The bankruptcy court granted judgment creditor's motion for summary judgment and subsequently denied debtor's motion for reconsideration. Debtor appealed.

Holdings: The District Court, Morrison C. England, Jr., J., held that:

(1) under Nevada law, the state court judgment was not entitled to preclusive effect in determining the applicability of the discharge exceptions for larceny and willful and malicious injury;

(2) debtor, who encouraged, cooperated, and assisted in the misappropriation of certain title plants and other proprietary files from judgment creditor, a title company and competitor of his own company, committed "larceny," within the meaning of the discharge exception;

TAB 4-B

MEMORANDUM

TO: Advisory Committee on Bankruptcy Rules

FROM: Subcommittee on Consumer Issues

RE: Forms 22A and C: National and Local Standard Expense Allowances Based on "Household Size"

DATE: August 28, 2008

Upon referral of the issue by the Advisory Committee at the March 2008 meeting, the Subcommittee on Consumer Issues has considered whether there should be a change in the instruction in Lines 19A, 19B, 20A, and 20B of Form 22A and Lines 24A, 24B, 25A, and 25B of Form 22C. In each of these lines, the debtor is instructed to deduct from income a National or Local Standard expense allowance determined, in part, by the debtor's "household size." The Subcommittee has determined that this instruction is not the best reflection of the statutory language, and **it recommends changes to Forms 22A and 22C as described below**. The Subcommittee suggests that these changes, if approved by the Advisory Committee, be forwarded to the Standing Committee for publication for public comment in August 2009.

In March 2007, the Advisory Committee agreed to change "family size" to "household size" in several lines of Forms 22A and 22C. In one area—determining the state median income that applies to the debtor's case—this change was clearly appropriate. Section 707(b)(7) provides the safe harbor from the means test presumption, and § 1325(b)(3) and (4) contain provisions bearing on the method of calculating disposable income and the length of the applicable commitment period. These provisions rely on the number of persons in the debtor's "household" to compare the debtor's income with the appropriate "median family income of the

applicable State." The debtor's "household" size is therefore the relevant consideration by the terms of the Code itself.

In the case of means test deductions, however, there is another, distinct use of "family" or "household" size. It determines the amount a debtor can claim based on National and Local Standard expense allowances for general expenses, health care, and housing. Here, the statutory language is not dispositive. Section 707(b)(2)(A)(ii)(I) simply provides that "[t]he debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards . . . for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case if the spouse is not otherwise a dependent." Since the National and Local standards are those set out in the Internal Revenue Manual, the Advisory Committee has generally sought to apply them—in the absence of a statutory provision to the contrary—in the manner that they are applied in the Manual itself. For example, Forms 22A and C carefully track the language of the Manual in describing the "Other Necessary Expense" allowances that are similarly provided for in § 707(b)(2)(A)(ii)(I). The IRS sets out its National Standards according to "number of persons," without referencing either "family" or "household" size. See the set of general expense allowances listed at http://www.irs.gov/businesses/small/article/0,,id=104627,00.html and the health care costs listed at http://www.irs.gov/businesses/small/article/0,,id=173385,00.html. For the Local Standard housing allowances, the IRS provides differing amounts depending on "family" size. See, e.g., the allowances for the District of Columbia listed at http://www.irs.gov/businesses/small/article/0,,id=104741,00.html.

For all three sets of allowances, the IRS indicates that the number of persons or family size is determined according to the number of dependents that the debtor claims. In the web

page cited above for the general National Standard allowances, the IRS states: "Generally, the total number of persons allowed for National Standards should be the same as those allowed as exemptions on the taxpayer's most recent year income tax return." The health care web page states: "Taxpayers and their dependents are allowed the standard amount monthly on a per person basis . . . ." And the housing web pages, as reflected in the D.C. example cited above, repeat the direction from the general National Standards list: "Generally, the total number of persons allowed for determining family size should be the same as those allowed as exemptions on the taxpayer's most recent year income tax return."

The Internal Revenue Manual itself is consistent with the dependent-focused instructions accompanying the lists of deduction amounts, as reflected in the following excerpts:

> § 5.15.1.7.8. Generally, the total number of persons allowed for national standard expenses should be the same as those allowed as exemptions on the taxpayer's current year income tax return. Verify that exemptions claimed on the taxpayer's income tax return meet the dependency requirements of the IRC. There may be reasonable exceptions. Fully document the reasons for any exceptions. For example, foster children or children for whom adoption is pending.

> § 5.15.1.8.7. Taxpayers and their dependents are allowed the [out-of-pocket health care] standard amount monthly on a per person basis, without questioning the amounts they actually spend.

> § 5.15.1.9.1.A. Generally the total number of persons allowed for determining family size [for Local Housing and Utilities allowances] should be the same as those allowed as exemptions on the taxpayer's most recent year tax return. There may be reasonable exceptions, such as foster children or children for whom adoption is pending.

Forms 22A and 22C deviate from the dependent-focused application of the National and Local Standards by directing the debtor to use "household" size without regard to whether the members of the debtor's household are dependents of the debtor. This can result in both under- and over-inclusiveness compared to the IRS instructions. The forms are under-inclusive in situations in which a debtor has dependents who are not members of the debtor's household (for

example, a dependent child living in a residential-care facility or with a former spouse). The forms are over-inclusive in situations in which the members of the debtor's household are not dependents of the debtor (for example, the self-sufficient parents of an adult debtor who lives in their home).

The Subcommittee recommends making the forms reflective of the IRS application of the National and Local Standards by making the following changes in the forms.

• In Line 19A of Form 22A and Line 24A of Form 22C: "Enter in Line 19A [24A] the 'Total' amount from IRS National Standards for Food, Clothing and Other Items for the applicable ~~household size~~ number of persons. (This information is available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court.) The applicable number of persons is the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support."

• In Line 19B of Form 22A and Line 24B of Form 22C: "Enter in Line b1 the ~~number of members of your household~~ applicable number of persons who are under 65 years of age, and enter in Line b2 the ~~number of members of your household~~ applicable number of persons who are 65 years of age or older. (The applicable number of persons in each age category is the number in that category that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.) ~~(The total number of household members must be the same as the number stated in Line 14b.)~~ Multiply Line a1 by Line b1 to obtain a total amount for persons under 65, and enter the result in Line c1. Multiply Line a2 by Line b2 to obtain a total amount for persons 65 and older, and enter the result in Line c2."

• In Line 20A of Form 22A and Line 25A of Form 22C: "Enter the amount of the IRS Housing and Utilities Standards; non-mortgage expenses for the applicable county and ~~household~~ family size. (The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.)"

• In Line 20B of Form 22A and Line 25B of Form 22C: "Enter . . . the amount of the IRS Housing and Utilities Standards; mortgage/rent expense for your county ~~and household~~ family size. (The applicable family size consists of the number that would currently be allowed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support.)

COMMITTEE NOTE

Form 22A, lines 19A, 19B, 20A, and 20B, and Form 22C, lines 24A, 24 B, 25A, and 25B, are amended to delete the terms "household" and "household size" and to replace them with "number of persons" or "family size." Under § 707(b)(2)(A)(ii)(I) means test deductions for food, clothing, and other items and for health care are permitted to be taken in the amounts specified in the IRS National Standards, and deductions for housing and utilities are permitted in the amounts specified in the IRS Local Standards. The IRS National Standards are based on numbers of persons, not household size. Similarly, the IRS Local Standards are based on family, not household, size. The IRS itself determines the applicable number of persons or family size for these purposes according to the number of dependents that the debtor claims for federal income tax purposes.

Allowing the specified deductions to be based on household size leads to results that are both over-inclusive and under-inclusive. If a debtor has dependents who are not members of the debtor's household, an instruction that the debtor's deduction take into account only household members results in a smaller deduction than the IRS standards allow. On the other hand, if a debtor lives in a household with persons the debtor does not support, allowing deductions to be based on household size results in a greater deduction than the IRS standards permit.

In order for Forms 22A and 22C to reflect more accurately the manner in which the specified National and Local Standards are applied by the IRS, the references to “household” and “household size” are deleted, and the substituted terms—“number of persons” and “family size”—are defined in terms of exemptions on the debtor’s federal income tax return and other dependents.

TAB 4-C

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: MORTGAGE PAYMENTS IN CHAPTER 13 CASES

DATE: AUGUST 27, 2008

Judge Wedoff raised for consideration by the Subcommittee whether there is a need for a national rule that would provide procedures for the disclosure of and adjudication of disputes regarding postpetition mortgage fees and charges in chapter 13 cases. A working group of the Subcommittee was formed to give further thought to this issue and to present its suggestions for discussion during the Subcommittee's August 14 conference call. **Based on its discussions and careful consideration of the issue, the Subcommittee recommends that Rule 3001(c) be amended and that a new Rule 3002.1 be adopted to provide a uniform, national procedure in chapter 13 cases for the disclosure of postpetition mortgage fees, expenses, and charges and other amounts required to be paid to cure arrearages and maintain mortgage payments pursuant to § 1322(b)(5).** The Subcommittee suggests that this proposal be forwarded to the Standing Committee with the recommendation that preliminary drafts of these rule changes be published for comment in August 2009.

This memorandum provides some background information about the problem and approaches that have been attempted or suggested to address it, the reasons for recommending national rules on the subject, and the Subcommittee's proposal for amendments to Rule 3001(c) and new rule 3002.1.

The Problem

The problem that has arisen in chapter 13 cases throughout the country was well

described by Judge Magner in a recent decision:

> A debtor that completes his plan by paying off his lender's entire arrearage and postpetition installments may find himself in foreclosure the day after a discharge is granted, based on unpaid and undisclosed post confirmation charges and fees. This result is clearly at odds with the notion of providing a successful debtor a fresh start.

Jones v. Wells Fargo Home Mortgage (*In re* Jones), 366 B.R. 584, 596 (Bankr. E.D. La. 2007). The central cause of this problem is the lack of notice of the assessment of postpetition fees and charges by mortgage lenders and servicers ("mortgagees"). These undisclosed charges, which the mortgagees say are authorized by the mortgage agreement, include attorneys fees, bankruptcy fees, late fees, inspection fees, and others.[1] In some cases, mortgagees have applied payments that were intended to cure arrearages or to maintain the current monthly mortgage obligation to these postpetition charges, thus leading to claims of default under the plan. In other cases the postpetition charges have not been revealed until after the debtor has emerged from chapter 13, believing that she is current on all her mortgage payments. If the debtor is unable to pay these amounts, she faces foreclosure notwithstanding the successful completion of her plan. Moreover, because the charges were not disclosed while the case was pending, the debtor was deprived of the opportunity to dispute their legitimacy in the bankruptcy court, as well as the opportunity to modify her plan to provide for payment of any appropriate charges.

Current Approaches to Address Problem

A variety of approaches have been either adopted or proposed by different groups to prevent chapter 13 debtors from being blindsided by undisclosed mortgage charges.

---

[1] Additionally, in some cases debtors have alleged that the mortgagees have assessed, either during the bankruptcy case or afterwards, prepetition charges that were not included in their proofs of claim.

1. Proposed federal legislation. The problem of undisclosed mortgage fees in chapter 13 has been brought to the attention of Congress, and several bills have been introduced that address the issue. So far neither house has voted on any of the bills, and the prospect for enactment of such legislation remains uncertain.

H.R. 3609, as amended by the Conyers-Chabot Substitute and reported favorably out of the House Judiciary Committee, contains a provision that is also included in two Senate bills, S. 2136 (reported favorably out of the Committee on the Judiciary) and S. 2636 (placed on the Senate legislative calendar). In almost identical language these bills contain provisions entitled "Combating Excessive Fees" that would amend § 1322(c) of the Bankruptcy Code to require mortgagees to file notice with the court of any fees, costs, or charges that arise during the pendency of the case. That notice would have to be filed no later than one year after the charges were incurred or sixty days before the conclusion of the case, whichever is earlier. These charges could be added to the secured debt provided for by the plan only if they were "lawful, reasonable, and provided for in the underlying contract." If the mortgagee failed to provide timely notice of the charges, that failure would constitute a waiver of a claim for the charges "for all purposes," and any attempt to collect the charges would constitute a violation of the automatic stay or discharge injunction.

These bills therefore seek to combat the problem by requiring the mortgagee to provide notice of postpetition charges while the chapter 13 case is pending, giving the court authority to determine the extent to which the charges are "lawful, reasonable, and provided for in the underlying contract," and prohibiting the collection of the charges if the required notice is not provided. Unfortunately, the timing provision of the bills is flawed. Because the date on which

a chapter 13 case is closed is not a specified day or one knowable in advance,[2] it would impossible for a mortgagee or anyone else to know when the deadline of "60 days before the conclusion of the case" had arrived.[3]

2. Approaches in the bankruptcy courts: local rules, standing orders, model plans, and court decisions. Attempts to address the problem that have actually been implemented have occurred at the bankruptcy court level. A majority of the bankruptcy courts that have imposed a requirement of disclosure of mortgage charges in chapter 13 cases have tied the requirement to the seeking of relief from the automatic stay. A few courts, however, have adopted model plan provisions requiring periodic or final itemized reports by the mortgagee of postpetition mortgage obligations. Finally, some courts have in specific cases granted relief for debtors against mortgagees who have attempted to collect undisclosed pre- or postpetition charges. The discussion that follows provides some examples of the main approaches that courts are currently taking but does not purport to be a comprehensive review of all the variations among the districts.

a. Disclosure in connection with relief from stay motions. One example of this approach is provided by the recent General Order issued by the bankruptcy judges in the Southern District of New York. This order requires mortgagees seeking relief from the automatic stay in chapter 13 cases (as well as chapter 7 and 11 cases filed by individuals) to attach to their motion a

---

[2] Under Rule 5009 there is a presumption that a chapter 13 case has been fully administered, thus allowing the case to be closed under § 350, if 30 days passes after the trustee files a final report and final account and no objection has been filed.

[3] Some current and former members of the Advisory Committee have also expressed concern about the inclusion of filing deadlines in the legislation, believing that to be a procedural matter more appropriately left to the rule making process.

completed worksheet issued by the court as a local form. Among other things, this worksheet requires the disclosure of information regarding the amount of the alleged postpetition default, including the following information: when each missed payment was due; the amount due; the amount received; the amount applied to principal; the amount applied to interest; the amount applied to escrow; and the amount of any late fee charged. The movant must also state the following postpetition charges it seeks from the debtor: attorney's fees in connection with the motion; its filing fee for the motion; and any other postpetition attorney's fees, inspection fees, appraisal fees, forced placed insurance provided by the movant, other advances or charges, and the amount held in suspense by the movant.

Although the General Order does not state the consequence to the mortgagee of not providing the required information, presumably a failure to comply would result in denial of the motion for relief from the stay. The debtor, of course, may dispute any of the asserted amounts in his opposition to the motion.

The approach of tying disclosure of postpetition charges to entitlement to relief from the automatic stay is aimed at ensuring that debtors who are making payments under their chapter 13 plans and directly to mortgagees will not lose their houses during the pendency of the case based on unknown or erroneous charges or application of payments. The mortgagee must reveal in detail the basis for the claim of default, including how payments have been applied and what postpetition charges have been assessed. The court is then in a position to rule on any disputes over these allegations. This approach, however, does not address the situation of a mortgagee who waits until after the bankruptcy case is successfully completed and the stay is terminated – at which point the debtor believes that the mortgage is current – to declare a default and initiate

foreclosure. As described below, some courts have imposed a disclosure requirement to deal with that situation.

b. Periodic or final disclosure requirement. The Bankruptcy Court for the Northern District of Illinois has adopted a mandatory model chapter 13 plan that contains several provisions concerning the home mortgage obligation and imposes a final disclosure requirement on the mortgagee. First it provides that if the debtor makes all payments to cure the prepetition arrearages in the amount specified in the plan and all required postpetition payments, "the mortgage will be reinstated according to its original terms, extinguishing any right of the mortgagee to recover any amount alleged to have arisen prior to the filing of the petition."

Second the plan requires the trustee within thirty days of making the final cure payment to serve a notice on the mortgagee, debtor, and debtor's attorney that sets out the following consequences of the completion of those payments:

- all prepetition obligations to the mortgagee have been satisfied;
- the mortgagee is required to treat the mortgage as fully current unless the debtor has failed to make timely payment of postpetition obligations;
- if the debtor has failed to make timely payment of any postpetition obligation, the mortgagee must "itemize all outstanding payment obligations as of the date of the notice, and file a statement of these obligations with the court," with notice to the trustee, the debtor, and the debtor's attorney, within sixty days of the service of the notice by the trustee;
- if the mortgagee fails to file such a statement within the required time, it is "required to treat the mortgage as reinstated according to its original terms, fully current as of the date

of the trustee's notice;"

• if the mortgagee does file such a statement within the required time, the debtor may challenge the accuracy of the statement within thirty days of its service by filing a motion with the court, in which case the court will resolve the challenge as a contested matter; and

• the debtor may propose a modified plan to pay any additional amounts that the debtor does not contest or that the court finds to be due.

Finally the model plan provides that any postpetition costs of collection, including attorney's fees, that are incurred before completion of the cure payments may be added to the cure amount on court order; otherwise, they must be sought under the procedure for postpetition charges described above.

The Northern District of Illinois plan requires disclosure at the end of the case (after all cure payments have been made) and declares the mortgage to be current if outstanding amounts are not revealed or are not sustained by the court. That procedure is intended to ensure that a debtor who successfully completes a plan will emerge from bankruptcy with a fully current mortgage. These provisions alone, however, do not address the need for disclosure of postpetition charges when the mortgagee seeks relief from the stay during the case due to the debtor's alleged default on his payments. The Central District of California plan, by contrast, has a model plan addendum that requires periodic reporting throughout the case. It therefore provides for the disclosure of information that will be relevant in both the relief-from-stay situation and the post-bankruptcy attempt to foreclose.

c. Bankruptcy court decisions. Unlike the districts discussed above that have adopted

generally applicable requirements for the disclosure of postpetition mortgage charges, some bankruptcy courts as the result of litigation have imposed such requirements on particular mortgagees or have recognized debtors' causes of action against particular mortgagees for collecting undisclosed charges during or after the chapter 13 case. This section discusses two of those decisions and illustrates the diversity of opinion that exists concerning the bankruptcy courts' authority in this area.

Perhaps the most far-reaching decision is Judge Elizabeth Magner's decision in Jones v. Wells Fargo Home Mortgage (*In re* Jones), 366 B.R. 584 (Bankr. E.D. La. 2007). The chapter 13 debtor in that case confirmed a plan under which the trustee was to remit payments to Wells Fargo to cure the prepetition arrearages, and the debtor was to pay directly to Wells Fargo the current mortgage payments and an agreed-upon amount to cure a postpetition default. After the debtor received court permission during the case to refinance the mortgage, it received a payoff statement from Wells Fargo indicating without explanation an amount greater than the debtor had expected. In order to go forward with the refinancing, the debtor paid Wells Fargo the specified payoff amount, but he later filed an adversary proceeding to recover excess funds paid.

Judge Magner ruled in the debtor's favor. First the court held that Wells Fargo had miscalculated the prepetition past-due balance and that it had improperly collected prepetition charges that were not included in its proof of claim. Second the court held that, contrary to the terms of the plan, Wells Fargo had applied current monthly mortgage payments to prepetition arrearages, thus creating a postpetition default and allowing it to collect interest to which it was not entitled. The court further held that Wells Fargo was not entitled to collect any attorney's fees incurred during the postpetition, preconfirmation period because it had not sought approval

of these fees under § 506(b) and Rule 2016(a). Judge Magner also disallowed Wells Fargo's entitlement to post-confirmation attorney's fees and charges because it had failed to sustain its burden of proving that the fees and charges were reasonable, as required by state law and the loan agreement.

Turning to the remedy to which the debtor was entitled, Judge Magner held that Wells Fargo had committed a willful violation of the automatic stay. According to the court, "Wells Fargo's failure to disclose other fees or request permission of the Court to seek their payment from estate property resulted in an illegal collection of fees not due from estate property and violated the automatic stay." 366 B.R. at 600. Judge Magner stressed that the mortgagee in this case had not just assessed postpetition charges, but had actually collected them from payments intended for other purposes, thus violating the confirmation order as well. As a matter of state law, the debtor was entitled to a return of the amounts paid that the court had disallowed. Furthermore, under § 362(k) the debtor was entitled to recover his actual damages, including costs and attorney's fees.

In a subsequent opinion, 2007 WL 2480494 (Aug. 29, 2007), Judge Magner awarded the debtor over $67,000 in attorney's fees and costs pursuant to §§ 362(k) and 105(a). The court then concluded that an additional sanction was warranted for Wells Fargo's "egregious" conduct, actions that the mortgagee admitted "were part of its normal course of conduct, practiced in perhaps thousands of cases." *Id.* at * 4. Rather than awarding punitive damages, however, the court accepted Wells Fargo's alternative proposal "to revise its practices in connection with all loans administered in the Eastern District of Louisiana."

The proposal that the court accepted and ordered Wells Fargo to follow requires the

mortgagee to file annually with the court, deliver to each of its chapter 13 debtors in the district, and serve on debtor's counsel and the trustee a statement itemizing all charges or fees that Wells Fargo alleges have accrued in the previous calendar year. The statement in each case must be filed, delivered, and served between January 1 and February 28, and the debtor may file an objection to any charges by March 31. In the absence of an objection, the listed charges will be approved by the court. The failure of Wells Fargo to file an annual statement in any case will constitute an admission that no charges accrued during the previous year. When a chapter 13 case is successfully completed, Wells Fargo must submit a final statement at least 10 days before the entry of a discharge order. This statement must itemize all postconfirmation charges that have accrued since January 1 of that year.

Other bankruptcy courts have agreed with some aspects of the *Jones* decisions. *See, e.g.*, Sanchez v. Ameriquest Mortgage Co. (*In re* Sanchez), 372 B.R. 289 (Bankr. S.D. Tex. 2007) (holding that postpetition, preconfirmation charges were per se unreasonable because of failure to file Rule 2016 application, postconfirmation charges were per se unreasonable because of failure to disclose them, and that the mortgagee violated the automatic stay by applying payments of estate property to the disallowed postpetition charges); Padilla v. Wells Fargo Home Mortgage, Inc. (*In re* Padilla), 379 B.R. 643 (Bankr. S.D. Tex. 2007) (rejecting view that erroneous application of plan payments violates the automatic stay, but holding that mortgagee must file Rule 2016 application for all postpetition fees and expenses, that application of payments to charges not allowed by contract and state law violates the confirmation order, and that debtor is entitled to disgorgement or damages for wrongful collection of postpetition charges). According to a February 21, 2008 memo from Meredith Mathis of the Bankruptcy

Court Administrative Division of the Administrative Office of the U.S. Courts, at least nine bankruptcy courts in addition to the Eastern District of Louisiana have created a CM/ECF event that allows a limited group of users to notice changes in mortgage payments.[4]

A recent decision by former Advisory Committee member Judge Eric Frank, by contrast, rejected the existence of a requirement under current law for a mortgagee to give notice or seek court approval of postpetition charges for which payment will be demanded after the bankruptcy case is closed. In Padilla v. GMAC Mortgage Corp. (*In re* Padilla), 389 B.R. 409 (Bankr. E.D. Pa. 2008), a chapter 13 debtor sought relief on several grounds against GMAC because of its collection of several previously undisclosed bankruptcy costs and fees when she sold her house immediately after emerging from bankruptcy. Judge Frank largely rejected the debtor's claims.[5] He rejected all of the claims that GMAC violated the discharge injunction by its collection of the fees, since the debtor received no discharge of this § 1322(b)(5) debt. He also declined to entertain a claim of contempt of the confirmation order. Even if a creditor acts contrary to the terms of a confirmed plan, Judge Frank reasoned, contempt does not lie because "the confirmation order is not a coercive court order directing creditors to act in conformity with the terms of a confirmed plan." *Id.* at 420.

Most significantly the court rejected the debtor's claim that GMAC violated the terms of

---

[4] Ms. Mathis reported that mortgagees are using CM/ECF to notice changes in mortgage payments in the four of the nine courts in which chapter 13 trustees make the mortgage payments, but are not using the system in the other five districts in which debtors make the payments directly.

[5] Even though it apparently was not clear exactly when the fees were incurred, the court accepted the debtor's attorney's representation that they were limited to fees incurred either prepetition or postpetition, preconfirmation.

the plan and § 1327(a) by collecting attorney's fees that it had failed to disclose or obtain court approval for during the case. Judge Frank's thorough analysis of the Code and Bankruptcy Rules revealed to him no provision that imposed an obligation on the mortgagee to either disclose or gain approval of these postpetition fees. In the absence of such a duty, there could be no waiver of the fees or violation of the terms of the plan. While he agreed with the *Jones* decision that from a policy standpoint "the bankruptcy system should impose disclosure and/or other procedural requirements on a secured creditor's right to assess legal expenses postpetition in a case in which the creditor's claim is being treated and cured in a confirmed chapter 13 plan," he disagreed that either §§ 506(b) or 1322(b)(5) or any other Code provision imposed those obligations. Neither provision imposes any procedural deadline for disclosing or seeking the payment of fees in a case in which the secured debt is to be cured and maintained under the plan. Judge Frank reasoned that "[because there is no discharge and the parties' contract passes through the chapter 13 case unaffected, it follows that after the conclusion of the bankruptcy case the secured creditor may collect all charges lawfully falling due under the contract that were not paid during the pendency of the bankruptcy plan." *Id.* at 440.

Judge Frank also rejected the argument accepted in *Jones* and the Texas *Padilla* case that Rule 2016 imposes a duty on the mortgagee to seek judicial approval of the postpetition fees and charges. At no point did GMAC seek payment of these fees from the estate, as required for the rule to apply; instead it only sought payment from the debtor after the estate had ceased to exist. Additionally, the court pointed out, unlike some other districts, there is no local rule or standing order in the Eastern District of Pennsylvania that requires disclosure or court approval of postpetition mortgage charges.

The one claim that the court did not dismiss was the debtor's claim that GMAC violated the Bankruptcy Code by collecting prepetition charges not included in its proof of claim after the debtor had cured the prepetition default under the plan. Judge Frank held that this conduct was inconsistent with the terms of the plan and therefore violated § 1327(a), which makes the plan binding on creditors. He also held that the violation is redressable by the court under § 105(a).

3. Best practices. Another effort to regulate postpetition mortgage charges has been undertaken by a subcommittee of the National Association of Chapter Thirteen Trustees ("NACTT") that also includes mortgage servicers, mortgagees, and creditors' counsel. They have produced a document entitled "Best Practices for Trustees and Mortgage Servicers in Chapter 13." This approach sets forth practices that it is hoped trustees and mortgagees will agree to follow on a voluntary basis.

More than two pages of suggested practices are included in the document, but among them are the following of particular relevance:

- The mortgagee should provide the debtor and file with the court a notice of and reason for any payment change.
- The mortgagee should annually provide the debtor and file with the court an escrow analysis and a notice of any payment change based on that analysis.
- The mortgagee should attach a statement to a formal notice of payment change that itemizes all postpetition costs and fees not previously approved by the court and that have become due since the prior escrow analysis or date of filing. If there is no objection to these charges, the trustee should take steps to provide for their payment under the plan (either as a separate or amended arrearage claim or by means of a modified plan).

• The mortgagee should monitor postpetition payments and should not seek to recover late fees unless a delay in payment is due to actual debtor default, rather than systemic delay.

• Payments should be properly applied to prepetition arrearages or ongoing mortgage payments, as the case may be, and the trustee's voucher should indicate the purpose of any payment.

• At the close of the case or entry of discharge, in jurisdictions in which trustees make all the mortgage payments, the mortgagee should review the trustee web site or the National Data Center ("NDC") to determine if there are any payment discrepancies with its accounting system.

The Subcommittee was informed that, because of their desire for uniformity of practice throughout the country, some of the largest mortgagees have indicated that they will comply with these best practices. Because of the voluntary nature of this approach, however, no mortgagee can be forced to comply, and there are no consequences for a failure to do so.

4. A model local rule. A committee of the National Conference of Bankruptcy Judges, headed by Judge Ray Lyons of the District of New Jersey, intends to draft a model rule governing the disclosure of postpetition mortgage charges that could be adopted as a local bankruptcy rule by districts throughout the country. This rule, which has not yet been drafted, is intended to be mandatory and to provide consequences for noncompliance. It will also provide time limits for the raising of objections to any mortgage fees by the debtor.

Should There Be a National Bankruptcy Rule Requiring the Disclosure of Postpetition Mortgage Charges in Chapter 13 Cases?

The problem of undisclosed and sometimes questionable postpetition mortgage charges is affecting chapter 13 cases nationwide. Currently the only mandatory procedures regulating the disclosure of those charges are ones imposed by various local rules, forms, standing orders, and court decisions. Many districts have yet to adopt any procedures, and in others they are limited to the relief-from-stay situation. Even among the districts that require disclosure of charges before the closing of the case, there are significant differences in the timing and the nature of the disclosure that is required. This lack of uniformity presents difficulties for national lenders and provides uneven protection for debtors around the country. With the prospect for congressional action to address the problem uncertain, a national bankruptcy rule providing a uniform procedure in all bankruptcy courts seems desirable.

A proposal for any such rule that requires disclosure and provides consequences for the failure to comply may face arguments that the rule is inconsistent with § 1322(b)(2)'s prohibition of the modification of home mortgages and that it exceeds the rule making authority under 28 U.S.C. § 2075. The Subcommittee believes that these arguments are without merit. Section 1322(b)(2), of course, is subject to § 1322(b)(5), which allows a plan to "provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending." In order for debtors to take full advantage of the option that § 1322(b)(5) provides, they and the trustees must know throughout the case the amount that is in default and the current amount of the payments that are being maintained. A rule that imposes requirements for the disclosure of this information in a chapter 13 case does not unlawfully modify the mortgage; it merely

provides a procedure, much like a discovery provision, that facilitates implementation of the cure and maintenance provision. As Judge Frank noted in the *Padilla* case:

> The debtor's performance of the postpetition contractual obligations takes place within the context of a court supervised financial rehabilitation process. Any assessments by the secured creditor for legal [or other] expenses incurred postpetition constitute part of the amount necessary to cure the default and directly impact the debtor's prospects for a successful chapter 13 rehabilitation. The failure to notify the debtor can have pernicious consequences.

389 B.R. at 437.

Judge Frank went on to determine that § 1322(b)(5) itself does not impose a disclosure duty or a procedural deadline on mortgagees. He pointed out, however, that "there are other mechanisms for establishing those requirements. . . . If a procedural vacuum exists that needs to be filled, it is more appropriate to do so either through the enactment of rules of court or the confirmation of chapter 13 plans that include necessary and appropriate procedural provisions addressing the subject matter." *Id.* at 441-42 (footnotes omitted). Because, as he explains, bankruptcy courts are divided over whether to confirm plans containing such procedural requirements (*see id.* at 442 n.57), the adoption of a bankruptcy rule is the only way to achieve a uniform solution (unless Congress enacts a statutory provision).

Proposal for National Bankruptcy Rules

The Subcommittee recommends that the problem of disclosure of the amounts that must be paid to cure prepetition mortgage defaults and to maintain mortgage payments during the course of a chapter 13 cases be addressed in two rules. First the Subcommittee recommends the following amendment to Rule 3001(c) to address the information that must be provided in a proof of claim regarding amounts claimed in addition to principal, amounts required to cure prepetition defaults, and the status of escrow accounts.

RULE 3001. Proof of Claim

* * * * *

(c) SUPPORTING INFORMATION.

(1) *Claim Based on a Writing*. When a claim, or an interest in property of the debtor securing the claim, is based on a writing, the original or a duplicate shall be filed with the proof of claim. If the writing has been lost or destroyed, a statement of the circumstances of the loss or destruction shall be filed with the claim.

(2) *Additional Statements Required.*

(A) If, in addition to its principal amount, a claim includes interest, fees, expenses or other charges incurred prior to the date of the petition, an itemized statement of the interest, fees, expenses, or charges shall be filed with the proof of claim.

(B) If a security interest is claimed in property of the debtor, the proof of claim shall include a statement of the amount necessary to cure any default as of the date of the petition.

(C) If a security interest is claimed in property that is the debtor's principal residence and an escrow account has been established in connection with the claim, the proof of claim shall be accompanied by an escrow account statement prepared as of the date

of the filing of the petition, in a form consistent with applicable nonbankruptcy law.

(3) *Failure to Provide Supporting Information.* If the holder of a claim fails to provide the information required in subdivision (c) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

* * * * *

COMMITTEE NOTE

Subdivision (c) is amended to prescribe with greater specificity the supporting information required to accompany a proof a claim and the consequences of failing to provide the required information. When the holder of a claim seeks to recover – in addition to the principal amount of a debt – interest, fees, expenses, or other charges, the proof of claim must be accompanied by a statement that itemizes these additional amounts. The itemization must be sufficiently specific to make clear the basis for the claimed amount.

If a claim is secured by property of the debtor and the debtor defaulted on the claim prior to the filing of the petition, the proof of claim must be accompanied by a statement of the amount required to cure the prepetition default. In the case of a claim secured by the debtor's principal residence, if an escrow account has been established in connection with the claim, the proof of claim must be accompanied by an escrow account statement showing the account balance and any amount owed as of the date

of the filing of the bankruptcy petition. The statement shall be prepared in a form consistent with the requirements of nonbankruptcy law. *See, e.g.,* 12 U.S.C. § 2601 *et seq.* (Real Estate Settlement Procedure Act).

A creditor who files a proof of claim and fails to provide any of the information required by subdivision (c) will be subject to the imposition of sanctions by the court. The creditor will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may also or instead of the specified sanction award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information.

The Subcommittee also recommends the adoption of the following new rule, Rule 3002.1, which would prescribe disclosure requirements for postpetition fees, expenses, and charges and other changes in mortgage payment amounts while a chapter 13 case is pending.

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

(a) NOTICE OF PAYMENT CHANGES. In a chapter 13 case, if a claim provided for under the debtor's plan is secured by a security interest in the debtor's principal residence, the holder of such claim shall file and serve on the debtor, debtor's counsel, and the trustee notice of any change in the payment amount, including changes that result from interest rate and escrow account adjustments, at least 30 days before a payment at a new amount is due.

(b) FORM AND CONTENT. Any notice filed and served pursuant to subdivision (a) of this rule (1) shall conform substantially to the form of notice under applicable nonbankruptcy law and the underlying agreement that would be given if the debtor were not a debtor in bankruptcy, and (2) shall be filed as a supplement to the holder's proof of claim.

(c) NOTICE OF FEES, EXPENSES, AND CHARGES. In a chapter 13 case, if a claim provided for under the debtor's plan is secured by a security interest in the debtor's principal residence, the holder of such claim shall file and serve on the debtor, debtor's counsel, and the trustee notice containing an itemization of all fees, expenses, or charges incurred in connection with the security interest after the filing of the bankruptcy case. The notice shall be filed as a supplement to the holder's proof of claim and sent within 30 days of the date when such fees, expenses, or charges are incurred. On motion of the debtor or trustee filed no later than one year after service of the notice given pursuant to this subdivision, after notice and hearing, the court shall determine whether such fees, expenses, or charges are required by the underlying agreement and applicable nonbankruptcy law for the curing of the default or the maintenance of payments in accordance with § 1322(b)(5) of the Code.

(d) NOTICE OF FINAL CURE PAYMENT. Within 30 days of making the final payment of any cure amount made on a claim secured by a security interest in the debtor's principal residence, the trustee in a chapter 13 case shall file and serve upon the holder of the claim, the debtor, and debtor's counsel a notice stating that the amount required to cure the default has been paid in full.

(e) RESPONSE TO NOTICE OF FINAL CURE PAYMENT. Within 21 days of service of the notice given pursuant to subdivision (d) of this rule, the holder of a claim secured by a security interest in the debtor's principal residence shall file and serve a statement indicating whether the debtor has paid in full the amount required by the underlying agreement and applicable nonbankruptcy law for the curing of the default and the maintenance of payments in accordance with § 1322(b)(5) of the Code. If applicable, the statement shall contain an itemization of any required cure or postpetition payments that the holder contends remain unpaid in connection with the security interest as of the date of the statement. The statement shall be filed as a supplement to the holder's proof of claim.

(f) MOTION AND HEARING. On motion of the debtor or trustee filed no later than 21 days after service of the statement

given pursuant to subdivision (e) of this rule, after notice and hearing, the court shall determine if the debtor has cured the default and paid in full all postpetition amounts required by the underlying agreement and applicable nonbankruptcy law in connection with the security interest.

(g) FAILURE TO NOTIFY. If the holder of a claim secured by a security interest in the debtor's principal residence fails to provide information required by subdivision (a), (c), or (e) of this rule, the holder may not present that information, in any form, as evidence in any hearing or submission in any contested matter or adversary proceeding in the case, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, after notice and hearing, may award other appropriate relief, including reasonable expenses and attorney's fees caused by the failure.

COMMITTEE NOTE

This rule is new. It is added to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor's plan.

In order to be able to fulfill the obligations of § 1322(b)(5), a debtor and the trustee must be informed of the exact amounts needed to cure any prepetition arrearage, *see* Rule 3001(c)(2), and the amounts of the postpetition payment obligations. If the latter amounts change over time, due to the adjustment of the interest rate, escrow account adjustments, or the assessment of fees, expenses, or other charges, notice of those changes in payment

amount needs to be conveyed to the debtor and trustee. Timely notice of these changes will permit the debtor or trustee to challenge the validity of any such charges, if necessary, and to adjust postpetition mortgage payments to cover any properly claimed adjustments. Compliance with the notice provisions of the rule should also eliminate any concern on the part of the holder of the claim that informing a debtor of changes in postpetition payment obligations might violate the automatic stay.

Subdivision (a) requires the holder of a claim secured by the debtor's principal residence to notify the debtor, debtor's counsel, and the trustee of any postpetition changes in the mortgage payment amount. This notice must be provided at least 30 days before the new payment amount is due.

Subdivision (b) provides the method of giving the notice of a payment change. The holder of claim must give notice of the change in substantially the same form that would be used according to the underlying agreement and nonbankruptcy law if the debtor were not a debtor in bankruptcy. In addition to serving the debtor, debtor's counsel, and the trustee, as required by subdivision (a), the holder of the claim must also file the notice of payment change on the claims register in the case as a supplement to its proof of claim.

Subdivision (c) requires an itemized notice to be given of any postpetition assessment of fees, expenses, or charges in connection with a claim secured by the debtor's principal residence. Such amounts might include, for example, inspection fees, late charges, and attorneys fees. The holder of the claim must serve a notice itemizing any such postpetition fees on the debtor, debtor's counsel, and the trustee within 30 days after the charges are incurred. Notice must also be filed on the claims register as a supplement to the creditor's proof of claim.

Within a year after service of a notice under subdivision (c), the debtor or trustee may move for a court determination of whether the fees, expenses, or charges are required by the underlying agreement or applicable nonbankruptcy law to cure a default or maintain payments.

Subdivision (d) requires the trustee to issue a notice within 30 days after making the last payment to cure a prepetition default on a claim secured by the debtor's principal residence. This

notice, which must be served on the holder of the claim, the debtor, and the debtor's counsel, provides that the amount required to cure the default has been paid in full

.

Subdivision (e) governs the response of the holder of the claim to the trustee's notice. Within 21 days after service of notice of the final cure payment, the holder of the claim must file and serve a statement indicating whether the prepetition default has been fully cured and whether postpetition payments have been maintained in full in accordance with § 1322(b)(5). If the holder of the claim contends that either amount has not been paid in full, its response must include an itemization of all missed payments. The response statement of the holder of the claim must be filed on the claims register as a supplement to the creditor's proof of claim and served on the trustee, the debtor, and the debtor's counsel.

Subdivision (f) provides the procedure for the judicial resolution of any disputes that may arise about the payment of a claim secured by the debtor's principal residence. The trustee or debtor may move no later than 21 days after the service of the statement under (e) for a determination by the court of whether the prepetition default has been cured and whether all postpetition obligations have been fully paid.

Subdivision (g) specifies sanctions that may be imposed if the holder of a claim secured by the debtor's principal residence fails to provide any of the information required by subdivisions (a), (c), or (e). The holder of the claim will be precluded from introducing into evidence or submitting in any form the omitted information at any trial or hearing in the bankruptcy case, unless the failure was substantially justified or is harmless. The court in its discretion, after notice and hearing, may also or instead of the specified sanction award other appropriate relief, including costs and attorney's fees caused by the creditor's failure to provide the required information.

If, after the chapter 13 debtor has completed payments under the plan and the case has been closed, the holder of a claim secured by the debtor's principal residence seeks to recover amounts that should have been but were not disclosed under this rule, the debtor may move to have the case reopened in order to seek sanctions against the holder of the claim under subdivision (g).

During the course of the Subcommittee's deliberations, it became aware of an issue regarding the manner in which mortgagees might file notices of changes in payment or the assessment of charges during the pendency of a chapter 13 case. As some courts began imposing these disclosure requirements on mortgagees, the mortgagees sought authority from individual courts to create a CM/ECF event that would allow the mortgagees to make these filings themselves rather than through their attorneys. Although some courts have allowed this practice, the Administrative Office's Bankruptcy Judges Advisory Group ("BJAG") and Bankruptcy Clerks Advisory Group ("BCAG") have expressed concern about the burden this practice may place on the clerk's office, the cluttering of the case docket that may result, and the possible perception of favoritism of allowing only a particular group of creditors to have this access. It appears that an agreement may be reached by representatives of various groups – BJAG, BCAG, the NACTT, and representatives of mortgage creditors – that the filing could be accomplished by means of the filing of a supplemental proof of claim on the claims register with an attached statement of the payment change or charges. This notice would be served on the debtor by first class mail and electronically served on debtor's counsel and the trustee. The Subcommittee has incorporated this procedure into Rule 3002.1.

TAB 4-D

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: AUTOMATIC DISMISSALS UNDER § 521(i)

DATE: AUGUST 18, 2008

Section 521(i)(1) of the Code provides that if an individual debtor in a voluntary case fails to file all of the required information within 45 days of the date of the filing of the petition, the "the case shall be automatically dismissed effective on the 46th day after the filing of the petition." As I have noted in previous memoranda, the courts have not reached any consensus on the meaning and operation of this provision. Some courts have concluded that the provision offers little or no discretion to the courts but to dismiss a case with the dismissal order effective on the 46th day after the filing of the case. See, e.g., In re Fawson, 338 B.R. 505 (Bankr. D. Utah 2006); In re Ott, 343 B. R. 264 (Bankr. D. Col. 2006). Other courts have found the provision ambiguous and concluded that the dismissal is either not automatic, or that the order of dismissal need not be made effective on the 46th day after the filing of the petition. See, e.g., In re Hall, 368 B.R. 595 (Bankr. W.D. Tex. 2007) (court concludes that it retains the discretion to condition dismissal on a bar to refiling for bankruptcy relief for two years); In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006) (court denies debtor's motion to dismiss even though debtor failed to comply with § 521).

A rule based solution to the operation of the section would be beneficial to the bankruptcy system, but the Committee has concluded that the courts' disparate views on the effect and operation of the section make it inappropriate to "force" a solution. Instead, the

Committee has directed that we monitor developments under the statute to see if a consensus builds on the meaning of § 521(i), at which time a new or amended rule could be proposed to address the issue.

Since the last meeting of the Committee in March, 2008, a few more decisions have been issued, but no consensus appears to be building. Two district courts hearing appeals from bankruptcy court decisions have held that "automatic is automatic," and followed the decision in In re Fawson and its progeny. In both Rivera v Miranda, 376 B.R. 382 (D.P.R. 2007), and Warren v. Wirum, 378 B.R. 640 (N.D. Ca. 2007), the district courts expressly rejected what they characterized as the "minority" position that the bankruptcy courts retain discretion to withhold or deny dismissal of an individual debtor's case when that debtor has not filed the required payment advices and has not in good faith attempted to file those documents but failed to do so. Instead, they each concluded that the court was without discretion to withhold dismissal of the cases, even though a strong argument existed that the debtors would effectively be able to abuse the process by filing a case, getting the benefit of the automatic stay, and then obtain a dismissal of the case if things turned out badly for the debtor.

Even if the court determines that dismissal is required under § 521(I), the timing of the dismissal can still present a problem. In In re Spencer, 3__ B.R. ___ (Bankr. D.D.C. 2007), the court held that the debtor's failure to file necessary documents required the dismissal of the case, but the court reserved its judgment on the timing of the dismissal. The statute provides that dismissal under the section is to be "effective on the 46th day after the date of the filing of the petition." But even with this somewhat straightforward language, Judge Teel concluded that sufficient ambiguity in the provision existed to permit some other timing for the dismissal. He

withheld a decision at that time and ordered the parties to provide additional briefing on the issue. He recently issued a subsequent decision about the operation of § 521(i) in In re Spencer, 388 B.R. 418 (Bankr. D.D.C. 2008). In this decision, Judge Teel concluded that the date on which the court orders the dismissal is the date on which the dismissal is effective. Judge Teel's opinion notes that making the dismissal order effective when it is entered by the court prevents injustice by making this order on notice to all creditors who then are returned to the "race of diligence" in collecting from the debtor on equal footing. 388 B.R. at 426-27. He specifically notes the Rivera and Warren decisions and rejects their analysis.

There is no question that the courts remain divided over the proper interpretation of § 521(i). There are fewer decisions being published, likely because local practices governing the matters are now set. Nonetheless, appeals seem to be working their way through the system, and decisions in the courts of appeals could be forthcoming in the next 12 months. I have been told that both of the district court decisions are on appeal to the courts of appeals. When those decisions are issued, we may be able to address the matter by rule unless the courts of appeals adopt divergent views on the issue.

TAB 5

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

RE: NEW FORM OF PETITION TO COMMENCE A CHAPTER 15 CASE

DATE: AUGUST 22, 2008

The Advisory Committee at the meeting in St. Michaels in March directed the Subcommittee to consider whether to propose a new form of petition to commence a case under chapter 15 of the Code. The Subcommittee met by teleconference on May 22, 2008 to discuss the issue, and it was reviewed again by teleconference at the Subcommittee's meeting on August 21, 2008. The Subcommittee recommends that no new petition form to commence a chapter 15 case be proposed at this time. The Subcommittee's reasons for reaching this conclusion are set out hereafter.

The Advisory Committee received a suggestion from Bankruptcy Judge Laura Myerson Isicoff (Bankr. S.D. Fla.) that the use of Official Form 1 to commence a chapter 15 case creates problems, particularly when the debtor in the foreign case is an individual. In the case before Judge Isicoff, she noted that the use of Official Form 1 by the trustee in the case pending in the United Kingdom seemed to create a "case" in the United States, and the commencement of a case can cause problems for the debtor. For example, the debtor (who had relocated to the United States) could not use a credit card because the credit reporting agencies would have reported the filing of a US case for the individual. In fact, she suggests, a "case" is not filed. Instead, only recognition of an existing foreign case is sought by a chapter 15 petition.

The Subcommittee discussion recognized this potential problem for individual debtors, but concluded that the creation of a separate form for the commencement of chapter 15 cases is not warranted for several reasons. First, very few chapter 15 cases are filed nationwide (in 2007, 42 chapter 15 cases were filed, and 31 of these were filed in the Southern District of New York), and of this number, it is most likely that nearly all were foreign cases of corporations. Thus, rarely will a person commence a chapter 15 case for recognition of the foreign case of an individual debtor. Furthermore, when a chapter 15 petition is filed, § 1504 notes that a "case" is commenced under the chapter. Consequently, when a chapter 15 petition for recognition is filed, whether that is accomplished through the filing of Official Form 1 or some other form, the credit reporting agencies will report that a bankruptcy petition has been filed against the debtor. The reporting agencies simply report that a bankruptcy case is pending for a particular debtor, and no distinction is made in these reports as to the chapter under which the case is proceeding. This would be true as well with regard to a chapter 15 case. Creating a new petition form would not solve the individual debtor's problem that Judge Isicoff noted. Moreover, the Subcommittee concluded that creditors and other parties with a need for the information should be allowed to know that a chapter 15 case regarding the debtor is pending.

The Subcommittee also considered whether the chapter 15 case could protect the interests of the individual debtor by conducting the case under the name of the person who is serving as the representative of the foreign debtor. The Subcommittee concluded that this would not be effective. First, it would create credit reporting problems for the representative, and second, it would fail to provide notice to creditors of the debtor that the chapter 15 case was filed. The Subcommittee therefore concluded that having the case proceed under the name of the foreign

representative was not a viable solution to the problem posed by Judge Isicoff.

The Subcommittee thus concludes that chapter 15 cases should still be commenced by the filing of Official Form 1. The rarity of chapter 15 petitions, and the even more rare circumstance of a chapter 15 filed in the case of an individual debtor, along with the likelihood that credit reporting agencies would still report the debtor as "in bankruptcy" when another form of petition is filed to commence a chapter 15 case lead the Subcommittee to recommend that no new form of petition be proposed and that these cases continue to be commenced by the filing of Official Form 1.

TAB 6

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON ATTORNEY CONDUCT AND HEALTH CARE

RE: RULE 6003 AND THE EMPLOYMENT OF COUNSEL

DATE: AUGUST 26, 2008

Rule 6003 became effective on December 1, 2007. Subdivision (a) of the rule provides that the court, absent immediate and irreparable harm, cannot grant an application for the employment of a professional within 20 days after the commencement of the case. The rule was a part of the package of amendments offered to address problems that had arisen primarily in large chapter 11 cases. It provides a short breathing spell for the courts and parties in interest who often face a large volume of documents being filed on the first day of a case. The rule institutes a cooling off period that allows for the appointment of a creditors' committee and gives the court and parties time to study and consider the often voluminous materials. Other subdivisions of the rule restrict the entry of orders granting relief under Rule 4001 and for some matters under § 365.

The Bankruptcy Judges Advisory Group has raised concerns about the rule and the potential for the rule to prevent corporate debtors from being represented during the first 20 days of the case. It argues that the rule is ambiguous in that its provision that no relief can be granted during the first 20 days could be read to preclude even the entry of an order at a later date that would be effective as of a date during the cooling off period. Moreover, this limitation could be interpreted as prohibiting the entry of an order approving the appointment of counsel, thereby

even preventing an appearance of counsel on behalf of the debtor in possession. If the debtor in possession is a corporation, it may only be represented by counsel, so under this reading of the rule no representation is possible. This argument has also been raised in publications. An informal survey of several bankruptcy judges also showed that the rule has generated different procedures for the approval of applications for the employment of counsel. In one court where they historically withheld approval of Rule 2014 applications for at least 10 days, they now simply extend that another 10 days. Moreover, even though they have withheld approval in the past, they have never experienced a situation in which anyone asserted that counsel for the debtor in possession could not be heard in the interim. In another court, approval was usually given at the start of the case, but it was always understood that if a conflict were identified that would render counsel not disinterested, that the earlier order would be vacated and compensation denied. In that district, the courts have assumed that the appointment of counsel would be necessary at the start of the case and fits within the "immediate and irreparable harm" exception to Rule 6003. Finally, in another court, the approval of employment as of the date of the filing of the application had worked well in that district and was entirely consistent with Rule 6003. These disparate applications of the same rule indicate that the rule has not accomplished one of its primary goals which was to create a national procedure so that incentives to select particular venues would be reduced.

Attached as a separate memorandum is a "blog" on the rule authored by Catherine Vance. That memorandum also has links to a short article in the Bankruptcy Court Decisions Weekly Notes and Comments as well as to an order entered in In re Smith, Case No. 08-63990 (Bankr. N.D. Ga., March 17, 2008). The BCD article notes that several courts have concluded

that the need for counsel constitutes immediate and irreparable harm that justifies the approval of employment during the first 20 days of the case. The Smith decision, on the other hand, follows much more closely what the Committee intended by the rule. It concludes that the court should withhold the entry of the order approving the employment, and it recognizes that attorneys have represented parties without incident prior to the entry of an order approving the employment. The subsequent entry of the order approving the employment will protect the attorney and permit the recovery of fees for the period beginning with the filing of the application. The blog from Ms. Vance also supports this position. Nonetheless, these materials also support the conclusion that the rule does not appear to be operating in the same manner throughout the country.

The Bankruptcy Judges Advisory Group also suggested that the rule as drafted could be interpreted to reach beyond what is its likely purpose because it limits the court's ability to enter any order "regarding" the enumerated categories. Among those restricted categories are orders approving the sale of property. Again, the "immediate and irreparable harm" exception would permit a court to enter an order approving the sale of property in extraordinary circumstances. The Advisory Group noted, however, that the rule as it exists could be read to prohibit a court during the first 20 days of a case even from approving bidding procedures for a later scheduled sale because that order would be an order "regarding" a sale. The rule was intended to prohibit the court from approving the sale during the cooling off period, but it was not intended to reach as far as bidding procedures for a sale that would not be finalized until more than 20 days after the commencement of the case.

The Subcommittee considered these positions and recommends that the rule be amended to resolve any ambiguity about its scope as well as to clarify that the courts can enter orders that

would be effective on a date prior to the entry of the order. The Subcommittee was not persuaded by the arguments that corporate debtors cannot be represented without first having an employment application approved. In fact, if that were so, then the attorney appearing in the matter at the hearing on the application (or even filing the application on behalf of the debtor in possession) could be viewed as acting without authority to represent the debtor in possession. Similarly, if the debtor in possession files several "first day" requests, it is likely that they were prepared and filed by an attorney. Did that attorney act without authority? Would a court's order approving the request for relief be null and void? No published decisions could be found in which such a position was taken. In fact, we could not find a single reported decision under Rule 6003 to date.

Nonetheless, resolving the ambiguity by amending the rule also provides an opportunity to expand the Committee Note to provide some comfort to the bench and bar about the scope and operation of the rule. The Subcommittee believes that a clarifying amendment to the rule can meet the dual goals of removing an ambiguity and providing comfort without changing the intended meaning and scope of the rule. It also provides an opportunity to expand the discussion of the issue in a Committee Note that might provide additional comfort for the courts and counsel that debtors in possession need not be unrepresented in the first 20 days of a case. Finally, the Subcommittee recommends that the proposed amendment be published for comment beginning in August 2009. The recommended amendment for publication is set out below.

RULE 6003. Interim and Final Relief Immediately Following the Commencement of the Case – Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory

Contracts[1]

Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, ~~grant relief~~ issue an order granting ~~regarding~~ the following:

(a) an application under Rule 2014;

(b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; ~~and~~ or

(c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

COMMITTEE NOTE

The rule is amended to clarify that it limits the timing of the entry of certain orders, but the rule does not prevent the court from providing an effective date for such an order that may relate back to the time of the filing of the application or motion, or to some other date. For example, concerns were expressed that the rule prohibited the courts from authorizing the employment of counsel during the first 21 days of a case. The rule, however, does not prevent the court from providing in the order that the relief requested in the motion or application is effective as of a date earlier than the issuance of the order. An application or motion for relief could be filed on the first day of the case. While the court,

---

[1]Incorporates time computation amendments approved by the Committee on Rules of Practice and Procedure that are due to take effect on December 1, 2009, if the Judicial Conference and Supreme Court approve and if Congress takes no action otherwise. Accordingly, all references in the rule and Committee Note to 20 days have been changed to 21 days.

> absent immediate and irreparable harm, cannot issue an order granting that relief until 21 days after the filing of the petition, the order, when entered, can grant that relief with an effective date earlier that the date the order is entered. Moreover, nothing in the rule prevents a professional from representing the trustee or a debtor in possession pending the approval of an application for the approval of the employment under Rule 2014.
>
> The amendment also clarifies that the scope of the rule is limited to granting the specifically identified relief set out in the subdivisions of the rule. Deleting "regarding" from the rule clarifies that the rule does not prohibit the court from entering orders in the first 21 days of the case that may relate to the motions and applications set out in subdivisions (a), (b), and (c), it is only prohibited from granting the relief requested by those motions or applications. For example, in the first 21 days of the case, the court could grant the relief requested in a motion to establish bidding procedures for the sale of property of the estate, but it could not, absent immediate and irreparable harm, grant a motion to approve the sale of property.

RECOMMENDATIONS NOT ACCEPTED

The Bankruptcy Judges Advisory Group also recommended that the rule be amended to authorize the issuance of interim orders for the employment of counsel. They recommended that the rule be revised to accomplish this by applying only to final orders of employment. The Subcommittee concluded that such a change would be unnecessary given the clarifications to the rule that are being recommended. The Subcommittee also does not believe that the rule should be amended as suggested by the Bankruptcy Judges Advisory Group to make the triggering date for the rule to be the date of the filing of the application or motion rather than the date of the filing of the petition. The rule is intended to provide a breathing spell at the commencement of the case, and if the motion or application is filed thereafter, the problems presented at the beginning of the case, such as a lack of familiarity with the facts and issues, or the large volume

of matters that are pending, are not likely to be present or as significant as they may be at the commencement of the case. As for situations in which a party files a motion or application near the end of the 20 day period and then seeks expedited relief that would fall just outside the limitation period, the Subcommittee concluded that the courts can protect the interests of parties by requiring appropriate notice of the motion or application.

The Subcommittee also considered a suggestion submitted by Judge Robert Kressel (Bankr. D. Minn.), a former member of the Committee. He asked the Committee to consider whether the triggering date should be the date of the entry of the order for relief rather than the date of the filing of the petition. He noted that in an involuntary case, it is most likely that the order for relief would not be entered until long after 20 days, so the court could enter an order approving the employment of debtor's counsel on the day that the order for relief was entered. He questioned whether the Committee had considered this issue and whether it would make more sense to have the order for relief being the trigger for the 20 day cooling off period.

Judge Kressel is certainly correct when he notes that the rule operates differently when an involuntary case is presented. However, the Subcommittee does not believe that the triggering date should be changed to the date of the entry of the order for relief for several reasons. First, the purpose of the limitation on the entry of orders at the start of the case under Rule 6003 is to give the court and parties in interest time to become familiar with the issues in the case. In an involuntary case, the opposing parties are typically quite familiar with the issues by the time an order for relief is entered in the matter. Second, the debtor has already been represented by counsel throughout the case, so the continuation of that representation is not likely to pose a problem. Third, even if it later becomes known that the debtor's counsel is not disinterested, the

court can vacate the employment order and take further appropriate action in the case. Finally, there are very few involuntary cases, and amending the rule simply to resolve such a rare problem is not necessary.

MEMORANDUM

TO: Bankruptcy Rules Advisory Committee

FROM: Bankruptcy Judges Advisory Group

RE: Rule 6003

DATE: April 24, 2008

The Bankruptcy Judges Advisory Group (BJAG) respectfully offers the following comments and proposals to the Bankruptcy Rules Advisory Committee regarding the need for further clarification of Rule 6003 as it pertains particularly to the employment of professionals during the 20-day period before the entry of a retention order. The majority of members believe that clarification would be helpful, but there is a minority view that no clarification is needed.

Majority View

Rule 6003 was apparently promulgated for two purposes: (a) to reduce the likelihood of forum or venue shopping by promulgating national rules which would establish uniformity of procedures for first day orders, and (b) to provide the court and the parties with an opportunity to consider retention of professionals at a time beyond the first few days of the case.[1] Most of the BJAG members have concerns about whether the rule will accomplish either goal.

As to the goal of achieving uniformity of procedures, the range of opinions among BJAG members, as well as Judge Massey's decision in In re Russell Smith, Case No. 08-63990, Bankr. N.D. Ga (Order of March 17, 2008), demonstrate that local rules, practices and customs will continue to influence the actual results reached under the new rule among the districts and even among judges within the same district. Some judges view the retention of counsel of sufficient importance that the absence of counsel would constitute "immediate and irreparable harm" to the estate in virtually all cases. The quantity of work necessary during the first 20 days of most Chapter 11 cases (i.e. preparation of schedules, cash collateral, DIP loans, 365(d)(4) issues, etc.)

---

[1] Memorandum to Advisory Committee on Bankruptcy Rules Re: Rule 6003 by Jeff Morris, Reporter, 3/20/08.

would support such a conclusion. Some judges are likely to view the "shall not" language in the rule under a plain meaning analysis and enter no order whatsoever for at least 20 days. In those districts, counsel may believe that it is acting at its peril pending the entry of an order. This may result in a reluctance to take small or non-public company Chapter 11 cases, demands for greater retainers, or minimal work being accomplished during the first few weeks of the case. The risk to counsel may be substantial. The UST's action in Judge Massey's case demonstrates this point. A contentious major creditor or the UST may intimidate counsel from acting during the early days of the case.

The goal of uniformity in procedures for first day orders may also be frustrated by the "immediate and irreparable harm" loop hole in the rule itself. If the court finds that the lack of counsel would cause "immediate and irreparable harm," it can approve retention "to the extent necessary" to avoid such harm. Subject to the likely variance in the standards for determining immediate and irreparable harm, the spirit of the rule could be effectively negated by local practices.

The second goal of the amendment, i.e., providing the court and the parties with an opportunity to consider retention at a time beyond the first few days of a case, is furthered by the new rule. We understand that the general consensus of the Committee is that Rule 6003 allows for the employment of counsel for the debtor-in-possession from the inception of the Chapter 11 filing, that the rule only limits the timing for the entry of the order approving retention and not the timing of the commencement of the actual retention, and that there is provision for immediate entry of a retention order where immediate and irreparable harm is shown. Nevertheless, the majority of BJAG members believe that the rule as it has been enacted creates uncertainty about whether DIP counsel may serve and be paid from the date of filing, assuming that they file their application timely and are otherwise qualified to serve. The level of uncertainty is evidenced in Judge Massey's opinion in Smith, in which he resolves the matter in accordance with the Committee's understandings. To reach that outcome, however, required the expenditure of time and legal resources by the court, the U.S. Trustee and counsel for the DIP. Counsel no doubt also charged the estate for his time. As well, uncertainty is created for corporation and partnerships, who may not appear in federal court without counsel. See 28 U.S.C. § 1654.

BJAG members have outlined other concerns about the impact of the rule. While a more deliberative process for Chapter 11 retentions appears to have been the focus of the rule, the impact on Chapter 7 trustees should also

be considered. Chapter 7 trustees may need to move expeditiously to protect assets of the estate or to take other actions within 20 days of the filing of a petition. Having orders appointing counsel placed in doubt may impede trustees in the performance of their statutory duties and impose additional delay and expense on a system that is already under stress.

Another concern is the line of cases that limit the entry of a retention order nunc pro tunc absent a showing of extraordinary circumstances. See, e.g., In re Milwaukee Engraving Co., 219 F.3d 635 (7th Cir. 2000), cert. denied, 531 U.S. 1112, 121 S.Ct. 856, 148 L.Ed. 2d 770 (2001), In re Jarvis, 53 F.3d 416, 420 (1st Cir. 1995) (extraordinary circumstances needed to justify nunc pro tunc appointment); In re El Paso Refinery, LP, 37 F.3d 230 (5th Cir. 1994); In re Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir. 1983).

Also cited as problematic is the impact of the rule on the entry of such orders as those used to establish bidding procedures. Read literally, the rule bars "grant[ing] relief" even for setting up bidding procedures for a sale during the first 20 days of the case.

The discussion among BJAG members has produced several alternative proposals, as follows:

1. A recommendation to amend Rule 6003 follows:

> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, ~~grant relief~~ issue an order granting ~~regarding~~ the following:
> (a) an application under Rule 2014. . .

The Advisory Committee Note might read as follows:

> Rule 6003 is amended to clarify that it is only the issuance of an order granting the application or motion that must be delayed until more than 20 days after the filing of the petition, and that Rule 6003 does not preclude a provision in the order making the relief effective as of a date earlier than the issuance of the order. In particular, the rule is amended to clarify that in the case of an application under Rule 2014, the Rule does not bar the professional from representing the trustee or the debtor in possession during the period prior to the issuance of the order, or bar a provision in the retention order that the authorization of

employment is effective as to representation during that period. Nor does the Rule bar the granting of relief on preliminary matters such as establishing bidding procedures in connection with the proposed sale of estate property.

2. A recommendation to follow the procedural model for cash collateral and DIP loans under Rules 4001(b) and (c) by amending the rule to provide that final orders on retention applications shall be entered after no less than 20 days notice, but that interim orders may be entered on an ex parte basis if the court determines that the applicant satisfies the requirements of section 327. No immediate and irreparable harm standard for interim authorization is necessary because legal representation will be necessary in every case.

3. A recommendation that the time bar should not be from the petition date, but from the date the application is filed. This will prevent applicants from evading the rule by filing their application 10 or 15 days after the petition date and seeking approval on day 21. It is the time between notice of the application and final approval that is important, not the time between the petition date and final approval of the retention.

4. A grammatical fix to change the "and" at the end of subsection (b) to "or", to recognize that one order will not provide for the three alternatives listed. All BJAG members agree with this proposed change.

Minority View

Several BJAG members disagree that changes to Rule 6003 are needed (1) to clarify Rule 6003 as not barring compensation to professionals for the period after filing of the application and before granting of the application, (2) to provide for interim orders approving employment pending a final order, or (3) to prevent "gaming" of Rule 6003 that can arise from the filing of the application only a few days before day 21 of the case.

I

These members believe that Judge Massey's interpretation of Rule 6003 as not barring representation until the application is granted is correct. The common practice in many places is to hold retention applications for a period

of time, usually 10 or 15 days, before a retention order is entered. During this time, necessary legal work is routinely performed which is later compensated. We have not heard of a challenge to the compensation of professionals for work performed after an application is filed but before the order is entered. See In re Smith, supra, at 4 ("This Court has not been able to find a single case that states that even though the trustee filed a timely application to employ, such work undertaken prior to the entry of the order granting the application is without legal effect or otherwise improper or may not be compensated.").

Rule 6003 works appropriately whether it is a debtor in possession or a trustee who files an application to employ a professional in the first 20 days of a case. In both instances, the authorization of employment will relate back to the date of the application (if not earlier).

The judges who hold the view that the rule need not be changed are not persuaded by the cases cited above that there is any problem with Rule 6003. In re Jarvis, 53 F.3d 416 (1st Cir. 1995) addressed an application for employment filed after the professional had performed the work at issue, and held that:

> [A] bankruptcy court may grant such a *post facto* application, but only if it can be demonstrated (1) that the employment satisfies the statutory requirements, and (2) that the delay in seeking court approval resulted from extraordinary circumstances.

In re Jarvis, 53 F.3d at 418. When (1) a professional meets the statutory requirements (of disinterestedness, etc.) and (2) the application for employment is filed *before* the services are performed, it follows from Jarvis that the application can later be approved effective as of the date of its filing.[2]

In contrast, In re Milwaukee Engraving Co., 219 F.3d 635 (7th Cir. 2000), addressed a professional who, as of the filing of the application and commencement of representation of the debtor in possession, did *not* meet the statutory requirements to be employed, leading to denial of the application to

---

[2] In re Triangle Chemicals, Inc., 697 F.2d 1280 (5th Cir. 1983) also addressed the same issue as In re Jarvis. In re El Paso Refinery, LP, 37 F.3d 230 (5th Cir. 1994), is not inconsistent with Jarvis: it addressed an issue not germane to our discussion, namely, whether a law firm could obtain a vacating of an order granting an application *nunc pro tunc* to employ another professional when the order blamed the law firm for the late filing.

employ it as counsel. It may make little sense that a bankruptcy judge has discretion under § 328(c) to allow (or deny) compensation to a law firm whose disinterestedness is discovered only after the application was approved, but no such discretion in the case of a law firm whose application is denied, but as the Seventh Circuit concluded, that is the way the statutory provisions are written. As Judge Massey notes, "there will always be some risk that approval will not be forthcoming with unpleasant consequences for the firm," but that is a cost the law firm should bear in order to permit other parties a fair opportunity to investigate the employment application. In re Smith, supra, at 5. It makes no sense to engage in rushed rulings on applications in order to permit the law firm to gain the advantage of § 328(c) even though an orderly ruling on the application would result in its denial.

If the professional is aware that the application for its employment presents a question that might (or might not) lead to disqualification, the debtor in possession (or trustee) can ask for an emergency determination of that question, and the court can grant an interim determination of that question so that the work can be compensated, if appropriate under § 328(c), despite the later entry of a final determination denying the application. Although, under Rule 6003, the applicant must show that such relief "is necessary to avoid immediate and irreparable harm," and the interim order should be limited to work that is necessary to avoid such harm, that is a reasonable restriction so that interested parties have an adequate opportunity to investigate the application before a final order issues.

Sometimes a real estate broker or other sales agent will decline to perform work until the application for employment is granted, but that may be because the professional fears that the application may be opposed based on the terms of compensation sought to be approved. But if there is a possibility that the terms might not be approved, then that is all the more reason to make sure there is time for objection to the application. Moreover, in true emergency situations (meaning, in the words of the rule, "to the extent that relief is necessary to avoid immediate and irreparable harm)", Rule 6003 permits the time period to be shortened.

Nor do these judges believe that the goal of uniformity in procedures for first day orders may be frustrated by the "immediate and irreparable harm" exception in the rule itself:

- A corporation or a partnership cannot file a petition without an attorney signing the petition. Even an individual chapter 11 debtor who will need the assistance of counsel in the case is

unlikely to file a chapter 11 petition without having an attorney representing her at the outset. An attorney who signed a petition is hardly able to claim that the debtor in possession needs an order authorizing the attorney's employment in order for the debtor to have counsel and avoid "immediate and irreparable harm."

- As a practical matter, experienced chapter 11 debtor in possession counsel understand that if their employment is eventually approved, the approval will relate back to the date of the application for employment (if not earlier). Experienced counsel carefully investigate the issue of disinterestedness before taking on such representation lest they undertake substantial work only to be denied compensation because their application is later denied based on a lack of disinterestedness.

- While there may be other professionals who need to be hired in the case, their role is secondary to that of the debtor in possession's general bankruptcy counsel, and it will be a rare case in which (1) immediate employment, and (2) immediate authorization of such employment is necessary to avoid "immediate and irreparable harm."

In short, these judges do not view the "immediate and irreparable harm" exception as a "loophole" through which uniform application will be frustrated.

In an article written by the Honorable James M. Peck, U.S. Bankruptcy Judge for the Southern District of New York[3], Judge Peck recognized the recent controversy about the retention of professionals, including variation in the way Rule 6003 is being applied, but advocated literal application of the rule rather than amendment. He opined as follows:

> Debtor's professionals routinely are able to perform their duties during the early weeks of a bankruptcy case as "proposed counsel" or as "proposed financial advisors" and thereafter may

---

[3] Hon. James M. Peck, "Changes Made to 'First Day' Motion Practice by Bankruptcy Rule 6003", The Association of Commercial Finance Attorneys, Inc., 2008 Continuing Legal Education Weekend, May 15-18, 2008. The article, as well as the transcript of the discussion on Rule 6003 in In re Quebecor World (USA), Inc., Case No. 08-10152, (S.D.N.Y. January 23, 2008) are attached.

obtain orders authorizing employment on a *nunc pro tunc* basis. Rule 6003 is designed to slow things down so that creditors have the time that they need to evaluate all aspects of the case, including the qualifications of the proposed professionals. For this reason, the author advocates literal application of the rule's mandatory language governing "first day" procedure except where it would be inequitable to do so.

II

As to the second proposal of authorizing interim orders, these judges note that Rule 6003 already authorizes an interim or final order sooner than day 21 of the case "to the extent that relief is necessary to avoid immediate and irreparable harm," and believe that the "immediate and irreparable harm" requirement is a reasonable restriction. As discussed in part I, the issuance of an interim order, based on a preliminary determination that employment will be authorized despite a close call regarding disinterestedness, and limited to work that is necessary to avoid immediate and irreparable injury, protects the interests of all.

III

As to the proposal to prevent "gaming" of Rule 6003 that can arise by filing of the application only a few days before day 21 of the case, a professional faces the risks:

> (1) that his work prior to the filing of the application will not be authorized on a *nunc pro tunc* basis if there was no justification for the delay in filing the application,
>
> (2) that the court will not look benignly on the timing of the application in an apparent attempt to circumvent Rule 6003, and
>
> (3) that the court would ordinarily insist on interested parties having the usual amount of time provided by Local Bankruptcy Rule to respond to such an application.[4]

---

[4] Although the response time generally provided by Local Bankruptcy Rule for an employment application may be less than the 20 days provided by Rule 6003 for a first-day application, the point is that by day 21 of the case the court and interested parties should be in a position that the Local

Accordingly, there is no need to re-write the rule to address such "gaming" of the rule.

Despite its applicability to only the first 20 days of the case, one of the salutary benefits of Rule 6003 is that it should serve to educate the bar that regardless of the stage at which an application to authorize employment of a professional is filed, the delay in entry of an order granting that application does not mean that the professional receives no compensation for services in the limbo period (between filing of the application and the granting of the same). This should serve to discourage emergency applications based on any misperception to the contrary. And it should lead to judges refusing to grant most such applications (including those filed *after* day 20 of the case) unless the applicant gives the United States Trustee and other interested parties the usual time in the district for responding to applications for entry of an order. Accordingly, if an application *is* filed, for example, at day 18 of the case, a judge would ordinarily insist on a response time longer than just 2 days.

CONCLUSION

The BJAG members appreciate the consideration of the Committee on this issue.

Honorable Philip H. Brandt
Honorable Charles Caldwell
Honorable J. Michael Deasy
Honorable Henley Hunter
Honorable Lewis Killian
Honorable Margaret Dee McGarity
Honorable Cecelia Morris
Honorable Michael Romero
Honorable S. Martin Teel, Jr.
Honorable Jerry Venters
Honorable John Waites
Honorable Judith Wizmur, Chair

Bankruptcy Rule response time is sufficient to given them adequate time to respond. If an application is filed, say, at day 18 of the case, and the response time under Local Bankruptcy Rule is 14 days, the application could not be granted until day 33 of the case (unless the response time were shortened for cause).

The Purpose and Application (So Far) of New Bankruptcy Rule 6003

By Catherine E. Vance

Development Specialists, Inc.

April 4, 2008

On December 1, 2007, some significant changes to the Federal Rules of Bankruptcy Procedure took effect. Among them is new Bankruptcy Rule 6003, which precludes the granting of certain relief within the first 20 days of a bankruptcy case. Specifically, new Rule 6003 provides:

> Rule 6003. Interim and Final Relief Immediately Following the Commencement of the Case – Applications for Employment; Motions for Use, Sale, or Lease of Property; and Motions for Assumption or Assignment of Executory Contracts.
>
> Except to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 20 days after the filing of the petition, grant relief regarding the following:
>
> (a) an application under Rule 2014;
>
> (b) a motion to use, sell, lease, or otherwise incur an obligation regarding property of the estate, including a motion to pay all or part of a claim that arose before the filing of the petition, but not a motion under Rule 4001; and
>
> (c) a motion to assume or assign an executory contract or unexpired lease in accordance with § 365.

According to the Advisory Committee Note, Rule 6003 was intended to pull some matters out of first-day consideration so that the court could focus on the truly urgent matters and parties would have time to weigh in on matters that affected their own interests. As the Advisory Committee Note states:

> There can be a flurry of activity during the first days of a bankruptcy case. This activity frequently takes place prior to the formation of a creditors' committee, and it also can include substantial amounts of materials for the court and parties in interest to review and evaluate. This rule is intended to alleviate some of the time pressures present at the start of a case so that full and close consideration can be given to matters that may have a fundamental impact on the case.

Deliberations among the Advisory Committee on Bankruptcy Rules prior to Rule 6003's adoption shed additional light on this intended purpose. One concern that led to Rule 6003 was that debtors' venue decisions were being influenced "by an imbalance in 'first day' practice in some districts." According to the Joint Subcommittee on Venue and Related Matters in Large Chapter 11 Cases, which recommended Rule 6003 to the Advisory Committee, the Rule, along with other amendments, was "intended to reinstate a greater degree of balance among the interests of all parties in the case during the opening stages of the proceedings." The Joint Subcommittee continued:

> It can occur that orders entered immediately after the commencement of the case can substantially limit the course the case may take. The courts frequently are presented with voluminous documents that they may not even be able to completely read prior to entering some order in the case. With these actions being taken so quickly, a creditors' committee may not even be formed prior to the court rendering a decision in the matter. Under these amendments, there would be a short breathing spell of twenty days at the start of the case that would provide an opportunity for the United States trustee to appoint a creditors' committee that may also be in a position to have employed professionals to assist it in taking a position on these matters. The rules still provide for expedited relief, but persons seeking that relief have the burden of showing the extraordinary need for the relief just as they do under the existing provisions of Rule 4001.

When Rule 6003 was transmitted to the Supreme Court, the Report of the Judicial Conference reiterated this point: "The proposed rule is designed to alleviate the acute time pressures present at the start of a case so that full and careful consideration can be given to matters that may have a fundamental and long-lasting impact on the case."

Not much is known yet about application of the rule in actual cases. Most of the attention the Rule has garnered has been with respect to professional retention and the perception that Rule 6003 could effectively deprive debtors in possession of the benefit of counsel and the services of other professionals for the first 20 days of the case.

In a recent article, Judge Spector articulates the professionals' concerns, apparently formed mostly from arguments made by the U.S. Trustee in the First NLC Financial Services bankruptcy.[1] There, according to Judge Spector, the U.S. Trustee resisted interim approval of the appointment of counsel and argued that the court should not even be considering the application at hearing because Rule 6003 makes no provision for court approval, interim or final, until 20 post-petition days have passed.

Judge Spector, observing the general rule that artificial entities cannot appear in court *pro se*, concludes that adoption of the U.S. Trustee's position would force chapter 11 debtors "to wait 20 days before its first-day motions of any type could be heard." This same deprivation-of-counsel argument has been proffered in other cases, including Aloha Airlines, in which the debtor urged the court to consider the consequences to the debtor if it lost its attorneys for 20 days.

Judge Spector and the Aloha Airlines application reflect two related views of Rule 6003. The first is that Rule 6003 does not preclude the court from entering an interim order on the first day of the case approving of the debtor's choice of counsel. The second view is that counsel cannot, or at least might not, perform any services on the debtor's behalf because § 327 of the Bankruptcy Code requires court approval of professionals' employment. This loss of counsel, in turn, implicates Rule 6003's exception because, absent approval, the debtor will suffer "immediate and irreparable harm." Either viewpoint, the argument goes, allows the court to bypass the 20-day waiting period.

An Atlanta bankruptcy court took a different approach in *In re Smith*,[2] and in doing so, it expressly rejected as "unfounded" the fear that the debtors might be without counsel while the application to employ awaits approval:

It is not unusual in bankruptcy cases pending under Chapters 7 and 11 for an attorney for a trustee to render services that include preparing and filing motions, appearing in court and giving advice about what a trustee should and should not do before the bankruptcy judge enters an order granting the motion of the trustee to employ the attorney. This Court has not been able to find a single case that states that even though the trustee filed a timely application to employ, such work undertaken prior to the entry of the order granting the application is without legal effect or otherwise improper or may not be compensated. Rather, it has generally been accepted for many years that bankruptcy courts have the authority to retroactively authorize employment of professionals.

Moreover, the court correctly observes that the conditions for approval have nothing to do with the debtor's financial crisis; rather, approval is dependent on disinterestedness and the absence of an interest adverse to the estate, just as compensation is limited to what is reasonable and necessary. The court added: "Although there will always be some risk that approval will not be forthcoming with unpleasant consequences for the firm, that risk and its consequences exist whether the Court considers the matter on day one or day twenty-one."

Curiously, the *Smith* court described Rule 6003's "immediate and irreparable harm" exception as "more suited to professionals other than the trustee's or DIP's primary bankruptcy counsel." The court did not expound on this point and so it's not clear whether the court was thinking of the non-attorney professionals commonly employed in large chapter 11 cases or some unique and pressing matter that could arise in any case. In either event, however, the court's discussion of disinterestedness and other requirements apply with equal force to all professionals whose employment must be approved.

Beyond the handful of cases dealing with professional retention, practically nothing is yet known about application of Rule 6003. In Lillian Vernon's motion to pay certain pre-petition claims, for example, it recites a number of cases in which Rule 6003 stood as no obstacle to approval, but it provides no reasoning by any court as to why the motions were approved. Aloha Airlines, which did voice concerns over Rule 6003 as it pertained to counsel, made no mention of the Rule in its first-day motion for approval to pay the pre-petition claims of its outside maintenance contractors. The airline likewise provided no reference to Rule 6003 in its motion for approval of bidding procedures to sell its cargo unit, despite the provision for a break-up fee, which, under the Rule's language, would "incur an obligation regarding property of the estate."

A controversy did emerge over a critical vendor motion in the Allied Van Lines bankruptcy. The debtors sought and received first-day approval to pay "prepetition unimpaired claims." A creditors' committee from another bankruptcy, 360networks, subsequently moved the court to vacate that order arguing that it created a presumption that the debtors' scheme of classifying unimpaired versus impaired creditors was correct and gave the debtors the power to pick and choose favored creditors, providing them with payment in full ahead of plan confirmation. Such classification issues, the 360networks committee argued, belong in the plan confirmation context, not in a first-day order. The 360networks committee also asserted that it received no notice of the first-day motion and, therefore, had no opportunity to be heard, or even to alert the court of its intention to object, before the order was entered. Notably, after it was formed, the Allied Van Lines committee joined the 360networks motion.

Based on the 360networks committee's arguments, it looks like the critical vendor motion to which it objected presented precisely what Rule 6003 was intended to prevent. Thus, the dispute could have provided the presiding judge the opportunity to examine Rule 6003 as applied to the parties' arguments and to issue a decision that might shed more light on the Rule. Alas, the matter was settled.

As with any new statute or rule, we can only speculate about the effects until live controversies emerge that are decided by the courts. The matter of professional retention is likely to be settled first, and if courts follow the reasoning of the *Smith* order, then Rule 6003's goal of reducing the overall volume of first-day matters will have been accomplished with no disruption in the rendering of professional services to the debtor.

Other matters are less predictable. As the *Smith* court observed, Rule 6003 could lead to language about "immediate and irreparable harm" being routinely included in first-day motions. However, Rule 9011 should serve as an effective disincentive to misuse the Rule's exception. In addition, some matters to which Rule 6003, by its plain language, would apply may nevertheless be removed from the Rule's reach if they are included in an approved DIP financing order. Financing orders are governed by Rule 4001, which is expressly excepted from Rule 6003.

It's also possible that Rule 6003 will have a greater impact on prepackaged bankruptcies in which the parties expect the visit to bankruptcy court to be a quick one. The 32-hour bankruptcy of Blue Bird Body Company, for example, might not be possible to duplicate. On the other hand, the very nature of a prepackaged bankruptcy ameliorates the need for Rule 6003 because of the pre-petition involvement of affected parties.

In the end, Rule 6003 shouldn't produce the sort of reaction that has been seen in the context of professional retention (and if it does, we would all do well to remind ourselves that concerns about the Rule could have been raised before it was adopted; only two public comments were actually submitted). Keeping in mind the Rule's purpose of ensuring notice to and consideration by interested parties, it should ultimately prove beneficial to debtors because of the greater protection afforded orders entered after everyone has had a chance to have their say.

---

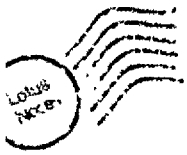
[1] Arthur J. Spector, *Making Sense of New Rule 6003: Interim Approval of the Retention of DIP Professionals*, Bankruptcy Court Decisions Weekly News & Comment, Feb. 19, 2008.

[2] *In re Smith*, No. 08-63990 (Bankr. E.D. Ga. Mar. 17, 2008) (order granting U.S. Trustee's motion to reconsider order approving application by debtor to employ bankruptcy counsel). Hat tip to Scott Riddle and his Georgia Bankruptcy Law Blog for posting the *Smith* order.

James Wannamaker/DCA/AO/USCOURTS
03/24/2008 01:31 PM

To
cc
bcc
Subject Fw: Rule 6003

08-BK-B



Robert Kressel/MNB/08/USCOURTS
03/11/2008 11:38 AM

To Laura T Swain/NYSD/02/USCOURTS, "Jeff <Morris@odo.law.udayton.edu/O=, Peter McCabe/DCA/AO/USCOURTS,/
cc
Subject Rule 6003

Hi Laura, Jeff and Peter:

I have already come across a situation where I suspect this new rule is not working as intended. I have a fairly new involuntary chapter 11 case. About three weeks after it was filed, the debtor consented to an order for relief and it was entered. The debtor immediately filed an application to approve employment,. It is over twenty days from the filing of the petition so the rule would allow me to approve it, but this seems inconsistent with the spirit of the rule which is to give people a chance to get organized before these kinds of orders are entered. I wonder if the computation time should be from the order for relief rather than the filing of the petition/ Although maybe that is not exactly right.

Any way, I thought the committee might want to take a look at this.

Best wishes to you and the rest of the committee.

Bob

TAB 7-A

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: PROCEDURE FOR INDICATIVE RULINGS

DATE: AUGUST 29, 2008

At its June 2008 meeting, the Standing Committee approved and sent to the Judicial Conference two new rules proposed in tandem by the Advisory Committees on Civil Rules and Appellate Rules. If promulgated, these new rules – Civil Rule 62.1 and Appellate Rule 12.1 (which are attached) – would formalize a practice already followed in many federal district courts of providing a so-called "indicative ruling" when the court lacks jurisdiction to grant a party's motion for relief due to the pendency of an appeal. During its conference call on August 21, the Subcommittee considered whether a similar rule or rules would be useful in the bankruptcy courts. **After careful consideration of the issue, the Subcommittee recommends that a preliminary draft of new Rule 8007.1 and amendments to Rule 9023 and 9024 be approved by the Advisory Committee and that these proposed rule changes be held in the "bull pen" at least until the March 2009 meeting.**

Proposed Civil Rule 62.1 applies when "a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is pending." The rule does not attempt to specify when the pendency of an appeal deprives a district court of jurisdiction to grant a motion for relief, but the Committee Note points out that the six types of postjudgment motions listed in Appellate Rule 4(a)(4) suspend the effect of a notice of appeal and are within the district court's jurisdiction to grant without resort to the indicative ruling procedure.

If a party, however, makes a motion for relief that does not suspend the effect of a notice of appeal and that the court lacks jurisdiction to grant – for example, a motion for relief under Rule 60(b) filed more than 10 days after the judgment was entered – Rule 62.1 would give the district court several options as to how to respond. The court could defer consideration of the motion, it could deny the motion, or it could state that "it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." If the district court states either that it finds the motion to be meritorious or that it raises a substantial issue, the movant would be required to notify the circuit clerk of that indicative ruling. The district court would rule on the motion only if the court of appeals remanded for that purpose.

Proposed Appellate Rule 12.1 provides the corresponding procedure for a court of appeals that receives notice that a district court has made an indicative ruling under Civil Rule 62.1. It gives the court of appeals discretion whether to remand to allow the district court to rule on the motion. If the court does remand, unless it expressly dismisses the appeal, it will retain jurisdiction to proceed with the appeal after the district court's ruling on the motion (should further proceedings in the court of appeals still be necessary). The Committee Note states that a court of appeals should dismiss the appeal "only when the appellant has stated clearly its intention to abandon the appeal." If the court of appeals does remand for a ruling on the motion, once the district court has ruled, the parties must give prompt notice of the ruling to the circuit clerk.

Although it appears that the situation in which an indicative ruling is sought does not arise with as great a frequency in the bankruptcy courts as in the district courts, the Subcommittee concluded that the adoption of a rule providing clear authorization and a uniform

procedure among the bankruptcy courts for this procedure would be beneficial. The addition of a rule similar to the likely-to-be-added Appellate Rule 12.1 (and the companion provisions for the trial court procedure) would also further the Subcommittee's project of bringing the Part VIII rules more in line with the Federal Rules of Appellate Procedure .

Unlike the separate Civil and Appellate Rules, the Bankruptcy Rules allow for a single rule prescribing the procedure to be followed in both the bankruptcy and appellate courts for indicative rulings. The Subcommittee, after considering an alternative two-rule approach, recommends that a single rule – Rule 8007.1 – be approved to govern the issuance of indicative rulings by bankruptcy judges and the corresponding procedures applicable in the appellate courts. In order to signal to litigants who file post-judgment motions the possibility of seeking an indicative ruling in situations in which the bankruptcy court lacks jurisdiction to grant relief due to the pendency of an appeal, the Subcommittee also recommends that Rules 9023 and 9024 be amended to add a cross-reference to Rule 8007.1. The proposed new rule and rules amendments are set out below.

Rule 8007.1 Indicative Ruling on Motion for Relief That is Barred by a Pending Appeal and Remand by the Court in Which the Appeal is Pending

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

(1) defer consideration of the motion;

(2) deny the motion; or

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

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

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

COMMITTEE NOTE

This new rule is an adaptation of Rule 62.1 F.R.Civ.P. and Rule 12.1 F.R.App.P. It provides a procedure for the issuance of an indicative ruling when a bankruptcy judge determines that, because of a pending appeal, the judge lacks jurisdiction to grant a motion for relief that the judge concludes is meritorious or raises a substantial issue. The rule, however, does not attempt to define the circumstances in which an appeal limits or defeats the bankruptcy judge's authority to act in the face of a pending appeal. (Rule

8002(b) identifies motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before the last such motion is resolved. The bankruptcy court has authority to grant the motion without resorting to the indicative ruling procedure.)

The court in which a bankruptcy appeal is pending, upon notification that the bankruptcy judge has issued an indicative ruling, may remand to the bankruptcy judge for a ruling on the motion for relief. The appellate court may remand all proceedings, thereby terminating the initial appeal, if it expressly states that it is dismissing the appeal. It should do so, however, only when the appellant has stated clearly its intention to abandon the appeal. The appellate court may instead choose to remand for the sole purpose of a ruling on the motion, while retaining jurisdiction to proceed with the appeal after the bankruptcy judge rules (if the appeal is not then moot and if any party wishes to proceed).

Rule 9023. New Trials; Amendment of Judgments

Rule 59 F.R.Civ.P. applies in cases under the Code, except as provided in Rule 3008. <u>In some circumstances post-judgment motion practice after an appeal has been docketed and is pending is governed by Rule 8007.1.</u>

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8007.1. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Rule 9024. Relief from Judgment or Order[1]

Rule 60 F.R.Civ.P. applies in cases under the Code except

[1] As amended effective December 1, 2008.

that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one-year limitation prescribed in Rule 60(c), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144, § 1230, or § 1330. In some circumstances post-judgment motion practice after an appeal has been docketed and is pending is governed by Rule 8007.1.

COMMITTEE NOTE

This rule is amended to include a cross-reference to Rule 8007.1. That rule governs the issuance of an indicative ruling when relief is sought that the court lacks authority to grant because of an appeal that has been docketed and is pending.

Because the Subcommittee is in the process of undertaking a revision of all of the Part VIII rules, it recommends that these proposed rule changes to implement an indicative ruling procedure not be sent forward to the Standing Committee at this time. If the Advisory Committee approves them at the October meeting, the Subcommittee suggests that they be held in the bull pen until the March meeting, at which point the Advisory Committee can determine whether the entire Rule VIII revision package, including these amendments, is ready to be sent forward, or, if not, whether these amendments should remain in the bull pen or be sent to the Standing Committee on their own.

ATTACHMENTS:

(AP) Rule 12.1. Remand After an Indicative Ruling by the District Court on a Motion for Relief That Is Barred by a Pending Appeal

(a) Notice to the Court of Appeals. If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue.

(b) Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal. If the court of appeals remands but retains jurisdiction, the parties must promptly notify the circuit clerk when the district court has decided the motion on remand.

Committee Note

This new rule corresponds to Federal Rule of Civil Procedure 62.1, which adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party moves under Civil Rule 60(b) to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant relief under a rule such as Civil Rule 60(b) without a remand. But it can entertain the motionn and deny it, defer consideration, state that it would grant the motion if the court of appeals remands for that purpose, or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Rule 12.1 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

Rule 12.1 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Appellate Rule 12.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission.

To ensure proper coordination of proceedings in the district court and in the court of appeals, the movant must notify the circuit

clerk if the district court states that it would grant the motion or that the motion raises a substantial issue. The "substantial issue" standard may be illustrated by the following hypothetical: The district court grants summary judgment dismissing a case. While the plaintiff's appeal is pending, the plaintiff moves for relief from the judgment, claiming newly discovered evidence and also possible fraud by the defendant during the discovery process. If the district court reviews the motion and indicates that the motion "raises a substantial issue," the court of appeals may well wish to remand rather than proceed to determine the appeal.

If the district court states that it would grant the motion or that the motion raises a substantial issue, the movant may ask the court of appeals to remand so that the district court can make its final ruling on the motion. In accordance with Rule 47(a)(1), a local rule may prescribe the format for the litigants' notifications and the district court's statement.

Remand is in the court of appeals' discretion. The court of appeals may remand all proceedings, terminating the initial appeal. In the context of postjudgment motions, however, that procedure should be followed only when the appellant has stated clearly its intention to abandon the appeal. The danger is that if the initial appeal is terminated and the district court then denies the requested relief, the time for appealing the initial judgment will have run out and a court might rule that the appellant is limited to appealing the denial of the postjudgment motion. The latter appeal may well not provide the appellant with the opportunity to raise all the challenges that could have been raised on appeal from the underlying judgment. *See, e.g., Browder v. Dir., Dep't of Corrections of Ill.*, 434 U.S. 257, 263 n.7 (1978) ("[A]n appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review."). The Committee does not endorse the notion that a court of appeals should decide that the initial appeal was abandoned — despite the absence of any clear statement of intent to abandon the appeal — merely because an unlimited remand occurred, but the possibility that a court might take that troubling view underscores the need for caution in delimiting the scope of the remand.

The court of appeals may instead choose to remand for the sole purpose of ruling on the motion while retaining jurisdiction to proceed with the appeal after the district court rules on the motion (if the appeal is not moot at that point and if any party wishes to

proceed). This will often be the preferred course in the light of the concerns expressed above. It is also possible that the court of appeals may wish to proceed to hear the appeal even after the district court has granted relief on remand; thus, even when the district court indicates that it would grant relief, the court of appeals may in appropriate circumstances choose a limited rather than unlimited remand.

If the court of appeals remands but retains jurisdiction, subdivision (b) requires the parties to notify the circuit clerk when the district court has decided the motion on remand. This is a joint obligation that is discharged when the required notice is given by any litigant involved in the motion in the district court.

When relief is sought in the district court during the pendency of an appeal, litigants should bear in mind the likelihood that a new or amended notice of appeal will be necessary in order to challenge the district court's disposition of the motion. *See, e.g., Jordan v. Bowen*, 808 F.2d 733, 736-37 (10th Cir. 1987) (viewing district court's response to appellant's motion for indicative ruling as a denial of appellant's request for relief under Rule 60(b), and refusing to review that denial because appellant had failed to take an appeal from the denial); *TAAG Linhas Aereas de Angola v. Transamerica Airlines, Inc.*, 915 F.2d 1351, 1354 (9th Cir. 1990) ("[W]here a 60(b) motion is filed subsequent to the notice of appeal and considered by the district court after a limited remand, an appeal specifically from the ruling on the motion must be taken if the issues raised in that motion are to be considered by the Court of Appeals.").

(CV) Rule 62.1 Indicative Ruling on a Motion for Relief That is Barred by a Pending Appeal

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;

(2) deny the motion; or

(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) **Notice to the Court of Appeals.** The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) **Remand.** The district court may decide the motion if the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a Rule 60(b) motion to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an "indicative ruling." (Appellate Rule 4(a)(4) lists six motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the last such motion is disposed of. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

This clear procedure is helpful whenever relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. Rule 62.1 does not attempt to

define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appeal jurisdiction. Rule 62.1 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Appellate Rule 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

TAB 7-B

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: REVISION OF THE PART VIII RULES

DATE: AUGUST 29, 2008

Upon the suggestion of Eric Brunstad at the March 2008 meeting that Part VIII of the bankruptcy rules be revised to bring them closer in line with the Federal Rules of Appellate Procedure ("FRAP"), the Chair of the Advisory Committee referred the matter to the Subcommittee for further consideration. During the Subcommittee's teleconference on May 8, 2008, Mr. Brunstad offered to begin the process of reviewing the Part VIII rules and comparing them to FRAP to determine whether and to what extent the bankruptcy appellate rules should be revised to address some issues covered by FRAP that are not currently addressed by the bankruptcy rules, to bring the organization of the Part VIII rules into closer alignment with FRAP, and to incorporate FRAP's more user-friendly style. Mr. Brunstad worked diligently on this project over the summer, and prior to the Subcommittee's August 21 conference call, he circulated a draft of a complete revision of the Part VIII rules.

During the August 21 teleconference, Mr. Brunstad outlined for the Subcommittee the process that he had used to produce his draft revision. He explained that his goal was to incorporate into the bankruptcy rules some of the innovations of FRAP, while retaining principles unique to bankruptcy appeals. He noted that in the case of some of his revisions of the 8000 rules, he used language taken directly from parallel FRAP rules, whereas in the case of other rule revisions, he used the FRAP format but retained existing rule provisions that address issues unique to bankruptcy. Elsewhere he added rules addressing topics currently absent from

the Part VIII rules, such as amicus briefs, intervention, and motions to expedite.

The Subcommittee expressed its gratitude to Mr. Brunstad for his extremely valuable work. It then discussed a plan for proceeding further. Mr. Brunstad offered to annotate his draft with indications of the source of each rule and any substantive differences from the existing Part VIII rules. He will complete this annotated draft prior to the October meeting. The Subcommittee then proposed that, because of the large scope of this project, the draft be divided up among members of the Advisory Committee for review and comment. The Subcommittee would then review all of the comments and assemble a complete revised draft for review by the Advisory Committee.

The Subcommittee seeks input from the Advisory Committee about its proposed method of proceeding and asks for confirmation of its authority to continue to pursue this project.

TAB 8

Item 8 will be an oral report.

TAB 9

UNITED STATES BANKRUPTCY COURT

NOTICE TO CONSUMER DEBTOR(S) UNDER §342(b) OF THE BANKRUPTCY CODE

In accordance with § 342(b) of the Bankruptcy Code, this notice to individuals with primarily consumer debts: (1) Describes briefly the services available from credit counseling services; (2) Describes briefly the purposes, benefits and costs of the four types of bankruptcy proceedings you may commence; and (3) Informs you about bankruptcy crimes and notifies you that the Attorney General may examine all information you supply in connection with a bankruptcy case.

You are cautioned that bankruptcy law is complicated and not easily described. Thus, you may wish to seek the advice of an attorney to learn of your rights and responsibilities should you decide to file a petition. Court employees cannot give you legal advice.

[Notices from the bankruptcy court are sent to the mailing address you list on your bankruptcy petition. In order to ensure that you receive information about events concerning your case, Bankruptcy Rule 4002 requires that you notify the court of any changes in your address. If you are filing a **joint case** (a single bankruptcy case for two married individuals), and each spouse lists the same mailing address on the bankruptcy petition, you and your spouse will generally receive notices mailed from the bankruptcy court in a jointly-addressed envelope.]

1. Services Available from Credit Counseling Agencies

With limited exceptions, § 109(h) of the Bankruptcy Code requires that all individual debtors who file for bankruptcy relief on or after October 17, 2005, receive a briefing that outlines the available opportunities for credit counseling and provides assistance in performing a budget analysis. The briefing must be given within 180 days **before** the bankruptcy filing. The briefing may be provided individually or in a group (including briefings conducted by telephone or on the Internet) and must be provided by a nonprofit budget and credit counseling agency approved by the United States trustee or bankruptcy administrator. The clerk of the bankruptcy court has a list that you may consult of the approved budget and credit counseling agencies. Each debtor in a joint case must complete the briefing.

In addition, after filing a bankruptcy case, an individual debtor generally must complete a financial management instructional course before he or she can receive a discharge. The clerk also has a list of approved financial management instructional courses. Each debtor in a joint case must complete the course.

2. The Four Chapters of the Bankruptcy Code Available to Individual Consumer Debtors

Chapter 7: Liquidation ($245 filing fee, $39 administrative fee, $15 trustee surcharge: Total fee $299)

1. Chapter 7 is designed for debtors in financial difficulty who do not have the ability to pay their existing debts. Debtors whose debts are primarily consumer debts are subject to a "means test" designed to determine whether the case should be permitted to proceed under chapter 7. If your income is greater than the median income for your state of residence and family size, in some cases, creditors have the right to file a motion requesting that the court dismiss your case under § 707(b) of the Code. It is up to the court to decide whether the case should be dismissed.

2. Under chapter 7, you may claim certain of your property as exempt under governing law. A trustee may have the right to take possession of and sell the remaining property that is not exempt and use the sale proceeds to pay your creditors.

3. The purpose of filing a chapter 7 case is to obtain a discharge of your existing debts. If, however, you are found to have committed certain kinds of improper conduct described in the Bankruptcy Code, the court may deny your discharge and, if it does, the purpose for which you filed the bankruptcy petition will be defeated.

4. Even if you receive a general discharge, some particular debts are not discharged under the law. Therefore, you may still be responsible for most taxes and student loans; debts incurred to pay nondischargeable taxes; domestic support and property settlement obligations; most fines, penalties, forfeitures, and criminal restitution obligations; certain debts which are not properly listed in your bankruptcy papers; and debts for death or personal injury caused by operating a motor vehicle, vessel, or aircraft while intoxicated from alcohol or drugs. Also, if a creditor can prove that a debt arose from fraud, breach of fiduciary duty, or theft, or from a willful and malicious injury, the bankruptcy court may determine that the debt is not discharged.

Chapter 13: Repayment of All or Part of the Debts of an Individual with Regular Income ($235 filing fee, $39

administrative fee: Total fee $274)

1. Chapter 13 is designed for individuals with regular income who would like to pay all or part of their debts in installments over a period of time. You are only eligible for chapter 13 if your debts do not exceed certain dollar amounts set forth in the Bankruptcy Code.

2. Under chapter 13, you must file with the court a plan to repay your creditors all or part of the money that you owe them, using your future earnings. The period allowed by the court to repay your debts may be three years or five years, depending upon your income and other factors. The court must approve your plan before it can take effect.

3. After completing the payments under your plan, your debts are generally discharged except for domestic support obligations; most student loans; certain taxes; most criminal fines and restitution obligations; certain debts which are not properly listed in your bankruptcy papers; certain debts for acts that caused death or personal injury; and certain long term secured obligations.

Chapter 11: Reorganization ($1000 filing fee, $39 administrative fee: Total fee $1039)

Chapter 11 is designed for the reorganization of a business but is also available to consumer debtors. Its provisions are quite complicated, and any decision by an individual to file a chapter 11 petition should be reviewed with an attorney.

Chapter 12: Family Farmer or Fisherman ($200 filing fee, $39 administrative fee: Total fee $239)

Chapter 12 is designed to permit family farmers and fishermen to repay their debts over a period of time from future earnings and is similar to chapter 13. The eligibility requirements are restrictive, limiting its use to those whose income arises primarily from a family-owned farm or commercial fishing operation.

3. Bankruptcy Crimes and Availability of Bankruptcy Papers to Law Enforcement Officials

A person who knowingly and fraudulently conceals assets or makes a false oath or statement under penalty of perjury, either orally or in writing, in connection with a bankruptcy case is subject to a fine, imprisonment, or both. All information supplied by a debtor in connection with a bankruptcy case is subject to examination by the Attorney General acting through the Office of the United States Trustee, the Office of the United States Attorney, and other components and employees of the Department of Justice.

WARNING: Section 521(a)(1) of the Bankruptcy Code requires that you promptly file detailed information regarding your creditors, assets, liabilities, income, expenses and general financial condition. Your bankruptcy case may be dismissed if this information is not filed with the court within the time deadlines set by the Bankruptcy Code, the Bankruptcy Rules, and the local rules of the court.

Certificate of [Non-Attorney] Bankruptcy Petition Preparer

I, the [non-attorney] bankruptcy petition preparer signing the debtor's petition, hereby certify that I delivered to the debtor this notice required by § 342(b) of the Bankruptcy Code.

_____ _____

Printed name and title, if any, of Bankruptcy Petition Preparer

Address:

_____

X_____

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose Social Security number is provided above.

Social Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person, or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

Certificate of the Debtor

I (We), the debtor(s), affirm that I (we) have received and read this notice.

_____ X_____

Printed Name(s) of Debtor(s) Signature of Debtor Date

Case No. (if known) _____ X_____

Signature of Joint Debtor (if any) Date

TAB 10

Item 10 will be an oral report.

TAB 11

Item 11 will be an oral report.

TAB 12

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: SERVICE OF MOTIONS COMMENCING CONTESTED MATTERS

DATE: AUGUST 5, 2008

An issue has been brought to the Advisory Committee concerning Rule 9014(b)'s requirement that motions commencing contested matters be served according to Rule 7004, rather than pursuant to Rule 5(b) F.R.Civ.P. Chief Bankruptcy Judge Vincent Zurzolo (C.D. Cal.) has proposed that such motions be permitted to be served in the same manner as motions in adversary proceedings and all other papers in contested matters, including by electronic means via CM/ECF on a party's attorney. This memorandum discusses Judge Zurzolo's proposal and the reasons for the current requirement of Rule 9014(b). This matter has been placed on the agenda of the October Rules Committee meeting for the Advisory Committee's discussion and consideration of whether it would like to take any further action on the proposal, including referring it to a subcommittee.

Judge Zurzolo's Proposal

The Bankruptcy Court for the Central District of California was in the process of revising its local rules to specify that delivery by means of a notice of electronic filing ("NEF") to an attorney who has already electronically filed a document in the case constitutes valid service of any filed document. According to Judge Zurzolo, it was then pointed out that national Rule 9014(b) "apparently" does not permit such service of a motion commencing a contested matter

except upon the attorney for the debtor.

Rule 9014(b) provides as follows:

RULE 9014. Contested Matters

* * * * *

(b) SERVICE. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided by Rule 5(b) F.R.Civ.P.

* * * * *

Rule 7004 provides for service of the summons and complaint on the party by first class mail or by one of the more traditional methods of service permitted by Rule 4(e) - (j) F.R.Civ.P. Rule 7004(g) also provides that if the debtor is represented by an attorney, whenever the debtor is served under Rule 7004, its attorney shall also be served by any means provided for by Rule 5(b) F.R.Civ.P. Rule 5(b) of the Federal Rules of Civil Procedure requires service of pleadings and other papers after the summons and complaint on the attorney for any party represented by an attorney, and it specifies several methods for such service, including sending it by electronic means if the party has consented in writing to that type of service. The rule also provides that service by electronic means may be accomplished through the court's transmission facilities if permitted by local rule.

Judge Zurzolo argues that under these rules "a motion filed within a bankruptcy case is treated differently than a motion filed within an adversary proceeding." The latter motions can be served on attorneys via an NEF and hyperlink to the document, rather than having to serve parties themselves by first class mail. He suggests that given the nationwide prevalence of

attorneys' use of CM/ECF for electronic filing and receipt of notice and service, having different service rules for motions commencing contested matters creates confusion and increased workload. He also says that because attorneys who register for CM/ECF know that they are consenting to receipt of filed documents by means of an NEF and are added to the list of attorneys who will receive electronic notification of all filed documents, it is illogical to "transmit[] to [such] an attorney a NEF with a hyperlink to a subsequently filed motion, and also requir[e] the movant to separately deliver the motion to the attorney by traditional means."

Based on these concerns, Judge Zurzolo proposes that Rule 9014(b) be amended to allow the initial motion as well as all other papers in a contested matter to be served pursuant to Rule 5(b) F.R.Civ.P.

Reasons for Rule 9014(b)'s Service Requirement

Since the adoption of Rule 9014 in 1983, subsection (b) has always included the first sentence that requires the initial motion of a contested matter to be served in the same manner as a summons and complaint that commences an adversary proceeding. The reason that this more formal means of service has been required is to provide clear notice that litigation is being commenced against the served party and to distinguish the filing of that motion from more routine filings that may be made throughout a bankruptcy case. In 2002 Rule 9014(b) was amended to permit subsequent filings in a contested matter to be served pursuant to Rule 5(b), including by means of electronic notification of the filing to parties' attorneys. But as the 2002 Committee Note and the rule itself indicate, the Advisory Committee chose to continue to require Rule 7004 service for the initial motion.

Judge Zurzolo's proposal rests on the equation of a motion commencing a contested

matter with motions filed in the course of an adversary proceeding or other motions filed throughout the bankruptcy case. Thus he argues that it makes no sense to single out these particular motions for special service requirements. The rationale underlying Rule 9014(b)'s requirement, however, is that a motion commencing a contested matter is equivalent to a complaint commencing an adversary proceeding and thus a service method designed to call the filing to the attention of the party or parties against whom relief is being sought is appropriate. The Advisory Committee to date, therefore, has intentionally chosen to treat differently a motion commencing a contested matter from a motion filed in an already commenced adversary proceeding.

Judge Zurzolo's proposal also seems to blur the notification of an attorney with the service of a party itself. Even if an attorney who has made an electronic filing previously in the case receives electronic notification of the filing of a motion commencing a contested matter involving his or her client, that notification will not be redundant with the service of that motion. Under Rule 9014(b) and 7004, service of the motion will be made on the party against whom relief is being sought, not the attorney. Even in the case of a debtor's attorney, electronic service on the attorney under Rule 7004(g) supplements, but does not substitute for, service on the debtor by first class mail or other means permitted by Rule 7004(b).

Recommendation

When Rule 9014(b) was amended in 2002 to permit papers filed after the initial motion to be served pursuant to Rule 5(b) F.R.Civ.P., a reporter's note commented that the change "could become more significant" because of the possible (and now actual) amendment of Rule 5(b) to allow electronic service with consent. Since the use of CM/ECF for service and notification has

become so widespread, the Advisory Committee may wish to consider whether that significant change in practice affects its conclusion about the desirability of more formal service of motions commencing contested matters. My view, however, is that the increased use of electronic notification of filings does not alter the fundamental reason for requiring Rule 7004 service of motions commencing adversary proceedings, and thus Judge Zurzolo's proposal should not be pursued. If, however, the Advisory Committee believes that the issue is worth reconsidering, I recommend that the proposal be referred to the Subcommittee on Consumer Issues for further consideration and the submission of a recommendation at the March meeting.

DATE: May 6, 2008

TO: Hon. Elizabeth L. Perris
Chief Bankruptcy Judge, District of Oregon
Advisory Committee on Bankruptcy Rules

FROM: Hon. Vincent Zurzolo
Chief Bankruptcy Judge, Central District of California

RE: FRBP 9014(b), Serving Motions

The purpose of this memo is to point out the apparent requirement in FRBP 9014(b) that motions be served using traditional methods, despite the shift to allowing delivery via CM/ECF of a NEF and hyperlink to constitute service of a document on attorneys who have already electronically filed a document in a bankruptcy case. My colleague Alan Ahart pointed out to me the apparently restrictive language of FRBP 9014(b) which, if strictly followed, fails to recognize service of motions via NEF on most attorneys. This is problematic, especially as it relates to motions filed in bankruptcy cases as opposed to motions filed in adversary proceedings.

A. FRBP 9014(b), 7004(g), FRCP 5(b)(3)

The current version of FRBP 9014(b) only allows service of motions via NEF on attorneys for debtors, and not on attorneys for any other persons or entities:

> **RULE 9014 CONTESTED MATTERS**
>
> "(*b*) *Service*. The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004. Any paper served after the motion shall be served in the manner provided for by Rule 5(b) F. R.Civ.P."

The pertinent provisions of FRBP 7004 are:

> **RULE 7004 PROCESS; SERVICE OF SUMMONS, COMPLAINT**
>
> (*b*) *Service by First Class Mail*.
>
> This subsection identifies individuals and other types of defendants, and does not appear to contain any treatment of parties represented by counsel.
>
> "(*g*) *Service on Debtor's Attorney*. If the debtor is represented by an attorney, whenever service is made upon the debtor under this Rule, service shall also be made upon the debtor's attorney by any means authorized under Rule 5(b) F.R.Civ. P."

FRBP 7005 makes clear that transmission of a NEF and hyperlink to a document constitutes

service of: (1) motions filed and served in adversary proceedings; and (2) motions filed in bankruptcy cases and served on debtor's attorneys.

RULE 7005 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) SERVICE: WHEN REQUIRED

> "(1) *In General*. Unless these rules provide otherwise, each of the following papers must be served on every other party:"
>
> > "(B) a pleading filed after the original complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;"
> >
> > "(D) a written motion, except one that may be heard ex parte; and"

(b) SERVICE: HOW MADE

> "(1) *Serving an Attorney*. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party."
>
> "(2) *Service in General*. A paper is served under this rule by:"
>
> > "(E) sending it by electronic means if the person consented in writing---in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;"
>
> "(3) *Using Court Facilities*. If a local rule so authorizes, a party may use the court's transmission facilities to make service under Rule 5(b)(2)(E)."

Based upon the above, it appears that a motion filed within a bankruptcy case is treated differently than a motion filed within an adversary proceeding. For example, if a trustee files a motion to assume an executory contract, under FRBP 9014(b) that motion would be served under 7004(b), and therefore must be served by traditional means except on debtor's counsel. Yet, if a plaintiff in an adversary proceeding files a motion for summary judgment, that motion qualifies under FRCP 5(a)(1)(D) to be served via NEF under FRCP 5(b)(2)(E) and (b)(3).

B. <u>Policy Promoting Use of NEF as Service Method</u>

The Central District of California, and districts nationwide, have made significant strides toward registering attorneys as CM/ECF Users for the purpose of electronic filing and electronic receipt of notice and service. Our Court is presently revising its Local Bankruptcy Rules to affirmatively specify that delivery to an attorney via NEF of any filed document, be it a notice, motion, response, order, etc, constitutes service of that document regardless of whether it is the duty of the court or another person or entity to complete such service.

It will create confusion and increased workload to impose a separate duty of non-electronic service just for motions filed in bankruptcy cases, when the same duty is not required when serving motions in adversary proceedings.

It is also not logical because NEFs are only transmitted to attorneys who have already electronically filed a document in a particular bankruptcy case. As a result, that attorney will be added by CM/ECF to the list of attorneys or trustees who will receive NEFs of all documents filed in the future in that case. Attorneys who register for CM/ECF know that they are consenting to receipt of filed documents via NEF. What purpose is served by transmitting to an attorney a NEF with a hyperlink to a subsequently filed motion, and also requiring the movant to separately deliver the motion to the attorney by traditional means?

C. Amendment of FRBP 9014(b)

My suggestion is to amend FRBP 9014(b) as follows:

> "(*b*) *Service*. The motion and any paper served after the motion shall be served in the manner provided for by Rule 5(b) F. R.Civ.P."

TAB 13

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: CONFLICT SCREENING POLICY

DATE: AUGUST 13, 2008

In May 2008 Judge Gordon Quist, chairman of the Committee on Codes of Conduct, sent a letter to Judge Lee Rosenthal, which is attached, that identified several issues concerning conflict screening that his committee believes might merit consideration of amending the existing federal rules of procedure requiring corporate parent disclosure. Because Judge Quist's letter raises issues relating to conflict screening in bankruptcy cases, Judge Rosenthal referred this matter to Judge Swain for consideration by the Advisory Committee. This memorandum discusses the issues raised by the Codes of Conduct Committee that are relevant to bankruptcy, provides some background information about the adoption and implementation of Rule 7007.1, and recommends further action that the Committee might take in response to Judge Quist's letter.

Issues Raised by the Committee on Codes of Conduct

In his letter Judge Quist discussed two issues of potential relevance to conflict screening in the bankruptcy courts. First he noted that the Committee on Codes of Conduct had identified concerns about both the scope of and method of filing corporate disclosures. He referred to the fact that the district court version of CM/ECF allows attorneys to enter corporate parent information electronically, which eases the burden on the clerks' offices, and that the system permits the identification of disclosed entities as either "parents" or "affiliates." Judge Quist stated that "[s]imilar adjustments are planned for the bankruptcy court CM/ECF system." This

technological development presents the possibility that attorneys are being required to duplicate efforts: preparing a written disclosure statement that is filed with the court and also entering information directly into the CM/ECF database. Moreover, in some districts there is a difference in the scope of the information provided by the two different methods of disclosure. The various federal rules (Fed. R. Civ. P. 7.1, Fed. Bankr. R. 7007.1, Fed. R. Crim. P. 12.4, and Fed. R. App. P. 26.1) require only the disclosure of the names of corporate parents, whereas some districts require broader disclosure via CM/ECF covering corporate affiliates as well.

The second issue raised by the Committee in Judge Quist's letter relates specifically to the bankruptcy courts. He noted that the changing status of creditors and other interested parties during the course of a bankruptcy case complicates the implementation of conflict screening software. The fact that an entity is merely a creditor in a bankruptcy case generally does not pose a financial conflict for a judge, but should that creditor later become a party to an adversary proceeding or a contested matter, that new status could present a conflict. Judge Quist noted a similar possibility with respect to other interested parties, including potential lenders or bidders. The Committee on Codes of Conduct therefore "suggests that the Standing Committee on Rules may wish to consider the special screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters."

Use of CM/ECF for Entry of Corporate Disclosure Information

Judge Quist referred to the possibility that the bankruptcy court version of CM/ECF would soon have the same capability as the district court version to allow attorneys to input corporate parent information directly. This capability will eliminate the need for clerks' offices

to manually enter the information from filed disclosure statements. According to Diane Traylor of the Administrative Office, the most recent bankruptcy release of CM/ECF (3.2) allows attorneys to add corporate parents and other affiliates in docket events. Although this release is currently available to the bankruptcy courts, Ms. Traylor indicated that as of mid-July only 9 bankruptcy courts were "live on R.3.2." Other courts are still awaiting the completion of testing and training before implementing it.

As this new version of CM/ECF is implemented in the bankruptcy courts, the issues mentioned in Judge Quist's letter regarding duplication of effort and scope of disclosure may arise. The scope of disclosure issue is discussed below. As for the concern that attorneys will be required to file a corporate ownership statement and also have to enter the same information into the CM/ECF database, an amendment to Rule 7007.1 could be considered that would allow electronic entry of the required information to satisfy the rule's requirement for the filing of a corporate ownership statement. Since the same issue arises in the district courts, the Advisory Committee may want to coordinate its efforts with the Civil Rules Advisory Committee's response to this concern.

Scope of the Disclosure Requirement

Independent of the issue of how corporate disclosures are made for purposes of conflict screening is the issue of what information should be disclosed and when disclosure should be required. Rule 7007.1 currently requires a corporation that is a party to an adversary proceeding to file a statement identifying any corporation that directly or indirectly owns 10% or more of the corporation's equity interests. This statement must be filed at the time of the corporation's first appearance, pleading, motion, response or other request for relief addressed to the court. A

supplemental statement must be filed if there is a change in circumstances with respect to the information required to be disclosed by the rule. (A corporate debtor is required by Rule 1007(a)(1) to file a similar statement with its petition.)

Rule 7007.1 was adopted in 2003 in order to provide information needed by bankruptcy judges to determine whether disqualification is required under Canon 3C(1)(c).[1] The bankruptcy rule is derived from Rule 26.1 Fed. R. App. P. The Committee Note points out that the rule does not cover all situations in which there might be a financial conflict requiring disqualification, nor does it cover other circumstances that may require disqualification, but it states that the rule is intended "to reach the majority of circumstances that are likely to call for disqualification under Canon 3(C)(1)(c)."

In response to the publication of Rule 7007.1 when it was being proposed, one comment was submitted that suggested that the rule be made applicable to contested matters as well as adversary proceedings. The Advisory Committee, however, chose to limit the applicability of the rule to adversary proceedings. There were several reasons for that decision. Because so many contested matters are resolved with little or no court involvement or very quickly, it was thought that requiring the filing of a corporate ownership statement in such situations would be unnecessary or even futile. Furthermore, although the Advisory Committee had initially considered a broader rule, the Standing Committee expressed a strong desire for consistency among the various federal rules requiring corporate ownership disclosure, and the narrower

---

[1] Canon 3(C)(1)(c) requires a judge's disqualification if "the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or minor child in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be affected substantially by the outcome of the proceeding."

bankruptcy rule eventually adopted was more in line with the other rules. The Committee Note to Rule 7007.1, however, points out that it "does not prohibit the adoption of local rules requiring disclosures beyond those called for" in the national rule.

A number of districts have in fact adopted local rules that require broader disclosure than is required by Rule 7007.1. A sampling of local rules reveals that some require a corporate ownership statement filed by parties to contested matters, as well as adversary proceedings (*see, e.g.*, Bankr. D.D.C. R. 5004-1; Bankr. C.D. Cal. R. 1002-5; Bankr. D. Md. R. 7003-2), others require disclosure, not just of parent corporations, but also of subsidiaries and affiliates (*see, e.g.*, Bankr. D.D.C. R. 5004-1), and others require disclosure by general or limited partnerships or joint ventures in addition to corporations (*see, e.g.*, Bankr. S.D.N.Y. R. 7007.1-1).

An Advisory Opinion (No. 100) issued by the Committee on Codes of Conduct in 2001 noted that "[p]art of the ethical challenge in bankruptcy cases lies in the fact that the identity of 'a party to the proceeding' may change with any motion, objection, or adversary proceeding." The Advisory Opinion took the position that "simply being a creditor or an interest holder of a bankruptcy estate is not a sufficient interest to make that creditor 'a party to the proceeding.'" The opinion concluded that the same is true for someone who files a proof of claim or votes on a plan. On the other hand, the Advisory Opinion stated that the following participants in a bankruptcy case are "part[ies] to the proceeding": members of creditors committees, debtors, trustees, parties to an adversary proceeding, and participants in a contested matter. Thus the opinion concluded that "[j]udges sitting in bankruptcy matters should be vigilant to the possibility that a creditor or interest holder's status may at some time change to 'a party.'"

After the Judicial Conference adopted the policy in September 2006 requiring courts to

use automated conflict screening software to assist in the identification of financial conflicts of interest, the Bankruptcy Judges Advisory Group created a Subcommittee on Mandatory Conflict Screening to consider issues involving conflict screening in bankruptcy cases. In February 2007 the Subcommittee (Judges Jerry Venters, Judge James Meyers, and Judge Lewis Killian) prepared a report that discussed particular issues and difficulties presented by automated conflict screening in the bankruptcy courts. Among the subcommittee's suggestions was there be "a procedure for the filing of corporate disclosure statements with respect to contested matters." The subcommittee noted that requiring the filing of corporate disclosure statements with every motion for relief and with each reaffirmation agreement could be time-consuming for the parties and burdensome for the courts. It suggested several possibilities (other than the filing of corporate disclosure statements on a motion-by-motion basis in each contested matter) that might be adopted to ease the burden: the creation of a centralized filing system for corporate disclosure statements in each district which could be screened for conflicts in individual bankruptcy cases; the creation of a nationwide centralized filing system for corporate disclosure statements; and the requirement that attorneys for corporations input the information directly into CM/ECF rather than placing this burden on clerks' offices.

Recommendation

The time now seems ripe for a reconsideration of Rule 7007.1. Given the issues raised by the Committee on Codes of Conduct, the new bankruptcy version of CM/ECF, the suggestions made by the Bankruptcy Judges Advisory Group, and the experience under local bankruptcy rules, it seems appropriate for the Advisory Committee to refer this matter to the Subcommittee on Attorney Conduct and Healthcare for further consideration and a report back at

the March meeting. In particular the Subcommittee should consider whether the requirement for filing a corporate ownership statement should be made applicable to contested matters and, if so, at what point in the proceeding this obligation should be imposed. The Subcommittee should also consider whether Rule 7007.1 should be amended to take account of the new ability of attorneys to input the disclosure information directly into CM/ECF. Finally, the Subcommittee should consider whether the disclosure information should be expanded to include subsidiaries and other affiliates and whether the obligation should be imposed on entities that do not fall within the definition of "corporations."

Attachment

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
482 GERALD R. FORD FEDERAL BUILDING
110 MICHIGAN STREET, N.W.
GRAND RAPIDS, MI 49503-2363

JUDGE JANICE ROGERS BROWN
JUDGE KAREN K. BROWN
JUDGE CAMERON McGOWAN CURRIE
JUDGE JAY A. GARCIA-GREGORY
JUDGE ANDREW S. HANEN
JUDGE RICHARD G. KOPF
JUDGE ALAN D. LOURIE
JUDGE JAMES F. McCLURE, JR.
JUDGE M. MARGARET McKEOWN
JUDGE ALAN H. NEVAS
JUDGE RUDOLPH T. RANDA
JUDGE HUGH B. SCOTT
JUDGE RONALD A. WHITE
JUDGE CHARLES R. WILSON

JUDGE GORDON J. QUIST
CHAIRMAN

ROBERT DEYLING
COUNSEL

(202) 502-1100

Tel. (616) 456-2253
Fax (616) 456-2243
Email: quist@miwd.uscourts.gov

May 8, 2008

Honorable Lee H. Rosenthal
Chair
Committee on Rules of Practice and Procedure
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Re: Conflict Screening Policy Issues

Dear Judge Rosenthal:

In September 2006, the Judicial Conference adopted the Mandatory Conflict Screening Policy (attached). The Judicial Conference Committee on Codes of Conduct, which recommended the adoption of the conflict screening policy, has identified three issues related to conflict screening that may merit the attention of the Standing Committee on Rules. Briefly, these issues all concern potential amendments to the federal rules of procedure that require the disclosure of corporate parent information, information that judges need in order to make informed determinations concerning recusal.[1]

[1] The federal rules of procedure require the parties to file statements disclosing their corporate parents. *See* Fed. R. Civ. P. 7.1, Fed. R. Crim. P. 12.4, Fed. R. App. P. 26.1; Fed. R. Bank. P. 7007.1

The first issue the Committee has identified concerns the scope of the disclosures, and the method used to file them. The district court version of the Case Management/Electronic Case Files (CM/ECF) system now permits attorneys to enter corporate parent information electronically, and allows the attorneys to label corporations as either a "parent" or "affiliate" when entered into the database. Similar adjustments are planned for the bankruptcy court CM/ECF system. Thus, the CM/ECF system now provides attorneys with an electronic method to enter corporate parent information directly into the system, which will ease the burden on clerks' offices to manually enter the information from the disclosure statements filed by attorneys.

At the same time, however, it seems clear that attorneys may be required to prepare and transmit the same information twice: once when preparing the disclosure statement to be filed with the court, and again when entering the information into the CM/ECF database. In addition, because some courts require the disclosure of *expanded* corporate disclosure information that is not required by the federal rules (i.e., information about the parties' corporate affiliates other than corporate parents), there may be differences between the information required in the disclosure statements and the information that attorneys enter in the electronic system. The Committee has been informed that the Administrative Office is examining additional steps that could be taken to address this issue, but the CM/ECF system does not currently have the capability to extract information from a disclosure statement, add it to the CM/ECF conflict screening database, and use that information to perform conflict screening.

Second, the Committee observes that the changing status of creditors and other interested parties during the course of a bankruptcy proceeding may complicate the implementation of conflict screening software in the bankruptcy courts. In a bankruptcy case there are usually numerous creditors who are not considered parties for recusal purposes but who may become parties during the course of the case. A creditor's status could change, for example, with the filing of an "adversary proceeding." A creditor's status may also change with the filing of a "contested matter" that is also adversarial in nature. Moreover, in bankruptcy cases there may be many "interested parties," such as a potential lender or bidder who may pose a financial conflict for the presiding judge. Once a potential conflict is identified, a judge can determine whether it is necessary to withdraw from the matter or the case. The conflict, however, must first be identified. Thus, the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts.

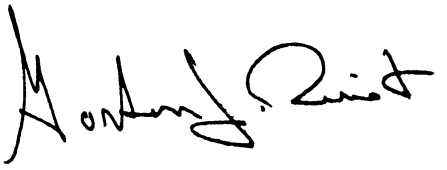
Accordingly, the Committee suggests that the Standing Committee on Rules may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters. I would also note, in this regard, that the Bankruptcy Judges Advisory Group has established a special subcommittee to consider unique issues related to conflict screening for bankruptcy judges.

The third issue the Committee has identified concerns the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse. The Committee has advised that a judge presiding over a criminal case must recuse if the judge has an

interest that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) of the Code of Conduct for United States Judges, or if the judge's impartiality might reasonably be questioned under Canon 3C(1). Obtaining appropriate disclosures from the parties to permit judges to fulfill this potential recusal obligation may require an amendment to the Federal Rules of Criminal Procedure, as current Rule 12.4 does not appear to cover disclosure of information related to restitution. *See* Fed. R. Crim.P. 12.4 (Advisory Committee Notes).

Thank you for considering the issues that the Committee has identified concerning the relationship between the federal rules and the judiciary's Mandatory Conflict Screening Policy. If you have any question, please feel free to contact me.

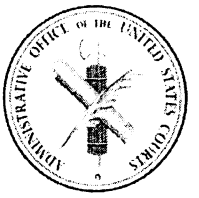
For the Committee,



Gordon J. Quist
Chairman

Encl.

cc: James C. Duff, Director, Administrative Office of the U.S. Courts



ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 19, 2006

MEMORANDUM

To: Chief Judges, United States Courts

From: James C. Duff

RE: NEW POLICY ON AUTOMATED CONFLICT SCREENING
(ACTION REQUESTED)

RESPONSE DUE DATES: November 30, 2006 and January 31, 2007

As you are aware, on September 19, 2006, the Judicial Conference adopted a new policy requiring the use of automated conflict screening software to assist judges in identifying financial conflicts of interest (*see Attachment A*). The mandatory policy requires courts to implement automated conflict screening and requires judges and judicial officers to develop a conflicts list, update it on a regular basis, and use it in automated screening (as a supplement to personal review of cases for conflicts). The judiciary's Case Management/Electronic Case Files (CM/ECF) system contains software for this purpose and is the preferred option.

The policy assigns chief judges and circuit councils specific responsibilities that will require immediate attention. **By November 30, 2006,** each chief judge is required to report to their circuit council the status of automated conflict screening in their court, including the number of judicial officers participating in automated screening, and any other information the circuit council seeks. **By January 31, 2007,** each circuit council is required to report to the Judicial Conference a preliminary plan to implement the policy. Courts not subject to the authority of a circuit council are to assume these responsibilities directly.

The Administrative Office will continue to improve existing CM/ECF conflict screening functionality and will provide training and assistance. In addition, I have assembled a working group of AO staff to support your implementation of this policy. They will be working with judges, court staff, and the Federal Judicial Center to develop

and disseminate guidance and materials for use in carrying out these new responsibilities. In that regard, and as a first step, they have developed a checklist for chief judges to use in preparing the November 30, 2006, report to the circuit councils (*see Attachment B*). In addition, the working group is developing the following materials that will be available in the near future:

- a checklist for circuit councils which will identify tasks that should be considered in implementing the policy;
- a checklist of decisions to be made by judges and clerks' office staff as they implement automated conflicts screening in CM/ECF; and
- an illustrative implementation plan, which circuit councils can use as a model for the preliminary plans to be submitted to the Judicial Conference by January 31, 2007.

If questions arise regarding policy guidance or interpretation, please contact Marilyn Holmes or Robert Deyling, Office of General Counsel, (202) 502-1100; for technical questions about the CM/ECF conflict screening software, please contact Gary Bockweg or Cam McCarthy, Office of Court Administration, (202) 502-2500. Peggy Irving, Chief of the Article III Judges Division, is coordinating AO support on these initiatives and she may be contacted for general information. The respective offices within the AO that support your operations are, of course, also available. These individuals, as well as the other members of the working group, will ensure your concerns are responded to quickly and comprehensively.

Attachments

cc: All United States Judges
Circuit Executives
District Court Executives
Clerks, United States Courts

ATTACHMENT A

Judicial Conference Policy on Mandatory Conflict Screening

Approved September 19, 2006

The Judicial Conference recognizes the efforts of the many courts which, with the assistance of the Administrative Office, have instituted automated conflict screening. Based on the proven effectiveness of automated screening and the importance of extending its use to all courts, the Judicial Conference adopts a mandatory conflict screening policy. This policy will be administered and directed by the circuit councils under the authority set forth in 28 U.S.C. 332(d)(1) (or by the individual courts not subject to the authority of a circuit council) and will provide that:

(1) The Administrative Office, in cooperation with the courts[1], shall continue developing, refining and deploying the necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system, shall examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and shall provide information, training, and assistance to facilitate implementation of and participation in the screening.

(2) Each court shall implement automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system (or other software with comparable function approved by the circuit council). The clerk's office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information[2] and other relevant information). The clerk's office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council. Each clerk's office shall also provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

(3) In addition to each judicial officer's personal review of cases for conflicts, each judicial officer shall develop a list identifying financial conflicts for use in conflict screening[3], shall review and update the list at regular intervals, and shall employ the list personally or with the assistance of court staff to participate in automated conflict screening.

---

[1] This Judicial Conference policy extends to courts of appeals, district courts, the Court of International Trade, the Court of Federal Claims, and bankruptcy courts, and to the judicial officers thereof, but does not extend to the Supreme Court.

[2] *See* Fed. R. App. P. 26.1; Fed. R. Civ. P. 7.1; Fed. R. Crim. P. 12.4; Fed. R. Bankr. P. 7007.

[3] A model form is available for this purpose. *See* Form AO-300.

(4) Each chief judge shall report to the respective circuit council by November 30, 2006, with an initial report on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. Each circuit council shall report to the Judicial Conference by January 31, 2007, with a preliminary plan for implementation of the mandatory financial conflict screening program within the circuit, and shall thereafter make such further reports as are required by the Judicial Conference.

(5) Each circuit council shall make all necessary and appropriate orders to implement the foregoing mandatory conflict screening policy within the circuit, taking into account the specific circumstances of that circuit and each judicial officer and court within it, and providing for appropriate exceptions (e.g., a seriously ill judge who is not being assigned cases).

(6) Each court not subject to the authority of a circuit council shall assume the responsibilities described above for circuit councils.

ATTACHMENT B

CHECKLIST FOR THE CHIEF JUDGE'S REPORT TO THE CIRCUIT COUNCIL ON AUTOMATED CONFLICT SCREENING
(Due November 30, 2006)

On September 19, 2006, the Judicial Conference adopted a new policy mandating the use of automated conflict screening software to identify financial conflicts of interest for judges. Pursuant to the new policy, each chief judge shall make an initial report to the respective circuit council on the status of automated conflict screening in the court, including the number of judicial officers participating in automated conflict screening and any additional information sought by the circuit council. The report is due to the circuit council by November 30, 2006.

To assist chief judges with this report, the following checklist of information has been compiled for each chief judge.

☐ Determine the number of judges on the court using automated conflict screening.

- How many judges use the CM/ECF conflict screening system?
- How many judges use some other automated conflict screening system? (The circuit council might require a general description of the software to determine whether it is comparable to CM/ECF.)

☐ Is there other information the circuit council has requested from the chief judge? (For example, the circuit council might require the name, title, and location of judges not using automated conflict screening, or require the reasons why judges are not using automated conflict screening.)

☐ Are there any other circumstances unique to this court the circuit council should consider when developing the implementation plan?

☐ Prepare and send the report to the circuit council by November 30, 2006.

Lee Rosenthal/TXSD/05/USCOURTS
05/13/2008 08:39 AM

To Judge Tallman/CA09/09/USCOURTS@USCOURTS, Laura T Swain/NYSD/02/USCOURTS@USCOURTS, Carl Stewart/CA05/05/USCOURTS@USCOURTS, Mark Kravitz/CTD/02/USCOURTS@USCOURTS

cc John Rabiej/DCA/AO/USCOURTS@USCOURTS

Subject Fw: Conflict Screening Policy Issues

Dear Chairs: I attach a letter from Judge Quist, chair of the Committee on Codes of Conduct, raising issues about the rules implications of the Judicial Conference Mandatory Conflict Screening Policy adopted in September 2006. The affected rules require disclosure of corporate parent information. Judge Quist has asked that the Rules Committees study the following issues: 1). the scope of the disclosures and the method used to identify them, which requires analysis of how well the rules mesh with the current and anticipated systems for attorneys to make the disclosures; 2). in bankruptcy cases, whether the rules adequately address the likelihood that the status of creditors and other interested parties may change during a proceeding, particularly in adversary proceedings and contested matters; and 3). in criminal cases, whether Rule 12.4 should be amended to require disclosure of information related to restitution. I am referring his letter to each of you and ask that you consider how best to examine the issues raised.

I look forward to seeing you all in a few weeks. Best regards, Lee

_____

Lee H. Rosenthal
United States District Judge
Southern District of Texas
515 Rusk, 11th Floor
Houston, Texas 77002
713-250-5980 (phone)
713-250-5213 (fax)

TAB 14

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: CASE LAW INTERPRETING RULE 2019

DATE: AUGUST 9, 2008

As discussed as the March Advisory Committee meeting, two trade associations – the Loan Syndications and Trading Association and the Securities Industry and Financial Markets Association – have submitted a proposal to the Advisory Committee that Rule 2019 be repealed. This rule, applicable in chapter 9 and 11 cases, requires entities and committees, other than official committees appointed under § 1102 or § 1114, to make certain disclosures if the entity or committee represents more than one creditor or equity security holder in the case. The Advisory Committee decided to table until the October meeting consideration of whether to refer the proposal to a subcommittee because it was anticipated that further public input on the desirability of amending or repealing Rule 2019 would be submitted. In the meantime, I was asked to prepare this memorandum for the October meeting discussing the case law under Rule 2019.

Although Rule 2019 is derived from §§ 209 - 213 of the Bankruptcy Act and former Chapter X Rule 10-211, only in the last year or so has it has given rise to controversy. Prior to a 2007 decision by Judge Allan Gropper of the Bankruptcy Court for the Southern District of New York, Rule 2019 was generally applied in a fairly routine manner. Since Judge Gropper's decision in *In re* Northwest Airlines Corp., 363 B.R. 701 (Bankr. S.D.N.Y. 2007), however, the rule's application to *ad hoc* committees, particularly those formed by hedge funds and other distressed investors, has been the subject of debate and, in some circles, the cause for alarm. So

far this issue has not produced other published opinions.

Background of Rule 2019

Under the system of federal equity receiverships, which grew up prior to the creation of an effective bankruptcy procedure for corporate reorganization, the corporation's management or the underwriter of a class of its securities would form protective committees for each class of its public securities. Protective committees were responsible for formulating plans of reorganization to be approved by the federal court. Although they were supposed to represent the interests of the security holders, these committees were often dominated by insiders or others with conflicts of interest, including those with either no interest in the debtor or with interests acquired at depressed prices.[1]

A 1937 report from the Securities and Exchange Commission highlighted problems with the equity receivership system. The SEC noted that corporate insiders, who controlled protective committees, often used their position as representatives of public investors to improve their own financial position to the detriment of the investors they represented. The SEC recommended that representatives of investors act as true fiduciaries and that Congress require representatives of multiple creditors or security holders to make disclosures, among other things, about their interests in or claims against the debtor, when they acquired them, whom they were representing, and how that representation came about. The SEC Report concluded that such information "will provide a routine method of advising the court and all parties in interest of the actual economic

[1] *See* James M. Shea, Jr., Note, *Who Is at the Table? Interpreting Disclosure Requirements for Ad Hoc Groups of Institutional Investors Under Federal Rule of Bankruptcy Procedure 2019*, 76 FORDHAM L. REV. 2561, 2568-70 (2008).

interest of all persons participating in the proceedings."[2] Congress enacted these recommendations in the Chandler Act, and the subsequently adopted rule requiring the disclosures is the predecessor of Rule 2019.

In its current form Rule 2019(a) requires in chapter 9 and chapter 11 cases every entity or committee representing more than one creditor or equity security holder (other than an official committee) to disclose the following information in a verified statement:

> (1) the name and address of the creditor or equity security holder;
>
> (2) the nature and amount of the claim or interest and the time of acquisition thereof unless it is alleged to have been acquired more than one year prior to the filing of the petition;
>
> (3) a recital of the pertinent facts and circumstances in connection with the employment of the entity or indenture trustee, and, in the case of a committee, the name or names of the entity or entities at whose instance, directly or indirectly, the employment was arranged or the committee was organized or agreed to act; and
>
> (4) with reference to the time of the employment of the entity, the organization or formation of the committee, or the appearance in the case of any indenture trustee, the amounts of claims or interests owned by the entity, the members of the committee or the indenture trustee, the times when acquired, the amounts paid therefor, and any sales or other disposition thereof.

Rule 2019(a)'s wording is somewhat awkward and, in places, ambiguous. For example, although the rule applies to the representation of multiple creditors or equity security holders, the first item of disclosure – "the name and address of the creditor or equity security holder" – is worded in the singular. Item 2, which follows the reference to the represented creditor or equity security holder, might be seen as being ambiguous about whether it requires disclosure of claims

[2] Menachem O. Zelmanovitz & Matthew W. Olsen, *Rule 2019: A Long Neglected Rule of Disclosure Gains Increasing Prominence in Bankruptcy*, PRATT'S J. BANKR. L., July-Aug. 2007, at 3-4.

or interests held by the representative or those represented. Finally item 4, which requires disclosure about the claims or interests of either the entity or the committee that is the representative, may be redundant with item 2, depending on how that provision is interpreted. Despite such issues of interpretation, few opinions have carefully parsed the language of the rule or acknowledged significant doubt about its meaning.

Case Law Prior to *Northwest Airlines*

Prior to 2007 most of the reported decisions concerning Rule 2019 concerned its application in the following contexts: (1) lawyers or law firms representing multiple creditors or equity security holders; (2) class actions; (3) attempts to keep information disclosed in Rule 2019 statements confidential.

Disclosure by lawyers. It is generally accepted that lawyers or firms representing more than one creditor or equity security holder are required to make disclosures under Rule 2019. *See, e.g., In re* Ok. P.A.C. First Ltd. P'ship, 122 B.R. 387, 391 (Bankr. D. Ariz. 1990). What has produced disputes is the extent of the disclosures required. In *In re* CF Holding Corp., 145 B.R. 124 (Bankr. D. Conn. 1992), two law firms representing five holders of equity interests and one creditor filed a Rule 2019 statement. That disclosure gave the names and addresses of their clients, stated that the holders of interests acquired those interests more than a year before the filing of the bankruptcy petition, and that the creditor held a claim for over $4 million in royalties due. Beyond that, the statement indicated the names of the individuals who contacted the firms about the representation and declared that no actual, non-waivable conflicts of interest existed. Upon objection by the unsecured creditors committee as to the sufficiency of the disclosure under Rule 2019, the court required the law firms to provide "any instrument

empowering the [firms] to act on behalf of the listed entities" and to reveal the nature and amount of the interests held by the five shareholders. *Id.* at 126-27. The court rejected arguments that the law firms were also required to reveal the names of everyone who was a stockholder or partner in the six represented entities and that they had to disclose the information listed in Rule 2019(a)(4) regarding the clients' acquisition or sale of their claims and interests. The court interpreted the latter provision to apply to the entity filing the disclosure statement (here the law firms), and not to the represented entities. *Id.* at 127. In rendering its decision, the court noted that "[r]eported case law on the issue of exactly what must an attorney declare in a Rule 2019 statement in order to comply with the rule is very sparse." *Id.* at 126.

More recent cases concerning Rule 2019 have frequently involved law firms' representations of multiple tort claimants. In Baron & Budd, P.C. v. Unsecured Asbestos Claimants Committee, 321 B.R. 147 (D.N.J. 2005), the district court affirmed the bankruptcy court's Rule 2019 compliance order that required several law firms to supplement their previously filed statements by including "a list and detailed explanation of any type of co-counsel, consultant or fee sharing relationships and arrangements whatsoever, in connection with this bankruptcy case" and by attaching "copies of any documents that were signed in conjunction with creating that relationship or arrangement." *Id.* at 166. The district court upheld the bankruptcy court's authority to order the disclosure under Rule 2019(a)(3) as constituting "pertinent facts and circumstances in connection with the employment of the entity." It declared that "the core purpose of Rule 2019 is to ensure that reorganization plans deal fairly with all creditors and are arrived at openly." *Id.* at 167. *See also In re* Pittsburgh Corning Corp., 260 F. App'x 463 (3rd Cir. 2008) (finding lack of standing to permit review of bankruptcy court's ruling

under Rule 2019 allowing tort claimants' law firms to file exemplars, rather than actual copies, of empowering documents and permitting access to the Rule 2019 statements only upon motion and order of the court); *In re* Congoleum Corp., 2005 WL 712540 (Bankr. D.N.J.. Mar. 24, 2005) (ordering asbestos claimants' lawyer to comply with Rule 2019 order within 5 days); *In re* Keene Corp., 205 B.R. 690, 704 (Bankr. S.D.N.Y.1997) (holding that lawyer's Rule 2019 statement that merely listed names and addresses of tort claimant clients, but none of the other information required by the rule, was "wholly inadequate").

Applicability of Rule 2019 to Class Actions. The issue whether Rule 2019 is applicable to putative or certified class actions has come up in several bankruptcy cases. Some courts have held that it is unnecessary for a lawyer representing class action claimants to file a Rule 2019 disclosure. For example, in Wilson v. Valley Elec. Membership Corp., 141 B.R. 309, 314-15 (E.D. La. 1992), Judge Sear rejected the argument that a lawyer seeking to file class proofs of claim was required to comply with Rule 2019. He explained:

> In a class action such as this one, there can be thousands of class members. Indeed, the first requirement for obtaining class treatment is that "the class is so numerous that joinder of all members is impracticable." Thus, to name every class member as a creditor and provide his or her address in a verified statement is impractical, if not impossible, considering that, upon filing a class action, the class representatives often do not yet know the names of all the class members because the defendants possess this information. Moreover, the named class representatives do not acquire the authority to act on behalf of the class until, and unless, the court certifies the class. Thus, as in this case, when the class proof of claim was filed, the named representatives could not provide documentation evincing their authority to act on behalf of the class because they had not yet acquired that authority and could not have known the identity of each member of the class. Finally, Rule 2019 more appropriately seems to apply to the formal organization of a group of creditors holding similar claims, who have elected to consolidate their collection efforts, rather than to class actions.

The court in *In re* Craft, 321 B.R. 189 (Bankr. N.D. Tex. 2005), stated that "[m]ost courts . . . have required compliance by class representatives with Rule 2019," but it followed the view of the Seventh Circuit that the certification of a class in and of itself satisfies the requirements of Rule 2019. *Id.* at 197-98 (citing *In re* Am. Reserve Corp., 840 F.2d 487, 493 n.6 (7th Cir. 1988)). *See also In re* Charter Co., 876 F.2d 866, 873 (11th Cir. 1989) (holding that class proofs of claim are not inconsistent with Rule 2019 since certification of the class satisfies the rule's objectives and denial of certification moots the issue); *In re* Spring Ford Indus., Inc., 2004 WL 231010 at * 4 (Bankr. E.D. Pa. Jan. 20, 2004) (holding that Rule 2019 is inapplicable to class action representatives, "who lack the information needed to comply with it," but that in any event "the rule's requirement will be satisfied *nunc pro tunc* by court certification of the class or mooted by denial of certification").

Decisions in which courts have taken the contrary view and have held that class representatives must file Rule 2019 statements include Reid v. White Motor Corp., 886 F.2d 1462 (6th Cir.1989); *In re* Bicoastal Corp., 133 B.R. 252 (Bankr. M.D. Fla. 1991); and *In re* FIRSTPLUS Fin. Inc., 248 B.R. 60, 69-70 (Bankr. N.D. Tex. 2000). Despite the statement in *Craft* that these cases represent the majority view, by my count the trend seems to be in the other direction.

Confidentiality of Rule 2019 Statements. In some cases an issue has arisen as to whether information disclosed in a Rule 2019 statement may remain confidential. Parties seeking to shield the information have had mixed results. The bankruptcy court in *In re I.G. Servs., Ltd.*, 244 B.R. 377 (Bankr. W.D. Tex. 2000), issued a confidentiality order allowing Mexican investors not to disclose their names and addresses in a Rule 2019 statement because they feared

becoming targets of crime due to their wealth. A news agency filed a motion to vacate this order, but the bankruptcy court denied the request. Its reasoning for upholding the confidentiality order was that

> Rule 2019 . . . was not promulgated to assure the public access to the identity of creditor or investor entities, but rather "to prevent improper participation in a reorganization case by attorneys representing creditors and stockholders." . . . .
>
> The suggestion that the court cannot alter the ambit of Rule 2019 relies on the assumption that the rule is there so that the press can know the identity of persons being represented in a bankruptcy case. The assumption, obviously, is wrong. Because the assumption is wrong, so also is Movants' argument. To hold otherwise would give the press standing which it does not enjoy, and would impose an unwritten duty on courts that, when they administer their cases, they must ever be mindful that they are servants of the press.

Id. at 383.

On appeal, the district court vacated the confidentiality order on the grounds that the investors had taken a risk by investing in the debtor and by filing claims with their investment account numbers. San Antonio Express-News v. Blackwell (*In re* Blackwell), 263 B.R. 505, 510 (W.D. Tex. 2000). Moreover, they had not made a sufficient showing that they were likely to be subjected to violence as a result of their participation in the bankruptcy proceedings. Thus they had failed to overcome the presumption of the openness of court proceedings. *Id.*

In other cases, however, courts have protected parties from full public disclosure of information in Rule 2019 statements. In *In re* Kaiser Aluminum Corp., 327 B.R. 554, 560 (D. Del. 2005), the district court upheld a bankruptcy court order that the Rule 2019 statements filed by law firms representing asbestos tort claimants not be posted on the court's electronic docket and that they be made available only upon motion and court order. The court held that the bankruptcy court's order struck the appropriate balance between allowing public access to the

information and ensuring that the information was not misused. *Id.*; *see also In re* Pittsburgh Corning Corp., 260 F. App'x 463 (3rd Cir. 2008) (finding lack of standing to permit review of bankruptcy court's order permitting access to Rule 2019 statements only upon motion and order of the court).

Northwest Airlines and Rule 2019's Application to *Ad Hoc* Committees

Prior to Judge Gropper's 2007 decision in *Northwest Airlines*, informal or *ad hoc* committees participating in chapter 11 cases had generally complied with Rule 2019 by filing a verified statement by the attorney or law firm representing the committee that listed the members of the committee, the aggregate amount of their interests or claims in the case, and the circumstances under which the attorney was retained. There was apparently little litigation over the sufficiency of these disclosures.[3]

In *Northwest Airlines*, an *ad hoc* committee of equity security holders filed a Rule 2019 statement verified by the committee's counsel. According to the court the statement provided the following information:

> [I]t identifies the 11 members of the Committee; discloses that, "[t]he members of the Ad Hoc Equity Committee own, in the aggregate, 16,195,200 shares of common stock of Northwest and claims against the Debtors in the aggregate amount of $164.7 million" and that "[s]ome of the shares of common stock and some of the claims were acquired by the members of the Ad Hoc Equity Committee after the commencement of the Cases;" states that KBT & F has been retained as "counsel to the Ad Hoc Equity Committee in the Cases pursuant to an engagement letter in the form annexed as Exhibit B hereto;" and states that KBT & F does not own any claims against or interests in the Debtors and that the members of the Committee are responsible for the firm's fees "subject to their right to have the Debtors reimburse KBT & F's fees and disbursements and other

[3] *See* Shea, *supra* note 1, at 2598.

expenses by order of the Court."

363 B.R. 701, 702. The debtor moved for an order requiring the committee to supplement its statement to provide the additional information required by Rule 2019. Specifically it sought disclosure by each of the committee members of the information required by Rule 2019(a)(4): the amounts of the claims or interests owned by each committee member, when they were acquired and the amounts paid, and any sales or dispositions of those claims or interests.

The court agreed with the debtor that the plain terms of the rule required the committee members to provide the additional information, and it ordered them to disclose it. Judge Gropper rejected the committee's argument that Rule 2019 did not require the requested disclosure because the members of the committee did not represent any other entities and counsel for the committee did not own any claims or interests in the debtor. Responding that "the rule may not be so blithely avoided," he stressed that the committee had been appearing in the case and that "[w]here an *ad hoc* committee has appeared as such, the committee is required to provide the information plainly required by Rule 2019 on behalf of each of its members." *Id.* at 703. He noted that by organizing themselves as a committee, these equity security holders "implicitly ask the court and other parties to give their positions a degree of credibility appropriate to a unified group with large holdings." *Id.* Judge Gropper further pointed out that the SEC report that gave rise to the rule "centered on perceived abuses by unofficial committees in equity receiverships and other corporate reorganizations." *Id.* at 704. In the end, the court stated that there was no basis for not applying Rule 2019 as written, even if, as the committee argued, it had been "frequently ignored or watered down." *Id.*

In a subsequent opinion Judge Gropper denied the *ad hoc* committee's motion to allow the supplemental Rule 2019 statement to be filed under seal and made available only to the court and the U.S. trustee. *In re* Northwest Airlines Corp., 363 B.R. 704 (2007). The court found "improbable" and unsupported by the evidence the committee's contention that disclosure of the information would allow competitors to discern their investment strategies. Instead, affidavits submitted in support of the committee's motion showed that the members were seeking to shield information about the price at which they purchased their claims and interests for strategic reasons in the case. According to Judge Gropper, by choosing to act as a group, the committee members subjected themselves to Rule 2019's disclosure requirements and gave up their right to keep their purchase information secret. The court remarked that "[t]his is not unfair because their negotiating decisions as a Committee should be based on the interests of the entire shareholders' group, not their individual financial advantage." *Id.* at 708. Rule 2019, Judge Gropper said, "is based on the premise that the other shareholders have a right to information as to Committee member purchases and sales so that they may make an informed decision whether this Committee will represent their interests or whether they should consider forming a more broadly-based committee of their own." *Id.* at 709. In this case, he said, that information could be especially important to other shareholders because committee members owned a significant amount of debt as well as stock and they had indicated that they might sell their interests, leaving the shareholders without representation.

Although the *Northwest Airlines* decisions have provoked a significant amount of commentary and indeed have led to the proposal before the Advisory Committee to repeal Rule 2019, neither decision has been cited by a subsequent reported decision. One bankruptcy court,

however, has rejected the approach adopted by Judge Gropper. Judge Schmidt of the Bankruptcy Court for the Southern District of Texas denied a debtor's motion to require an *ad hoc* committee of noteholders to disclose the type of information under Rule 2019 that Judge Gropper required in *Northwest Airlines. In re* Scotia Pacific Co., 2007 WL 2726902 (Bankr. S.D. Tex. May 29, 2007). The only reported document is Judge Schmidt's denial of the debtor's motion for reconsideration, which does not reveal the court's reasoning. According to commentators, however, the noteholders referred to themselves as a "group" rather than a "committee" and argued that Rule 2019 did not apply to them because they did not speak for anyone outside the group.[4] Thus they claimed that they were not representatives of anyone else. At the hearing on the motion, Judge Schmidt agreed that they were "'just one law firm representing a bunch of creditors.'" Taking what he articulated as "'a practical approach,'" Judge Schmidt ruled that the individual noteholders did not have to provide the information required by Rule 2019(a)(4).[5]

Conclusion

To date the bankruptcy court in only one case has issued a reported decision requiring disclosure under Rule 2019(a)(4) by individual members of *ad hoc* committees. The prospect that other courts will similarly require such disclosure is sufficiently unsettling to hedge funds and distressed investors that two trade associations have sought repeal of Rule 2019. A year and a half after the *Northwest Airlines* decision, however, no other courts have jumped on the

[4] *See* Shea, *supra* note 1, at 2604-06; Kevin J. Coco, Survey, *Empty Manipulation: Bankruptcy Procedure Rule 2019 and Ownership Disclosure in Chapter 11 Cases*, 2008 COLUM. BUS. L. REV. 610, 632.

[5] Shea, *supra* note 1, at 2604.

bandwagon. The fact that Judge Gropper's decision stands alone seems to undercut the urgency of the proposal for repeal of the rule.

TAB 15

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: SEVENTH CIRCUIT *ZEDAN* OPINION

DATE: AUGUST 21, 2008

The Seventh Circuit recently issued an opinion in Zedan v. Habash, 529 F.3d 398 (2008), which addresses two issues that implicate the bankruptcy rules. The first issue concerns whether a creditor should be able to object to or seek revocation of a discharge based on debtor fraud that the party discovered during the "gap" period after the deadline for objecting to discharge has passed but prior to the granting of the discharge. The second issue, raised by Chief Judge Easterbrook in his concurring opinion, questions the wisdom of Rule 7001's classification of a proceeding to object to or revoke a discharge as an adversary proceeding. Chief Judge Easterbrook expressed concern about the impact of the classification on appellate jurisdiction – namely, that the termination of such an adversary proceeding constitutes a final order permitting court of appeals review, even if other proceedings seeking denial or revocation of the discharge are still pending. Because of his view that Rule 7001(4) potentially conflicts with 28 U.S.C. § 157(b)(2)(J), he brought this matter to the attention of a member of the Standing Committee, and Judge Rosenthal referred it to the Advisory Committee for consideration.

The next section of this memorandum summarizes the background of the *Zedan* decision and the majority and concurring opinions. The background summary is followed by a discussion of the operation and history of the rules provisions as to which *Zedan* raises questions, and outlines approaches that the Committee may want to consider in connection with the questions

raised by the opinions in *Zedan*.[1]

BACKGROUND

The debtor, Habash, filed a chapter 7 petition in August 2004. The deadline for creditors to object to discharge was extended from December 2004 to February 2005. Meanwhile, a new trustee was appointed, and she obtained an extension of her deadline to object to discharge until September 2005. No creditor filed an objection prior to the February deadline. The trustee engaged in discovery and eventually negotiated a resolution of the case that resulted in the debtor's discharge and an auction of his nonexempt assets. Although the extended time to object to discharge had expired in September 2005 and the sale took place in February 2006, for reasons that are not revealed the bankruptcy court did not enter a discharge order until November 2007.

In April 2006 creditor Zedan brought an adversary proceeding under §§ 523(a)(4) and 727(d)(1), asserting that the debtor had fraudulently misrepresented his income and the value of his assets and seeking "revocation" of the discharge (which, as noted above, had not yet been issued). The bankruptcy court dismissed the proceeding without opinion on the ground that it was untimely. Zedan appealed to the district court, which affirmed. Because no discharge had been entered when Zedan filed his adversary proceeding, the court held that it was not untimely under § 727(e)(1). It was untimely nevertheless, the court concluded, because it was not filed within one year of the deadline for objecting to discharge. The court also held that the complaint

[1] I am grateful to have been able to consult with Professors Jeffrey Morris and Alan Resnick, my two immediate predecessors as Reporter to the Advisory Committee. Their knowledge of the historical background of the rules and their insights into the issues raised in the *Zedan* opinions were extremely helpful in the preparation of this memorandum.

failed to allege fraud with sufficient particularity. 529 F.3d at 401.

Zedan appealed to the Seventh Circuit in February 2007. At oral argument the panel ordered the parties to file supplemental memoranda on "'whether rejecting a single potential objection to discharge is a final order immediately reviewable by the Court of Appeals even though the bankruptcy judge has yet to decide whether the debtor will be discharged.'" *Id.* The court, in an opinion by Judge Kanne, held that it had jurisdiction. Because the dismissal of Zedan's complaint constituted the final disposition of an adversary proceeding, it met the test the Seventh Circuit has consistently applied for finality in a bankruptcy proceeding: "whether an order resolves a discrete dispute that, but for the continuing bankruptcy, would have been a stand-alone suit by or against the trustee [or other party]." *Id.* at 402. Here the ruling by the bankruptcy court finally determined the rights of the creditor Zedan with respect to his objection to or attempt to revoke the (as yet to be entered) discharge, even if it did not finally determine the rights of the debtor.

On the merits the court affirmed the dismissal of Zedan's complaint. Noting that he had based his challenge to the discharge on § 727(d)(1) because the deadline for objecting under § 727(a) had long since passed, the court pointed out the "quandary created by the juxtaposition of the Bankruptcy Code with the Federal Rules of Bankruptcy Procedure." *Id.* at 404. Rule 4004 requires the filing of an objection to discharge no later than 60 days following the first date set for the § 341 meeting, but permits the extension of that deadline upon timely application by the trustee or another party in interest. If no objection is made by the applicable deadline, the rule directs the bankruptcy court to "forthwith grant the discharge." In a case like this one, however, in which the discharge is not immediately granted, a gap period is created between the

objection deadline and the discharge. If a creditor discovers during that gap period that the debtor has engaged in fraud, it will be too late under the rules to object to discharge, but the creditor will not be able to seek revocation of the discharge based on fraud even after the discharge is granted. That is because § 727(d)(1) requires that the party seeking revocation of discharge on the ground of fraud "not know of such fraud until *after* the granting of such discharge" (emphasis added). While the *Zedan* court acknowledged that the Second and Ninth Circuits had interpreted § 727(d)(1) flexibly to allow relief in this type of gap situation, it sided with several district and bankruptcy courts that had enforced the literal terms of the statute. Moreover, in this case the court concluded that the relief Zedan sought was "nonsensical" because a "bankruptcy court cannot revoke an order that it has never issued." *Id.* at 405.

Although the court recognized that Rule 4004 as written should have prevented the problem that the creditor faced because the rule does not allow for a significant gap period, it said that the Code must prevail when the rules are not followed. The court invited either Congress or the Supreme Court to address this problem to avoid what it characterized as the "clash" between the Bankruptcy Rules and the Code. *Id.* at 406.

Chief Judge Easterbrook joined the court's opinion, but wrote separately to address further the appellate jurisdiction issue. He accepted as a given that "[t]he terminating order of an adversary action in bankruptcy is a 'final decision' for the purposes of 28 U.S.C. § 158(d)." *Id.* at 407. Because Rule 7001(4) required Zedan to bring his challenge to the discharge as an adversary proceeding, Chief Judge Easterbrook agreed that the court had appellate jurisdiction. He questioned, however, whether that result was desirable. He observed that Rules 4004(d) and 7001(4) "appear to be inconsistent with a statute that classifies objections to discharge as

contested matters in core proceedings," *citing* 28 U.S.C. § 157(b)(2)(J) and Kontrick v. Ryan, 540 U.S. 443, 453 (2004), while acknowledging that "adversary actions can be appropriate in core proceedings." *Id.* He further noted that Rule 7001(4) was written before the adoption of § 157(b)(2)(J) in 1984 and has not been revisited since then.

According to Chief Judge Easterbrook, it was only the rules' classification of Zedan's proceeding as an adversary proceeding that gave the creditor a right to appeal to the court of appeals at the point that he did. Had the rules instead treated his proceeding as a contested matter, Chief Judge Easterbrook reasoned, the court of appeals would have lacked jurisdiction to hear his appeal. He posited that a decision rejecting one ground for objecting to a discharge is not final in the sense required for court of appeals review if the decision whether to grant the discharge has not been resolved. Indeed he pointed out that, in this case, "the judge did not reach the ultimate decision until after Zedan's appeal had been argued in this court." *Id.* Judge Easterbrook stated that he did "not see any good reason why the rules should employ a form that can produce appellate review of one creditor's arguments against a discharge, before the bankruptcy court has decided whether the debtor receives one," and he suggested that the "appropriate committees should take a look at this subject." *Id.*

DISCUSSION

The Gap Issue

As the *Zedan* opinion recognized, if the timetable contemplated by Rule 4004(c)(1) is followed, the problem presented in that case should not arise in most cases. A trustee or creditor would have approximately 90 days, plus the length of any extension granted by the bankruptcy court, to engage in discovery (approximately 30 days before the § 341 meeting and 60 days

thereafter) and to decide whether to object to the debtor's discharge, and that period could be extended for cause. Once that time period passed, the bankruptcy court would "forthwith grant the discharge" if no objection was filed. Then, under § 727(d)(1) and (e), the creditor, trustee, or U.S. trustee would have a year in which to seek revocation of the discharge based on fraud that the requesting party learned of after the granting of the discharge.

The discharge is not, however, always granted immediately after the expiration of the objection deadline. Rule 4004(c)(1) itself lists situations in which the entry of the discharge may be delayed – for example, if a motion to dismiss the case is pending, the debtor has not paid the filing fee in full, or another proceeding objecting to discharge is pending. Moreover, as *Zedan* illustrates, it may happen that a court simply delays entering the discharge notwithstanding Rule 4004(c)(1)'s command. Whatever the reason for the delay, if there is a gap between the deadline for objecting and the entry of the discharge, the possibility arises that during that period a party will discover fraud that would have been a basis for an objection to discharge if it had been discovered in time to object, or that would have been a basis for seeking revocation of the discharge if it had been discovered after the discharge was granted. If § 727(d)(1) is applied as written, the party seeking to challenge the discharge in this gap situation will be out of luck.

As the *Zedan* Court recognized, some courts have declined to apply § 727(d) literally. The Ninth Circuit has addressed the gap situation by "deeming" the discharge to have been granted immediately after the objection deadline passed, even though no formal discharge order was ever entered. Ross v. Mitchell (*In re* Dietz), 914 F.2d 161, 164 (1990). The *Ross* court then determined that the trustee learned of the fraud after the deemed date of the discharge, and thus

he satisfied the requirements of § 727(d)(2).[2] The Second Circuit has also declined to read § 727(d) as precluding revocation at the request of someone who learns of the fraud during the gap period. In Citibank, N.A. v. Emery (*In re* Emery), 132 F.3d 892, 896 (1998), the court held that "the literal application of § 727(d) here cannot have been intended by Congress and the Supreme Court." Thus in that case, in which the trustee learned of the fraud after the discharge should have been granted but before it actually was entered, the court concluded that the debtor should not be immune from revocation of the discharge. Despite imputing the discharge date back to the deadline for objecting to discharge for purposes of § 727(d)(1), the *Emery* court held that the one-year time limit under § 727(e) for seeking revocation would still run from the date of the actual entry of the discharge order. *Id.* at 897.

Possible Approaches

The Committee may wish to refer to a subcommittee the question of whether any changes in the rules are warranted in light of the circuit conflict with respect to the ability to object to discharge during the "gap" period. If such a referral is to be made, I would suggest that the matter be directed to the Consumer Issues Subcommittee, and I offer the following observations as to possible responses to *Zedan*'s criticism of Rule 4004.

(1) Make no change in rule. Because the "gap" problem should be rare, the statute and rules favor finality over the ability to litigate all possible objections to discharge, and Rule 4004 already makes provision for extensions of the time to object, the Committee could determine that

---

[2] Unlike the *Zedan* case, the trustee in *Dietz* sought revocation of the discharge under § 727(d)(2), which does not state that the moving party must have learned of the debtor's fraud after the granting of the discharge. The Ninth Circuit, however, relied on case law interpreting that subsection also "to require that the trustee must have learned of the debtor's fraud *after* discharge has been granted." 914 F.2d at 163.

the current rule strikes an appropriate balance and no change is warranted. These considerations are described in further detail in the following paragraphs.

As Rule 4004 is currently written, there should rarely be a significant gap between the deadline for objecting to discharge and the court's entry of the discharge order. Once the deadline passes, Rule 4004(c)(1) directs the court to "forthwith grant the discharge." The fact that courts do not always adhere to this requirement is not necessarily a reason to amend the rule if it is generally working as intended. The statutory and rules provisions governing discharge are based on the desirability of having tight deadlines in order to achieve finality, except under certain specified and limited circumstances in which revocation is permitted. Under that scheme, not all instances of fraud will result in the debtor being denied a discharge. For example, fraud discovered more than one year after the granting of the discharge will not be a basis for revocation.

Moreover, Rule 4004(b) allows a party to seek an extension of the time for filing a complaint objecting to discharge, so where the trustee or creditor has some suspicion of fraud or other bad acts by the debtor, that party may be granted additional time to discover the necessary evidence in order to object. Finally, two courts of appeals have interpreted § 727(d) to allow motions to revoke discharge even when the fraud was discovered before the discharge was actually entered, thus eliminating (in those circuits) the possible unfairness to a creditor or trustee caught in a gap.

(2) Amend Rule 4004. Alternatively, the Committee could conclude that the existence of a circuit split and the *Zedan* court's analysis warrant a change in the rule to remedy the "gap" problem where a discharge is not issued promptly upon the expiration of the deadline for

objections to discharge.

Despite the command of Rule 4004(c)(1), it appears that the existence of a gap period between the objection deadline and the entry of a discharge order occurs with sufficient frequency that it has produced a split in the circuits on how to handle this issue. Moreover, the rule itself allows a gap under some of the circumstances listed in (c)(1) in which the court is not required to grant the discharge forthwith. So long as a gap may exist and § 727(d)(1) is applied as written (and (d)(2) is interpreted as requiring the party seeking revocation to have learned of the debtor's fraud before the entry of the discharge), there will be cases in which a debtor will obtain a discharge despite having engaged in fraudulent activity before or during the bankruptcy case.

Should the Advisory Committee decide that this issue is sufficiently serious to warrant referral to the Consumer Issues Subcommittee, it might suggest that the Subcommittee consider an amendment to Rule 4004(b) along the following lines:

RULE 4004. Grant of Denial of Discharge

* * * * *

(b) EXTENSION OF TIME. On motion of any party in interest, after hearing on notice, the court may for cause extend the time to file a complaint objecting to discharge. The motion shall be filed before the time has expired<u>, except that the motion may be filed after the time has expired and before the granting of the discharge if the objection to discharge is based on facts that, if discovered after the discharge, would result in revocation of discharge under</u>

section 727(d) and the movant did not have knowledge of the facts giving rise to the objection in time to permit the timely filing of the complaint.

* * * * *

If such an amendment is considered, the Subcommittee should also examine whether, among other things, such a rule would implicitly undercut the command that the discharge be granted forthwith after the passage of the deadline for objecting, as well as whether it would unnecessarily create a lack of finality and certainty regarding objections to discharge.

The Adversary Proceeding Issue

Chief Judge Easterbrook in his concurring opinion raised the questions (1) whether the inclusion in Rule 7001 of proceedings to object to or revoke a discharge is inconsistent with 28 U.S.C. § 157(b)(2)(J); and (2) even if it is not, whether such proceedings should be reclassified as contested matters, especially considering the impact that the classification has on appellate jurisdiction.

As noted above, Chief Judge Easterbrook's concurrence argues that the provisions of Rules 4004(d) and 7001(4) requiring the litigation of objections to discharge as adversary proceedings conflict with 28 U.S.C. § 157(b)(2)(J), which "classifies objections to discharge as contested matters in core proceedings." 529 F.3d at 407. However, the concurrence also recognizes that "adversary actions can be appropriate within core proceedings." *Id.* Thus, while § 157(b)(2)(J) does include objections to discharges in the nonexclusive list of core proceedings,

the statute does not delineate the subject matter of contested matters and adversary proceedings.[3] Instead, whether bankruptcy litigation takes the form of an adversary proceeding or a contested matter is determined exclusively by the rules. An amendment of Rule 7001(4) is not required, therefore, in order to make it consistent with § 157(b)(2)(J). As far as the language of the statute is concerned, an objection to a discharge may be a contested matter or an adversary proceeding.

Chief Judge Easterbrook's position that objections to discharge ought to be litigated as contested matters rather than as adversary proceedings nonetheless merits serious consideration. His *Zedan* concurrence makes several arguments – all focused on the concept of finality for appellate purposes – for reclassifying objections to discharge as contested matters. When a bankruptcy court rules on one party's objection, there may be proceedings raising other bases for denying the discharge still pending. Thus, the ultimate question whether the debtor should receive a discharge has not yet been resolved. Chief Judge Easterbrook argues that, in that situation, the resolution of the first party's objection does not result in a final decision in the usual sense of that term. Allowing an immediate and nondiscretionary appeal of the denial of that objection may result in the resolution of an abstract issue and a waste of judicial resources, since the bankruptcy court could ultimately deny the discharge for other reasons. He also contrasts objections to discharge with other types of adversary proceedings, such as preference actions, counseling that "an objection to discharge is better handled as a contested matter, as every bankruptcy entails a potential dispute about discharge" and the resolution of issues about

[3] Kontrick v. Ryan, 540 U.S. 443, 453 (2004), cited in the *Zedan* concurrence for the proposition that the rules conflict with the statute, merely states that "Section 157(b)(2)(J) instructs only that 'objections to discharges' are '[c]ore proceedings' within the jurisdiction of the bankruptcy courts."

the discharge "do not (at least, need not) entail third parties." 529 F.3d at 407.

In contrast to the Chief Judge Easterbrook's appellate jurisdiction perspective on the classification of discharge objections as contested matters or adversaries, the Advisory Committee has historically focused on notice and due process concerns in determining the extent to which matters affecting the discharge should be litigated as adversary proceedings. Such proceedings were classified as adversary proceedings under former Bankruptcy Rule 701, and that classification was carried over to the new rule. The basis for that classification appears to rest on the importance of the discharge to the debtor. Obtaining a discharge is the debtor's ultimate goal in filing for bankruptcy, and so it has traditionally been believed that the greater procedural protections available in an adversary proceeding are appropriate in this context. Cases in which several different grounds for objecting to discharge are litigated sequentially are likely to be relatively rare (indeed, no other objections had been interposed in *Zedan*). Furthermore, the existing rules include a mechanism for avoiding the premature "finality" of individual decisions in separate adversaries challenging the discharge on different grounds – the bankruptcy court could consolidate the multiple actions under Rule 7042 rather than decide them in a piecemeal manner. Thus, the inefficient appellate jurisdiction scenario that the *Zedan* concurrence envisions seems unlikely to arise frequently.[4]

[4] It is also possible that a court of appeals could decide that the resolution of an adversary proceeding denying an objection to discharge is not final if the discharge has not been entered. The Second Circuit in the *Emery* case expressed doubt whether it had appellate jurisdiction in that situation, and in response the appellant obtained a § 1292(b) certification from the district court. 132 F.3d at 894. A clear rule accepting the finality of all resolutions of adversary proceedings, however, seems preferable. *See Zedan*, 529 F.3d at 407 (Easterbrook, C.J., concurring) ("Any effort to sort the final decisions of adversary proceedings into appealable and non-appealable bins would lead to pointless grief and expense.").

Having said that, I should note that the list of issues required to be litigated as adversary proceedings has not remained static over time. Unlike former Rule 701, Rule 7001 does not include requests for relief from the automatic stay. That decision was made in order to accommodate the expedited resolution schedule called for by § 362. Recently, the Advisory Committee made the decision that not all objections to discharge require the formality of an adversary proceeding. Preliminary drafts of amendments to Rules 7001 and 4004(a), which were approved at the September 2007 meeting and have since been approved by the Standing Committee and are currently being published for public comment, would reclassify as contested matters objections to discharge based on the claim that the debtor too recently received a discharge in a prior case. That reclassification decision was based on the straightforward nature of the objection, which will generally be based on information obtainable from the debtor's schedules, and the debtor's presumed personal familiarity with the existence and timing of the prior discharge.

These actions by the Advisory Committee show that it has been attentive to whether there is a reason to readjust the categories of adversary proceedings and contested matters. Although I am not persuaded of the desirability of making this change with respect to all objections to discharge (or revocations of discharge), Chief Judge Easterbrook has provided a valuable perspective of the effect of the classification decision on appellate practice that merits the Advisory Committee's consideration. Should the Advisory Committee decide that the issue requires further consideration, I suggest that it be referred to the Consumer Issues Subcommittee.

HZedan v. Habash
C.A.7 (Ill.),2008.

United States Court of Appeals,Seventh Circuit.
Najib ZEDAN, Plaintiff-Appellant,
v.
Basem E. HABASH and Susan Habash, Defendants-Appellees.
No. 07-1286.

Argued Nov. 8, 2007.
Decided June 16, 2008.
As Modified June 24, 2008.

Background: "Gap period" creditor, who did not discover Chapter 7 debtor's alleged fraud until after expiration of deadline for him to file denial-of-discharge complaint but prior to entry of discharge order, filed complaint to "revoke" debtor's still ungranted Chapter 7 discharge as having been fraudulently obtained. The United States Bankruptcy Court for the Northern District of Illinois entered order dismissing creditor's complaint with prejudice, and creditor appealed. The District Court, Elaine E. Bucklo, J., 360 B.R. 775, affirmed, and creditor again appealed.

Holding: The Court of Appeals, Kanne, Circuit Judge, held that complaint failed to state claim for "revocation" of debtor's discharge, given that, at time creditor filed its complaint, bankruptcy court had still not entered order granting debtor a discharge.

Affirmed.

Easterbrook, Chief Judge, concurred and filed opinion.

West Headnotes

[1] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Court of Appeals had jurisdiction to hear creditor's appeal from order of district court affirming bankruptcy court's dismissal of complaint that creditor had filed objecting to debtor's discharge, as final order that resolved discrete proceeding in bankruptcy case, even though creditor, after dismissal of its complaint and entry of discharge order, had filed complaint to revoke debtor's discharge on same grounds previously alleged in its initial complaint, and even though this other proceeding was still pending. 28 U.S.C.A. § 158(d)(1).

[2] Bankruptcy 51 3765

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3762 Jurisdiction
51k3765 k. Court of Appeals. Most Cited Cases
Court of Appeals has jurisdiction over bankruptcy appeal only if both the bankruptcy court's order and the district court's order reviewing that original order are final decisions. 28 U.S.C.A. § 158(d)(1).

[3] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Concept of an appealable, final order is considerably more flexible in context of a bankruptcy appeal than in context of an ordinary civil appeal. 28 U.S.C.A. § 158(a)(1), (d)(1).

[4] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
In bankruptcy context, order does not have to

terminate entire bankruptcy proceeding in order to be "final," for purposes of appeal. 28 U.S.C.A. § 158(a)(1), (d)(1).

[5] Bankruptcy 51 3767

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3766 Decisions Reviewable
51k3767 k. Finality. Most Cited Cases
Test that Court of Appeals utilizes in assessing "finality" of order, for purposes of appeal in bankruptcy case, is whether order resolves a discrete dispute that, but for the continuing bankruptcy, would have been a stand-alone suit by or against trustee. 28 U.S.C.A. § 158(d)(1).

[6] Bankruptcy 51 3765

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3762 Jurisdiction
51k3765 k. Court of Appeals. Most Cited Cases
Court of Appeals has appellate jurisdiction in bankruptcy case over orders finally disposing of any adversary proceeding. 28 U.S.C.A. § 158(d)(1).

[7] Bankruptcy 51 3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases
Court of Appeals reviews dismissal of adversary complaint in bankruptcy de novo.

[8] Bankruptcy 51 3779

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3779 k. Scope of Review in General. Most Cited Cases
Court of Appeals may affirm district court's decision in its bankruptcy appellate capacity on any basis supported by record.

[9] Bankruptcy 51 3322

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeability
51k3320 Revocation or Modification
51k3322 k. Application, Hearing, and Determination. Most Cited Cases
Complaint that creditor filed after bar date for it to file a denial-of-discharge complaint had expired, based upon allegedly fraudulent conduct of debtor that it discovered during "gap period" between expiration of bar date and entry of discharge order, failed to state claim for "revocation" of debtor's discharge where, at time creditor filed its complaint, bankruptcy court had still not entered order granting debtor a discharge; court could not "revoke" discharge that had not yet been entered. 11 U.S.C.A. § 727(d)(1); Fed.Rules Bankr.Proc.Rule 4004(a), 11 U.S.C.A.

[10] Bankruptcy 51 3321

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeability
51k3320 Revocation or Modification
51k3321 k. Grounds. Most Cited Cases

Bankruptcy 51 3322

51 Bankruptcy
51X Discharge
51X(B) Dischargeable Debtors
51X(B)2 Determination of Dischargeability
51k3320 Revocation or Modification
51k3322 k. Application, Hearing, and Determination. Most Cited Cases
Better reading of language in bankruptcy statute permitting creditor to seek revocation of debtor's discharge as having been fraudulently obtained only if creditor is ignorant of debtor's alleged fraud until after discharge is granted is a literal one, that does not permit creditor that learns of debtor's alleged fraud during the "gap period" between expiration of 60-day deadline for it to file denial-of-discharge complaint

and entry of discharge order to successfully pursue revocation claim; interpreting statutory language literally to preclude such "gap period" claims was consistent with clear and unambiguous language of statute and with policy of liberally interpreting the Code in favor of debtor, and did not prevent creditors, by diligently investigating any alleged fraud by debtor and moving for extensions of 60-day deadline, from taking steps to protect themselves. 11 U.S.C.A. § 727(d)(1); Fed.Rules Bankr.Proc.Rule 4004(a), 11 U.S.C.A.

[11] Statutes 361 188

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 k. In General. Most Cited Cases
As long as statutory scheme is coherent and consistent, there generally is no need for court to inquire beyond plain language of statute.

[12] Bankruptcy 51 2021.1

51 Bankruptcy
51I In General
51I(B) Constitutional and Statutory Provisions
51k2021 Construction and Operation
51k2021.1 k. In General. Most Cited Cases
Provisions of the Bankruptcy Code should be construed liberally in favor of debtor.

***399** Maurice J. Salem (argued), Salem Law Office, Palos Heights, IL, for Appellant.
Jeffrey B. Rose (argued), Tishler & Wald, Chicago, IL, for Appellees.

Before EASTERBROOK, Chief Judge, and FLAUM and KANNE, Circuit Judges.

KANNE, Circuit Judge.
Basem Habash filed a voluntary bankruptcy petition in August 2004. Nearly 20 months later, Najib Zedan, a judgment creditor of Habash, initiated an adversary proceeding that objected to the discharge of Habash's debts because of alleged fraud by Habash in representing his income and assets to the bankruptcy trustee. *See*11 U.S.C. §§ 523(a)(4); 727(d)(1). At the time Zedan filed the adversary complaint, the deadline for creditors to object to a discharge had long passed, and the bankruptcy court had yet to grant a discharge to Habash. The bankruptcy court dismissed Zedan's complaint, and Zedan immediately appealed the decision to the district court, which affirmed the dismissal. *See* ***400***Zedan v. Habash (In re Habash)*, 360 B.R. 775 (N.D.Ill.2007). We also affirm the dismissal of Zedan's complaint.

I. HISTORY

Habash filed for bankruptcy in the Northern District of Illinois in late August 2004. The bankruptcy court scheduled the first meeting of creditors for late October 2004, and set a deadline of December 20, 2004, for creditors to file objections to the discharge of Habash's debts. *See*Fed. R. Bankr.P. 4004(a). Before the creditors' meeting, the appointed bankruptcy trustee resigned; consequently, the creditors' meeting was rescheduled for early December 2004. In late November 2004, Zedan, a judgment creditor, filed a motion to extend the time for creditors to object to the discharge. The bankruptcy court granted Zedan's motion and extended the creditors' deadline until February 4, 2005. In January 2005, the newly appointed bankruptcy trustee, Deborah Ebner, filed a motion to extend her own deadline to object to Habash's discharge. This motion, and a subsequent motion to extend, were both granted, and the trustee was ultimately given a September 2005 deadline to object to the discharge.

Zedan did not file any objection to Habash's discharge before February 4, 2005 (nor did any other creditor). For the next ten months, Habash cooperated with the trustee-he participated in discovery conducted by the trustee's attorney in September 2005, *see*Fed. R. Bankr.P.2004, and negotiated a resolution of his case that would include an auction of his assets and the eventual discharge of his debts. The trustee did not object to the discharge, and in December 2005, the bankruptcy court entered an order approving the agreed-upon procedure for dividing Habash's non-exempt assets, and scheduled a sale for February 2006.

In January 2006, Zedan hired new counsel, who

immediately filed a motion to postpone the scheduled sale. This eleventh-hour motion argued that the sale of Habash's assets should be postponed because, Zedan alleged, Habash had fraudulently represented his income and the value of his assets to the bankruptcy trustee. The bankruptcy trustee did not join in Zedan's objection. On February 8, 2006, the bankruptcy court denied Zedan's motion, and on February 15, 2006, the auction sale of Habash's nonexempt assets took place. The bankruptcy court approved the sale a few days later.

In April 2006, Zedan filed an adversary complaint in the bankruptcy court under 11 U.S.C. §§ 523(a)(4) and 727(d)(1), and also under Illinois law governing fraudulent transfer and misappropriation of corporate assets. The adversary complaint sought a judgment that Habash's debts were non-dischargeable, and reiterated most of the arguments that Zedan had raised in his motion to postpone the sale-the adversary complaint alleged fraud by Habash when disclosing his income, property value, and inventory to the trustee. *See Habash,* 360 B.R. at 777. In July 2006, without issuing an opinion, the bankruptcy court dismissed Zedan's adversary proceeding with prejudice-ostensibly because the bankruptcy court regarded the complaint as untimely.[FN1]

> FN1. Specifically, the bankruptcy court stated: "The time limits expired in February of '05 and there's no reason that they should be extended, changing attorneys doesn't mean you get to start over again. So the motion to dismiss is granted." *Id.*

Zedan immediately appealed the bankruptcy court's dismissal to the district court, asserting that the bankruptcy court failed to apply the proper legal standard when dismissing the adversary complaint and improperly dismissed the complaint as ***401** untimely. As for timeliness, Zedan argued that the adversary complaint was based on fraud that was not discovered until after the deadline to file objections had lapsed. As such, Zedan contended that his adversary complaint asserted a claim based on "newly discovered fraud" under 11 U.S.C. § 727(d)(1), and he argued that the timing requirement of 11 U.S.C. § 727(e)-which permits a creditor to pursue revocation of a discharge within one year of an actual discharge-should apply instead of the bankruptcy court's deadline for creditors to object to the discharge. The bankruptcy court still had not granted a discharge to Habash, and Zedan argued that "if one can file an adversary complaint based on fraud one year after discharge, then surely one can file it after a deadline has passed, but before a discharge."

In January 2007, the district court affirmed the bankruptcy court's dismissal of Zedan's adversary complaint "on different grounds." *Habash,* 360 B.R. at 778. In the district court's view, the bankruptcy court had erred as a matter of law because the February 2005 date to file objections did not bar Zedan from pursuing relief under 11 U.S.C. § 727(d)(1). *See id.* The district court held that because no discharge had ever been entered, Zedan had acted within the time limits set by 11 U.S.C. § 727(e). *See id.* However, the district court adopted a different timeliness limitation: it stated that Zedan was required to file his adversary complaint within one year of discharge or within one year after the "cut-off date to file objections." *See id.* (citing *Citibank N.A. v. Emery (In re Emery),* 132 F.3d 892, 895-96 (2d Cir.1998)). The district court then held that Zedan's adversary complaint was still untimely because he failed to file within one year of the cut-off date. *See id.* In addition to untimeliness, the district court also noted that Zedan's adversary complaint was legally insufficient because Zedan failed to plead his claim with particularity as required by Fed. R. Bank. P. 7009, and because he had failed to investigate and diligently pursue his claim despite being on notice of the alleged fraud. *Habash,* 360 B.R. at 778-80.Zedan filed a notice of appeal in this court on February 8, 2007.

II. ANALYSIS

[1] Before we can consider the merits of Zedan's appeal, we must first address a question of appellate jurisdiction noticed by the panel. *In re Salem,* 465 F.3d 767, 771 (7th Cir.2006); *see also Chiplease, Inc. v. Steinberg (In re Res. Tech. Corp.),* 528 F.3d 467, 474 (7th Cir.2008) ("Our first task is to confirm that we have jurisdiction to hear this appeal."). At the time Zedan filed his notice of appeal, the bankruptcy court had still not decided whether to grant a discharge to Habash. Shockingly, neither side's brief contained this fact-or any facts regarding the status of the bankruptcy case-as required by Circuit Rule 28(a)(3). *See Fifth Third Bank, Ind. v. Edgar County*

Bank & Trust, 482 F.3d 904, 905 (7th Cir.2007) ("Circuit Rule 28(a)(3) ... requires details on how the matters appealed in a bankruptcy case relate to any part of the litigation still under way in the bankruptcy court or the district court."). Nor could the parties definitively answer our questions about the status of the bankruptcy at oral argument.

Frustrated by this noncompliance with our circuit rules, Chief Judge Easterbrook, on behalf of the panel, issued an order from the bench requiring the parties "to file supplemental memoranda addressing whether rejecting a single potential objection to discharge is a final order immediately reviewable by the Court of Appeals even though the bankruptcy judge has yet to decide whether the debtor will be discharged." That order also requested that ***402** the parties brief the status of the ongoing bankruptcy proceedings. The parties complied with the order, and both supplemental memoranda concluded that we have jurisdiction over this appeal.

From conducting our own review of the bankruptcy court's docket, we learned that Habash's assets had been distributed from the estate prior to oral argument in this appeal, and on November 21, 2007, the bankruptcy court finally granted a discharge to Habash. On November 27, 2007, Zedan filed a new notice of appeal to the district court in the bankruptcy proceeding: in that action, presently before the Northern District of Illinois (No. 08 C 0120), Zedan appealed both the bankruptcy court's November 21, 2007 discharge order and its July 2006 order dismissing his adversary complaint-the order at issue before us. Habash filed a motion to dismiss that case based on lack of jurisdiction; that motion is still pending.

[2][3][4][5] This court has jurisdiction over "appeals from all final decisions, judgments, orders, and decrees entered" by a district court pursuant to its review of final decisions of a bankruptcy court. 28 U.S.C. § 158(d)(1). Therefore, we only have jurisdiction over a bankruptcy appeal if both the bankruptcy court's order and the district court's order reviewing that original order are final decisions. *Salem*, 465 F.3d at 771 (citing *In re Rimsat Ltd.*, 212 F.3d 1039, 1044 (7th Cir.2000)). We have observed that finality in a bankruptcy appeal under 28 U.S.C. § 158(d) is "considerably more flexible than in an ordinary civil appeal taken under 28 U.S.C. § 1291." *In re Gould*, 977 F.2d 1038, 1040-41 & n. 2 (7th Cir.1992); *see also Chiplease*, 528 F.3d at ----; *In re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1299 (7th Cir.1997). In the bankruptcy context, finality does not require the termination of the entire bankruptcy proceeding. *See In re UAL Corp.*, 411 F.3d 818, 821 (7th Cir.2005) (" '[T]he fact that the bankruptcy proceeding continues before the bankruptcy judge does not preclude treating an interlocutory order by him-interlocutory in the sense that it does not terminate the entire proceeding-as final for purposes of appellate review.' " (quoting *In re Szekely*, 936 F.2d 897, 899 (7th Cir.1991))). Rather, the test we have utilized to determine finality under § 158(d) is whether an order resolves a discrete dispute that, but for the continuing bankruptcy, would have been a stand-alone suit by or against the trustee. *See Bank of Am. v. Moglia*, 330 F.3d 942, 944 (7th Cir.2003) (citing *Golant v. Levy (In re Golant)*, 239 F.3d 931, 934 (7th Cir.2001) and *Rimsat*, 212 F.3d at 1044).

[6] We have consistently explained that the final disposition of any adversary proceeding falls within our jurisdiction. *See In re Teknek, LLC*, 512 F.3d 342, 345 (7th Cir.2007) ("For the purpose of appellate jurisdiction we treat adversary proceedings as if they were separate suits."); *Fifth Third Bank*, 482 F.3d at 905 ("A final resolution of *any* adversary proceeding is appealable, as it is equivalent to a stand alone lawsuit."(citing *Forty-Eight Insulations*, 115 F.3d 1294; *In re Morse Elec. Co.*, 805 F.2d 262 (7th Cir.1986)) (emphasis added)); *Mellon Bank, N.A. v. Dick Corp.*, 351 F.3d 290, 292 (7th Cir.2003) ("We have jurisdiction of the creditors' appeal, because the order under review is the final decision in an adversary proceeding."); *In re Lopez*, 116 F.3d 1191, 1193 (7th Cir.1997) ("A bankruptcy case is often a congeries of functionally distinct cases. The clearest example is that of the adversary action.... Once the action is finally decided in the bankruptcy and district courts, the fact that the bankruptcy proceeding may be continuing is no reason to delay the appeal from the decision in the action, so the decision is deemed 'final,' ***403** and appeal allowed."); *see also In re UAL Corp.*, 408 F.3d 847, 850 (7th Cir.2005); *In re Marchiando*, 13 F.3d 1111, 1113-14 (7th Cir.1994).

This sweeping language is harmonious with the fact that adversary proceedings frequently resolve legal issues that appear logically separate from the

ordinary measures determined in the main bankruptcy proceeding. *See* *Teknek*, 512 F.3d at 345 ("Adversary proceedings (for example, tort actions against a debtor, or attempts by the debtor to recover preferential transfers) are conceptually distinct from core matters such as locating the debtor's existing assets and approving plans of reorganization."). But here the conceptual gap between the subject matter resolved in the adversary proceeding and "core matters" has been somewhat narrowed because Zedan has filed an adversary complaint to revoke a discharge, which is more closely related to the main proceedings. *See* *Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004) (noting that Congress has classified an objection to a debtor's discharge as a core proceeding); *see also* 28 U.S.C. § 157(b)(2)(J). Nevertheless, we have acknowledged that the dismissal of an adversary complaint objecting to a debtor's discharge is a final decision that falls within our jurisdiction. *See* *Marchiando*, 13 F.3d at 1113-14; *Suburban Bank of Cary Grove v. Riggsby (In re Riggsby)*, 745 F.2d 1153, 1154 (7th Cir.1984) ("[W]e think it reasonably clear that the dismissal by the bankruptcy judge of a complaint objecting to the discharge of the bankrupt is final."). This is because the adversary proceeding will finally determine the rights of the creditor seeking to object to or revoke the discharge, even if it does not finally determine the rights of the debtor. And that sort of "discrete" finality is sufficient to confer jurisdiction under the relaxed approach to finality applied in bankruptcy cases. *See, e.g.*, *Chiplease*, 528 F.3d at ----; *Moglia*, 330 F.3d at 944; *Forty-Eight Insulations, Inc.*, 115 at 1299.

Zedan filed his claim as an adversary proceeding because the Bankruptcy Rules required him to do so-a creditor who seeks to object to or revoke the discharge of a debtor *must* initiate a separate adversary proceeding. *See* Fed. R. Bankr.P. 4004(d), 7001(4). The adversary proceeding was finally resolved by the bankruptcy court in July 2006 when it dismissed the adversary complaint with prejudice. *See* Fed. R. Bankr.P. 7041 (incorporating Fed.R.Civ.P. 41 into adversary proceedings in bankruptcy); Fed.R.Civ.P. 41(b) (stating that an involuntary dismissal "operates as an adjudication on the merits"). Once the bankruptcy court entered the order of dismissal, the court was left with nothing further to do with respect to the adversary complaint. *See* *Marchiando*, 13 F.3d at 1113. Similarly, the district court's order affirming that dismissal also constituted a final judgment. Therefore, we have jurisdiction over this appeal.

[7][8] Turning to the merits, we review the dismissal of an adversary complaint in bankruptcy *de novo*. *Enodis Corp. v. Employers Ins. of Wausau (In re Consol. Indus.)*, 360 F.3d 712, 716 (7th Cir.2004). We may affirm the district court's decision on any basis supported by the record. *Dye v. United States (In re Dye)*, 360 F.3d 744, 750 (7th Cir.2004); *Goldberg Sec. Inc. v. Scarlata (In re Scarlata)*, 979 F.2d 521, 526 n. 5 (7th Cir.1992).

Zedan claims that the bankruptcy court and district court both erred in dismissing his adversary complaint for its untimeliness. Zedan argues that his adversary complaint alleged evidence of fraud that was undiscovered until September 2005. Zedan claims that because of the "newly discovered fraud," and because the bankruptcy court had yet to grant a discharge, ***404** his complaint was timely under 11 U.S.C. § 727(e). Zedan also contends that the district court erred by applying the improper legal standard when it determined that Zedan had not pled the fraud with particularity as required by Fed. R. Bankr.P. 7009.

Zedan's adversary complaint requested a declaration that Habash's debts were not dischargeable because of the alleged fraud. At the time of the complaint, the bankruptcy court had not yet ordered a discharge; in the ordinary course, Zedan's claim would have been filed as an *objection* to a yet-to-issue discharge. *See* 11 U.S.C. § 727(c). But because the deadline to file objections had lapsed, Zedan's adversary complaint invoked 11 U.S.C. § 727(d)(1), which entitles a debtor to different relief-*revocation* of an already-issued discharge.

At first blush, Zedan's adversary complaint seems nonsensical-Zedan filed a complaint to "revoke" a nonexistent discharge. But Zedan's creative pleading arises from a deeper quandary created by the juxtaposition of the Bankruptcy Code with the Federal Rules of Bankruptcy Procedure. Under the Code, a creditor may object to the granting of a discharge to a debtor. 11 U.S.C. § 727(c). The Federal Rules of Bankruptcy Procedure require a creditor who seeks to object to or revoke the discharge of a debtor to initiate a separate adversary proceeding. *See* Fed. R. Bankr.P. 4004(d); Fed R.

Bankr.P. 7001(4). In turn, Fed. R. Bankr.P. 4004(a), which governs adversary proceedings filed in objection to a debtor's discharge, requires a complaint objecting to the discharge to be filed no later than 60 days following the first set meeting of the creditors. Once this time expires, and if no objection has been lodged, the Bankruptcy Rules state that "the court shall forthwith grant the discharge." Fed. R. Bankr.P. 4004(c); *see also Emery*, 132 F.3d at 895.

So the Bankruptcy Rules clearly contemplate that a discharge will follow almost immediately after the 60-day period to file an objection expires. Yet, as this case demonstrates, the 60-day window under the Bankruptcy Rules may close well before any discharge is granted. When that happens, the expiration creates a "gap period" between the deadline for creditors to object to a discharge, and the date the discharge is actually granted. *See Emery*, 132 F.3d at 895; *England v. Stevens (In re Stevens)*, 107 B.R. 702 (9th Cir.BAP1989). In this case, the gap period resulted because the bankruptcy court bifurcated the deadline for the creditors to object to the discharge (February 2005) and the deadline for the trustee to object to the discharge (September 2005).

The gap period creates a predicament for creditors who discover a debtor's fraud during the gap period (*i.e.*, the creditor who discovers the debtor's fraud *after* the deadline to file objections has elapsed but *before* a discharge has been entered) because the Bankruptcy Code requires a creditor to be ignorant of the debtor's fraud until after the discharge date in order to avail himself of the process for revoking the discharge. *See*11 U.S.C. § 727(d)(1). But under the Bankruptcy Rules, a bankruptcy court will likely dismiss a creditor's objection as untimely if it comes after the deadline to file objections has passed-as was the case for Zedan here. Thus, a creditor who learns of fraud during the gap period is whipsawed and left no remedy under either the Bankruptcy Code or the Bankruptcy Rules: he cannot file a timely objection under the Rules, and the language of the Code prevents him from revoking the discharge once it is issued.

***405** Other federal courts have noticed this tension between the Bankruptcy Code and the Rules. In *In re Emery*, the Second Circuit resolved the dilemma, stating that "we do not believe that Congress intentionally drafted a statute to punish fraudulent conduct by debtors that at the same time provides a period of immunity for such debtors." 132 F.3d at 896. As a result, the Second Circuit eschewed a literal interpretation of § 727(d)(1): it ignored the clear statutory limitation that a creditor must learn of the debtor's fraud after the discharge, and allowed a creditor who learned of fraud during the gap period to bring a claim for revocation. *See id.* at 895-97. This was the approach the district court modeled its decision on in this case. *See Habash*, 360 B.R. at 778.

The Ninth Circuit has also allowed an adversary complaint to proceed even though it was filed pursuant to § 727(d)(1) before a formal order of discharge was entered. *See Dietz v. Mitchell (In re Dietz)*, 914 F.2d 161 (9th Cir.1990). In contrast, several district and bankruptcy courts have elected to enforce the literal language of the Bankruptcy Code, and have barred claims filed based upon fraud learned during the gap period. *See Santa Fe Private Equity Fund II, LP v. Silver (In re Silver)*, 367 B.R. 795, 821-22 (Bkrtcy.D.N.M.2007); *Powell v. First Nat'l Bank (In re Powell)*, 113 B.R. 512, 513 (W.D.Ark.1990); *Employers Mut. Cas. Co. v. Lazenby (In re Lazenby)*, 253 B.R. 536 (Bankr.E.D.Ark.2000).

The district court explained that Zedan's complaint failed to state a claim under either approach. Zedan clearly was not ignorant of the alleged fraud before the discharge-in fact, the discharge had not been entered when he filed his adversary complaint, or even when he appealed its dismissal to the district court. Thus, Zedan's claim failed under the literal language of the statute. The district court also reasoned that Zedan's claim failed under the more lenient approach because he filed his adversary complaint in April 2006, more than one year after the deadline to file objections imposed by the bankruptcy court.

[9] But we do not think the district court needed to go so far-this case is far simpler. Unlike the creditor in *Emery*, Zedan filed his complaint to "revoke" the discharge before the discharge had ever been entered. Our initial instinct-that Zedan has advanced a nonsensical claim-holds true because Zedan's complaint sought relief that the bankruptcy court could not possibly grant. A bankruptcy court cannot

revoke an order that it has never issued. Therefore, Zedan's adversary complaint failed to state a claim upon which relief could be granted, *see*Fed.R.Civ.P. 12(b)(6); Fed. R. Bankr.P. 7012, and both lower courts properly dismissed the complaint, *see Vill. of Rosemont v. Jaffe*, 482 F.3d 926, 936 (7th Cir.2007). We need not decide on the proper approach to a gap-period creditor's dilemma here.

[10][11] Still, it seems to us that a literal reading of § 727(d)(1) is the better solution. The clear, unambiguous language of the statute requires that "the requesting party ... not know of the fraud until after the granting of the discharge." 11 U.S.C. § 727(d)(1). And "as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute." *United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989); *see also Lamie v. United States Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d 1024 (2004). We believe the language of the Bankruptcy Code is coherent and consistent: while Congress undoubtedly has provided for the ***406** revocation of a discharge in cases of fraud, it has clearly limited the statutory remedy in unambiguous terms.

Fed. R. Bankr.P. 4004(a), which sets an earlier deadline for objecting to the discharge, is one of the Federal Rules of Bankruptcy Procedure promulgated by the Supreme Court, and as such cannot "abridge, enlarge, or modify any substantive right." *See*28 U.S.C. § 2075; *see also Term Loan Holder Comm. v. Ozer Group (In re Caldor Corp.)*, 303 F.3d 161, 170 (2d Cir.2002) ("[F]orsaking the plain meaning of a provision of the Bankruptcy Code solely because that meaning conflicts with a bankruptcy rule would run afoul of 28 U.S.C. § 2075."). The Bankruptcy Rules' requirement that objections be lodged within 60 days, *see*Fed. R. Bankr.P. 4004(a), combined with its promise that a discharge be granted "forthwith," *see*Fed. R. Bankr.P. 4004(c), makes it unlikely that a gap period will occur. However, when the Bankruptcy Rules fail to operate as expected and produce a conflict with the Code, the Code must prevail. If Congress wants to address this conflict, it is its prerogative to do so. *Silver*, 367 B.R. 795, 822 n. 57. Likewise, the Supreme Court might take initiative and amend the Bankruptcy Rules to avoid clashing with the Code.

[12] A literal reading of the Bankruptcy Code also makes sense in light of our recognition that provisions of the Code should be construed liberally in favor of the debtor. *See, e.g., Vill. of San Jose v. McWilliams*, 284 F.3d 785, 790 (7th Cir.2002). Section 727(d)(1) explicitly limits the rights of a creditor to revoke a discharge; this limitation obviously inures to the benefit of the debtor. And a creditor who fears that he might discover fraud during the gap period and thus lose his § 727(d)(1) action for revocation still has other remedies: he may either petition the bankruptcy court to extend the deadline to file objections, *see*Fed. R. Bankr.P. 9006(b), or request more time to conduct a sufficient investigation of the debtor, *see*Fed. R. Bankr.P. 4004(b); *see also Mid-Tech Consulting, Inc. v. Swendra*, 938 F.2d 885, 887 (8th Cir.1991) ("[T]he burden is on the creditor to investigate diligently any possibly fraudulent conduct before discharge.").

In this case, Zedan elected to forego these rights and wait for the trustee to investigate Habash. As a result, Zedan bore the unfortunate consequence of learning about the alleged fraud within the gap period. He therefore would have been disqualified from the relief provided by 11 U.S.C. § 727(d)(1) under the plain terms of the statute even had he waited for the bankruptcy court to enter a discharge. This result seems neither harsh, nor unjust, considering that Zedan did not conduct his own discovery but merely attempted to avail himself of fortuitous testimony elicited during the trustee's investigation. This fact demonstrates why a literal interpretation of the Bankruptcy Code ensures the better course-creditors will have an incentive to actively investigate a debtor for potential fraud before the period to object closes, rather than wait until after discharge, which forces the bankruptcy court to undo the fresh start that equity grants to a debtor.

III. CONCLUSION

We AFFIRM the dismissal of the adversary complaint.

EASTERBROOK, Chief Judge, concurring.

Although I join the court's opinion without reservation, a few additional observations about appellate jurisdiction are appropriate.

***407** The terminating order of an adversary action in bankruptcy is a "final decision" for the purpose of 28

U.S.C. § 158(d). Many decisions in this circuit, and elsewhere, so hold. Any effort to sort the final decisions of adversary proceedings into appealable and non-appealable bins would lead to pointless grief and expense. A clear rule on jurisdictional issues beats a fuzzy standard. See *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988). So we have appellate jurisdiction because Zedan filed an adversary action, in which both the bankruptcy judge and the district judge rendered final decisions.

But should this have happened? As the court's opinion observes, Fed. R. Bankr.P. 4004(d) and 7001(4) say that creditors must initiate adversary actions if they want the court to block or revoke a discharge. These rules appear to be inconsistent with a statute that classifies objections to discharge as contested matters in core proceedings. 28 U.S.C. § 157(b)(2)(J); *Kontrick v. Ryan*, 540 U.S. 443, 453, 124 S.Ct. 906, 157 L.Ed.2d 867 (2004). Rule 7001(4), which governs this subject (Rule 4004(d) is just a pointer), was adopted before 1984, when § 157(b)(2)(J) was enacted, and has not been revisited.

If Zedan's objection had been presented as a contested matter, then we would lack appellate jurisdiction. A decision rebuffing one objection to another litigant's request is not “final” in the sense that matters for appellate review. After the bankruptcy judge found Zedan's position wanting, the question whether Habash's debts would be discharged remained open; the judge did not reach the ultimate decision until after Zedan's appeal had been argued in this court. One might as well appeal from an order denying a motion for discovery or a grant of summary judgment on some but not all of a litigant's legal theories. But because Zedan's motion was handled as an adversary action, the disposition is appealable. I do not think that we can dismiss the appeal from the terminating decision of the proceeding actually conducted, just because the bankruptcy court might have conducted a different kind of proceeding.

Even if we were to hold that § 157(b)(2)(J) supersedes Rule 7001(4), the fact would remain that this *was* an adversary action. I recognize that adversary actions can be appropriate within core proceedings, but an objection to a discharge is better handled as a contested matter, as every bankruptcy entails a potential dispute about discharge. Arguments pro and con about discharge do not (at least, need not) entail third parties, as preference-recovery actions commonly do.

As this case shows, the choice between contested matters and adversary proceedings affects appellate review as well as the style and service list of papers filed in the bankruptcy court. I do not see any good reason why the rules should employ a form that can produce appellate review of one creditor's arguments against a discharge, before the bankruptcy court has decided whether the debtor receives one. After Zedan filed his appeal, the bankruptcy judge might have denied Habash a discharge following an objection from the Trustee or a creditor who filed within the deadline. Separating Zedan's arguments from those of other participants in the bankruptcy, and dispatching them for immediate appeal while the bankruptcy judge has yet to decide the main question, presents abstract issues and squanders judicial resources. The appropriate committees should take a look at this subject.

C.A.7 (Ill.),2008.
Zedan v. Habash
529 F.3d 398, Bankr. L. Rep. P 81,263

END OF DOCUMENT

TAB 16

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: SUGGESTIONS FOR AMENDMENT OF RULES 3003(c)(2) AND 2016(b)

DATE: AUGUST 30, 2008

Judge Paul Mannes (Bankr. D. Md.) has submitted two suggestions for rules amendments (08-BK-C). The first concerns Rule 3003(c)(2), which specifies who must file a proof of claim in a chapter 11 case. Section 1111(a) provides that a proof of claim or interest is deemed filed for any claim or interest included in the debtor's schedule unless it is scheduled as disputed, contingent, or unliquidated. Rule 3002(c)(2) therefore requires a creditor or equity security holder whose claim or interest is not scheduled or is scheduled as disputed, contingent, or unliquidated to file a proof of claim or interest within the time prescribed by the rule. A creditor or equity security holder who is required, but fails, to timely file a proof of claim or interest is not considered a creditor in the case for purposes of voting or distribution.

Judge Mannes suggests that Rule 3003(c)(2) be amended to require a chapter 11 debtor to serve on each creditor whose claim is scheduled as disputed, contingent, or unliquidated notice of the fact of that designation and of the need to file a proof of claim in order to vote or receive any distribution. He proposes that the notice be served within 15 days after the filing of the schedule or after the date on which a creditor's claim is added to a schedule as disputed, contingent, or unliquidated. (Under the new time computation rules, this deadline would be changed to 14 days.)

Form 9 currently includes the following instruction to creditors:

You may look at the schedules that have been or will be filed at the bankruptcy

> clerk's office. . . . If your claim is not listed at all *or* if your claim is listed as disputed, contingent, or unliquidated, then you must file a Proof of Claim or you might not be paid any money on your claim and may be unable to vote on a plan.

This instruction is on the back side of the form in small type under the explanation of "Claims."

Judge Mannes suggests the need for the proposed amendment of Rule 3003(c)(2) because "it is not uncommon for debtors either out of ignorance or design to schedule creditors in a fashion requiring the filing of a proof of claim. These creditors often do not have ready access to the court files and may be frozen out of the process."

Judge Mannes' proposal would therefore shift the burden from a creditor to determine how its claim was scheduled to the chapter 11 debtor to provide affirmative notice to those creditors that must file a proof of claim in the case. Consideration of the merit of this suggestion requires a weighing of the competing burdens (requirement that the debtor give notice to all holders of disputed, contingent, or unliquidated claims versus requirement that each such creditor determine how its claim was scheduled), as well as perhaps a determination of whether debtors are improperly classifying claims for strategic reasons. If the Advisory Committee is interested in pursuing this suggestion further, I suggest that this matter be referred to the Subcommittee on Business Issues for consideration of a possible amendment of Rule 3003(c)(2) along the lines suggested by Judge Mannes.

Judge Mannes raised another issue in his letter, although it is one that he described as one of "less urgency." He suggests that Rule 2016(b) be amended to "require the attorney for the debtor to file and transmit to the United States Trustee the statement required by § 329 of the Code." While Rule 2016(b) already requires the debtor's attorney to file and transmit to the U.S. trustee "within 15 days after the order for relief" the statement required by § 329, Judge Mannes

states that he has been "at a loss to understand the reasoning behind not requiring the filing of the statement with the petition." He recognizes that some districts have local rules that require this statement to be filed more promptly, and he apparently is suggesting the possibility of amending Rule 2016(b) to require the statement to be filed with the petition in all districts.

Section 329 requires a debtor's attorney to file a statement of the compensation paid within the year prior to bankruptcy or agreed to be paid to the attorney for services in connection with the case and the source of such payment. The Committee Note to Rule 2016 explains that subdivision (b) was amended in 1987 to require the § 329 statement to be filed before the meeting of creditors in order to "assist the parties in conducting the examination of the debtor." The subdivision was later amended in 1991 to require the statement to be transmitted to the U.S. trustee in order to provide the U.S. trustee with information "needed to determine whether to request appropriate relief based on excessive fees." Because the current time requirement of 15 (to become 14) days after the order for relief seems sufficient to meet the purposes of the disclosure requirement – and indeed results in the filing of the statement before the court is permitted by Rule 6003 to grant the application for employment of the debtor's attorney – I do not see the need to amend Rule 2016(b). If, however, the Advisory Committee would like to pursue the suggestion further, I suggest that it be referred to the Subcommittee on Attorney Conduct and Healthcare.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MARYLAND

PAUL MANNES
JUDGE

U. S. Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770
(301) 344-8040

April 8, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

Dear Mr. McCabe:

This is to suggest consideration by the Committee of an amendment to Bankruptcy Rule 3003(c)(2). The Rule would require the debtor in a case under Chapter 11 to serve upon each creditor, whose claim is scheduled as disputed, contingent or unliquidated, notice of that listing within 15 days after filing the schedule or within 15 days after adding such a creditor to a previously filed schedule. The notice should state that a creditor must file a proof of claim and the failure to do so timely will prevent the creditor from voting on a plan or participating in any distribution.

This Rule is suggested because it is not uncommon for debtors either out of ignorance or design to schedule creditors in a fashion requiring the filing of a proof of claim. These creditors often do not have ready access to the court files and may be frozen out of the process.

Another possible change but of less urgency is to Bankruptcy Rule 2016(b). This would require the attorney for the debtor to file and transmit to the United States Trustee the statement required by § 329 of the Code. While it is true that the courts by local rule can expedite this filing, I have been at a loss to understand the reasoning behind not requiring the filing of the statement with the petition.

Respectfully yours,

Paul Mannes

PAUL MANNES

TAB 17

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: PROPOSAL FOR ADMINISTRATIVE EXPENSE APPLICATION PROCEDURE

DATE: AUGUST 10, 2008

Judge Wedoff has referred to the Advisory Committee a suggestion for a rule amendment that he received from Philip V. Martino, an attorney now located in Tampa, Florida, who was previously a panel trustee in Chicago. Mr. Martino's proposal is for an amendment to Rule 1017 that would provide a simplified procedure for a chapter 7 trustee to seek compensation when a case is converted to chapter 13. Judge Wedoff has indicated that he believes Mr. Martino's proposal triggers consideration of whether there are other situations in which requests for payment of administrative expenses should be sought by means of a procedure like that used for prepetition claims. He has suggested that since this broader issue is presented most frequently in business cases, the Advisory Committee, if it chooses to pursue it, should refer the matter to the Subcommittee on Business Issues.

Mr. Martino's Proposal

Mr. Martino's proposal concerns the situation in which a chapter 7 case is converted to a chapter 13 case, typically because the chapter 7 trustee identified some non-exempt assets available to pay creditors. Rather than requiring the chapter 7 trustee to file an application for compensation and attend a hearing in the chapter 13 case, Mr. Martino proposes that Rule 1017 be amended to provide for the chapter 7 trustee's filing of a proof of claim in the chapter 13 case

and the allowance of the claim if there are no objections. He suggests that the following subdivision be added to Rule 1017:

RULE 1017. Dismissal or Conversion of Case; Suspension

* * * * *

(g) COMPENSATION PROCEDURE FOLLOWING CONVERSION FROM CHAPTER 7 CASE TO A CHAPTER 13 CASE. Following conversion from a chapter 7 to a chapter 13 case, the chapter 7 trustee or interim trustee shall have 30 days within which to file a proof of claim as contemplated under § 501 for chapter 7 trustee compensation and need not file a request for payment of compensation as contemplated under § 503. Should no party in interest object to that claim, it shall be deemed allowed. Should an objection be raised, the court may allow reasonable compensation consistent with § 326, but shall consider the amounts to be distributed under the chapter 13 plan when determining the chapter 7 trustee's disbursements.

Mr. Martino argues that the chapter 7 trustee is likely to be seeking compensation for only a few hours of work, and he believes that a simplified compensation procedure is desirable.

Broader Issue Identified by Judge Wedoff

In response to Mr. Martino's proposal, Judge Wedoff noted that there are at least two other situations in which it might be appropriate for administrative expenses to be sought by means of a proof of claim, rather than having to use the more formal procedure of filing a request for payment of an administrative expense. The first of these situations is when a supplier of goods or services in the ordinary course of business during a chapter 11 case seeks payment after

the case is converted to chapter 7. The other is when a supplier of goods received by the debtor during the 20 days before the commencement of a case seeks to recover their value pursuant to § 503(b)(9). Although both types of claims are administrative expenses under § 503, they are both similar in nature to prepetition claims, and thus Judge Wedoff suggests that payment by means a proof of claim procedure is appropriate. He believes that a new rule providing for the filing of a proof of claim for these types of administrative expenses and setting a deadline for doing so is best located in Part III of the rules.

Considerations for the Advisory Committee

The procedure for seeking payment of administrative expenses is not set out in much detail in the Code or in the rules. Section 503(a) provides that an "entity may timely file a request for payment of an administrative expense, or may tardily file such request if permitted by the court for cause." The legislative history of that provision indicates that Congress contemplated that the "Rules of Bankruptcy Procedure will specify the time, the form, and the method of such a filing." Rule 2016(a) prescribes the content of an application for compensation for services rendered or reimbursement of expenses, and Rule 1019(6) provides timing requirements for requesting payment of administrative expenses incurred in chapter 11, 12, or 13 cases before conversion of cases to chapter 7. Neither the rules nor forms otherwise specify the time, form, or method of filing a request for payment of an administrative expense.

In considering what action, if any, to take on Mr. Martino's proposal for an amendment to Rule 1017 and on Judge Wedoff's suggestion for a broader look at the procedure for requesting payment of certain administrative expenses, the Advisory Committee may want to consider the following options:

– take no further action on the proposals;

– limit consideration to the specific issue raised by Mr. Martino, and refer that issue to the Subcommittee on Consumer Issues;

– accept the suggestion of Judge Wedoff that consideration be expanded to the two other situations he has identified in which a request for payment of administrative expenses by means of a proof of claim might be appropriate, and refer the issue to the Subcommittee on Business Issues;

– in addition to the issues identified by Judge Wedoff, ask the Business Subcommittee to consider whether there are other situations in which the payment of administrative expenses should be requested by a proof-of-claim-type procedure and to give further consideration to whether the rules or forms should provide more specific guidance about payment of administrative expenses.

Because Judge Wedoff has already identified two other situations in which the type of payment application procedure sought by Mr. Martino might be beneficial, I agree that Mr. Martino's proposal should not be considered in isolation. If the matter is referred to the Business Subcommittee, it can take a broader look at the question of how the rules deal with applications for the payment of administrative expenses and whether simplified procedures are needed for some types of such postpetition claims.

From: Martino, Philip V.

Sent: Monday, June 09, 2008 11:07 AM

To: 'eugene_wedoff@ilnb.uscourt.gov <'eugene_wedoff@ilnb.uscourt.gov> '

Cc: Greer, Colleen

Subject: proposed change to Rule 1017

Dear Judge Wedoff:

I did not forget our discussion at the US Trustee seminar regarding trying to ease the way for trustees to be paid when cases convert from chapter 7 to chapter 13 (usually in response to the chapter 7 trustee identifying equity sufficient to pay unsecured creditors). Set out below is language that allows the displaced chapter 7 trustee to file a request for compensation akin to the proof of claim procedure otherwise reserved to unsecured pre-petition creditors. I have added language identifying how the trustee's compensation should be calculated in the event a party in interest objects to the request. As we discussed, I am attempting to save the trustee from having to file a formal motion and attend a hearing for compensation for what should be only one to three hours of work.

And thanks again for participating in the US Trustee seminar.

<http://www.dlapiper.com/ <http://www.dlapiper.com/> >

Philip V. Martino

DLA Piper US LLP

100 North Tampa Street

Suite 2200

Tampa, Florida 33602-5809

813-222-5938 **T**
312-630-7334 **F**

philip.martino@dlapiper.com <philip.martino@dlapiper.com>

Rule 1017

(g) Compensation Procedure following conversion from chapter 7 case to a chapter 13 case. Following conversion from a chapter 7 to a chapter 13 case, the chapter 7 trustee or interim trustee shall have 30 days within which to file a proof of claim as contemplated under § 501 for chapter 7 trustee compensation and need not file a request for payment of compensation as contemplated under § 503. Should no party in interest object to that claim, it shall be deemed allowed. Should an objection be raised, the court may allow reasonable compensation consistent with § 326, but shall consider the amounts to be distributed under the chapter 13 plan when determining the chapter 7 trustee's disbursements.

TAB 18

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JEFF MORRIS, REPORTER

RE: SUGGESTIONS FOR AMENDMENTS TO DIRECTOR'S REAFFIRMATION FORM

DATE: AUGUST 25, 2008

The Committee has received three suggestions from bankruptcy judges regarding reaffirmation agreements. Judge Paul Mannes (Bankr. D. Md.) made a specific suggestion for the amendment of language contained in the Director's Form 240A Reaffirmation Agreement. Judges Randall Newsome (Bankr. ND Ca.) and Judge Robert Kressel (Bankr. D. Minn.) offered more general comments regarding the reaffirmation form. While it is not clear from their written comments, oral communications with the commentators and aspects of the written comments make it clear that their suggestions relate to the Reaffirmation Agreement form and not the proposed Official Form 27, Reaffirmation Agreement Cover Sheet.

Judge Mannes suggests that Part A(2)(c) of the Director's Form should be amended. It currently states that "if the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth In Lending Act:

> the interest rate on your loan may be a variable interest rate which changes from time to time, so that the annual percentage rate disclosed here may be higher or lower."

Judge Mannes suggests that this language may not be understood by many consumer debtors, so he suggests the following solution.

"(c) The underlying debt transaction (is)(is not) [check one] a variable rate

transaction.
A variable rate interest transaction changes from time to time, so the annual percentage rate disclosed here may become higher or lower, and the monthly payment that you make may change."

I think that Judge Mannes' suggestion to simplify the language is a good one. The Committee might consider further revision of the second sentence. It might be amended to read as follows:

> A variable rate interest transaction changes from time to time, so the annual percentage rate on your debt under this agreement may become higher or lower than the rate disclosed here, and the monthly payment that you make may change.

First, it makes the person completing the form affirmatively check whether the underlying transaction is a variable rate transaction. In the current form, no such election must be made. Instead, the language operates more as a warning or instruction for the debtor, and it may not be communicating the message successfully to consumer debtors. The proposed language is somewhat more accessible, and it reminds the debtor that not only may the interest rate be higher or lower than the original amount of the loan, but that the monthly payment that the debtor may be required to make may also change.

The suggestions made by Judges Newsome and Kressel are related. They each involve, in part, the role of debtor's attorneys in reaffirmation practice, although there are some differences in their suggestions. Judge Newsome notes that the reaffirmation agreements he sees are often "incomplete and inaccurate." He states that they often do not provide "the total amount of debt, including interest, that the debtors are reaffirming." Furthermore, he notes that creditors frequently simply refer to the original agreement between the parties as the terms of the reaffirmation agreement. However, he notes, they often fail to attach the original contract.

Thus, it is impossible for the court to evaluate the agreement with respect to best interests of debtors, and the like. Moreover, he suggests that there are false certifications of an absence of hardship, even when the debtor's schedules indicate that the debtor has negative income.

For many of these problems, it is not clear to me that a form can resolve the issue. With regard to the Director's Form Reaffirmation Agreement, the amount of debt agreed to be reaffirmed is supposed to "include all fees and costs (if any) that have accrued as of the date of this disclosure." This statement could be revised to require the amount to include "all interest, fees, and costs (if any) that have accrued as of the date of this disclosure." This might resolve the problem of failure of some parties to reaffirmation agreements to include accrued interest in the statement of the amount of the debt being reaffirmed.

As to Judge Newsome's comment about the failure of parties to attach the original agreement between the parties to the reaffirmation agreement, the current Director's Form does not require that the party filing the agreement attach a copy. Rather, it simply provides an opportunity at the very beginning of the form to check a box indicating that the reaffirmation agreement is attached. The instructions in Part A(2) of the form in subparagraph 5 on page 4 of the agreement also state that the separate reaffirmation agreement must be attached. However, that assumes there is a "separate" reaffirmation agreement. If the original agreement is the "reaffirmation agreement," then an argument could be raised that it need not be filed or attached to the Director's Form. More properly, I think that the original agreement is the reaffirmation agreement, and in that instance it should be filed with the court under § 524. In any event, the form could be improved by requiring the attachment of all documents that affect the rights of the parties under the reaffirmation agreement. This obligation should be placed right at the front of

the agreement so that it is not overlooked. The instructions could also be expanded to state that the original agreement between the parties must be attached to or filed with the Director's Form.

Judge Newsome's concern about the false certifications of no presumption of hardship is a matter that should be resolved in large part by Official Form 27 when it becomes effective. Under the Reaffirmation Agreement Cover Sheet, the debtor's Schedule I and J, income and expense amounts, will be set out on the cover sheet right next to the debtor's current income and expenses. Any discrepancy between the two will be apparent from the face of the cover sheet. This should prevent the false claims of no presumption of hardship. In situations where it does not prevent that false claim from being made, it will be very apparent to the court that the debtor or debtor's attorney has filed an internally inconsistent document.

Judge Kressel raised an issue relating to debtors who are represented by attorneys in the negotiation of the reaffirmation agreement. He notes that attorneys who represent debtors in negotiating reaffirmation agreements sometimes do not complete the form in which they certify that the reaffirmation agreement was fully informed and voluntary on the part of the debtor and does not impose an undue hardship on the debtor or dependents of the debtor. Part C of the Director's Form reaffirmation agreement includes all of this information, and it provides a signature line for the debtor's attorney. Judge Kressel suggests that some debtors' attorneys are not completing that form. Again, Official Form 27 has a question that must be answered with regard to whether the debtor was represented by counsel during the course of negotiating the reaffirmation agreement. The Official Form also follows that question with a question as to whether the debtor's attorney has executed the appropriate certification. This should resolve the problem posed by Judge Kressel, although the Director's Form could be amended to make this a

more prominent question that must be answered. As with the suggestion that the reaffirmation agreement form require the attachment of the actual reaffirmation agreement, it could likewise require the attachment of the debtor's attorney's certification, or a statement that the debtor was not represented by an attorney during the course of negotiations of the reaffirmation agreement. It may not solve the problem, particularly if debtors are advised to check that the attorney has not represented them even when the attorney did participate in negotiating the reaffirmation agreement. There is nothing a form can do to make parties and attorneys comply with the requirements of the form. Nonetheless, making these questions more prominent on the form might improve compliance with the Code, Rules and Official Forms. It might also improve the use of the Director's Form Reaffirmation Agreement.

The Standing Committee has approved Official Form 27, and it is now pending before the Judicial Conference for its consideration. Assuming that the Judicial Conference approves the form, it would become effective on December 1, 2009, conditioned on the Supreme Court's approval of the proposed amendment to Rule 4008 which would require the filing of the Reaffirmation Agreement Cover Sheet. I think it would be appropriate for the Forms Subcommittee to conduct its own study of the Director's Form Reaffirmation Agreement to see if it can be improved in response to the suggestions by Judges Mannes, Newsome, and Kressel. It might also be appropriate to revise the Director's Form to conform more closely to the questions asked in the Reaffirmation Cover Sheet form. Given that Official Form 27 will not become effective until December 1, 2009, at the earliest, this is not a matter that requires immediate attention. Nonetheless, it would be helpful to have the Director's Form revised, if appropriate, so that those revisions could become effective at the same time as Official Form 27.

UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF MARYLAND

08-BK-A

PAUL MANNES
JUDGE

U. S. Courthouse
6500 Cherrywood Lane
Greenbelt, Maryland 20770
(301) 344-8040

March 10, 2008

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
Administrative Office of the U.S. Courts
One Columbus Circle, N.E.
Washington, DC 20544

RE: Bankruptcy Form 240A

Dear Mr. McCabe:

The purpose of this letter is to request a revision in Form 240A. Section (c) of the Form now reads:

> (c) If the underlying debt transaction was disclosed as a variable rate transaction on the most recent disclosure given under the Truth in Lending Act:
>
> > The interest rate on your loan may be a variable interest rate which changes from time to time so that the annual percentage rate disclosed here may be higher or lower.

I suggest that the Reaffirmation Agreement state:

> (c) The underlying debt transaction (is) (is not) [check one] a variable rate transaction.
>
> > A variable rate interest transaction changes from time to time, so the annual percentage rate disclosed here may become higher or lower, and the monthly payment that you make may change.

The persons entering into these Reaffirmation Agreements are generally not the most sophisticated consumers. I suggest this language is clearer than the existing Form.

Sincerely yours,

Paul Mannes

PAUL MANNES

Randall
Newsome/CANB/09/USCOURTS

06/12/2008 05:09 PM

To: Laura T
Swain/NYSD/02/USCOURTS@USCOURTS

cc

Subject Re: Your Comment Regarding the Reaffirmation Agreement Form

Dear Laura,

As I indicated at the meeting, I am routinely seeing incomplete and inaccurate information from both debtors, their attorneys, and creditors in reaffirmation agreements. Among other problems, creditors are not providing the total amount of debt, including interest, that the debtors are reaffirming. "Total debt" should mean just that, including interest. Creditors are often merely referring to the original contract as the terms of the reaffimation, without attaching the contract. Attorneys are falsely certify that no presumption of hardship exists, even though the schedules indicate that the debtor has negative income each month. The form needs substantial clarification.

Best regards,

Randy

Robert Kressel/MNB/08/USCOURTS
08/11/2008 02:39 PM

To Laura Taylor Swain/NYSD/02/USCOURTS@USCOURTS

cc

Subject Reaffirmation Form

Hi Laura:

It was a delight to see you in Seattle. I am following up our conversation on this topic.

One of the improvements that I think could be made tot his form is the inclusion of a place to indicate that the debtor was or was not "represented by an attorney during the course of negotiating an agreement..." Section 524(c)(6)(A). Often, even though the attorney did not sign the certifications, the attorney did represent the debtor in negotiating it. , but there is noting in the record from which that can be determined.

All my best.

Bob

TAB 19

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: FEE WAIVER ISSUES

DATE: AUGUST 10, 2008

Bankruptcy Judge Colleen Brown (D. Vt.) has asked the Advisory Committee to review and consider expanding Official Form 3B, the Application for Waiver of the Chapter 7 Filing Fee. She says that given the timing of the filing of the form in relation to the deadline for filing the debtor's schedules, a court often must make a decision about fee waiver on less than complete or accurate information. She suggests either that debtors seeking a fee waiver be required to file their schedules simultaneously with the filing of the waiver application, that the form be revised to require more detailed financial information, or that a court delay ruling on the waiver application until the schedules are filed.

BAPCPA added 28 U.S.C. § 1930(f), which permits a bankruptcy or district court to waive the filing fee (which is currently $299) for a chapter 7 petition if a debtor has income less than 150% of the official poverty line for a family of the debtor's family size and the debtor is unable to pay the fee in installments. Form 3B was adopted in 2005 to implement this provision, and Rule 1006(c), scheduled to go into effect in its permanent form in December 2008, requires the filing of the completed official form by a chapter 7 debtor seeking a fee waiver at the time of the filing of the petition.

Form 3B requires debtors to provide information about their family size and income, monthly expenses, real and personal property, and additional information about payments to

attorneys and others in connection with the case, prior bankruptcy filings, and reasons for the inability to pay the filing fee in installments. In order to eliminate duplication of effort and inconsistencies, the form instructs debtors in several places to state information that the debtor provided or will provide in specified schedules. Form 3B also includes a standard order in which the court indicates whether it grants the waiver; denies it and, if so, whether it permits the debtor to pay in installments; or schedules the application for a hearing.

Judge Brown has described several problems that she has encountered in ruling on fee waiver applications. She says that in many instances waiver applications are incomplete or there turn out to be inconsistencies between the information provided in the application and information later provided in the schedules. Moreover, she notes, there is often a need for details underlying the total income and expense figures listed in the waiver form, which information is not revealed until the schedules are filed.

Judge Brown's district has implemented two procedures regarding fees waivers that she says have proven to be helpful. First the judges in the district have started waiting until all schedules have been filed before ruling on a waiver application. Although she recognizes that this procedure allows a debtor access to bankruptcy and the automatic stay for up to 15 days without paying any filing fee, it does allow fee waiver decisions to be made on the basis of more accurate and complete information. The alternative, she notes, is to require debtors seeking a fee waiver, unlike all other chapter 7 debtors, to file their schedules at the time of the filing of their petitions and waiver applications.

The other procedure the District of Vermont has adopted is to modify the standard 3B order to include room for a brief explanation of the basis for the denial of a waiver application.

Judge Brown says that the bankruptcy bar asked for this addition so that attorneys could explain to their clients why a waiver application was denied and also so that they could gain an understanding of the criteria being applied by the court. Judge Brown is hopeful that providing the reasons for denials will eventually lead to a reduction in the number of applications filed and an improvement in the quality of the ones that are submitted.

In addition to expressing concerns about the timing and content of fee waiver applications, Judge Brown raises a number of legal issues relevant to the decision whether to grant a waiver. Among them she questions whether the court can take into account the debtor's likely future receipt of a tax refund, and if so, how soon the refund must occur; whether the court can make the fee waiver contingent on the outcome of an adversary proceeding brought by the debtor to recover damages, directing the debtor if successful to pay the filing fee; whether there is any limit on the amount of attorney's fee that a debtor receiving a fee waiver may pay; and whether a family member who is paying the debtor's attorney's fees or mortgage can be ordered to pay the filing fee. She also questions how late in the case a court can revoke a fee waiver based on the determination that circumstances at the time of filing did not in fact warrant the waiver.

Although the legal issues Judge Brown has raised should probably be left to the courts rather than resolved by rule or form, the Advisory Committee might refer the issues about the content of Form 3B and the timing of the court's ruling of waiver applications to the Forms Subcommittee for consideration of whether to recommend any changes to the form or to Rule 1006(c). The Subcommittee should consider the advantages and disadvantages of either postponing a decision on the waiver application until all schedules are filed, requiring the debtor

to file all schedules at the time of the petition, or requiring more information in the application itself. Alternatively, the Subcommittee should consider whether to leave the form unchanged and to allow courts to adopt local procedures, as the District of Vermont has done, to address any problems that they encounter in implementation of the fee waiver process.

From: Colleen Brown
Sent: 06/25/2008 06:19 PM EDT
To: Laura Swain
Cc: Elizabeth Perris; Elizabeth_Gibson@unc.edu; James Wannamaker; Jeff.Morris@notes.udayton.edu; Scott Myers
Subject: Re: Rules Committee work; Suggestions re Revisions to Forms Project

Dear Laura,

I thank you for agreeing to put the IFP waiver issue on the agenda for the fall meeting of the full committee, and apologize for my delay in responding to your questions regarding the points I raised about fee waiver applications.

Part of the reason for the delay is that I wanted to do more research on the procedure locally and check with the debtor and trustee bars about the question. I am glad I engaged in that process because I learned quite a lot. First, I learned that in Vermont we have implemented a procedure whereby we do not consider the IFP application until all schedules have been filed. We did this because of consistently deficient applications (detailed more below). This procedure has been working very well and I would encourage the committee to consider creating a rule regarding IFP applications that requires schedules to be filed prior to any action on an application. I recognize that this raises the issue of a case pending -- and the stay being in effect -- for 15 days (soon to be 14 days) without the D having paid any filing fee, but I see no alternative unless the rule were to deprive the D seeking a fee waiver of the full time period permitted other debtors to file schedules. I find the schedules essential to my analysis of these applications and have opted to live with the D having a free ride for a couple of weeks. It is not an ideal solution and hope perhaps the wise minds of your committee might find a better compromise.

The second point I would like to bring to the attention of the rules committee is the importance of having good fee waiver orders. The bar in Vermont has asked that any denial of fee waiver applications set forth a finding for the denial, so the attorney can explain it to her client and the bar can understand the criteria the court is applying. I think this is eminently reasonable. Therefore, we have recently modified our local form order that has a free text box in which my findings can be set forth. I specify in the text box whether the denial is due to the D's failure to show the first prong of the test (150% of the poverty limit for this sized family) or the second prong of the test (D unable to pay the fee, even in installments), and point to the information in the schedules and/or application that I am relying on to reach that determination. It is too early to know how well it is working but I expect this may reduce the number of fee waiver applications and improve the quality of the applications filed. We'll see.

Our systems manager, Gary Gfeller, created the form order. It is automated (though, technically, something less than interactive) such that when the Clerk's Office employee is creating it she gets a different form depending on the answers she gives to a series of queries (eg., was application denied? if so, is the D permitted to pay in installments? if so, the system calculates the due dates and amounts, making all payments due within the time frame set forth in the rule). I attach a copy of the form order. If anyone on your committee would like further info about the form order, Gary Gfeller would be happy to answer your questions. It is very handy because since it is generated electronically, it is sure to be mathematically and time frame correct, does not include the installment payments box unless I have both denied the application and authorized installment payments, and concisely explains the basis of any denial in a public document that the bar and trustees can review.

Lastly, let me respond directly to the specific questions you posed (**my replies are in bold**):

Is it that people are not providing the financial information the form requests?
in many instances, the application is incomplete (since if Ds have not yet completed their schedules, they are guessing about the specifics)

Or that the information is divergent from what eventually comes in on the forms,
there are very often inconsistencies between the answers on the application and the info on the schedules, even on basic questions such as number in household

or that you need the detail that underlies the total figures required by the form,
the details, not included on the application, is often essential, for example, in connection with information pertaining to liens, exemptions, and the overall budget detail

or something else?
we have had more than one example (indeed we are probably closer to a dozen) where the fee was waived and the industrious ch 7 trustee who was outraged about losing his commission in a case where he perceived the D could pay the fee did some sleuth work and discovered egregious extravagances in the D's budget *(worst case was a woman who had her nails done weekly)* and successfully moved to have the waiver order reconsidered and the waiver revoked

Any further information you can provide as to the nature of the practical problem would be very helpful.
I am advised (and this has been documented in an NABT article of late last year) that the Vt bk court has granted more fee waivers than any other district . . . and it appears (by no coincidence I am sure) that the most aggressive trustee, in terms of seeking reconsideration of fee waivers, practices here. So, there have been many interesting challenges raised here about how far the court must look for assets before determining the D cannot afford to pay the filing fee. There have also been fascinating questions raised around revocation of the waiver: the legal criteria invoked here is that the form specifies that the fee waiver can be revoked if the Court subsequently becomes aware that circumstances at the time of the filing did not warrant the waiver. A general issue this raises is how late in the case can such facts and circumstances effect the revocation of the waiver? Must it be within the time frame for paying the filing fee in installments? or does the revocation of the waiver start the 120 day period running anew?

That is just the tip of the iceberg, Laura ..... Let me give you a few illustrative examples of the Yankee creativity that has been unleashed in connection with these fee waiver applications:

– if the D has not yet filed a tax return but in the past has regularly received a sizable refund, should the court take that into account? and if so, how soon must the refund be due in order to be considered available at the time of filing? can the court direct the D to file by April 15 and prohibit him from obtaining an extension?

– what about if the D has filed an AP to recover damages from a 3rd party, part of which would be exempt, can the court direct that the filing fee waiver is contingent upon the outcome of that AP? and direct the D to pay the filing fee when she recovers, even if it is many months, or years, after the order for relief?

– the statute says that a fee waiver cannot be denied just b/c the D paid a fee to an atty, but is some amount of an atty fee is too much? can a D who has no assets and meets the 150% criteria get a fee waiver if she has paid an atty $1200? what about if a family member paid the $1200?

– does it matter if that family member who paid the attorney fee also pays the D's mortgage each month? can the court direct that party to pay the filing fee? *(I don't think so!!)*

This may be more than you want to know, but thought you should get the full flavor of the question~

I hope I have answered your questions and adequately articulated the issues I would like to see the Rules Committee consider.
Please feel free to give me a call if you would like to talk further about this.

Thanks to you and your committee for all the great work you do to improve the practice in our bankruptcy courts.

Cheers!
Colleen

Colleen A. Brown
U.S. Bankruptcy Judge
District of Vermont
(802) 776-2030

Laura T Swain/NYSD/02/USCOURTS (Dist Judge)

06/12/2008 04:29 PM

To
Colleen Brown/VTB/02/USCOURTS@USCOURTS

cc
Elizabeth Perris/ORB/09/USCOURTS, James Wannamaker/DCA/AO/USCOURTS, Scott Myers, Jeff.Morris@notes.udayton.edu, Elizabeth_Gibson@unc.edu

Subject
Re: Rules Committee work; Suggestions re Revisions to Forms Project

Dear Colleen,

Thank you for your thoughtful feedback. I plan to put the IFP waiver issue on the full committee agenda for our upcoming fall meeting (in anticipation of referring the issue to our Forms subcommittee if the full committee agrees that's the appropriate course), but would appreciate some additional information from you as to why the current Official Form 3B is inadequate. The form was intended to elicit the relevant information that would come in on Schedules I, J, A & B, and to encourage early filing of those forms. Is it that people are not providing the financial information the form requests? Or that the information is divergent from what eventually comes in on the forms, or that you need the detail that underlies the total figures required by the form, or something else? Any further information you can provide as to the nature of the practical problem would be very helpful.

The drafting issue is very much on the radar screen of the Forms Modernization project, and I appreciate your reiterating and expanding on the comments at the Chief Judges' conference.

I'll look forward to hearing from you at your convenience.

Yours,

Laura

LAURA TAYLOR SWAIN
United States District Judge
(212) 805-0417
FAX (212) 805 -0426

Colleen Brown/VTB/02/USCOURTS

06/10/2008 11:35 AM

To
Laura Swain, elizabeth_perris@orb.uscourts.gov
cc

Subject
Rules Committee work; Suggestions re Revisions to Forms Project

Hello Laura and Liz,

I am writing to follow up on the discussion we had in DC last week at the Chief Bk Judges' Workshop, when the two of you, on behalf of the rules committee, asked for feedback re bankruptcy forms.

If you need something more formal, I will be happy to do that (though I won't get to it for a couple of weeks).

First, I would like to ask the committee to review -- and consider expanding -- the form application for waiver of filing fee. Given the timing of bankruptcy cases and the short window of time for paying a filing fee in installments, it often seems we are trying to rule on these waiver requests without prior to the due date of the schedules, and hence with precious little detail re the debtor's financial circumstances. I would urge the committee to consider either requiring persons who seek a fee waiver to file schedules with the fee waiver application or requiring more detailed financial info on the fee waiver application form, so courts can make an informed decision as to whether the debtor "cannot afford to pay the filing fee in installments".

Second, I would urge the forms revision committee to take seriously the point made by Steve Rhodes re the errors in many schedules being due to debtors misunderstanding the forms (and perhaps reflecting that the forms may not be drafted as well as they might be for the audience filling them out), specifically in the context of the "abuse prevention" goal of BAPCPA. As chair of the NCBJ-UST Liaison committee I have spoken regularly with the EOUST Exec Director Clifford White about whether the "material misstatements" the UST audits uncover truly demonstrate an intent by debtors to abuse the bankruptcy system -- either on a micro or macro level. I am persuaded that if the forms were drafted in a way that made them more easily understood, there would be two very important results: (1) debtors would have fewer "errors" on their schedules and (2) the incidence of material misstatements would be a more reliable indicator of the extent of abuse of the bankruptcy system. These outcomes would be of great value to all constituencies and give Congress better data to work from when formulating bankruptcy policy.

I appreciate how complex and difficult the work of the rules committee is and do not mean in any way to criticize the quality of the rules and forms you have created. You do amazing work! Rather, I want

to suggest that we are at a point in time when there remains a great deal of speculation and disagreement as to the level of ***intentional*** material misstatements in debtor schedules and the value of the UST audits. I believe the critical work you are undertaking to revise the forms could be just what is needed to improve the value of the UST audits and reduce the number of misstatements on debtor schedules.

I would be happy to discuss my comments with you, at your convenience -- and provide more detail if you so desire.

Warm regards,
Colleen

Colleen A. Brown
U.S. Bankruptcy Judge
District of Vermont
(802) 776-2030

TAB 20

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: JIM WANNAMAKER

RE: DOLLAR AMOUNTS ON PROOF OF CLAIM

DATE: AUGUST 25, 2008

The bankruptcy courts in the Southern District of New York and the Eastern District of Pennsylvania have pointed out a discrepancy between Official Form 10, Proof of Claim, and the data entry screens for claims in the judiciary's Case Management/Electronic Case Filing (CM/ECF) system.

The Official Form includes blanks for the dollar amounts of the amount of the claim (box 1), the amount of the claim which is secured (box 4), and the amount of the claim entitled to priority (box 5). Box 4, which is to be completed only for secured claims, also includes a blank for the unsecured amount, which is intended to be for the unsecured balance of a partially secured claim. The docket event for filing a claim in CM/ECF includes additional blanks. A creditor filing electronically or a deputy clerk entering a claim filed on paper onto the claims docket is asked to insert the dollar amounts for "secured", "unsecured", "priority", and "unknown." The software adds the numbers to generate the total amount of the claim.

The box for the general unsecured portion of the claim was deleted from the Proof of Claim in 1997 in response to reports from several clerks that creditors often got either the total or one of the components wrong, which made it difficult or impossible for the clerk to enter the correct numbers on the claims docket. In a subsequent revision, all four numbers were reinstated on the form. In response to renewed complaints that debtors were getting the math wrong, the

general unsecured box on the proof of claim was deleted again in the amendment to Form 10 effective on December 1, 2007. The Committee Note for the 2007 amendment states that the only dollar amount needed for a general unsecured claim is the amount of the claim. There is no need for a separate box for the amount which is unsecured. If the claim or any part of it is secured or entitled to priority, the creditor is directed to provide details in the appropriate sections of the form. In another 2007 change, the filer is required to state the amount to be afforded priority only once.

The courts have indicated that the additional blanks in entries on the CM/ECF claims docket and the software's calculation of the total have caused problems, at times, especially with partially secured claims or claims entitled to priority only in part. With paper claims, a deputy clerk may have to calculate the unsecured portion of the claim. In addition, the software will overstate the amount of the claim if a creditor enters $20,000 for "unsecured" and $10,950 for "priority" for a $20,000 wage claim, which is entitled to priority only for the first $10,950 of the claim. Creditors also may include the amount of the claim in both"unknown" and another blank.

Because the entry screen for claims in CM/ECF can be changed more quickly than the Official Form and because trustees and other parties generally only need the three dollar amounts set out on the form, staff at the Administrative Office have proposed that the blanks for "unsecured" and "unknown" be deleted from the entry screen. In order to facilitate entry of the claim, the three remaining dollar amounts would be set out on the entry screen in the same order as they are set out on the Proof of Claim form. In order to avoid problems with overstating the value of the claim, staff have proposed deleting CM/ECF's calculation of the total of the claim. Creditors are required to state the amount of the claim in box 1 on the form and do not need help

from the software to enter that amount in CM/ECF. The changes are intended to reduce the number of instances in which deputy clerks are required to do math before they can enter a claim or in which creditors' errors result in CM/ECF overstating the amount of the claim.

These changes will be discussed with the Bankruptcy CM/ECF Working Group for inclusion in the upcoming CM/ECF Release 4.0.

TAB 21

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: EOUST SUGGESTIONS FOR RULES AMENDMENTS

DATE: AUGUST 31, 2008

Mark Redmiles, Principal Deputy Director of the Executive Office for United States Trustees, has submitted two suggestions for rules amendments. The first is a proposed amendment of Interim Rule 1017(e) (which is scheduled to take effect as the national rule on December 1, 2008). The other suggestion concerns Interim Rule 4004(c) (which is also scheduled to take effect as the national rule on December 1, 2008).

Rule 1017(e)

Rule 1017(e) prescribes the procedure for dismissal or conversion of an individual debtor's case for abuse under § 707(b). Rule 1017(e)(1) provides that the deadline for filing a motion to dismiss for abuse is "60 days after the first date set for the meeting of creditors under § 341(a)." It allows the deadline to be extended for cause if a request is filed before the time for filing the motion expires. Rule 1017(e)(1), however, excepts from its coverage motions made under § 704(b)(2) to the extent the statutory provisions are contrary to the rule.

Section 704(b) prescribes the duties of the U.S. trustee (or bankruptcy administrator) with respect to reviewing cases of individual debtors for the presumption of abuse. Paragraph (b)(1) requires the U.S. trustee to review materials filed by the debtor and to file with the court a statement of whether a presumption of abuse arises under § 707(b). That statement must be filed "not later than 10 days after the date of the first meeting of creditors." § 704(b)(1)(A). If the U.S. trustee determines that there is a presumption of abuse in the case and the debtor is not

below the applicable median family income, the U.S. trustee must either file a motion to dismiss or convert under § 707(b) or file a statement explaining why such a motion is not appropriate. The statute provides that the U.S. trustee's motion must be filed "not later than 30 days after the date of filing the statement under paragraph (1)." § 704(b)(2).

The time period stated in § 704(b)(1) for the U.S. trustee's filing of the initial statement regarding a presumption of abuse – "10 days after the date of the first meeting of creditors" – is ambiguous. It is unclear whether this language means that the time starts running on the first date set for the § 341 meeting (regardless of whether it is actually held then), the first date on which the § 341 meeting is actually commenced, or the date on which the § 341 meeting concludes. Courts have reached conflicting conclusions about the meaning of this language. *Compare, e.g.*, Turner v. Close (*In re* Close), 384 B.R. 856, 866 (D. Kan. 2008) (concluding that phrase "refers to the first meeting date and not some later date"), *with In re* Singletary, 354 B.R. 455, 466 (Bankr. S.D. Tex. 2006) (concluding that time period starts running "after the meeting of creditors"). The interpretation given to this language in § 704(b)(1) can in turn affect the timeliness of a U.S. trustee's motion to dismiss under § 704(b)(2), since the latter deadline is calculated from the filing of the initial statement.

When the Advisory Committee wrote Interim Rule 1017(e)(1), it chose not to take a position on the meaning of the ambiguous statutory language. Thus it prescribed time limits for motions to dismiss "[e]xcept as otherwise provided in § 704(b)(2)." The Committee Note states that the amendments "to subdivision (e) preserve the time limits already in place for § 707(b) motions, except to the extent that § 704(b)(2) sets the deadline for the United States trustee to act." Thus any party other than the U.S. trustee who moves to dismiss for abuse under § 707(b)

is subject to Rule 1017(e)(1)'s deadlines. The U.S. trustee must adhere to § 704(b)(2) to the extent it imposes a different time requirement.

The ambiguity of § 704(b)(1) obviously presents uncertainty for U.S. trustees, and the amendment to Rule 1017(e) that Mr. Redmiles has proposed seeks to eliminate the ambiguity. His proposal would, among other things, add a new provision to Rule 1017(e) that would state that "the date of the first meeting of creditors referenced in § 704(b)(1)(A) is the date the meeting of creditors under § 341(a) is first convened." His proposed amendment would also provide that the U.S. trustee would be required to file a motion to dismiss or convert for abuse within the time set forth in § 704(b)(2), but "no later than 60 days after the first date set for the meeting of creditors under § 341(a), if the meeting of creditors is not convened or concluded on the first date set."

The Advisory Committee considered Interim Rule 1017(e) and § 704(b)(1)'s ambiguity at the September 2007 meeting in response to a suggestion by Judge Wesley Steen (Bankr. W.D. Tex.) (07-BK-D). Judge Steen suggested that Rule 1017(e) be amended either by eliminating the reference to § 704(b)(2) (thus clearly making the rule's deadline applicable to the U.S. trustee as well as other parties) or by clarifying whether the rule's deadline applies to the U.S. trustee in a situation in which the § 704(b) time period would expire after the rule's deadline. The Advisory Committee decided to make no change to Rule 1017(e) at that time due to the lack of consensus among the courts as to whether § 704(b) imposes a deadline on the U.S. trustee and, if it does, at what point that time period begins to run.

The amendment of Rule 1017(e) proposed by Mr. Redmiles would clarify both the meaning of § 704(b)(1)'s reference to "the date of the first meeting of creditors" and the

applicability of the rule's deadline as an outside limit on the U.S. trustee's authority to file a motion to dismiss for abuse. Although this clarity might be welcomed by U.S. trustees and courts, in my view it would be beyond the scope of the rule making process to define the meaning of an ambiguous statutory phrase. If Congress has imposed a deadline on the U.S. trustee in § 704(b), then a rule may not alter that deadline. Unless the courts reach a consensus that § 704(b) does not impose a deadline (currently the minority view) or a consensus on when the deadline starts to run, my recommendation would be to continue to leave the issue to the courts for interpretation, as Rule 1017(e) currently does.

Rule 4004(c)

Mr. Redmiles' other suggestion concerns Rule 4004(c), which governs the timing of the court's entry of a discharge. As a general matter, the rule requires the court to grant the discharge "forthwith" upon the expiration of the time stated by the rule for filing a complaint objecting to discharge. Subdivision (c), however, specifies twelve exceptions to that requirement. Among those exceptions are cases in which a motion is pending to dismiss the case, to extend the time for objecting to discharge, or to delay or postpone discharge. Mr. Redmiles suggests that those provisions (Rule 4004(c)(1)(D), (E), (F), (I), and (K)) be amended by adding the language "or until appellate review is no longer available."

Mr. Redmiles argues in support of his suggested amendment that the term "pending" generally includes the period from the commencement of a case until all appeals have been exhausted or the time for taking an appeal has lapsed. Because he says that Rule 4004(c) could nevertheless be read to mean that the court should refrain from entering the discharge only while the complaint or motion is pending before the bankruptcy court, the rule should be clarified.

Otherwise, he says, "a discharge could be entered immediately upon denial of a motion to dismiss even though appellate review has not yet occurred."

Contrary to Mr. Redmiles, I believe that the most natural reading of the current language is that a motion (unlike a case) is pending only until it is ruled on by the bankruptcy court. If that is so, and a number of courts seem to have read it that way, Mr. Redmiles' suggested amendment, rather than just providing clarification, would extend the period the time before a court could enter a discharge in some cases. The suggestion therefore relates to the matter included at Tab 15 regarding the "gap" issue in the Seventh Circuit's *Zedan* decision. If the suggested amendment to Rule 4004(c) were to be adopted, the gap between the expiration of the period for objecting to discharge and the actual entry of a discharge in some cases would be significantly lengthened. That expansion of the gap would exacerbate the problem presented in *Zedan* for a creditor, trustee, or U.S. trustee who learned of the debtor's fraud during the gap. Under the Seventh Circuit view, and in the absence of an amendment of Rule 4004(b), the creditor, trustee, or U.S. trustee would be unable either to object to discharge or seek revocation of discharge on the basis of the fraud.

In support of his suggestion, Mr. Redmiles does not cite any cases in which an appellate court reversed the denial of a motion to dismiss yet considered itself bound to uphold the discharge, and I was unable to find any. In fact, some courts have concluded that they do have authority to vacate the discharge if they reverse the bankruptcy court's denial of a motion to dismiss. *See* Turner v. Close (*In re* Close), 384 B.R. 856, 863 (D. Kan. 2008) (expressing doubt about the debtor's argument that the appeal taken after the discharge was entered was moot "in light of [the court's] ability to vacate the discharge order in the event of a reversal"); McVay v.

Otero, 371 B.R. 190, 205 (W.D. Tex. 2007) (vacating the discharge order and remanding for the bankruptcy court to reconsider the U.S. Trustee's motion to dismiss). There are cases in which a debtor has argued that an appeal of a denial of a motion to dismiss is moot or equitably moot because the discharge had already been granted. *See, e.g., Close*, 384 B.R. at 862-63; Kasparian v. Conley (*In re* Conley), 369 B.R. 67, 70- 72 (1st Cir. BAP 2007). But I was not able to find any case in which that argument was accepted. Instead, courts either concluded that they could vacate the discharge and thus the case was not moot, or they concluded that there was no need to reach the issue because the appeal lacked merit.

It is not clear to me, therefore, that a problem exists for which an amendment is needed. Given the possible exacerbation of the gap problem noted above, my recommendation is not to pursue this suggestion further. If, however, the Advisory Committee decides to consider the possibility of amending Rule 4004(b) to address the gap issue, it may wish to have the subcommittee consider this issue along with the other.

Should the Advisory Committee decide to pursue either or both of Mr. Redmiles' suggestions, I recommend that they be referred to the Subcommittee on Consumer Issues.

U.S. Department of Justice

Executive Office for United States Trustees

Office of the Director *Washington, D.C. 20530*

August 22, 2008

The Honorable Laura Taylor Swain
U.S. District Judge
U.S. District Court
Daniel Patrick Moynihan U.S. Courthouse
500 Pearl Street, Suite 755
New York, NY 10007

Dear Judge Swain:

Enclosed for consideration by the Advisory Committee on Bankruptcy Rules are proposed revisions to Interim Rule 1017 to remove ambiguity with regard to the filing deadline for presumed abuse statements and motions to dismiss under 11 U.S.C. § 704(b), and Interim Rule 4004(c) to clarify that a case may not be discharged until the time for appellate review has expired.

If you have any questions or need additional information, please feel free to contact me at (202) 307-1391.

Sincerely,

Mark A. Redmiles
Principal Deputy Director

Enclosures

cc: Professor Jeffrey W. Morris, Reporter
Professor S. Elizabeth Gibson, Assistant Reporter

INTERIM RULE 1017(e)

Discussion

Pursuant to 11 U.S.C. § 704(b)(1)(A), the United States Trustee is required to file with the court, not later than 10 days "after the date of the first meeting of creditors," a statement (the "10-day statement") as to whether a case is presumed to be an abuse under section 707(b). Understanding when this 10-day period begins to run is significant because getting it wrong can result in the denial of a motion to dismiss under section 704(b)(2) as untimely.

Section 704(b) was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005) ("BAPCPA"). That section provides:

> (1) With respect to a debtor who is an individual in a case under this chapter –
>
> > (A) the United States trustee (or the bankruptcy administrator, if any) shall review all materials filed by the debtor and, not later than 10 days after the date of the first meeting of creditors, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b); and
> >
> > (B) not later than 5 days after receiving a statement under subparagraph (A), the court shall provide a copy of the statement to all creditors.
>
> (2) The United States trustee (or bankruptcy administrator, if any) shall, not later than 30 days after the date of filing a statement under paragraph (1), either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States trustee (or the bankruptcy administrator, if any) does not consider such a motion to be appropriate, if the United States trustee (or the bankruptcy administrator, if any) determines that the debtor's case should be presumed to be an abuse under section 707(b) . . .

11 U.S.C. § 704(b).

Interim Rule 1017(e)(1) provides that "[e]xcept as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss . . ." Fed. R. Bankr. P. 1017(e)(1).

The Interim Rule preserves the existing 60 day deadline for section 707(b) motions, but exeepts from its coverage section 704(b)(2). Section 704(b)(2) provides a deadline for certain motions to dismiss under section 707(b), and the deadline is triggered by the filing of a presumed abuse statement by the U.S. trustee in accordance with section 704(b)(1). However, use of the phrase "after the date of the first meeting of creditors" in section 704(b)(1) has created ambiguity regarding how the deadline in section 704(b)(2) is to be applied.

The term "first meeting of creditors" has not been used, pre-BAPCPA, since the Bankruptcy Act of 1898. Turner v. Close (In re Close), 384 B.R. 856, at *16 (D. Kansas 2008) (Bankruptcy Reporter pagination not yet available); In re Draisey, 2008 Bankr. LEXIS 1004, at *5 (Bankr. D. Minn., April 8, 2008). Congress reintroduced the phrase in 2005 and it now appears in Section 704(b) and also in Section 521(a)(6). Why the phrase was reintroduced is unknown, but some courts have suggested that it is the result of careless drafting. In re Close, 384 B.R. at *18 ("[u]nfortunately, Congress did not define the new triggers in a clear and consistent manner); In re Draisey, 2008 Bankr. LEXIS 1004, at *5 (Bankr. D. Minn., April 8, 2008) (term "first meeting of creditors" illustrated a notion that there could be more than one meeting, a feature of the Bankruptcy Act of 1898 that was abandoned by Congress in the mid-1970s; "BAPCPA's legislative history is sketchy at best, and it has no indication why Congress used 'first'"); In re Cadwallder, 2007 Bankr. LEXIS 2260, at *34 (Bankr. S.D. Tex., June 28, 2008) (meeting required by § 341 is important but the references to it in the Bankruptcy Code are not as precise as one might hope). The result is that courts have inconsistently interpreted what the phrase means.

The legislative history discussing this section seems clear:

> Section 102(c) of the Act amends section 704 of the Bankruptcy Code to require the United States trustee or bankruptcy administrator in a chapter 7 case where the debtor is an individual to: (1) review all material filed by the debtor; and (2) file a statement with the court (within ten days ***following the meeting of creditors held pursuant to section 341*** of the Bankruptcy Code) as to whether or not the debtor's case should be presumed to be an abuse under section 707(b).

H.R. Rep. No. 31, 109th Cong., 1st Sess. 102 (2005) (emphasis added).

Two courts in the Southern District of Texas have interpreted the phrase "after the date of the first meeting of creditors" to mean after it has been held or is concluded. In re Singletary, 354 B.R. 455, 466 (Bankr. S.D. Tex. 2006) (UST has up to ten days after the meeting of creditors to file a 10-day statement); In re Cadwallder, 2007 Bankr. LEXIS at *36 (first meeting of creditors and meeting of creditors are equivalent). One court has ruled that the phrase means after the date the first creditors meeting in the case is actually convened. See e.g., In re Close, 384 B.R. 856, at *23 (plain meaning of "date of first meeting" means the first meeting date and not some later date).

As reflected in the range of bankruptcy court decisions to date, it is not clear whether the presumed abuse statement must be filed 10 days from the first date set, from the date the meeting of creditors is first convened, or from the conclusion of the meeting.

Proposed Amendment

The following amendment is proposed to provide a consistent deadline for presumed abuse statements filed under section 704(b)(1) and consequently motions filed pursuant to section 704(b)(2).

Rule 1017. Dismissal or Conversion of Case; Suspension.

(e)(1) Except as otherwise provided in § 704(b)(2), a motion to dismiss a case for abuse under § 707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss. [delete rest of paragraph from (1) and insert at new (3)]

(2) the date of the first meeting of creditors referenced in § 704(b)(1)(A) is the date the meeting of creditors under § 341(a) is first convened.

(3) As provided in § 704(b)(2), the United States Trustee shall file a motion to dismiss within the time set forth in that section, but no later than 60 days after the first date set for the meeting of creditors under § 341(a), if the meeting of creditors is not convened or concluded on the first date set.

(4) The party filing the motion shall set forth in the motion all matters to be considered at the hearing. A motion to dismiss under § 707(b)(1) and (3) shall state with particularity the circumstances alleged to constitute abuse.

(5) If the hearing is set on the court's own motion, notice of the hearing shall be served on the debtor no later than 60 days after the first date set for the meeting of creditors under § 341(a). The notice shall set forth all matters to be considered by the court at the hearing.

INTERIM RULE 4004(c)

Discussion

Interim Rule 4004(c) requires the court to grant a discharge "forthwith," unless several conditions listed in subparagraph (1) prevent it. Five of these conditions do not allow for possible appellate review and, therefore, should be amended. The Rule provides, in relevant part, as follows:

> (c) Grant of Discharge.
>
> (1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:
>
> . . .
>
> (D) a motion to dismiss the case under § 707 is pending,
>
> (E) a motion to extend the time for filing a complaint objecting to discharge is pending,
>
> (F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending,
>
> . . .
>
> (I) a motion to delay or postpone discharge under § 727(a)(12) is pending;
>
> . . .
>
> (K) a motion to delay discharge, alleging that the debtor has not filed with the court all tax documents required to be filed under § 521(f), is pending.

Fed. R. Bankr. P. 4004(c)(1).

Under the Interim Rule, as long as the types of motions specified are pending, including a motion to dismiss under 11 U.S.C. § 707, the bankruptcy court should not enter a discharge order. Black's Law Dictionary states that "an action or suit is 'pending' from its inception until the rendition of final judgment." Black's Law Dictionary 1134 (6th ed. 1990). Cf. Griffith v. Kentucky, 479 U.S. 314, 326 (1987) (cases on appeal are "pending cases" to which a new rule of decision applied). The Supreme Court has defined "final judgment" to mean "one where 'the availability of appeal' has been exhausted or has lapsed, and the time to petition for certiorari has passed." Bradley v. Sch. Bd. of Richmond, 416 U.S. 696, 711 n.14 (1974), citing Linkletter v. Walker, 381 U.S. 618, 622 n.5 (1965). See, e.g., Williams v. Cain, 217 F.3d 303, 310-11 (5th

Cir. 2000) (defining "pending" under 28 U.S.C. § 2244(d)(2) to mean until appellate review was no longer available). Thus, the word "pending" under Interim Rule 4004(c) includes section 707 motions and other motions upon which a final, non-appealable order has not been entered.

Nonetheless, some could read the Interim Rule as meaning that those types of motions specified in the Interim Rule, including a motion to dismiss under section 707, are pending only so long as the motion is before the bankruptcy court. Under such a reading, a discharge could be entered immediately upon denial of a motion to dismiss even though appellate review has not yet occurred.

Proposed Amendment

The following amendment is proposed to clarify that the time a motion is pending under the Rule includes the time the denial of the motion is on appeal, which ensures discharges will not be entered in cases until the motion is final and unappealable. The proposed change protects parties' rights to appeal denials, and ensures appellate courts will be able to exercise their jurisdiction over such appeals.

(c) Grant of Discharge.

(1) In a chapter 7 case, on expiration of the time fixed for filing a complaint objecting to discharge and the time fixed for filing a motion to dismiss the case under Rule 1017(e), the court shall forthwith grant the discharge unless:

. . .

(D) a motion to dismiss the case under § 707 is pending, or until appellate review is no longer available;

(E) a motion to extend the time for filing a complaint objecting to discharge is pending, or until appellate review is no longer available;

(F) a motion to extend the time for filing a motion to dismiss the case under Rule 1017(e) is pending, or until appellate review is no longer available;

. . .

(I) a motion to delay or postpone discharge under § 727(a)(12) is pending, or until appellate review is no longer available;

. . .

(K) a motion to delay discharge, alleging that the debtor has not filed with the court all tax documents required to be filed under § 521(f), is pending, or until appellate review is no longer available.

TAB 22

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

ANTHONY J. SCIRICA
CHAIRMAN, EXECUTIVE COMMITTEE

(215) 597-2399
(215) 597-7373 FAX
ascirica@ca3.uscourts.gov

August 26, 2008

MEMORANDUM TO ALL COMMITTEE CHAIRS

SUBJECT: USE OF SUBCOMMITTEES

As you know, it has been the policy of the Judicial Conference, as reflected in *The Judicial Conference and Its Committees*, that the work of its committees be done by each committee as a whole as much as possible. To assure that this policy is advanced to the greatest degree possible consistent with efficient operation of the committees, the Executive Committee has been looking at the extent to which subcommittees are being used. The attached draft best practices guide has been developed, using input from committee staff, to assist committees in the management of subcommittees. The Executive Committee requests that you review it with your committee and provide any comments to the Judicial Conference Executive Secretariat. In addition, the Executive Committee asks that no further subcommittees be created until it has completed its review of this subject.

To further assist in this effort, the Executive Committee would like each committee, no later than January 16, 2009, to report on each of its existing subcommittees, detailing the need for the subcommittee, its composition and mission, and its sunset date.

We look forward to your comments and hope that this process will assure that policy formulation is both as broad-based and as efficient as possible.

Anthony J. Scirica

Attachment

cc: Committee Staff

DRAFT

BEST PRACTICES GUIDE TO USING SUBCOMMITTEES OF JUDICIAL CONFERENCE COMMITTEES

INTRODUCTION

In recent years, it has become apparent that subcommittees can be an important tool in the accomplishment of the business of the Judicial Conference committees. Chairs have established subcommittees for a variety of reasons, such as to address complex or technical issues, to increase oversight of a particular program, to address emergencies, or to prepare to implement a specific statute. However each subcommittee created can cause additional bureaucratic complications, call on staff resources and expense. Approximately 81 subcommittees have been created, sometimes without careful consideration of the benefits and burdens.

The Judicial Conference policy quoted below seeks to accommodate these practical realities while assuring that subcommittees are used in a focused manner to support the collegial decision making of, and not as a surrogate for, the full committee.

This guide is designed to help in maximizing the effectiveness of subcommittees, while maintaining appropriate accountability and resource constraints. It is not comprehensive. We welcome any and all suggestions for improving it and for keeping it relevant as the work of committees evolves.

CURRENT CONFERENCE POLICY ON SUBCOMMITTEES

> It is the Conference's preference that work be performed by full committees, and *standing* subcommittees are discouraged. Chairs may appoint subcommittees composed of committee members to consider specific topics as necessary, but the number of subcommittees and meetings should be held to the minimum needed to accomplish the work of the committee. The approval of the Chief Justice, through the Conference Secretary, is required to appoint non-members [*i.e.*, persons who are not already members of any Judicial Conference committee] to subcommittees, ... The Conference Secretary maintains a list of all existing subcommittees, and chairs should notify the Secretary when one is established.

The Judicial Conference of the United States and Its Committees, p. 4 (Sep. 2007) (parenthetical and emphasis added).

ROLE OF COMMITTEE CHAIR

The chair of the full committee may establish a subcommittee and designate its members and chair. At the time the chair of a subcommittee is designated, the committee chair should discuss with the chair of the subcommittee such subjects as subcommittee procedures, the relationship of the subcommittee with the full committee, and how best to coordinate with the committee chair. The chair of the full committee should consider the impact on committee staffing resources when creating and assigning tasks to subcommittees.

MEMBERSHIP

It is preferable that the chair of a subcommittee have at least one year of service on the full committee before being designated. The chair might consider committee members' special interests, experience, or expertise when selecting subcommittee members. Membership should be balanced in terms of points of view, experience, etc. The size of the subcommittee should be as small as is consistent with the requirements imposed by workload, deadlines, and need for expertise. Experience has shown that it is beneficial for the chair of the full committee to participate in as many teleconferences and meetings of the subcommittee as possible.

DURATION OF SUBCOMMITTEE

All subcommittees (unless institutionally permanent, such as the Budget Committee's Economy Subcommittee and the Judicial Resources Committee's Judicial Statistics Subcommittee) should have a sunset date, subject to renewal, and be reviewed periodically to see if disbanding is appropriate; the chair of the full committee may dissolve a subcommittee whenever deemed appropriate. Some committees establish subcommittees to enable quick responses to emergencies and to maintain focus on recurring matters, such as long-range planning, and these may have a longer existence. Appointment of a new committee chair and the five-year committee jurisdictional review are also good times to review the need for each subcommittee.

MISSION AND AUTHORITY

The mission of each subcommittee should be clearly defined in the records of the committee. Subcommittees are creatures of the full committee and generally do not have independent authority, unless it is granted by the Conference or the Executive Committee. Use of AO staff and expenditures by subcommittees must be approved in advance by the chair. [Alternative: Communication with AO staff should be through the chair.]

MEETINGS

Telephonic meetings are encouraged, as is use of other technologies, such as collaborative electronic workplaces, and the like. It is occasionally appropriate for more than one subcommittee, either of the same or different full committees, to meet jointly on matters of common interest. In-person subcommittee meetings should normally be held in conjunction with meetings of the full committee. Out-of-cycle, in-person subcommittee meetings in venues other than Washington, D.C. must be approved by the chair of the Executive Committee of the Judicial Conference. *The Judicial Conference of the United States and Its Committees*, p. 4 (Sep. 2007).

SUBCOMMITTEE RECORDS AND CORRESPONDENCE

The chair of the full committee should sign any committee-related communication to recipients who are not members of the committee. In those rare instances when it is appropriate for the chair of a subcommittee to communicate with recipients who are not members of the committee, the communication must be expressly approved by the chair of the full committee.

Information considered by the subcommittee should be available to interested members of the full committee.

Subcommittees often complete the majority of their work between meetings of the full committee using telephonic meetings, e-mail, and other means to generate a report to the full committee. This enables the subcommittee report to be prepared in the same way as, and included in, other agenda materials for the full committee, giving the committee sufficient time to consider the issues. When the subcommittee chooses to hold an in-person meeting contiguous to the full committee meeting, this preparatory technique minimizes last-minute demands on the subcommittee and staff and enables the subcommittee to focus on final deliberations and fine tuning of its recommendations.

TAB 23

Bankruptcy Rules Tracking Docket (By Rule or Form Number) 9/4/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 1004.2 (new), 5009, 5012 (new), 9001 Chapter 15 rules	05-BK-B Judge Samuel Bufford 1/20/06 Committee proposal	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised amendments 9/06 - Committee approved Rules 1004.2, 5009, 9001 for publication 9/06 - Committee approved Rule 5012 for publication as revision of amendment published 08/06 3/07 - Publication deferred for further study 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 2/08 - Subcommittee discussed 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/10

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1005 Include all names used by debtor for 8 years in caption; redact an individual's taxpayer ID number	Committee proposal and Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA)	3/05 - Committee considered, referred to Subcommittee on Privacy, Public Access & Appeals 9/05 - Referred to Forms Subcomt. 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1006 Installment payments, waiver of filing fee	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1007(a),(b),(c) Required documents	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 4/07 - Committee approved Rule 1007(a)(4) as revised by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1007(a)(2) Creditors list in involuntary case	06-BK-057 Chief Deputy Clerk Margaret Grammar Gay	3/07 - Referred to Subcommittee on Business Matters 6/07 - Subcommittee discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 6/08 - Published for public comment	12/1/10

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 1007(a), (c),(f),(h), 1011(b), 1019(5), 1020(a), 2002(a),(b),(o), (q), 2003(a),(d), 2006(c), 2007(b), 2007.2(a), 2008, 2015(a),(d), 2015.1(a),(b), 2015.2, 2015.3(b),(e), 2016(b),(c), 3001(e), 3015(b),(g), 3017(a),(f), 3019(b), 3020(e), 4001(a),(b),(c), 4002(b), 4004(a), 6003, 6004(b), (d),(g),(h), 6006(d), 6007(a), 7004(e), 7012(a), 8001(f), 8002(a),(b),(c), 8003(a),(c), 8006, 8009(a), 8015, 8017(a), 9006(d), 9027(e),(g), 9033(b),(c), Change deadlines of less than 30 days to multiples of 7	Committee proposal (Standing Committee's Time Computation Committee)	9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Ad hoc group of bankruptcy judges approved 3/07 - Committee approved for publication as revised 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved 6/08 - Standing Committee approved	12/1/09

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1007(b)(7),(c) Extension of time to file statement on completion of financial management course	Judge Christopher Klein 8/8/06	9/06 - Referred to Subcommittee on Consumer Matters 12/06 - Subcommittee considered 3/07 - Committee included suggestion in Rule 1007(c) amendment 6/07 - Standing Committee approved revised amendment 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rules 1007(c), 4004, 5009 Additional notice that case may be closed without discharge	Committee proposal	3/07 - Committee discussed, referred to Subcommittee on Consumer Matters 6/07 - Subcommittee discussed 9/07 - Committee approved for publication, held in bull pen 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/10
Rule 1009(b) Amended Statement of Intention	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1010 Service of petition for recognition of foreign nonmain proceeding	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1010 Service of petition for recognition of all foreign proceedings	05-BK-B Judge Samuel Bufford 1/20/06	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised amendments 9/06 - Committee approved for publication 3/07 - Committee deferred for further study 6/07 - Subcommittee discussed 9/07 - Committee did not include in chapter 15 package	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1010(b) Rule 7007.1 applied in involuntary cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1011(a) Who may contest petition for recognition of a foreign proceeding.	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1011(f) Rule 7007.1 applied to responses to involuntary and chapter 15 cases	Committee proposal	9/04 - Committee considered, referred to Reporter 3/05 - Committee considered, tabled to 9/05 9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rules 1014, 1015	Richard Broude	2/08 - Subcommittee on Technology and Cross Border Insolvency considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/10

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1015(b) Cross reference to § 522(b)	Committee proposal (technical amendment) to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1017(e) Dismissal or conversion for abuse	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1017(e) Clarify meaning of "the date of the first meeting of creditors" and applicability of Rule 1017(e) deadline to U.S. trustees	Mark Redmiles for EOUST	10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1017(e) Application of § 704(b)	Judge Wesley Steen 07-BK-D	9/07 - Committee took no action 10/08 - Committee agenda	
Rules 1017(g) (new), 1019(6) Applications for payment of administrative expenses	Judge Eugene Wedoff Attorney Philip Martino	10/08 - Committee agenda	
Rule 1017.1 (new) Sufficiency of Debtor's certification of exigent circumstances	Committee proposal	2/07 - Subcommittee on Consumer Issues approved 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Consumer Subcommittee considered 3/08 - Committee withdrew proposed rule and included certification in revised Exhibit D	12/1/08
Rule 1018 Is injunctive relief under §§ 1519(e), 1521(e) governed by Rule 7065?	05-BR-037 Insolvency Law Committee of the Business Law Section of State Bar of California	3/07 - Referred to Subcommittee on Technology and Cross Border Insolvency 6/07 - Subcommittee considered 9/07 - Committee considered 2/08 - Subcommittee considered 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/10

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1019(2) New filing periods in converted case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved with revised Committee Note 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 1019(2) New filing period for objection to exemptions in converted case	Judge Dennis Montali 06-BK-054, Judge Paul Mannes 07-BK-C	6/07 - Subcommittee on Consumer Matters discussed 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/10
Rule 1020 Small business chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1021 (new) Health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2002(a),(b),(c),(f),(g),(p),(q) Additional notice requirements	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 4/07 - Committee approved Rule 2002(p),(q) as revised by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2002(g)(5) Notice under § 342(g)(1)	National Bankruptcy Conference to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2002(k) Notice to U.S. trustee of petition for recognition	Committee proposal to implement BAPCPA	3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2002 Determination of mailing address of a foreign creditor	05-BK-B Judge Samuel Bufford 1/20/06	3/06 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/06 - Subcommittee discussed 6/06 - Subcommittee approved revised amendments 9/06 - Committee approved for publication 3/07 - Committee included in Rule 2002(p) amendment 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2003(a) Meeting of creditors not convened	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2007.1 Election of trustee in chapter 11 case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2007.2 (new) Appointment of patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2015 Notice by foreign representative	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2015(a)(6) Periodic financial reports by small business debtor	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2015.1 (new) Patient care ombudsman	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2015.2 (new) Patient transfer in health care business case	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 2015.3 (new) Periodic reports on related entities	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 2016(c) Conform to amendment to § 110(h)	Committee proposal (technical amendment)	9/07 - Committee approved 10/07 - Considered by Style Subcommittee 2/08 - Considered by Consumer Subcommittee 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved	12/1/09
Rule 2019 Repeal the rule as unnecessary	Loan Syndication and Trading Association, Securities Industry and Financial Markets Association 07-BK-G	3/08 - Committee discussed, Chair directed the Assistant Reporter to prepare a review of the case law on Rule 2019 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 3001(c), 3002.1 (new) Disclosure of postpetition mortgage fees	Committee proposal	5/08 - Subcommittee on Consumer Matters discussed 5/08 - Subcommittee on Consumer Matters discussed 10/08 - Committee agenda	
Rule 3002(c)(5) Timing issues for notice of newly discovered assets	04-BK-E Judge Dana L. Rasure for Bankruptcy Judges Advisory Group 11/15/04	3/05 - Committee considered, referred to Privacy Subcommittee 9/05 - Deferred pending further study of time periods 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 3002(c), 3003(c) Time for governmental unit and creditor with foreign address to file proof of claim	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 3003 Require chapter 11 debtors to notice creditors scheduled as disputed, contingent, or unliquidated	Judge Paul Mannes 08-BK-C	10/08 - Committee agenda	
Rule 3016(b) Combined plan and disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 3016(d) Forms for plan and disclosure statement	Business Subcommittee to implement BAPCPA	8/05 - Approved in principle by Committee as national rule 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 3017.1 Conditional approval of form disclosure statement	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 3019 Modification of confirmed plan	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4002 Debtor's obligation to provide tax returns, personal identification, and other documents	03-BK-D Lawrence A. Friedman 8/1/03 Interim Rule to implement BAPCPA	8/03 - Sent to chair and reporter 9/03 - Committee considered, referred to Consumer Subcomt. 1/04 - Consumer Subcommittee considered at focus group meeting 3/04 - Committee approved for publication 6/04 - Standing Committee approved for publication 8/04 - Published for public comment 3/05 - Committee approved (as modified) 4/05 - Committee deferred action 8/05 - Included in Interim Rules 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved with revised Committee Note 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4003(b) Changes deadlines for objections to exemptions.	04-BK-B Judge Eugene R. Wedoff 2/17/04	3/04 - Sent to chair and reporter 9/04 - Committee considered, referred to Consumer Subcomt. 11/04 - Approved by Subcommittee 3/05 - Committee approved in part, referred to Consumer Subcomt. for further study 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 4003(b) Objection to exemption based on § 522(q)	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4003(d) Lien holder's objection to avoidance notwithstanding the 30-day limit	04-BK-B Judge Eugene R. Wedoff 2/17/04	9/04 - Committee considered along with Rule 4003(b) amendment, referred to Consumer Subcommittee 3/05 - Committee considered, referred to Consumer Subcomt. 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rules 4004, **7001** Application of sections 1328(f), 727(a)(8),(9); objection to discharge by motion	Judge Neil Olack Committee proposal	9/06 - Referred to Subcommittee on Consumer Matters 12/06 - Subcommittee considered 2/07 - Subcommittee considered 3/07 - Committee considered, referred to Subcommittee 6/07 - Subcommittee considered 9/07 - Committee approved for publication 1/08 - Standing Committee approved for publication	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4004(c) Requirements for discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee discussed 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 4004(c) Delay discharge until appellate review is no longer available	Mark Redmiles for EOUST	10/08 - Committee agenda	
Rules 4004(d), 7001(4) Classification of proceedings to object to or revoke discharge as adversary proceedings; motions to revoke in gap period	Judge Frank Easterbrook 08-BK-E Zedan v. Habas, 529 F.3d 398 (7th Cir. 2008)	10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4006 Notice that case closed without discharge	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 4007 Time to file dischargeability action	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4008(a) Filing deadline for reaffirmation agreement	01-BK-E Bankruptcy Judges Advisory Group 11/30/01	1/02 - Referred to chair and reporter 3/02 - Committee considered, referred to subcommittee. 10/02 - Committee approved for publication 1/03 - Standing Committee approved for publication 8/03 - Published for public comment 3/04 - Committee approved 6/04 - Standing Committee approved 9/04 - Judicial Conference approved 4/05 -Withdrawn from Supreme Court at request of Committee and Executive Committee due to conflicting BAPCPA provisions 3/06 - Committee approved revised draft for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee discussed 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 4008(a) Requires use of Official Form coversheet	Committee proposal	4/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Consumer Subcommittee 3/08 - Committee approved 6/08 - Standing Committee approved	12/1/09
Rule 4008(b) Debtor's § 524(k) statement in support of reaffirmation	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 5001(b) Holding court outside the district in an emergency	Committee Proposal	9/03 - Committee approved in principle; further action deferred 9/05 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 5003 Mailing addresses of certain tax authorities	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 5008 (new) Notice regarding presumption of abuse	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 5009(b) (new) Closing case without entry of discharge	Committee proposal	6/07 - Committee approved for publication, held for new Rule 5009(c) for chapter 15 cases 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 5012 (new) Communications with foreign courts	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee deferred for further study 6/07 - Subcommittee discussed 9/07 - Included in package of chapter 15 amendments approved for publication 3/08 - Committee approved for publication 6/08 - Standing Committee approved for publication 8/08 - Published for public comment	12/1/08
Rule 6003 Issuance of orders during 20-day cooling off period	Bankruptcy Judges Advisory Group 08-BK-D	3/08 - Committee discussed 8/08 - Subcommittee on Attorney Conduct and Health Care discussed 10/08 - Committee agenda	
Rule 6003 Start 20-day period with order for relief	Judge Robert Kressel 08-BK-B	3/08 - Committee discussed 8/08 - Subcommittee on Attorney Conduct and Health Care discussed 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 6004(g) Sale of personally identifiable information	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved with revised Committee Note 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 6011 (new) Disposal of patient records	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 7012, 7022, 7023.1, and 9024 Conforming amendments	Committee proposal in response to restyling of Civil Rules	2/05 - Restyled Civil Rules published for comment 9/05 - Committee discussed impact on Bankruptcy Rules 12/05 - Committee submitted comment on restyled Civil Rules 9/06 - Restyled Civil Rules approved by Judicial Conference 9/06 - Committee discussed need to amend Bankruptcy Rules 2/07 - Reporter drafted conforming amendments 3/07 - Committee approved as technical amendments 6/07 - Standing Committee approved as technical amendments 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rules 7052, (new) 7058, 9021 Separate document requirement for judgments in an adversary proceeding or contested matter	04-BK- Judge David Adams Committee proposal	9/04 - Committee considered, referred to Privacy, Public Access and Appeals Subcommittee 12/04 – Subcommittee discussed alternative approaches 3/05 - Committee approved in principle for contested matters, referred to Subcommittee 9/05 - Referred to Subcommittee 3/06 - Referred to Subcommittee 7/06 - Subcommittee approved alternative amendments 9/06 - Committee approved revised amendment for publication 1/07 - Standing Committee approved in principle 3/07 - Committee approved for publication as submitted 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	12/1/09
Rules 7052, 9015, 9023 "Decouple" time provisions in the rules from new 30-day periods in Civil Rules 50, 52, 59	Committee proposal	9/07 - Referred to Privacy, Public Access and Appeals Subcommittee 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 8001 Direct appeals	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 9/05 - Amended by Committee 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved with revised Committee Note 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rules 8001 - 8020 Revise Part VIII of the rules to more closely follow the Appellate Rules	Eric Brunstad	3/08 - Referred to Privacy, Public Access and Appeals Subcommittee 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee agenda	
Rules 8002, 9023 Conform to 30-day amendment to Civil Rule 59	Committee proposal	3/07 - Referred to Subcommittee on Privacy, Public Access, and Appeals 6/07 - Subcommittee discussed 9/07 - Committee considered with time amendments to Rule 8002, etc., and decoupling of Rules 7052, 9015, and 9023 11/07 - Special request for comments published 2/08 - Subcommittee considered 3/08 - Committee declined to extend time to 30 days	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 8003(d) Authorization of direct appeal as leave to appeal	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 8006 Premature filing of appellant's designation of items in the record on appeal	John Shaffer	12/07 - Subcommittee on Privacy, Public Access, and Appeals discussed 2/08 - Considered by subcommittee 3/08 - Committee took no action with the understanding that the issue could be addressed as part of a comprehensive review of the 800 rules	
Rules 8007.1 (new), 9023, 9024 Indicative rulings	Committee proposal	8/08 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9006(a) Enlargement and reduction of time	Interim Rule to implement BAPCPA	8/05 - Approved by Committee as Suggested Interim Rule 3/06 - Committee approved for publication with changes as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 4/07 - Committee approved as revised by email 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08
Rule 9006(a) Template rule for time computation	Standing Committee's Time Computation Committee	9/06 - Committee discussed time computation project, small groups to review deadlines in bankruptcy rules 12/06 - Considered by ad hoc group of Committee members 1/07 - Discussed by Standing Committee 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 3/08 - Committee approved revised amendment 6/08 - Standing Committee approved revised amendment	12/1/09

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9006(a)(1) Exclude weekends, holidays from computing 5 days to send creditors a copy of UST's statement on presumption of abuse	Bankruptcy Clerk, Southern District of New York	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee recommended statutory change of 5-day period in connection with time computation amendments	
Rule 9006(a)(3)(A) Correct reference to Rule 6(a)(1)	Committee proposal	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee included in time amendment 6/08 - Standing Committee approved	
Rule 9006(f) Correct cross-reference to Civil Rule 5(b)(2)	Bankruptcy Clerk, Middle District of North Carolina	2/08 - Considered by Subcommittee on Privacy, Public Access, and Appeals 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	
Rule 9009 Use of form plan and disclosure statement not mandatory	Business Subcommittee to implement BAPCPA	3/06 - Committee approved for publication as national rule 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved 4/08 - Supreme Court approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 9014(b) Permit service on debtor's attorney of a motion initiating a contested matter through CM/ECF as provided in Civil Rule 5(b)	Judge Vincent Zurzolo	10/08 - Committee agenda	
New Rule Require electronic filers to use data-enabled forms	Donald Walton for EOUST	3/06 - Sent to chair and reporter 6/06 - Discussed by chair, reporter, Forms Subcommittee chair, and Mr. Walton 9/06 - Committee endorsed the concept and recommended treating as a technical standard under Rule 5005(a)(2) 10/07 - Considered by Automation Subcommittee of Bankruptcy Administration Committee 12/07 - Considered by Judicial Conference IT Committee 1/07 - Considered by Bankruptcy Administration Committee 6/07 - Considered by Bankruptcy Administration Committee 1/08 - Considered by Bankruptcy Administration Committee 3/08 - Judicial Conference received Bankruptcy Administration Committee report	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
New Rule Automatic dismissal under § 521(i)	06-BK-011 Judge Marvin Isgur 06-BK-020 National Association of Consumer Bankruptcy Attorneys	6/07 - Subcommittee on Consumer Matters discussed 9/07 - Committee discussed 2/08 - Considered by Consumer Subcommittee 3/08 - Committee discussed 10/08 - Committee agenda	
Which statutory bankruptcy deadlines should be amended as a result of change in computing time under Rule 9006(a)	Request by Time Computation Subcommittee	02/08 - Discussed by bankruptcy judges on the committee 3/08 - Committee recommended that 5-day deadlines in 11 U.S.C. §§ 109(h)(3)(A)(ii); 322(a); 332(a); 342(e)(2); 521(e)(3)(B); 521(i)(2); 704(b)(1)(B); 764(b), and 749(b) be changed to 7 days	
Exhibit D to Official Form 1 Debtor's certification of credit counseling	Committee proposal	2/07 - Subcommittee on Consumer Issues approved 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for public comment 2/08 - Considered by Consumer Subcommittee 3/08 - Committee approved as revised 6/08 - Standing Committee approved	12/1/08
Official Form 1 Create a new form for the petition in chapter 15 cases	Judge Laurel M. Isicoff 07-BK-F	3/08 - Referred to Subcommittee on Technology and Cross Border Insolvency 5/08 - Subcommittee considered 8/08 - Subcommittee considered 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 3B Require debtors to file more detailed information or delay the court's ruling on the application	Judge Colleen Brown	10/08 - Committee agenda	
Official Form 8 Clarify that debtor must complete entire form	Judge Elizabeth L. Perris 8/3/06	9/06 - Referred to Subcommittee on Consumer Affairs 12/06 - Subcommittee considered revision 1/07 - Forms Subcommittee made further revisions 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for comment 2/08 - Forms Subcommittee considered revised form 3/08 - Committee approved revised form 6/08 - Standing Committee approved	12/1/08
Official Form 9F Delete debtor's telephone number	Chief deputy clerk, District of New Mexico	02/08 - Forms Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 10 Restrict disclosure of highly personal medical data in proofs of claim	06-BK-016 Judge Colleen Brown.	3/07 - Referred to Subcommittee on Privacy, Public Access, and Appeals 6/07 - Subcommittee discussed 9/07 - Committee considered, referred to Forms Subcommittee 2/08 - Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	12/1/08
Official Form 10 Refine definition of "creditor" and "claim" on back of form	Committee proposal	6/07 - Subcommittee on Forms discussed 9/07 - Committee tentatively approved "creditor" definition 2/08 - Forms Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	12/1/08
Official Form 10 Add a space for the general unsecured portion of a claim	Eastern District of Pennsylvania Southern District of New York	10/08 - Committee agenda	
Official Form 22A Use "family" size instead of "household" size for National Standard deduction on line 19A	Judge Eugene Wedoff 3/6/08	3/08 - Referred to Subcommittee on Forms 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 22C Deduction of business expenses by chapter 13 business debtors	Drummond v. Wiegand, 386 B.R. 238 (9th Cir. BAP Apr. 3, 2008)	5/08 - Subcommittee on Consumer Matters discussed 10/08 - Committee agenda	
Official Form 23 Revise filing deadlines set out on Official Form	Bankruptcy court, Southern District of New York	2/08 - Forms Subcommittee considered 3/08 - Committee approved as technical amendment 6/08 - Standing Committee approved	12/1/08
Official Forms 25A, 25B (new) Form plan and disclosure statement	Business Subcommittee to implement BAPCPA	9/05 - Model plan approved in principle 9/05 - Model plan and disclosure statement referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 1/07 - Forms Subcommittee approved technical amendments 3/07 - Committee approved Form 25A as revised 3/07 - Committee approved Form 25B 6/07 - Standing Committee approved Forms 25A, 25B 9/07 - Judicial Conference approved for 12.1.08	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 25C (new) Periodic financial report by small business debtor	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved as revised 6/07 - Standing Committee approved 9/07 - Judicial Conference approved for 12.1.08	12/1/08
Official Form 26 (new) Periodic report on related entities	Business Subcommittee to implement BAPCPA	9/05 - Referred to Business Subcommittee 3/06 - Committee approved for publication 6/06 - Standing Committee approved for publication 8/06 - Published for public comment 3/07 - Committee approved 6/07 - Standing Committee approved 9/07 - Judicial Conference approved for 12.1.08	12/1/08

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Form 27 (new) Cover sheet for reaffirmation or Form 240 as Official Form	Committee proposal	3/06 - Designation as Official Form referred to Forms Subcommittee 8/06 - Subcommittee discussed 9/06 - Committee tabled for 1 year 1/07 - Forms Subcommittee proposed cover sheet 3/07 - Committee approved for publication 6/07 - Standing Committee approved for publication 8/07 - Published for comment 2/08 - Forms Subcommittee considered revised form 3/08 - Committee approved revised form 6/08 - Standing Committee approved	12/1/09
Official Form 27 (new) Include § 524(k), Rule 4008(b) statement in Official Form	Bankruptcy Judges Advisory Group Committee proposal	6/07 - Subcommittee on Forms discussed, included in version of new Form 27 for publication 8/07 - Chair approved inclusion in Form 27 published for comment 9/07 - Committee ratified chair's decision to include	12/1/09
Official Forms, Director's Forms Review forms for consistency in certifications	Request by the Chair	3/08 - Request during discussion of new Form 283	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Official Forms Alternatives to paper-based format for forms; renumber Official Forms	Judge James D. Walker, Jr. 5/24/06 Judge Marvin Isgur 06-BK-011 Patricia Ketchum 6/9/07	9/06 - Committee will coordinate a study with the Administrative Office 8/07 - Discussion of how to organize the study 9/07 - Committee discussed and authorized chair to create group 1/08 - Organizational meeting for Forms Modernization Project	
Director's Form 201 Advise debtors that notices to joint debtors at the same address will be mailed in a single envelope	Staff recommendation	10/08 – Committee agenda	
Director's Form 240 Reaffirmation agreement	Forms Subcommittee to implement BAPCPA 06-BK-B Kelly Sweeney, CDC, CO bankruptcy court 5/5/06 Judge Paul Mannes 08-BK-A Judges Randall Newsome and Robert Kressel	9/05 - Referred to Forms Subcommittee 10/05 - Amended form issued by Director of Administrative Office 8/06 - Issued by Director of Administrative Office 8/06 - Subcommittee approved further revision 9/06 - Committee approved revised form 12/06 - Issued by Director of Administrative Office 1/07 - Forms Subcommittee approved amendments 2/07 - Amendments deferred 10/08 - Committee agenda	

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Director's Form 283 (new) Certification of DSO, § 522(q) requirements for chapter 13 discharge	Judge Joyce Bihary	10/07 - Subcommittee on Forms discussed 2/08- Subcommittee considered revised draft form 3/08 - Committee approved revised form 12/08 - Will be posted with other 12.1.08 forms amendments	
Post rules suggestions on the Internet	Request by the Chair	03/08 - Committee discussed 03/08 - Suggestions posted	

TAB 24

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SCOTT MYERS

RE: POSTING SUGGESTED RULES AMENDMENTS ON THE INTERNET

DATE: AUGUST 27, 2008

At the Committee's spring 2008, meeting at St. Michaels, Maryland, James Ishida reported that the Rules Committee Support Office has begun to post suggestions concerning the bankruptcy rules and forms on its public internet site at:

http://www.uscourts.gov/rules/Bankruptcy_Rules_Suggestions_Chart.htm

Suggestions are organized by year, and historic suggestions have been posted beginning with those received in 2003. The purpose of posting suggestions is to aid internal tracking, facilitate public research, and inform those considering a suggestion about whether the issue has been addressed before.

Given that it has been up for less than a year, the suggestions pages has been well-received so far. For the six-month period from March 1, 2008 - August 27, 2008, there were 466 "visits" to the bankruptcy suggestions page, or about 76 visits per month. The average time each visitor spent on the page was 40 seconds.

At our current meeting, the Committee will consider five suggestions made in 2008. Members are encouraged to tell their colleagues about this resource, especially in the context of suggestions they receive directly and sometimes forward informally, as it will help the Rules Committee Support Office keep track of such suggestions, and ensure they are addressed by the Committee in a timely manner.

Like comments on rules published for comment, suggestions can be made by writing to the following address:

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Suggestions can also easily be made by email by selecting the “Contact Rules Support” link on the main public rulemaking webpage at:

http://www.uscourts.gov/rules/index.html

TAB 25

Item 25 will be an oral report.

TAB 26

MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: ELIZABETH GIBSON, REPORTER

RE: MEANS TEST EXEMPTION FOR CERTAIN RESERVISTS AND NATIONAL GUARD MEMBERS

DATE: AUGUST 21, 2008

Currently pending in Congress is legislation entitled the "National Guard and Reservists Debt Relief Act of 2008" that would create a temporary exemption from the chapter 7 means test for certain members of the National Guard and Armed Forces Reserves. The House version of the bill, H.R. 4044, was approved by the House on June 23, 2008, and an identical Senate bill, S. 3197, has been referred to the Committee on the Judiciary. Because enactment of the legislation would require that Form 22A be amended to allow a debtor to claim this exemption, this memorandum explains the scope of the exemption that would be created and discusses the options for amending the form to incorporate its provisions, should that become necessary.

H.R. 4044 and S. 3197

The proposed legislation states that its purpose is "to amend title 11 . . . to exempt for a limited period, from the application of the means-test presumption of abuse under chapter 7, qualifying members of reserve components of the Armed Forces and members of the National Guard who, after September 11, 2001, are called to active duty or to perform a homeland defense activity for not less than 90 days." It would amend § 707(b)(2)(D) to provide as follows:

> Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing, if
>
> (i) the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period in which he or she was—

(I) ~~(i)~~ on active duty (as defined in section 101(d)(1) of title 10); or

(II) ~~(ii)~~ performing a homeland defense activity (as defined in section 901(1) of title 32); or

(ii) while—

(I) the debtor is—

(aa) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or

(bb) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days; and

(II) if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.

Unlike the existing exemption for disabled veterans, the proposed new exemption would not necessarily provide permanent relief from the means test for the covered reservists and members of the National Guard. Instead, by its terms it would prevent a court from dismissing a chapter 7 case based on the means test during the period of time that a qualifying reservist or National Guard member is on active duty or performing homeland defense activities and for 540 days after being released from active duty or after ceasing to perform homeland defense activities. We have been informed by committee staff that this limitation on the exemption was an intentional policy decision by the sponsors of the legislation. They chose not to make the exemption applicable to chapter 7 cases *filed* within the designated time periods. Instead they chose to prevent means test *dismissals* during those time periods. That choice was made in order to prevent the exemption from applying to a qualifying debtor who filed just before the expiration of the designated period. Thus, as the stated purpose of the bill indicates, it provides

an exemption "for a limited period."[1]

In addition to amending § 707(b)(2)(D), the proposed legislation would also require the GAO within two years of the effective date of the Act to complete a study on the use and effects of the amendment. The Act would go into effect 60 days after its enactment, and it would apply to bankruptcy cases commenced within the three-year period after its effective date.

Options for Amending Form 22A

Should this legislation become law, Form 22A will need to be amended to allow a chapter 7 filer to claim the new exemption from the means test. The form currently contains two check boxes in Part I allowing qualifying disabled veterans and debtors whose debts are not primarily consumer debts to claim exclusion from the means test. Those debtors then check the box at the top of the form that says that the presumption of abuse does not arise and sign the verification at the end of the form. Because of their exclusion from the means test, they do not need to complete any of the other parts of Form 22A.

The challenge presented by the pending legislation is to devise a form that properly implements a temporary exemption. Some reservists and National Guard members will both file and conclude their chapter 7 cases during the period that they are exempt from the means test. Others will file during the exemption period but will lose that exemption while their cases are still pending. The point during the case at which the exemption expires will vary depending on the debtor's date of release from active duty or cessation of homeland defense activities.

Because one of the usual benefits of being exempt from the means test is being relieved

[1] There is a slight drafting error in the current version of the bills. If corrected, "(i)" would be inserted before rather than after "if," thus making the word "if" inapplicable to part (ii).

of the burden of completing Form 22A, a revision of the form to implement the exemption proposed by this legislation should attempt to the extent possible to define a group of qualifying reservists and National Guard members who do not need to complete the form's requests for information about income and expenses. Unfortunately, that approach may not be feasible. I discuss below several possible ways to amend Form 22A to provide for the proposed exemption.

(1) Instruct all reservists and members of the National Guard who at the time of filing their petitions meet all of the requirements of the new exemption not to complete the form (other than the initial declaration regarding their exclusion, the statement that the presumption of abuse does not arise, and the final verification). Because, however, the exemption will expire for some members of this group while their cases are pending, this option would require at least some of those debtors to complete Form 22A at the point that their exemptions run out. The form, of course, is one designed to be filed at the beginning of the case, and the procedures for reviewing whether a presumption of abuse arises all occur in the case's early stages. This option of a later filing, therefore, presents some awkwardness, including the need to file an initial form claiming the exemption and then an amended or new form providing the necessary information. Adding to the complexity is the fact that there is a range of times (from shortly after filing to just before completion of the case) at which this requirement might kick in. If, however, a debtor's exemption from the means test does not expire until after the deadline for seeking dismissal based on the presumption of abuse, it should not matter that the debtor did not complete the means test form. That notion suggests consideration of the following option.

(2) Define a group of reservists and National Guard members who would be immune from a motion to dismiss based on the means test. If a debtor is covered by the exemption at the

time the case is filed and will remain exempt through the point at which anyone (including the court) might move to dismiss based on the means test, then the debtor could be relieved from the duty of having to complete Form 22A. Under Rule 1017(e) (effective December 2008), a motion to dismiss a case for abuse generally must be filed no later than 60 days after the first date set for the § 341 meeting, and notice of a hearing on the court's own motion to dismiss must be served on the debtor by the same deadline. Since under Rule 2003(a) the meeting of creditors must be set for a date within 20 to 40 days after the order for relief, in most cases the debtor would be safe from the filing of a motion to dismiss based on the means test after the 100th day of the case. That means that if at the time of filing a chapter 7 petition a reservist or member of the National Guard is still on active duty or performing homeland defense activities or was released from such service fewer than 440 days earlier, the debtor's exemption will extend throughout the period in which dismissal might be sought.

There are, however, two problems with amending Form 22A based on this analysis. First, because Rule 1017(e)(1) permits the extension of the deadline for moving for dismissal, it is possible that in some cases the debtor will be subject to a motion to dismiss based on the means test beyond the 100th day of the case. The exemption of some debtors in the group described above may therefore expire before they are safe from the possibility of a means test dismissal. Thus they could not be instructed in advance that they do not need to complete the rest of the form.

Even if one assumes that these extensions will be rare and thus the form need not reflect that possibility, a practical problem nevertheless arises. I attempted to draft an amended form that provides for an exemption for the defined group, which is attached, and you can see that it is

complex and lengthy. Further editing and formatting can surely improve upon my draft, but, given the nature of this temporary exemption, any attempt to describe debtors who are fully protected from the means test is likely to be prolix. That realization then suggests a third possibility.

(3) Require all reservists and National Guard members to complete Form 22A at the beginning of the case to the extent that it is applicable. This is the least complicated solution from the courts' (and form drafters') point of view, although not so for the debtors. Judge Wedoff has drafted a form taking this approach, and it is attached. It permits debtors to declare that they are eligible to take advantage of the new temporary exemption from the means test and, if they are no longer on active duty or performing homeland defense activities, to state their release date. They are instructed to check a new box at the top of the form that says "The presumption is temporarily inapplicable," and to complete Parts II, III, and VIII of the form in all cases and, if they are above the applicable median family income, Parts IV - VII as well. These debtors would still be protected from dismissal pursuant to the means test, regardless of the information revealed on the form, so long as their exemption remains in effect. If a debtor's exemption expired at a point that someone could still move to dismiss under § 707(b), then the means test information would be available to support the motion. If the exemption remained in effect until the deadline passed, the information provided on Form 22A would not be considered. This approach has the obvious disadvantage of requiring debtors to complete a form that may never be relevant in their cases, but at least the burden will be relatively limited for debtors who

fall at or below the median family income.[2]

Conclusion

The proposed effort to assist reservists and National Guard members who end up filing for bankruptcy by giving them some relief from the means test is no doubt well intentioned, but the concept of a temporary exemption does not fit well within the chapter 7 framework. Nevertheless, should the proposed legislation be enacted, the Advisory Committee will need to act quickly to recommend adjustments to Form 22A that will allow reservists and National Guard members who qualify for the exemption to declare their entitlement to it and that will instruct them on which parts of the form they must complete. Though not perfect, the third option described above may be the only way to implement effectively an exemption that will expire for some debtors during the time period in which a dismissal may be sought under the means test.

[2] This solution, as well as any other that requires a debtor qualifying under the proposed exemption to file Form 22A at some point, is inconsistent with Rule 1007(b)(4) (effective December 2008). That provision excuses debtors from filing the income and expense information in Form 22A if "§ 707(b)(2)(D) applies." The proposed exemption would be placed in that Code section. It does not seem, however, that efforts should be begun to amend the rule to take account of an exemption that, as proposed, will cease to apply three years after its effective date.

Part I. EXCLUSION FOR DISABLED VETERANS, NATIONAL GUARD AND RESERVE MEMBERS, AND NON-CONSUMER DEBTORS

1A	If you are a disabled veteran described in the Veteran's Declaration in this Part IA, (1) check the box at the beginning of the Veteran's Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete the remaining parts of this statement. ❑ **Veteran's Declaration.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. § 901(1)).

1B	If you are currently a member of a reserve component of the Armed Forces or a member of the National Guard as described in this Part IB, (1) check the box at the beginning of the Active Duty Declaration, (2) check the box for the "The presumption does not arise at this time" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete the remaining parts of this statement. ❑ **Active Duty Declaration.** By checking this box, I declare under penalty of perjury that I am a member of a reserve component of the Armed Forces or a member of the National Guard, that I am on a period of active duty (as defined in 10 U.S.C. § 101(d)(1)) of not less than 90 days or that I am performing a homeland defense activity (as defined in 10 U.S.C. § 101(d)(1)) for a period of not less than 90 days, and that after September 11, 2001, I was called to active duty or to perform such homeland defense activity.

1C	If you were previously a member of a reserve component of the Armed Forces or a member of the National Guard as described in this Part IC, (1) check the box at the beginning of the Released from Active Duty Declaration, and (2) check the box for the "The presumption does not arise at this time" at the top of this statement. If your release date was 440 days or less from the date of the filing of your bankruptcy petition, (3) complete the verification in Part VIII. Do not complete the remaining parts of this statement at this time. If your release date was more than 440 days from the date of the filing of your bankruptcy petition, (3) complete the remaining parts of this statement that are applicable. ❑ **Released from Active Duty Declaration.** By checking this box, I declare under penalty of perjury that, as a member of a reserve component of the Armed Forces or a member of the National Guard, I served for a period of active duty (as defined in 10 U.S.C. § 101(d)(1)) of not less than 90 days or I performed a homeland defense activity (as defined in 10 U.S.C. § 101(d)(1)) for a period of not less than 90 days, and that after September 11, 2001, I was called to active duty or performed such homeland defense activity. I further declare under penalty of perjury that the date of my release from active duty or of ceasing to perform such homeland defense activity was _____, which is no more than 540 days from the date of the filing of my bankruptcy petition.

In re _____
Debtor(s)

Case Number: _____
(If known)

According to the calculations required by this statement:

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

(Check the box as directed in Parts I, III, and VI of this statement)

CHAPTER 7 STATEMENT OF CURRENT MONTHLY INCOME AND MEANS-TEST CALCULATION

In addition to Schedules I and J, this statement must be completed by every individual chapter 7 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. MILITARY AND NON-CONSUMER DEBTORS

Disabled Veterans. If you are a disabled veteran described in the Declaration in this Part IA, (1) check the box at the beginning of the Declaration, (2) check the box for "The presumption does not arise" at the top of this statement, and (3) complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

1A .☐ **Declaration of Disabled Veteran.** By checking this box, I declare under penalty of perjury that I am a disabled veteran (as defined in 38 U.S.C. § 3741(1)) whose indebtedness occurred primarily during a period in which I was on active duty (as defined in 10 U.S.C. § 101(d)(1)) or while I was performing a homeland defense activity (as defined in 32 U.S.C. §901(1)).

Non-consumer Debtors. If your debts are not primarily consumer debts, check the box below and complete the verification in Part VIII. Do not complete any of the remaining parts of this statement.

1B ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.

Reservists and National Guard Members; active duty or homeland defense activity. Members of a reserve component of the Armed Forces and members of the National Guard, who were called to active duty (as defined in 10 U.S.C. § 101(d)(1)) after September 11, 2001, for a period of at least 60 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 60 days, are not subject to any form of means testing during the time of active duty or homeland defense activity and for 540 days thereafter. If you are within these categories, (1) check the appropriate boxes and complete any required information in the Declaration of Reservists and National Guard Members below, (2) check the box for "The presumption is temporarily inapplicable" at the top of this statement, and (3) complete the remaining parts of this statement as instructed.

☐ **Declaration of Reservists and National Guard Members.** By checking this box and making the appropriate entries below, I declare that I am eligible for a temporary exclusion from means testing.

1C
a. I am ☐ a member of the reserve component of the Armed Forces /or/
☐ a member of the National Guard;

and

b. ☐ I was called to active duty after September 11, 2001, for a period of at least 60 days and
☐ I remain on active duty /or/
☐ I was released from active duty on _____, which is less than 540 days before this bankruptcy case was filed.

or

c. ☐ I am performing homeland defense activity for a period of at least 60 days /or/
☐ I performed homeland defense activity for a period of at least 60 days, terminating on _____, which is less than 540 days before this bankruptcy case was filed.

TAB 27

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 9, 2008

MEMORANDUM

To: Chief Judges, United States District Courts
Judges, United States Bankruptcy Courts
District Court Executives
Clerks, United States District Courts
Clerks, United States Bankruptcy Courts

From: James C. Duff

RE: NEED TO RESCIND LOCAL ADOPTION OF INTERIM BANKRUPTCY RULES
(IMPORTANT INFORMATION)

The following new rules and amendments to the Federal Rules of Bankruptcy Procedure will take effect on December 1, 2008, unless Congress acts to the contrary :

> Bankruptcy Rules 1005, 1006, 1007, 1009, 1010, 1011, 1015, 1017, 1019, 1020, 2002, 2003, 2007.1, 2015, 3002, 3003, 3016, 3017.1, 3019, 4002, 4003, 4004, 4006, 4007, 4008, 5001, 5003, 6004, 7012, 7022, 7023.1, 8001, 8003, 9006, 9009, and 9024, and new Bankruptcy Rules 1021, 2007.2, 2015.1, 2015.2, 2015.3, 5008, and 6011.

The above rule amendments and new rules implement the substantive and procedural changes to the Bankruptcy Code made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Pub. L. No. 109-08, 119 Stat. 23). As you know, the Advisory Committee on Bankruptcy Rules prepared Interim Rules for use by the courts while it studied the Act and prepared permanent national rules though the customary three-year rulemaking process. Except for Interim Rule 5012 (Communication of and Cooperation with Foreign Courts and Foreign Representatives), which is under study, the amendments and new rules supersede the Interim Rules adopted generally by the courts as local rules in October 2005 when most provisions of the Act took effect.

Because the new and amended rules will supersede the Interim Rules on December 1, 2008, the courts should ensure that their local rules or orders adopting the Interim Rules are repealed or sunset when the new rules go into effect. Courts may wish to retain Interim Rule 5012 until it is replaced by a permanent national rule.

Copies of the proposed new rules and amendments are posted at http://www.uscourts.gov/rules/supct0408.html.

TAB 28

Item 28 will be an oral report.

TAB 29

Item 29 will be an oral report.

TAB 30

Item 30 will be an oral report.

TAB 31

Item 31 will be an oral report.

TAB 32

Item 32 will be an oral report.