ADVISORY COMMITTEE
ON
BANKRUPTCY RULES

Phoenix, AZ
March 29-30, 2012

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ADVISORY COMMITTEE ON BANKRUPTCY RULES
Meeting of March 29 - 30, 2012
Phoenix, Arizona

Introductory Items

1. Greetings. (Judge Wedoff)

2. Approval of minutes of Chicago meeting of September 26 – 27, 2011. (Judge Wedoff)

● Draft minutes.

3. Oral reports on meetings of other committees:

(A) January 2012 meeting of the Committee on Rules of Practice and Procedure. (Judge Wedoff and Professor Gibson)

Proposed amendment to Rule 7054 including the Standing Committee's correction of a long-standing grammatical error in the first sentence of subsection (b) by changing the verb "provides" to "provide."

● Draft minutes of the Standing Committee meeting of January 5 – 6, 2012.

(B) January 2012 meeting of the Committee on the Administration of the Bankruptcy System. (Judge Lefkow and Judge Perris)

(C) November 2011 and March 2012 meetings of the Advisory Committee on Civil Rules. (Judge Harris)

(D) October 2011 meeting and upcoming April 2012 meeting of the Advisory Committee on Evidence. (Judge Wizmur)

(E) October 2011 meeting and upcoming April 2012 meeting of the Advisory Committee on Appellate Rules. (Professor Gibson)

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

Subcommittee Reports and Other Action Items

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

(A) Recommendation on comment received on published amendments to Rule 3007(a). (Judge Harris and Professor Gibson)

- Professor Gibson's memo will be distributed separately.

(B) Recommendation concerning Suggestion (11-BK-B) by Judge A. Benjamin Goldgar to amend Rule 3002(a) to require secured creditors to file proofs of claim. (Judge Harris and Professor McKenzie)

- Memo of February 28, 2012, by Professor McKenzie.

(C) Recommendation concerning Suggestion (10-BK-H) by chapter 13 trustee Debra L. Miller to amend Rule 3002 to provide a special deadline for filing deficiency claims resulting from the sale of collateral. (Judge Harris and Professor McKenzie)

- Memo of February 27, 2012, by Professor McKenzie.

(D) Recommendation concerning technical amendments to Rule 4004(c)(1) to clarify the introductory language and to conform to the simultaneous amendment of Rule 1007(b)(7). (Judge Harris and Professor Gibson)

- Memo of February 22, 2012, by Professor Gibson.

See Item 7B for the subcommittee's recommendation concerning revising Official Forms 22A line 32) and 22C (line 37) to reflect the IRS allocation of internet services in National & Local Standards.

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

(A) Recommendation concerning comments received on published amendments to Official Form 6C. (Judge Harris and Judge Perris)

- Professor Gibson's memo will be distributed separately.

(B) Recommendation concerning comments received on published amendments to Rule 1007 and Rule 5009 and the conforming amendment to Form 23. (Judge Wedoff)

- Memo of February 28, 2012, by Judge Wedoff.

(C) Report on planning for a mini-conference to be held in conjunction with the Advisory Committee's fall meeting to gather input on the new mortgage forms,

Form 10 (Attachment A), Form 10 (Supplement 1), and Form 10 (Supplement 2), and the desirability of including a complete loan history on Form 10 (Attachment A). (Judge Perris, Judge Harris, and Professor Gibson)

● Memo of February 23, by Professor Gibson.

(D) Recommendation concerning Suggestion 11-BK-D by chapter 13 trustee staff attorney Sabrina L. McKinney to provide a space on the proof of claim (Form 10) to designate the general unsecured amount of a claim and recommendation to eliminate the instruction to attach a power of attorney, if any. (Judge Perris, Judge Harris, and Professor Gibson)

● Memo of February 21, by Professor Gibson.

See Item 7B for the subcommittees' recommendation concerning the comments on the published amendments to Official Forms 22A and 22C.

6. Report by the Chapter 13 Form Plan Drafting Group. (Judge Perris, Mr. Rao, Professor McKenzie)

Report on the Drafting Group's work on a national form chapter 13 plan and amendments to Rules 3001(f), 3002(c), 3007, 3012, 3015(d) and (f), 4003(d), 7001, 7004, and 9009, and a new rule on objections to claims proposed in connection with a form plan. (Judge Perris, Mr. Rao, and Professor McKenzie)

● A memo will be distributed separately.

7. Report by the Subcommittee on Forms. (Judge Perris, Professor Gibson, and Mr. Myers)

(A) Report on the status of the Forms Modernization Project and recommendation concerning publication of proposed new individual financial forms developed by the project. (Judge Perris, Professor Gibson, and Mr. Myers)

● Memo of February 28, 2012, by Judge Perris.
● Copies of revised Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2 are set out at Appendix A.

(B) Recommendations by the Subcommittees on Consumer Issues and Forms on the comments on the published amendments to Official Forms 22A and 22C and on revising Official Forms 22A and 22C to reflect the IRS allocation of internet services in National & Local Standards. (Judge Wedoff)

● Memo of February 29, 2012, by Judge Wedoff.
● Published Amendment to Form 22C in response to *Hamilton v. Lanning*.

● Additional Amendments to Forms 22A and 22C

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

(A) Recommendation on Suggestion 11-BK-I by Judge Erik P. Kimball to amend Rules 7008 and 7012; Suggestion 11-BK-K by Chief Judge Bruce W. Black and Judges A. Benjamin Goldgar and Carol Doyle to amend Rules 7008, 9027, and 9033, and to create new Rule 9008.1; and Suggestion 11-BK-L by Chief Judge Arthur J. Gonzalez to amend the general order referring bankruptcy cases and matters from the district court to the bankruptcy court, all in response to the Supreme Court's decision in *Stern v. Marshall*, 131 S. Ct. 2594 (2011). Judge Wizmur and Professor McKenzie)

● Professor McKenzie's memo will be distributed separately.

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

● Memo of February 27, 2012, by Professor McKenzie.

(C) Recommendation on whether Rule 1014(b) should be amended to clarify who is responsible for giving notice of the hearing on a motion to determine where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. (Judge Wizmur and Professor Gibson)

● Memo of February 22, 2012, by Professor Gibson.

(D) Report on the impact on the Bankruptcy Rules of proposed amendments to Civil Rules 37 and 45 which were published in August 2011. (Judge Wizmur and Professor Gibson)

● Memo of February 11, 2012, by Professor Gibson.

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

(A) Recommendation on publication of the proposed revision of the Part VIII rules. (Professor Gibson)

● Professor Gibson's memo will be distributed separately.
● Proposed new Rules 8001 - 8027 are set out at Appendix B.

(B) Recommendation concerning Suggestion (11-BK-E) by retired Bankruptcy Judge A. Thomas Small and Professor Alan N. Resnick to allow litigants in an adversary proceeding to limit their appeal rights. (Judge Jordan and Professor McKenzie)

● Memo of February 24, 2012, by Professor McKenzie.

(C) Recommendation concerning Suggestion (11-BK-J) by the Judicial Conference's Committee on Court Administration and Case Management for bankruptcy rule and form amendments intended to reduce the likelihood that the privacy of debtors' social-security numbers will be breached.

● Memo of February 25, 2012, by Professor Gibson.
● Revised Official Form 21.

10. Report by the Subcommittee on Attorney Conduct and Health Care. (Mr. Rao and Professor Gibson)

Recommendation concerning Suggestion 10-BK-G by Geoffrey L. Berman for the adoption of national standards, in addition to local court rules and state law rules on professional responsibility, for practice in the bankruptcy court of any district. (Mr. Rao and Professor Gibson)

● Memo of February 22, 2012, by Professor Gibson.

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

Recommendation concerning the possibility of adopting a bankruptcy rule establishing standards for electronic signatures by parties other than attorneys. (Mr. Baxter and Professor Gibson)

● Memo of February 22, by Professor Gibson.

12. Recommendations on published amendments to Rules 9006, 9013, and 9014, and Official Form 7. (Judge Wedoff)

● Memo of February 29, by Judge Wedoff.

<u>Discussion Items</u>

13. Suggestion 12-BK-A by Judge Michael J. Kaplan to amend Official Form 3B to exclude non-cash governmental assistance from the calculation of the debtor's income. (Judge Wedoff)

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

15. Suggestion 12-BK-C by Judge Barry S. Schermer to amend Official Form 10(Attachment A) to clarify the treatment of an escrow shortage. (Judge Wedoff)

16. Suggestion 12-BK-D by Judge S. Martin Teel, Jr. to amend Rule 7001(1) as it concerns compelling the debtor to deliver the value of property to the trustee. (Judge Wedoff)

17. Suggestion 11-BK-N by Attorney David S. Yen for a rule and form for applications to waive fees, other than filing fees, under 28 U.S.C. § 1930(f)(2). (Judge Wedoff)

18. Suggestion 11-BK-M by Attorney Jim Spencer to amend Rule 9027 to require that a notice of removal be filed with the bankruptcy clerk. (Judge Wedoff)

19. Oral report on revision of Official Forms 9C, 9D, 9E, 9E(Alt.), 9F, 9F(Alt.), 9G, 9H, and 9I to encourage creditors to obtain the proof of claim form the federal rulemaking website, rather than the bankruptcy clerk's office. (Mr. Wannamaker)

<u>Information Items</u>

20. Oral report on the status of bankruptcy-related legislation. (Judge Wedoff, Professor Gibson, and Mr. Wannamaker)

21. Oral update on opinions interpreting section 521(i) of the Bankruptcy Code. (Professor Gibson)

22. New procedures for the Standing Committee and its advisory committees approved by the Judicial Conference at its September 2011 meeting. (Judge Wedoff)

    ● Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees, as revised.

23. *Bull Pen* (Mr. Wannamaker):

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

    B. Amendment to Official Form 23 to implement the proposed amendment to Rule 1007(b)(7) which would authorize providers of financial management course

providers to file notification of the debtor's completion of the course, approved at September 2010 meeting.

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

24. Rules Docket (Mr. Wannamaker).

25. Future meetings:

Fall 2012 meeting, September 11 - 12, 2012, at the Hotel Monaco in Portland, Oregon. Possible locations for the spring 2013 meeting.

26. New business.

27. Adjourn.

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ADVISORY COMMITTEE ON BANKRUPTCY RULES

Chair, Advisory Committee on Bankruptcy Rules	**Honorable Eugene R. Wedoff** United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604
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Liaison from Committee on the Administration of the Bankruptcy System	**Honorable Joan Humphrey Lefkow** United States District Court Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street, Room 1956 Chicago, IL 60604

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Advisory Committee on Bankruptcy Rules

Subcommittee/Liaison Assignments, Effective November 1, 2011

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

<table>
<tr>
<td>Subcommittee on Attorney Conduct and Healthcare
John Rao, Esq., Chair
Judge Karen K. Caldwell
Judge Robert James Jonker
Judge Jean C. Hamilton
Judge Arthur I. Harris
Mark A. Redmiles, Esq., EOUST liaison</td>
<td>Subcommittee on Technology and Cross Border Insolvency
Michael St. Patrick Baxter, Esq., Chair
Judge Sandra Segal Ikuta
Judge Adalberto Jordan
Judge Arthur I. Harris
Professor Edward R. Morrison
Mark A. Redmiles, Esq., EOUST liaison</td>
</tr>
<tr>
<td>Civil Rules Liaison:
Judge Arthur I. Harris

Evidence Rules Liaison:
Judge Judith H. Wizmur</td>
<td>CM/ECF Working Group and CM/ECF Next Gen Liaison:
Judge Elizabeth L. Perris</td>
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</table>

Advisory Committee on Bankruptcy Rules

Members	Position	District/Circuit	Start Date		End Date
Eugene R. Wedoff Chair	B	Illinois (Northern)	Member: Chair:	2004 2010	---- 2013
Michael St. Patrick Baxter	ESQ	Washington, DC		2008	2014
Karen K. Caldwell	D	Kentucky (Eastern)		2009	2012
Jean C. Hamilton	D	Missouri (Eastern)		2011	2014
Arthur I. Harris	B	Ohio (Northern)		2010	2012
Sandra Segal Ikuta	C	Ninth Circuit		2010	2012
Robert James Jonker	D	Michigan (Western)		2010	2013
Adalberto Jose Jordan	D	Florida (Southern)		2010	2013
Richardo I. Kilpatrick	ESQ	Michigan		2011	2014
J. Christopher Kohn*	DOJ	Washington, DC		----	Open
David A. Lander	ESQ	Missouri		2008	2014
Edward R. Morrison	ACAD	New York		2010	2013
Elizabeth L. Perris	B	Oregon		2007	2013
John Rao	ESQ	Massachusetts		2006	2012
Judith H. Wizmur	B	New Jersey		2008	2014
S. Elizabeth Gibson Reporter	ACAD	North Carolina		2008	Open

Principal Staff: Jonathan C. Rose 202-502-1820
Jim H. Wannamaker 202-502-1910

* Ex-officio

LIAISON MEMBERS

Committee	Member	Committee
Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

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TAB 1

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Greetings; Introduction of new members

Item 1 will be an oral report.

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TAB 2

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

(DRAFT MINUTES)

The following members attended the meeting:

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

The following persons also attended the meeting:

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

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

The following member was unable to attend the meeting:

John Rao, Esquire

Introductory Items

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

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

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

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

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

3. Oral reports on meetings of other committees:

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

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

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

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

are not extended or made permanent.

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

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

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

(D) Meeting of the Advisory Committee on Evidence.

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

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

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

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

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

Subcommittee Reports and Other Action Items

4. Report by the Subcommittee on Consumer Issues.

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

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

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

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

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

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

The Subcommittee, however, did not see a need for the amendment. Rule 4004(c)(1)(K) already provides for a delay in the entry of a discharge if "a presumption has arisen under § 524(m) that a reaffirmation agreement is an undue hardship." The exception is broader than the one proposed by Judge Mannes, and it encompasses the situation he apparently had in mind. If the

court has scheduled a reaffirmation hearing that has to be concluded before the discharge is entered, it would be a situation in which a presumption of undue hardship has arisen. Thus under Rule 4004(c)(1)(K), the court could delay the entry of the discharge until after the conclusion of the hearing.

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

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

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

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

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

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

The Subcommittee recommended that Rule 7054 be amended to include much of the substance of Civil Rule 54(d)(2) and that the provision on attorney's fees in Rule 7008 be deleted. The amendments would clarify the procedure for seeking an award of attorney's fees and provide a

nationally uniform procedure for doing so. They also would bring the bankruptcy rules into closer alignment with the civil rules and eliminate a trap for the unwary. Proposed language amending Rules 7054 and 7008 was included in the agenda materials.

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

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

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

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

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

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

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

Judge Perris reported that the working group has reviewed many of the model plans in existence, and it has requested information from judges around the country about the idea of a national model plan. The Assistant Reporter said there have been 40-50 responses – mostly in support of the project (though many supporters anticipate negative responses once a detailed plan is produced for comment). Some responses objected to the idea of a national plan, arguing that it is more important that chapter 13 plans be flexible and allow for local practice, but that was a minority position.

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

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

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

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

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

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

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

available after December 18, 2011.

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

7. Report of the Subcommittee on Forms.

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

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

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

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

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

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

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

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

Judge Perris said the need for customized output is where NextGen and the FMP intersect. Reviewers were generally excited about the prospect that NextGen would collect the data contained in the forms and that user-created reports could be generated from the form data. If the

Judicial Conference allowed non-judiciary users, such as case trustees and other parties in the case, to generate reports, the length of the new forms would much less of an issue to those users.

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

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

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

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

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

8. Report of the Subcommittee on Business Issues.

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

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

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

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

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

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

The Reporter described Judge Reigle's suggestion. Bankruptcy Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

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

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

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

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

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

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

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

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

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

Oral report on the revision of the Part VIII rules.

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

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

The Reporter said that a number of general drafting decisions reflected reoccurring issues throughout the Part VIII draft. For example, the working group concluded that references to appellate "court" are more common than appellate "judge" and therefor adopted an "appellate court" convention. And, although the bankruptcy rules historically favor "shall" over "must," the working group concluded that using "must" would make the Part VIII rules more consistent with FRAP. The working group also decided that internal references to "this rule" should be avoided if possible, and instead chose to restate the entire rule or refer to the rule subsection. **The Committee supported the working group's drafting conventions.**

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

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

Rule 8002: no amendments suggested.

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

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

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

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

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

Rule 8008: no changes.

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

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

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

Rule 8012: stylistic changes.

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

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

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

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

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

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

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

Mr. Redmiles said that the formation of committees was under review by the EOUST well before the *United Building Products* came out, and Ms. Eitel said that the EOUST has developed new internal guidance and template forms for U.S. trustees that explain how to form committees.

She said the biggest problem with respect to committee formation was getting creditors to serve at all, and the new guidelines address that, but they will also reveal proxy votes and should address the concerns raised in *United Building Products.*

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

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

No report.

Discussion Items

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

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

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

The Assistant Reporter said he did not think there was anything the Committee could do at this point but see how courts interpret the opinion. **A motion to take no action at this time, and**

to monitor case law, passed without opposition.

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

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

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

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

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

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

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

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

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

17. Suggestion 11-BK-F by Chief Judge Peter W. Bowie to amend Rules 7012, 7004(e), and

9006(f) to provide that the deadline for responding runs from the date of service of a summons, rather than the date of issuance.

Referred to the Business and Consumer Subcommittees.

Information Items

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

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

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

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

20. *Bull Pen*:

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

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

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

No comments were made on matters in the bull pen.

21. Rules Docket.

Mr. Wannamaker said the rules docket was meant to help the Advisory Committee keep

track of its work, and that he would appreciate any comments.

22. Future meetings:

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

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

23. New business.

No new business.

24. Adjourn.

Respectfully submitted,

Scott Myers

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Feb. 28, 2012

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 5-6, 2012
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 5 and 6, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole and Larry D. Thompson, Esquire were unable to attend, but Mr. Thompson participated by telephone. The Department of Justice was represented at the meeting by Elizabeth J. Shapiro, Esquire.

Also participating were the committee's former chair, Judge Lee H. Rosenthal, former lawyer members Douglas R. Cox and William J. Maledon, and the committee's style consultant, Professor R. Joseph Kimble.

Judge Rosenthal chaired a discussion on class action issues with the following panelists: Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules; Daniel C. Girard, Esquire, a former member of the advisory committee; and John H. Beisner, Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Rules Committee Officer
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center
Bernida Evans	Rules Office Management Analyst

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
- Judge Jeffrey S. Sutton, Chair
- Professor Catherine T. Struve, Reporter

Advisory Committee on Bankruptcy Rules —
- Judge Eugene R. Wedoff, Chair
- Professor S. Elizabeth Gibson, Reporter
- Professor Troy A. McKenzie, Associate Reporter

Advisory Committee on Civil Rules —
- Judge David G. Campbell, Chair
- Professor Edward H. Cooper, Reporter
- Professor Richard L. Marcus, Associate Reporter

Advisory Committee on Criminal Rules —
- Judge Reena Raggi, Chair
- Professor Sara Sun Beale, Reporter
- Professor Nancy J. King, Associate Reporter

Advisory Committee on Evidence Rules —
- Judge Sidney A. Fitzwater, Chair
- Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Committee Membership Changes

Judge Kravitz announced with regret that the terms of Messrs. Cox and Maledon had expired on October 1, 2011, and both were attending their last Standing Committee meeting. He thanked them for their distinguished service on the committee, described their many contributions to the committee's work and the rules program, and presented each with a plaque signed by Chief Justice John Roberts, Jr. and Judge Thomas F. Hogan, Director of the Administrative Office.

Judge Kravitz introduced the new committee members, Judge Wesley and Mr. Garre, and he summarized their impressive legal backgrounds. He reported that Mr. Thompson was also a newly appointed member of the committee, but was unable to attend the meeting.

Meeting with Supreme Court Justices

Judge Rosenthal reported on a recent meeting held at the Supreme Court that she had attended with Judge Kravitz, Dean Levi, Professor Coquillette, and former committee chair Judge Anthony J. Scirica. They had an extensive and candid exchange with the Chief Justice and other justices on the rules program. The discussion, she said, touched upon such matters as the openness of the rules process, the procedures followed by the rules committees, the effective use of empirical research to support proposed rule amendments, and the rules committees' ongoing relationships with Congress, the bar, and the academy. The meeting, she said, had been very beneficial and met all the committee's objectives. She added that it would make sense to pursue similar dialogues with the Court every five years or so.

Judicial Conference Report

Judge Kravitz reported that the Judicial Conference at its September 2011 session had approved all the proposed amendments to the rules and forms presented by the committee.

Rules Taking Effect on December 1, 2011

Judge Kravitz referred to the amendments to the appellate, criminal, and evidence rules and the bankruptcy rules and forms that took effect by operation of law on December 1, 2011.

Pending Rule Amendments

Judge Kravitz reported that proposed amendments to the appellate, bankruptcy, civil, criminal, and evidence rules had been published for comment in August 2011. Although public hearings had been scheduled, few requests had been submitted by bench and bar to date to testify on the proposals.

Lawsuit Abuse Reduction Act

Ms. Kuperman reported that the proposed Lawsuit Abuse Reduction Act of 2011 (H.R. 966) would restore the mandatory-sanctions provision of FED. R. CIV. P. 11 (sanctions). Adopted in 1983, she said, the provision simply did not work and was later repealed in 1993. In addition, she said, the proposed legislation would eliminate the beneficial safe-harbor provision of Rule 11(c)(2), added in 1993. It gives a party 21 days to withdraw challenged assertions on a voluntary basis.

She pointed out that Judges Rosenthal and Kravitz had written to the chair of the House Judiciary Committee to oppose the bill. Their letter emphasized that the Federal Judicial Center's empirical research had demonstrated that the 1983 version of Rule 11 had produced wasteful satellite litigation and increased the time and costs of civil litigation. She added that the American Bar Association and other organizations had also sent letters to Congress opposing the legislation.

She noted that the House Judiciary Committee had held a hearing on H.R. 966 in March 2011 and then reported out the bill. But there was no further action in the House, although a companion bill (S. 533) was introduced in the Senate.

Sunshine in Litigation Act

Ms. Kuperman reported that Judges Rosenthal and Kravitz had written to the chair of the Senate Judiciary Committee to oppose the proposed Sunshine in Litigation Act of 2011 (S. 623). The bill would prevent a court from issuing a discovery protective order unless it first makes particularized findings of fact that the order would not restrict the disclosure of information relevant to protecting public health or safety. She noted that the bill, similar to others introduced in past Congresses, had been favorably reported out of committee in May 2011, but there had been no further action on it.

Pleading Standards

Ms. Kuperman reported that no legislation was currently pending in Congress to address civil pleading standards in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009).

Consent Decrees

Ms. Kuperman noted that legislation (H.R. 3041) had been introduced to limit the duration of consent decrees issued by federal courts that impose injunctive or other prospective relief against state or local programs or officials. The bill, she said, was being monitored closely by the Judicial Conference's Federal-State Jurisdiction Committee. It would not amend the federal rules directly, but could impact the rules in procedural ways. The legislation, she said, had been referred to Congressional committee, but no further action had taken place on it.

Costs and Burdens of Civil Discovery

Ms. Kuperman reported that the House Judiciary Committee Subcommittee on the Constitution had held a hearing in December 2011 on "the costs and burdens of civil discovery." She noted that Judges Kravitz and Campbell had sent a letter to the subcommittee chair providing an update on the advisory committee's various efforts to reduce discovery costs, burdens, and delays. The letter, she said, urged Congress to allow the Advisory Committee on Civil Rules to continue pursuing these issues under the thorough and deliberate process that Congress created in the Rules Enabling Act. She added that Congressional staff had been invited to, and had attended, the advisory committee's recent meeting in Washington. The committee, she added, will continue to keep members and staff of Congress informed of pertinent developments.

Time to File a Notice of Appeal When a Federal Officer or Employee is a Party

Ms. Kuperman reported that the Congress had enacted legislation amending 28 U.S.C. § 2107 to conform it to the December 2011 change in FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). The statute mirrors the amended rule and clarifies the time for parties to appeal in a civil case when a federal officer or employee is sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

Bankruptcy Legislation

Ms. Kuperman reported that legislation (Pub. L. No. 112-64) had been enacted in December 2011 to extend for another four years the exemption given to qualified reservists and members of the National Guard from application of the means-test presumption of abuse in Chapter 7 bankruptcy cases. She noted that a footnote in an interim bankruptcy rule would have to be updated to incorporate the number of the new public law. In addition, she said, legislation was pending to add some bankruptcy judgeships and increase the filing fee for chapter 11 cases. If enacted, it would require conforming changes to the bankruptcy forms to reflect the higher fee.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rose reported that Judge Thomas F. Hogan had assumed his duties as the new Director of the Administrative Office.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil reported that Judge Jeremy D. Fogel, the new Director of the Federal Judicial Center, had decided to undertake a comprehensive study of case-dispositive motions in civil cases. To that end, he said, the Center was seeking assistance from several law professors to participate in the study and provide law students to help in the research. The Center, he added, was conducting pilot efforts for the project and would present proposals for consideration by the Advisory Committee on Civil Rules at its March 2012 meeting. He suggested that the project would likely be ready to proceed at the start of the next academic year.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 2-3, 2011.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2011 (Agenda Item 10). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

Judge Sutton thanked the members, reporters, and committee staff for working with congressional staff on the amendment of 28 U.S.C. § 2107 to make it consistent with FED. R. APP. P. 4(a)(1) (time to file a notice of appeal in a civil case). Even though it involved a relatively minor, technical change, he said, it had taken enormous effort and skill to accomplish the legislative action.

He reported that only one comment had been received to date on the advisory committee's proposed amendment to FED. R. APP. P. 28 (briefs) that would remove the requirement that a brief set forth separate statements of the case and of the facts. The comment, from a prominent appellate judge, opposed combining the two statements.

But, he said, the advisory committee believed that the current requirement of separate statements had generated confusion and redundancy. Combining them would provide lawyers with greater flexibility in making their presentations.

Judge Sutton reported that the advisory committee had not reached a consensus on whether to treat federally recognized Indian tribes the same as states for the purpose of filing amicus briefs under FED. R. APP. P. 29(a) (amicus briefs). The committee, though, did reach a consensus that municipalities should be included with Indian tribes if a Rule 29 amendment were pursued. Judge Sutton added that he had sent a letter to the chief judges of all the courts of appeals soliciting their views on the matter.

Judge Sutton reported that Professor Richard D. Freer of Emory Law School, a guest speaker at the advisory committee's recent meeting had complained about the frequency of federal rule changes. Professor Freer argued that frequent changes increase costs, add confusion for lawyers, complicate electronic searches, and may lead to unintended consequences. He suggested that if rule changes were made less often – such as once every several years – the bar would pay more attention to the rules and submit more and better comments. Judge Sutton noted that the advisory committee was taking the criticism to heart and generally supports deferring and bundling amendments where feasible.

A member endorsed the suggestion generally and added that lawyers often complain about the committees "tinkering" with the rules. Other participants pointed out that the advisory committees do in fact bundle rule amendments where possible. Nevertheless, many rule changes are required by legislation, case law developments, and other factors beyond the committees' control.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professor Gibson presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of December 12, 2011 (Agenda Item 8).

Amendments for Publication

FED. R. BANKR. P. 7054(b) and 7008(b)

Judge Wedoff reported that the proposed amendments to FED. R. BANKR. P. 7054 (judgments and costs) and FED. R. BANKR. P. 7008(b) (attorney's fees) would clarify the procedure for seeking the award of attorney's fees in adversary proceedings. Bankruptcy procedures, he explained, are different from those in civil actions in the district courts.

Civil practice is governed by FED. R. CIV. P. 54(d)(2) (attorney's fees), which specifies that a claim for attorney fees be made by motion unless the substantive law requires proving the fees at trial as an element of damages. The bankruptcy rules, though, have no analog to FED. R. CIV. P. 54(d)(2). Instead, attorney's fees are governed by FED. R. BANKR. P. 7008(b), which specifies that a request for the award of attorney's fees be pleaded as a claim in a complaint or other pleading.

The difference between the civil and bankruptcy rules, he said, creates a trap for the unwary, especially for lawyers who practice regularly in the district courts. Moreover, the difference between bankruptcy practice and civil practice has led bankruptcy courts to adopt different, non-uniform approaches to handling fee applications. The largest bankruptcy court in the country, for example, has adopted the civil practice by local rule.

In a recent decision, the Ninth Circuit bankruptcy appellate panel pointed to a gap in the current bankruptcy rules. It noted that when a party follows FED. R. BANKR. P. 7008(b) and pleads its demand for attorney's fees in the complaint, the bankruptcy rules specify no procedure for awarding them. The panel's opinion expressly invited the advisory committee to close the gap by amending FED. R. BANKR. P. 7054. That rule currently incorporates FED. R. CIV. P. 54(a)-(c) and has its own provision governing recovery of costs by a prevailing party. But it has no provision like FED. R. CIV. P. 54(d)(2) governing recovery of attorney's fees.

Judge Wedoff explained that the advisory committee agreed with the bankruptcy appellate panel and decided to conform the bankruptcy rules to the civil rules – thus requiring that a claim for the award of attorney's fees in an adversary proceeding be made by motion. To do so, the proposed amendments incorporate much of FED. R. CIV. P. 54(d)(2) into a new FED. R. BANKR. P. 7054(b)(2) prescribing the procedure for seeking attorney fees. Current FED. R. BANKR. P. 7008(b), requiring that the demand be pleaded in a complaint or other pleading, would be deleted. Judge Wedoff added that FED. R. CIV. P. 54(d)(2)(D), dealing with referral of matters to a master or magistrate judge, would not be incorporated because it is not relevant to the bankruptcy courts.

Judge Wedoff reported that the advisory committee would also correct a long-standing grammatical error in the first sentence of FED. R. BANKR. P. 7054(b) by changing the verb "provides" to "provide."

The committee without objection by voice vote approved publication of the proposed amendments to FED. R. BANKR. P. 7054(b) and the proposed deletion of FED. R. BANKR. P. 7008(b).

Information Items

PART VIII – THE BANKRUPTCY APPELLATE RULES

Judge Wedoff reported that the advisory committee had been engaged for several years in a major project to revise the Part VIII rules. The principal objectives of the project, he said, are: (1) to align Part VIII more closely with the Federal Rules of Appellate Procedure; and (2) to adjust the rules to the reality that bankruptcy court records today are filed, stored, and transmitted electronically, rather than in paper form.

He explained that the advisory committee had made substantial progress and would return to the Standing Committee in June 2012 seeking permission to publish the revised Part VIII rules for public comment. At this point, the advisory committee just wanted to give the Standing Committee a preliminary look at the first half of the rules, explain the principal changes from the current rules, and address any concerns that members might have. He invited the members to bring any suggestions to the advisory committee's attention.

Professor Gibson noted that Part VIII deals primarily with appeals from a bankruptcy court to a district court or bankruptcy appellate panel. If a case proceeds from there to the court of appeals, the Federal Rules of Appellate Procedure take over. In addition, in 2005 Congress authorized direct appeals from a bankruptcy court to a court of appeals in limited circumstances. Accordingly, the new Part VIII rules also contain provisions dealing with permissive direct appeals.

She noted that Part VIII had largely been neglected since 1983, even though the Federal Rules of Appellate Procedure have since been amended on several occasions and completely restyled in 1998. She pointed out that Part VIII was difficult to follow and needs to be reorganized and rewritten for greater ease of use. In addition, it needs to be updated and made more consistent with the current Federal Rules of Appellate Procedure. She emphasized that the proposed revisions were comprehensive in nature. Some rules would be combined, some deleted, and some moved to new locations.

Professor Gibson explained that the advisory committee had conducted two mini-conferences on the proposed rules with members of the bench and bar. The participants, she said, expressed substantial support for the proposed revisions, but several recommended that additional changes be made to take account of the widespread use of technology in the federal courts. They urged the committee to revise the rules to recognize explicitly that court records in bankruptcy cases now are filed and maintained in electronic form.

Judge Wedoff and Professor Gibson noted that the proposed new Part VIII rules largely adopt the style conventions of the other, restyled federal rules. For example, they

consistently use the word "must" to denote an affirmative obligation to act, even though the other parts of the bankruptcy rules still use the word "shall." He pointed out that the Part VIII rules are largely distinct from the rest of the bankruptcy rules. As a result, there should be no problem with using the modern terminology only in Part VIII and not in other bankruptcy rules.

Professor Gibson noted that the advisory committee had revised and reorganized Part VIII so thoroughly that it would not be meaningful to produce a redlined or side-by-side version comparing the old and new rules. Rather, she said, the committee was using the committee notes to specify where particular provisions in the new rules are located in the current rules.

A participant suggested that it would be helpful to produce a chart showing readers where each provision in the current rules has been relocated. Professor Gibson agreed, but explained that some provisions had been broken up and relocated in several different places. Judge Wedoff agreed to work on producing a chart, but added that it might be of limited value because readers will need to examine the new rules as a whole.

FED. R. BANKR. P. 8001

Professor Gibson noted that proposed FED. R. BANKR. P. 8001 (scope and definitions) was new and had no counterpart in the existing rules. Similar to FED. R. APP. P. 1, it sets forth the scope of the Part VIII rules and contains three definitions: (1) "BAP" to mean a bankruptcy appellate panel; (2) "appellate court" to mean either the district court or the BAP to which an appeal is taken; and (3) "transmit" to mean sending documents electronically (unless a document is sent by or to a pro se litigant, or a local court rule requires a different means of delivering the document).

She explained that the advisory committee had deliberately selected the term "transmit" to highlight a specific process with a strong presumption in favor of electronic transfer of a document or record. A member suggested, though, that the proposed definition of "transmit" was not sufficiently forceful and suggested including a stronger affirmative statement that electronic transmission is to be the norm. Judge Wedoff agreed and added that electronic transmission was already universal in the bankruptcy courts except for pro se litigants. Another member cautioned that it is problematic to use a word like "transmit," which has a much broader common meaning, and ascribe to it an intentionally narrower meaning. Perhaps a unique new term could be devised, such as "e-transmit."

Some members questioned the proposed definition of "appellate court" because it contradicted the ordinary meaning of the term, which normally refers to the courts of appeals. Judge Wedoff and Professor Gibson agreed to have the advisory committee reconsider the definition.

FED. R. BANKR. P. 8002

Professor Gibson reported that proposed FED. R. BANKR. P. 8002 (time to file a notice of appeal) must remain in its current place because 28 U.S.C. § 158(c)(2) refers to it by number. She said that the committee had essentially restyled the existing rule and added a provision to cover inmates confined in institutions.

FED. R. BANKR. P. 8003 and 8004

Professor Gibson explained that proposed Rules 8003 (appeal as of right) and 8004 (appeal by leave) would set forth in two separate rules the provisions governing appeals as of right and appeals by leave. The two are combined in the current FED. R. BANKR. P. 8001 (manner of taking an appeal). The proposed revisions, she said, will conform Part VIII to the Federal Rules of Appellate Procedure.

She noted that under the current bankruptcy appellate rules, an appeal is not docketed in the appellate court until the record is complete and received from the bankruptcy clerk. Proposed FED. R. BANKR. P. 8003(d)(2), however, conforms to the Federal Rules of Appellate Procedure and requires the clerk of the appellate court to docket the appeal earlier, as soon as a notice of appeal is received. Proposed FED. R. BANKR. P. 8004 would continue the current bankruptcy practice of requiring an appellant to file both a notice of appeal and a motion for leave to appeal.

FED. R. BANKR. P. 8005

Professor Gibson explained that proposed FED. R. BANKR. P. 8005 (election to have an appeal heard by the district court) governs appeals in those circuits that have a BAP. Under 28 U.S.C. § 158(c)(1), an appeal in those circuits is heard by the BAP unless a party to the appeal elects to have it heard by the district court. The proposed rule provides the procedure for exercising that election, and it eliminates the current requirement that the election be made on a separate document. Instead, a new Official Form will be devised for the election. Proposed Rule 8005(c) specifies that a party seeking a determination of the validity of an election must file a motion in the court in which the appeal is then pending.

FED. R. BANKR. P. 8006

Professor Gibson noted that proposed FED. R. BANKR. P. 8006 (certification of a direct appeal to the court of appeals) overlaps substantially with the Federal Rules of Appellate Procedure. Under 28 U.S.C. § 158(d)(2), a case may be certified for direct appeal from a bankruptcy court in three ways. First, the bankruptcy court, the district court, or the BAP may make the certification itself based on one of the direct appeal criteria specified in 28 U.S.C. § 158(d)(2)(A). Second, the certification may be made by all the parties to the appeal. Third, the bankruptcy court, district court, or BAP must make the certification if a majority of the parties on both sides of the appeal ask the court to make it.

Judge Wedoff explained that the proposed rule provides the procedures for implementing each of the three options. Since the bankruptcy court is likely to have the most knowledge about a case, proposed Rule 8006(b) specifies that a case will remain pending in the bankruptcy court, for purposes of certification only, for 30 days after the effective date of the first notice of appeal. The 30-day hold gives the bankruptcy court time to make a certification. Once the certification has been made, the case is in the court of appeals, and the request for permission to take a direct appeal must be filed with the circuit clerk within 30 days. The court of appeals has discretion to take the direct appeal, and the procedure is similar to that under 28 U.S.C. § 1292(b).

Judge Sutton reported that the Advisory Committee on Appellate Rules was working closely with the bankruptcy advisory committee on revising the Part VIII rules, with Professor Struve and Professor Amy Barrett serving as liaisons to the project. He noted that the appellate advisory committee had drafted corresponding changes in FED. R. APP. P. 6 (appeal in a bankruptcy case) by adding a new subdivision 6(c) to address permissive direct appeals from a bankruptcy court.

He reported that appellate advisory committee members had questioned the choice of the verb "transmit" in FED. R. APP. P. 6 and debated several other potential terms. In addition, he said, concern had been voiced over the wisdom of introducing a new term, such as "transmit,""provide," or "furnish," but only in FED. R. APP. P. 6. It would be inconsistent with the terminology used in the other appellate rules. The appellate courts, moreover, are not as far advanced with electronic filing as the bankruptcy courts and may not be ready to receive other types of appeals in the same manner as bankruptcy appeals. But, he added, it may well be acceptable as a practical matter to live with two different verbs in the rules for a while. A member suggested using the term "send," but Judge Sutton pointed out that in the electronic environment, the clerk of the bankruptcy court may merely provide the appellate court with links to the bankruptcy court record, rather than actually send or transmit the record to the appellate court.

Judge Sutton suggested convening an ad hoc subcommittee, comprised of at least one person from each advisory committee, to consider a uniform way of describing the transmission of records throughout the federal rules. Several participants endorsed the concept and emphasized the desirability of using the same language across all the rules. Others warned, though, that the project could be very complicated because many other provisions in the rules also need to be amended to take account of technology, and they cited several examples. A member cautioned that whatever terminology is selected must accommodate the continuing need for paper records and paper copies.

Professor Gibson said that the new bankruptcy appellate rules, scheduled to be published in August 2012, will be the test case for the new terminology. Judge Sutton added that eventually all the federal rules will have to be accommodated to the electronic world. But that project, he said, will take considerable time to accomplish. He emphasized that the immediate problem facing the advisory committees was to decide before publication on the right terminology for the proposed new Part VIII bankruptcy rules and the amendments to FED. R. APP. P. 6.

Judge Kravitz appointed Judge Gorsuch to chair an ad hoc subcommittee to consider devising a standard way of describing electronic filing and transmission throughout the rules. He asked the chairs of the appellate, bankruptcy, civil, and criminal advisory committees to provide at least one representative each.

FED. R. BANKR. P. 8007

Professor Gibson noted that proposed FED. R. BANKR. P. 8007 (stay pending appeal) would continue the practice of current FED. R. BANKR. P. 8005 that requires a party ordinarily to seek relief pending an appeal in the bankruptcy court first.

A member pointed out that proposed Rule 8007(b)(2) did not provide for the situation in which a bankruptcy court fails to issue a timely ruling. He said that the Federal Rules of Appellate Procedure in that circumstance authorize a party to ask the court of appeals for relief. Professor Gibson replied that the advisory committee will consider the matter.

FED. R. BANKR. P. 8008

Professor Gibson explained that proposed FED. R. BANKR. P. 8008 (indicative rulings) had been adapted from the new indicative ruling provisions in the civil and appellate rules. Proposed FED. R. BANKR. P. 8008(a) is parallel to FED. R. CIV. P. 62.1. It specifies what action a bankruptcy court may take on a motion for relief that it lacks authority to grant because an appeal has been docketed and is pending. The moving party must notify the appellate court if the bankruptcy court states either that it would grant the motion or the motion raises a substantial issue.

She pointed out that the rule is complicated because an appeal may be pending in the district court, the BAP, or the court of appeals. Proposed FED. R. BANKR. P. 8008(c) governs the indicative ruling procedure in the district court and the BAP, while FED. R. APP. P. 12.1 takes over if the appeal is pending in the court of appeals.

FED. R. BANKR. P. 8009 and 8010

Professor Gibson reported that proposed FED. R. BANKR. P. 8009 (record and issues on appeal) and FED. R. BANKR. P. 8010 (completing and transmitting the record) would govern the record on appeal. They apply to direct appeals to the court of appeals, as well as to appeals to the district court or BAP.

Rule 8009 differs from the Federal Rule of Appellate Procedure because it continues the current bankruptcy practice of requiring the parties to designate the record on appeal. That procedure is necessary because a bankruptcy case is a large umbrella that may cover thousands of documents, of which only a few may be at issue on appeal.

Proposed FED. R. BANKR. P. 8009(f) would govern sealed documents. If a party designates a sealed document as part of the record, it must identify the document without revealing secret information and file a motion with the appellate court to accept it under seal. If the motion is granted, the bankruptcy clerk transmits the sealed document to the appellate court.

Professor Gibson noted that the advisory committee was still refining proposed FED. R. BANKR. P. 8010 to specify a court reporter's duty to provide a transcript and file it with the appellate court. The majority of bankruptcy courts, she said, record proceedings by machine. A transcript is prepared by a transcription service when ordered through the clerk. She suggested that the court reporters may not always know in which court an appeal is pending and where they must file the transcript.

FED. R. BANKR. P. 8011

Professor Gibson reported that proposed FED. R. BANKR. P. 8011 (filing, service, and signature) had been derived from current FED. R. BANKR. P. 8008 (filing and service) and FED. R. APP. P. 25 (filing and service). She noted that it followed the format, style, and some of the detail of FED. R. APP. P. 25, but placed more emphasis on electronic filing and service.

FED. R. BANKR. P. 8012

Professor Gibson reported that proposed FED. R. BANKR. P. 8012 (corporate disclosure statement) was a new provision derived from FED. R. APP. P. 26.1.

RULES AND FORMS PUBLISHED FOR COMMENT IN AUGUST 2011

Judge Wedoff reported that the advisory committee had received 11 comments and one request to testify on the proposed rules and forms published in August 2011. The only significant area of concern reflected in the comments, he said, related to the proposed amendment to Official Form 6C, dealing with exemptions. Prompted by the Supreme Court's decision in *Schwab v. Reilly*, 130 S. Ct. 2652 (2010), the revised form would give debtors the option of stating the value of their claimed exemptions as "the full fair market value of the exempted property." Some trustees, he said, are concerned that the change will encourage people to claim the entire value of the property even though they are not entitled to it.

STERN V. MARSHALL

Judge Wedoff reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decision in *Stern v. Marshall,* 131 S. Ct. 2594 (2011). He pointed out that Professor McKenzie was leading the committee's efforts and had identified three concerns.

First, he said, the scope of the decision was unclear. The holding itself was narrow. It stated that even though that the Bankruptcy Code designates a counterclaim by a bankruptcy estate against a creditor as a "core" bankruptcy proceeding that a bankruptcy judge may decide with finality, that statutory grant of authority is inconsistent with Article III of the Constitution. A non-Article III bankruptcy judge cannot exercise the authority constitutionally because the counterclaim is really a non-bankruptcy matter.

It is not clear, he said, whether the constitutional prohibition will be held to apply to other matters designated by the statute as "core," especially fraudulent conveyance claims. The Supreme Court, he explained, has previously described fraudulent conveyance actions as essentially common law claims like those usually reserved to the Article III courts.

Second, there is uncertainty over the extent to which litigant consent may cure the defect and authorize a bankruptcy judge to hear and finally determine a proceeding that would otherwise fall beyond the judge's authority. The governing statute, 28 U.S.C. § 157(b) and (c), specifies that a bankruptcy judge may decide "core" bankruptcy proceedings with finality. If a matter is not a "core" proceeding, the bankruptcy judge

may only file proposed findings and conclusions for disposition by the district court, unless the parties consent to entry of a final order or judgment by the bankruptcy judge.

The bankruptcy rules, he explained, currently contain a mechanism for obtaining litigant consent, but only in "non-core" proceedings. FED. R. BANKR. P. 7008(a) (general pleading rules) provides that parties must specify in their pleadings whether an adversary proceeding is "core" or "non-core" and, if "non-core," whether the pleader consents to entry of final orders or judgment by the bankruptcy judge. The problem, he said, is that the term "core" now is ambiguous. As a result of *Stern v. Marshall,* he suggested, there are now statutory "core" proceedings, enumerated in 28 U.S.C. § 157(b), and constitutional "core" proceedings. The advisory committee, he said, was considering proposed rule amendments to resolve the ambiguity.

Third, there is a potential for reading *Stern v. Marshall* as having created a complete jurisdictional hole in which a bankruptcy court may not be able to do anything at all in some cases – either to enter a final order or to submit proposed findings and conclusions. He explained that 28 U.S.C. § 157(c) specifies that if a matter is not a "core" proceeding under 28 U.S.C. § 157(b), a bankruptcy judge may enter proposed findings of fact and conclusions of law for disposition by the district court. After *Stern v. Marshall,* some statutory "core" proceedings are now unconstitutional for the bankruptcy court to decide with finality. Therefore, there is a question as to whether 28 U.S.C. § 157(c), which specifically authorizes a bankruptcy judge to issue proposed findings and conclusions in "a matter that is not a core proceeding," refers only to matters that are not core under 28 U.S.C. § 157(b) or also includes matters that are not "core" under the Constitution.

If § 157(c) refers only to matters that are not "core" under the statute, bankruptcy judges would have no authority to issue proposed findings and conclusions of law in matters that the statute explicitly defines as "core" matters. And for some of these statutory "core" matters, the Constitution prevents bankruptcy judges from entering a final judgment. The potential void, he said, could arise relatively frequently. It would apply to all counterclaims by a bankruptcy estate against creditors filing claims against the estate, and it might also be held to include fraudulent conveyance cases.

QUARTERLY REPORTING BY ASBESTOS TRUSTS

Judge Wedoff reported that the advisory committee had decided to take no action on a proposal for a new rule that would require asbestos trusts created in accordance with § 524(g) of the Bankruptcy Code to file quarterly reports with the bankruptcy courts. The committee, he said, had concerns over its authority to issue a rule to that effect under the Rules Enabling Act because the trusts are created at the conclusion of a chapter 11 case. He noted that the committee had obtained input on the proposal from various interested organizations, and the great majority stated that a rule was not appropriate.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the advisory committee's forms modernization project was making substantial progress and was linked ultimately to the Administrative Office's development of the Next Generation electronic system to supersede CM/ECF. He said that the new forms produced by the committee had been designed in large measure to take advantage of electronic filing and reporting. They are clearer, easier to read, and have instructions integrated into the questions. As a result, though, some attorneys have complained that the new forms are appreciably longer than the current versions and will require more time to complete.

The advisory committee, he said, was very sensitive to these concerns and was trying to shorten the forms where possible, while still eliciting more accurate information. Moreover, he said, the length of the forms will be substantially reduced by not having separate instructions filed.

He added that the advisory committee would like to expedite implementation of the new forms, especially consumer forms that deal with debtor income and expenses. The committee, he said, was planning to bring some of the forms to the Standing Committee at its next meeting and seek authority to publish them for public comment.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of December 2, 2011 (Agenda Item 6). Judge Campbell reported that the advisory committee had no action items to present.

Information Items

POTENTIAL RULE ON PRESERVATION FOR FUTURE LITIGATION

Judge Campbell reported that a panel at the May 2010 Duke Law School conference on civil litigation had urged the advisory committee to adopt a new national rule governing preservation of evidence in civil cases. The panel, he said, presented the outline of a proposed preservation rule, including eight specific elements that it said needed to be addressed in order to provide appropriate guidance to bench and bar. The proposal, he said, had been referred to the committee's discovery subcommittee, and Ms. Kuperman was asked to prepare a memorandum on the state of the law regarding preservation obligations and sanctions.

Judge Campbell pointed out that the committee's research revealed that federal case law is unanimous in holding that the duty to preserve discoverable information is triggered when a party reasonably anticipates being a party to litigation. But, he said, no consensus exists in the case law regarding: (1) when a party should reasonably anticipate being brought into litigation; and (2) the extent of the preservation duty. Rather, the law is fact-driven and left to resolution on a case-by-case basis.

As for the law on sanctions for failure to preserve, the courts of appeals are in disagreement. Some circuits hold that mere negligence is sufficient for a court to invoke sanctions, while others require some form of willfulness or bad faith before sanctions may be imposed. Some courts, moreover, have tried to specify what kinds of conduct may result in what kinds of sanctions.

Judge Campbell reported that the advisory committee wanted to ascertain the extent of preservation problems, and it asked the Federal Judicial Center to study the frequency of spoliation motions in the federal courts. That study, conducted by Emery Lee, reviewed over 131,000 cases filed in 19 district courts in 2007 and 2008. It found that spoliation motions had been filed in only 209 cases, or 0.15% of the total. About half those motions related to electronically stored information. The study revealed, moreover, that sanctions had been imposed against both plaintiffs and defendants.

In addition, the committee examined the existing laws that impose preservation obligations. It found that there is a substantial body of statutes that deal with preservation, covering many different subjects. But no coherent pattern emerges from them.

Judge Campbell reported that the discovery subcommittee had focused on what elements should be included in a proposed rule, and Professor Marcus produced initial discussion drafts to show three different possible approaches to a rule. The first was a very detailed rule, as proposed by the Duke panel. It included specific provisions giving examples of the types of events that constitute reasonable anticipation of litigation and trigger a duty to preserve. It addressed the scope of the duty to preserve, including the subject matter, the sources of information, the types of information, and the form of preservation. It also laid out time limits on the scope of the duty, such as how far back a custodian must retain information and how long the obligation to preserve continues. It contained a presumptive number of record custodians who must be identified and instructed to preserve information. The rule was also detailed on sanctions, specifying what kinds of conduct will lead to what kinds of sanctions.

The second proposed rule, he said, was substantially more general, addressing the trigger, scope, and duration of the duty to preserve and the selection of sanctions, but in less detail. Essentially, it directed parties to behave reasonably in all dimensions.

The third proposed rule addressed only sanctions and did not specify the trigger, scope, or duration of preservation obligations. Instead, it focused exclusively on the area of greatest concern to lawyers and their clients – the area, moreover, where there is the greatest disagreement and uncertainty in the law. The expectation was that by addressing the key problem of sanctions, the rule would give guidance to the people who make preservation decisions and relieve much of the uncertainty about the trigger and scope of the duty to preserve.

The third rule also distinguished between sanctions and curative measures. The latter consist of targeted actions designed to cure the consequences flowing from a failure to preserve information, such as allowing extra time for discovery or requiring the party who failed to preserve to pay the costs of seeking substitutes for the missing information. Under the proposed rule, remedial measures could be imposed if a preservation duty were not followed.

Imposition of more serious sanctions – such as an adverse inference instruction, claim preclusion, dismissal, or entry of judgment – would require something more than a mere failure to preserve. A showing would have to be made of some kind of knowing conduct, such as willfulness or bad faith. The rule also laid out the factors that a judge should consider in imposing sanctions, including the level of notice given the custodians, the reasonableness and proportionality of the efforts, whether there was good faith consultation, the sophistication of the parties, the actual demands made for preservation, and whether a party sought quick guidance from a judge.

Judge Campbell reported that the three rules had been discussed at a one-day mini-conference in Dallas in September with invited attorneys, judges, law professors, and technical experts. The committee, he said, heard very thoughtful, competing views from the participants. The discussions were very helpful, and several participants submitted papers elaborating on their positions.

In essence, he said, corporate representatives argued that the sheer cost of preserving information in anticipation of litigation is an urgent problem that calls for a strong, detailed rule providing clear guidance to record custodians. In particular, they complained about the uncertainty that corporations face in not knowing where and when a suit will be filed against them, what the claims will be, and what information may be relevant in each case. They are concerned about the heavy costs of over-preserving information. But, more importantly, they fear the harm to their reputation that may result from accusations of spoliation.

On the other hand, plaintiffs' lawyers argued that a detailed national rule would lead to greater destruction of information because of its negative implications. It would encourage custodians to destroy information not explicitly spelled out in the rule. They emphasized that there will always be information that simply does not fit within the details of a rule, but must nevertheless be preserved.

Department of Justice representatives argued that case law should be allowed to continue running its course, and no preservation rule should be adopted at this time. They argued, in particular, that the first of the three proposed rules would lead to over-preservation by government agencies, as they would be forced to preserve records whenever there is a dispute over a claim with the government.

Judge Campbell noted that the discovery subcommittee met at the close of the mini-conference and later by telephone. It then reported in detail on the mini-conference at the full advisory committee's November 2011 meeting. After lengthy discussion, the committee decided that the subcommittee needed to continue to receive input and explore the three potential options. Under its new chair, Judge Paul W. Grimm, the subcommittee will continue to consider all the issues as open and report back at the advisory committee's March 2012 meeting.

Several members suggested that the first of the three proposed rules, the detailed option, would not be workable because of the endless variety of possible situations that may arise. A detailed new national rule, moreover, could lead to satellite litigation, as with the 1983 amendments to FED. R. CIV. P. 11 (sanctions). A sanctions-only rule, on the other hand, such as the third proposal, would resolve the serious split among the circuits on the law of sanctions, and it might well be effective in sending strong signals regarding pre-litigation conduct.

Judge Campbell suggested that even if the committee were to adopt a new federal rule on spoliation, a myriad of different rules will still exist in the state courts. Accordingly, there will not be national uniformity in any event. The problems of uncertainty will continue because state law often governs preservation obligations. A participant added that the rules on preservation are largely rules of attorney conduct, which lie within the traditional province of the states. Because of the relevance of state law, the federal courts would be on stronger jurisdictional grounds if the rule were limited to sanctions.

A member added that in most cases no federal proceeding is pending when the duty to preserve first attaches. It was suggested that the advisory committee take a limited focus because it may lack authority under the Rules Enabling Act to adopt pre-litigation preservation standards.

A participant pointed out that the scope of the obligation to preserve before trial is related to the scope of discovery under FED. R. CIV. P. 26(b)(1). Therefore, it may not be possible to have a rule that narrows the scope of what information must be preserved before a case is filed if that provision is at odds with what information must be produced in discovery after a case is filed. Moreover, apart from the duty to preserve certain records and information, substantial additional cost is incurred in searching the

information. Thus, even if it were inexpensive just to preserve information, it would still be expensive for the parties to search through it. Therefore, it might be necessary to reconsider the scope of discovery under Rule 26(b)(1).

FED. R. CIV. P. 45

Judge Campbell reported that the proposed amendments to Rule 45 (subpoena) had been published in August 2011. They make four basic changes: (1) simplifying the rule by having a subpoena issued in the name of the presiding court, authorizing nationwide service, and having local enforcement in the district where the witness is; (2) allowing the court where discovery is taken in appropriate instances to send disputes back to the court presiding over the case; (3) overruling the *Vioxx* line of cases that authorize subpoenas for out-of-state parties and a party's corporate officers to testify at trial from a distance of over 100 miles; and (4) clarifying the obligation of a serving party to provide notice.

He said that a public hearing had been scheduled for January 27, 2012, but the committee had received only two requests to testify. As a result, the hearing may be canceled and the requesting parties asked to put their views in writing or participate in a teleconference.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell reported that a subcommittee chaired by Judge John G. Koeltl was studying the many recommendations for improvements in civil litigation made by participants at the May 2010 Duke Law School conference. He noted that the subcommittee was focusing on five categories of proposals to implement suggestions made at the conference.

First, one of the common themes voiced by lawyers at the conference was that judges need to be more active in case management. But merely promulgating additional rules will not produce better managers. Therefore, the subcommittee was coordinating with the Federal Judicial Center to improve judicial education programs and enhance informational resources. Among other things, a new civil case-management section of the *Benchbook for U.S. District Court Judges* had been drafted.

Second, Judge Campbell noted that efforts were being made to tap into local efforts around the country to test new procedures for managing litigation. A number of case-management pilot programs were underway, and the committee was working with the Federal Judicial Center to identify and monitor them. In addition, the committee would ask chief judges around the country to keep it informed about pertinent local developments.

Judge Campbell reported that one of the initiatives that the committee was encouraging was a project to develop a standard protocol for initial discovery in employment discrimination cases. Drafted jointly by lawyers representing both plaintiffs and defendants, the protocol identifies the information that each side must exchange at the outset of an employment case, without the need for depositions or interrogatories. No objections are allowed except for attorney-client privilege. The protocol, he said, will be made available to all federal courts, and all the judges on the advisory committee will adopt it and encourage their colleagues to do the same.

Third, the advisory committee had encouraged additional empirical work, especially by the Federal Judicial Center, on how federal courts are actually handling their cases on a daily basis. One study by the Center was focusing on the early stages of a civil case, including initial scheduling orders, Rule 26(f) planning conferences, and Rule 16(b) initial pretrial conferences. The study revealed that court dockets show that the initial scheduling orders required by FED. R. CIV. P. 16(b)(1) are issued in only about half the civil cases in the district courts. But, he cautioned, docket information may not be sufficiently reliable because there are no uniform ways of recording the pertinent data, and the absence of public records may be the result of inadequate docketing practices. In addition to reviewing the docket sheets, the Center will conduct a survey of lawyers to ascertain what events occurred early in their cases.

Fourth, Judge Campbell noted that the committee had invited judges and lawyers from the Alexandria Division of the Eastern District of Virginia to discuss their experiences with that court's "rocket docket." He added that all the judges on the court share a common philosophy that cases must be handled promptly, and the bar works very well within that court culture.

Fifth, Judge Campbell said that several specific rule amendments were being considered in light of the Duke Conference, including: reducing the time to hold an initial case management conference from 120 to 60 days; eliminating the moratorium on discovery until after the Rule 26(f) conference is held; requiring parties to talk to the court about discovery problems before filing motions; amending Rule 26 to emphasize the importance of proportionality; reducing obstructive objections; limiting the presumed number of depositions in a case to five and the presumptive maximum time of a deposition from seven hours to four; reducing the presumptive number of interrogatories below the current 25; postponing contention interrogatories until later in a case; reducing service time; mandating that judges hold a scheduling conference; and emphasizing in Rule 1 that lawyers must cooperate with each other. He added that rules language was being drafted to help in considering these various ideas.

Professor Cooper added that another area for potential rulemaking was the relationship between pleading motions and discovery. Two competing proposals had been offered. One would suspend discovery until the court rules on a motion to dismiss

for failure to state a claim. The other would create a presumption in favor of ruling on a motion to dismiss only after some discovery has occurred.

Judge Campbell said that the central theme at the Duke conference had been that parties generally believe that civil litigation takes too long and costs too much. The advisory committee, he said, was contemplating conducting a "Duke II" conference, but had not yet made a decision on the matter.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee had no immediate plans to propose rule amendments dealing with pleading standards. The committee was actively reviewing the developing case law, and the Federal Judicial Center was continuing to conduct empirical research on the frequency of motions to dismiss and their disposition.

The Center's research had found a statistically significant increase in the number of motions filed, but not in the rate of granting motions. It was not possible to tell whether more cases were being dismissed out of the system because courts often grant motions to dismiss with leave to amend. A follow-up study by the Center had shown no statistically significant increase in plaintiffs excluded from the system by motions to dismiss or cases terminated by motions to dismiss, other than in financial instrument cases. On the other hand, some law professors have conducted their own research and claim that there has in fact been an increase in dismissals from the system.

Professor Cooper noted that the advisory committee had been presented with a large number of suggested changes in pleading standards and various suggestions for integrating pleading practice with discovery practice. He noted that there were many opportunities and possibilities for rule changes, but the committee was not contemplating proposing any rule for publication in the coming year.

PLEADING FORMS

Professor Cooper pointed out that FED. R. CIV. P. 84 (forms) specifies that the illustrative civil forms in the appendix "suffice" under the rules. He noted specifically that the form for pleading negligence had been approved by the Supreme Court in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 565 n.10 (2007). But lower federal courts have found a tension between Supreme Court cases and the current pleading forms, especially Form 18 (complaint for patent infringement).

The larger question, he said, was why the committee was still in the forms business. There was a clear need for illustrative forms in 1938 to show the bar how the new federal rules would work in practice. That objective, however, may no longer be important. Moreover, the committee has generally not paid a great deal of attention to

the forms over the years. Although some, such as Form 5 (notice of a lawsuit) and Form 6 (waiver of service of a summons) had been very carefully coordinated with FED. R. CIV. P. 4(d) (waiver of service), most forms do not receive much attention.

He noted that the advisory committees have adopted different approaches towards drafting forms, and the forms are used in different ways for different purposes. The civil and appellate forms, for example, are promulgated through the full Rules Enabling Act process. The official bankruptcy forms, on the other hand, follow the first several steps of that process, but are prescribed by the Judicial Conference. The criminal forms do not go through the Rules Enabling Act process at all. They are drafted by the Administrative Office with some consultation with the criminal advisory committee..

The Standing Committee, he said, had appointed an ad hoc subcommittee on forms, composed of members of the advisory committees, to consider the appropriate role of the committees in preparing forms. Among other things, the subcommittee will consider whether the current variety of approaches is appropriate or whether there is a need for more uniformity. There appears to be little support for adopting a uniform approach, as sufficient coordination may be achieved through the Standing Committee's review of the advisory committees' recommendations. The subcommittee will also consider whether it is advisable for any of the forms to continue to follow all the steps of the full Rules Enabling Act process. He added that there was no urgency in making those decisions.

CLASS ACTIONS

Judge Campbell reported that the advisory committee had recently formed a subcommittee on class actions, chaired by Judge Michael W. Mosman, and it had begun to identify issues that might possibly warrant future rulemaking.

Professor Marcus provided background on the development of Rule 23. He explained that after the important 1966 amendments to FED. R. CIV. P. 23 (class actions), the advisory committee took no action on class actions for 25 years. In 1991, the Judicial Conference, on the recommendation of its ad hoc committee on asbestos litigation, directed the committee to study whether Rule 23 should be amended to improve the disposition of mass tort cases.

In response, the committee considered a wide range of different possible changes in the rule and sought extensive input from the bench and bar. In 1996, it published a limited number of significant amendments. They would have required a court to consider whether a class claim is sufficiently mature and whether the probable relief to individual class members justifies the costs and burdens of class litigation (commonly referred to as the "just ain't worth it" test). They would also have explicitly permitted certification of settlement classes and a discretionary interlocutory appeal from certification decisions.

During the publication period, the proposed amendments to revise the certification process proved to be very controversial. Moreover, the Supreme Court issued its decision in *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), dealing with settlement certification. As a result, the committee decided to proceed only with the proposed addition of Rule 23(f) authorizing a discretionary interlocutory appeal. That provision took effect in 1998 and has proved successful.

In 2000, the committee continued working on the rule. Its additional efforts resulted in several amendments that took effect in 2003, including improving the timing of the court's certification decision, strengthening the process for reviewing proposed class-action settlements, and authorizing a second opt-out opportunity for certain class members to seek exclusion from the settlement. It also added Rule 23(g) governing the appointment of class counsel, including interim class counsel, and Rule 23(h) governing the award of attorney's fees.

Judge Campbell pointed out that the amendments pursued by the advisory committee did not address the problems of overlapping classes, recurrent efforts to certify a class through judge-shopping, or recurrent efforts to approve a settlement. Professor Cooper, he noted, had devised creative ideas on addressing those issues by rule, but they attracted too much controversy.

Judge Campbell reported that the advisory committee was considering whether Rule 23 needs to be amended to take account of several recent developments, including enactment of the Class Action Fairness Act and recent class-action case law. The committee, he said, had compiled a list of potential issues that might be addressed and was considering whether the time was ripe to give further consideration to Rule 23. On the other hand, he said, any significant change in the rule would likely be controversial, and the committee has several other, more important projects on its agenda.

INTERLOCUTORY APPEAL FROM ATTORNEY-CLIENT PRIVILEGE DECISION

Professor Cooper reported that a suggestion had been referred to the advisory committee for a rule amendment that would allow appeal by permission from an order granting or denying discovery of materials claimed to be protected by attorney-client privilege. Although referred to the civil committee, he said, the matter should also be considered by the other advisory committees.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of December 12, 2011 (Agenda Item 9).

Amendments for Final Approval

FED. R. CRIM. P. 16(a)(2)

Judge Raggi reported that the advisory committee was proposing an amendment to FED. R. CRIM. P. 16(a)(2) (discovery and inspection) that would clarify an ambiguity introduced during the 2002 restyling of the criminal rules. The change would make it clear that the restyling of the rule had made no change in the protection given to government work product.

She explained that Rule 16(a) allows a defendant to inspect papers and materials held by the government. Before restyling, Rule 16(a)(1)(C) had contained enumerated exceptions to that access, including one for the government's work product. The restyled rule, however, eliminated the exceptions.

The district courts, she said, have rejected claims that the 2002 amendments had changed the substance of the rule, using the doctrine of a "scrivener's error" to deny access by the defendant to the government's work product. As a result, there appear to be no serious practical problems and no urgency to make a correction. Nevertheless, she said, the advisory committee agreed unanimously that it was inappropriate to have an ambiguous restyled rule and decided to pursue an amendment.

The committee, she pointed out, believed that the proposed change was technical and could be made without publication. Nevertheless, it recognized that the Standing Committee needed to make that policy decision.

The committee without objection by voice vote approved the proposed technical and conforming amendment for final approval by the Judicial Conference without publication.

Information Items

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee was considering the Attorney General's recommendation to amend FED. R. CRIM. P. 6(e) (recording and disclosing grand jury proceedings). The amendment would provide procedures for authorizing disclosure of historically significant grand jury materials after a suitable period of years.

The proposal, she said, was in response to a district court decision that ordered the release of grand jury materials dealing with President Nixon's testimony before the Watergate grand jury. The district court issued the release order relying on its inherent

authority, even though FED. R. CRIM. P. 6(e) contains no provision expressly authorizing release of the materials.

She noted that the Department of Justice did not agree that the court had inherent authority to order disclosure, but it did not appeal the decision. Instead, it asked the advisory committee to amend Rule 6 to allow disclosure after a specified period of years. The proposal, she said, was being studied by a subcommittee chaired by Judge John F. Keenan.

FED. R. CRIM. P. 16

Judge Raggi reported that the advisory committee – after extensive study and debate – had decided not to pursue amendments to FED. R. CRIM. P. 16 (discovery and inspection) to codify the duty of prosecutors to turn over exculpatory information to the defendant. The committee, however, agreed to address the matter in a "best practices" section of the *Benchbook for U.S. District Court Judges.* She said that she had met with Judge Paul L. Friedman, chairman of the Federal Judicial Center's Benchbook Committee, and a draft section had been prepared.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of November 28, 2011 (Agenda Item 11). Judge Fitzwater noted that the advisory committee had no action items to present.

Information Items

SYMPOSIUM ON THE RESTYLED FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the restyled Federal Rules of Evidence had taken effect on December 1, 2011. The advisory committee, he said, had held its October 2011 meeting in Williamsburg, Virginia, at the William and Mary Marshall-Wythe College of Law. The meeting was preceded by a symposium on the restyled rules, hosted by William and Mary at the committee's request.

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater noted that the advisory committee was considering a proposal to amend Rule 801(d)(1)(B) (hearsay exemption for certain prior consistent statements). It would make prior consistent statements admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. The amendment, he said, was based on the premise that there is no meaningful distinction between substantive and rehabilitative use of prior consistent statements. The needed jury instruction, moreover, is almost impossible for jurors to understand.

He noted that there was a difference of opinion in the advisory committee on whether to pursue a change in the rule, and the members would appreciate receiving any further advice from the Standing Committee on the matter. He also noted that the committee, with the help of the Federal Judicial Center, was planning to send a questionnaire to all district judges soliciting their views on the advisability of the proposed amendment.

A member supported making the proposed change in Rule 801, but cautioned against sending out questionnaires to all judges on potential rule changes, especially where a proposed rule is not particularly significant. He said that it could set a bad precedent for other committees to send out surveys on a regular basis.

PRIVILEGES PROJECT

Judge Fitzwater reported that the advisory committee undertook a project several years ago to compile the federal common law on evidentiary privileges. The initiative, he said, was not intended to result in a codification of the evidentiary privileges or in new federal rules. Rather, it was expected to lead to a Federal Judicial Center monograph providing a restatement of the federal common law. Because of the potential sensitivity of the project, however, the committee decided not to proceed further without Standing Committee guidance and approval.

Professor Capra explained that the committee had undertaken similar types of projects in the past. For example, when Congress enacted the evidence rules in 1975, it made several changes in the rules proposed by the judiciary, but it did not change the accompanying committee notes. As a result, some of the notes are inconsistent with the text of the rules. At the committee's request, he compiled the inconsistencies and produced a Federal Judicial Center monograph under his own name. Later, the advisory committee authorized him to write a monograph on the discordance between some of the rules and the prevailing case law. Both publications were very helpful to the bar.

Professor Capra said that the law of privileges is very important, but it is not codified. The advisory committee began developing a set of privilege rules to reflect the federal common law. After initial efforts, the project, under the leadership of Professor Kenneth S. Broun, was deferred because of the committee's other priorities, such as restyling the rules. He added that the project was a low priority for the committee and would be put aside if other matters need attention. After having completed the restyling project, however, the committee now has a light pending agenda.

Members asked whether the advisory committee itself was planning to approve the work and whether the project was the best use of the committee's time and the judiciary's limited resources. Several agreed that it would be a beneficial project, but it should have a relatively low priority. Judge Kravitz added that it was fine to produce the paper, but he would not recommend giving it official advisory committee approval.

A participant recommended that the project continue because there has been recurring interest by Congress over the years in enacting privileges by law. Professor Capra added that since 1996, the advisory committee had been asked to comment on six different proposals dealing with privileges.

A member said that the Standing Committee should defer to the advisory committee's best judgment on the matter. If the advisory committee finds the project useful, especially since Congress may ask for input on privileges, it should continue.

Judge Fitzwater and Professor Capra suggested allowing Professor Broun to continue on the work on the matter and report to the advisory committee as needed at its meetings. A committee consensus developed to adopt their suggestion.

COMMITTEE JURISDICTIONAL REVIEW

The committee authorized Judge Kravitz and Professor Coquillette to complete for the committee a self-evaluation questionnaire for the Judicial Conference's Executive Committee on the need for the committee's continued existence, the scope of its jurisdiction, and its workload, composition, and operating processes.

PANEL DISCUSSION ON CLASS ACTIONS

Judge Rosenthal presided over a panel discussion on class actions with Dean Robert H. Klonoff, a member of the Advisory Committee on Civil Rules, Daniel C. Girard, Esquire, a former member of the advisory committee, and John H. Beisner, Esquire.

Judge Rosenthal noted that the discussion was in accord with the committee's tradition of spending time at its January meetings in examining long-term trends and issues that may affect the rules process in the future, but do not require immediate changes in the rules. She explained that the Class Action Fairness Act of 2005 (CAFA) had now been in place for seven years and the courts have issued several important class-action decisions in the last few years. In light of the committee's statutory obligation to monitor the continuing operation and effect of the federal rules, she said, it was an opportune time to start thinking about whether any changes in FED. R. CIV. P. 23 might be needed in the future. Class actions, she added, are a high profile area of the law and involve a great deal of money and interest.

The panel, she pointed out, consisted of an attorney who primarily represents plaintiffs and a lawyer and a law professor who normally have represented defendants. She asked them to focus on the impact of the recent cases on class-action practice and to identify any potential rule changes that might have a beneficial impact on class-action litigation.

The panel discussed a wide range of issues, but the exchange can be categorized as falling into the following four broad topics:

1. Front-loading of cases;
2. Class definition;
3. Settlement classes; and
4. Competing classes and counsel.

1. FRONT-LOADING OF CASES

In re Hydrogen Peroxide

The panel discussed the impact of *In re Hydrogen Peroxide Antitrust Litigation,* 552 F.3d 305 (3rd Cir. 2009). In the case, the Third Circuit held that the district court was obligated at the certification phase of a class action to apply a rigorous analysis of the available evidence and make findings supported by a preponderance of the evidence (rather than a mere threshold showing) that each element of Rule 23 has been met.

The district court was required to resolve all factual and legal disputes relevant to class certification, even if they overlap with the merits. Specifically, it should have resolved the battle of the experts over whether the alleged injury could be demonstrated by proof common to the class, rather than individual to its members. The decision, moreover, expressed concern that the district court's order certifying the class would place unwarranted pressure on the defendant to settle non-meritorious claims – elevating that concern, in effect, into a policy factor to consider in the certification process.

Although not all courts follow *Hydrogen Peroxide*, it was suggested that the practical impact of the case has been that plaintiffs are now confronted with an early merits-screening test. They must present their evidence at the certification stage or risk losing the case if the court denies certification. That conclusion, moreover, was seen as bolstered by several other cases, including the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541 (2011).

In *Wal-Mart,* the Supreme Court ruled that if the plaintiffs had evidence of company-wide employment discrimination, they had to present it by the time of the certification hearing. A key question, therefore, is whether the courts will now impose a higher standard of "commonality," as in *Wal-Mart*, which would necessitate more expansive discovery, or whether they will read *Wal-Mart* as limited to the unique employment setting and continue the traditional concept of commonality.

Discovery at certification

A panelist argued that *Hydrogen Peroxide* has created a much more expensive class-certification process, particularly in complex cases. He said that there is considerable uncertainty for the lawyers on how discovery is to take place after the pleading stage. Discovery may have to be conducted before certification is heard and expert witnesses may be subjected to a full *Daubert* analysis.

It was noted that expert testimony now is often a central feature at the certification stage, and extensive case law is developing on the subject, including whether *Daubert* applies at the class-certification stage. In *Wal-Mart,* the treatment of expert witnesses at certification was an important factor in the majority opinion, and *Hydrogen Peroxide* was largely a battle of the experts.

It was suggested that plaintiffs' lawyers often feel disadvantaged by the front-loading of discovery. At the same time, defendants traditionally have preferred to bifurcate discovery and avoid excessive costs by limiting discovery at certification and deferring full-blown discovery on the merits until later.

In front-loading the discovery, though, the recent decisions have raised questions about how much merits discovery is actually required up front and whether the discovery

can continue to be bifurcated if plaintiffs are now required to prove the merits of the certification issues. The discovery problems are complicated, moreover, because discovery is now largely electronic and does not lend itself very well to phasing.

A panelist said that the recent decisions have caused additional work and difficulties for the parties but have not created a crisis situation. It appears, for example, that meritorious class actions are not being killed in the cradle, as plaintiffs are afforded a fair chance to explain to the court why they believe that their class can be certified.

One panelist argued that what information both sides should put forward in class certification briefing is becoming much clearer. The information necessarily will vary from case to case, but much of the discovery is simply not relevant for certification purposes. The judges, he said, are closely managing the cases and overseeing the discovery.

The focus now for the parties, he said, is on providing useful information that a court needs to make the certification decision. Judges, for example, often ask the lawyers whether particular discovery is really needed for certification or can be deferred until later in order to meet the schedule for class certification. Some judges also indicate to the parties what sort of discovery will be needed for certification and set a time for certification briefing, leaving it up to the lawyers to figure out the details of what discovery must be exchanged for certification.

A panelist noted that *Hydrogen Peroxide* cited the advisory committee note to the 2003 amendments to Rule 23, which sets forth the concept of a "trial plan that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof." The recent cases, he said, have been sending a uniform message that the district court should instruct the parties to gather their available information and figure out what a class trial would look like. The court, thus, exercises the gateway function of deciding whether the jury will have the evidence it needs to make a decision that the entire class is entitled to relief. The key issue is whether the evidence varies so much among the individual plaintiffs that the jury is unable to decide that the defendant is liable to all members of the class.

Early practicable time for making the certification decision

In light of the additional information that now has to be gathered for certification, the panel discussed whether courts are being more flexible in applying Rule 23(c)(1)(A)'s requirement that certification occur at "an early practicable time." There appears to be little uniformity among the courts, however, as courts cite the language of the rule to support every conceivable outcome. Some make the certification decision very early in the case, while others defer it until much later. A few districts specify

categorically that a class certification motion be made within 90 days, while in others, the certification process occurs at the close of discovery.

Early dispositive motions

It was reported that the trend towards front-loading of class-action litigation has led to an increasing tendency to find ways to dispose of cases at an early stage. As a matter of good practice, therefore, a defendant who believes that a national class action cannot be certified under any circumstances should force the plaintiffs to come forward at an early stage and move for class certification.

Since CAFA, many more class-action cases are being brought in the federal courts that involve state laws, and more motions are being filed that challenge jurisdiction. Some state laws, moreover, appear to grant relief for class members in circumstances that may not meet the criteria for standing in the Article III federal courts.

It was suggested that there has been some drift away from analyzing class membership questions under the criteria specified in Rule 23(a) and (b) and framing them instead as matters of standing. A defendant, thus, moves to strike class allegations at the pleading stage, challenging the definition of the class through a dispositive motion, claiming that the class includes members who do not have standing. The trend may be a reaction to the sheer complexity of the issues in a multi-state post-CAFA class action, the high costs of conducting discovery, and a lack of clear guidance. In essence, the dispositive motions assert that there is some fundamental flaw in a particular class and, therefore, no need to go through the expense of discovery and the certification process.

In addition, there is some confusion over the ability of an individual plaintiff to act in a representative capacity. Some defendants claim that unless a plaintiff's claim is a mirror image of the claim of every other person in the class, in ways that do not necessarily relate to the presentation of common proof, the plaintiff does not have standing to act on behalf of others in a representative capacity.

2. CLASS DEFINITION

Preponderance and Commonality

It was suggested that there is uncertainty over what is meant by "preponderance" in Rule 23(b)(3). Under the current language of the rule, it was argued, plaintiffs are faced with a "winner take all" proposition. The court has to decide whether common issues of law and fact predominate. If they do, the court will certify the class. If they do not, certification will be denied.

It was noted that if common issues of law and fact do not predominate under Rule 23(b)(3), a court may still certify a class action under Rule 23(c)(4) for particular common issues. There is, however, very little guidance as to when a court may certify an issues class. Although a body of case law is developing on issues classes, it varies from circuit to circuit.

Recent cases show that the courts are sharply divided on Rule 23(c)(4). One circuit has ruled that an issues class is a housekeeping remedy, and predominance still must be shown. Another has held that predominance need not be shown, and a court only has to consider whether resolution of the issue will materially advance the case.

A panelist said that issues classes are not commonly invoked by counsel because lawyers prefer a more complete outcome to their litigation. They are not normally interested in litigating on a piece-meal basis. As a practical matter, there are too many complications in issues-class litigation, and it is generally not worth it for them. Another panelist disagreed, however, and suggested that issues classes are quite important and have been used effectively in environmental tort cases and employment cases.

It was recommended that the Advisory Committee on Civil Rules monitor the developing case law and ultimately evaluate whether to consider a rule amendment that adjusts the standards of Rule 23(c)(4) to give the courts greater guidance on when a class may be certified that has both common issues and individual issues. The panelists pointed out that courts that have wrestled with the rule have said that the matter is unclear. It was also noted that the ALI had spent a great deal of time on issues classes as part of its recent restatement project. If properly defined, it was argued, an amended federal rule on issues classes could be beneficial to the mass adjudication of cases.

It was pointed out that there is a mechanism for dealing with predominance issues arising from state-law variations, especially in post-CAFA cases involving consumer claims arising under the laws of multiple states. In these cases, defendants generally argue that the claims have to be considered individually under different state consumer protection laws. Although a national class action may still be maintained, as in the *De Beers* litigation in the Third Circuit, a case may effectively be divided into sub-classes on a state-by-state basis for litigation purposes. In the settlement context, the analysis of state law variations historically was an issue of "manageability." Defense counsel would argue that the court cannot litigate the case on a manageable basis because the jury would have to be charged on the law of 50 states.

It was pointed out that one factor that has increased the number of class-action cases in the federal courts is the strategy of plaintiffs – reinforced by a general skepticism of federal courts towards nationwide classes – to break down a class into several subclasses, such as a separate class action for each state. That tendency will continue to occur in employment cases, as classes are broken down into smaller class actions,

especially after *Wal-Mart v. Dukes*. The trend will result in more class actions, and multiple class actions on the same subject. The Judicial Panel on Multidistrict Litigation will routinely draw the federal cases together to conduct the discovery on a common basis. In the end, though, separate certification determinations will have to be made in each class action.

In the past, commonality was not an important issue and was often stipulated. The real issue, rather, was predominance. But the Supreme Court has now said that the common issue has to be central to the validity of each of the claims. It has to be a central, dispositive issue to class certification. Commonality, moreover, is used in other rules, such as Rule 20 (joinder), which contains the exact same language. So one issue for the future will be whether *Wal-Mart* will have an impact on joinder.

Rule 23(b)(2) classes

It was suggested that *Wal-Mart v. Dukes* represents a potential sea change, not only regarding "commonality" under Rule 23(a), but also for classes under Rule 23(b)(2). A panelist said that the most remarkable aspect of the *Wal-Mart* decision, and potentially the most important aspect, was the section dealing with Rule 23(b)(2). The Court's statements that back pay could not be brought as part of a (b)(2) action because it was not "incidental" were a major departure from the decisions of the courts of appeals. Moreover, the Supreme Court suggested that there may be a due process problem with any monetary claim in a (b)(2) action, even a claim for statutory damages or incidental damages.

Accordingly, many difficult questions arise as to the scope of Rule 23(b)(2) after *Wal-Mart*, and there will be a great deal of analysis of the decision and the ensuing case law. Questions will arise, for example, on whether some problems can be dealt with by allowing opt-out classes under (b)(2) or hybrid classes under (b)(2) and (b)(3).

Arbitration Clause Cases

It was argued that *AT&T Mobility v. Concepcion,* 131 S. Ct. 1740 (2011), may have the most important impact of any of the recent class-action cases, for it has been seen as effectively eviscerating many small claims cases. Although the Supreme Court noted in *Amchem* (which dealt with mass torts) that class actions are really about small claims cases, rather than mass torts, it later dealt a virtual death knell to many small claims cases in *Concepcion.*

It was suggested that one of the issues that plaintiffs thought was left open in *Concepcion* was whether a "no class-arbitration" clause may be invalidated if the plaintiffs can show that it is impossible to vindicate their rights other than through class

arbitration. One court of appeals ruled recently, however, that the argument could not survive after *Concepcion*.

3. SETTLEMENT CLASSES

The need for a Rule 23 amendment on settlement classes

A panelist said that many of the court decisions since *Amchem Products, Inc. v. Windsor,* 521 U.S. 591 (1997), have wrestled with what must be shown in the context of certifying a settlement class. Although *Amchem* said that the district court does not have to worry about "manageability" in a settlement case under Rule 23(b)(3), the class must still meet the tests of preponderance, commonality, and adequacy, and the case has to be treated as if it were going to trial. In the Third Circuit's *De Beers* litigation, for example, the court's opinion noted that "(e)ver since the Supreme Court's landmark decisions in *Amchem Products Inc. v. Windsor,* 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999), one of the most vexing questions in modern class action practice has been the proper treatment of settlement classes, especially in cases national in scope that may also implicate state law."

Judge Kravitz asked the panel whether FED. R. CIV. P. 23 should be amended to deal specifically with settlement classes.

The panelists agreed that the absence of a settlement-class provision has created problems and has tended to push settlements, especially in mass-tort cases, outside the court system. Since *Amchem*, the parties in these cases have had to construct work-around solutions to achieve settlements, often a settlement that lies outside judicial supervision under Rule 23(e).

The absence of a workable settlement-class device is seen as a major problem in mass torts because there is no supervision of the parties' actions or the attorney's fees. Defendants, moreover, are concerned about engaging in settlements outside the courts because they are left to their own devices. They must hope that the terms of the settlement stick because they have not been sanctioned by a court.

A panelist summarized three specific impacts of *Amchem.* First, he said, more cases are now proceeding to non-class settlements, where there are no criteria and no supervision. Second, several cases have struck down non-judicial settlements, forcing the parties to go back to the court and try cases that all the parties wanted to settle. Third, the requirements for a litigation class place defendants in an awkward position. If they claim under *Amchem* that the case is suitable for class certification and trial, and then fail to settle, they may have stipulated to something that will harm them for litigation purposes. The internal problem for the defendants is what they must do to support and

enforce a settlement after they have asserted to the court that the case is suitable for certification as a litigation class.

A panelist added that the absence of a clearly defined standard for certification of a settlement class is exploited by tactical, professional objectors. In essence, they want a financial reward in return for dropping their objections. Greater clarity in the rule, he said, would not solve the problem of non-meritorious objections entirely, but it would take an argument away from nuisance objectors.

Approval of Settlements

Judge Rosenthal reported that the rules committees retreated in the 1990s from the decision to seek approval of a separate provision for settlement classes because *Amchem* and *Ortiz* were pending in the Supreme Court. But there was also strong and negative reaction to the committee's published rule, especially from law professors who argued that it would unleash the forces of collusion and lead to rampant reverse auctions.

At the same time, defendants feared that loosening the standards for certification of settlement classes would bleed over inevitably to loosen the standards for litigation class actions. They warned that the proposal would invite more class actions because it would be easier for potential plaintiffs to obtain settlement awards. In light of these concerns, she said, there was no consensus for the committee to proceed with the proposal.

She added that the 2003 amendments to Rule 23 were designed to put rigor into the evaluation of a settlement's fairness, reasonableness and adequacy and to strengthen the oversight of attorney's fees. The amendments, though, deliberately did not address whether the standards for certifying a settlement class should be different from those for certifying a trial class. She asked whether conditions have changed since 2003 and whether the absence of a settlement class certification standard in Rule 23, coupled with other concerns raised by the panelists, are sufficiently acute to warrant pursuing rule amendments.

A panelist explained that effective brakes are currently in place to deal with abusive settlements. Most class actions, moreover, are litigated in a relatively small number of district courts. The judges are sophisticated and experienced and know how to deal with issues of fairness and compensation.

A panelist urged pursuing a distinct rule addressing settlement classes. He noted that the current requirements for certification are clear, perhaps too clear, and are inconsistent with the realities of the settlement process. The defendants, in reality, are waiving their defenses and do not have a trial plan because their objective is a settlement without a trial. Nevertheless, *Amchem* requires them to go through a certification process

that does not make a lot of sense for them. Another panelist did not see a pressing need for a settlement-class rule in anti-trust, securities, and financial services cases, but agreed that it could be helpful in mass-tort cases.

A panelist argued that the primary focus of a proposed settlement-class rule should not be on the class-certification process. He pointed out that settlements in mass-tort cases do not reach the stage of court approval under Rule 23(e)(2) because the plaintiffs cannot meet the certification requirements of Rule 23(a) and (b).

Rather, an amended rule should build on Rule 23(e)(2), which specifies that a settlement must be "fair, reasonable, and adequate." The rule would alter *AmChem's* statement that Rule 23(e) is not a substitute for Rule 23(a) and (b). Instead, the inquiry in a settlement-class case would proceed directly to Rule 23(e), essentially skipping over Rule 23(a) and (b).

The amendment could augment the court's inquiry under Rule 23(e)(2) by requiring it to examine the fairness of compensation among the different members of the class and determine whether variations in individual entitlement are adequately reflected in the proposed settlement. Injuries of class members, for example, may well range from mere fear of injury to permanent disability. It was pointed out that most mass-tort settlements do in fact consider those distinctions and typically provide a grid of different compensation levels for different levels of injury. They also establish some sort of due process arrangements for making the awards.

The recent ALI principles of aggregate litigation deal with certification of a settlement class and provide that a settlement class does not have to meet the standards for a litigation class. They specify the various fairness factors that must be applied to settlements and address second opt-outs and objectors. It was recommended that the civil advisory rules committee review the ALI deliberations to see whether any of the proposals it considered would be suitable for a federal rule change.

It was reported that the ALI also had taken a hard look at cy-près cases. Its principles of aggregate litigation create a presumption that undistributed money is given to the class. If there is a cy-près issue, it is normally because it is difficult to distribute the money, and a recipient or recipients must be selected that mirrors the purpose of the class.

Although just one part of the larger ALI project to address settlement classes, the cy-près portion of the new principles has been cited more often than all other provisions of the principles combined. It has recently been adopted as the law of a federal circuit and cited by two other circuits. A panelist recommended that if the advisory committee decides to proceed with amendments to address settlement classes, cy-près should be an important component of them.

Role of the state attorneys general in class settlements

It was pointed out that the attorneys general of the states review class-action settlements carefully and play a useful and appropriate role. The attorneys general have a sharing arrangement and work well together in reviewing settlements and taking action where appropriate.

Under CAFA a defendant has to give notice of a settlement to the attorneys general of the affected states within 90 days. After the notice, the lawyers may receive calls from a group of attorneys general inquiring into the facts and details of the case and the settlement. They are also often asked to present supporting information to justify their fees. In addition, when a truly abusive settlement is announced, law professors, concerned lawyers who may have had competing cases, as well as the attorneys general, normally come forward to object.

It was agreed that the impact of the efforts of the attorneys general has been to raise the bar generally for negotiating and presenting settlements. Courts, moreover, are very conscious in overseeing how much money is distributed to the class, how soon it is distributed, and how much the lawyers receive in fees.

In light of the effectiveness of the review of settlements by the attorneys general, the panel was asked whether there is still a need for Rule 23(e)'s requirement that the presiding judge review and approve all settlements. The panelists replied that judicial supervision is still appropriate and pointed out that the attorneys general do not intervene in every case.

4. Competing Classes and Counsel

Duplication of efforts

A panelist pointed to the problems arising when many different counsel file similar class actions, as often occurs under the federal anti-trust laws. Historically, the cases have been coordinated by having the Multidistrict Litigation Panel sweep them into a single proceeding for pretrial purposes. Recently, though, lawyers for both plaintiffs and defendants have been invoking the "first-filed" rule. Thus, if the defendants have no objection to the location of the first-filed case, their lawyers file motions to stay or dismiss all other class actions, and the matter never reaches the MDL panel. Likewise, plaintiffs who file the first case defend their turf by filing motions to stay or dismiss all later cases.

It was reported that law firms filing class-action cases have a significant problem in controlling the work of other, competing lawyers. When a law firm representing a class of plaintiffs reaches the point of resolving the case with the defendants, it is often

confronted with other lawyers seeking fees for having performed unnecessary or counter-productive services. The lawyers were not asked to perform the work for the class, and their intervention may in fact be an impediment to resolution of the case. Defendants should not have to pay for the unnecessary services, nor should fees be diverted from the lawyers who actually handled the important work on the case.

It was pointed out that the Southern District of New York has developed a body of case law specifying that before class counsel is appointed, services that duplicate the work rendered by other counsel are not compensable. And after the appointment of counsel, only services performed at the direction of lead counsel are compensable. That process was said to be working effectively and might be considered for inclusion in an amended rule.

Appointment of Counsel

It was reported that Rule 23(g), part of the 2003 rule amendments, has worked very well and is beneficial for practitioners. It allows the court to appoint interim class counsel after a case has been filed to represent the class up through certification. Then at certification the court decides whom to appoint as class counsel. There is some question, though, as to whether the rule applies when there is just one case.

A panelist said that Rule 23(g) should be applied early and often, for it is essential for the courts to control the appointment of counsel and the payment of attorney fees. In many CAFA cases, for example, a lawyer must negotiate with other lawyers who have filed duplicative cases in order to reach agreement on the hard policy decisions on how best to frame the case to achieve court certification. It leads to a good deal of tactical behavior among counsel that has little to do with the presentation of the case for certification. To make those hard policy decisions, he said, it is important to have only one lead lawyer, or maybe two lawyers, in charge of the case. Better outcomes are reached when a court asserts strong control at the front end of a case, and Rule 23(g) is the perfect vehicle to achieve that control.

A panelist said that when there is an MDL proceeding, which brings many class actions together, some courts forgo Rule 23(g) and rely on their inherent authority and do one of two things. On the one hand, they may instruct the counsel of all the many overlapping cases that they should get together and file a consolidated complaint that is, in effect, an amalgam of all the actions. Usually, as a part of that process, a management team emerges to take responsibility for the new complaint, which essentially initiates a new action. On the other hand, where there are many single-state actions in the MDL proceeding, the cases will not be combined because each state wants to stand on its own. Typically a liaison counsel is appointed by the court to bring all the counsel together. He added that counsel are not usually brought together for fee-sharing purposes, although they generally have made some arrangements on their own.

Federal-State coordination

Judge Rosenthal noted that CAFA has increased the number of federal class actions and affected the nature and extent of federal-state issues. She asked whether the pre-CAFA problems have abated and whether Rule 23 is adequate in dealing with current federal-state coordination issues.

It was agreed that CAFA is working much as its proponents intended. Cases with interstate implications are migrating to the federal courts, while those involving local controversies remain in the state courts.

A panelist said that the remaining coordination problems arise mostly in one state. When there is a multi-state controversy after CAFA, most class actions will be filed in the federal courts. But if a group of plaintiffs live in the same state as the defendant, their class action will be heard in the state courts. He said that it is common to have a national MDL proceeding that consolidates class actions proceedings for all the federal cases, except those in one state. In that state, there will be a parallel class action in the state courts for local residents. Despite the separate proceedings, coordination normally occurs among counsel and the courts.

The panelists noted that the federal MDL judges have become very proficient in handling MDL proceedings and in reaching out to work cooperatively with the state courts in mass-tort cases. They added that state court judges have their own difficult issues to resolve, and coordination with their federal colleagues has been very beneficial.

CONCLUSIONS

Judge Rosenthal summarized the various concerns voiced by the panelists and asked each to pick the single most promising potential rule amendment that would have a beneficial impact on class-action practice.

Front-loading of cases

One panelist cited the front-loading of cases after *Hydrogen Peroxide* as an important issue that needs to be addressed. He suggested drafting a rule to give the parties and the courts more guidance on exactly what information a plaintiff must produce for class certification. The parties, he said, are uncertain about the impact of all the recent cases. They want an early ruling on class certification, but they also want to avoid discovery costs and prefer to continue with some form of bifurcated discovery.

Class definition

Another panelist suggested a rule that revisits the issue of predominance and acknowledges that most cases appropriate for class adjudication in fact have individual issues. To pretend that such is not the case, he said, results in a waste of time and much unproductive behavior. There is, moreover, a difficult intersection among several class-definition issues, including the current ambiguity over issues classes under Rule 23(c)(4), the use of (b)(2)-(b)(3) hybrid classes, certification of settlement-only classes, and handling (b)(3) classes that have some individual issues with bifurcated liability and damages.

Rather than having an "all or nothing" approach to certification based on whether common issues predominate or not, the committee might prepare a rule that gives the courts direction and discretion in class-actions that have individual issues. As a starting point, he suggested examining the case law on issues-classes under Rule 23(c)(4). A wide variety of cases, he said, can be adjudicated very effectively on a class basis. But many of the most important – those where group adjudication will confer the most social benefit – will likely have individual issues as well as common issues. He also suggested developing a rule that is flexible enough to accommodate a lower bar for certification of classes for settlement purposes.

Settlement classes

Another panelist's choice was for a distinct settlement-class rule. It might be similar to the advisory committee's proposed amendments to Rule 23(b)(4) in the 1990s. Regardless of the details of the rule, though, it should contain a specific provision that creates a clear basis for a district court to approve and supervise mass-tort settlements under Rule 23.

NEXT MEETING

The committee will hold its next meeting on Monday and Tuesday, June 11 and 12, 2012, in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 4A

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Professor Gibson’s memo for Item 4A will be distributed separately.

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TAB 4B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: AMENDMENT TO RULE 3002(a) TO REQUIRE SECURED CREDITORS TO FILE PROOFS OF CLAIM

DATE: FEBRUARY 28, 2012

Pending before the Advisory Committee is a suggestion (11-BK-B) by Judge A. Benjamin Goldgar (Bankr. N.D. Ill.) to amend the Bankruptcy Rules to require secured creditors to file proofs of claim in order to have allowed claims. The suggestion was assigned to the Consumer Subcommittee, and it reached the preliminary conclusion that, because the omission of secured creditors from Rule 3002(a) has the greatest impact in chapter 13 cases, the suggestion should be coordinated with the project to draft a chapter 13 form plan. The Subcommittee also raised the possibility that an amendment requiring secured creditors to file proofs of claim could have unintended consequences in cases under other chapters of the Code. At the Advisory Committee's fall meeting, members requested that the Subcommittee give further consideration to the potential impact the suggested rule change would have beyond chapter 13 cases. The Advisory Committee also agreed that any proposal to amend Rule 3002(a) should be coordinated with the working group developing the chapter 13 form plan.

The Subcommittee discussed the suggestion during conference calls on December 21, 2011, and February 1, 2012. During those discussions and in subsequent communications, the Subcommittee weighed a number of considerations. First, the Subcommittee considered whether requiring secured creditors to file proofs of claim would have negative effects in non-chapter 13 cases. Second, the Subcommittee considered whether some light could be shed on the matter

from the records of the Advisory Committee's decision not to adopt a similar amendment to Rule 3002(a) twenty years ago. Third, the Subcommittee considered the views of the chapter 13 form plan working group on whether an amendment to Rule 3002(a) should be limited to chapter 13 cases. Fourth, the Subcommittee solicited the views of the Business Subcommittee on the possible impact of a requirement that secured creditors file proofs of claim beyond chapter 13 cases.

Based on its deliberations, the Subcommittee favors amending Rule 3002(a) to require secured creditors to file proofs of claim generally. Nevertheless, the Subcommittee recognizes that the issue is not free from doubt, and that persuasive arguments can be made in favor of a narrower approach limiting the requirement to chapter 13 cases. Accordingly, the Subcommittee presents both options for the Advisory Committee's consideration.

This memorandum gives a brief background on Judge Goldgar's suggestion and summarizes the various views expressed on the suggestion by members of the Subcommittee, the chapter 13 working group, and the Business Subcommittee. Alternative versions of an amended Rule 3002(a) are presented at the conclusion.

Judge Goldgar's Suggestion

Rule 3002(a) currently provides that "[a]n unsecured creditor or an equity security holder must file a proof of claim or interest for the claim or interest to be allowed . . . ." The omission of secured creditors from Rule 3002(a) has led to disagreement among courts on two related questions: whether a secured creditor must file a proof of claim to participate in a chapter 13 plan, and whether a nongovernmental secured creditor must file a proof of claim within 90 days of the meeting of creditors, as required by Rule 3002(c). Judge Goldgar suggested requiring that

a proof of claim be filed in order for a secured creditor to have an allowed secured claim. His proposal would amend Rule 3002(a) to say so explicitly by removing the rule's current limitation to unsecured creditors. A consequence of requiring secured creditors to file proofs of claim would be to permit disallowance of an untimely secured claim under Rule 3002(c).

The Consumer Subcommittee's Consideration of the Suggestion

Two issues were initially considered by the Subcommittee. First, the Subcommittee discussed possible consequences of requiring all secured creditors to file proofs of claim. Second, the Subcommittee reviewed records relating to a similar proposal that the Advisory Committee declined to adopt twenty years. This review was undertaken in the hope that those records would provide some insight on the advisability of moving forward with an amendment to Rule 3002(a) and the scope of any amendment.

1. The Effect of Amending Rule 3002(a) to Apply to All Secured Creditors

The Subcommittee concluded that amending Rule 3002(a) generally to require a secured creditor to file a proof of claim would not have a significant impact outside chapter 13 cases, with the exception of chapter 12 cases. As in chapter 13 cases, courts in chapter 12 cases have also faced the question whether a secured creditor must file a proof of claim in order to have an allowed claim that is entitled to receive distributions under the debtor's plan. *See In re Boucek*, 280 B.R. 533, 537 (Bankr. D. Kan. 2002). In chapter 7 cases, a secured creditor would retain the right to look to its security for payment of its debt, because its lien survives bankruptcy. *Dewsnup v. Timm*, 502 U.S. 410, 417-18 (1992). In chapter 11 cases, secured creditors routinely file claims (or have their claims listed in the schedules filed by the debtor) as provided by Rule

3003. In the Subcommittee's view, the potential effects of an amendment to Rule 3002(a) would be limited so long as the amendment makes clear that (i) a secured creditor's lien survives bankruptcy and (ii) filing a claim is required solely for the purpose of establishing an allowed secured claim.

Nevertheless, the Subcommittee recognized that disputes about the effect of a secured creditor's failure to file a proof of claim or to do so in a timely manner are litigated most frequently in chapter 13 cases. The issue does not appear to be a source of confusion in chapter 7 or chapter 11 cases. Tailoring an amendment for chapter 13 cases would be responsive to the area most in need of clarification. One downside risk to an amendment tailored to chapter 13 cases, however, is the possible negative implication that a secured creditor does not need to file a proof of claim in order to have an allowed claim in cases under other chapters.

2. *The Previous Proposal to Amend Rule 3002(a) to Require Secured Creditors to File Proofs of Claim*

The Subcommittee reviewed the records of the Advisory Committee's past consideration of a similar proposal to change Rule 3002. In 1991, the Chapter 13 Subcommittee of the Advisory Committee proposed amending Rule 3002(a) "to clarify that secured creditors must file proofs of claims before the bar date in order to have 'allowed claims' . . . ." Notably, the Reporter to the Advisory Committee prepared a memorandum concluding that it would be inconsistent with the Code to require a secured creditor to file a proof of claim in order to retain its lien, but that it would not be inconsistent with the Code to require a secured creditor to file a proof of claim in order to have an allowed claim. The Reporter reasoned that excluding secured creditors from Rule 3002(a) contributed to the mistaken impression that only unsecured creditors

must file a proof of claim in order to have allowed claims. Then, as now, chapter 13 cases generated most of the confusion prompting the proposal, but the amendment was not limited to chapter 13 cases. The Advisory Committee published a preliminary draft of the proposed Rule in August 1991.

The proposal failed, however, due to division in the Advisory Committee and opposition from public comments. The principal bases of opposition were that a filing requirement (i) would be essentially meaningless (because failure to file alone would not affect the secured creditor's lien); (ii) would mislead less sophisticated secured creditors by suggesting that their lien would be voided by a failure to file; and (iii) would unfairly discriminate against governmental units by coercing them to waive sovereign immunity by filing proofs of claim as secured creditors. One public comment also opposed the amendment on the ground that it might prejudice oversecured creditors in cases in which the trustee administers and sells collateral for the benefit of the estate. This comment argued that an oversecured creditor's failure to file a proof of claim could be invoked to deny recovery from proceeds from the sale of collateral to which its lien attached. Ultimately, the Advisory Committee reported to the Standing Committee in May 1992 that the proposed amendment to Rule 3002 proved "controversial" and was withdrawn for further consideration.

The Subcommittee did not find these concerns to be sufficiently serious to abandon the proposal to amend Rule 3002(a). The Subcommittee viewed the filing requirement as beneficial, and not an empty gesture, because it would make clear that a proof of claim must be filed for a secured creditor to have an allowed claim. The Subcommittee viewed the concern about misleading the unsophisticated secured creditor as one that could be answered by the inclusion of language restating what the Code provides—that is, a secured creditor does not lose its lien

solely due to the failure to file a proof of claim. *See* § 506(d). The Subcommittee did not believe the concern about oversecured creditors would present a common problem, because the Code already gives an oversecured creditor strong incentives to file a proof of claim. *See, e.g.*, Code § 506(b) (permitting an oversecured creditor with an allowed claim to recover interest and attorney's fees). The Subcommittee therefore agreed that language should be added in the text of the amended rule itself reiterating that the failure to file does not, by itself, void a secured creditor's lien.

The concern about the treatment of governmental units arose before shifts in the law of sovereign immunity in bankruptcy after the 1991 proposal to amend Rule 3002(a). Before 1994, the Code tied waiver of a governmental unit's sovereign immunity to its filing of a proof of claim.[1] In 1994, however, Congress amended § 106 in its entirety to overrule two Supreme Court decisions narrowly construing federal and state governments' waiver of sovereign immunity in bankruptcy. *See United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96 (1989). Amended § 106 does not tie the loss of a governmental unit's sovereign immunity solely to the filing of a proof of claim. Section 106(a) now provides an outright abrogation of sovereign immunity with respect to a broad range of enumerated Code provisions, regardless of the governmental unit's decision

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[1] Before 1994, § 106 read in pertinent part:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

not to file a proof of claim.[2] Although courts and commentators had expressed doubts about the validity of amended § 106, at least with respect to state entities, the Supreme Court upheld the constitutionality of the provision. *See Central Virginia Community College v. Katz*, 546 U.S. 356 (2006) (finding that § 106(a) validly abrogated state entities' Eleventh Amendment immunity in preferential transfer action).

Nevertheless, § 106(b) retains the prior provision that treats the filing of a proof of claim as a waiver of sovereign immunity. This may work in certain cases to expand § 106(a)'s already broad abrogation of sovereign immunity whenever a governmental unit files a proof of claim. Thus, the concern that governmental units will be unfairly coerced into waiving sovereign immunity is not as stark as it was in 1991, but it is not completely academic.

Views of Other Groups

The Subcommittee solicited the views of the working group tasked with drafting a chapter 13 form plan as well as the views of the Business Subcommittee. Each group was asked whether an amendment to Rule 3002(a) should be limited to chapter 13 cases. A draft version of an amended rule limited to chapter 13 cases and one applicable generally were submitted for consideration by each group.

1. Views of the Chapter 13 Form Plan Working Group

The chapter 13 form plan working group reached a general consensus that an amendment to Rule 3002(a) should require secured creditors generally to file proofs of claim. That view

[2] The enumerated Code provisions are §§ 105, 106, 107, 108, 303, 346, 362, 363, 364, 365, 366, 502, 503, 505, 506, 510, 522, 523, 524, 525, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 722, 724, 726, 728, 744, 749, 764, 901, 922, 926, 928, 929, 944, 1107, 1141, 1142, 1143, 1146, 1201, 1203, 1205, 1206, 1227, 1231, 1301, 1303, 1305, and 1327.

rested principally on two considerations. First and foremost, although the omission of secured creditors from current Rule 3002(a) has generated the most concern in chapter 13 cases, applying the requirement beyond chapter 13 would have no apparent negative consequences. Second, the prudential reason for limiting an amendment solely to chapter 13 cases—the fear of causing unforeseen, unwanted disruptions in non-chapter 13 cases—was outweighed by the possibility of unwanted confusion in a chapter 13-specific rule. A chapter-13 specific rule could suggest that, in non-chapter 13 cases, a secured creditor does not need to file a proof of claim in order to have an allowed claim.

2. Views of the Business Subcommittee

Some members of the Business Subcommittee expressed concerns about the broader version of the amendment. The first concern was the possibility of unintended consequences. On this view, a more narrowly defined amendment to Rule 3002(a) would be preferable because the genesis of the suggestion is case law on chapter 13 cases and no broader problem was identified. Relatedly, the possibility that a broader amendment will have unwanted consequences has not been answered with sufficient confidence.

The second concern relates to governmental units. Because § 106(b) of the Code expands the waiver of sovereign immunity for a governmental unit that chooses to file a proof of claim—even beyond the abrogation of immunity provided for enumerated Code provisions in § 106(a)—requiring the filing of a proof of claim generally may be coercive for governmental units. If penalties of some sort attach to a failure to file a secured claim, they would impose an unfair condition on a governmental unit's decision not to file a secured claim if it wished to avoid a broader waiver of sovereign immunity.

Both of these concerns were tied to a prudential concern about the scope of the rule change. Because the principal goal of the proposed amendment would be to clarify the law in chapter 13 consumer cases, it would be sensible not to invite possible critical comment or opposition with an amendment that covered broader territory, where the benefits of clarifying the law were not as obvious.

Two Versions of Amended Rule 3002(a)

In light of the divergent views on the matter, the Subcommittee includes two possible versions of an amended Rule 3002(a) for the Advisory Committee's consideration.

1. Amendment Not Limited to Chapter 13 Cases

This version of amended Rule 3002(a) adds a new provision requiring that secured creditors must file proofs of claim for the claim to be allowed, and stating that the failure to file a secured claim would not be sufficient reason alone to void the creditor's lien. Although cautionary language to that effect could be placed in an Advisory Committee note, the Subcommittee believed it would be preferable to include the cautionary language in the text of the rule itself. The amendment excludes Rules 1019(3) (concerning claims filed before conversion of a case to chapter 7), 3003 (providing for filing of claims in chapter 9 and chapter 11 cases), 3004 (providing that a debtor or trustee may file a proof of claim if the creditor does not do so in a timely manner), and 3005 (providing that a guarantor, surety, indorser, or codebtor may file a proof of claim if the creditor does not do so in a timely manner).

RULE 3002. FILING PROOF OF CLAIM OR INTEREST

1 (a) NECESSITY FOR FILING.

2 (1) *Unsecured Creditors and Equity Security Holders.* An

3 unsecured creditor or an equity security holder must file a proof of claim

4 or interest for the claim or interest to be allowed, except as provided in

5 Rules 1019(3), 3003, 3004, and 3005.

6 (2) *Secured Creditors.* A secured creditor must file a proof of

7 claim for the claim to be allowed, except as provided in Rules 1019(3),

8 3003, 3004, and 3005. A lien that secures a claim against the debtor is not

9 void due only to the failure of any entity to file a proof of claim.

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2. *Amendment Covering Only Chapter 13 Cases*

This is a version of the amendment limited to chapter 13 cases. In addition to the limitation to chapter 13 cases, this version of the amendment does not exclude Rules 1019(3) or 3003, which are inapplicable in chapter 13 cases.

RULE 3002. FILING PROOF OF CLAIM OR INTEREST

1 (a) NECESSITY FOR FILING.

2 (1) *Unsecured Creditors And Equity Security Holders.* An

3 unsecured creditor or an equity security holder must file a proof of claim

4 or interest for the claim or interest to be allowed, except as provided in

5 Rules 1019(3), 3003, 3004, and 3005.

6 (2) *Secured Creditors*. A secured creditor in a chapter 13

7 individual's debt adjustment case must file a proof of claim for the claim

8 to be allowed, except as provided in Rules 3004, and 3005. A lien that

9 secures a claim against the debtor is not void due only to the failure of any

10 entity to file a proof of claim.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: SUGGESTED AMENDMENT TO RULE 3002 TO PROVIDE A SPECIAL DEADLINE FOR FILING DEFICIENCY CLAIMS

DATE: FEBRUARY 27, 2012

Debra L. Miller, a standing chapter 13 trustee (N.D. Ind.), suggests amending the Bankruptcy Rules to limit the time in which a secured creditor may pursue a deficiency claim after the sale of collateral. She calls attention to situations in which an undersecured creditor waits until the end of a chapter 13 case to pursue a deficiency claim, long after the sale of the underlying collateral. As a result, the chapter 13 trustee must recover a portion of the distribution already paid to unsecured creditors in order to pay the secured creditor a pro rata share on its deficiency claim. Cases involving undersecured car loans appear to be the genesis of this suggestion. Ms. Miller suggests giving a secured creditor 60 days from the sale of the collateral or the expiration of the claims bar date, whichever is later, to pursue a deficiency claim. Failure to do so in a timely manner would result in disallowance of the deficiency claim. She also suggests amending Rule 3004 to permit a debtor to file a deficiency claim on the creditor's behalf. The Advisory Committee assigned the suggestion to the Subcommittee for further consideration. The Subcommittee discussed the suggestion during its December 21, 2011, conference call.

The Subcommittee recommends that no further action be taken on the suggestion. The treatment of an undersecured creditor's deficiency claim in a chapter 13 case has caused a good deal of confusion in the courts. The scenario described in this suggestion, however, involves a

subset of cases in which there does not appear to be significant disagreement. If a secured creditor files a proof of claim, and the proof of claim gives timely notice of the secured creditor's intent to hold the estate accountable for any unsecured portion of the claim that may occur when the collateral is sold after confirmation, courts will allow a later-filed deficiency claim as an amendment to the proof of claim. The specific concern expressed in the suggestion—undue delay in seeking a deficiency after sale of collateral—is one that courts appear adequately equipped to address by application of the equitable factors weighed when deciding whether to permit the deficiency claim to relate back to the earlier proof of claim. One equitable factor is whether there has been undue delay in asserting the deficiency. The lack of cases discussing the specific concern raised by the suggestion indicates that this is not a widespread problem or that courts routinely address it under current case law.

The Treatment of Deficiency Claims

Courts have disagreed about the treatment of an undersecured creditor's late-filed deficiency claim in a chapter 13 case. Two situations seem to generate many of the reported cases. The first arises when a creditor files a proof of claim asserting its secured status and later seeks to file an unsecured claim after the bar date in order to recover a deficiency resulting from the sale of collateral.[1] The second situation involves an attempt by a creditor with an

[1] Some courts have allowed the late-filed deficiency claim as an amendment on the theory that it relates back to the original proof of claim, while most others have taken the view that relation back is inapplicable when the nature or characterization of the claim is being altered. *Compare In re Breaux*, 410 B.R. 236 (Bankr. W.D. La. 2009) (allowing a late-filed deficiency claim on a relation-back theory), *with In re George*, 426 B.R. 895 (Bankr. M.D. Fla. 2010) (disallowing a deficiency claim as untimely after rejecting a relation-back theory), and *In re McBride*, 337 B.R. 451 (Bankr. N.D.N.Y. 2006) (same). Similar arguments have been pressed under § 502(j) of the Code and Bankruptcy Rule 3008, which permit a bankruptcy court to reconsider the allowance or disallowance of a claim "for cause" based on the equities. *In re George*, 426 B.R. at 899.

undersecured 910-day-vehicle claim to pursue a deficiency when the debtor seeks to surrender the car in satisfaction of the debt.[2]

There is not the same disagreement about the allowance of a deficiency claim when the secured creditor gives sufficient notice in an original proof of claim of its intent to seek a deficiency in the event the collateral is later sold. *See, e.g.*, *In re Winters*, 380 B.R. 855 (Bankr. M.D. Fla. 2007) (allowing a deficiency claim after the sale of collateral because the creditor expressly reserved the right to recover any deficiency in the event that its collateral was repossessed and sold at a loss). Courts appear to treat the deficiency claim as an amendment that relates back to the earlier proof of claim. There is not much discussion in the case law about how long a creditor may delay before pursuing a deficiency claim.

The reason for the absence of case law appears to be that there are already adequate tools to prevent a creditor's filing of a deficiency claim long after the sale of the collateral. The Bankruptcy Rules do not speak directly to the issue. Nevertheless, if an undersecured creditor files a timely proof of claim giving adequate notice of the intent to file a deficiency claim at a later date in the event that its collateral is sold at a loss, courts look to whether the claimant intentionally or negligently delayed in filing the amendment and whether other equitable considerations justify amendment. *See In re Matthews*, 313 B.R. 489, 494-95 (Bankr. M.D. Fla. 2004) (weighing five equitable factors in deciding whether to permit a creditor to assert an otherwise untimely deficiency claim). If a creditor preserves the right to seek a deficiency upon sale of the collateral but then waits years after that sale to pursue the deficiency claim, that circumstance alone would seem to justify disallowance of the deficiency claim.

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[2] In these cases, the question is whether a chapter 13 debtor's surrender of the automobile bars the car lender from pursuing a deficiency claim under the hanging paragraph of 11 U.S.C. § 1325(a). *See In re Adams*, 403 B.R. 387, 390-91 (Bankr. E.D. La. 2009) (collecting cases).

Perhaps a court could find that failing to allow the deficiency claim, even if the undersecured creditor delayed pursuing it, would give unsecured creditors a windfall. *See id.* (including the possibility of a windfall to unsecured creditors as a reason for permitting allowance of an untimely deficiency claim). But that is only one factor to be considered, and it seems unlikely that courts would systematically find that the possibility of a windfall to unsecured creditors trumps the other equitable factors weighing against an untimely deficiency claim.

It is therefore not surprising that there do not appear to be many cases involving an undersecured creditor that has unduly delayed pursuing a deficiency claim after sale of the collateral. The equitable factors courts consider in permitting an amendment to an earlier proof of claim are sufficient to prevent unfair or abusive attempts to seek recovery on a deficiency claim that could have been pursued more promptly. Courts may also deal with this concern by requiring timely pursuit of any deficiency as part of an order lifting the automatic stay to allow sale of the collateral. Language to that effect could also be included in the national chapter 13 form plan being developed by the Advisory Committee. An amendment to the Bankruptcy Rules would not significantly clarify this area or prevent mischief that cannot be dealt with by courts under current law.

Accordingly, the Subcommittee recommends that no further action be taken on this suggestion.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON CONSUMER ISSUES

RE: REVISION OF RULE 4004(c)(1)

DATE: FEBRUARY 22, 2012

In the course of considering a suggestion for an amendment of Rule 4004(c)(1)(J), the Subcommittee detected several problems with the wording of subdivision (c)(1). First, (c)(1) directs the court to enter a discharge "forthwith" upon the expiration of the time for objecting to discharge unless one of the listed circumstances exists. The rule is structured therefore as a mandate with several enumerated exceptions. That wording does not prohibit the court from entering a discharge if one of the exceptional circumstances exists; it just takes away the mandate to do so. The circumstances listed in (c)(1)(A)-(L), however, are ones in which the discharge should not be entered. Properly worded, the provision should prohibit the entry of the discharge under the listed circumstances.

Second, subparagraph (K) applies if a "presumption [of undue hardship imposed by a reaffirmation agreement] has arisen under § 524(m)," but it does not have an end point. As written, the exception in (K) continues to apply even after the presumption has expired or been subject to a court ruling. Several other provisions in Rule 4004(c)(1), by contrast, refer to the fact that a certain motion is still pending; those exceptions therefore become inapplicable after there is a ruling on the motion.

Finally, subparagraph (H) provides for delay in the entry of the discharge if "the debtor has not filed with the court a statement of completion of a course concerning personal financial management as required by Rule 1007(b)(7)." The Committee has proposed an amendment to

Rule 1007(b)(7) that would relieve the debtor of the obligation to file that statement if the course provider notifies the court directly that the debtor has completed the course. That proposed amendment was published for public comment in August, along with a related amendment to Rule 5009. The impact of the amendment of Rule 1007(b)(7) on Rule 4004(c)(1)(H), however, was overlooked. The latter provision needs to be amended to take account of the possibility that the debtor may not have an obligation to file a statement of completion of a personal financial management course because the course provider has already notified the court of the debtor's completion. In that circumstance, there is no need to delay entry of the discharge just because the debtor has not filed a statement of completion.

Although it appears that courts are interpreting the rule sensibly and that the first two wording issues are not in need of immediate attention, the need to amend Rule 4004(c)(1)(H) is more pressing. The amendment of Rule 1007(b)(7) is on schedule to take effect on December 1, 2013. At the fall 2011meeting, the Committee therefore requested the Subcommittee to recommend at the spring meeting amendments to Rule 4004(c)(1) to address all of the identified issues. Because the intent of the stylistic amendments is to state more clearly the existing meaning of the rule, about which courts have not disagreed, and the amendment to subparagraph (H) is intended to take account of the amendment to Rule 1007(b)(7), **the Subcommittee recommends that the Rule 4001(c)(1) amendments be presented to the Standing Committee for approval without publication, with an expected effective date of December 1, 2013.**

<u>Proposed Draft of Amended Rule 4004(c)(1)</u>

To address the three issues discussed above, the Subcommittee recommends that Rule 4004(c)(1) be amended as follows:

Rule 4004. Grant or Denial of Discharge

1 * * * * *

2 (c) GRANT OF DISCHARGE.

3 (1) In a chapter 7 case, on expiration of the

4 times fixed for objecting to discharge and for filing a

5 motion to dismiss the case under Rule 1017(e), the court

6 shall forthwith grant the discharge ~~unless~~, except that the

7 court shall not grant the discharge if:

8 (A) the debtor is not an individual;

9 (B) a complaint, or a motion under

10 § 727(a)(8) or (a)(9), objecting to the discharge has

11 been filed and not decided in the debtor's favor;

12 (C) the debtor has filed a waiver under

13 § 727(a)(10);

14 (D) a motion to dismiss the case under

15 § 707 is pending;

16 (E) a motion to extend the time for filing a

17 complaint objecting to the discharge is pending;

18 (F) a motion to extend the time for filing a

19 motion to dismiss the case under Rule 1017(e)(1) is

20 pending;

21 (G) the debtor has not paid in full the filing

22 fee prescribed by 28 U.S.C. § 1930(a) and any other

23 fee prescribed by the Judicial Conference of the

24 United States under 28 U.S.C. § 1930(b) that is

25 payable to the clerk upon the commencement of a

26 case under the Code, unless the court has waived

27 the fees under 28 U.S.C. § 1930(f);

28 (H) the debtor has not filed with the court a

29 statement of completion of a course concerning

30 personal financial management ~~as~~ if required by

31 Rule 1007(b)(7);

32 (I) a motion to delay or postpone discharge

33 under § 727(a)(12) is pending;

34 (J) a motion to enlarge the time to file a

35 reaffirmation agreement under Rule 4008(a) is

36 pending;

37 (K) a presumption ~~has arisen~~ is in effect

38 under § 524(m) that a reaffirmation agreement is an

39 undue hardship and the court has not concluded a

40 hearing on the presumption; or

41 (L) a motion is pending to delay discharge~~,~~

42 because the debtor has not filed with the court all

43 tax documents required to be filed under § 521(f).

44 * * * * *

COMMITTEE NOTE

Subdivision (c)(1) is amended is several respects. The introductory language of paragraph (1) is revised to emphasize that the listed circumstances do not just relieve the court of the obligation to enter the discharge promptly but that they prevent the court from entering a discharge.

Subdivision (c)(1)(H) is amended to reflect the simultaneous amendment of Rule 1007(b)(7). The amendment of the latter rule relieves a debtor of the obligation to file a statement of completion of a course concerning personal financial management if the course provider notifies the court directly that the debtor has completed the course. Subparagraph (H) now requires postponement of the discharge when a debtor fails to file a statement of course completion only if the debtor has an obligation to file the statement.

Subdivision (c)(1)(K) is amended to make clear that the prohibition on entering a discharge due to a presumption of undue hardship under § 524(m) of the Code ceases when the presumption expires or the court concludes a hearing on the presumption.

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Professor Gibson's memo for Item 5A will be distributed separately.

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TAB 5B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: EUGENE R. WEDOFF

RE: COMMENTS ON PROPOSALS TO AMEND RULES 1007 AND 5009

DATE: FEBRUARY 28, 2012

Among the proposed amendments published for comment in 2011 are two amendments dealing with the obligation of individual debtors in Chapters 7, 11, and 13 to complete a personal financial management course as a condition of discharge. The following descriptions of the amendments are based on the memorandum from the Advisory Committee to the Standing Committee:

1. **Rule 1007(b)(7)** would be amended to relieve individual debtors of the obligation to file Official Form 23 if the provider of an instructional course concerning personal financial management directly notifies the court that the debtor has completed the course. The Bankruptcy Code provides that a discharge must be denied an individual debtor who does not complete a personal financial management course after filing the bankruptcy petition, but the Code does not address what document must be filed to attest to course completion or who must file it. In implementing the Code requirement, Rule 1007(b)(7) currently requires that the debtor file a "statement of completion of a course concerning personal financial management, prepared as prescribed by the appropriate Official Form." The form referred to is Official Form 23, and it requires the debtor to certify that he or she has completed an instructional course in personal financial management.

The rule amendment would authorize financial management course providers to file course completion statements directly with the court, reducing the number of cases closed without entry of a discharge, which currently occurs when debtors are unable to get the necessary certificate from the course provider or they fail to file Form 23. Many of these cases are reopened later, necessitating the payment of an additional fee, in order for the debtor to file the statement and the court to issue the discharge.

2. **Rule 5009(b)** would be amended to reflect the proposed amendment of Rule 1007(b)(7). Rule 5009(b) currently requires the clerk to send a notice to an individual debtor who has not filed Official Form 23 within 45 days after the first date set for the meeting of creditors. The proposed amendment would require the clerk to send this notice only if the debtor is required to file the statement and has failed to do so within the 45-day period. If a course provider has already provided notification of the debtor's completion of the course, the debtor would not be required to file Form 23.

Four comments were submitted in connection with the proposed amendments, all from law offices. Three—from Michael C. Shklar, Phillip Dy, and Ganna L. Gudkova—are very supportive of the amendments. One, from Jeanne E. Hovenden, opposes the amendments on the ground that only attorneys should be responsible for filing the course completion certificates: "The service provider is not an attorney and has no specific knowledge of the debtor's situation at any time during a case. There are rare situations where a discharge injures the debtor due to unforeseen events that occur after the filing of a case. The service provider will have no idea that a discharge is no longer in the debtor's best interest." This does not appear to be a substantial consideration. As the comment indicates, avoiding discharge is likely to be a concern of individual debtors only in very

rare cases, and in those cases, the debtor would have the option of waiving the discharge under § 727(a)(10) of the Code or failing to complete plan payments under Chapter 11 or 13, all of which would result in no discharge being entered despite the filing of a notification of course completion by the provider.

As a whole, then, the comments do not appear to provide any substantial basis for reconsidering the Advisory Committee's recommendation that these amendments be adopted as published.

If the Advisory Committee does seek final approval of the rule amendments, an accompanying amendment of Official Form 23 would also be required. This amendment was approved at the fall 2010 meeting and placed in the bullpen pending the publication of the rule amendments. The proposed form changes are as follows:

Debtor's Certification of Completion of Postpetition Instructional Course Concerning Personal Financial Management

This form should not be filed if an approved provider of a postpetition instructional course concerning personal financial management has already notified the court of the debtor's completion of the course. Otherwise, ~~E~~every individual debtor in a chapter 7 or chapter 13 case or in a chapter 11 case in which § 1141(d)(3) applie~~s, or chapter 13 case~~ must file this certification. If a joint petition is filed and this certification is required, each spouse must complete and file a separate certification. Complete one of the following statements and file by the deadline stated below:

* * * * *

Instructions: Use this form only to certify whether you completed a course in personal financial management and only if your course provider has not already notified the court of your completion of the course. (Fed. R. Bankr. P. 1007(b)(7).) Do NOT use this form to file the certificate given to you by your prepetition credit counseling provider and do NOT include with the petition when filing your case.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND FORMS

RE: MINI-CONFERENCE ON 2011 MORTGAGE FORMS

DATE: FEBRUARY 23, 2012

On December 1, 2011, Official Forms 10A (Mortgage Proof of Claim Attachment), 10S1 (Notice of Mortgage Payment Change), and 10S2 (Notice of Postpetition Mortgage Fees, Expenses, and Charges) went into effect. These forms were designed to implement the new mortgage claim disclosure requirements of Rules 3001(c) and 3002.1, which became effective on the same day as the forms. When the Advisory Committee gave final approval to the forms at the spring 2011 meeting, it considered written comments and hearing testimony that had suggested the need for a detailed loan history, rather than just an itemization of prepetition fees, expenses, and charges. It also considered questions that had been raised about the sufficiency of the information sought regarding escrow accounts.

Notwithstanding these comments, the Committee concluded that it was important for the forms to go into effect simultaneously with the new rules. It therefore approved the forms with minor changes and decided that it would be useful to convene a mini-conference on the effectiveness of the forms after a period of experience with them. At the fall 2011 meeting, the Committee voted to hold a mini-conference, if funding permitted, in connection with the fall 2012 Advisory Committee meeting. (Alternatively, should there not be sufficient funds for a mini-conference, the Committee favored conducting teleconferences with targeted groups.) The Chair asked these Subcommittees to undertake the planning for the mini-conference and to report

on the preliminary plans at the spring 2012 meeting. The Subcommittees began this planning during their joint conference call on January 30.

Indications thus far from the Administrative Office are that funds will be made available to hold a mini-conference on the mortgage forms. The mini-conference is therefore being planned for Monday, September 10, 2012, in Portland, Oregon, just prior to the Advisory Committee meeting on Tuesday and Wednesday.

Issues that the Subcommittees Considered

1. *What should be the goals of the mini-conference?* The Subcommittees suggest that the purpose of the mini-conference on the mortgage forms is to ensure that the new forms are enabling debtors and trustees to obtain the information they need to deal properly with home mortgages in bankruptcy, particularly in chapter 13 cases, and that the disclosure requirements are not imposing an undue burden on mortgage creditors or costs on the debtors not commensurate with the benefits. The specific goals of the mini-conference, then, will be to learn how the forms are operating in actual practice and to determine whether any modifications of them are needed. The forms address important and difficult issues, and a great amount of thought and consultation, as well as public comment, went into their design. Because there were differences of opinion among persons with expertise about how best to obtain the needed information, the mini-conference will allow the Committee to determine – with the benefit of actual experience with the forms – whether any refinements to them are needed.

2. *What issues should be discussed at the mini-conference?* The Subcommittees identified a number of issues that might be considered at the mini-conference. Among them are the following:

- Are creditors complying with the new disclosure requirements?

- Is all the needed information being asked for?
- Is any unnecessary information being asked for?
- Are districts imposing different or additional disclosure requirements or adopting different local forms?
- Are the national forms sufficiently compatible with creditor account software to enable their completion without undue burden?
- Are smaller creditors encountering problems with completing the forms?
- Have administrative or technological problems been encountered with the filing of the forms, either by mortgage creditors or clerks' offices?
- What questions have arisen regarding the applicability of the new disclosure requirements?
- To what extent are the costs of compliance with the new disclosure requirements being passed on to debtors as postpetition fees? Do the benefits to debtors outweigh the costs?

The Subcommittees will engage in outreach to interested groups to ask what are the most significant issues they have encountered with the new forms.

3. *What should be the format of the mini-conference?* Some mini-conferences convened by rules committees consist of panels of experts presenting and discussing papers prepared in advance. The Subcommittees do not believe that a format of that type is appropriate for this mini-conference. The Committee is seeking to gain information about the efficacy of the new mortgage forms from those who have been using them. The focus is on practical issues, although some unresolved legal issues (for example, how unpaid, prepetition escrow amounts should be calculated) may arise.

The Subcommittees propose that the conference be organized around issues that are announced to participants in advance. The Subcommittees will designate a particular topic or topics for each participant to be prepared to discuss. Presentation by the assigned participants of a topic will be followed by open discussion among the entire group. The Subcommittees will consider what written materials should be circulated in advance by the Committee and participants.

4. *Who should be invited to participate?* The success of the mini-conference depends to a large degree on who the participants are. It will be important to have all the affected constituencies represented and to have people in attendance who have experience with the forms and who are knowledgeable, articulate, and willing to listen to other viewpoints. The Subcommittees identified the types of groups that should be represented:

- home mortgage servicers and attorneys (or others who are actually filing the proofs of claim attachments and supplements);
- consumer debtor attorneys;
- chapter 13 trustees;
- bankruptcy judges; and
- clerks of court.

The Subcommittees suggest that there be approximately 20 invited participants in addition to Committee members, reporters, and staff. The mini-conference will be an open meeting, so other people will be permitted to attend and observe the proceedings.

5. *What are the next steps in planning the mini-conference?* Members of the Subcommittees will contact individuals representing the various constituencies listed above and ask them to suggest issues that the mini-conference should address and the names of people who

would be knowledgeable participants. Judge Perris has offered to inquire whether the mini-conference can be held in a conference room or courtroom at the U.S. District Court in Portland. In the early summer the Subcommittees will compile lists of the invitees and the issues to be discussed. They will then determine the format for the discussions and the types of written materials that will be circulated in advance of the mini-conference.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEES ON CONSUMER ISSUES AND FORMS

RE: SUGGESTIONS FOR CHANGES TO FORM 10

DATE: FEBRUARY 21, 2012

The Subcommittees have considered two suggestions for changes to Form 10 (Proof of Claim). One (11-BK-D) was submitted by Sabrina McKinney, an attorney in Montgomery, Alabama, and the other is an issue involving powers of attorney that Mr. Rao called to the Subcommittee's attention. **The Subcommittees recommend that Ms. McKinney's suggestion be referred to the Forms Modernization Project ("FMP") for further consideration and that the Committee propose an amendment to Form 10 to eliminate the instruction to "[a]ttach a power of attorney, if any."**

McKinney Suggestion

Ms. McKinney suggested that the proof of claim form be amended to provide a space for a claimant to specify the amount of an unsecured, non-priority claim. Currently Form 10 asks in item 1 what the total amount of the claim was as of the filing of the bankruptcy case. If the claim is completely or partially secured, the claimant must specify in item 4 the amount of the secured claim and any amount unsecured. And if all or part of the claim is entitled to a priority, the claimant must state in item 5 the amount entitled to a priority. Under the current design of Form 10, therefore, the amount of a totally unsecured, non-priority claim should be the amount listed in item 1, and no amounts should be listed under items 4 and 5.

Ms. McKinney is a staff attorney for a chapter 13 trustee. She explained in email correspondence with the AO, which is included with her suggestion, that her office frequently encounters proofs of claim of unsecured creditors that are filled out incorrectly because the form does not specifically ask for the amount of an unsecured claim. Without the option of stating that a claim is just unsecured, some unsecured creditors will erroneously identify their claims as secured or priority. Likewise, CM/ECF does not permit a creditor to indicate that a claim is completely unsecured. Ms. McKinney said that the result of this confusion is an increase in the number of objections to claims that the trustee must file.

Ms. McKinney suggested that Form 10 be amended to add a line for the amount of an "unsecured nonpriority claim" with a checkbox indicating that there is no collateral or lien securing the claim, the claim exceeds the value of any collateral, or there is no entitlement to a priority for the claim. Under her suggested revision of Form 10, there would also be an item where the total amount of the claim and its component amounts would be listed as follows:

Total amount of claim at time case filed: _________ _________ _________ _________
(unsecured) (secured) (priority) (total)

Serial Changes to Form 10

The issue raised by Ms. McKinney has been addressed by the Advisory Committee on several occasions. Before the 1997 amendments to the form took effect, a creditor had to list in item 4 the unsecured, secured, and priority amounts of the claim. This information then had to be repeated in item 5, where the creditor also had to state the total amount of the claim. The form was amended in 1997 to eliminate this redundancy and to make it easier to complete the form correctly. The total amount of the claim was asked for at the outset, and only that amount was to be provided unless the claim was secured or entitled to a priority, in whole or in part. This change was made because trustees and others complained that the redundancy of the prior

form was confusing, resulting in a greater workload for trustees in identifying errors and objecting to claims.

The amended version of Form 10 remained in effect from 1997 until 2003. In 2003 the form was again amended to reinstate a space for indicating the amount of an unsecured, non-priority claim and to require the creditor to add the component parts of the claim to arrive at a total claim amount. This change was made in response to complaints similar to those now voiced by Ms. McKinney: without a specific place to state the amount of an unsecured, non-priority claim, unsecured creditors mistakenly listed their claims as secured or priority.

In 2007 Form 10 was amended once again to eliminate the request for the amount of an unsecured, non-priority claim and the need for the creditor to add up the components of a claim. Creditors' totals frequently differed from the automatic calculation done by CM/ECF, so the form no longer required the creditor to do the addition. Although Form 10 was revised in several respects as of December 1, 2011, the information sought about the claim amount was not changed. This part of the current form remains as it was amended in 2007.

The Subcommittees' Recommendation

The Subcommittees recognize that the way in which Form 10 should ask for information about the total amount of a claim and its components is a problem that has vexed the Committee over the years. They concluded, however, that changing back and forth every few years between the two methods that have been used is not a good solution and that each method seems to have its critics.

To the extent the problem with the pre-1997 version of Form 10 was redundancy, that problem has been eliminated. And there does not seem to be any inherent problem with asking a creditor to state the amount of its unsecured, non-priority claim, especially if not asking the

question leads to confusion. The real problem appears to result from asking the creditor to add up the secured; priority; and unsecured, non-priority components of the claim to arrive at a total claim amount and in reconciling the information that the creditor provides. (Some creditors probably have problems in correctly identifying the amount of their secured and priority claims, but those problems will persist regardless of whether the amount of the unsecured, non-priority claim is stated or whether addition is required.)

Form 10 was amended in 2011, 2008, 2007, 2005, 2003, 1997, 1995, 1993, and 1991, and a change will be sought for 2012. The Subcommittees were reluctant to embark now on yet another round of amendments regarding the information that a creditor must provide. They concluded that there may be a technological solution to the problem that Ms. McKinney has raised. The Subcommittees therefore recommend that the Advisory Committee ask the FMP to take Ms. McKinney's suggestion into account in its redesign of the proof of claim form.

Power of Attorney

John Rao informed the Subcommittees that some agents who have filed proofs of claim on behalf of creditors have argued that the instruction to attach a copy of a power of attorney, "if any," is inconsistent with the rules. Among the checkboxes in the signature line of the current form is the following option: "☐ I am the creditor's authorized agent. (Attach copy of power of attorney, if any.)." Contrary to the instruction to attach a copy of the power of attorney, Rule 9010(c) provides: "The authority of any agent, attorney in fact, or proxy to represent a creditor *for any purpose other than the execution and filing of a proof of claim* or the acceptance or rejection of a plan shall be evidenced by a power of attorney conforming substantially to the appropriate Official Form" (emphasis added).

Although the amendment to Form 10 that went into effect on December 1, 2011, added the checkbox language quoted above, the direction to "[a]ttach copy of power of attorney, if any" predates that amendment. It previously was the last sentence in the signature line, which did not contain any checkboxes for specifying the capacity in which the signer was acting.

Courts and commentators have agreed that under Rule 9010(c) a power of attorney is not required for an agent who files a proof of claim and thus, despite Form 10's instruction, a power of attorney does not have to be attached. For example, the court in *In re* Shabazz, 206 B.R. 116, 124 n.11 (Bankr. E.D. Va. 1996), stated:

> There is no express requirement in Fed. R. Bankr. P. 3001 that a power of attorney be attached if a proof of claim is signed by an agent or attorney-in-fact. It is true that Official Form 10 contains the instruction "attach power of attorney, if any." The use of the phrase, "if any," does not require in literal terms that an agent must have a power of attorney but only that if a power of attorney exists, it must be attached. The language of Fed. R. Bankr. P. 9010(c) strongly implies that a power of attorney is *not* required in order to sign a proof of claim . . . .

Accord Isom v. eCast Settlement Corp. (*In re* Isom), 321 B.R. 756, 757 (Bankr. N.D. Ga. 2005) ("And there is no requirement that evidence of an individual's authority to act on behalf of a claimant be attached to a proof of claim. FED. R. BANKR. P. 9010(c) . . . ."); *In re* Roberts, 20 B.R. 914, 917 n.2 (Bankr. E.D.N.Y. 1982) ("Subparagraph (c) of [then applicable] Bankruptcy Rule 910 . . . makes clear that a power of attorney need not accompany a proof of claim."); 10 ALAN N. RESNICK & HENRY J. SOMMER, COLLIER ON BANKRUPTCY ¶ 9010.08 (16th ed. 2011) ("The only exception to this latter rule [requiring a power of attorney] is when the act involved is the execution and filing of a proof of claim or the execution and filing of the acceptance or rejection of a plan.").

Because Form 10 suggests the need to attach to a proof of claim a power of attorney if one exists, the Subcommittees recommend that the Advisory Committee propose the deletion of

that instruction from Official Form 10 and the recently adopted mortgage supplements. The Committee has already approved an amendment to Form 10 that it will propose go into effect on December 1, 2012, without publication,[1] so the Subcommittees recommend that this proposed amendment to Form 10 be included with that recommendation. The Committee may, however, want to hold in the bullpen similar changes to the mortgage supplements until it decides whether to propose any other amendments to those forms.

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[1] At the spring 2011 meeting, the Committee approved the proposal that the following language be added to line 7 of Form 10:

> 7. Documents: Attached are **redacted** copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, ~~and~~ security interests, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and **redacted** copies of documents providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage Proof of Claim Attachment is being filed with this claim. *(See instruction # 7, and the definition of "**redacted**.")*
>
> DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAYBE DESTROYED AFTER SCANNING.

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A memo for Item 6 will be distributed separately.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON FORMS

RE: FORMS MODERNIZATION PROJECT

DATE: FEBRUARY 28, 2012

A. Background

The Bankruptcy Official Forms Modernization Project (FMP) began its work in 2008. The project is being carried out by an ad hoc group composed of members of the Advisory Committee's Subcommittee on Forms working in liaison with representatives of other relevant Judicial Conference committees. The history of the FMP's work is discussed in greater detail in the Memorandum included in the materials for the fall Advisory Committee meeting.

The dual goals of the FMP are to improve the official bankruptcy forms and to improve the interface between the forms and available technology. The judiciary is in the process of developing "the next generation" of CM/ECF (Next Gen), and the modernized forms are being designed to use the enhanced technology that will become available through Next Gen. From a forms perspective, the major change in Next Gen will be the ability to store all information on forms as data so that authorized users can produce customized reports containing the information they want from the forms, displayed in whatever format they choose.

The FMP made a preliminary decision that the debtor forms for individuals and entities other than individuals should be separated, because separate areas of inquiry apply to each group. There is a greater need for the forms submitted by individuals to be less technical,

because more individuals are unsophisticated compared to other entities and individuals may not have the assistance of counsel. The FMP began by drafting and testing the forms for individuals.

B. Fall 2011 Advisory Committee Meeting

By the time of the fall 2011 meeting, the drafting and testing of the modernized individual debtor filing package had largely been completed and the FMP was in the process of collecting prepublication comments from several bankruptcy groups, including members of the National Association of Chapter 13 Trustees (NACTT), the National Association of Bankruptcy Trustees, the National Association of Consumer Bankruptcy Attorneys, and attorneys from U.S. Trustee offices.

In the materials for that meeting, the Subcommittee on Forms requested that this Committee recommend to the Standing Committee that all the draft individual forms be published for comment in August 2012. The recommendation, however, came with the following caveat:

> The publication report should note that it is not expected that the forms will be implemented until such time as Next Gen becomes operational. This delay will assure that the courts have the required technology to prepare the customized reports using information from forms for end users. It will also allow required lead time for software vendors and outside users.

The Advisory Committee discussed the pre-publication comments received from the organizations and other reviewers. Most reviewers supported the user-friendly language in the new forms, but some believed that the language is less precise than current form language and will lead to more pro se filings. Others thought that the length of the forms (including instructions not intended to be filed) will discourage pro se filings, but will require additional work for debtors' counsel and therefore increase fees. Reviewers were less concerned about the

length of the forms once they were informed that the goal is to make the new forms effective in conjunction with Next Gen, which would allow custom reports to be created from the data collected on the forms.

In light of the comments about length, the Forms Subcommittee believes that the acceptance and success of the individual filing package will depend to a large extent on whether Next Gen is sufficiently operational to permit data to be extracted from the forms and inserted into customizable reports when the forms go into effect. At the time of the fall meeting, and still today, it is uncertain when Next Gen 1.0 will become operational, although it is expected that it will be late 2013 or 2014. It is also uncertain what features will be included in 1.0.

Another concern raised about implementation of the modernized forms is whether the judiciary is going to be able to develop a method to capture electronically information on forms that are filed by pro se parties. The Pro Se Pathfinder project has developed a method for doing that. Three districts, the Central District of California, the District of New Mexico, and the District of New Jersey, will begin testing the product this spring using actual cases from their districts.

Accordingly, the Subcommittee on Forms suggested, and the Advisory Committee preliminarily approved at the fall meeting, an incremental approach. The Advisory Committee agreed to recommend publication in 2012 of a subset of the individual debtor filing package, consisting of the fee waiver and installment fee forms, the income and expense forms, and the means test forms. These particular forms involve only individual debtors and can replace existing forms. The selected forms, which are not significantly longer than the forms

they replace, involve the debtors' income and expenses and are used by courts, U.S. Trustees, and case trustees for varied purposes.

Implementation of these forms should allow fuller testing of the technological features of the modernized forms. The data on these forms is frequently accessed by end users and customized reports using that data can be prepared by judiciary users. The extent to which bankruptcy participants outside the judiciary can access and use the data to prepare their own reports will depend on policies of the Judicial Conference of the U.S. Courts (JCUS). Those policies are still being considered and prepared.

The Subcommittee on Forms requests that this Committee recommend to the Standing Committee that the following draft modernized individual debtor forms be published for comment in August 2012:

B3A	**Application for Individuals to Pay the Filing Fee in Installments**
B3B	**Application to Have the Chapter 7 Filing Fee Waived**
B6I	**Schedule I: Your Income**
B6J	**Schedule J: Your Expenses**
B22A-1	**Chapter 7 Statement of Your Current Monthly Income**
B22A-2	**Chapter 7 Means Test Calculation**
B22B	**Chapter 11 Statement of Your Current Monthly Income**
B22C-1	**Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period**
B22C-2	**Chapter 13 Calculation of Your Disposable Income**

C. FMP Progress Since the Fall 2011 Advisory Committee Meeting

1. Individual Filing Package

At the fall meeting, it was suggested that the groups asked to provide pre-publication comments on the draft individual debtor filing package be expanded to include the creditor member groups (mortgage and non-mortgage) of the NACTT, which was done. The creditor groups jointly participated in two focus group telephone conferences conducted by Dr. Beth Wiggins and Dr. Molly Johnson from the Federal Judicial Center.

Dr. Wiggins and Dr. Johnson, with help from Carolyn Bagin, compiled the comments and issues identified as a result of both the testing and the pre-publication review of the forms by various groups. On December 6-7, 2011, several people who had been involved in drafting the individual debtor filing package met to discuss the comments and issues, resulting in a number of changes to the draft forms.

Also, as a result of those discussions and decisions made at the January 27, 2012, meeting of the full FMP, the instructions and checklists have been compiled into a booklet and a glossary of terms used in the forms and instructions has been drafted. The creation of the separate booklet reduces the apparent bulk of the drafts. Originally, the instructions had been interspersed with the forms, even though the instructions were not to be filed.

Drafting is continuing on several forms pertinent to individual debtors, including the Notice to Individual Consumer Debtor (current Director's Form B 201A), the Chapter 7 Individual Debtor's Statement of Intention (current Official Form B 8), and the Reaffirmation Agreement Cover Sheet (current Official Form B 27).

2. <u>Non-Individual Form Preparation</u>

Dr. Wiggins and Dr. Johnson organized several conference calls with attorneys, chapter 7 trustees, and attorneys from U.S. Trustee offices, who have experience completing and using non-individual forms, and with claims agents who assist in completing forms in large cases to obtain input regarding how the current forms could be improved for non-individual debtors. Each person was asked for suggestions regarding what the guiding principles should be with respect to non-individual debtor forms.

Using the information provided as well as the experience of the FMP members, the FMP at its meeting held on January 27, 2012, adopted the following guidelines for the non-individual debtor forms.

■ Eliminate requests for information that pertains only to individuals.

■ To the extent possible, parallel how businesses commonly keep their financial records. For example, provide cash flow information in a form more consistent with business financial reporting rather than how it is currently reported on Schedules I and J.

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

■ Provide better instructions about how to value assets on the schedules, and provide a valuation methodology that would allow people who commonly sign schedules to respond without needing expert valuations of assets.

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

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

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

■ Keep inter-district variations to a minimum, particularly with respect to the mailing matrix.

The FMP will soon begin drafting the forms used by non-individual debtors at the outset of a case. Work has already been done to identify information in the current forms that pertains only to individuals so that it can be eliminated. The FMP is seeking assistance from a few people with accounting expertise in order to bring the way the schedules and statement of financial affairs seeks information into greater conformity with how non-individual debtors, particularly businesses, keep records. This should also increase the potential to import data directly from the entity's records into the schedules and statement of financial affairs. The FMP is also seeking assistance in the technology area to make sure that the drafts are consistent with likely available technology in Next Gen and that the information provided can be readily used to produce the required customized reports. Dr. Wiggins and Dr. Johnson are contacting representative end users including judges, clerks, career law clerks, lawyers, case trustees, and attorneys from U.S. Trustee offices regarding what information will be useful in preparing end user reports. As part of the drafting process, the group will produce a glossary and limited instructions to make it easier for those organizing information to understand the forms.

D. Conclusion

The Subcommittee on Forms endorses the limited implementation of the modernized forms consistent with the action of the Advisory Committee at its fall meeting. This will provide the benefit of implementing some of the new forms and of testing new technological features. If issues develop, changes can be made to the rest of the individual debtor forms before they are published.

Now that the bulk of the initial drafting of the case-commencement individual debtor forms has been completed, the FMP is moving forward with drafting the comparable forms for entities other than individuals.

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Proposed new Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2 are set out at Appendix A.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: EUGENE R. WEDOFF

RE: COMMENTS ON PROPOSALS TO AMEND FORMS 22A AND 22C

DATE: FEBRUARY 29, 2012

Among the proposed amendments published for comment in 2011 are two amendments affecting the means test forms in Chapters 7 and 13. The first, affecting the forms in both chapters, makes an adjustment in the IRS "Other Necessary Expense" for telecommunications, in order to reflect the IRS's deduction for business cell phone expense. The other, affecting only the Chapter 13 form, responds to the Supreme Court's *Lanning* decision, dealing with postpetition changes in the debtor's income and expenses. The following description of the proposed amendments is based on the memorandum from the Advisory Committee to the Standing Committee recommending publication, as supplemented to address a recent change in the IRS's treatment of internet expenses.

1. **Official Forms 22A (Chapter 7 Statement of Current Monthly Income and Means-Test Calculations) and 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income)** would be amended to make minor adjustments to the deduction for telecommunication expenses.

The means test of § 707(b) of the Code uses expense amounts specified by "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." § 707(b)(2)(A)(ii)(I). The Advisory Committee's comparison of Forms 22A and 22C to the IRS list of Other Necessary Expenses revealed one respect in which the al-

lowed deductions on the forms are narrower than the IRS categories. The deduction for telecommunication services allows for the monthly cost of pagers, call waiting, internet service, etc. "to the extent necessary for your health and welfare or that of your dependents." The IRS, on the other hand, includes as Other Necessary Expenses the cost of optional telephones, telephone services, and internet provider/email "if it meets the necessary expense test." For internet and email services, the explanation goes on to say, "generally for the production of income." It therefore appears that the IRS necessary expense test does not limit these types of expenses to ones necessary for the debtor's health and welfare but considers as well their necessity for the production of income.

The Committee therefore voted at its September 2010 meeting to propose an amendment to Forms 22A and 22C that would permit the deduction of telecommunication services, including business cell phone service, to the extent necessary for the production of income if not reimbursed by the debtor's employer or deducted earlier in calculating the debtor's personal business income. In each form, the relevant line for telecommunications expenses was proposed to read as follows:

> **Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone and cell phone service—such as pagers, call waiting, caller id, special long distance, internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount previously deducted.**

This proposal, as published, elicited no comments.

After publication of the proposed change, the IRS revised its expense deduction under the "Local Standards: Housing and Utilities" category, effective October 3, 2011, to include an allowance for internet service. See

http://www.irs.gov/individuals/article/0,,id=96543,00.html (the category now includes "residential telephone service, cell phone service, cable television, *and internet service*").

At its fall meeting, the Advisory Committee was made aware of this potential change, and charged the Consumer Subcommittee with drafting amendments to Forms 22A and 22C to accommodate it. The Subcommittee determined that no changes were needed on the two forms for deductions under Local Standards for Housing and Utilities, because a total allowed amount (based on location and household size) is provided by the U.S. Trustee Program and the forms do not refer to the types of expenses that are included in the calculation.

However, because residential internet service is now covered by the Local Standards, the Subcommittee determined that it should not be separately deductible as part of the "Other Necessary Expense" for telecommunications. At the same time, as with cell phone service, internet service would continue to be deductible as a business expense if not reimbursed by the debtor's employer or previously deducted in determining the debtor's net personal business income. Accordingly, the Subcommittee has recommended the following adjustment to line 32 of Form 22A and line 37 of Form 22C, to be implemented as conforming amendments, without publication:

> **Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone, <u>internet</u> and cell phone service—such as pagers, call waiting, caller id, special long distance, <u>business</u> internet service, or business cell phone service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amount<u>s deducted on line 4b or any other amounts deducted on line 4b [3b for Chapter 13]</u> or any other amounts previously deducted.**

2. **Official Form 22C (Chapter 13 Statement of Current Monthly Income and Calculations of Commitment Period and Disposable Income)** would also be amended in response to the Supreme Court's decision in *Hamilton v. Lanning,* 130 S. Ct. 2464 (2010). That case concerned the calculation of a chapter 13 debtor's "projected disposable income," which under § 1325(b)(1) of the Bankruptcy Code the debtor's plan may be required to devote to payment of unsecured claims. The Supreme Court rejected a purely "mechanical" approach to the calculation that considers only the debtor's average monthly income for the six months before bankruptcy. The Court instead adopted a "forward-looking" approach that allows consideration of changes in the debtor's income and expenses that have occurred before confirmation or are virtually certain to occur afterward.

Because Form 22C calculates disposable income for above-median-income debtors—following the Code definition of "disposable income"—based only on information about the debtor's pre-bankruptcy average income and current expenses, the Advisory Committee considered whether the form should be amended at its September 2010 meeting. The Committee approved adding a question to Form 22C in which above-median-income chapter 13 debtors would list any changes in the income and expenses reported on the form that have already occurred or are virtually certain to occur during the 12 months following the filing of the petition. The same time frame for reporting anticipated changes is set out in § 521(a)(1)(vi) of the Code and is included in Schedules I and J (Current Income and Current Expenditures of Individual Debtor(s)).

The proposed addition to Form 22C is the following:

61	**Change in income or expenses.** If any change from the income or expenses you reported in this form has occurred or is virtually certain to occur during the 12-month period following the date of the filing of your petition, state in the space below: each line affected, the reason for the change, the date of the change, and the amount by which the income or expense reported on the affected line would be increased or decreased. For example, if the wages reported in Line 2 have increased or decreased, or are definitely scheduled to increase or decrease in the future, you would make an entry listing Line 2, the reason for the increase or decrease, the date it has occurred or will occur, and the amount of the change. Make a similar entry for increases or decreases in expenses reported earlier in this form. Add a separate page with additional lines, if necessary.				
	Line to change	Reason for change	Date of change	Increase (+) or decrease (-)	Amount of change
					$
					$
					$

Two comments were submitted in connection with the proposed amendment, all from law offices. The first, from California attorney Peter M. Lively, objects to the amendment on the ground that its one-year period for changes in income or expenses conflicts with the Ninth Circuit's decision in *Maney* v. *Kagenveama (In re Kagenveama)***,** 541 F.3d 868, 876 (9th Cir. 2008), holding that there is no applicable commitment period for the payment of projected disposable income if that income is less than zero. There may be some question as to whether this holding survives the decision in *Lanning*, but even if it does, the proposed amendment, by requiring debtors to provide information about changes in income and expenses, does not prevent the debtor from arguing that there is no applicable commitment period. The current version of Form 22C specifies that, depending on whether the debtor's income is above or below the applicable state median, the applicable commitment period is either three or five years, and nothing in the proposed amendment affects that longstanding interpretation of the applicable commitment period under Section 1325(b)(4).

The other comment is from attorney Henry J. Sommer, writing on behalf of the National Association of Consumer Bankruptcy Attorneys. The NACBA position is that the proposed amendment is unnecessary and confusing, since changes in income and expenses in the year after filing are already required to be reported on Schedules I and J and can be addressed by motions to modify a confirmed Chapter 13 plan.

These objections do not appear to be well founded. First, Schedules I and J report different income and expenses than those called for in calculating projected disposable income under Form 22C.

• Social security benefits are income reportable under Schedule I while regular gifts from family members are not; the definition of current monthly income, in Section 101(10A) of the Code, used in calculating projected disposable income under Section 1325(b)(2), is the opposite.

• Schedule I requires reporting of the debtor's income at the time of filing, while "current monthly income" under Section 101(10A) uses an average of the income received during the six months prior to filing.

• Schedule J, in all respects, requires a statement of the debtor's actual expenses, while, for debtors with above-median income, the means test used in Section 1325(b)(3) uses IRS and statutory formulas that provide for higher or lower allowances than the debtor's actual expenses.

• *Lanning*, in interpreting Section 1325(b), deals only with changes that have occurred or are virtually certain to occur. Schedules I and J, in contrast, require reporting of future changes "reasonably anticipated to occur."

Second, modification of a confirmed plan is not an appropriate method for dealing

with changes of the kind involved in *Lanning*. Proper treatment of projected disposable income is a requirement for plan confirmation in the first instance.

Neither of the comments, then, appears to provide a substantial basis for reconsidering the Advisory Committee's recommendation that the *Lanning* amendment be adopted.

The following Committee Note would explain all incorporating all of the changes to the means test forms discussed above.

COMMITTEE NOTE

The chapter 13 form is amended in response to the Supreme Court's decision in *Hamilton v. Lanning,* 130 S. Ct. 2464 (2010). Adopting a forward-looking approach, the Court there held that the calculation of a chapter 13 debtor's projected disposable income under §1325(b) of the Code may take into account changes to income or expenses reported elsewhere on this form that, at the time of plan confirmation, have occurred or are virtually certain to occur. Those changes could result in either an increased or decreased projected disposable income.

A new line 61 is added to Form 22C for the reporting of those changes, and the title of Part VI is changed to reflect its broadened content. Only debtors whose annualized current monthly income exceeds the applicable median family income have their projected disposable income determined exclusively by the information provided on Form 22C. Therefore they are the only debtors required to provide the information about changes to income and expenses on this form. Debtors whose annualized current monthly income falls at or below the applicable median must report on Schedules I and J any changes to income and expenses that are reasonably expected to occur within the next year.

In reporting changes to income on line 61, a debtor must indicate whether the amounts reported in Part I of the form—which are monthly averages of various types of income received during the six months prior to the filing of the bankruptcy case—have already changed or are virtually certain to change during the 12 months following the filing of the bankruptcy petition. For each change, the debtor must indicate the line of this form on which the changed amount was reported, the reason for the change, the date of its occurrence, whether the change was an increase or decrease of income, and the amount of the change.

In reporting changes to expenses on line 61, a debtor must list changes to the debtor's actual expenditures reported in Part IV that are virtually certain to occur during the 12 months following the filing of the bankruptcy petition. With respect to the deductible amounts reported in Part IV that are determined by the IRS national and local standards, only changed amounts that result from changed circumstances in the debtor's life—such as the addition of a family member or the surrender of a vehicle—should be reported. For each change in expenses, the same information required to be provided for income changes must be reported.

Because of the addition of new line 61, the line for the debtor's verification is renumbered as 62.

Line 32 of Form 22A and line 37 of Form 22C are amended to permit the deduction of telecommunications cell phone expenses that are necessary for the production of income if those expenses have not been reimbursed by the debtor's employer. The same lines are also amended to state that expenses for internet service may be deducted as an "Other Expense" only if necessary for the production of income. Under new IRS guidelines, expenses for home internet service used for other purposes are now included in the Local Standards for housing and utilities; non-mortgage expenses. If a debtor is self-employed, those business cell phone and internet expenses may be deductible as ordinary and necessary operating expenses at line 5 of Form 22A and line 4 of Form 22C and may not be deducted a second time.

TAB 7B-1

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57	**Deduction for special circumstances.** If there are special circumstances that justify additional expenses for which there is no reasonable alternative, describe the special circumstances and the resulting expenses in lines a-c below. If necessary, list additional entries on a separate page. Total the expenses and enter the total in Line 57. **You must provide your case trustee with documentation of these expenses and you must provide a detailed explanation of the special circumstances that make such expenses necessary and reasonable.**	$
58	**Total adjustments to determine disposable income.** Add the amounts on Lines 54, 55, 56, and 57 and enter the result.	$
59	**Monthly Disposable Income Under § 1325(b)(2).** Subtract Line 58 from Line 53 and enter the result.	$

	Nature of special circumstances	Amount of expense
a.		$
b.		$
c.		$
		Total: Add Lines a, b, and c

Part VI: ADDITIONAL INFORMATION

60 **Other Expenses.** List and describe any monthly expenses, not otherwise stated in this form, that are required for the health and welfare of you and your family and that you contend should be an additional deduction from your current monthly income under § 707(b)(2)(A)(ii)(I). If necessary, list additional sources on a separate page. All figures should reflect your average monthly expense for each item. Total the expenses.

	Expense Description	Monthly Amount
a.		$
b.		$
c.		$
	Total: Add Lines a, b, and c	$

61 **Change in income or expenses.** If any change from the income or expenses you reported in this form has occurred or is virtually certain to occur during the 12-month period following the date of the filing of your petition, state in the space below: each line affected, the reason for the change, the date of the change, and the amount by which the income or expense reported on the affected line would be increased or decreased. For example, if the wages reported in Line 2 have increased or decreased, or are definitely scheduled to increase or decrease in the future, you would make an entry listing Line 2, the reason for the increase or decrease, the date it has occurred or will occur, and the amount of the change. Make a similar entry for increases or decreases in expenses reported earlier in this form. Add a separate page with additional lines, if necessary.

Line to change	Reason for change	Date of change	Increase (+) or decrease (-)	Amount of change
				$
				$
				$

Part VII: VERIFICATION

62 I declare under penalty of perjury that the information provided in this statement is true and correct. *(If this is a joint case, both debtors must sign.)*

Date: ________________________ Signature: ________________________
(Debtor)

Date: ________________________ Signature: ________________________
(Joint Debtor, if any)

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TAB 7B-2

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In re ______________________________
Debtor(s)

Case Number: __________________
(If known)

According to the information required to be entered on this statement (check one box as directed in Part I, III, or VI of this statement):

☐ **The presumption arises.**
☐ **The presumption does not arise.**
☐ **The presumption is temporarily inapplicable.**

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. If none of the exclusions in Part I applies, joint debtors may complete one statement only. If any of the exclusions in Part I applies, joint debtors should complete separate statements if they believe this is required by § 707(b)(2)(C).

Part I. MILITARY AND NON-CONSUMER DEBTORS

1A	**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. ☐ **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)).
1B	**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. ☐ **Declaration of non-consumer debts.** By checking this box, I declare that my debts are not primarily consumer debts.
1C	**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 90 days, or who have performed homeland defense activity (as defined in 32 U.S.C. § 901(1)) for a period of at least 90 days, are excluded from all forms of means testing during the time of active duty or homeland defense activity and for 540 days thereafter (the "exclusion period"). If you qualify for this temporary exclusion, (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 verification in Part VIII. **During your exclusion period you are not required to complete the balance of this form, but you must complete the form no later than 14 days after the date on which your exclusion period ends, unless the time for filing a motion raising the means test presumption expires in your case before your exclusion period ends.** ☐ **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 because, as a member of a reserve component of the Armed Forces or the National Guard a. ☐ I was called to active duty after September 11, 2001, for a period of at least 90 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 b. ☐ I am performing homeland defense activity for a period of at least 90 days /or/ ☐ I performed homeland defense activity for a period of at least 90 days, terminating on ________________, which is less than 540 days before this bankruptcy case was filed.

29	**Other Necessary Expenses: education for employment or for a physically or mentally challenged child.** Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.	$
30	**Other Necessary Expenses: childcare.** Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. **Do not include other educational payments.**	$
31	**Other Necessary Expenses: health care.** Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 19B. **Do not include payments for health insurance or health savings accounts listed in Line 34.**	$
32	**Other Necessary Expenses: telecommunication services.** Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone, internet, and cell phone service—such as pagers, call waiting, caller id, special long distance, or business internet service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. **Do not include any amounts deducted on line 4b or any other amounts previously deducted.**	$
33	**Total Expenses Allowed under IRS Standards.** Enter the total of Lines 19 through 32.	$

Subpart B: Additional Living Expense Deductions

Note: Do not include any expenses that you have listed in Lines 19-32

34	**Health Insurance, Disability Insurance, and Health Savings Account Expenses.** List the monthly expenses in the categories set out in lines a-c below that are reasonably necessary for yourself, your spouse, or your dependents. a. Health Insurance $ b. Disability Insurance $ c. Health Savings Account $ Total and enter on Line 34	$
	If you do not actually expend this total amount, state your actual total average monthly expenditures in the space below: $ _____________	
35	**Continued contributions to the care of household or family members.** Enter the total average actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses.	$
36	**Protection against family violence.** Enter the total average reasonably necessary monthly expenses that you actually incurred to maintain the safety of your family under the Family Violence Prevention and Services Act or other applicable federal law. The nature of these expenses is required to be kept confidential by the court.	$
37	**Home energy costs.** Enter the total average monthly amount, in excess of the allowance specified by IRS Local Standards for Housing and Utilities, that you actually expend for home energy costs. **You must provide your case trustee with documentation of your actual expenses, and you must demonstrate that the additional amount claimed is reasonable and necessary.**	$
38	**Education expenses for dependent children less than 18.** Enter the total average monthly expenses that you actually incur, not to exceed $147.92* per child, for attendance at a private or public elementary or secondary school by your dependent children less than 18 years of age. **You must provide your case trustee with documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in the IRS Standards.**	$

**Amount subject to adjustment on 4/01/13, and every three years thereafter with respect to cases commenced on or after the date of adjustment.*

In re ______________________________
Debtor(s)

Case Number: ________________
(If known)

According to the calculations required by this statement:
- ☐ **The applicable commitment period is 3 years.**
- ☐ **The applicable commitment period is 5 years.**
- ☐ **Disposable income is determined under § 1325(b)(3).**
- ☐ **Disposable income is not determined under § 1325(b)(3).**

(Check the boxes as directed in Lines 17 and 23 of this statement.)

CHAPTER 13 STATEMENT OF CURRENT MONTHLY INCOME AND CALCULATION OF COMMITMENT PERIOD AND DISPOSABLE INCOME

In addition to Schedules I and J, this statement must be completed by every individual chapter 13 debtor, whether or not filing jointly. Joint debtors may complete one statement only.

Part I. REPORT OF INCOME

Line	Description	Column A Debtor's Income	Column B Spouse's Income
1	**Marital/filing status.** Check the box that applies and complete the balance of this part of this statement as directed. a. ☐ Unmarried. **Complete only Column A ("Debtor's Income") for Lines 2-10.** b. ☐ Married. **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 2-10.**		
	All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.	**Column A** **Debtor's Income**	**Column B** **Spouse's Income**
2	**Gross wages, salary, tips, bonuses, overtime, commissions.**	$	$
3	**Income from the operation of a business, profession, or farm.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 3. If you operate more than one business, profession or farm, enter aggregate numbers and provide details on an attachment. Do not enter a number less than zero. **Do not include any part of the business expenses entered on Line b as a deduction in Part IV.** a. Gross receipts: $ b. Ordinary and necessary business expenses: $ c. Business income: Subtract Line b from Line a	$	$
4	**Rent and other real property income.** Subtract Line b from Line a and enter the difference in the appropriate column(s) of Line 4. Do not enter a number less than zero. **Do not include any part of the operating expenses entered on Line b as a deduction in Part IV.** a. Gross receipts: $ b. Ordinary and necessary operating expenses: $ c. Rent and other real property income: Subtract Line b from Line a	$	$
5	**Interest, dividends, and royalties.**	$	$
6	**Pension and retirement income.**	$	$
7	**Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose.** Do not include alimony or separate maintenance payments or amounts paid by the debtor's spouse. Each regular payment should be reported in only one column; if a payment is listed in Column A, do not report that payment in Column B.	$	$

<table>
<tr><td>29</td><td>Local Standards: transportation ownership/lease expense; Vehicle 2. Complete this Line only if you checked the “2 or more” Box in Line 28.
Enter, in Line a below, the “Ownership Costs” for “One Car” from the IRS Local Standards: Transportation (available at www.usdoj.gov/ust/ or from the clerk of the bankruptcy court); enter in Line b the total of the Average Monthly Payments for any debts secured by Vehicle 2, as stated in Line 47; subtract Line b from Line a and enter the result in Line 29. Do not enter an amount less than zero.
<table>
<tr><td>a.</td><td>IRS Transportation Standards, Ownership Costs</td><td>$</td></tr>
<tr><td>b.</td><td>Average Monthly Payment for any debts secured by Vehicle 2, as stated in Line 47</td><td>$</td></tr>
<tr><td>c.</td><td>Net ownership/lease expense for Vehicle 2</td><td>Subtract Line b from Line a.</td></tr>
</table></td><td>$</td></tr>
<tr><td>30</td><td>Other Necessary Expenses: taxes. Enter the total average monthly expense that you actually incur for all federal, state, and local taxes, other than real estate and sales taxes, such as income taxes, self-employment taxes, social-security taxes, and Medicare taxes. Do not include real estate or sales taxes.</td><td>$</td></tr>
<tr><td>31</td><td>Other Necessary Expenses: involuntary deductions for employment. Enter the total average monthly deductions that are required for your employment, such as mandatory retirement contributions, union dues, and uniform costs. Do not include discretionary amounts, such as voluntary 401(k) contributions.</td><td>$</td></tr>
<tr><td>32</td><td>Other Necessary Expenses: life insurance. Enter total average monthly premiums that you actually pay for term life insurance for yourself. Do not include premiums for insurance on your dependents, for whole life or for any other form of insurance.</td><td>$</td></tr>
<tr><td>33</td><td>Other Necessary Expenses: court-ordered payments. Enter the total monthly amount that you are required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments. Do not include payments on past due obligations included in Line 49.</td><td>$</td></tr>
<tr><td>34</td><td>Other Necessary Expenses: education for employment or for a physically or mentally challenged child. Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.</td><td>$</td></tr>
<tr><td>35</td><td>Other Necessary Expenses: childcare. Enter the total average monthly amount that you actually expend on childcare—such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.</td><td>$</td></tr>
<tr><td>36</td><td>Other Necessary Expenses: health care. Enter the total average monthly amount that you actually expend on health care that is required for the health and welfare of yourself or your dependents, that is not reimbursed by insurance or paid by a health savings account, and that is in excess of the amount entered in Line 24B. Do not include payments for health insurance or health savings accounts listed in Line 39.</td><td>$</td></tr>
<tr><td>37</td><td>Other Necessary Expenses: telecommunication services. Enter the total average monthly amount that you actually pay for telecommunication services other than your basic home telephone, internet, and cell phone service—such as pagers, call waiting, caller id, special long distance, or business internet service—to the extent necessary for your health and welfare or that of your dependents or for the production of income if not reimbursed by your employer. Do not include any amounts deducted on line 3b or any other amounts previously deducted.</td><td>$</td></tr>
<tr><td>38</td><td>Total Expenses Allowed under IRS Standards. Enter the total of Lines 24 through 37.</td><td>$</td></tr>
</table>

Subpart B: Additional Living Expense Deductions
Note: Do not include any expenses that you have listed in Lines 24-37

TAB 8A

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Professor McKenzie's memo for Item 8A will be distributed separately.

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TAB 8B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: SUGGESTED AMENDMENTS TO THE BANKRUPTCY RULES TO CHANGE THE CALCULATION OF TIME FOR RESPONDING TO A SUMMONS

DATE: FEBRUARY 27, 2012

Chief Judge Peter W. Bowie (Bankr. S.D. Cal.) has suggested a change in the Bankruptcy Rules' method of calculating the time for a defendant to respond to a summons in an adversary proceeding. The suggestion urges the Advisory Committee to amend Rule 7012 so that service, and not issuance, of the summons triggers the defendant's time to respond. At the Advisory Committee's fall meeting, the Subcommittee was assigned the task of preparing a recommendation on the suggestion, which was discussed during the Subcommittee's conference call on December 20, 2011.

The Subcommittee recommends that Rule 7004 be amended instead of Rule 7012. The window of time under Rule 7004(e) in which a party may serve a summons after its issuance should be reduced from 14 days to 7 days. This change would reduce the likelihood that a defendant will have inadequate time to respond to a summons without fundamentally altering the way in which the time to respond to a summons is calculated under the Bankruptcy Rules.

This memorandum provides a brief review of the differences between the Bankruptcy Rules and the cognate Civil Rules provisions on service of a summons and discusses the considerations weighed by the Subcommittee in preparing its recommendation.

Calculating the Time to Respond to a Summons

The Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure diverge with respect to a defendant's time to respond to a summons. Rule 12 of the Civil Rules calculates the defendant's time to answer from the date of service of the summons and complaint. Rule 7012(a) of the Bankruptcy Rules, on the other hand, provides that (except for a United States officer or agency) "the defendant shall serve an answer within 30 days after the *issuance* of the summons" (emphasis added). Because Rule 7004(e), in turn, allows a serving party to withhold a summons for up to "14 days after the summons is issued" before serving it, the answering party may have as little as 16 days' time to respond—or possibly even less if the summons is served by mail.[1] Rule 9006(f) can constrict the time to respond further, because the usual 3 days' enlargement of time to respond when service is effected by mail does not apply (it applies only when the period of time to be enlarged is calculated based on the date of service). Chief Judge Bowie suggests that a defendant should have at least 30 days to respond from the date of service and not the date of issuance, and should enjoy the usual enlargement of time provided under Rule 9006(f) for service by mail.

It is true that the analogous provisions of the Civil Rules may give more time to a defendant to respond, but that is not necessarily the case. Under the Civil Rules, unless the plaintiff requests a waiver of service, the defendant has 21 days—not 30 days—to respond after service of the summons and complaint. *See* Rule 12(a)(1)(A)(i). Thus, the defendant in a bankruptcy proceeding may have more time than a defendant in an analogous civil proceeding to answer. If, however, the plaintiff withholds service until the last possible day and then serves the

[1] The serving party could hold the summons until the fourteenth day and serve it by mail without running afoul of the Rule. *See* Rule 7004(e) ("If service is by any authorized form of mail, the summons and complaint shall be deposited in the mail within 14 days after the summons is issued.").

summons by mail, under the Bankruptcy Rules the defendant would have less than 16 days' time to respond—perhaps significantly less, depending on how long the summons spends in transit.

1. Whether the Difference Between the Civil and Bankruptcy Rules Should be Eliminated

The Subcommittee weighed four considerations in its discussion. First, although the Bankruptcy Rules generally seek to incorporate the Civil Rules where appropriate, one reason for departing from the Civil Rules is the need for greater speed in bankruptcy cases. *Compare* Civil Rule 52(b) ("On a party's motion filed *no later than 28 days* after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly." (emphasis added)), *with* Bankruptcy Rule 7052 ("Rule 52 F.R. Civ. P. applies in adversary proceedings, except that any motion under subdivision (b) of that rule for amended or additional findings shall be filed *no later than 14 days* after entry of judgment." (emphasis added)). Some deviation between the Civil and Bankruptcy Rules in favor of expedition in bankruptcy proceedings is not unwarranted. The question for the Subcommittee was how great a deviation was advisable, and whether parties could be prejudiced under the Bankruptcy Rules' approach to serving and responding to a summons.

Second, there is a benefit to the continued use of the issuance date, rather than the service date, of a summons as the trigger for the defendant's time to respond. Arguably the issuance date is less subject to disagreement and therefore provides clarity in calculating the time a defendant has to respond upon receipt of the summons. It is not unusual for a rule to choose a date more definitive than a service or receipt date when calculating the time to respond. *Compare* Sup. Ct. R. 25.2 (calculating the respondent's time to file a brief on the merits from the date the petitioner's brief is filed), *with* Sup. Ct. R. 25.2, 525 U.S. 1222 (1998) (repealed 2003)

(calculating the respondent's time to file a brief on the merits from the date the petitioner's brief is received).

Third, the potential scenario raised by the suggestion—in which a defendant has less than 16 days to respond to a summons because the plaintiff in an adversary proceeding waits until the last possible moment to serve the summons and does so by mail—could be avoided in large part without adopting the Civil Rules method of calculating the time to respond. The source of the mischief in that scenario is the plaintiff's withholding of the summons for up to two weeks and not the calculation of the response period from the date of issuance of the summons.

Fourth, it is doubtful that a plaintiff in an adversary proceeding will need a full two weeks after issuance of a summons to serve it. Because summonses are issued electronically, and because the Bankruptcy Rules provide for nationwide service of process, there is no obvious reason for permitting a plaintiff to delay serving a summons. The Subcommittee discussed the possibility that a party initiating multiple related adversary proceedings may need several days to organize and serve the papers in each proceeding, but members of the Subcommittee concluded that 7 days provided sufficient time to do so.

2. Recommended Rulemaking

The Subcommittee recommends amending Rule 7004(e) to provide that a summons remains valid for only 7 days after issuance rather than 14 days.[2] This amendment to the Rules would substantially reduce the likelihood that a private defendant would face a significantly

[2] The current version of Rule 7004(e) appears to be the result of the shift in 2009 to the "days mean days" approach of the Judicial Conference's Time-Computation Project. Former Rule 7004(e) provided a 10-day window to serve a summons, which was expanded to 14 days when time periods were changed to conform to the new approach. It does not appear that the Advisory Committee discussed the effect of lengthening the window of time for service of a summons in an adversary proceeding.

shorter time to respond to a summons in bankruptcy than in civil litigation. In most circumstances, this change means that a defendant in an adversary proceeding will have at least as much time to respond as a defendant in nonbankruptcy civil litigation. To be sure, there may be circumstances in which that is not the case—for example, if the summons is served on the seventh day, service is effected by mail, and the mail is delayed for several days in transit. But those circumstances are likely to be uncommon. In any event, if they do occur, a party may seek an enlargement of time by the court under Rule 9006.

The Subcommittee also considered altering Rule 9006(f) to provide a 3-day enlargement of the time to respond when a summons is served by mail. This would decrease the likelihood that a delay in transit would unfairly reduce a defendant's time to respond to a summons. The downside to this approach, however, is the loss of the clarity and certainty in calculating time from the issuance of the summons. For that reason, the Subcommittee rejected any alteration at this time to Rule 9006(f).

The amended Rule 7004(e) would be worded as follows:

RULE 7004. PROCESS; SERVICE OF SUMMONS, COMPLAINT

*****

1 (e) SUMMONS: TIME LIMIT FOR SERVICE WITHIN THE UNITED
2 STATES. Service made under Rule 4(e), (g), (h)(1), (i), or (j)(2) F.R. Civ. P.
3 shall be by delivery of the summons and complaint within ~~14~~ 7 days after the
4 summons is issued. If service is by any authorized form of mail, the summons
5 and complaint shall be deposited in the mail within ~~14~~ 7 days after the summons
6 is issued. If a summons is not timely delivered or mailed, another summons shall

7 be issued and served. This subdivision does not apply to service in a foreign

8 country.

TAB 8C

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: ADDITIONAL ISSUES CONCERNING RULE 1014(b)

DATE: FEBRUARY 22, 2012

Rule 1014(b) governs the procedure for determining where cases will proceed if petitions are filed in different districts by, against, or regarding the same debtor or related debtors. The rule provides that, upon motion, the court in which the first-filed petition is pending may determine – in the interest of justice or for the convenience of the parties – the district or districts in which the cases will proceed. Except as otherwise ordered by that court, proceedings in the cases in the other districts "shall be stayed by the courts in which they have been filed" until the first court makes its determination.

At the fall 2011 meeting of the Rules Committee, the Subcommittee recommended that Rule 1014(b) be amended to provide that proceedings in subsequently filed cases are stayed only upon order of the court in which the first-filed petition is pending. It also recommended some stylistic changes to the rule to provide greater clarity. The Committee unanimously accepted the Subcommittee's recommendation and voted to seek publication for comment of the proposed amendment, to be worded as follows:

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS INVOLVING

3 THE SAME OR RELATED DEBTORS ARE FILED IN

4 DIFFERENT COURTS. If petitions commencing cases under the

5 Code or seeking recognition under chapter 15 are filed in different

6 districts by, regarding, or against (1) the same debtor, (2) a

7 partnership and one or more of its general partners, (3) two or

8 more general partners, or (4) a debtor and an affiliate, ~~on motion~~

9 ~~filed~~ the court in the district in which the first-filed petition ~~filed~~

10 ~~first~~ is pending ~~and after hearing on notice to the petitioners, the~~

11 ~~United States trustee, and other entities as directed by the court, the~~

12 ~~court~~ may determine, in the interest of justice or for the

13 convenience of the parties, the district or districts in which ~~the case~~

14 ~~or~~ any of the cases should proceed. The court may make this

15 determination on motion and after hearing on notice to the

16 petitioners, the United States trustee, and other entities as directed

17 by the court. ~~Except as otherwise ordered by t~~ The court ~~in the~~

18 ~~district in which the petition filed first is pending,~~ may order the

19 parties to the subsequently filed cases to refrain from proceeding

20 further in those cases ~~the proceedings on the other petitions shall~~

21 ~~be stayed by the courts in which they have been filed~~ until it makes

22 the determination under this subdivision ~~is made~~.

Following the fall meeting, the rule was sent to Professor Joe Kimble, the rules style consultant, for his review. He made several suggestions that were then considered by the Style Subcommittee. One of his suggestions was to clarify who has the responsibility for giving notice of the hearing on a Rule 1014(b) motion. The existing rule does not specify who provides the notice; instead it refers to a "hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court." The proposed amendment approved at the fall meeting was similarly worded. When the Style Subcommittee discussed who should give notice of the hearing, members also raised questions about whether the existing list of recipients of the notice is sufficiently broad. Because these issues went beyond matters of style, the Style Subcommittee and Judge Wedoff concluded that the amendment of Rule 1014(b) should be referred back to the Business Subcommittee for further consideration.

The Subcommittee reconsidered the wording of the amendment to Rule 1014(b) during its December 20, 2011 conference call. **It recommends that the Committee approve a revised version of the previously approved amendment and that the amendment to Rule 1014(b) be submitted to the Standing Committee for publication in August 2012.**

Issues for Consideration

1. *Who gives notice?* The issue raised by Professor Kimble is who should be required to give notice of the hearing. He suggested that a new sentence be started on line 15, stating that "The court [or the clerk] must give notice of the hearing to the petitioners, the United States trustee, and other entities as directed by the court." He noted, however, that it does not make sense for the court to be the subject of the sentence, given the concluding phrase about directives by the court. Therefore the only reasonable choices are the clerk and the movant.

The Subcommittee noted that other parts of Rule 1014 use the same nonspecific wording about notice. Like existing subdivision (b), paragraphs (1) and (2) of subdivision (a) both refer to a "hearing on notice to the petitioners, the United States trustee, and other entities as directed by the court." And throughout the rules, the phrase "after notice and a hearing" or similar language is used without specifying who must give notice.

By contrast, Rule 2002 states directly that "the clerk, or some other person as the court may direct," shall give to debtors, creditors, trustees, and United States trustees, among others, notice of specific hearings, orders, and other matters that are listed in the rule. The rule does not refer to hearings on Rule 1014 motions. Rule 2002(m) does, however, give the court authority to fill in details about notice that are not otherwise provided in the rules. It says that the "court may from time to time enter orders designating the matters in respect to which, the entity to whom, and the form and manner in which notices shall be sent except as otherwise provided by these rules."

Because Rule 1014(b)'s reference to a "hearing on notice" is consistent with the wording of Rule 1014(a)(1) and (2), is a frequently used phrase throughout the rules, and can be given specific content by a court order, the Subcommittee recommends that the wording approved by the Committee in September be retained.

2. *Who should receive notice?* Existing Rule 1014(b) and the proposed amendment require that notice of the hearing be given to the petitioners, the United States trustee, and other entities as directed by the court. The Style Subcommittee raised a question about whether the rule should provide that others, such as creditors in the multiple cases, must also be given notice.

The requirement that notice be given to "the petitioners, the United States trustee, and other entities as directed by the court" mirrors the language in Rule 1014(a)(1) regarding motions

to transfer cases filed in a proper district and (a)(2) regarding motions to transfer cases filed in an improper district. In the case of a Rule 1014(b) motion, however, the provision of notice to persons who have participated in a case and may be affected by the court's determination of the motion is more complicated. As the Subcommittee previously noted, Rule 1014(b) is unusual in a couple of respects. First, it authorizes a bankruptcy court to order that a case pending in another court be transferred. Second, because the rule is not triggered until a related case is commenced and a Rule 1014(b) motion is filed, the first case may have been pending for a lengthy period when a hearing on the motion is held. Those circumstances mean that (1) parties who are unknown to the court that hears the Rule 1014(b) motion will need to receive notice, and (2) there may be a large group of creditors and other parties who may be affected by the motion and therefore should receive prior notice of the hearing.

Rule 2002 requires a broader list of recipients of notice than does Rule 1014. Subdivision (a) of Rule 2002 requires notice to be given to "the debtor, the trustee, all creditors and indenture trustees." The Subcommittee concluded that notice of a hearing under Rule 1014(b) should be given to everyone on this list, as well as to the United States trustee, who is entitled to notice under current Rule 1014(b).[1]

The Subcommittee also concluded that the rule should be clarified by expressly providing that notice must be given to the specified parties in all of the related cases that are the subject of the court's Rule 1014(b) determination. Under the amendment, the interests of parties to the subsequently filed case(s) could be affected because the court ruling on the motion may order those proceedings stayed. The clerk in court 1 (the court making the determination), however, may not have a mailing matrix of all the creditors, indenture trustees, and any trustees that are

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[1] Under current Rule 1014(b) notice must be given to "petitioners." Since petitioners will be either the debtor or creditors, they are also included in the Rule 2002(a) notice list.

involved only in a related case. Therefore the party that files the Rule 1014(b) motion may be in a better position than the clerk to provide the required notice. The Committee Note has been amended to reflect that fact.

Proposed Revision of the Rule 1014(b) Amendment

The following draft shows by double underlining and double strikethroughs the recommended changes to the previously approved amendment of Rule 1014(b). It includes the style changes recommended by Professor Kimble that the Style Subcommittee accepted.

Rule 1014. Dismissal and Change of Venue

1 * * * * *

2 (b) PROCEDURE WHEN PETITIONS INVOLVING

3 THE SAME OR RELATED DEBTORS ARE FILED IN

4 DIFFERENT COURTS. If petitions commencing cases under the

5 Code or seeking recognition under chapter 15 are filed in different

6 districts by, regarding, or against (1) the same debtor, (2) a

7 partnership and one or more of its general partners, (3) two or

8 more general partners, or (4) a debtor and an affiliate, ~~on motion~~

9 ~~filed~~ the court in the district in which the first-filed petition ~~filed~~

10 ~~first~~ is pending ~~and after hearing on notice to the petitioners, the~~

11 ~~United States trustee, and other entities as directed by the court, the~~

12 ~~court~~ may determine, in the interest of justice or for the

13 convenience of the parties, the district or districts in which ~~the case~~

14 ~~or~~ any of the cases should proceed. The court may ~~make this~~

15 ~~determination~~ so determine on motion and after hearing on notice

16 to the following entities in these cases: petitioners, the United

17 States trustee, entities entitled to notice under Rule 2002(a), and

18 other entities as directed by the court. Except as otherwise ordered

19 by t The court in the district in which the petition filed first is

20 pending, may order the parties to the subsequently filed cases to

21 refrain from proceeding further in those cases the proceedings on

22 the other petitions shall be stayed by the courts in which they have

23 been filed until it makes the determination under this subdivision is

24 made.

COMMITTEE NOTE

Subdivision (b) provides a practical solution for resolving venue issues when related cases are filed in different districts. It designates the court in which the first-filed petition is pending as the decision maker if a party seeks a determination of where the related cases should proceed. Subdivision (b) is amended to clarify when proceedings in the subsequently filed cases are stayed. It requires an order of the court in which the first-filed petition is pending to stay proceedings in the related cases. Requiring a court order to trigger the stay will prevent the disruption of other cases unless there is a judicial determination that this subdivision of the rule applies and that a stay of related cases is needed while the court makes its venue determination.

Notice of the hearing must be given to all debtors, trustees, creditors, indenture trustees, and United States trustees in the affected cases, as well as any other entity that the court directs. Because the clerk of the court that makes the determination often may lack access to the names and addresses of entities in other cases, a court may order the moving party to provide notice.

The other changes to subdivision (b) are stylistic.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON BUSINESS ISSUES

RE: PROPOSED AMENDMENTS TO CIVIL RULES 45 AND 37

DATE: FEBRUARY 11, 2012

The Advisory Committee on Civil Rules has proposed a major revision of Rule 45 and a conforming amendment to Rule 37. These amendments were published for comment last August. Because Bankruptcy Rule 9016 provides that Civil Rule 45 applies in cases under the Code and Rule 7037 makes Rule 37 applicable in adversary proceedings, the Subcommittee considered whether these proposed amendments would have any unique impacts in bankruptcy cases that might require adjustments to the incorporating bankruptcy rules. The Subcommittee concluded that in only rarely occurring circumstances could the proposed civil rules have a different impact in bankruptcy proceedings. **It therefore recommends that the Advisory Committee take no action at this time in response to the proposed amendments to Civil Rules 45 and 37.**

Proposed Changes to Rules 45 and 37

One of the main purposes of the proposed amendments to Rule 45 is to simplify the subpoena rule. Eliminating confusion about which court issues a subpoena, the amendment would designate the court where the underlying case is pending as the issuing court. Rule 45(a)(2) would provide that a "subpoena must issue from the court where the action is pending," and subdivision (b)(2) would permit the subpoena to "be served at any place within the United States." Thus, if a party to an adversary proceeding in the Bankruptcy Court for the District of New Jersey wanted to subpoena a witness in the Northern District of California to a deposition,

the party would be able to serve on that witness a subpoena issued by the New Jersey bankruptcy court.

That change does not mean, however, that the witness would have to go to New Jersey to be deposed. The proposed amendment would continue the existing rule's geographic restrictions on place of compliance. The relevant provisions would be brought together in one subdivision, Rule 45(c). It would provide that a subpoena could command a person to attend a trial, hearing, or deposition only (1) within 100 miles of where the person resides, is employed, or regularly transacts business; or (2) anywhere within the state where the person resides, is employed, or regularly transacts business if the person subpoenaed is a party or a party's officer, or the person is commanded to attend a trial and would not incur substantial expense. Thus in the case of the deposition of the witness in the Northern District of California, the New Jersey subpoena could not require the witness to travel more than 100 miles from work or home. A subpoena commanding the production of documents, tangible things, or electronically stored information could require compliance only at "a place reasonably convenient for the person who is commanded to produce." Should issues of compliance arise or a motion to quash be filed, the court in the district where compliance is required (in the above example, most likely the Northern District of California) would in most cases rule on the matter.

The proposed amendment rejects a line of cases that have interpreted the existing rule to permit parties and party offices to be subpoenaed to testify at trial without the imposition of any geographic limit. The Committee seeks to restore what it believes was the intended meaning of the 1991 amendment of Rule 45 – that all subpoenas are subject to the rule's geographical limitations.

Amended Rule 45(f) would allow the court where compliance is required to transfer a subpoena-related motion to the issuing court under limited circumstances. Such a transfer would be authorized only if (1) all parties and the person subject to the subpoena consent, or (2) the court finds exceptional circumstances. The Committee Note gives as examples of exceptional circumstances the following situations in which the subpoena dispute is focused on issues involved in the underlying action:

- the issues have already been presented to the issuing court;
- the issues bear significantly on the issuing court's management of the underlying action;
- there is a risk of inconsistent rulings on subpoenas served in multiple districts; or
- the issues overlap with the merits of the underlying action.

The note states that transfer would not be appropriate if the subpoena dispute focuses on the burden or expense on the nonparty subject to the subpoena.

If a transfer of the subpoena motion were made under this rule, an attorney for the person subject to the subpoena who is authorized to practice in the court where the motion was made would be permitted to file papers and appear on the motion in the issuing court. Once the issuing court ruled on the motion, it could transfer its order to the court where the motion was made for purposes of enforcement.

Finally, the proposed amended Rule 45 would require that notice and a copy of a subpoena be served on each party before it is served on the person subject to the subpoena if the subpoena commanded the production of documents, electronically stored information, or tangible things, or the inspection of premises.

Rule 37(b) would be amended to conform to changes to Rule 45. A sentence would be added that would apply only when a deposition-related motion was transferred from the

compliance court to the issuing court. If a deponent failed to comply with an order of the issuing court compelling discovery, the failure could be treated as contempt of either the court where the deposition is taken or the court where the action is pending.

Special Impact on Bankruptcy?

Members of the Subcommittee believe that the proposed amendment of Rule 45 would be beneficial to bankruptcy courts and practitioners, just as it would be in the district court context. The rule is more clearly organized, and its provisions are more straightforward and easier to understand. The Civil Rules Committee identified some issues on which it particularly invited comments, including whether additional notices should be required, what should be the standard for the transfer of subpoena motions, whether the rule should authorize nationwide subpoenas requiring parties and officers of parties to testify at trial, and whether the simplification effort has been successful. It is still possible that the Civil Rules Committee might make changes to the published rules in response to comments received on these or other topics.

Assuming that the rule is approved in substantially the form in which it was published, the Subcommittee identified only one situation in which the amended rule might operate differently in bankruptcy cases. That situation could arise when a subpoena motion is transferred to the issuing court. One of the exceptional circumstances that the Civil Rules Committee stated as justifying a transfer is that the issues bear significantly on the issuing court's management of the underlying action. There could be a limited set of cases in which the rule as drafted might not serve the intended purpose in the bankruptcy context. If the underlying action is an adversary proceeding that under 28 U.S.C. § 1409 must be brought in a district other than the one where the bankruptcy case is pending (the district where the defendant resides or the district where the claim could be brought under applicable nonbankruptcy venue provisions), then that

court would be the issuing court, not the home bankruptcy court. Proposed Rule 45(f) would not authorize the motion to be transferred to the district where the underlying bankruptcy case is pending, even if it might bear significantly on that court's management of the bankruptcy case.

The Subcommittee concluded that this issue is not likely to be frequently encountered, at least if transfer in the absence of consent remains one that is, as the draft Committee Note says, "truly rare." While this is a situation in which a bankruptcy proceeding differs from a civil case, the Subcommittee did not consider the possibility of the occurrence of this situation to require any immediate action by the Advisory Committee. It recommends instead that the Committee wait and see if amended Rule 45 is adopted and, if so, to revisit the issue only if it appears that the new subpoena rule causes any problems in bankruptcy cases.

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TAB 9A

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Proposed new Rules 8001 – 8027, Item 9A, are set out at Appendix B.

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TAB 9B

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: SUGGESTED AMENDMENTS TO RULES 7016 AND 8001 TO REQUIRE STATEMENT ON LIMITATION OF RIGHT TO APPEAL IN ADVERSARY PROCEEDINGS

DATE: February 24, 2012

The Rules Committee received a suggestion (11-BK-E) to allow litigants in an adversary proceeding to limit their appeal rights. The suggestion, from retired Bankruptcy Judge A. Thomas Small and Professor Alan N. Resnick, comprises two recommended changes to the Bankruptcy Rules. The first would require the parties to file, after commencement of the proceeding but prior to trial, a statement disclosing whether all parties have agreed to limit their right to appeal. The second would enforce that limitation by requiring dismissal of an appeal as provided by the parties' agreement. The suggestion would amend Rule 7016 (which incorporates the pretrial procedures of Rule 16 of the Civil Rules) and Rule 8001 (which currently governs, among other things, the manner of taking an appeal and the voluntary dismissal of an appeal). At the Committee's fall meeting, the suggestion was referred to the Subcommittee on Privacy, Public Access, and Appeals for further consideration. The Subcommittee discussed the suggestion during its January 11, 2012, conference call.

The Subcommittee has concluded that no further action should be taken on the suggestion. Three considerations motivate this recommendation. First, there does not appear to be a significant need for a rule explicitly providing for the enforcement of an agreement by parties to limit their appeal rights. Federal courts of appeals already enforce agreements of that

kind in nonbankruptcy proceedings, and there is no reason to believe that agreements respecting bankruptcy appeals would be treated differently. Second, the Subcommittee was concerned that requiring parties to file a statement respecting whether they have agreed to limit their appeal rights could present a risk of prejudice and gamesmanship. Knowledge of the parties' appeal waiver might negatively affect a bankruptcy judge's treatment of the dispute, and the selective disclosure of a party's failure to consent to a waiver of appeal rights may be abused by other parties as a litigation tactic. Third, the Subcommittee was reluctant to recommend the suggestion without further deliberation on rulemaking responses to *Stern v. Marshall*. Although the suggestion is not motivated by *Stern*, it touches on similar territory—the nature and scope of access to the Article III courts in bankruptcy litigation—and any changes in the area should not be undertaken without full consideration of their broader implications.

The Suggestion

The suggestion permits parties, by mutual agreement, to limit themselves to one level of appeal (to the district court or bankruptcy appellate panel) or to no appeal at all from the bankruptcy court. Although directed at adversary proceedings, the submission contemplates that a court could make the appeal limitation procedure applicable in contested matters under Rule 9014(c). The suggestion is intended to reduce delays in bankruptcy cases, reduce costs incurred by litigants, and lessen the appellate workload of the federal courts.

The first part of the suggestion would amend Rule 7016 by adding a new subpart (b). The new provision requires parties to an adversary proceeding to file a statement regarding whether all have agreed to a limitation on appeals from any order, judgment, or decree entered by the bankruptcy court in the proceeding. As amended, Rule 7016 would read:

RULE 7016. PRE-TRIAL PROCEDURE; FORMULATING ISSUES; WAIVING RIGHT TO APPEAL

(a) Rule 16 F.R. Civ. P. applies in adversary proceedings.

(b) After the commencement of the proceeding and prior to the commencement of the trial, the parties shall by jointly or separately filing a statement state whether all parties have voluntarily waived the right to appeal under 28 U.S.C. § 158 from any order, judgment, or decree to be rendered by the bankruptcy court in the proceeding or, if they have not waived such right to appeal, whether they have voluntarily waived the right to appeal to the court of appeals from any order, judgment, or decree entered by the district court or bankruptcy appellate panel service under 28 U.S.C. § 158(a) or (c).

The second part of the suggestion would amend the Part VIII Rules to require dismissal of an appeal taken contrary to the parties' agreement to limit their appeal rights. An agreement to limit appeal rights, however, would not bar an appeal based on one of the following: lack of subject matter jurisdiction, a violation of a constitutional right, or fraud or other improper means of procuring the decision. This portion of the suggestion would be found in a new subpart (d) to Rule 8001. The amended Rule would read in pertinent part:

RULE 8001. MANNER OF TAKING APPEAL; VOLUNTARY DISMISSAL; DISMISSAL BASED ON WAIVER; CERTIFICATION TO COURT OF APPEALS

*****

(d) Except to the extent that the appeal is based on alleged lack of subject-matter jurisdiction, a violation of a right provided under the Constitution of the United States, or fraud or other improper means in the procurement of the order,

judgment, or decree, an appeal from an order, judgment, or decree under 28 U.S.C. § 158 shall be dismissed, if at any time after the commencement of the proceeding in which such order, judgment, or decree was entered, and before the date of such entry, all appellants and appellees in a joint statement or in separate statements expressly waived the right to take an appeal from such order, judgment, or decree.

In their submission, Judge Small and Professor Resnick state that the amendment to Rule 8001 could stand on its own and should be adopted whether or not the Rules Committee decides to move forward with the suggested amendment to Rule 7016.

Discussion

A. Does the Suggestion Address a Significant Problem?

Although the submission expresses the belief that the suggestion would result in speedier and more efficient administration of bankruptcy cases, it is arguable whether the proposed changes address a significant gap in the Bankruptcy Rules. To be sure, the Bankruptcy Rules do not contain an express provision governing appeal waivers, but neither do the Rules prohibit parties from entering into agreements to limit their appeal rights. It appears that those agreements would be enforceable now. There is not much case law on the question, but courts of appeals in ordinary civil litigation have routinely enforced agreements between parties to forgo the right to appeal a lower court's decision. *See*, *e.g.*, *In re Lybarger*, 793 F.2d 136 (6th Cir. 1986) (dismissing appeal based on agreement providing that resolution of attorney's fee dispute by district court "shall be final and the parties waive all rights of appeal and further review"); *Brown v. Gillette Co.*, 723 F.2d 192 (1st Cir. 1983) (*per curiam*) (dismissing appeal in order to

enforce agreement that district court's decision would be "final and binding" and not subject to appeal); *Goodsell v. Shea*, 651 F.2d 765 (C.C.P.A. 1981) ("The great weight of authority favors enforceability of agreements not to appeal from a decision of a specified tribunal."). In doing so, courts have not relied on any explicit provision in the Civil or Appellate Rules. Although there do not appear to be reported bankruptcy decisions discussing waivers of the right to appeal by agreement, the principle should apply equally to bankruptcy proceedings. Given the federal appellate courts' willingness to enforce an agreement between parties to limit appeal rights, an amendment to the Bankruptcy Rules appears to provide little additional benefit.

B. Is the Suggestion Advisable?

1. Amending Rule 7016

Turning to the details of the suggestion, the Subcommittee was concerned about the potential effects of the first part of the suggestion—the amendment to Rule 7016. That portion of the suggestion raises the possibility of prejudice and gamesmanship if one party is unwilling to waive or otherwise limit its right to appeal in a bankruptcy proceeding. The proposal permits a joint or separate filing of an appeal waiver statement. Permitting separate filings creates an unnecessary risk of gamesmanship. A party might file a separate statement indicating its own willingness to waive an appeal in order to prejudice or coerce a reluctant adversary.

Even if this part of the suggestion were altered to provide that the appeal waiver statement must be filed jointly on behalf of all parties and not separately, the Subcommittee considered a more basic concern. As noted at the Committee's fall meeting, there is a risk that a bankruptcy judge who knows that a decision will not be appealed may, even if unintentionally, show less care and attention in resolving the dispute. The parties, of course, could decide to

accept that risk in order to reap the benefit of speedier resolution of their dispute. But the Subcommittee found it difficult to see the benefit from mandating disclosure of the agreement to waive or limit appeal rights in every case.[1]

2. Amending Rule 8001

The Subcommittee's discussion about the second portion of the suggestion raised concerns about the extent—and the advisability—of the waiver proposal. The language in the second part of the suggestion regarding an appeal based on "a violation of a right provided under the Constitution of the United States" provides an ambiguous exception to the appeal waiver provision. It is unclear whether this would mean that parties could not waive their right to appeal if the underlying litigation itself involves a constitutional claim or whether parties could not waive the right to challenge some constitutional defect in the proceedings below. Either meaning presents difficulties.[2] Parties may agree to settle a constitutional claim, so it is difficult to see why they cannot also agree to accept a bankruptcy judge's decision on a constitutional claim as final and not subject to further review. If the other meaning is intended, and an appeal could not be waived when there is an allegation of a constitutional defect in the proceedings in the bankruptcy court, two problems emerge. First, "a violation of a right provided under the Constitution of the United States" encompasses a broad range of issues, including due process

[1] There is some indication in the case law that an appeal waiver in ordinary civil litigation must be made part of the record below. *See Goodsell*, 651 F.2d at 767 ("[T]his court will not ignore an agreement not to appeal where a clear mutual intent not to appeal is shown *and the agreement is made part of the record below*." (emphasis added)). That could be accomplished, however, without the need for public disclosure of the parties' agreement at the outset of litigation. The parties could file their agreement on the record after entry of a decision by the bankruptcy court.

[2] A secondary issue raised by this portion of the suggestion is its proper placement in the Part VIII Rules. It does not belong in revised Rule 8001 (which will cover the scope of the Part VIII Rules and definitional items). It probably fits best in revised Rule 8003 (which will address the manner of taking an appeal) or in new Rule 8023 (which will address voluntary dismissals).

arguments, that could be raised in many appeals—thereby opening a large loophole in the proposal and reducing the savings of appellate court time it is intended to generate. Second, the proposal would touch on broader questions about the ability of litigants to waive the right to an Article III forum and the scope of any such waiver, because the entitlement to an Article III forum is also a right provided under the Constitution. Those questions are sensitive ones in light of *Stern v. Marshall*. Members of the Subcommittee concluded that taking further action on the suggestion would be inadvisable at this time in light of the uncertainty produced about those questions after *Stern*.

Providing for the enforcement of appeal waivers could highlight for parties that they may limit their resort to appeals in bankruptcy and thereby encourage the practice. If so, including an appeal waiver provision in the Bankruptcy Rules might reduce delays in the resolution of disputes in bankruptcy cases and take appellate cases off the dockets of district courts, BAPs, and courts of appeals. But the Subcommittee concluded that this possible benefit would be outweighed by the potential downside risks of adopting the proposal. The Subcommittee therefore recommends that no further action be taken on this suggestion.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON PRIVACY, PUBLIC ACCESS, AND APPEALS

RE: CACM SUGGESTION FOR AMENDMENTS TO RULE 2002(a)(1) AND OFFICIAL FORM 21

DATE: FEBRUARY 25, 2012

Judge Julie A. Robinson, chair of the Judicial Conference's Committee on Court Administration and Case Management ("CACM"), has submitted a suggestion (11-BK-J) on behalf on her Committee for bankruptcy rule and form amendments intended to reduce the likelihood that the privacy of debtors' social-security numbers ("SSNs") will be breached. This recommendation arose in response to CACM's consideration of the report and recommendations of the Standing Committee's Privacy Subcommittee, which met during 2009-10 and was composed of members from each of the Rules Advisory Committees and from CACM.

Neither the Privacy Subcommittee nor the Standing Committee recommended any bankruptcy rule or form amendments. CACM, however, asked the Administrative Office of the U.S. Courts ("AO") to undertake follow-up studies regarding the need for full SSNs in bankruptcy, apparently in response to a Federal Judicial Center study for the Privacy Subcommittee that had revealed that the greatest number of public disclosures of SSNs occurred in bankruptcy cases. Based on the results of the AO studies, CACM recommends that Rule 2002(a)(1) be amended to eliminate the requirement that the notice of the meeting of creditors include the debtor's full SSN and that Official Form 21 (Statement of Social-Security Number or Individual Taxpayer-Identification Number) be amended to include a prominent notice that the form should not be filed on the public docket. **The Subcommittee recommends that the**

Advisory Committee propose an amendment of Form 21 for publication but that it not propose an amendment of Rule 2002(a)(1) at this time.

Background of Rule 2002(a)(1)

Rule 2002(a)(1) requires 21-day notice to be given of "the meeting of creditors under § 341 or § 1104 of the Code, which notice, unless the court orders otherwise, shall include the debtor's employer identification number, social security number, and any other federal taxpayer identification number" (emphasis added). The underlined language was added in 2003 in conjunction with an amendment to Rule 1005 that limited the caption of a bankruptcy petition to the last four digits of the debtor's SSN. As originally proposed, only Rule 1005, and not Rule 2002(a)(1), would have been amended, and only the last four digits of the debtor's SSN would have been provided on the § 341 notice. Private creditor interests, the credit reporting industry, United States trustees, and the Justice Department all expressed concern that permitting debtors to list only the final four digits of social-security numbers would create problems in identifying debtors. They feared that this truncated information could lead to inadvertent violations of the automatic stay and discharge injunction. They also stated that it could limit the ability of creditors and trustees to determine whether a particular debtor had obtained bankruptcy relief previously and was engaged in a serial bankruptcy filing and that it could hamper law enforcement efforts to prosecute debtors for bankruptcy fraud and related crimes.

In response to the comments, the Advisory Committee proposed that the amendment to Rule 1005 be joined by the addition of Rule 1007(f) – which requires the debtor to submit to the court, but not file, a statement of his or her full SSN – and the amendment to Rule 2002(a)(1) requiring the notice of the meeting of creditors to contain the debtor's full SSN. These

amendments were approved, and Form 21 was adopted for the statement of the debtor's full social-security number.

AO Studies

In October 2010 the AO's Bankruptcy Court Administrative Division submitted a report to CACM on "The Use of Debtors' Full Social Security Numbers in Bankruptcy Cases." (This report is Attachment 1 to Judge Robinson's suggestion.) The AO study noted several ways in which, contrary to the intent of the rules, debtors' SSNs get publically disclosed: Form 21s are mistakenly bundled with other documents and are filed on the court docket; the notice of the meeting of creditors with the full SSN is sent by mail to some creditors and does not arrive at the correct destination; the Bankruptcy Noticing Center mistakenly sends the full SSN to unintended recipients; and creditors attach the Form 21 to proofs of claim that are filed on the claims register.

The study discussed the continued need for full SSNs by various users internal to the bankruptcy system. It also stated that for many public and private sector entities, SSNs remain important identifiers, although it reported that there is a trend toward reducing reliance on SSNs. Some entities are now using systems that use a combination of data elements for identification purposes, rather than a single number. The AO study concluded that using only the last four digits of a debtor's SSN, in combination with either the debtor's first and last name or with the debtor's first and last name and the district of filing, permits the unique identification of a debtor in the overwhelming majority of cases.

Based on these findings, the authors of the AO study recommended to CACM that the full SSN not be sent to notice recipients in bankruptcy cases, that the process for collecting full SSNs and providing access to various government agencies be improved, and that Form 21

prominently state that it should not be filed on the docket.

In 2011 the Bankruptcy Court Administration Division engaged in an additional phase of the study for CACM. (This is Attachment 2 to the Suggestion.) It solicited input from 25 private and public entities that would be affected by a decision to use only the last four digits of a debtor's SSN on the notice of the meeting of creditors. It received mixed responses from 15 of the entities. Six of eleven responding private entities indicated that they no longer rely on full SSNs for identification purposes and thus they would not be adversely affected by receiving only the last four digits of the debtor's SSN. Only one of the four public entities that responded, the California Franchise Tax Board, shared that view.

The other three public respondents – the IRS, the Georgia Department of Revenue, and the Washington Department of Revenue – all indicated that they rely on the full SSN for identification. The IRS stated that the absence of this information would require a time-consuming manual identification process. Some of the private entities that responded also indicated that they still use the full SSN. This group included several claims purchasers who also serve as claims servicers or noticing agents.

The AO report stated that the study was presented to the spring 2011 meetings of the Bankruptcy Clerks Advisory Group and the Bankruptcy Judges Advisory Group. According to the report, "[n]either group expressed concern or anticipated difficulty with the Judiciary truncating the SSN on the notice of meeting of creditors."

The report concluded that it might be appropriate to continue to collect and provide the full SSN to internal court system users and to the U.S Trustee Program, the Bankruptcy Administrators Program, and U.S. Attorney's Offices, and perhaps also to other government entities such as the IRS and state taxing authorities. The information could be provided to these

users electronically through secure means. On the other hand, the report concluded that there may be less justification for continuing to provide the full SSN to private entities, some of whom might transmit or sell the data to third parties for commercial gain.

The authors of the AO study recommended that Rule 2002(a)(1) be amended to truncate the debtor's SSN on the notice of meeting of creditors. They explained that publication of such an amendment would provide an opportunity for more widespread public comment on the impact of the change. They further recommended that CACM consider an exception to the privacy policy that would enable governmental entities to receive full SSNs by means of secure, electronic transmission. The report indicated that CACM had already agreed to recommend that Form 21 be amended to state prominently that the form not be filed on the docket and that the AO work with court personnel and CM/ECF program staff to ensure that e-filers understand how to submit Form 21 as a private docket entry.

The Subcommittee's Recommendation

The Subcommittee recognized that the suggestion to provide only the last four digits of the debtor's SSN to most creditors rests on the balancing of competing concerns: the interest in protecting debtors against the inappropriate public disclosure of their SSNs, on the one hand, and the legitimate need for creditors and other participants in the bankruptcy system for this information, on the other. As long as debtors are still required to provide the court with their full SSNs, as they would be even if the suggestion is adopted, there remains a risk of erroneous disclosure. However, imposing greater restrictions on access to full SSNs should at least decrease the incidence of breaches of privacy.

After a full discussion during its January 11 conference call, the Subcommittee concluded that the AO studies show that there remains a sufficient need for access to debtors' SSNs among

both public and private creditors that it would be premature at this time to propose removal of the full SSN from the notice of the meeting of creditors. If this information is still needed by creditors to ensure that they are seeking payment from the correct debtor or that a debtor from whom they are seeking payment has filed for bankruptcy, it is hard to ignore that concern. Mr. Kohn reaffirmed the need of the IRS for full SSNs, and the Subcommittee was not convinced that there is an appropriate basis for drawing a distinction between the degrees of access granted public and private creditors. The trend among creditors of using other types of identifiers for debtors is likely to continue, in which case the need for SSNs will decrease. In that case, an amendment of Rule 2002(a)(1) can be reconsidered in the future.

The Subcommittee concluded that an amendment of Form 21 to include a prominent warning not to file the form on the public docket would be beneficial without producing any harm. It therefore recommends that the Advisory Committee propose adding the following language to Form 21: "**An individual debtor must submit this form to the court, but must not file it on the public docket. This form will not be included in the court's electronic records.**"

COMMITTEE NOTE

The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects the debtor's social-security number or taxpayer identification number from becoming accessible to the public.

TAB 9C-1

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An individual debtor must submit this form to the court, but must not file it on the public docket. This form will not be included in the court's electronic records.

United States Bankruptcy Court

_____________ District Of _____________

In re ____,	)	
[Set forth here all names including married, maiden, and trade names used by debtor within last 8 years]	)	
Debtor	)	Case No. ______________
Address ____	)	
____	)	Chapter _______________
Last four digits of Social-Security or Individual Taxpayer-Identification (ITIN) No(s).,(if any): ___________________	)	
____	)	
Employer Tax-Identification (EIN) No(s).(if any): _________	)	
____	)	

STATEMENT OF SOCIAL-SECURITY NUMBER(S)

*(or other Individual Taxpayer-Identification Number(s) (ITIN(s)))**

1.Name of Debtor (Last, First, Middle):_______________________________
(Check the appropriate box and, if applicable, provide the required information.)

☐ Debtor has a Social-Security Number and it is:_________________
(*If more than one, state all.)*

☐ Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN), and it is: _______________________
(If more than one, state all.)

☐ Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

2.Name of Joint Debtor (Last, First, Middle):___________________________
(Check the appropriate box and, if applicable, provide the required information.)

☐ Joint Debtor has a Social-Security Number and it is: _______________________
(*If more than one, state all.)*

☐ Joint Debtor does not have a Social-Security Number but has an Individual Taxpayer-Identification Number (ITIN) and it is: _________________________
(If more than one, state all.)

☐ Joint Debtor does not have either a Social-Security Number or an Individual Taxpayer-Identification Number (ITIN).

I declare under penalty of perjury that the foregoing is true and correct.

X ____
Signature of Debtor Date

X ____
Signature of Joint Debtor Date

<u>Joint debtors must provide information for both spouses</u>.
Penalty for making a false statement: Fine of up to $250,000 or up to 5 years imprisonment or both. 18 U.S.C. §§ 152 and 3571.

COMMITTEE NOTE

The form is amended to remind debtors that, in accordance with Rule 1007(f), it should be submitted to the court, but not filed on the public docket. This rule protects the debtor's social-security number or taxpayer-identification number from becoming accessible to the public.

TAB 10

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON ATTORNEY CONDUCT AND HEALTHCARE ISSUES

RE: SUGGESTION FOR A NATIONAL BANKRUPTCY BAR

DATE: FEBRUARY 22, 2012

Geoffrey L. Berman, Vice President of Development Specialists, Inc., submitted a suggestion (11-BK-G) for a national bankruptcy bar, using Rule 9029 (Local Bankruptcy Rules; Procedure When There is No Controlling Law) as a basis. Mr. Berman explained that his suggestion was prompted by a September 2011 en banc order of the Bankruptcy Court for the Southern District of Florida that sanctioned an attorney appearing in that court. Mr. Berman said that the order highlighted the continuing and growing nature of ethics and civility problems in the bankruptcy courts, which he believes might be addressed by the creation of "a set of national standards, in addition to any local court rules, and the underlying state law rules for professional responsibility." The Advisory Committee referred the suggestion to the Subcommittee for its consideration.

The order to which Mr. Berman referred is Order Sanctioning Attorney Kevin C. Gleason, *In re New River Dry Dock, Inc.*, No. 06-13274-BKC-JKO (Bankr. S.D. Fla. Sept. 20, 2011) (en banc). The court suspended the attorney from practicing before that court for 60 days and referred the matter to the Florida Bar because of his "unprofessional and disrespectful" comments regarding the judge in papers filed with the court and his highly irregular attempt at an ex parte contact with the judge. Among the attorney's several offending statements were the following:

- "Wrong. The statute, which I followed and you ignored, requires service upon the party seeking to enforce a judgment, and permits that party 2 days to respond."
- "It is sad when a man of your intellectual ability cannot get it right when your own record does not support your half-baked findings."

The attorney later delivered a bottle of wine to the judge's chambers with a note suggesting that they attempt to resolve their issues privately.

The Subcommittee's Recommendation

The Subcommittee concluded that the order that prompted Mr. Berman's suggestion does not, in itself, demonstrate a need for a national bankruptcy bar or national ethical standards. The attorney who was sanctioned was someone who the court said had "practiced before this Court for many years." It was not a case of an out-of-district attorney who was accustomed to different ethical standards; nor is it likely that the behavior for which the attorney was sanctioned would be viewed as acceptable in any other district. A lack of uniform, national standards of professional conduct therefore did not seem to present a problem in that case. Moreover, the court was able to respond to the behavior by applying its inherent powers, § 105 of the Code, and the Florida Bar Rules.[1] There was no indication that additional authority was needed.

To the extent that Mr. Berman's suggestion rests on the desire to permit bankruptcy lawyers to practice throughout the country without meeting the admission requirements of individual districts, it is similar to, although broader than, the suggestion of the States' Association of Bankruptcy Attorneys that the Advisory Committee considered and voted not to pursue at the fall 2011 meeting largely because of the jurisdiction exercised by local courts over the admission and conduct of conduct of attorneys appearing before them. The Subcommittee

[1] The court stated that it was "informed, but not controlled, by the Florida Bar Rules which provide a useful framework against which to measure the conduct under review." Order at p. 10.

also noted concern that Mr. Berman's suggestion would create an additional layer of ethical standards, which might create a conflict with existing district and state bar standards. **The Subcommittee recommends that no further action be taken on this suggestion.**

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TAB 11

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: SUBCOMMITTEE ON TECHNOLOGY AND CROSS BORDER INSOLVENCY

RE: ELECTRONIC SIGNATURES OF PERSONS OTHER THAN ATTORNEYS

DATE: FEBRUARY 22, 2012

At the fall 2011 meeting of the Advisory Committee, the Subcommittee on Forms reported on a set of technological issues that the Forms Modernization Project ("FMP") had been considering and for which it had determined that a national rule might be beneficial. The first issue was whether and under what circumstances bankruptcy courts can accept documents signed electronically by a debtor or another party without requiring the retention of a paper copy containing a "wet" or original signature. Second, if retention is required, should a national rule be proposed that specifies the proper custodian of the wet signature and the period of retention? Currently these issues in bankruptcy are governed by local rules that vary significantly from one district to another. Members of the FMP had observed that if an electronic signature alone could suffice for proving that the actual signing of the document in question, electronic filing would be facilitated, and some of the opposition to the length of the modernized initial-filing documents might be reduced. Following presentation and discussion of the Forms Subcommittee's report at the fall meeting, the Chair referred the electronic signature issues to this Subcommittee for consideration of the need for any rule changes.

The Subcommittee considered this matter during its January 25 conference call. **It recommends that a national rule on electronic signatures be developed, following one of two approaches discussed below, and that, if this recommendation is accepted by the**

Advisory Committee, the Chair determine from the Chair of the Standing Committee whether the project should be pursued as a joint undertaking of several of the rules committees.

Current Law

Bankruptcy Rule 5005(b)(2) provides in part that a "court may by local rule permit or require documents to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." This provision was added in 1996 to authorize courts to permit electronic filing, signing, and verification, and was amended in 2006 to allow courts to require those activities to be done electronically, so long as reasonable exceptions are allowed.

Bankruptcy courts responded to this authorization by enacting local rules or guidelines regarding electronic filing. Professor Dan Capra, reporter for the Evidence Rules Committee, said that model local rules were drafted for the guidance of federal courts. Among them was a model rule that imposed a duty on authorized filers to preserve documents with the original signatures of persons other than the filer (such as debtors). Professor Capra noted that the model rule was written to require the filer to retain the originals because clerks of court raised objections to a model rule that required the court to retain custody of the originals. Many bankruptcy courts today have local rules with requirements for the filing attorney to retain documents with the non-attorney's original signature for a specified period of time.

Some courts, including the Bankruptcy Courts for the Northern District of Illinois and for the Northern District of Ohio, have adopted an alternative procedure. The local rules of these courts require electronically filed documents that must be signed by someone other than the filer to be accompanied by a declaration signed by the person whose signature is required. The

declaration bearing an original signature is scanned by the clerk's office and retained in electronic form.

In the course of discussions by the FMP, questions arose about whether electronic signatures alone – without a paper copy bearing the wet signature – could suffice for purposes of providing evidence in a subsequent criminal prosecution against a debtor or other party for perjury or other bankruptcy crimes. Mr. Redmiles, a member of the FMP, conducted discussions with DOJ representatives which revealed that they do not favor the existing practice of having debtors' attorneys retain documents with the debtors' original signatures. In particular, they noted that requiring an attorney to retain these documents could present ethical issues for the attorney if the signed documents were later sought in connection with the pursuit of criminal charges against the attorney's client. They also expressed concern about the lack of uniformity among the districts regarding the required retention period. The DOJ representatives were of the view that a paper document with a wet signature is not necessarily required for a criminal prosecution, but they felt that a prosecution would be on firmer ground if there were a federal statute or national rule declaring the presumptive validity of an electronic signature and if the technology for assuring the authenticity of an electronic signature were enhanced.

DOJ has submitted a recommendation to NextGen's Additional Stakeholders Functional Requirements Group related to the electronic signature issue. DOJ recommends that documents bearing wet signatures, signed under penalty of perjury, be retained for five years (the statute of limitations for fraud and perjury proceedings) and that they be retained by the clerk of court. The recommendation suggests that these changes be made if there is no national rule declaring that electronic copies of such documents in the court's ECF system constitute legally sufficient best evidence in the absence of an original (hard-copy) signed document.

Because the Advisory Committee decided at the fall meeting that the issues that have been raised about electronic signatures are ones that courts and attorneys are currently facing, it asked the Subcommittee to consider the present need for a rule-based response, rather awaiting a NextGen solution.

Options Favored by the Subcommittee

The Subcommittee recommends that a national bankruptcy rule amendment be pursued. It proposes two options for consideration, neither of which would require attorneys or clerks to retain hard copies of documents with wet signatures.

(1) Rule 5005(b) could be amended to adopt a declaration procedure similar to the one used in the Northern District of Illinois and the Northern District of Ohio. The rule would provide that a declaration with an original signature must be filed when documents requiring the signature of someone other than the filer are filed electronically. The clerk would scan the declaration, which would attest to the truthfulness and validity of the information in the electronically filed document, and would store the declaration electronically. No hard copies of the underlying document or the declaration would have to be retained.

(2) Rule 5005(b) could be amended to declare that any petition or other document electronically filed and verified, signed, or subscribed in a manner that is consistent with technical standards that the Judicial Conference of the United States establishes must be treated for all purposes (including penalties for perjury) in the same manner as though signed or subscribed. This language generally tracks the language of 26 U.S.C. § 6061(b)(2), which validates electronic signatures on tax returns. The IRS uses PID numbers as electronic signatures (previously assigned by the IRS to electronically filing taxpayers and now in most cases selected by the taxpayers themselves). The Subcommittee concluded that a bankruptcy

rule along these lines should not specify the technological method for providing an electronic signature. As the 1996 Committee Note to Rule 5005 stated:

> Judicial Conference standards governing the technological aspects of electronic filing will result in uniformity among judicial districts to accommodate an increasingly national bar. By delegating to the Judicial Conference the establishment and future amendment of national standards for electronic filing, the Supreme Court and Congress will be relieved of the burden of reviewing and promulgating detailed rules dealing with complex technological standards. Another reason for leaving to the Judicial Conference the formulation of technological standards for electronic filing is that advances in computer technology occur often, and changes in the technological standards may have to be implemented more frequently than would be feasible by rule amendment under the Rules Enabling Act process.

If the Advisory Committee agrees with the recommendation to develop a national rule for the handling of electronic signatures, it suggests that the Chair of the Advisory Committee first consult with the Chair of the Standing Committee. Judge Wedoff could inform Judge Kravitz of the issues that have been raised about electronic signatures in bankruptcy cases and inquire whether other rules committees might have an interest in developing electronic signature provisions that would be uniform across the various rules. If there is interest, a subcommittee of the Standing Committee might be created that could propose a unified approach.

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MEMORANDUM

TO: ADVISORY COMMITTEE ON BANKRUPTCY RULES

FROM: EUGENE R. WEDOFF

RE: PROPOSALS TO AMEND RULES 9006, 9013, AND 9014, AND OFFICIAL FORM 7

DATE: FEBRUARY 29, 2012

Among the proposed amendments published for comment in 2011 are several rules changes designed to highlight the default deadlines for the service of motions and written responses, and a form change designed to define the term "insider" more appropriately. These proposed amendments are described below, based on the memorandum from the Advisory Committee to the Standing Committee recommending publication. No comments were received in connection with any of these proposed amendments.

1. **Rule 9006,** based on Civil Rule 6, contains a subsection regarding the time for service of motions. Although many districts have their own local rules governing motion practice, some do not. For the latter districts, Rule 9006(d) provides timing rules for any motions not addressed elsewhere in the Bankruptcy Rules or imposed in an individual case. Unlike the civil rule, however, Rule 9006 does not indicate in its title that it addresses time periods for motions. Nor is it followed by a rule that addresses the form of motions, as is the case with the civil rule. The Committee concluded that several rule amendments should be proposed to highlight the existence of Rule 9006(d). The first set of changes is to Rule 9006 itself. The Committee voted to amend the title of the rule to add a reference to the "time for motion papers." This change, which is consistent with Civil Rule 6, should make it easier to find the provision governing motion practice.

The Committee also proposed that the coverage of subdivision (d) be expanded to address the timing of the service of any written response to a motion, not just opposing affidavits. Local motion practices vary widely, so the Committee concluded that the provision should be as inclusive as possible. The caption of subdivision (d) and its wording would be changed to reflect this expansion. As amended, the rule would read as follows:

Rule 9006. Computing and Extending Time; <u>Time for Motion Papers</u>

. 1 *****

. 2 (d) ~~FOR~~ MOTIONS~~S~~ <u>PAPERS</u> ~~—AFFIDAVITS~~. A

. 3 written motion, other than one which may be heard ex parte,

. 4 and notice of any hearing shall be served not later than seven

. 5 days before the time specified for such hearing, unless a

. 6 different period is fixed by these rules or by order of the

. 7 court. Such an order may for cause shown be made on ex

. 8 parte application. When a motion is supported by affidavit,

. 9 the affidavit shall be served with the motion~~; and, except.~~

. 10 <u>Except</u> as otherwise provided in Rule 9023, ~~opposing~~

. 11 ~~affidavits~~ <u>any written response shall</u> ~~may~~ be served not later

. 12 than one day before the hearing, unless the court permits

. 13 <u>otherwise</u> ~~them to be served at some other time.~~

2. **Rule 9013**, which addresses the form and service of motions, would be amended to provide a cross-reference to the time periods in Rule 9006(d). This amendment, like the ones to Rule 9006(d), is intended to call greater attention to the default deadlines for motion practice. In addition, stylistic changes have been made to Rule 9013 to add greater clarity.

Rule 9013. Motions: Form and Service

. 1 A request for an order, except when an application is

. 2 authorized by these rules, shall be by written motion, unless

. 3 made during a hearing. The motion shall state with

. 4 particularity the grounds therefor, and shall set forth the relief

. 5 or order sought. Every written motion, other than one which

. 6 may be considered ex parte, shall be served by the moving

. 7 party within the time determined under Rule 9006(d). The

. 8 moving party shall serve the motion on:

. 9 (a) the trustee or debtor in possession and on those

. 10 entities specified by these rules; or,

. 11 (b) the entities the court directs if these rules do not

. 12 require service or specify the entities to be served ~~if service~~

. 13 ~~is not required or the entities to be served are not specified by~~

. 14 ~~these rules, the moving party shall serve the entities the court~~

. 15 ~~directs~~.

3. **Rule 9014**, which addresses contested matters, would be similarly amended to add a cross-reference to the times under Rule 9006(d) for serving motions and responses.

Rule 9014. Contested Matters

. 1 *****

. 2 (b) SERVICE. The motion shall be served in the

. 3 manner provided for service of a summons and complaint by

. 4 Rule 7004 and within the time determined under Rule

. 5 9006(d). Any written response to the motion shall be served

. 6 <u>within the time determined under Rule 9006(d)</u>. Any paper

. 7 served after the motion shall be served in the manner

. 8 provided by Rule 5(b) F. R. Civ.

.

4. **Official Form 7. Statement of Financial Affairs)** would be amended to make the definition of "insider" consistent with the Bankruptcy Code's definition of the word. The phrase "any owner of 5 percent or more of the voting or equity securities of a corporate debtor" would be deleted, and "any persons in control of a corporate debtor" would be included.

The Code definition of "insider" lists other relationships that make someone an insider, including a "person in control" of a corporate debtor, but the statute contains no bright-line test that would invariably make a 5 percent shareholder an insider. The language proposed to be deleted was added to the form's definition in 2000, but no explanation for this amendment appears in the Committee Note, Advisory Committee report to the Standing Committee, or the Advisory Committee minutes. The Committee recognized that the Code definition of "insider" is not exclusive since it says that the term "includes" the relationships that are listed. It found no basis, however, for concluding that § 101(31) provides authority to create the bright-line, 5 percent definition that currently appears in Form 7. As amended the definition of "insider" in Form 7 would be the following:

> *"Insider."* The term "insider" includes but is not limited to: relatives of the debtor; general partners of the debtor and their relatives; corporations of which the debtor is an officer, director, or person in control; officers, directors, and any persons in control of a corporate debtor and their relatives; affiliates of the debtor and insiders of such affiliates; and any managing agent of the debtor. 11 U.S.C. § 101(2), (31).

TABS 13-21

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Suggestions 12-BK-A, 12-BK-B, 12-BK-C, 12-BK-D, 11-BK-N, and 11-BK-M
Obtaining a Copy of Official Form 10
Bankruptcy-related legislation
Section 521(i)

Items 13 - 21 will be oral reports.

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TAB 22

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Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees

(as codified in *Guide to Judiciary Policy*, Vol. 1, § 440)

§ 440 Procedures for Committees on Rules of Practice and Procedure

This section contains the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees," last amended in September 2011. JCUS-SEP 2011, p. __.

§ 440.10 Overview

The Rules Enabling Act, 28 U.S.C. §§ 2071–2077, authorizes the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for the federal courts. Under the Act, the Judicial Conference must appoint a standing committee, and may appoint advisory committees to recommend new and amended rules. Section 2073 requires the Judicial Conference to publish the procedures that govern the work of the Committee on Rules of Practice and Procedure (the "Standing Committee") and its advisory committees on the Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure and on the Evidence Rules. *See* 28 U.S.C. § 2073(a)(1). These procedures do not limit the rules committees' authority. Failure to comply with them does not invalidate any rules committee action. *Cf.* 28 U.S.C. § 2073(e).

§ 440.20 Advisory Committees

§ 440.20.10 Functions

Each advisory committee must engage in "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. *See* 28 U.S.C. § 331.

§ 440.20.20 Suggestions and Recommendations

Suggestions and recommendations on the rules are submitted to the Secretary of the Standing Committee at the Administrative Office of the United States Courts, Washington, D.C. The Secretary will acknowledge the suggestions or recommendations and refer them to the appropriate advisory committee. If the Standing Committee takes formal action on them, that action will be reflected in the Standing Committee's minutes, which are posted on the judiciary's rulemaking website.

§ 440.20.30 Drafting Rule Changes

(a) Meetings

Each advisory committee meets at the times and places that the chair designates. Advisory committee meetings must be open to the public, except when the committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Preparing Draft Changes

The reporter assigned to each advisory committee should prepare for the committee, under the direction of the committee or its chair, draft rule changes, committee notes explaining their purpose, and copies or summaries of written recommendations and suggestions received by the committee.

(c) Considering Draft Changes

The advisory committee studies the rules' operation and effect. It meets to consider proposed new and amended rules (together with committee notes), whether changes should be made, and whether they should be submitted to the Standing Committee with a recommendation to approve for publication. The submission must be accompanied by a written report explaining the advisory committee's action and its evaluation of competing considerations.

§ 440.20.40 Publication and Public Hearings

(a) Publication

Before any proposed rule change is published, the Standing Committee must approve publication. The Secretary then arranges for printing and circulating the proposed change to the bench, bar, and public. Publication should be as wide as possible. The proposed change must be published in the *Federal Register* and on the judiciary's rulemaking website. The Secretary must:

(1) notify members of Congress, federal judges, and the chief justice of each state's highest court of the proposed change, with a link to the judiciary's rulemaking website; and

(2) provide copies of the proposed change to legal-publishing firms with a request to timely include it in publications.

(b) Public Comment Period

A public comment period on the proposed change must extend for at least six months after notice is published in the *Federal Register*, unless a shorter period is approved under paragraph (d) of this section.

(c) Hearings

The advisory committee must conduct public hearings on the proposed change unless eliminating them is approved under paragraph (d) of this section or not enough witnesses ask to testify at a particular hearing. The hearings are held at the times and places that the advisory committee's chair determines. Notice of the times and places must be published in the *Federal Register* and on the judiciary's rulemaking website. The hearings must be recorded. Whenever possible, a transcript should be produced by a qualified court reporter.

(d) Expedited Procedures

The Standing Committee may shorten the public comment period or eliminate public hearings if it determines that the administration of justice requires a proposed rule change to be expedited and that appropriate notice to the public can still be provided and public comment obtained. The Standing Committee may also eliminate public notice and comment for a technical or conforming amendment if the Committee determines that they are unnecessary. When an exception is made, the chair must advise the Judicial Conference and provide the reasons.

§ 440.20.50 Procedures After the Comment Period

(a) Summary of Comments

When the public comment period ends, the reporter must prepare a summary of the written comments received and of the testimony presented at public hearings. If the number of comments is very large, the reporter may summarize and aggregate similar individual comments, identifying the source of each one.

(b) Advisory Committee Review; Republication

The advisory committee reviews the proposed change in light of any comments and testimony. If the advisory committee makes substantial changes, the proposed rule should be republished for an additional period of public comment unless the advisory committee determines that republication would not be necessary to achieve adequate public comment and would not assist the work of the rules committees.

(c) Submission to the Standing Committee

The advisory committee submits to the Standing Committee the proposed change and committee note that it recommends for approval. Each submission must:

(1) be accompanied by a separate report of the comments received;

(2) explain the changes made after the original publication; and

(3) include an explanation of competing considerations examined by the advisory committee.

§ 440.20.60 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The advisory committee's chair arranges for preparing the minutes of the committee meetings.

(b) Records

The advisory committee's records consist of:

- written suggestions received from the public;
- written comments received from the public on drafts of proposed rules;
- the committee's responses to public suggestions and comments;
- other correspondence with the public about proposed rule changes;
- electronic recordings and transcripts of public hearings (when prepared);
- the reporter's summaries of public comments and of testimony from public hearings;
- agenda books and materials prepared for committee meetings;
- minutes of committee meetings;

- approved drafts of rule changes; and
- reports to the Standing Committee.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for general public correspondence about proposed rule changes and electronic recordings of hearings when transcripts are prepared. This correspondence and archived records are maintained by the Administrative Office of the United States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.20.30(a).

§ 440.30 Standing Committee

§ 440.30.10 Functions

The Standing Committee's functions include:

(a) coordinating the work of the advisory committees;

(b) suggesting proposals for them to study;

(c) considering proposals they recommend for publication for public comment; and

(d) for proposed rule changes that have completed that process, deciding whether to accept or modify the proposals and transmit them with its own recommendation to the Judicial Conference, recommit them to the advisory committee for further study and consideration, or reject them.

§ 440.30.20 Procedures

(a) Meetings

The Standing Committee meets at the times and places that the chair designates. Committee meetings must be open to the public, except when the Committee — in open session and with a majority present — determines that it is in the public interest to have all or part of the meeting closed and states the reason. Each meeting must be preceded by notice of the time and place, published in the *Federal Register* and on the judiciary's rulemaking website, sufficiently in advance to permit interested persons to attend.

(b) Attendance by the Advisory Committee Chairs and Reporters

The advisory committees' chairs and reporters should attend the Standing Committee meetings to present their committees' proposed rule changes and committee notes, to inform the Standing Committee about ongoing work, and to participate in the discussions.

(c) Action on Proposed Rule Changes or Committee Notes

The Standing Committee may accept, reject, or modify a proposed change or committee note, or may return the proposal to the advisory committee with instructions or recommendations.

(d) Transmission to the Judicial Conference

The Standing Committee must transmit to the Judicial Conference the proposed rule changes and committee notes that it approves, together with the advisory committee report. The Standing Committee's report includes its own recommendations and explains any changes that it made.

§ 440.30.30 Preparing Minutes and Maintaining Records

(a) Minutes of Meetings

The Secretary prepares minutes of Standing Committee meetings.

(b) Records

The Standing Committee's records consist of:

- the minutes of Standing Committee and advisory committee meetings;
- agenda books and materials prepared for Standing Committee meetings;
- reports to the Judicial Conference; and
- official correspondence about rule changes, including correspondence with advisory committee chairs.

(c) Public Access to Records

The records must be posted on the judiciary's rulemaking website, except for official correspondence about rule changes. This correspondence and archived records are maintained by the Administrative Office of the United

States Courts and are available for public inspection. Minutes of a closed meeting may be made available to the public but with any deletions necessary to avoid frustrating the purpose of closing the meeting under § 440.30.20(a).

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TAB 23

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Item 23 will be an oral report.

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Bankruptcy Rules Tracking Docket (By Rule or Form Number) 3/1/12

Suggestion	Docket No., Source & Date	Status Pending Further Action	Tentative Effective Date
Rule 1007(c) Conform to deadline in (a)(2) to file a list of creditors in an involuntary case	Committee proposal Suggestion 10-BK-L Susan Ivancsics, Court Services Admin, Northern District of Indiana	9/10 - Committee approved as technical amendment, Reporter to draft Committee Note 6/11 - Standing Committee approved as technical amendment 9/11 - Judicial Conference approved	12/1/12
Rule 1007(b)(7) Allow financial management course provider to file notice of course completion	Suggestion 09-BK-I Dana C. McWay on behalf of the Next Generation Bankruptcy CM/ECF Clerk's Office Functional Requirements Group	4/10 - Committee considered, referred to Subcommittee on Consumer Issues 8/10 - Subcommittee considered 9/10 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee agenda	12/1/13
Rule 1007, Exhibit D to Official Form 1 Amendment of 11 U.S.C. 109(h)(1) by Bankruptcy Technical Corrections Act	David Sime Clerk, District of Utah	7/11 - Discussed by Consumer and Forms subcommittees 9/11 - Committee considered, no further action	

Rule 1014 Cases filed in different districts by a debtor and certain affiliates	Suggestion 10-BK-J Judge Linda Riegle	4/11- Committee discussed, referred to Business Subcommittee 6/11, 8/11 - Subcommittee discussed 9/11 - Committee approved for publication 11/11 - Referred to Subcommittee for further consideration 12/11 - Subcommittee considered 3/12 - Committee agenda	12/1/14
Rule 2002(a)(1), Official Forms 9A-I, 21	Suggestion 11-BK-J Committee on Court Administration and Case Management	1/12 - Subcommittee on Privacy, Public Access, and Appeals considered 3/12 - Committee agenda	
Rule 2002(f)(1) Require notice of chapter 13 confirmation	Suggestion 12-BK-B Bankruptcy Noticing Working Group	3/12 - Committee agenda	
Rule 2015(a)(3) Correct reference to 11 U.S.C. § 704(a)(8).	William Redden, Clerk Eastern District of Virginia	3/11 - Referred to Chair and Reporter 4/11 - Committee approved as technical amendment 6/11 - Standing Committee approved as technical amendment 9/11 - Judicial Conference approved	12/1/12

Rule 3001, **Official Form 10** Facilitate identification of stale claims and inadequately documented claims filed after bulk transfer of consumer debts	Suggestion 08-BK-J Judge A. Thomas Small	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved amendment to Rule 3001(c)(1) for publication with mortgage amendments to Rules 3001, 3002.1 (see above); certification approved, added to pending amendments to Form 10 6/09 - Standing Committee approved for publication 8/09 - Published for comment 2/10 - Public hearing 2/10 - Consumer Subcommittee considered comments 4/10 - Committee approved republication of revised Rule 3001 and publication of Form 10 with certification 6/10 - Standing Committee approved publication 8/10 - Published for comment 2/11 - Public hearing 2/11 - Subcommittee considered comments 4/11 - Committee approved Rule 3001 as revised 6/11 - Standing Committee approved revised rule 9/11 - Judicial Conference approved revised rule	12/1/12 Rule 3001 12/1/11 Form 10
Rules 3001, 3002, 3007, 3012, 3015, 4003, 7001, 7004, 9009 Amendments in connection with a chapter 13 form plan	Committee proposal	9/11 - Committee discussed 3/12 - Working group discussed 3/12 - Committee agenda	12/1/14

Rule 3001(c) Discrepancy between the rule and paragraph 7 of instructions for Form 10	Comment 10-BK-02 Linda Spaight AO US Courts, BCAD	3/11 – Forms Subcommittee considered 4/11 - Committee approved as a technical amendment 6/11 - Standing Committee approved as a technical amendment 9/11 - Judicial Conference approved	12/1/12
Rule 3002(a) Require secured creditors to file proofs of claim	Suggestion (11-BK-B) Judge A. Benjamin Goldgar	7/11 - Consumer Subcommittee discussed 9/11 - Committee discussed, referred to Subcommittee on Consumer Issues 12/11, 2/12 - Subcommittee considered 3/12 - Committee agenda	12/1/14
Rules 3002, 3004 Deadline for filing deficiency claims	Suggestion (11-BK-H) Trustee Debra L. Miller	12/11- Subcommittee on Consumer Issues considered 3/12- Committee agenda	
Rule 3007(a) Disposition of objections to claims by negative notice	Suggestion 09-BK-H Judge Margaret Dee McGarrity on behalf of the Bankruptcy Judges Advisory Group	1/10 - Subcommittee on Consumer Issues considered 4/10 - Committee discussed, referred to Subcommittee on Consumer issues 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Subcommittee on Consumer issues 12/10 - Subcommittee considered 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Subcommittee on Consumer Issues considered 3/12 - Committee agenda	12/1/13

Rule 3007(a) Clarify service requirements for objections to claims	Suggestion (09-BK-N) Judge Michael E. Romero on behalf of the Bankruptcy Judges Advisory Group	4/10 - Committee discussed, referred to Subcommittee on Consumer issues 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Subcommittee on Consumer issues 12/10 - Subcommittee considered 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Subcommittee on Consumer Issues considered 3/12 - Committee agenda	12/1/13
Rule 4004(c)(1)(J) Hearing on reaffrmation agreement	Suggestion 10-BK-K Judge Paul Mannes	4/11 - Committee discussed, referred to Subcommittee on Consumer Issues 7/11 - Subcommittee considered 9/11 - Committee considered, no further action	
Rule 4004(c)(1) Clarification	Committee Proposal	9/11 - Committee discussed, referred to Subcommittee on Consumer Issues 12/11 - Subcommittee considered 3/12 - Committee agenda	12/1/14

Rule 5009(b) Conform rule to amendment to Rule 1007(b)(7)	Committee Proposal	12/10 - Considered by Consumer Subcommittee 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee agenda	12/1/13
Rule 7001(1) Compelling the debtor to deliver the value of property to the trustee	Suggestion 12-BK-D Judge S. Martin Teel, Jr.	3/12 - Committee agenda	
Rules 7004(e), 7012, 9006(f) Provide that the deadline for responding to a summons runs from the date of service, not the date of issuance	Suggestion 11-BK-F Chief Judge Peter W. Bowie	9/11 - Committee discussed, referred to Subcommittee on Business Issues 12/11 - Subcommittee considered 3/12 - Committee agenda	
Rules 7008, **7054** Finding that there is a gap in the procedure for requesting allowance of attorney's fees in adversary proceedings	Charlie Y, Inc., v. Carey B.A.P. 9th Cir. (Mar. 4, 2011)	4/11 - Committee discussed. Referred to Consumer and Business Subcommittees 7/11 - Consumer Subcommittee discussed 7/11 - Business Subcommittee discussed 9/11 - Committee approved for publication 1/12 - Standing Committee approved for publication as revised	12/1/14

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Rules 7016, 8001 Permit parties to agree that their appellate options will be limited to no more than one appeal or to no appeal at all	Suggestion 11-BK-E Judge A. Thomas Small	9/11 - Committee discussed, referred to Appeals Subcommittee 1/12 - Subcommittee considered 3/12 - Committee agenda	
Rules 7054(b) Time provisions	Committee proposal	10/09 - Committee approved changing 5 days to 7 days, deferred 1-day provision 11/09 - BJAG recommended changing 1 day to 7 days 2/10 - Subcommittee on Business Issues considered 4/10 - Committee approved for publication 6/10 - Standing Committee approved for publication 8/10 - Published for comment 2/11 - One comment 4/11 - Committee approved 6/11 - Standing Committee approved 9/11 - Judicial Conference approved	12/1/12
Rule 7056, Civil Rule 56 Timing of summary judgment motions in contested matters and adversary proceedings after civil rule amended	Judge Wedoff	3/09 - Committee discussed 10/09 - Committee considered, referred to Subcommittee on Consumer Issues 2/10 - Note in newsletters for bankruptcy judges and clerks 3/10 - Subcommittee considered 4/10 - Committee approved for publication (see Rule 7054(b) above)	12/1/12

Rules 8001 - 8020 Revise Part VIII of the rules to modernize and more closely follow the Appellate Rules	Eric Brunstad Committee proposal	3/08 - Referred to Privacy, Public Access and Appeals Subcommittee 5/08 - Subcommittee discussed 8/08 - Subcommittee discussed 10/08 - Committee discussed 3/09 - Open meeting of Subcommittee on Privacy, Public Access, and Appeals 3/09 - Committee discussed 6/09 - Subcommittee discussed comments at open meeting 9/09 - Subcommittee discussed comments at 2nd open meeting 10/09 - Report to committee 12/09 - Revised draft incorporated comments at 2nd open meeting 2/10 - Subcommittee considered 4/10 - Committee received progress report 8/10, 9/10 - Subcommittee calls 9/10 - Report on Committee agenda 12/10, 2/11 - Subcommittee calls 4/11 - Discussed during joint meeting with Appellate Rules Committee 7/11 - Drafting group reviewed and revised the draft 9/11 - Committee discussed 12/1 - Report to Standing Committee 1/12, 3/12 - Subcommittee considered 3/12 - Committee agenda	12/1/14

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 Part VIII rules	
Rules 8007.1 (new), 9023, 9024 Indicative rulings	Committee proposal	8/08 - Subcommittee on Privacy, Public Access, and Appeals discussed 10/08 - Committee tentatively approved new Rule 8007.1 and Rule 9024 amendment for publication 3/09 - Rules 8007.1 and 9024 assigned to the Bull Pen	
Rule 9006(d) Delete as superfluous, not properly located in the Rules, and may create confusion **Rules 9013, 9014**	Suggestion 10-BK-D Judge Raymond T. Lyons Committee proposal	8/10 - Considered by the Subcommittee on Business Issues 9/10 - Committee approved amendments to Rules 9006, 9013, 9014 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee agenda	12/1/13
Rule 9016 Impact of proposed amendments to Civil Rules 37 and 45	Committee proposal	4/11 - Committee discussed, deferred until after civil rules are published 8/11 - Rules 37 and 45 published 9/11 - Bull Pen 12/11 - Subcommittee on Business Issues considered 3/12 - Committee agenda	
Rule 9027 File notice of removal with bankruptcy clerk	Suggestion 11-BK-M Attorney Jim Spencer	3/12 - Committee agenda	

Bankruptcy Rules Impact of decision in Stern v. Marshall, 131 S. Ct. 2594 (2011)	Committee proposal Suggestion 11-BK-I Judge Eric P. Kimball Suggestion 11-BK-K Judges Black, Goldgar, and Doyle Suggestion 11-BK-L Judge Arthur Gonzalez	9/11 - Committee discussed, referred to Subcommittee on Business Issues 3/12 - Subcommittee considered 3/12 - Committee agenda	
New Rule, **New Form** Waiver of additional fees	Suggestion 11-BK-N Attorney David S. Yen	3/12 - Committee agenda	
New Rule Automatic dismissal under § 521(i)	Suggestion 06-BK-011 Judge Marvin Isgur Suggestion 06-BK-020 National Association of Consumer Bankruptcy Attorneys	6/07 - Subcommittee on Consumer Issues discussed 9/07 - Committee discussed 2/08 - Considered by Consumer Subcommittee 3/08 - Committee discussed 10/08, 3/09, 10/09 - Committee discussed, Reporter to continue monitoring 4/10, 9/10, 4/11, 9/11 - Committee reports	
New Rule, **New Form** Applications for allowance of administrative expenses	Suggestion 09-BK-J Judge William Stone, Jr.	4/10 - Committee considered, referred to Subcommittee on Business Issues 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Business Subcommittee 3/11 - Subcommittee discussed 4/11 - Committee discussed 6/11 - Subcommittee discussed 9/11 - Committee considered, no further action	

New Rule Reports by trusts under § 524(g)	Suggestion 10-BK-H Institute for Legal Reform, an affiliate of the U.S. Chamber of Commerce	3/11 - Business Subcommittee discussed 4/11 - Committee discussed 6/11, 8/11 - Subcommittee discussed 9/11 - Committee considered, no further action	
New Rule Provide more clarity in the selection for creditors' committees and to discourage unethical behavior by counsel	Suggestion 10-BK-N Judge Thomas W. Waldrep, Jr.	4/11 - Committee discussed, referred to Attorney Conduct Subcommittee 7/11 - Subcommittee discussed 9/11 - Committee considered, no further action	
New Rule Admission to practice and local counsel requirements for governmental entities	Suggestion 10-BK-M States' Association of Bankruptcy Attorneys	4/11 - Committee discussed, referred to Attorney Conduct Subcommittee 7/11 - Subcommittee discussed 9/11 - Committee considered, no further action	
New Rule National standard for practice before bankruptcy courts	Suggestion 11-BK-G Geoffrey L. Berman	1/12 - Attorney Conduct Subcommittee considered 3/12 - Committee agenda	
New Rule Electronic Signatures	Forms Modernization Project	8/11 - Forms Modernization Project considered 9/11 - Committee discussed 1/12 - Technology Subcommittee considered 3/12 - Committee agenda	

Official Form 3B Exclude non-cash government assistance	Suggestion 12-BK-A Judge Michael J. Kaplan	3/12 - Committee agenda	
Official Form 6C Extent of claimed exemption, *Schwab v. Reilly,* 130 S. Ct. 2652 (2010),	Judge Eugene Wedoff	7/09 - Subcommittee on Consumer Issues considered 10/09 - Committee discussed 4/10 - Committee discussed 6/10 - Supreme Court decision 8/10 - Consumer and Forms Subcommittees considered 9/10 - Committee considered, referred to Consumer, Forms Subcommittees 10/10 - Subcommittees considered 4/11 - Committee approved 4-column version for publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 2/12 - Forms and Consumer Subcommittees considered comments 3/12 - Committee agenda	
Official Form 7 Revise definition of an "insider"	Suggestion 10-BK-I Aaron Cahn	2/11- Subcommittee on Forms considered 4/11 - Committee approved publication 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee agenda	

Official Forms 9C, 9D, 9E, 9E(Alt.), 9F, 9F(Alt.), 9G, 9H, 9I Encourage creditors to obtain proof of claim form courts' website	Bankruptcy Noticing Working Group	3/12 - Committee agenda	
Official Form 10, Rule 3001 Revise Form 10 certification to deter stale claims	Suggestion 08-BK-J Judge A. Thomas Small Committee proposal	1/09 - Subcommittee on Consumer Issues discussed 3/09 - Committee approved revised certification, added to pending amendments to Form 10 (see above)	12/1/11
Official Form 10 Add reminder in Box 7 to file new forms	Committee proposal	4/11 - Committee approved, deferred for Rule 3001 amendments in 2012 9/11 - Held in Bull Pen	12/1/12
Official Form 10 Provide a space for designating the amount of a general unsecured claim	Suggestion 11-BK-D Sabrina L. McKinney	9/11 - Committee discussed, referred to Forms and Consumer Subcommittees 1/12 - Subcommittees considered 3/12 - Committee agenda	
Official Form 10 Eliminate instruction to attach power of attorney	John Rao	1/12 - Forms and Consumer Subcommittees considered 3/12 - Committee agenda	

Official Forms 10(Attach. A) 10(Suppl. l) 10(Suppl. 2) How to gather input on new mortgage forms, the desirability of including a complete loan history	Committee proposal	7/11 - Consumer and Forms subcommittees discussed 9/11 - Committee discussed, referred to Forms and Consumer Subcommittees 1/12 - Subcommittees discussed 3/12 - Committee agenda	
Official Form 10(Attach. A) Treatment of escrow shortage	Suggestion 12-BK-C Judge Barry S. Schermer	3/12 - Committee agenda	
Official Forms 22A, 22C Deducting telecommunications expenses by debtor who is not self-employed	William J. Neild Comment 09-BK-032	4/10 - Committee discussed, referred to Subcommittee on Consumer Issues 8/10 - Subcommittee considered 9/10 - Committee discussed, referred to Forms Subcommittee 2/11- Subcommittee considered 4/11 - Committee approved, referred to Forms Subcommittee for final review 2/11 - Subcommittee reviewed 6/11 - Standing Committee approved for publication 8/11 - Published for comment 2/12 - Subcommittee on Consumer Issues considered comments 3/12 - Committee agenda	12/1/12
Official Forms 22A, 22C Change in IRS allocation of internet services in National Standards and Local Standards	Mark Redmiles	9/11 - Committee discussed, referred to Subcommittee on Consumer Issues 12/11, 2/12 - Subcommittee considered 3/12 - Committee agenda	12/1/12

Official Form 22C Amend in response to *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010).	Committee Proposal	9/11 - Committee approved 6/11 - Standing Committee approved for publication 8/11 - Published for comment 2/12 - Forms and Consumer Subcommittees considered comments 3/12 - Committee agenda	12/1/12
Official Forms 22A, 22C Allow below-median income debtors to file shortened versions of the forms	Suggestion 11-BK-C Wendell J. Sherk	9/11 - Committee considered, referred to Forms Modernization Project 3/12 - Included in proposed amendments to Forms 22A, 22C	
Official Form 22C Calculation of projected disposable income under § 1325(b)(1), *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010)	Committee proposal	4/10 - Committee discussed 6/10 - Supreme Court decision 8/10 - Consumer and Forms Subcommittees considered 9/10 - Committee approved, referred to Consumer, Forms Subcommittees for final review 2/11- Subcommittees reviewed 6/11 - Standing Committee approved publication 8/11 - Published for comment 3/12 - Committee agenda	12/1/12
Official Form 23 Conform to amendment to Rule 1007(b)(7)	Committee proposal	9/10 - Committee discussed, referred to Forms Subcommittee for final review 2/11- Subcommittee reviewed 4/11 - Held in the Bullpen	12/1/13

New Form Form chapter 13 plan	Suggestion 10-BK-G Judge Margaret Mahoney Comment 10-BK-M States' Association of Bankruptcy Attorneys (SABA)	2/11 - Consumer and Forms Subcommittees discussed 4/11 - Assigned to Forms Subcommittee, with direction to present a proposal for advancing the recommendation at the September meeting 6/11 - Working group appointed 6/11, 8/11 - Working group discussed 8/11 - Judge Wedoff requested information on local model chapter 13 plans 9/11 - Committee discussed 1/12, 2/12 - Working group discussed 3/12 - Committee agenda	12/1/14
Official Forms Alternatives to paper-based format for forms; renumber Official Forms	Judge James D. Walker, Jr. Comment 06-BK-011 Judge Marvin Isgur Patricia Ketchum	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 2008 /2009/2010/2011/2012 - Forms Modernization Project continues work, meetings in January, June 9/10 - Statement of Financial Affairs drafting session 9/10 - Progress report on agenda 10/10 - Form 22 drafting session 4/11 – Progress report 9/11 - Committee approves publishing new individual financial forms 3/12 - Draft financial forms on Committee agenda	12/1/13 Individual Financial Forms

TABS 25-27

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Future meetings
New business
Adjourn

Items 25 – 27 will be oral reports.

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APPENDIX A

Proposed Official Forms 3A, 3B, 6I, 6J, 22A-1, 22A-2, 22B, 22C-1, and 22C-2

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The following pages contain the forms and committee notes to be published for comment, as well as the instructions for the forms. The committee notes explain the stylistic changes to the modernized forms and highlight any substantive changes.

Fee Forms

Form 3A Application for Individuals to Pay the Filing Fee in Installments	p. 3
Form 3A Instructions	p. 5
Form 3A Committee Note	p. 6
Form 3B Application to Have the Chapter 7 Filing Fee Waived	p. 7
Form 3B Instructions	p. 11
Form 3B Committee Note	p. 12

Income and Expense Forms

Schedule I: Your Income	p. 13
Schedule I Instructions	p. 14
Schedule J: Your Expenses	p. 17
Schedule J Instructions	p. 19
Schedule I and J Committee Note	p. 21

Means Test and Current Monthly Income Forms (B22s)

Form 22A-1 Chapter 7 Statement of Your Current Monthly Income	p. 23
Form 22A-2 Chapter 7 Means Test Calculation	p. 26
Forms 22A-1 and 22A-2 Instructions	p. 35
Form 22B Chapter 11 Statement of Your Current Monthly Income	p. 36
Form 22 B Instructions	p. 37
Form 22C-1 Chapter13 Statement of Your Current Monthly Income and Calculation of Commitment Period	p. 39
Form 22C-2 Chapter 13 Calculation of Your Disposable Income	p. 43
Forms 22C-1 and 22C-2 Instructions	p. 51
Forms 22A-1, 22A-2, 22B, 22C-1, and 22C-2 Committee Note	p. 52

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FORM 3A

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Fill in this information to identify your case:

Debtor 1 ______________________________
First Name Middle Name Last Name

Debtor 2 ______________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ______________ District of __________ (State)

Case number ______________________
(If known)

❑ Check if this is an amended filing

Official Form 3A

Application for Individuals to Pay the Filing Fee in Installments

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information.

Part 1: Specify Your Proposed Payment Timetable

1. **Which chapter of the Bankruptcy Code are you choosing to file under?**

   ❑ Chapter 7 .... *Fee*: **$306**
   ❑ Chapter 11 .... *Fee*: **$1,046**
   ❑ Chapter 12 .... *Fee*: **$246**
   ❑ Chapter 13 .... *Fee*: **$281**

2. **You may apply to pay the filing fee in up to four installments. Fill in the amounts you propose to pay and the dates you plan to pay them. Be sure all dates are business days. Then add the payments you propose to pay.**

   You must propose to pay the entire fee no later than 120 days after you first file for bankruptcy. If necessary, you may ask the court to extend the deadline to 180 days after you file. In that case, you must explain why you need the extension.

   If the court approves your application, the court will set your final payment timetable.

You propose to pay…

Amount	When	Date
$_________	❑ With the filing of the petition ❑ On or before this date.........	MM / DD / YYYY
$_________	On or before this date	MM / DD / YYYY
$_________	On or before this date	MM / DD / YYYY
+ $_________	On or before this date	MM / DD / YYYY
Total $_________	◀ Your total must equal the entire fee for the chapter you checked in line 1.	

Part 2: Sign Here

By signing here, you state that you are unable to pay the full filing fee at once, that you want to pay the fee in installments, and that you understand that:

You must pay your entire filing fee before you make any more payments or transfer any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with your bankruptcy case.

You must pay the entire fee no later than 120 days after you first file for bankruptcy, unless the court extends your deadline to 180 days. Your debts will not be discharged until your entire fee is paid.

If you do not make any payment when it is due, your bankruptcy case may be dismissed, and your rights in other bankruptcy proceedings may be affected.

Signature of Debtor 1	Signature of Debtor 2	Your attorney's name and signature, if you used one
Date ________ MM / DD / YYYY	Date ________ MM / DD / YYYY	Date ________ MM / DD / YYYY

Fill in this information to identify the case:

Debtor 1 ______________________________________
First Name Middle Name Last Name

Debtor 2 ______________________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ________________ District of ________
(State)

Case number (*If known*): ________________________

Chapter filing under:
- [ ] Chapter 7
- [ ] Chapter 11
- [ ] Chapter 12
- [ ] Chapter 13

Order Approving Payment of Filing Fee in Installments

After considering the *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A), the court orders that:

[ ] The debtor(s) may pay the filing fee in installments on the terms proposed in the application.

[ ] The debtor(s) must pay the filing fee according to the following terms:

	You must pay…	On or before this date…
	$__________	__________ Month / day / year
	$__________	__________ Month / day / year
	$__________	__________ Month / day / year
	+ $__________	__________ Month / day / year
Total		

Until the filing fee is paid in full, the debtor(s) must not make any additional payment or transfer any additional property to an attorney or to anyone else for services in connection with this case.

____
Month / day / year

By the court: ______________________________
United States Bankruptcy Judge

Official Form 3A

Instructions for the Application for Individuals to Pay the Filing Fee in Installments

United States Bankruptcy Court 12/01/13

How to Fill Out the Application

If you cannot afford to pay the full filing fee when you first file for bankruptcy, you may pay the fee in installments. However, in most cases, you must pay the entire fee within 120 days after you file, and the court must approve your payment timetable. Your debts will not be discharged until you pay your entire fee.

Do not file this form if you can afford to pay your full fee when you file.

If you are filing under chapter 7 and cannot afford to pay the full filing fee at all, you may be qualified to ask the court to waive your filing fee. See *Application to Have Your Chapter 7 Filing Fee Waived* (Official Form 3B).

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out the *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

Things to remember when filling out this form

Be as complete and accurate as possible.

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, is amended in its entirety. It was substantially revised as part of the Forms Modernization Project. Among the goals of the Project was the clarification of forms and their instructions in order to make them easier to read and, as a result, to increase the completeness and accuracy of responses. In pursuit of this goal, the revised forms provide a context for the questions being asked and explain technical terms that are used. They also adopt a more conversational tone that addresses the individual debtor directly as "you" and are made more visually appealing. In order to simplify the task of providing information, the revised forms frequently provide examples of the type of information being sought and include information needed to answer some of the questions or directions about where necessary information can be found. Rather than posing broad, open-ended questions that may not be fully answered, the revised forms break down questions into specific subparts for which an answer – even if "no" – is prompted.

FORM 3B

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Fill in this information to identify your case:

Debtor 1 ______________________________
First Name Middle Name Last Name

Debtor 2 ______________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ________________ District of ________
(State)

Case number ______________________________
(If known)

❑ Check if this is an amended filing

Official Form 3B

Application to Have the Chapter 7 Filing Fee Waived

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Tell the Court About Your Family and Your Family's Income

1. **What is the size of your family?**
Your family includes you, your spouse, and any dependents listed on *Schedule J: Current Expenditures of Individual Debtor(s)* (Official Form 6J).

____
Number of people

Check all that apply.
❑ You
❑ Your spouse
❑ Your dependents ______________
How many dependents?

2. **Fill in your family's average monthly income.**
Include your spouse's income if your spouse is living with you, even if your spouse is not filing.
Do not include your spouse's income if you are separated and your spouse is not filing with you.

Person in your family	That person's average monthly net income (take-home pay)
You	$______________
Your spouse	+ $______________
Total	$______________

Add your income and your spouse's income or copy line 10 of *Schedule I: Your Income,* if you have already filled it out.
Your family's average monthly net income

3. **Do you expect your family's average monthly net income to increase or decrease by more than 10% during the next 6 months?**
❑ No
❑ Yes. Explain. ....

4. **Tell the court why you are unable to pay the filing fee in installments within 120 days.**

Part 2: Tell the Court About Your Monthly Expenses

5. **Estimate your average monthly expenses.**
$______________
You may use *Schedule J: Your Expenses* to determine your estimation. If you have already filled out *Schedule J,* copy line 22.

6. **Do these expenses cover anyone who is not included in your family as reported in line 1?**
❑ No
❑ Yes. Identify who....

7. Does anyone other than you regularly pay any of these expenses?

❑ No
❑ Yes. Identify who.........

How much does this person regularly pay? $_________ monthly

List any contributions to expenses you have or will list in line 11 of *Schedule I: Your Income.*

8. Do you expect your average monthly expenses to increase or decrease by more than 10% during the next 6 months?

❑ No
❑ Yes. Explain ....

Part 3: Tell the Court About Your Property

If you have already filled out *Schedule A: Real Property (Official Form 6A)*, attach a copy to this application and go to Part 4.

9. How much cash do you have?

Examples: Money you have in your wallet, in your home, and on hand when you file this application

Cash: $_______________

10. Bank accounts and other deposits of money?

Examples: Checking, savings, money market, or other financial accounts; certificates of deposit; shares in banks, credit unions, brokerage houses, and other similar institutions. If you have more than one account with the same institution, list each. Do not include 401(k) and IRA accounts.

	Institution name:	Amount:
Checking account:	______________________	$______________
Savings account:	______________________	$______________
Other financial accounts:	______________________	$______________
Other financial accounts:	______________________	$______________

11. Your home? (if you own it outright or are purchasing it)

Examples: House, condominium, manufactured home, or mobile home

____
Number Street

____
City State ZIP Code

Current value: $______________

Amount you owe on mortgage and liens: $______________

12. Other real estate?

____
Number Street

____
City State ZIP Code

Current value: $______________

Amount you owe on mortgage and liens: $______________

13. The vehicles you own?

Examples: Cars, vans, trucks, sports utility vehicles, motorcycles, tractors, boats

Make: ________________
Model: ________________
Year: __________
Mileage ________________

Current value: $______________

Amount you owe on liens: $______________

Make: ________________
Model: ________________
Year: __________
Mileage ________________

Current value: $______________

Amount you owe on liens: $______________

14. Other assets?

Do not include household items and clothing.

Describe the other assets:

Current value: $______________

Amount you owe on liens: $______________

15. Money or property due you?

Examples: Tax refunds, past due or lump sum alimony, spousal support, child support, maintenance, divorce or property settlements, Social Security benefits, Workers' compensation, personal injury recovery

Who owes you the money or property?

____

____

How much is owed?

$________________

$________________

Do you believe you will likely receive payment in the next 3 or 4 months?

- No
- Yes. Explain:

Part 4: Answer These Additional Questions

16. Have you paid anyone for services for this case, including filling out this application, the bankruptcy filing package, or the schedules?

- ❑ No
- ❑ Yes. **Whom did you pay?**
  - ❑ An attorney
  - ❑ A bankruptcy petition preparer, paralegal, or typing service
  - ❑ Someone else ______________________________

How much did you pay?

$____________________

17. Have you promised to pay or do you expect to pay someone for services for your bankruptcy case?

- ❑ No
- ❑ Yes. **Whom do you expect to pay?**
  - ❑ An attorney
  - ❑ A bankruptcy petition preparer, paralegal, or typing service
  - ❑ Someone else ______________________________

How much do you expect to pay?

$____________________

18. Has anyone paid someone on your behalf for services for this case?

- ❑ No
- ❑ Yes. **Who was paid on your behalf?**
  - ❑ An attorney
  - ❑ A bankruptcy petition preparer, paralegal, or typing service
  - ❑ Someone else _____________

Who paid?

- ❑ Parent
- ❑ Brother or sister
- ❑ Friend
- ❑ Pastor or clergy
- ❑ Someone else ________

How much did someone else pay?

$____________________

19. Have you, your spouse, or both of you filed for bankruptcy within the last 8 years?

- ❑ No
- ❑ Yes. District ___________________________ When ___________ (MM/DD/YYYY) Case number ____________________

District ___________________________ When ___________ (MM/DD/YYYY) Case number ____________________

District ___________________________ When ___________ (MM/DD/YYYY) Case number ____________________

Part 5: Sign Here

By signing here under penalty of perjury, I declare that I cannot afford to pay the filing fee either in full or in installments. I also declare that the information I provided in this application is true and correct.

____
Signature of Debtor 1

Date _________________
MM / DD / YYYY

____
Signature of Debtor 2

Date _________________
MM / DD / YYYY

Fill in this information to identify the case:			
Debtor 1	____________ First Name	____________ Middle Name	____________ Last Name
Debtor 2 (Spouse, if filing)	____________ First Name	____________ Middle Name	____________ Last Name
United States Bankruptcy Court for the: ________________ District of ________ (State)			
Case number (If known)	________________________________		

Order on the Application to Have the Chapter 7 Filing Fee Waived

After considering the debtor's *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B), the court orders that the application is:

[ ] **Granted.** However, the court may order the debtor to pay the fee in the future if developments in administering the bankruptcy case show that the waiver was unwarranted.

[ ] **Denied**. The debtor must pay the $306 filing fee according to the following terms:

	You must pay…	On or before this date…
	$_________.____	____________ Month / day / year
	$_________.____	____________ Month / day / year
	$_________.____	____________ Month / day / year
	+ $_________.____	____________ Month / day / year
Total	$ 306.00	

If the debtor would like to propose a different payment timetable, the debtor must file a motion promptly with a payment proposal. The debtor may use *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A) for this purpose. The court will consider it.

The debtor must pay the entire filing fee before making any more payments or transferring any more property to an attorney, bankruptcy petition preparer, or anyone else in connection with the bankruptcy case. The debtor must also pay the entire filing fee to receive a discharge. If the debtor does not make any payment when it is due, the bankruptcy case may be dismissed and the debtor's rights in future bankruptcy cases may be affected.

[ ] **Scheduled for hearing.**

A hearing to consider the debtor's application will be held

on ______________ at ____:____ AM/PM at ____.
Month / day / year Address of courthouse

If the debtor does not appear at this hearing, the court may deny the application.

______________ **By the court:** ____
Month / day / year United States Bankruptcy Judge

Official Form 3B

Instructions for the Application to Have the Chapter 7 Filing Fee Waived

United States Bankruptcy Court 12/01/2013

How to Fill Out the Application

The fee for filing a bankruptcy case under Chapter 7 is $306. If you cannot afford to pay the entire fee now in full or in installments within 120 days, use this form. If you can afford to pay your filing fee in installments, see *Application for Individuals to Pay the Filing Fee in Installments* (Official Form 3A).

If you file this form, you are asking the court to waive your fee. After reviewing your application, the court may waive your fee, set a hearing for further investigation, or require you to pay the fee in installments or in full.

For your fee to be waived, all of these statements must be true:

You are filing for bankruptcy under Chapter 7.

You are an individual.

The total combined monthly income for your family is less than 150% of the official poverty guideline last published by the U.S. Department of Health and Human Services (DHHS). (For more information about the guidelines, go to http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyResources/PovertyGuidelines.aspx.)

You cannot afford to pay the fee in installments.

Your family includes you, your spouse, and any dependents listed on *Schedule J*. Your family may be different from your *household*, referenced on *Schedules I* and *J*. Your household may include your unmarried partner and others who live with you and with whom you share income and expenses.

If a bankruptcy petition preparer helped you complete this form, make sure that person fills out *Declaration and Signature of Non-Attorney Bankruptcy Petition Preparer* (Official Form 19); include a copy of it in this package.

If you have already completed the following forms, the information on them may help you when you fill out this application:

Schedule A: Real Property (Official Form 6A)

Schedule I: Your Income (Official Form 6I)

Schedule J: Your Expenses (Official Form J)

Understand the terms used in this form

The *Application to Have the Chapter 7 Filing Fee Waived* (Official Form 3B) uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. For example, if the form asks, “Do you own a car?” the answer would be *yes* if either debtor owns a car. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

Be as complete and accurate as possible.

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

This form, which applies only in cases of individual debtors, is amended in its entirety. It was substantially revised as part of the Forms Modernization Project.

Among the goals of the Project was the clarification of forms and their instructions in order to make them easier to read and, as a result, to increase the completeness and accuracy of responses. In pursuit of this goal, the revised forms provide a context for the questions being asked and explain technical terms that are used. They also adopt a more conversational tone that addresses the individual debtor directly as "you" and are made more visually appealing. In order to simplify the task of providing information, the revised forms frequently provide examples of the type of information being sought and include information needed to answer some of the questions or directions about where necessary information can be found. Rather than posing broad, open-ended questions that may not be fully answered, the revised forms break down questions into specific subparts for which an answer—even if "no"—is prompted.

In addition, there have been minor technical changes.

Line 1 of the form asks the debtor the size of the debtor's family. Because the revised forms list dependents on lines 1 and 2 of Official Form 6J, instead of Official Form 6I, the reference to the number of dependents has been changed from Schedule I, line 16, to Schedule J. Also, the declaration and signature section for a non-attorney bankruptcy petition preparer (BPP) has been removed as unnecessary. The same declaration, required under 11 U.S.C. § 110, is contained in Official Form 19. That form must be completed and signed by the BPP, and filed with each document for filing prepared by a BPP.

SCHEDULE I

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Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

Debtor 2 ____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________________ District of __________
(State)

Case number ______________________________
(If known)

❑ Check if this is an amended filing

Official Form 6I

Schedule I: Your Income

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

   If you have more than one job, attach a separate page with information about additional employers.

   Include employment information about a non-filing spouse unless you are separated.

   Include part-time, seasonal, or self-employed work.

   Occupation should Include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	Employed Not employed	Employed Not employed
Occupation	____________________	____________________
Employer's name	____________________	____________________
Employer's address	____________________ Number Street ____________________ ____________________ ____________________ City State ZIP Code	____________________ Number Street ____________________ ____________________ ____________________ City State ZIP Code
How long employed there?	________	________

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

		For Debtor 1	For Debtor 2 or non-filing spouse
2. **List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$__________	$__________
3. **Estimate and list monthly overtime pay, if any.**	3.	+ $__________	+ $__________
4. **Calculate gross income.** Add line 2 + line 3.	4.	$__________	$__________

		For Debtor 1	For Debtor 2 or non-filing spouse	
Copy line 4 here .... ➔	4.	$________	$________	
5. **List all payroll deductions:**				
5a. **Payroll taxes and social security payments**	5a.	$________	$________	
5b. **Contributions for retirement plans**	5b.	$________	$________	
5c. **Required repayments of retirement fund loans**	5c.	$________	$________	
5d. **Insurance**	5d.	$________	$________	
5e. **Union dues**	5e.	$________	$________	
5f. **Other deductions.** Specify: ____________	5f.	$________	$________	
5g. **Other deductions.** Specify: ____________	5g.	$________	$________	
5h. **Other deductions.** Specify: ____________	5h.	+ $________	+ $________	
6. **Add the payroll deductions**. Add lines 5a + 5b + 5c + 5d + 5e +5f + 5g +5h.	6.	$________	$________	
7. **Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$________	$________	
8. **List all other income regularly received:**				
8a. **Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$________	$________	
8b. **Interest and dividends**	8b.	$________	$________	
8c. **Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$________	$________	
8d. **Unemployment compensation**	8d.	$________	$________	
8e. **Social Security**	8e.	$________	$________	
8f. **Other government assistance.** Specify: ____________	8f.	$________	$________	
8g. **Pension or retirement income**	8g.	$________	$________	
8h. **Other monthly income.** Specify: ____________	8h.	+ $________	+ $________	
9. **Add all other income**. Add lines 8a + 8b + 8c + 8d + 8e + 8f +8g + 8h.	9.	$________	$________	
10. **Calculate monthly income.** Add line 7 + line 9. Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.	10.	$________	+ $________	= $________

11. **List all contributions to the expenses that you list in *Schedule J* that anyone else makes.**

Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives.

Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.

Specify: ____ 11. + $________

12. **Add the amount in last column of line 10 to the amount in line 11.** The result is the combined monthly income. Write that amount on the *Summary of Schedules* and the *Statistical Summary of Certain Liabilities and Related Data,* if it applies. 12. $________

Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
- ❑ No.
- ❑ Yes. Explain: ____________

Official Form 6I

Instructions for Schedule I: Your Income

United States Bankruptcy Court 12/01/13

How to fill out Schedule I

In *Schedule I: Your Income* (Official Form 6I), you will give the details about your employment and monthly income as of the date you file this form. If you are married and your spouse is living with you, include information about your spouse even if your spouse is not filing with you. If you are separated and your spouse is not filing with you, do not include information about your spouse.

How to report employment and income

If you have nothing to report for a line, write $0.

In Part 1, line 1, fill in employment information for you and, if appropriate, for a non-filing spouse. If either person has more than one employer, attach a separate page with information about the additional employment.

In Part 2, give details about the monthly income you currently expect to receive. Show all totals as monthly payments, even if income is not received in monthly payments.

If your income is received in another time period, such as daily, weekly, quarterly, annually, or irregularly, calculate how much income would be by month, as described below.

If either you or a non-filing spouse has more than one employer, calculate the monthly amount for each employer separately, and then combine the income information for all employers for that person on lines 2-7.

One easy way to calculate how much income would be per month is to total the payments earned in a year, then divide by 12 to get a monthly figure. For example, if you are paid annually, you would simply divide your annual salary by 12 to get the monthly amount.

Below are other examples of how to calculate monthly amount.

Example for quarterly payments:

If you are paid $15,000 every quarter, figure your monthly income in this way:

	$15,000	*income every quarter*
X	4	*pay periods in the year*
	$60,000	*total income for the year*

$60,000 (*income for year*) / 12 (*number of months in year*) = $5,000 *monthly income*

Example for bi-weekly payments:

If you are paid $2,500 every other week, figure your monthly income in this way:

	$2,500	*income every other week*
X	26	*number of pay periods in the year*
	$65,000	*total income for the year*

$65,000 (*income for year*) / 12 (*number of months in year*) = $5,417 *monthly income*

Example for weekly payment:

If you are paid $1,000 every week, figure your monthly income in this way:

	$1,000	*income every week*
X	52	*number of pay periods in the year*
	$52,000	*total income for the year*

$52,000 (*income for year*) / 12 (*number of months in year*) = $4,333 *monthly income*

Example for irregular payments:

If you are paid $4,000 8 times a year, figure your monthly income in this way:

$4,000 *income a payment*
X 8 *payments a year*
$32,000 *income for the* year

$32,000 (*income for year*) / 12 (*number of months in year*) = $2,667 *monthly income*

Example for daily payments:

If you are paid $75 a day and you work about 8 days a month, figure your monthly income in this way:

$75 *income a day*
X 96 *days a year*
$7,200 *total income for the year*

$7,200 (*income for year*) / 12 (*number of months in year*) = $600 *monthly income*

or this way:

$75 *income a day*
X 8 *payments a month*
$600 *income for the* month

In Part 2, line 11, fill in amounts that other people provide to pay the expenses you list on *Schedule J: Your Expenses*. For example, if you and a person to whom you are not married deposit the income from both of your jobs into a single bank account and pay all household expenses and you list all your joint household expenses on *Schedule J*, you must list the amounts that person contributes monthly to pay the household expenses on line 11. If you have a roommate and you divide the rent and utilities, do not list the amounts your roommate pays on line 11 if you have listed only your share of those expenses on *Schedule J*. However, if you have listed the cost of the rent and utilities for your entire house or apartment on *Schedule J*, you must list your roommate's contribution to those expenses on *Schedule I*, line 14. Do not list line 11 contributions that you already disclosed on line 5.

Note that the income you report on *Schedule I* may be different from the income you report on other bankruptcy forms. For example, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1), *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B), and the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C-1) all use a different definition of income and apply that definition to a different period of time. *Schedule I* asks about the income that you are now receiving, while the other forms ask about income you received in the applicable time period before filing. So the amount of income reported in any of those forms may be different from the amount reported here.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

Be as complete and accurate as possible.

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

SCHEDULE J

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Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

Debtor 2 ____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ________________________ District of ___________
(State)

Case number ____
(If known)

❑ Check if this is an amended filing

Official Form 6J

Schedule J: Your Expenses

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Do you have dependents who live with you?**

   Do not list Debtor 1 and Debtor 2.

   If you are filing jointly and live in separate households, list dependents who live in either household.

   No
   Yes. Fill out this information.

Each dependent who lives in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1	_______________	________
Person 2	_______________	________
Person 3	_______________	________
Person 4	_______________	________
Person 5	_______________	________

2. **Do you have dependents who do not live with you?**

   Do not list anyone listed in line 1.

   No
   Yes. Fill out this information:

Each dependent who does not live in the household	That person's relationship to Debtor 1 or Debtor 2	That person's age
Person 1	_______________	_______
Person 2	_______________	_______

3. **Does anyone else live in your household?**

   Do not list Debtor 1, Debtor 2, and any dependents listed on lines 1 and 2.

   If you are filing jointly and live in separate households, list everyone else who lives in either household.

   No
   Yes. Fill out this information

Each other person who lives in the household	That person's relationship to Debtor 1 or Debtor 2
Person 1	_______________
Person 2	_______________
Person 3	_______________

Part 2: Estimate Your Ongoing Monthly Expenses

		Column A For all individuals **Your expenses as of the date you file for bankruptcy**	Column B For Chapter 13 ONLY **What your expenses will be if your current plan is confirmed**
4. **The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$__________	$__________
If not included in line 4:			
4a. Real estate taxes	4a.	$__________	$__________
4b. Property, homeowner's, or renter's insurance	4b.	$__________	$__________
4c. Home maintenance, repair, and upkeep expenses	4c.	$__________	$__________
4d. Homeowner's association or condominium dues	4d.	$__________	$__________
5. **Additional mortgage payments for your residence**, such as home equity loans	5.	$__________	$__________
6. **Utilities:**			
6a. Electricity, heat, natural gas	6a.	$__________	$__________
6b. Water, sewer, garbage collection	6b.	$__________	$__________
6c. Telephone, cell phone, Internet, satellite, and cable services	6c.	$__________	$__________
6d. Other. Specify: ______________________	6d.	$__________	$__________
7. **Food and housekeeping supplies**	7.	$__________	$__________
8. **Childcare and children's education costs**	8.	$__________	$__________
9. **Clothing, laundry, and dry cleaning**	9.	$__________	$__________
10. **Personal care products and services**	10.	$__________	$__________
11. **Medical and dental expenses**	11.	$__________	$__________
12. **Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12.	$__________	$__________
13. **Entertainment, clubs, recreation, newspapers, magazine, and books**	13.	$__________	$__________
14. **Charitable contributions and religious donations**	14.	$__________	$__________
15. **Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.			
15a. Life insurance	15a.	$__________	$__________
15b. Health insurance	15b.	$__________	$__________
15c. Vehicle insurance	15c.	$__________	$__________
15d. Other insurance. Specify:______________________	15d.	$__________	$__________
16. **Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: ______________________	16.	$__________	$__________
17. **Installment or lease payments:**			
17a. Car payments for Vehicle 1	17a.	$__________	$__________
17b. Car payments for Vehicle 2	17b.	$__________	$__________
17c. Student loan payments	17c.	$__________	$__________
17d. Other. Specify:______________________	17d.	$__________	$__________
17e. Other. Specify:______________________	17e.	$__________	$__________

Debtor 1 ________________________________ Case number (*if known*)________________________
First Name Middle Name Last Name

		Column A *For all individuals* **Your expenses as of the date you file for bankruptcy**	Column B *For Chapter 13 ONLY* **What your expenses will be if your current plan is confirmed**
18. **Alimony, maintenance, and support that you pay to others**	18.	$_______	$_______
19. **Other payments you make to support others who do not live with you.** Specify:________________________	19.	$_______	$_______
20. **Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I*: *Your Income* (Official Form 6I)**			
20a. Mortgages on other property	20a.	$_______	$_______
20b. Real estate taxes	20b.	$_______	$_______
20c. Property, homeowner's, or renter's insurance	20c.	$_______	$_______
20d. Maintenance, repair, and upkeep expenses	20d.	$_______	$_______
20e. Homeowner's association or condominium dues	20e.	$_______	$_______
21. **Other**. Specify: ________________________	21.	+ $_______	+ $_______
22. **Your monthly expenses.** Add lines 4 through 21. The result is your monthly expenses.	22.	$_______	$_______
23. **Calculate your monthly net income.**			
23a. Copy line 12 (*your combined monthly income*) from *Schedule I.*	23a.	$_______	$_______
23b. Copy your monthly expenses from line 22 above.	23b.	− $_______	−$_______
23c. Subtract your monthly expenses from your monthly income. The result is your *monthly net income*.	23c.	$_______	$_______

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**

For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

❑ No.
❑ Yes. Explain here:

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Official Form 6J

Instructions for Schedule J: Your Expenses

United States Bankruptcy Court 12/01/13

How to Fill Out Schedule J

Use Column A of *Schedule J: Your Expenses* (Official Form 6J) to estimate the monthly expenses, as of the date you file for bankruptcy, for you, your dependents, and the other people in your household whose income is included on *Schedule I: Your Income* (Official Form 6I).

If you are filing under chapter 13, you must also complete Column B. In Column B, itemize what your monthly expenses would be under the plan that you are submitting with this schedule or, if no plan is being submitted now, under the most recent plan you previously submitted.

Include your non-filing spouse's expenses unless you are separated. If one of you keeps a separate household, fill out separate *Schedule J* for Debtor 1 and Debtor 2 and write *Debtor 1* or *Debtor 2* at the top of page 1 of the form.

Do not include expenses that other members of your household pay directly from their income if you did not include that income on *Schedule I*. For example, if you have a roommate and you divide the rent and utilities and you have not listed your roommate's contribution to household expenses in line 11 of *Schedule I*, you would list only your share of these expenses on *Schedule J*.

Show all totals as monthly payments. If you have weekly, quarterly, or annual payments, calculate how much you would spend on those items every month.

Do not list as expenses any payments on credit card debts incurred before filing bankruptcy.

Do not include business expenses on this form. You have already accounted for those expenses as part of determining net business income on *Schedule I*.

On line 20, do not include expenses for your residence or for any rental or business property. You have already listed expenses for your residence on lines 4 and 5 of this form. You listed the expenses for your rental and business property as part of the process of determining your net income from that property on *Schedule I* (line 8a).

If you have nothing to report for a line, write $0.

Understand the terms used in this form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

Be as complete and accurate as possible.

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).

If two married people are filing together, both are equally responsible for supplying correct information.

Do not list a minor child's full name. Instead, fill in only the child's initials and the full name and address of the child's parent or guardian. For example, write A.B., a minor child (*John Doe, parent, 123 Main St., City, State*). 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m) and 9037.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

COMMITTEE NOTE

Schedule I: Your Income (Official Form 6I) and *Schedule J: Your Expenses* (Official Form 6J) which apply only in cases of individual debtors, are amended in their entirety. They were substantially revised as part of the Forms Modernization Project.

Among the goals of the Project was the clarification of forms and their instructions in order to make them easier to read and, as a result, to increase the completeness and accuracy of responses. In pursuit of this goal, the revised forms provide a context for the questions being asked and explain technical terms that are used. They also adopt a more conversational tone that addresses the individual debtor directly as "you" and are made more visually appealing. In order to simplify the task of providing information, the revised forms frequently provide examples of the type of information being sought and include information needed to answer some of the questions or directions about where necessary information can be found. Rather than posing broad, open-ended questions that may not be fully answered, the revised forms break down questions into specific subparts for which an answer—even if "no"—is prompted.

Revised Schedules I and J seek to obtain a full picture of debtor's economic situation—to the extent that debtor receives income or has expenses. The revised forms are intended to avoid the situation that frequently happens with the current forms where debtor lives with and pools assets with other people and the household provides support to dependents who may not be related by blood or marriage to debtor.

The amendments seek to avoid the situation where the expenses listed on Schedule J are for the entire household, but the income listed on Schedule I is only for the debtor. Line 11 on revised Schedule I, now includes contributions made by someone else to the expenses on Schedule J and the debtor is instructed to include contributions from an unmarried partner, members of the debtor's household, dependents, roommates, and other friends or relatives.

As revised, Schedule J asks for expenses at two different points in time in chapter 13 cases—as of the date the debtor files bankruptcy (Column A) and as of the date a proposed 13 plan is confirmed (Column B).

In drafting the form it became apparent that at least some courts are using Schedules I and J in analyzing proposed chapter 13 plans and potential modification of those plans. Sometimes amended Schedules I and J are required when a debtor's financial circumstances change. To avoid a lack of clarity on the form regarding the date to be used in computing expenses, and in order to allow Schedule J to continue to serve the plan feasibility function, the revised form requests information on both time bases in chapter 13 cases.

New lines 1, 2, and 3 on revised Schedule J request information on dependents who live with the debtor, dependents who live separately, and other members of the household. In addition, new line 23 on the form includes a calculation of the debtor's monthly net income.

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FORMS 22A-1 AND 22A-2

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Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

Debtor 2 ____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________________ District of __________
(State)

Case number ____________________________________
(If known)

Check one only as directed in lines 1, 2, 3, or 17:

According to the calculations required by this Statement:

☐ 1. There is no presumption of abuse.

☐ 2. The presumption of abuse is determined by Form 22A–2.

☐ 3. The Means Test does not apply now because of qualified military service but it could apply later.

☐ Check if this is an amended filing

Official Form 22A–1

Chapter 7 Statement of Your Current Monthly Income

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Identify the Kind of Debts You Have

1. **Are your debts primarily consumer debts?** *Consumer debts* are defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose." Make sure that your answer is consistent with the "Nature of Debts" box on page one of the *Voluntary Petition* (Official Form 1).

   ☐ No. On the top of this page, check box 1, *There is no presumption of abuse*.......... Go to Part 5.

   ☐ Yes.......... Go to Part 2.

Part 2: Determine Whether Military Service Provisions Apply to You

If you are filing this case jointly and any of the exclusions in Part 2 applies to only one of you, the other person should complete a separate *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) if you believe that this is required by 11 U.S.C. § 707(b)(2)(C).

2. **Are you a disabled veteran** (as defined in 38 U.S.C. § 3741(1))**?**

   ☐ No. Go to line 3.

   ☐ Yes. Did you incur debts mostly while you were on active duty or while you were performing a homeland defense activity? 11 U.S.C. § 101(d)(1)); 32 U.S.C. § 901(1)

   ☐ No. Go to line 3.

   ☐ Yes. On the top of this page, check box 1, *There is no presumption of abuse.*.......... Go to Part 5.

3. **Are you or have you been a Reservist or member of the National Guard?**

   ☐ No. Go to Part 3.

   ☐ Yes. Were you called to active duty or did you perform a homeland defense activity? 10 U.S.C. § 101(d)(1); 32 U.S.C. § 901(1)

   ☐ No. Go to Part 3.

   ☐ Yes. Check any one of the following categories that applies:

   ☐ **I was called to active duty after September 11, 2001**, for at least 90 days and remain on active duty**.**

   ☐ **I was called to active duty after September 11, 2001,** for at least 90 days and was released from active duty on ______________, which is fewer than 540 days before I file this bankruptcy case.

   ☐ **I am performing a homeland defense activity for at least 90 days.**

   ☐ **I performed a homeland defense activity for at least 90 days**, ending on ______________, which is fewer than 540 days before I file this bankruptcy case.

If you did not check any of these categories, go to Part 3.

If you checked one of the categories, go to the top of this page. Check box 3, *The Means Test does not apply now because of qualified military service but it could apply later;* then go to Part 5. You are not required to fill out the rest of this form during the exclusion period. The *exclusion period* means the time you are on active duty or are performing a homeland defense activity, and for 540 days afterward. 11 U.S.C. § 707(b)(2)(D)(ii). If your exclusion period ends before your case is closed, you may have to file an amended form later.

Debtor 1 ______________________________ First Name Middle Name Last Name   Case number (*if known*)______________________

Part 3: Calculate Your Current Monthly Income

4. **What is your marital and filing status?** Check one only.

- ❑ **Not married.** Fill out Column A, lines 5-14.
- ❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 5-14.

Married and your spouse is NOT filing with you. You and your spouse are:

- ❑ **Living in the same household and are not legally separated.** Fill out both Columns A and B, lines 5-14.
- ❑ **Living separately or are legally separated**. Fill out Column A, lines 5-14; do not fill out Column B. By checking this box, you declare under penalty of perjury that you and your spouse are legally separated under nonbankruptcy law that applies or that you and your spouse are living apart for reasons that do not include evading the Means Test requirements. 11 U.S.C. § 707(b)(7)(B).

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For you**	*Column B* **Debtor 2 or non-filing spouse**
5. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$________	$________
6. **Alimony and maintenance payments**			$________	$________
7. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 6.			$________	$________
8. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$________			
Ordinary and necessary operating expenses	− $________			
Net monthly income from a business, profession, or farm	$________	**Copy here**➔	$________	$________
9. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$________			
Ordinary and necessary operating expenses	− $________			
Net monthly income from rental or other real property	$________	**Copy here**➔	$________	$________
10. **Interest, dividends, and royalties**			$________	$________
11. **Unemployment compensation**			$________	$________
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here: .... ↓				
For you	$________			
For your spouse	$________			
12. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.			$________	$________
13. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 13c.				
13a.			$________	$________
13b.			$________	$________
13c. Total amounts from separate pages, if any.			+ $________	+ $________

14. **Calculate your total current monthly income.** Add lines 5 through 13 for each column. Then add the total for Column A to the total for Column B.

$________ + $________ = $________ **Total current monthly income**

Part 4: Determine Whether the Means Test Applies to You

15. **Calculate your annual income using your total current monthly income from Part 3.** Follow these steps:

15a. Copy your total current monthly income from line 14.......... **Copy line 14 here**→ 15a. $________

Multiply by 12 (the number of months in a year). **x** 12

15b. The result is your annual income for this part of the form. 15b. $________

16. **Calculate the median family income that applies to you.** Follow these steps:

Fill in the state in which you live. [ ]

Fill in the number of people in your household. [ ]

Fill in the median family income for your state and size of household. .... 16. $________

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

17. **How do the lines compare?**

17a. ❑ Line 15b is less than or equal to line 16. On the top of page 1, check box 1, *There is no presumption of abuse.* Go to Part 5.

17b. ❑ Line 15b is more than line 16. On the top of page 1, check box 2, *The presumption of abuse is determined by Form 22A–2*. Go to Part 5 and fill out Form 22A–2.

Part 5: Sign Here

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ ______________________ Signature of Debtor 1

✘ ______________________ Signature of Debtor 2

Date ____________ MM / DD / YYYY

Date ____________ MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22A–2, *Chapter 7 Means Test Calculation.*

If you checked line 17b, fill out Official Form 22A–2, *Chapter 7 Means Test Calculation* and file it with this form.

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Fill in this information to identify your case:

Debtor 1 ______________________________
First Name Middle Name Last Name

Debtor 2 ______________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________ District of ________
(State)

Case number ______________________
(If known)

Check one only as directed in lines 40 or 42:

According to the calculations required by this Statement:

- ❑ 1. There is no presumption of abuse.
- ❑ 2. There is a presumption of abuse.

❑ Check if this is an amended filing

Official Form 22A–2

Chapter 7 Means Test Calculation

12/13

To fill out this form, you will need your completed copy of Form 22A–1:*Chapter 7 Statement of Your Current Monthly Income (Official Form 22A-1)*.

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Determine Your Adjusted Income

1. **Copy your total current monthly income.** .... **Copy line 14 from Official Form 22A-1 here** ➔ 1. $________

2. **Did you fill out Column B in Part 3 of Official Form 22A–1?**

   ❑ No. Fill in $0 on line 3d.

   ❑ Yes. Is your spouse filing with you?

   ❑ No. Go to line 3.

   ❑ Yes. Fill in $0 on line 3d.

3. **Adjust your current monthly income by subtracting any part of your spouse's income not used to pay for the household expenses of you or your dependents.** Follow these steps:

   On line 14, Column B of Form 22A–1, was any amount of the income you reported for your spouse NOT regularly used for the household expenses of you or your dependents?

   ❑ No. Fill in 0 on line 3d.

   ❑ Yes. Fill in the information below:

State each purpose for which the income was used For example, the income is used to pay your spouse's tax debt or to support people other than you or your dependents	**Fill in the amount you are subtracting from your spouse's income**
3a.	$____________
3b.	$____________
3c.	+ $____________
3d. **Total.** Add lines 3a, 3b, and 3c.	$____________

Copy total here ➔ 3d. – $________

4. **Adjust your current monthly income.** Subtract line 3d from line 1. $________

Part 2: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 5-14. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 6-15 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not deduct any amounts that you subtracted from your spouse's income in line 3 and do not deduct any operating expenses that you subtracted from income in lines 8 and 9 of Form 22A–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B of Form 22A–1 is filled in.

5. **The number of people used in determining your deductions from income**
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 6-7.

6. **Food, clothing, and other items:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $__________

7. **Out-of-pocket health care allowance:** Using the number of people you entered in line 5 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories — people who are under 65 and people who are 65 or older — because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 22.

People who are under 65 years of age

7a.	Out-of-pocket health care allowance per person	$__________		
7b.	Number of people who are under 65	X ______		
7c.	**Subtotal.** Multiply line 7a by line 7b.	$__________	**Copy line 7c here**➔	$__________

People who are 65 years of age or older

7d.	Out-of-pocket health care allowance per person	$__________		
7e.	Number of people who are 65 or older	X ______		
7f.	**Subtotal.** Multiply line 7d by line 7e.	$__________	**Copy line 7f here**➔	+ $__________

7g. **Total**. Add lines 7c and 7f. .... $__________ **Copy total here**➔ 7g. $__________

Local Standards You must use the IRS Local Standards to answer the questions in lines 8-15.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Use the U.S. Trustee Program chart to answer the questions in lines 8-9. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

8. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 5, fill in the dollar amount listed for your county for insurance and operating expenses. $__________

9. **Housing and utilities – Mortgage or rent expenses:**

9a. Using the number of people you entered in line 5, fill in the dollar amount listed for your county for mortgage or rent expenses. 9a. $__________

9b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of the creditor	Does payment include taxes or insurance?	Average monthly payment
	❑ No ❑ Yes	$__________
	❑ No ❑ Yes	$__________
	❑ No ❑ Yes	+ $__________

9b. Total average monthly payment $__________ **Copy line 9b here➔** – $__________ Repeat this amount on line 33a.

9c. Net mortgage or rent expense.

Subtract line 9b (*total average monthly payment*) from line 9a (*mortgage or rent expense*). If this amount is less than $0, enter $0. 9c. $__________ **Copy line 9c here➔** $__________

10. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $__________

Explain why:

11. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.
❑ 0. Go to line 14.
❑ 1. Go to line 12.
❑ 2 or more. Go to line 12.

12. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $__________

13. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:**

13a. Ownership or leasing costs using IRS Local Standard 13a. $______

13b. Average monthly payment for all debts secured by Vehicle 1.
Do not include installment payments for leased vehicles.

To calculate the average monthly payment here and on line 13e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
	$______

Copy 13b here➔ – $______ Repeat this amount on line 33b.

13c. Net Vehicle 1 ownership or lease expense
Subtract line 13b from line 13a. If this amount is less than $0, enter $0. 13c. $______ **Copy net Vehicle 1 expense here➔** $______

Vehicle 2 **Describe Vehicle 2:**

13d. Ownership or leasing costs using IRS Local Standard 13d. $______

13e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
	$______

Copy here➔ – $______ Repeat this amount on line 33c.

13f. Net Vehicle 2 ownership or lease expense
Subtract line 13e from 13d. If this amount is less than $0, enter $0. 13f. $______ **Copy net Vehicle 2 expense here ➔** $______

14. **Public transportation expense**: If you claimed 0 vehicles in line 11, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $______

15. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 11 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation.* $______

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

16. **Taxes:** The total monthly amount that you will actually owe for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. However, if you expect to receive a tax refund, you must divide the expected refund by 12 and subtract that number from the total monthly amount that is withheld to pay for taxes.
    Do not include real estate, sales, or use taxes. $________

17. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.
    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $________

18. **Life insurance:** The total monthly premiums that you pay for your term life insurance.
    Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance. $________

19. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.
    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 35. $________

20. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $________

21. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.
    Do not include payments for any elementary or secondary school education. $________

22. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 7.
    Payments for health insurance or health savings accounts should be listed only in line 25. $________

23. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer.
    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 8 of *Official Form 22A-1*, or any amount you previously deducted. + $________

24. **Add all of the expenses allowed under the IRS expense allowances.**
    Add lines 16 through 23. $________

Additional Expense Deductions

These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 6-24.

25. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance	$__________
Disability insurance	$__________
Health savings account	+ $__________
Total	$__________

Copy total here ➔ .... $__________

Do you actually spend this total amount?

- ❑ No. How much do you actually spend? $__________
- ❑ Yes

26. **Continued contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $__________

27. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $__________

    By law, the court must keep the nature of these expenses confidential.

28. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 8.

    If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs.

    You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary. $__________

29. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $__________

    You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 6-23.

    * Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

30. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $__________

    To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

    You must show that the additional amount claimed is reasonable and necessary.

31. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). $__________

32. **Add all of the additional expense deductions.**
    Add lines 25 through 31. $__________

Deductions for Debt Payment

33. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 33a through 33g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

	Average monthly payment
Mortgages on your home	
33a. Copy line 9b here	$________
Loans on your first two vehicles	
33b. Copy line 13b here.	$________
33c. Copy line 13e here.	$________

	Name of each creditor for other secured debt	Identify property that secures the debt	Does payment include taxes or insurance?	
33d.			❑ No ❑ Yes	$________
33e.			❑ No ❑ Yes	$________
33f.			❑ No ❑ Yes	+ $________

33g. Total average monthly payment. Add lines 33a through 33f. $________ Copy total here➔ $________

34. **Are any debts that you listed in line 33 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 35.
❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 34, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$________	÷ 60 =	$________
		$________	÷ 60 =	$________
		$________	÷ 60 =	+ $________
			Total	$________

Copy total here➔ $________

35. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

❑ No. Go to line 36.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 19.

Total amount of all past-due priority claims. $_______ ÷ 60 = $_______

36. **Are you eligible to file a case under Chapter 13?** 11 U.S.C. § 109(e). For more information, go to www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx

❑ No. Go to line 37.

❑ Yes. Fill in the following information.

Projected monthly plan payment if you were filing under Chapter 13	$_______
Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.	x ______
Average monthly administrative expense if you were filing under Chapter 13	$_______

Copy total here ➔ $_______

37. **Add all of the deductions for debt payment.**
Add lines 33g through 36. $_______

Total Deductions from Income

38. **Add all of the allowed deductions.**

Copy line 24, *All of the expenses allowed under IRS expense allowances*.............	$_______
Copy line 32, *All of the additional expense deductions*..	$_______
Copy line 37, *All of the deductions for debt payment*...	+ $_______
Total deductions	$_______

Copy total here ➔ $_______

Part 3: Determine Whether There Is a Presumption of Abuse

39. **Calculate monthly disposable income for 60 months**

39a. Copy line 4, *adjusted current monthly income*	$_______
39b. Copy line 38, *Total deductions.*.......	− $_______
39c. Monthly disposable income 11 U.S.C. § 707(b)(2) Subtract line 39b from line 39a.	$_______

Copy line 39c here ➔ $_______

For the next 60 months (5 years) x 60

39d. **Total**. Multiply line 39c by 60. ....39d. $_______ Copy line 39d here ➔ $_______

40. **Find out whether there is a presumption of abuse.** Check the box that applies:

- ❑ **The line 39d is less than $7,025*.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.
- ❑ **The line 39d is more than $11,725*.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.
- ❑ **The line 39d is at least $7,025*, but not more than $11,725*.** Go to line 42.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases filed on or after the date of adjustment.

41. 41a. **Fill in the amount of your total nonpriority unsecured debt.** If you filled out the *Statistical Summary of Certain Liabilities and Related Data* (Official Form 6), you may refer to line 5 at the bottom of that form. $__________

x .25

41b. **25% of your total nonpriority unsecured debt.** 11 U.S.C. § 707(b)(2)(A)(i)(I)
Multiply line 41a by 0.25. $__________ Copy here➔ $__________

42. **Determine whether the income you have left over after subtracting all allowed deductions is enough to pay 25% of your unsecured, nonpriority debt.**
Check the box that applies:

- ❑ **Line 39d is less than line 41b.** On the top of page 1 of this form, check box 1, *There is no presumption of abuse.* Go to Part 5.
- ❑ **Line 39d is equal to or more than line 41b.** On the top of page 1 of this form, check box 2, *There is a presumption of abuse.* You may fill out Part 4 if you claim special circumstances. Then go to Part 5.

Part 4: Give Details About Special Circumstances

43. **Do you have any special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative?** 11 U.S.C. § 707(b)(2)(B)

- ❑ No. Go to Part 5.
- ❑ Yes. Fill in the following information. All figures should reflect your average monthly expense or income adjustment for each item. You may include expenses you listed in line 25.

You must give a detailed explanation of the special circumstances that make the expenses or income adjustments necessary and reasonable. You must also give your case trustee documentation of your actual expenses or income adjustments.

Give a detailed explanation of the special circumstances	Average monthly expense or income adjustment
	$__________
	$__________
	$__________
	$__________

Part 5: Sign Here

By signing here, I declare under penalty of perjury that the information on this statement and in any attachments is true and correct.

✘ ______________________ Signature of Debtor 1   ✘ ______________________ Signature of Debtor 2

Date __________ MM / DD / YYYY   Date __________ MM / DD / YYYY

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Official Forms 22A–1 and 22A–2

Instructions for the Chapter 7 Statement of Your Current Monthly Income and Means Test Calculation

United States Bankruptcy Court 12/01/13

How to fill out these forms

Official Forms 22A–1 and 22A –2 determine whether your income and expenses create a presumption of abuse that may prevent you from obtaining relief from your debts under chapter 7 of the Bankruptcy Code. Chapter 7 relief can be denied to a person who has primarily consumer debts if the court finds that the person has enough income to repay creditors a portion of their claims set out in the Bankruptcy Code.

You must file 22A –1, the *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A –1) if you are an individual filing for bankruptcy under chapter 7. This form will determine your current monthly income and compare whether your income is more than the median income for households of the same size in your state. If your income is not above the median, there is no presumption of abuse and you will not have to fill out the second form.

If your income is above the median, you must file the second form, 22A –2, *Chapter 7 Means Test Calculation* (Official Form 22A –2). The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay other debts. If this amount is high enough, it will give rise to a *presumption of abuse*. A presumption of abuse does not mean you are actually trying to abuse the bankruptcy system. Rather, the presumption simply means that you may have enough income that you should not be granted relief under chapter 7. You may overcome the presumption by showing special circumstances that reduce your income or increase your expenses.

If you cannot obtain relief under chapter 7, you may be eligible to continue under another chapter of the Bankruptcy Code and pay creditors over a period of time.

Read each question carefully. You may not be required to answer every question on this form. For example, your military status may determine whether you must fill out the entire form. The instructions will alert you if you may skip questions.

If you have nothing to report for a line, write $0.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse may file a single statement. However, if an exclusion in Parts 1 or 2 applies to either of you, separate statements may be required. 11 U.S.C. § 707(b)(2)(C).

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out these forms

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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FORM 22B

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Fill in this information to identify your case:

Debtor 1 ____
First Name Middle Name Last Name

Debtor 2 ____
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ______________________ District of __________
(State)

Case number ______________________________________
(If known)

❒ Check if this is an amended filing

Official Form 22B

Chapter 11 Statement of Your Current Monthly Income

12/13

You must file this form if you are an individual and are filing for bankruptcy under Chapter 11. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Current Monthly Income

1. **What is your marital and filing status?** Check one only.

❑ **Not married.** Fill out Column A, lines 2-10.

❑ **Married and your spouse is filing with you.** Fill out both Columns A and B, lines 2-10.

Married and your spouse is NOT filing with you: You and your spouse are:

❑ **Living in the same household and not legally separated.** Fill out both Columns A and B, lines 2-10.

❑ **Living separately or are legally separated**. Fill out Column A, lines 2-10; do not fill out Column B.

Fill in the average monthly income that you received from all sources during the 6 full months before you filed for bankruptcy. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result.
Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$__________	$__________
3. **Alimony and maintenance payments**			$__________	$__________
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 3.			$__________	$__________
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$________			
Ordinary and necessary operating expenses	− $________			
Net monthly income from a business, profession, or farm	$________	**Copy here➔**	$__________	$__________
6. **Net income from rental and other real property**				
Gross receipts (before all deductions)	$________			
Ordinary and necessary operating expenses	− $________			
Net monthly income from rental or other real property	$________	**Copy here➔**	$__________	$__________

	Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
7. **Interest, dividends, and royalties**	$__________	$__________
8. **Unemployment compensation.** Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:	$__________	$__________
For you .... $_________		
For your spouse .... $_________		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.	$__________	$__________
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.		
10a.	$__________	$__________
10b.	$__________	$__________
10c. Total amounts from separate pages, if any.	+ $__________	+ $__________
11. **Calculate your total current monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.	$__________ +	$__________ = $_______ **Total current monthly income**

Part 2: Sign Here

By signing here, under penalty of perjury I declare that the information on this statement or in any attachments is true and correct.

✘ ____________________________________
Signature of Debtor 1

✘ ____________________________________
Signature of Debtor 2

Date _______________
MM / DD / YYYY

Date _______________
MM / DD / YYYY

Official Form 22B

Instructions for the Chapter 11 Statement of Your Current Monthly Income

United States Bankruptcy Court 12/01/13

How to Fill Out this Form

You must file the *Chapter 11 Statement of Your Current Monthly Income* (Official Form 22B) if you are an individual filing for bankruptcy under Chapter 11.

If you have nothing to report for a line, write $0.

Understand the terms used in the form

This form uses *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, this form uses *you* to ask for information from both debtors. When information is needed about the spouses separately, the form uses *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

- Be as complete and accurate as possible.
- If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies On the top of any additional pages, write your name and case number (if known).
- If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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FORMS 22C-1 AND 22C-2

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Fill in this information to identify your case:

Debtor 1 ______________________________
First Name Middle Name Last Name

Debtor 2 ______________________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________ District of ________
(State)

Case number ______________________
(If known)

Check as directed in lines 17 and 21:

According to the calculations required by this Statement:

- ❑ 1. Disposable income is not determined under 11 U.S.C. § 1325(b)(3).
- ❑ 2. Disposable income is determined under 11 U.S.C. § 1325(b)(3).

- ❑ 3. The commitment period is 3 years.
- ❑ 4. The commitment period is 5 years.

❑ Check if this is an amended filing

Official Form 22C–1

Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period

12/13

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Average Monthly Income

1. **What is your marital and filing status?** Check one only.
   - ❑ **Not married.** Fill out Column A, lines 2-11.
   - ❑ **Married.** Fill out both Columns A and B, lines 2-11.

Fill in the average monthly income that you received from all sources, derived during the 6 full months before you file this bankruptcy case. 11 U.S.C. § 101(10A). For example, if you are filing on September 15, the 6-month period would be March 1 through August 31. If the amount of your monthly income varied during the 6 months, add the income for all 6 months and divide the total by 6. Fill in the result. Do not include any income amount more than once. For example, if both spouses own the same rental property, put the income from that property in one column only. If you have nothing to report for any line, write $0 in the space.

			Column A **For Debtor 1**	*Column B* **Debtor 2 or non-filing spouse**
2. **Your gross wages, salary, tips, bonuses, overtime, and commissions** (before all payroll deductions).			$________	$________
3. **Alimony and maintenance payments**			$________	$________
4. **All amounts from any source which are regularly paid for household expenses of you or your dependents, including child support.** Include regular contributions from an unmarried partner, members of your household, your dependents, parents, and roommates. Also, include regular contributions from a spouse if Column B is not filled in. Do not include payments you listed on line 3.			$________	$________
5. **Net income from operating a business, profession, or farm**				
Gross receipts (before all deductions)	$________			
Ordinary and necessary operating expenses	– $________			
Net monthly income from a business, profession, or farm	$________	Copy here➔	$________	$________

		Column A For Debtor 1	Column B Debtor 2 or non-filing spouse
6. **Net income from rental and other real property**			
Gross receipts (before all deductions)	$________		
Ordinary and necessary operating expenses	− $________		
Net monthly income from rental or other real property	$________ Copy here→	$________	$________
7. **Interest, dividends, and royalties**		$________	$________
8. **Unemployment compensation**		$________	$________
Do not enter the amount if you contend that the amount received was a benefit under the Social Security Act. Instead, list it here:................................. ↓			
For you..	$________		
For your spouse..	$________		
9. **Pension or retirement income.** Do not include any amount received that was a benefit under the Social Security Act.		$________	$________
10. **Income from all other sources not listed above.** Specify the source and amount. Do not include any benefits received under the Social Security Act or payments received as a victim of a war crime, a crime against humanity, or international or domestic terrorism. If necessary, list other sources on a separate page and put the total on line 10c.			
10a.		$________	$________
10b.		$________	$________
10c. Total amounts from separate pages, if any.		+ $________	+ $________
11. **Calculate your total average monthly income.** Add lines 2 through 10 for each column. Then add the total for Column A to the total for Column B.		$________ +	$________ = $________ Total average monthly income

Part 2. Determine How to Measure Your Deductions from Income

12. **Copy your total average monthly income from line 11.** .... $________

13. **Calculate the marital adjustment.** Check one:

- ❑ You are not married. Fill in 0 in line 13d.
- ❑ You are married and your spouse is filing with you. Fill in 0 in line 13d.
- ❑ You are married and your spouse is not filing with you.

Fill in the amount of the income listed in line 11, Column B, that was NOT regularly paid for the household expenses of you or your dependents, such as payment of the spouse's tax liability or the spouse's support of someone other than you or your dependents.

In lines 13a-c, specify the basis for excluding this income and the amount of income devoted to each purpose. If necessary, list additional adjustments on a separate page.

If this adjustment does not apply, enter 0 on line 13d.

13a.	$________
13b.	$________
13c.	+ $________
Total	$________

Copy here. → 13d. − $________

14. **Your current monthly income.** Subtract line 13d from line 12. 14. $ ____________

15. **Calculate your current monthly income for the year.** Follow these steps:

15a. Copy line 14 here ➔ .... 15a. $ ____________

Multiply line 15a by 12 (the number of months in a year). x 12

15b. The result is your current monthly income for the year for this part of the form. 15b. $__________

16. **Calculate the median family income that applies to you.** Follow these steps:

16a. Fill in the state in which you live.

16b. Fill in the number of people in your household.

16c. Fill in the median family income for your state and size of household. .... 16c. $__________

To find that information, either go to the Means Test information at http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court .

17. **How do the lines compare?**

17a. ❑ Line 15b is less than line 16c. On the top of page 1 of this form, check box 1, *Disposable income is not determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3.** Do NOT fill out Official Form 22C–2: *Calculation of Disposable Income.*

17b. ❑ Line 15b is equal to or more than line 16c. On the top of page 1 of this form, check box 2, *Disposable income is determined under 11 U.S.C. § 1325(b)(3).* **Go to Part 3 and fill out Official Form 22C–2: Calculation of Disposable Income.** On line 35 of that form, copy your current monthly income from line 14 above.

Part 3: Calculate Your Commitment Period Under 11 U.S.C. § 1325(b)(4)

18. **Copy your total average monthly income from line 11.** .... 18. $__________

19. **Deduct the marital adjustment if it applies.** If you are married, your spouse is not filing with you, and you contend that calculating the commitment period under 11 U.S.C. § 1325(b)(4) allows you to deduct part of your spouse's income, copy the amount from line 13d.
If the marital adjustment does not apply, fill in 0 on line 19a. 19a. – $__________

Subtract line 19a from line 18. 19b. $__________

20. **Calculate your current monthly income for the year.** Follow these steps:

20a. Copy line 19b.. .... 20a. $__________

Multiply by 12 (the number of months in a year). x 12

20b. The result is your current monthly income for the year for this part of the form. 20b. $__________

20c. Copy the median family income for your state and size of household from line 16c. .... $__________

21. **How do the lines compare?**

❑ Line 20b is less than or equal to line 20c. On the top of page 1 of this form, check box 3, *The commitment period is 3 years*. Go to Part 4.
❑ Line 20b is more than line 20c. On the top of page 1 of this form, check box 4, *The commitment period is 5 years*. Go to Part 4.

Part 4: Sign Here

By signing here, under penalty of perjury I declare that the information on this statement and in any attachments is true and correct.

✘ ______________________________ Signature of Debtor 1

✘ ______________________________ Signature of Debtor 2

Date _______________ MM / DD / YYYY

Date _______________ MM / DD / YYYY

If you checked 17a, do NOT fill out or file Official Form 22C–2: *Calculation of Disposable Income*.

If you checked 17b, fill out Official Form 22C–2: *Calculation of Disposable Income* and file it with this form. On line 35 of that form, copy your current monthly income from line 14 above.

Fill in this information to identify your case:

Debtor 1 ____________________
First Name Middle Name Last Name

Debtor 2 ____________________
(Spouse, if filing) First Name Middle Name Last Name

United States Bankruptcy Court for the: ____________ District of ________
(State)

Case number ____________________
(If known)

Draft, February 28, 2012

❑ Check if this is an amended filing

Official Form 22C–2

Chapter 13 Calculation of Your Disposable Income

12/13

To fill out this form, you will need your completed copy of Form 22C–1*: Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period.*

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for being accurate. If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

Part 1: Calculate Your Deductions from Your Income

The Internal Revenue Service (IRS) issues National and Local Standards for certain expense amounts. Use these amounts to answer the questions in lines 1-11. To find the IRS standards, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

Deduct the expense amounts set out in lines 1-11 regardless of your actual expense. In later parts of the form, you will use some of your actual expenses if they are higher than the standards. Do not include any operating expenses that you subtracted from income in lines 5 and 6 of Official Form 22C–1, and do not deduct any amounts that you subtracted from your spouse's income in line 13 of Form 22C–1.

If your expenses differ from month to month, enter the average expense.

Whenever this part of the form refers to *you*, it means both you and your spouse if Column B is filled in.

1. **The number of people used in determining your deductions from income**
   Fill in the number of people who could be claimed as exemptions on your federal income tax return, plus the number of any additional dependents whom you support. This number may be different from the number of people in your household.

National Standards You must use the IRS National Standards to answer the questions in lines 2-3.

2. **Food, clothing, and other items:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for food, clothing, and other items. $__________

3. **Out-of-pocket health care allowance:** Using the number of people you entered in line 1 and the IRS National Standards, fill in the dollar amount for out-of-pocket health care. The number of people is split into two categories—people who are under 65 and people who are 65 or older—because older people have a higher IRS allowance for health care costs. If your actual expenses are higher than this IRS amount, you may deduct the additional amount on line 18.

People who are under 65 years of age

3a. Out-of-pocket health care allowance per person $________

3b. Number of people who are under 65 X ______

3c. **Subtotal**. Multiply line 3a by line 3b. $________ **Copy line 3c here➔** $________

People who are 65 years of age or older

3d. Out-of-pocket health care allowance per person $________

3e. Number of people who are 65 or older X ______

3f. **Subtotal**. Multiply line 3d by 3e. $________ **Copy line 3f here➔** + $________

3g. **Total**. Add lines 3c and 3f. $________ **Copy total here➔** 3g. $________

Local Standards You must use the IRS Local Standards to answer the questions in lines 5-11.

Based on information from the IRS, the U.S. Trustee Program has divided the IRS Local Standard for housing for bankruptcy purposes into two parts:

- **Housing and utilities – Insurance and operating expenses**
- **Housing and utilities – Mortgage or rent expenses**

Refer to the U.S. Trustee website to answer the questions in lines 4-5. Go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

4. **Housing and utilities – Insurance and operating expenses:** Using the number of people you entered in line 1, fill in the dollar amount listed for your county for insurance and operating expenses. $________

5. **Housing and utilities – Mortgage or rent expenses:**

5a. Using the number of people you entered in line 1, fill in the dollar amount listed for your county for mortgage or rent expenses. $________

5b. Total average monthly payment for all mortgages and other debts secured by your home.

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Next divide by 60.

Name of the creditor	Average monthly payment
	$________
	$________
	+ $________

5b. Total average monthly payment $________ **Copy line 5b here➔** – $________ Repeat this amount on line 29a.

5c. Net mortgage or rent expense.

Subtract line 5b (*total average monthly payment*) from line 5a (*mortgage or rent expense*). If this number is less than $0, enter $0. $________ **Copy 5c here➔** $________

6. **If you claim that the U.S. Trustee Program's division of the IRS Local Standard for housing does not accurately compute the amount that applies to you, fill in any additional amount you claim.** $________

Explain why:

7. **Local transportation expenses:** Check the number of vehicles for which you claim an ownership or operating expense.
- ❑ 0. Go to line 10.
- ❑ 1. Go to line 8.
- ❑ 2 or more. Go to line 8.

8. **Vehicle operation expense:** Using the IRS Local Standards and the number of vehicles for which you claim the operating expenses, fill in the *Operating Costs* that apply for your Census region or metropolitan statistical area. $_________

9. **Vehicle ownership or lease expense:** Using the IRS Local Standards, calculate the net ownership or lease expense for each vehicle below. You may not claim the expense if you do not make any loan or lease payments on the vehicle. In addition, you may not claim the expense for more than two vehicles.

Vehicle 1 **Describe Vehicle 1:**

9a. Ownership or leasing costs using IRS Local Standard 9a. $____________

9b. Average monthly payment for all debts secured by Vehicle 1.
Do not include costs for leased vehicles.

To calculate the average monthly payment here and on line 9e, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

Name of each creditor for Vehicle 1	Average monthly payment
	$____________

Copy 9b here➔ – $____________ Repeat this amount on line 29b.

9c. Net Vehicle 1 ownership or lease expense
Subtract line 9b from line 9a. If this number is less than $0, enter $0. 9c. $____________ **Copy net Vehicle 1 expense here➔** $____________

Vehicle 2 **Describe Vehicle 2:**

9d. Ownership or leasing costs using IRS Local Standard 9d. $____________

9e. Average monthly payment for all debts secured by Vehicle 2. Do not include costs for leased vehicles.

Name of each creditor for Vehicle 2	Average monthly payment
	$____________

Copy here➔ – $____________ Repeat this amount on line 29c.

9f. Net Vehicle 2 ownership or lease expense
Subtract line 9e from 9d. If this number is less than $0, enter $0. 9f. $__________ **Copy net Vehicle 2 expense here ➔** $____________

10. **Public transportation expense**: If you claimed 0 vehicles in line 7, using the IRS Local Standards, fill in the *Public Transportation* expense allowance regardless of whether you use public transportation. $____________

11. **Additional public transportation expense:** If you claimed 1 or more vehicles in line 7 and if you claim that you may also deduct a public transportation expense, you may fill in what you believe is the appropriate expense, but you may not claim more than the IRS Local Standard for *Public Transportation*. $____________

Other Necessary Expenses In addition to the expense deductions listed above, you are allowed your monthly expenses for the following IRS categories.

12. **Taxes:** The total monthly amount that you actually pay for federal, state and local taxes, such as income taxes, self-employment taxes, social security taxes, and Medicare taxes. You may include the monthly amount withheld from your pay for these taxes. If you expect to receive a tax refund, you must divide the refund by 12 and subtract that number from the total monthly amount you actually pay for taxes. $__________

    Do not include real estate or sales taxes.

13. **Involuntary deductions:** The total monthly payroll deductions that your job requires, such as retirement contributions, union dues, and uniform costs.

    Do not include amounts that are not required by your job, such as voluntary 401(k) contributions or payroll savings. $__________

14. **Life insurance:** The total monthly premiums that you pay for your term life insurance.

    Do not include premiums for insurance on your dependents, for whole life, or for any other form of life insurance. $__________

15. **Court-ordered payments:** The total monthly amount that you pay as required by the order of a court or administrative agency, such as spousal or child support payments.

    Do not include payments on past due obligations for spousal or child support. You will list these obligations in line 31. $__________

16. **Education:** The total monthly amount that you pay for education that is either required:
    - as a condition for your job, or
    - for your physically or mentally challenged dependent child if no public education is available for similar services. $__________

17. **Childcare:** The total monthly amount that you pay for childcare, such as babysitting, daycare, nursery, and preschool.

    Do not include payments for any elementary or secondary school education. $__________

18. **Additional health care expenses, excluding insurance costs:** The monthly amount that you pay for health care that is required for the health and welfare of you or your dependents and that is not reimbursed by insurance or paid by a health savings account. Include only the amount that is more than the total entered in line 3. $__________

    Payments for health insurance or health savings accounts should be listed only in line 21.

19. **Telecommunication services:** The total monthly amount that you pay for telecommunication services, such as pagers, call waiting, caller identification, special long distance, business internet service, and business cell phone service, to the extent necessary for your health and welfare or that of your dependents or for the production of income, if it is not reimbursed by your employer. + __________

    Do not include payments for basic home telephone, internet and cell phone service. Do not include self-employment expenses, such as those reported on line 5 of *Official Form 22C-1*, or any amount you previously deducted.

20. **Add all of the expenses allowed under the IRS expense allowances.**

    Add lines 2 through 19. $__________

Additional Expense Deductions These are additional deductions allowed by the Means Test.
Note: Do not include any expense allowances listed in lines 2-20.

21. **Health insurance, disability insurance, and health savings account expenses.** The monthly expenses for health insurance, disability insurance, and health savings accounts that are reasonably necessary for yourself, your spouse, or your dependents.

Health insurance $________

Disability insurance $________

Health savings account + $________

Total $________ **Copy total here→** .... $________

Do you actually spend this total amount?

❑ No. How much do you actually spend? $________
❑ Yes

22. **Continuing contributions to the care of household or family members.** The actual monthly expenses that you will continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member of your household or member of your immediate family who is unable to pay for such expenses. $________

23. **Protection against family violence.** The reasonably necessary monthly expenses that you incur to maintain the safety of you and your family under the Family Violence Prevention and Services Act or other federal laws that apply. $________

By law, the court must keep the nature of these expenses confidential.

24. **Additional home energy costs.** Your home energy costs are included in your non-mortgage housing and utilities allowance on line 4.

If you believe that you have home energy costs that are more than the home energy costs included in the non-mortgage housing and utilities allowance, then fill in the excess amount of home energy costs. $________

You must give your case trustee documentation of your actual expenses, and you must show that the additional amount claimed is reasonable and necessary.

25. **Education expenses for dependent children who are younger than 18.** The monthly expenses (not more than $147* per child) that you pay for your dependent children who are younger than 18 years old to attend a private or public elementary or secondary school. $________

You must give your case trustee documentation of your actual expenses, and you must explain why the amount claimed is reasonable and necessary and not already accounted for in lines 2-19.

* Subject to adjustment on 4/01/13, and every 3 years after that for cases begun on or after the date of adjustment.

26. **Additional food and clothing expense.** The monthly amount by which your actual food and clothing expenses are higher than the combined food and clothing allowances in the IRS National Standards. That amount cannot be more than 5% of the food and clothing allowances in the IRS National Standards. $________

To find the maximum additional allowance, either go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office of the bankruptcy court.

You must show that the additional amount claimed is reasonable and necessary.

27. **Continuing charitable contributions.** The amount that you will continue to contribute in the form of cash or financial instruments to a religious or charitable organization. 11 U.S.C. § 548(d)(3) and (4). + ________

Do not include any amount more than 15% of your gross monthly income.

28. **Add all of the additional expense deductions.**
Add lines 21 through 27. $________

Deductions for Debt Payment

29. **For debts that are secured by an interest in property that you own, including home mortgages, vehicle loans, and other secured debt, fill in lines 29a through 29g.**

To calculate the total average monthly payment, add all amounts that are contractually due to each secured creditor in the 60 months after you file for bankruptcy. Then divide by 60.

			Average monthly payment
Mortgages on your home			
29a. Copy line 5b here			$________
Loans on your first two vehicles			
29b. Copy line 9b here.			$________
29c. Copy line 9e here.			$________
Name of each creditor for other secured debt	**Identify property that secures the debt**	**Does payment include taxes or insurance?**	
29d.		❑ No ❑ Yes	$________
29e.		❑ No ❑ Yes	$________
29f.		❑ No ❑ Yes	+ $________
29g. Total average monthly payment. Add lines 29a through 29f.			$________

Copy total here ➔ $________

30. **Are any debts that you listed in line 29 secured by your primary residence, a vehicle, or other property necessary for your support or the support of your dependents?**

❑ No. Go to line 31.

❑ Yes. State any amount that you must pay to a creditor, in addition to the payments listed in line 29, to keep possession of your property (called the *cure amount*). Next, divide by 60 and fill in the information below.

Name of the creditor	Identify property that secures the debt	Total cure amount		Monthly cure amount
		$________	÷ 60 =	$________
		$________	÷ 60 =	$________
		$________	÷ 60 =	+ $________
			Total	$________

Copy total here ➔ $________

31. **Do you owe any priority claims — such as a priority tax, child support, or alimony — that are past due as of the filing date of your bankruptcy case?** 11 U.S.C. § 507

❑ No. Go to line 32.

❑ Yes. Fill in the total amount of all of these priority claims. Do not include current or ongoing priority claims, such as those you listed in line 15.

Total amount of all past-due priority claims. $____________ ÷ 60 = $________

32. **Projected monthly Chapter 13 plan payment** $________

Current multiplier for your district as determined under schedules issued by the Executive Office for United States Trustees. To find this information, go to http://www.justice.gov/ust/eo/bapcpa/meanstesting.htm or ask for help at the clerk's office x ______

Average monthly administrative expense $________ Copy total here ➔ $________

33. **Add all of the deductions for debt payment.** Add lines 29 through 32. $________

Total Deductions from Income

34. **Add all of the allowed deductions.**

Copy line 20, *All of the expenses allowed under IRS expense allowances* .... $________

Copy line 28, *All of the additional expense deductions* .... $________

Copy line 33, *All of the deductions for debt payment* .... + $________

Total deductions $________ Copy total here ➔ $________

Part 2: Determine Your Disposable Income Under 11 U.S.C. § 1325(b)(2)

35. **Copy your total current monthly income from line 14 of Form 22C-1,** ***Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period.*** .... $________

36. **Fill in any reasonably necessary income you receive for support for dependent children.** The monthly average of any child support payments, foster care payments, or disability payments for a dependent child, reported in Part I of Form 22C –1, that you received in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child. $________

37. **Fill in all qualified retirement deductions.** The monthly total of all amounts that your employer withheld from wages as contributions for qualified retirement plans, as specified in § 541(b)(7) plus all required repayments of loans from retirement plans, as specified in § 362(b)(19). $________

38. **Total of all deductions allowed under 11 U.S.C. § 707(b)(2)(A).** Copy line 34. .... $________

39. **Deduction for special circumstances.** If special circumstances justify additional expenses and you have no reasonable alternative, describe the special circumstances and their expenses. You must give your case trustee a detailed explanation of the special circumstances and documentation for the expenses.

Describe the special circumstance	Amount of expense
39a.	$________
39b.	$________
39c.	+ $________

39d. **Total**. Add lines 39a through 39c .... 39d. $________ Copy 39d here ➔ + $________

40. **Total adjustments.** Add lines 36 through 39d. $________ Copy total here ➔ — $________

41. **Calculate your monthly disposable income under § 1325(b)(2).** Subtract line 40 from line 35. $________

Part 3: Change in Income or Expenses

42. **Change in income or expenses.** If the income in Form 22C-1 or the expenses you reported in this form has changed or is virtually certain to change during the 12 months after the date you filed your bankruptcy petition, fill in the information below. For example, if the wages reported increased after you filed your petition, check *22C-1* in the first column, enter line 2 in the second column, explain why the wages increased, fill in when the increase occurred, and fill in the amount of the increase.

Form	Line	Reason for change	Date of change	Increase or decrease?	Amount of change
❑ B22C–1 ❑ B22C –2	____		____	❑ Increase ❑ Decrease	$________
❑ B22C–1 ❑ B22C –2	____		____	❑ Increase ❑ Decrease	$________
❑ B22C–1 ❑ B22C –2	____		____	❑ Increase ❑ Decrease	$________
❑ B22C–1 ❑ B22C –2	____		____	❑ Increase ❑ Decrease	$________

Part 4: Sign Here

By signing here, under penalty of perjury you declare that the information on this statement and in any attachments is true and correct.

✘ ______________________ Signature of Debtor 1

✘ ______________________ Signature of Debtor 2

Date ____________ MM / DD / YYYY

Date ____________ MM / DD / YYYY

Official Forms 22C–1 and 22C–2

About the Chapter 13 Statement of Your Current Monthly Income, Calculation of Commitment Period and Chapter 13 Calculation of Your Disposable Income

United States Bankruptcy Court 12/01/13

How to Fill Out these Forms

Official Forms 22C─1 and 22C─2 determine the period for your payments to creditors, how the amount you may be required to pay to creditors is established, and, in some situations, how much you must pay.

You must file 22C ─1, the *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 22C ─1) if you are an individual and you are filing under chapter 13. This form will determine your current monthly income and determine whether your income is below the median income for households of the same size in your state. If your income is not above the median, you will not have to fill out the second form. Form 22C -1 also will determine your applicable commitment period–the time period for making payments to your creditors.

If your income is above the median, you must file the second form, 22C ─2, *Chapter13 Calculation of Your Disposable Income*. The calculations on this form—sometimes called the *Means Test*—reduce your income by living expenses and payment of certain debts, resulting in an amount available to pay unsecured debts. Your chapter 13 plan may be required to provide for payment of this amount toward unsecured debts.

Read each question carefully. You may not be required to answer every question on this form. The instructions will alert you if you may skip questions.

Some of the questions require you to go to other sources for information. In those cases, the form has instructions for where to find the information you need.

If you and your spouse are filing together, you and your spouse must file a single statement.

Understand the terms used in these form

These forms use *you* and *Debtor 1* to refer to a debtor filing alone. A married couple may file a bankruptcy case together—called a *joint case*—and in joint cases, these forms use *you* to ask for information from both debtors. When information is needed about the spouses separately, the forms use *Debtor 1* and *Debtor 2* to distinguish between them. In joint cases, one of the spouses must report information as *Debtor 1* and the other as *Debtor 2*. The same person must be *Debtor 1* in all of the forms.

Things to remember when filling out this form

Be as complete and accurate as possible.

If more space is needed, attach a separate sheet to this form. Include the line number to which the additional information applies. On the top of any additional pages, write your name and case number (if known).

If two married people are filing together, both are equally responsible for supplying correct information.

Do not file these instructions with your bankruptcy filing package. Keep them for your records.

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COMMITTEE NOTES FOR FORMS 22A-1, 22A-2, 22B, 22C-1 AND 22C-2

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COMMITTEE NOTE[1]

Official Forms 22A-1, 22A-2, 22C-1, and 22C-2 are amendments to the "means test" forms used by individuals in chapter 7 and 13, formerly Official Forms 22A and 22C. The original forms have been substantially revised as part of the Forms Modernization Project (the FMP). Official Form 22B, used by individuals in chapter 11, has also been revised as part of the FMP.

Among the goals of the FMP is the clarification of forms and their instructions in order to make them easier to read and, as a result, to increase the completeness and accuracy of responses. In pursuit of this goal, the revised forms provide a context for the questions being asked and explain technical terms that are used. They also employ more commonly-used language, and address the individual debtor directly as "you." The formatting is designed to be clearer. In order to simplify the task of providing information, the revised forms often provide examples of the type of information being sought and include information needed to answer some of the questions or directions about where necessary information can be found. Rather than posing broad, open-ended questions that may not be fully answered, the revised forms break down questions into specific subparts for which an answer—even if "no"—is prompted.

There are some differences in presentation and the order in which certain information is requested on the chapter 7 and chapter 13 versions of the forms.

For chapter 7, former Official Form 22A has been split into two forms: 22A-1 and 22A-2. Official Form 22A-1, *Chapter 7 Statement of Your Current Monthly Income*, calculates the debtor's current monthly income and will be completed by all chapter 7 debtors who are individuals and will compare that calculation to the median income for households of the same size in the debtor's state. Official Form 22A-2, *Chapter 7 Means Test Calculation*, will be completed only by those chapter 7 debtors whose income is above the state median income for similarly sized households.

Also, Part VII, *Additional Expense Claims*, of former Official Form 22A has been replaced with Part 4 of Official Form 22A-2, which allows the debtor to describe special circumstances

[1] In addition to the changes described in this Committee Note, the forms include changes that were previously published for comment in August 2011 and conforming changes to reflect the IRS allocation of internet services. These changes, which are scheduled to take effect on December 1, 2012, if approved by the Judicial Conference of the United States, are incorporated in lines 23 of Form 22A-2 and lines 19 and 42 of Form 22C-2.

that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative. The treatment of the reported amounts is unchanged: they are not deducted from the expenses calculated by the form.

For chapter 13, there is a similar split of income and expense calculations. The calculation of current monthly income and the plan commitment period applies to all chapter 13 debtors and is treated in Official Form 22C-1, *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period*. If the calculation for current monthly income in Official Form 22C-1 results in a number below the median family income for the debtor's state and size of household, the debtor will not have to fill out Official Form 22C-2, *Chapter13 Calculation of Your Disposable Income*. However, if the income is equal to or exceeds the applicable median, Official Form 22C-2 calculates disposable income under 11 U.S.C. § 1325(b)(3), through a report of allowed expense deductions.

Line 60 of former Official Form 22C has not been repeated in Official Form 22C-2. This line allowed debtors to list, but not deduct from income, "Other Necessary Expense" items that are not included within the categories specified by the Internal Revenue Service. Because debtors are separately allowed to deduct any expenses arising from special circumstances, however, former Line 60 was rarely used. Special Circumstances are reported on Form 22C-2 at line 39.

APPENDIX B

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FEDERAL RULES OF BANKRUPTCY PROCEDURE

PART VIII. BANKRUPTCY APPEALS

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Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission

1 (a) GENERAL SCOPE. These Part VIII rules govern the
2 procedure in United States district courts and bankruptcy appellate
3 panels for appeals taken from judgments, orders, and decrees of
4 bankruptcy courts. They also govern certain procedures involving
5 appeals to courts of appeals under 28 U.S.C. § 158(d).
6 (b) DEFINITION OF "BAP." "BAP" means a bankruptcy
7 appellate panel established by the judicial council of a circuit and
8 authorized to hear appeals from the bankruptcy court for the
9 district in which an appeal is taken under 28 U.S.C. § 158.
10 (c) METHOD OF TRANSMISSION. A document must
11 be sent electronically under these Part VIII rules, unless the
12 document is being sent by or to an individual who is not
13 represented by counsel or the governing rules of the court
14 expressly permit or require mailing or other means of delivery.

COMMITTEE NOTE

These Part VIII rules apply to appeals under 28 U.S.C. § 158(a) from bankruptcy courts to district courts and BAPs. Subsequent appeals to courts of appeals are generally governed by the Federal Rules of Appellate Procedure.

Seven of the Part VIII rules do, however, relate to appeals to courts of appeals. Rule 8004(e) provides that authorization by the court of appeals of a direct appeal of a bankruptcy court's interlocutory judgment, order, or decree constitutes a grant of leave to appeal. Rule 8006 governs the procedure for certification under 28 U.S.C. § 158(d)(2) of a direct appeal from a judgment, order, or decree of a bankruptcy court to a court of appeals. Rule 8007 addresses stays pending a direct appeal to a court of

appeals. Rule 8008 authorizes a bankruptcy court to issue an indicative ruling while an appeal is pending in a court of appeals. Rules 8009 and 8010 govern the record on appeal in a direct appeal allowed under 28 U.S.C. § 158(d)(2). And Rule 8025 governs the granting of a stay of a judgment of a district court or BAP pending an appeal to the court of appeals.

These rules take account of the evolving technology in the federal courts for the electronic filing, storage, and transmission of documents. Except as applied to pro se parties, the Part VIII rules require documents to be sent electronically, unless applicable court rules or orders expressly require or permit another means of sending a particular document.

Rule 8002. Time for Filing Notice of Appeal

1 (a) FOURTEEN-DAY PERIOD.

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

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

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

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

21 (b) EFFECT OF MOTION ON TIME FOR APPEAL.

22 (1) If a party timely files in the bankruptcy court
23 any of the following motions, the time to file an appeal
24 runs for all parties from the entry of the order disposing of
25 the last such remaining motion:
26 (A) to amend or make additional findings
27 under Rule 7052, whether or not granting the
28 motion would alter the judgment;
29 (B) to alter or amend the judgment under
30 Rule 9023;
31 (C) for a new trial under Rule 9023; or
32 (D) for relief under Rule 9024 if the motion
33 is filed no later than 14 days after entry of the
34 judgment.
35 (2)(A) If a party files a notice of appeal after the
36 court announces or enters a judgment, order, or decree –
37 but before it disposes of any motion listed in subdivision
38 (b)(1) – the notice becomes effective when the order
39 disposing of the last such remaining motion is entered.
40 (B) A party intending to challenge on appeal an
41 order disposing of any motion listed in subdivision (b)(1),
42 or the alteration or amendment of a judgment, order, or
43 decree upon such a motion, must file a notice of appeal or

44 an amended notice of appeal. The notice of appeal or
45 amended notice of appeal must be filed in compliance with
46 Rule 8003 or 8004 and within the time prescribed by this
47 rule, measured from the entry of the order disposing of the
48 last such remaining motion.
49 (3) No additional fee is required to file an amended
50 notice of appeal.
51 (c) APPEAL BY AN INMATE CONFINED IN AN
52 INSTITUTION.
53 (1) If an inmate confined in an institution files a
54 notice of appeal from a judgment, order, or decree of a
55 bankruptcy court to a district court or BAP, the notice is
56 timely if it is deposited in the institution's internal mail
57 system on or before the last day for filing. If an institution
58 has a system designed for legal mail, the inmate must use
59 that system to receive the benefit of this rule. Timely filing
60 may be shown by a declaration in compliance with 28
61 U.S.C. § 1746 or by a notarized statement, either of which
62 must set forth the date of deposit and state that first-class
63 postage has been prepaid.
64 (2) If an inmate files under this subdivision the first
65 notice of appeal from a judgment, order, or decree of a

66 bankruptcy court to a district court or BAP, the 14-day
67 period provided in subdivision (a)(2) for another party to
68 file a notice of appeal runs from the date when the
69 bankruptcy court dockets the first notice.
70 (d) EXTENSION OF TIME FOR APPEAL.
71 (1) The bankruptcy court may extend the time for
72 filing a notice of appeal by a party unless the judgment,
73 order, or decree appealed from:
74 (A) grants relief from an automatic stay
75 under § 362, 922, 1201, or 1301 of the Code;
76 (B) authorizes the sale or lease of property
77 or the use of cash collateral under § 363 of the
78 Code;
79 (C) authorizes the obtaining of credit under
80 § 364 of the Code;
81 (D) authorizes the assumption or
82 assignment of an executory contract or unexpired
83 lease under § 365 of the Code;
84 (E) approves a disclosure statement under
85 § 1125 of the Code; or
86 (F) confirms a plan under § 943, 1129,
87 1225, or 1325 of the Code.

88 (2) The bankruptcy court may extend the time to

89 file a notice of appeal if:

90 (A) a motion for extension of time is filed

91 with the bankruptcy clerk within the time prescribed

92 by this rule; or

93 (B) a motion is filed with the bankruptcy

94 clerk no later than 21 days after the time prescribed

95 by this rule expires and is accompanied by a

96 demonstration of excusable neglect; but

97 (C) no extension of time for filing a notice

98 of appeal may exceed 21 days after the time

99 otherwise prescribed by this rule, or 14 days after

100 the date the order granting the motion is entered,

101 whichever is later.

COMMITTEE NOTE

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

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

Subdivision (b), like former Rule 8002(b) and F.R. App. P. 4(a),

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

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

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

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

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

1 (a) FILING THE NOTICE OF APPEAL.

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

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

12 (3) The notice of appeal must:

13 (A) conform substantially to the appropriate
14 Official Form;

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

17 (C) be accompanied by the prescribed fee.

18 (4) If requested by the bankruptcy clerk, each
19 appellant must promptly file the number of copies of the
20 notice of appeal that the bankruptcy clerk needs for
21 compliance with subdivision (c).

22 (b) JOINT OR CONSOLIDATED APPEALS.

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

24 from a judgment, order, or decree of a bankruptcy court

25 and their interests make joinder practicable, they may file a

26 joint notice of appeal. They may then proceed on appeal as

27 a single appellant.

28 (2) When parties have separately filed timely

29 notices of appeal, the district court or BAP may join or

30 consolidate the appeals.

31 (c) SERVING THE NOTICE OF APPEAL.

32 (1) The bankruptcy clerk must serve notice of the

33 filing of a notice of appeal by transmitting it to counsel of

34 record for each party to the appeal – excluding the

35 appellant – or, if a party is proceeding pro se, by

36 transmitting it to the pro se party's service address.

37 (2) The bankruptcy clerk's failure to serve notice

38 does not affect the validity of the appeal.

39 (3) The bankruptcy clerk must give each party

40 served notice of the date on which the notice of appeal was

41 filed and note on the docket the names of the parties served

42 and the date and method of the service.

43 (4) The bankruptcy clerk must promptly transmit

44 the notice of appeal to the United States trustee, but failure

45 to transmit notice to the United States trustee does not

46 affect the validity of the appeal.

47 (d) TRANSMITTING THE NOTICE OF APPEAL TO

48 THE DISTRICT COURT OR BAP; DOCKETING THE APPEAL.

49 (1) The bankruptcy clerk must promptly transmit

50 the notice of appeal to the clerk of the BAP if a BAP has

51 been established for appeals from that district and the

52 appellant has not elected to have the appeal heard by the

53 district court. Otherwise, the bankruptcy clerk must

54 promptly transmit the notice of appeal to the clerk of the

55 district court.

56 (2) Upon receiving the notice of appeal, the clerk

57 of the district court or BAP must docket the appeal under

58 the title of the bankruptcy court action with the appellant

59 identified – adding the appellant's name if necessary.

COMMITTEE NOTE

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

Subdivision (a) incorporates much of the content of former Rule 8001(a) regarding the taking of an appeal as of right under 28 U.S.C.

§ 158(a)(1) or (2). The rule now requires that the judgment, order, or decree being appealed be attached to the notice of appeal.

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

Subdivision (c) is derived from former Rule 8004 and F.R. App. P. 3(d). Under Rule 8001(c), the former rule's requirement that service of the notice of appeal be accomplished by mailing is generally modified to require the bankruptcy clerk to serve counsel by electronic means. Service on pro se parties must be made by sending the notice to the address most recently provided to the court.

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

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

1 (a) NOTICE OF APPEAL AND MOTION FOR LEAVE
2 TO APPEAL. An appeal from an interlocutory judgment, order, or
3 decree of a bankruptcy court as permitted by 28 U.S.C. § 158(a)(3)
4 may be taken only by filing with the bankruptcy clerk a notice of
5 appeal as prescribed by Rule 8003(a) and within the time allowed
6 by Rule 8002. The notice of appeal must be accompanied by a
7 motion for leave to appeal prepared in accordance with subdivision
8 (b) and, unless served electronically using the court's transmission
9 equipment, with proof of service in accordance with Rule 8011(d).
10 (b) CONTENT OF MOTION; RESPONSE.
11 (1) A motion for leave to appeal under 28 U.S.C.
12 § 158(a)(3) must include the following:
13 (A) the facts necessary to understand the
14 questions presented;
15 (B) the questions themselves;
16 (C) the relief sought;
17 (D) the reasons why leave to appeal should
18 be granted; and
19 (E) an attachment of the interlocutory
20 judgment, order, or decree from which appeal is
21 sought, and any related opinions or memoranda.

22 (2) A party may file with the clerk of the district
23 court or BAP a response in opposition or a cross-motion
24 within 14 days after the motion is served.
25 (c) TRANSMITTING THE NOTICE OF APPEAL AND
26 MOTION; DOCKETING THE APPEAL; DETERMINING THE
27 MOTION.
28 (1) The bankruptcy clerk must promptly transmit
29 the notice of appeal and the motion for leave to appeal,
30 together with any statement of election under Rule 8005, to
31 the clerk of the district court or BAP.
32 (2) Upon receiving the notice of appeal and motion
33 for leave to appeal, the clerk of the district court or BAP
34 must docket the appeal under the title of the bankruptcy
35 court action with the movant-appellant identified – adding
36 the movant-appellant's name if necessary.
37 (3) The motion and any response or cross-motion
38 are submitted without oral argument unless the district
39 court or BAP orders otherwise. If the motion for leave to
40 appeal is denied, the district court or BAP must dismiss the
41 appeal.
42 (d) FAILURE TO FILE A MOTION. If an appellant does
43 not file a motion for leave to appeal an interlocutory judgment,

44 order, or decree, but timely files a notice of appeal, the district

45 court or BAP may:

46 • direct the appellant to file a motion for leave to

47 appeal; or

48 • treat the notice of appeal as a motion for leave to

49 appeal and either grant or deny leave.

50 If the court directs that a motion for leave to appeal be filed, the

51 appellant must file the motion within 14 days after the order

52 directing the filing is entered, unless the order provides otherwise.

53 (e) DIRECT APPEAL TO COURT OF APPEALS. If

54 leave to appeal an interlocutory judgment, order, or decree is

55 required under 28 U.S.C. § 158(a)(3) and has not been granted by

56 the district court or BAP, an authorization by the court of appeals

57 of a direct appeal under 28 U.S.C. § 158(d)(2) satisfies the

58 requirement for leave to appeal.

COMMITTEE NOTE

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

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

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

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

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

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

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

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

1 (a) FILING OF THE STATEMENT OF ELECTION. To
2 elect under 28 U.S.C. § 158(c)(1) to have an appeal heard by the
3 district court, a party must:
4 (1) submit a statement of election that conforms
5 substantially to the appropriate Official Form; and
6 (2) file the statement within the time prescribed by
7 28 U.S.C. § 158(c)(1).
8 (b) TRANSFER OF THE APPEAL. Upon receiving an
9 appellant's timely statement of election, the bankruptcy clerk must
10 transmit all documents related to the appeal to the district court.
11 Upon receiving a timely statement of election by a party other than
12 the appellant, the BAP clerk must promptly transfer the appeal and
13 any pending motions to the district court.
14 (c) DETERMINING THE VALIDITY OF AN
15 ELECTION. No later than 14 days after the statement of election
16 is filed, a party seeking a determination of the validity of an
17 election must file a motion in the court in which the appeal is then
18 pending.
19 (d) APPEAL BY LEAVE – TIMING OF ELECTION. If
20 an appellant moves for leave to appeal under Rule 8004 and fails
21 to file a separate notice of appeal concurrently with the filing of its

22 motion, the motion must be treated as if it were a notice of appeal

23 for purposes of determining the timeliness of the filing of a

24 statement of election.

COMMITTEE NOTE

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

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

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

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

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

Rule 8006. Certification of Direct Appeal to Court of Appeals

1 (a) EFFECTIVE DATE OF CERTIFICATION.
2 Certification of a judgment, order, or decree of a bankruptcy court
3 for direct review in a court of appeals under 28 U.S.C. § 158(d)(2)
4 is effective when the following events have occurred:
5 (1) the certification has been filed;
6 (2) a timely appeal has been taken from the
7 judgment, order, or decree in accordance with Rule 8003 or
8 8004; and
9 (3) the notice of appeal has become effective under
10 Rule 8002.
11 (b) FILING OF CERTIFICATION. The certification
12 required by 28 U.S.C. § 158(d)(2)(A) must be filed with the clerk
13 of the court in which a matter is pending. For purposes of this
14 rule, a matter is pending in the bankruptcy court for 30 days after
15 the effective date of the first notice of appeal from the judgment,
16 order, or decree for which direct review in the court of appeals is
17 sought. A matter is pending in the district court or BAP thereafter.
18
19 (c) JOINT CERTIFICATION BY ALL APPELLANTS
20 AND APPELLEES. A joint certification by all the appellants and
21 appellees under 28 U.S.C. § 158(d)(2)(A) must be made by

22 executing the appropriate Official Form and filing it with the clerk
23 of the court in which the matter is pending. The parties may
24 supplement the certification with a short statement of the basis for
25 the certification, which may include the information listed in
26 subdivision (f)(3).
27 (d) COURT THAT MAY MAKE CERTIFICATION.
28 (1) Only the bankruptcy court may make a
29 certification on request of parties or on its own motion
30 while the matter is pending before it as provided in
31 subdivision (b).
32 (2) Only the district court or BAP may make a
33 certification on request of parties or on its own motion
34 while the matter is pending before it as provided in
35 subdivision (b).
36 (e) CERTIFICATION ON THE COURT'S OWN
37 MOTION.
38 (1) A certification on the court's own motion under
39 28 U.S.C. § 158(d)(2)(A) must be set forth in a separate
40 document. The clerk of the certifying court must serve this
41 document on all the parties to the appeal in the manner
42 required for service of a notice of appeal under Rule
43 8003(c)(1). The certification must be accompanied by an

44 opinion or memorandum that contains the information
45 required by subdivision (f)(3)(A)-(D).
46 (2) Within 14 days after the court's certification, a
47 party may file with the clerk of the certifying court a short
48 supplemental statement regarding the merits of
49 certification.
50 (f) CERTIFICATION BY THE COURT ON REQUEST.
51 (1) A request by a party for certification that a
52 circumstance specified in 28 U.S.C. § 158(d)(2)(A)(i)-(iii)
53 exists, or a request by a majority of the appellants and a
54 majority of the appellees, must be filed with the clerk of the
55 court in which the matter is pending within the time
56 specified by 28 U.S.C. § 158(d)(2)(E).
57 (2) A request for certification must be served on all
58 parties to the appeal in the manner required for service of a
59 notice of appeal under Rule 8003(c)(1).
60 (3) A request for certification must include the
61 following:
62 (A) the facts necessary to understand the
63 question presented;
64 (B) the question itself;
65 (C) the relief sought;

66 (D) the reasons why the appeal should be
67 allowed and is authorized by statute and rule,
68 including why a circumstance specified in 28
69 U.S.C. § 158(d)(2)(A)(i)-(iii) exists; and
70 (E) a copy of the judgment, order, or decree
71 that is the subject of the requested certification and
72 any related opinion or memorandum.
73 (4) A party may file a response to a request for
74 certification within 14 days after the request is served, or
75 such other time as the court in which the matter is pending
76 may allow. A party may file a cross-request for
77 certification within 14 days after the request is served, or
78 within 60 days after the entry of the judgment, order, or
79 decree, whichever occurs first.
80 (5) The request, cross-request, and any response
81 are not governed by Rule 9014 and are submitted without
82 oral argument unless the court in which the matter is
83 pending otherwise directs.
84 (6) A certification of an appeal under 28 U.S.C.
85 § 158(d)(2) in response to a request must be made in a
86 separate document served on all the parties to the appeal in
87 the manner required for service of a notice of appeal under

88 Rule 8003(c)(1).

89 (g) PROCEEDING IN THE COURT OF APPEALS

90 FOLLOWING CERTIFICATION. A request for permission to

91 take a direct appeal to the court of appeals under 28 U.S.C.

92 § 158(d)(2) must be filed with the clerk of the court of appeals

93 within 30 days after the date the certification becomes effective

94 under subdivision (a).

COMMITTEE NOTE

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

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

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

leave to appeal an interlocutory ruling has been granted, the authorization by the court of appeals is treated as the granting of leave to appeal.

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

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

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

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

1 (a) INITIAL MOTION IN THE BANKRUPTCY COURT;
2 TIME TO FILE.
3 (1) A party must ordinarily move first in the
4 bankruptcy court for the following relief:
5 (A) a stay of a judgment, order, or decree of
6 the bankruptcy court pending appeal;
7 (B) approval of a supersedeas bond;
8 (C) an order suspending, modifying,
9 restoring, or granting an injunction while an appeal
10 is pending; or
11 (D) the suspension or continuation of
12 proceedings in a case or other relief permitted by
13 subdivision (e).
14 (2) A motion for a type of relief specified in
15 paragraph (1) may be made in the bankruptcy court either
16 before or after the filing of a notice of appeal of the
17 judgment, order, or decree appealed from.
18 (b) MOTION IN THE DISTRICT COURT, BAP, OR
19 COURT OF APPEALS IN A DIRECT APPEAL; CONDITIONS
20 ON RELIEF.
21 (1) A motion for a type of relief specified in Rule

22 subdivision (a)(1), or to vacate or modify an order of the
23 bankruptcy court granting such relief, may be made in the
24 district court or BAP or in the court of appeals in a direct
25 appeal to that court.
26 (2) The motion must:
27 (A) show that it would be impracticable to
28 move first in the bankruptcy court if the moving
29 party has not sought relief in the first instance in the
30 bankruptcy court; or
31 (B) state the bankruptcy court's ruling and
32 any reasons given by the bankruptcy court for its
33 ruling.
34 (3) The motion must also include:
35 (A) the reasons for granting the relief
36 requested and the pertinent facts;
37 (B) originals or copies of affidavits or other
38 sworn statements supporting facts subject to
39 dispute; and
40 (C) relevant parts of the record.
41 (4) The movant must give reasonable notice of the
42 motion to all parties.
43 (c) FILING OF BOND OR OTHER SECURITY. The

44 district court or BAP may condition relief under this rule on the

45 filing of a bond or other appropriate security with the bankruptcy

46 court.

47 (d) REQUIREMENT OF BOND FOR TRUSTEE OR

48 THE UNITED STATES. When a trustee appeals, a bond or other

49 appropriate security may be required. When an appeal is taken by

50 the United States, its officer, or its agency or by direction of any

51 department of the federal government, a bond or other security is

52 not required.

53 (e) CONTINUATION OF PROCEEDINGS IN THE

54 BANKRUPTCY COURT. Notwithstanding Rule 7062 and subject

55 to the authority of the district court, BAP, or court of appeals, the

56 bankruptcy court may:

57 (1) suspend or order the continuation of other

58 proceedings in the case; or

59 (2) make any other appropriate orders during the

60 pendency of an appeal on terms that protect the rights of all

61 parties in interest.

COMMITTEE NOTE

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

Subdivision (a), like the former rule, requires a party ordinarily to seek relief pending an appeal in the bankruptcy court. Subdivision (a)(1)

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

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

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

Rule 8008. Indicative Rulings

1 (a) RELIEF PENDING APPEAL. If a party files a timely
2 motion in the bankruptcy court for relief that the bankruptcy court
3 lacks authority to grant because of an appeal that has been
4 docketed and is pending, the bankruptcy court may:
5 (1) defer consideration of the motion;
6 (2) deny the motion; or
7 (3) state that the court would grant the motion if the
8 court in which the appeal is pending remands for that
9 purpose, or state that the motion raises a substantial issue.
10 (b) NOTICE TO COURT IN WHICH THE APPEAL IS
11 PENDING. If the bankruptcy court states that it would grant the
12 motion, or that the motion raises a substantial issue, the movant
13 must promptly notify the clerk of the court in which the appeal is
14 pending.
15 (c) REMAND AFTER INDICATIVE RULING. If the
16 bankruptcy court states that it would grant the motion or that the
17 motion raises a substantial issue and the appeal is pending in a
18 district court or BAP, the district court or BAP may remand for
19 further proceedings, but it retains jurisdiction unless it expressly
20 dismisses the appeal. If the district court or BAP remands but
21 retains jurisdiction, the parties must promptly notify the clerk of

22 that court when the bankruptcy court has decided the motion on

23 remand.

COMMITTEE NOTE

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

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

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

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

Rule 8009. Record and Issues on Appeal; Sealed Documents

1 (a) DESIGNATION AND COMPOSITION OF RECORD
2 ON APPEAL; STATEMENT OF ISSUES ON APPEAL.
3 (1) *Appellant's Duties*. Within 14 days after:
4 • filing a notice of appeal as prescribed by Rule
5 8003(a);
6 • entry of an order granting leave to appeal; or
7 • entry of an order disposing of the last remaining
8 motion of a kind listed in Rule 8002(b)(1);
9 whichever is later,
10 the appellant must file with the bankruptcy clerk and serve on the
11 appellee a designation of the items to be included in the record on
12 appeal and a statement of the issues to be presented. A designation
13 and statement served prematurely must be treated as served on the
14 first day on which filing is timely under this paragraph.
15 (2) *Appellee's and Cross-Appellant's Duties.*
16 Within 14 days after service of the appellant's designation
17 and statement, the appellee may file and serve on the
18 appellant a designation of additional items to be included in
19 the record on appeal and, if the appellee has filed a cross-
20 appeal, the appellee as cross-appellant must file and serve a
21 statement of the issues to be presented on the cross-appeal

22 and a designation of additional items to be included in the
23 record.
24 (3) *Cross-Appellee's Duties*. Within 14 days after
25 service of the cross-appellant's designation and statement,
26 a cross-appellee may file and serve on the cross-appellant a
27 designation of additional items to be included in the record.
28 (4) *Record on Appeal*. Subject to subdivisions (d)
29 and (e), the record on appeal must include the following:
30 • items designated by the parties as provided by
31 paragraphs (1)-(3);
32 • the notice of appeal;
33 • the judgment, order, or decree being appealed;
34 • any order granting leave to appeal;
35 • any certification under 28 U.S.C. § 158(d)(2);
36 • any opinion or findings of fact and conclusions of
37 law, issued by the court, relating to the subject of
38 the appeal, including transcripts of all oral rulings;
39 • any transcript ordered as prescribed by subdivision
40 (b); and
41 • any statement required by subdivision (c).
42 Notwithstanding the parties' designations, the district court
43 or BAP may order the inclusion of additional items from

44 the record as part of the record on appeal.

45 (5) *Copies for the Bankruptcy Clerk*. If paper

46 copies are needed, a party filing a designation of items to

47 be included in the record must provide to the bankruptcy

48 clerk a copy of any designated items that the bankruptcy

49 clerk requests. If the party fails to provide the copy, the

50 bankruptcy clerk must prepare the copy at the party's

51 expense.

52 (b) TRANSCRIPT OF PROCEEDINGS.

53 (1) *Appellant's Duty*. Within the time period

54 prescribed by subdivision (a)(1), the appellant must:

55 (A) order in writing from the reporter, as

56 defined in Rule 8010(a)(1), a transcript of any parts

57 of the proceedings not already on file that the

58 appellant considers necessary for the appeal, and

59 file the order with the bankruptcy clerk; or

60 (B) file with the bankruptcy clerk a

61 certificate stating that the appellant is not ordering a

62 transcript.

63 (2) *Cross-Appellant's Duty*. Within 14 days after

64 the appellant files with the bankruptcy clerk a copy of the

65 transcript order or a certificate stating that appellant is not

66 ordering a transcript, the appellee as cross-appellant must:

67 (A) order in writing from the reporter a

68 transcript of any parts of the proceedings not

69 ordered by appellant and not already on file that the

70 cross-appellant considers necessary for the appeal,

71 and file a copy of the order with the bankruptcy

72 clerk; or

73 (B) file with the bankruptcy clerk a

74 certificate stating that the cross-appellant is not

75 ordering a transcript.

76 (3) *Appellee's or Cross-Appellee's Right to Order*.

77 Within 14 days after the appellant or cross-appellant files

78 with the bankruptcy clerk a copy of a transcript order or

79 certificate stating that a transcript will not be ordered, the

80 appellee or cross-appellee must order in writing from the

81 reporter a transcript of any parts of the proceedings not

82 already ordered or on file that the appellee or cross-

83 appellee considers necessary for the appeal. The order

84 must be filed with the bankruptcy clerk.

85 (4) *Payment*. At the time of ordering, a party must

86 make satisfactory arrangements with the reporter for paying

87 the cost of the transcript.

88 (5) *Unsupported Finding or Conclusion.* If the
89 appellant intends to urge on appeal that a finding or
90 conclusion is unsupported by the evidence or is contrary to
91 the evidence, the appellant must include in the record a
92 transcript of all testimony and copies of all exhibits
93 relevant to that finding or conclusion.
94 (c) STATEMENT OF THE EVIDENCE WHEN A
95 TRANSCRIPT IS UNAVAILABLE. Within the time period
96 prescribed by subdivision (a)(1), the appellant may prepare a
97 statement of the evidence or proceedings from the best available
98 means, including the appellant's recollection, if a transcript of a
99 hearing or trial is unavailable. The statement must be served on
100 the appellee, who may serve objections or proposed amendments
101 within 14 days after being served. The statement and any
102 objections or proposed amendments must then be submitted to the
103 bankruptcy court for settlement and approval. As settled and
104 approved, the statement must be included by the bankruptcy clerk
105 in the record on appeal.
106 (d) AGREED STATEMENT AS THE RECORD ON
107 APPEAL. Instead of the record on appeal as defined in
108 subdivision (a), the parties may prepare, sign, and submit to the
109 bankruptcy court a statement of the case showing how the issues

110 presented by the appeal arose and were decided in the bankruptcy
111 court. The statement must set forth only those facts averred and
112 proved or sought to be proved that are essential to the court's
113 resolution of the issues. If the statement is accurate, it, together
114 with any additions that the bankruptcy court may consider
115 necessary to a full presentation of the issues on appeal, must be
116 approved by the bankruptcy court and certified to the district court
117 or BAP as the record on appeal. The bankruptcy clerk must then
118 transmit it to the clerk of the district court or BAP within the time
119 provided by Rule 8010. A copy of the agreed statement may be
120 filed instead of the appendix required by Rule 8018(b).
121 (e) CORRECTION OR MODIFICATION OF THE
122 RECORD.
123 (1) If any difference arises about whether the
124 record truly discloses what occurred in the bankruptcy
125 court, the difference must be submitted to and settled by
126 the bankruptcy court and the record conformed
127 accordingly. If an item has been improperly designated as
128 part of the record on appeal, a party may move to strike the
129 improperly designated item.
130 (2) If anything material to either party is omitted
131 from or misstated in the record by error or accident, the

132 omission or misstatement may be corrected, and a
133 supplemental record may be certified and transmitted:
134 (A) on stipulation of the parties;
135 (B) by the bankruptcy court before or after
136 the record has been forwarded; or
137 (C) by the district court or BAP.
138 (3) All other questions as to the form and content
139 of the record must be presented to the district court or BAP.
140 (f) SEALED DOCUMENTS. A document placed under
141 seal by the bankruptcy court may be designated as part of the
142 record on appeal. In designating a sealed document, a party must
143 identify it without revealing confidential or secret information.
144 The bankruptcy clerk must not transmit a sealed document to the
145 clerk of the district court or BAP as part of the transmission of the
146 record. Instead, a party seeking to present a sealed document to
147 the district court or BAP as part of the record on appeal must file a
148 motion with the district court or BAP to accept the document under
149 seal. If the motion is granted, the movant must notify the
150 bankruptcy court of the ruling, and the bankruptcy clerk must
151 promptly transmit the sealed document to the clerk of the district
152 court or BAP.
153 (g) OTHER. All parties to an appeal must take any other

154 action necessary to enable the bankruptcy clerk to assemble and

155 transmit the record.

156 (h) DIRECT APPEALS TO COURT OF APPEALS. Rules

157 8009 and 8010 apply to appeals taken directly to the court of

158 appeals under 28 U.S.C. § 158(d)(2). A reference in Rules 8009

159 and 8010 to the "district court or BAP" includes the court of

160 appeals when it has authorized a direct appeal under 28 U.S.C.

161 § 158(d)(2). In direct appeals to the court of appeals, the reference

162 in Rule 8009(d) to Rule 8018(b) means F.R. App. P. 30.

COMMITTEE NOTE

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

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

Subdivision (b) governs the process for ordering a complete or

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

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

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

Subdivision (f) is a new provision that governs the handling of any document that remains sealed by the bankruptcy court and that a party wants to include in the record on appeal. The party must request the district court or BAP to accept the document under seal, and that motion must be granted before the bankruptcy clerk may transmit the sealed document to the clerk of the district court or BAP.

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

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

Rule 8010. Completion and Transmission of the Record

1 (a) DUTIES OF REPORTER TO PREPARE AND FILE
2 TRANSCRIPT.
3 (1) If courtroom proceedings are recorded without
4 a reporter present, the person or service that the bankruptcy
5 court designates to transcribe the recording is the reporter
6 for purposes of this rule.
7 (2) The reporter must prepare and file a transcript
8 as follows:
9 (A) Upon receiving an order for a transcript, the
10 reporter must file in the bankruptcy court an
11 acknowledgment of the request, the date it was received,
12 and the date on which the reporter expects to have the
13 transcript completed.
14 (B) Upon completing the transcript, the reporter
15 must file it with the bankruptcy clerk, who will notify the
16 clerk of the district court or BAP of the filing.
17 (C) If the transcript cannot be completed within 30
18 days of receipt of the order, the reporter must seek an
19 extension of time from the bankruptcy clerk. The clerk
20 must enter on the docket and notify the parties whether the
21 extension is granted.

22 (D) If the reporter does not file the transcript within
23 the time allowed, the bankruptcy clerk must notify the
24 bankruptcy judge.
25 (b) DUTY OF BANKRUPTCY CLERK TO TRANSMIT
26 RECORD.
27 (1) Subject to Rule 8009(f) and subdivision (b)(5)
28 of this rule, when the record is complete for purposes of
29 appeal, the bankruptcy clerk must transmit to the clerk of
30 the district court or BAP either the record or a notice of the
31 availability of the record and the means of accessing it
32 electronically.
33 (2) If there are multiple appeals from a judgment or
34 order, the bankruptcy clerk must transmit a single record.
35 (3) Upon receiving the transmission of the record
36 or notice of the availability of the record, the clerk of the
37 district court or BAP must enter its receipt on the docket
38 and give prompt notice to all parties to the appeal.
39 (4) If the district court or BAP directs that paper
40 copies of the record be furnished, the clerk of that court
41 must notify the appellant and, if the appellant fails to
42 provide the copies, the bankruptcy clerk must prepare the
43 copies at the appellant's expense.

44 (5) Subject to subdivision (c), if a motion for leave
45 to appeal has been filed with the bankruptcy clerk under
46 Rule 8004, the bankruptcy clerk must prepare and transmit
47 the record only after the district court or BAP grants leave
48 to appeal.
49 (c) RECORD FOR PRELIMINARY MOTION IN
50 DISTRICT COURT OR BAP. If, prior to the transmission of the
51 record as prescribed by subdivision (b), a party moves in the
52 district court or BAP for any of the following relief:
53 • leave to appeal;
54 • dismissal;
55 • a stay pending appeal;
56 • approval of a supersedeas bond, or additional
57 security on a bond or undertaking on appeal;
58 • or any other intermediate order –
59 the bankruptcy clerk must transmit to the clerk of the district court
60 or BAP any parts of the record designated by a party to the appeal
61 for inclusion in the record for the preliminary motion, or a notice
62 of the availability of those parts and the means of accessing them
63 electronically.

COMMITTEE NOTE

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

Subdivision (a) generally retains the procedure of former Rule 8007(a) regarding the reporter's duty to prepare and file a transcript if one is requested by a party. It clarifies that the person or service that transcribes the recording of a proceeding is considered the reporter under this rule if the proceeding is recorded without a reporter present in the courtroom. It also makes clear that the reporter must file with the bankruptcy court the acknowledgment of the request for a transcript and statement of the expected completion date, the completed transcript, and any request for an extension of time beyond 30 days for completion of the transcript.

Subdivision (b) requires the bankruptcy clerk to transmit the record to the clerk of the district court or BAP when the record is complete and, in the case of appeals under 28 U.S.C. §158(a)(3), leave to appeal has been granted. This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The district court or BAP may, however, require that a paper copy of some or all of the record be furnished, in which case the clerk of that court will direct the appellant to provide the copies. If the appellant does not do so, the bankruptcy clerk must prepare the copies at the appellant's expense.

In a change from former Rule 8007(b), subdivision (b) of this rule no longer directs the clerk of the district court or BAP to docket the appeal upon receipt of the record from the bankruptcy clerk. Instead, under Rules 8003(d) and 8004(c), the clerk of the district court or BAP dockets the appeal upon receipt of the notice of appeal or, in the case of appeals under 28 U.S.C. § 158(a)(3), the notice of appeal and the motion for leave to appeal. Those documents are to be transmitted promptly to the district court or BAP by the bankruptcy clerk. Accordingly, by the time the clerk of the district court or BAP receives the record, the appeal will already be docketed in that court. The clerk of the district court or BAP must indicate on the docket and give notice to the parties to the appeal when the transmission of the record is received. Under Rule 8018(a), the briefing schedule is generally based on that date.

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

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

Rule 8011. Filing and Service; Signature

1 (a) FILING.

2 (1) *Filing with the Clerk*. A document required or
3 permitted to be filed in the district court or BAP must be
4 filed with the clerk of that court.

5 (2) *Filing: Method and Timeliness*.

6 (A) *In general*. Filing may be
7 accomplished by transmission to the clerk of the
8 district court or BAP. Except as provided in
9 subdivision (a)(2)(B)(ii), (B)(iii), and (C), filing is
10 timely only if the clerk receives the document
11 within the time fixed for filing.

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

15 (i) transmitted to the clerk of the
16 district court or BAP in accordance with
17 applicable electronic transmission
18 procedures for the filing of documents in
19 that court;

20 (ii) mailed to the clerk of the district
21 court or BAP by first-class mail – or other

22 class of mail that is at least as expeditious –

23 postage prepaid, if the court's procedures

24 permit or require a brief or appendix to be

25 filed by mailing; or

26 (iii) dispatched to a third-party

27 commercial carrier for delivery within three

28 days to the clerk of the district court or

29 BAP, if the court's procedures permit or

30 require a brief or appendix to be filed by

31 commercial carrier.

32 (C) *Inmate filing*. A document filed by an

33 inmate confined in an institution is timely if

34 deposited in the institution's internal mailing

35 system on or before the last day for filing. If an

36 institution has a system designed for legal mail, the

37 inmate must use that system to receive the benefit

38 of this rule. Timely filing may be shown by a

39 declaration in compliance with 28 U.S.C. § 1746 or

40 by a notarized statement, either of which must set

41 forth the date of deposit and state that first-class

42 postage has been prepaid.

43 (D) *Copies*. If a document is filed

44 electronically in the district court or BAP, no paper
45 copy is required. If a document is filed by mail or
46 delivery to the district court or BAP, no additional
47 copies are required The district court or BAP may,
48 however, require by local rule or order in a
49 particular case the filing or furnishing of a specified
50 number of paper copies.
51 (3) *Filing a Motion with a Judge*. In appeals to the
52 BAP, if a motion requests relief that may be granted by a
53 single judge, any judge of that court may permit the motion
54 to be filed with the judge. The judge must note the filing
55 date on the motion and transmit it to the BAP clerk.
56 (4) *Clerk's Refusal of Documents*. The clerk of the
57 district court or BAP must not refuse to accept for filing
58 any document transmitted for that purpose solely because it
59 is not presented in proper form as required by these rules or
60 by any local rule or practice.
61 (b) SERVICE OF DOCUMENTS REQUIRED. Copies of
62 all documents filed by any party and not required by these Part
63 VIII rules to be served by the clerk of the district court or BAP
64 must, at or before the time of filing, be served on all other parties
65 to the appeal by the party making the filing or a person acting for

66 that party. Service on a party represented by counsel must be

67 made on counsel.

68 (c) MANNER OF SERVICE.

69 (1) Service must be made electronically if feasible

70 and permitted by local procedure. If not, service may be

71 made by any of the following methods:

72 (A) personal, including delivery to a

73 responsible person at the office of counsel;

74 (B) mail; or

75 (C) third-party commercial carrier for

76 delivery within three days.

77 (2) When it is reasonable, considering such factors

78 as the immediacy of the relief sought, distance, and cost,

79 service on a party must be by a manner at least as

80 expeditious as the manner used to file the document with

81 the district court or BAP.

82 (3) Service by mail or by commercial carrier is

83 complete on mailing or delivery to the carrier. Service by

84 electronic means is complete on transmission, unless the

85 party making service receives notice that the document was

86 not transmitted successfully to the party attempted to be

87 served.

88 (d) PROOF OF SERVICE.

89 (1) Documents presented for filing must contain

90 either:

91 (A) an acknowledgment of service by the

92 person served; or

93 (B) proof of service in the form of a

94 statement by the person who made service

95 certifying:

96 (i) the date and manner of service;

97 (ii) the names of the persons served;

98 and

99 (iii) for each person served, the mail

100 or electronic address, facsimile number, or

101 the address of the place of delivery, as

102 appropriate for the manner of service.

103 (2) The clerk of the district court or BAP may

104 permit documents to be filed without acknowledgment or

105 proof of service at the time of filing, but must require the

106 acknowledgment or proof of service to be filed promptly

107 thereafter.

108 (3) When a brief or appendix is filed by mailing,

109 delivery, or electronic transmission in accordance with

110 subdivision (a)(2)(B), the proof of service must also state

111 the date and manner by which the document was filed.

112 (e) SIGNATURE. If filed electronically, every motion,

113 response, reply, brief, or submission authorized by these Part VIII

114 rules must include the electronic signature of the person filing the

115 document or, if the person is represented, the electronic signature

116 of counsel. The electronic signature must be provided by

117 electronic means that are consistent with any technical standards

118 that the Judicial Conference of the United States establishes. If

119 filed in paper form, every motion, response, reply, brief, or

120 submission authorized by these rules must be signed by the person

121 filing the document or, if the person is represented, by counsel.

COMMITTEE NOTE

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

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

Subdivision (a)(4) provides that the clerk of the district court or BAP may not refuse to accept a document for filing solely because its form does not comply with these rules or any local rule or practice. The district

court or BAP may, however, direct the correction of any deficiency in any document that does not conform to the requirements of these rules or applicable local rules, and may prescribe such other relief as the court deems appropriate.

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

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

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

Rule 8012. Corporate Disclosure Statement

1 (a) WHO MUST FILE. Any nongovernmental corporate
2 party appearing in the district court or BAP must file a statement
3 that identifies any parent corporation and any publicly held
4 corporation that owns 10% or more of its stock or states that there
5 is no such corporation.
6 (b) TIME FOR FILING; SUPPLEMENTAL FILING. A
7 party must file the statement prescribed by subdivision (a) with its
8 principal brief or upon filing a motion, response, petition, or
9 answer in the district court or BAP, whichever occurs first, unless
10 a local rule requires earlier filing. Even if the statement has
11 already been filed, the party's principal brief must include a
12 statement before the table of contents. A party must supplement
13 its statement whenever the information that must be disclosed
14 under subdivision (a) changes.

COMMITTEE NOTE

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

Rule 8013. Motions; Intervention

1 (a) CONTENTS OF MOTION; RESPONSE; REPLY.

2 (1) *Application for Relief*. A request for an order

3 or other relief is made by filing with the clerk of the district

4 court or BAP a motion for that order or relief, with proof of

5 service on all other parties to the appeal.

6 (2) *Contents of a Motion*.

7 (A) *Grounds and relief sought.* A motion

8 must state with particularity the grounds for the

9 motion, the relief sought, and the legal argument

10 necessary to support it.

11 (B) *Motion to expedite appeal*. A motion to

12 expedite the consideration of an appeal must

13 explain what circumstances justify the district court

14 or BAP considering the appeal ahead of other

15 matters. If the district court or BAP grants a motion

16 to expedite, it may accelerate the transmission of

17 the record, the deadline for filing briefs and other

18 documents, oral argument, and resolution of the

19 appeal. Under appropriate circumstances, a motion

20 to expedite the consideration of an appeal may be

21 filed as an emergency motion under subdivision (d).

22 (C) *Accompanying documents.*

23 (i) Any affidavit or other document

24 necessary to support a motion must be

25 served and filed with the motion.

26 (ii) An affidavit must contain only

27 factual information, not legal argument.

28 (iii) A motion seeking substantive

29 relief must include a copy of the bankruptcy

30 court's judgment, order, or decree, and any

31 accompanying opinion, as a separate exhibit.

32 (D) *Documents barred or not required.*

33 (i) A separate brief supporting or

34 responding to a motion must not be filed.

35 (ii) A notice of motion is not

36 required.

37 (iii) A proposed order is not

38 required.

39 (3) *Response and Reply; Time to File*. Unless the

40 district court or BAP orders otherwise,

41 (A) any party to the appeal may file a

42 response to the motion within seven days after

43 service of the motion, and

44 (B) the movant may file a reply to a

45 response within seven days after service of the

46 response.

47 A reply must address only matters raised in the response.

48 (b) DISPOSITION OF A MOTION FOR A

49 PROCEDURAL ORDER. Notwithstanding subdivision (a)(3), the

50 district court or BAP may rule on a motion for a procedural order,

51 including a motion under Rule 9006(b) or (c), at any time without

52 awaiting a response. Any party adversely affected by the court's

53 ruling may move to reconsider, vacate, or modify the ruling within

54 seven days after service of the procedural order.

55 (c) ORAL ARGUMENT. A motion will be decided

56 without oral argument unless the district court or BAP orders

57 otherwise.

58 (d) EMERGENCY MOTION.

59 (1) Whenever a movant requests expedited action

60 on a motion on the ground that, to avoid irreparable harm,

61 it needs relief in less time than would normally be required

62 for the district court or BAP to receive and consider a

63 response, the word "Emergency" must precede the title of

64 the motion.

65 (2) The emergency motion must

66 (A) be accompanied by an affidavit setting
67 forth the nature of the emergency;
68 (B) state whether all grounds advanced in
69 support of it were submitted to the bankruptcy court
70 and, if any grounds relied on were not submitted,
71 why the motion should not be remanded for
72 reconsideration by the bankruptcy court;
73 (C) include the email addresses, office
74 addresses, and telephone numbers of moving
75 counsel and, when known, of opposing counsel and
76 any unrepresented parties to the appeal; and
77 (D) be served as prescribed by Rule 8011.
78 (3) Before filing an emergency motion, the movant
79 must make every practicable effort to notify opposing
80 counsel and any opposing unrepresented parties in time for
81 them to respond to the motion. The affidavit or declaration
82 accompanying the emergency motion must also state when
83 and how opposing counsel and unrepresented parties were
84 notified, or, if they were not notified, why it was
85 impracticable to do so.
86 (e) POWER OF A SINGLE BAP JUDGE TO
87 ENTERTAIN A MOTION.

88 (1) A judge of a BAP may act alone on any motion,
89 but may not dismiss or otherwise determine an appeal,
90 deny a motion for leave to appeal, or deny a motion for a
91 stay pending appeal if denial would result in mootness of
92 the appeal.
93 (2) The BAP may review the action of a single
94 judge, either on its own motion or on the motion of a party.
95 (f) FORM OF DOCUMENTS; PAGE LIMITS; AND
96 NUMBER OF COPIES.
97 (1) *Format of a Paper Document*. Rule 27(d)(1)
98 F.R. App. P. applies in the district court or BAP to a paper
99 version of a motion, response, or reply.
100 (2) *Format of an Electronically Filed Document*.
101 A motion, response, or reply filed electronically must
102 comply with the requirements made applicable to a paper
103 copy under paragraph (1) regarding covers, line spacing,
104 margins, typeface, and type styles. It must also comply
105 with the length requirements under paragraph (3).
106 (3) *Page Limits*. Unless the district court or BAP
107 permits or directs otherwise, the following page limits
108 apply:
109 (A) a motion or a response to a motion must

110 not exceed 20 pages, exclusive of the corporate
111 disclosure statement and accompanying documents
112 authorized by subdivision (a)(2)(C); and
113 (B) a reply to a response must not exceed
114 ten pages.
115 (4) *Copies*. Copies must be provided only if they
116 are required by local rule or by an order in a particular
117 case.
118 (g) INTERVENTION. Unless a statute provides
119 otherwise, an entity seeking to intervene in an appeal pending in
120 the district court or BAP must file a motion for leave to intervene
121 with the clerk of the district court or BAP and serve a copy on all
122 parties to the appeal. The motion, or other notice of intervention
123 authorized by statute, must be filed within 30 days after the appeal
124 is docketed. It must contain a concise statement of the movant's
125 interest and ground for intervention, whether intervention was
126 sought in the bankruptcy court, why intervention is being sought at
127 this stage of the proceeding, and why participation in the appeal as
128 an amicus curiae would not adequately protect the movant's
129 interest.

COMMITTEE NOTE

Rule 8013 is derived from current Rule 8011 and F.R. App. P. 15(d) and 27. It adopts many of the provisions of the appellate rules that specify the form and page limits of motions and accompanying documents, while also adapting those requirements for the context of electronic filing. In addition, it prescribes the procedure for seeking to intervene in the district court or BAP.

Subdivision (a) retains much of the content of former Rule 8011(a) regarding the contents of a motion, response, and reply. It also specifies the documents that may accompany a motion. Unlike the former rule, which allowed the filing of separate briefs supporting a motion, subdivision (a) now adopts the practice of F.R. App. P. 27(a) of prohibiting the filing of briefs supporting or responding to a motion. The motion or response itself must include the party's legal arguments.

Subdivision (a)(2)(B) clarifies procedures for a motion to expedite the consideration of an appeal. This motion seeks to expedite the time for the disposition of the appeal as a whole, whereas an emergency motion – which is addressed by subdivision (d) – typically involves an urgent request for relief short of disposing of the entire appeal (for example, an emergency request for a stay pending appeal to prevent imminent mootness). In appropriate cases – such as when there is an urgent need to resolve the appeal quickly to prevent harm to a party – a motion to expedite the consideration of an appeal may be filed as an emergency motion.

Subdivision (b) retains the substance of former Rule 8011(b). It authorizes the district court or BAP to act on a motion for a procedural order without awaiting a response to the motion. It specifies that a party seeking reconsideration, vacation, or modification of the order must file a motion within seven days after service of the order.

Subdivision (c) continues the practice of former Rule 8011(c) and F.R. App. P. 27(e) of dispensing with oral argument of motions in the district court or BAP unless the court orders otherwise.

Subdivision (d), which carries forward the content of former Rule 8011(d), governs emergency motions that the district court or BAP may rule on without awaiting a response when necessary to prevent irreparable harm. A party seeking expedited action on a motion in the district court or BAP must explain the nature of the emergency, whether all grounds in support of the motion were first presented to the bankruptcy court, and, if not, why the district court or BAP should not remand for reconsideration. The moving

party must also (1) explain the steps taken to notify opposing counsel and any unrepresented parties to the appeal in advance of filing the emergency motion and (2) if they were not notified, state why it was impracticable to do so.

Subdivision (e), like former Rule 8011(e) and similar to F.R. App. P. 27(c), authorizes a single BAP judge to rule on certain motions. This authority, however, does not extend to issuing rulings that would dispose of the appeal. For that reason the rule now prohibits a single BAP judge from denying a motion for a stay pending appeal when the effect of that ruling would be to require dismissal of the appeal as moot. A ruling by a single judge is subject to review by the BAP.

Subdivision (f) incorporates by reference the formatting and appearance requirements of F.R. App. P. 27(d)(1). When paper copies of the listed documents are filed, they must comply with the requirements of the specified rules regarding reproduction, covers, binding, appearance, and format. When these documents are filed electronically, they must comply with the relevant requirements of the specified rules regarding covers and format. Subdivision (f) also specifies page limits for motions, responses, and replies, which is a matter that former Rule 8011 did not address.

Subdivision (g) clarifies the procedures for seeking to intervene in a proceeding that has been appealed. It is based on F.R. App. P. 15(d), but it also requires an explanation of why intervention is being sought at the appellate stage. The former Part VIII rules did not address intervention.

Rule 8014. Briefs

1 (a) APPELLANT'S BRIEF. The appellant's brief must
2 contain under appropriate headings and in the order indicated:
3 (1) a corporate disclosure statement, if required by
4 Rule 8012;
5 (2) a table of contents, with page references;
6 (3) a table of authorities listing cases
7 alphabetically, statutes, and other authorities cited, with
8 references to the pages of the brief where they are cited;
9 (4) a jurisdictional statement, including:
10 (A) the basis for the bankruptcy court's
11 subject matter jurisdiction, with citations to
12 applicable statutory provisions and a brief
13 discussion of the relevant facts establishing
14 jurisdiction;
15 (B) the basis for the district court's or
16 BAP's jurisdiction, with citations to applicable
17 statutory provisions and a brief discussion of the
18 relevant facts establishing jurisdiction;
19 (C) the filing dates establishing the
20 timeliness of the appeal; and
21 (D) an assertion that the appeal is from a

22 final judgment, order, or decree, or information

23 establishing the district court's or BAP's

24 jurisdiction on another basis;

25 (5) a statement of the issues presented and, for each

26 issue, a concise statement of the applicable standard of

27 appellate review;

28 (6) a concise statement of the case setting out the

29 facts relevant to the issues submitted for review and

30 identifying the rulings presented for review, with

31 appropriate references to the record;

32 (7) a summary of the argument, which must contain

33 a succinct, clear, and accurate statement of the arguments

34 made in the body of the brief, and which must not merely

35 repeat the argument headings;

36 (8) the argument, which must contain the

37 appellant's contentions with respect to the issues presented

38 and the reasons supporting those contentions, with citations

39 to the authorities and parts of the record relied upon;

40 (9) a short conclusion stating the precise relief

41 sought; and

42 (10) the certificate of compliance, if required by

43 Rule 8015(a)(7) or (b).

44 (b) APPELLEE'S BRIEF. The appellee's brief must

45 conform to the requirements of subdivision (a)(1)-(8) and (10),

46 except that none of the following need appear unless the appellee

47 is dissatisfied with the appellant's statement:

48 (1) the jurisdictional statement;

49 (2) the statement of the issues and the applicable

50 standard of appellate review; and

51 (3) the statement of the case.

52 (c) REPLY BRIEF. The appellant may file a brief in reply

53 to the appellee's brief. A reply brief must comply with the

54 requirements of subdivision (a)(2)-(3).

55 (d) STATUTES, RULES, REGULATIONS, OR

56 SIMILAR AUTHORITY. If determination of the issues presented

57 requires reference to the Code or other statutes, rules, regulations,

58 or similar authority, the relevant parts must be set out in the brief

59 or in an addendum.

60 (e) BRIEFS IN A CASE INVOLVING MULTIPLE

61 APPELLANTS OR APPELLEES. In a case involving more than

62 one appellant or appellee, including consolidated cases, any

63 number of appellants or appellees may join in a brief, and any

64 party may adopt by reference a part of another's brief. Parties may

65 also join in reply briefs.

66 (f) SUBMISSION OF SUPPLEMENTAL

67 AUTHORITIES. If pertinent and significant authorities come to a

68 party's attention after the party's brief has been filed, or after oral

69 argument but before a decision, the party may promptly advise the

70 clerk of the district court or BAP by a signed submission setting

71 forth the citations. The submission, which must be served on the

72 other parties to the appeal, must state the reasons for the

73 supplemental citations, referring either to the pertinent page of a

74 brief or to a point argued orally. The body of the submission must

75 not exceed 350 words. Any response must be made within seven

76 days after service of the submission, unless otherwise ordered by

77 the court, and must be similarly limited.

COMMITTEE NOTE

Rule 8014 is derived from former Rule 8010(a) and (b) and F.R. App. P. 28. Adopting much of the content of Rule 28, it provides greater detail regarding appellate briefs than former Rule 8010 contained.

Subdivision (a) prescribes the content and structure of the appellant's brief. It largely follows former Rule 8010(a)(1), but, in order to ensure national uniformity, it eliminates the provision authorizing a district court or BAP to alter these requirements. Subdivision (a)(1) provides that when Rule 8012 requires an appellant to file a corporate disclosure statement, it must be placed at the beginning of the appellant's brief. Subdivision (a)(10) is also new. It implements the requirement under Rule 8015(a)(7) and (b) for the filing of a certificate of compliance with the limit on the number of words or lines allowed to be in a brief.

Subdivision (b) carries forward the provisions of former Rule 8010(a)(2).

Subdivision (c) is derived from F.R. App. P. 28(c). It explicitly authorizes an appellant to file a reply brief, which will generally complete the briefing process.

Subdivision (d) is similar to former Rule 8010(b), but it is reworded to reflect the likelihood that briefs will generally be filed electronically rather than in paper form.

Subdivision (e) mirrors F.R. App. P. 28(i). It authorizes multiple appellants or appellees to join in a single brief. It also allows parties to incorporate by reference portions of another party's brief.

Subdivision (f) adopts the procedures of F.R. App. P. 28(j) with respect to the filing of supplemental authorities with the district court or BAP after a brief has been filed or after oral argument. Unlike the appellate rule, it specifies a period of seven days for filing a response to a submission of supplemental authorities. The supplemental submission and response must comply with the signature requirements of Rule 8011(e).

Rule 8015. Form and Length of Briefs; Form of Appendices and Other Papers.

1 (a) PAPER COPIES OF BRIEFS. If a paper copy of a
2 brief may or must be filed, the following provisions apply:
3 (1) *Reproduction*.
4 (A) A brief may be reproduced by any
5 process that yields a clear black image on light
6 paper. The paper must be opaque and unglazed.
7 Only one side of the paper may be used.
8 (B) Text must be reproduced with a clarity
9 that equals or exceeds the output of a laser printer.
10 (C) Photographs, illustrations, and tables
11 may be reproduced by any method that results in a
12 good copy of the original. A glossy finish is
13 acceptable if the original is glossy.
14 (2) *Cover*. The front cover of a brief must contain:
15 (A) the number of the case centered at the
16 top;
17 (B) the name of the court;
18 (C) the title of the case as prescribed by
19 Rule 8003(d)(2) or 8004(c)(2);
20 (D) the nature of the proceeding and the
21 name of the court below;

22 (E) the title of the brief, identifying the
23 party or parties for whom the brief is filed; and
24 (F) the name, office address, telephone
25 number, and email address of counsel representing
26 the party for whom the brief is filed.
27 (3) *Binding*. The brief must be bound in any
28 manner that is secure, does not obscure the text, and
29 permits the brief to lie reasonably flat when open.
30 (4) *Paper Size, Line Spacing, and Margins*. The
31 brief must be on 8½-by-11 inch paper. The text must be
32 double-spaced, but quotations more than two lines long
33 may be indented and single-spaced. Headings and
34 footnotes may be single-spaced. Margins must be at least
35 one inch on all four sides. Page numbers may be placed in
36 the margins, but no text may appear there.
37 (5) *Typeface*. Either a proportionally spaced or
38 monospaced face may be used.
39 (A) A proportionally spaced face must
40 include serifs, but sans-serif type may be used in
41 headings and captions. A proportionally spaced
42 face must be 14-point or larger.
43 (B) A monospaced face may not contain

44 more than 10½ characters per inch.

45 (6) *Type Styles*. A brief must be set in plain, roman

46 style, although italics or boldface may be used for

47 emphasis. Case names must be italicized or underlined.

48 (7) *Length*.

49 (A) *Page limitation*. A principal brief must

50 not exceed 30 pages, or a reply brief 15 pages,

51 unless it complies with (B) and (C).

52 (B) *Type-volume limitation*.

53 (i) A principal brief is acceptable if:

54 • it contains no more than

55 14,000 words; or

56 • it uses a monospaced face

57 and contains no more than 1,300 lines of

58 text.

59 (ii) A reply brief is acceptable if it

60 contains no more than half of the type

61 volume specified in item (i).

62 (iii) Headings, footnotes, and

63 quotations count toward the word and line

64 limitations. The corporate disclosure

65 statement, table of contents, table of

66 citations, statement with respect to oral
67 argument, any addendum containing
68 statutes, rules, or regulations, and any
69 certificates of counsel do not count toward
70 the limitation.
71 (C) *Certificate of Compliance*.
72 (i) A brief submitted under
73 subdivision (a)(7)(B) must include a
74 certificate signed by the attorney, or an
75 unrepresented party, that the brief complies
76 with the type-volume limitation. The person
77 preparing the certificate may rely on the
78 word or line count of the word-processing
79 system used to prepare the brief. The
80 certificate must state either:
81 • the number of words in the
82 brief; or
83 • the number of lines of
84 monospaced type in the brief.
85 (ii) A certificate of compliance that
86 conforms substantially to the appropriate
87 Official Form satisfies the requirements of

88 item (i).

89 (b) ELECTRONICALLY FILED BRIEFS. A brief that is

90 filed electronically must comply with subdivision (a), other than

91 (a)(1), (a)(3), and the paper requirement of (a)(4).

92 (c) PAPER COPIES OF APPENDICES. If a paper copy

93 of an appendix may or must be filed, it must comply with

94 subdivision (a)(1), (2), (3), and (4), with the following exceptions:

95 (1) An appendix may include a legible photocopy

96 of any document found in the record or of a printed

97 decision.

98 (2) When necessary to facilitate inclusion of odd-

99 sized documents such as technical drawings, an appendix

100 may be a size other than 8½-by- 11 inches, and need not lie

101 reasonably flat when opened.

102 (d) ELECTRONICALLY FILED APPENDICES. An

103 appendix that is filed electronically must comply with subdivision

104 (a)(2) and (4), other than the paper requirement of (a)(4).

105 (e) OTHER DOCUMENTS.

106 (1) Motion. Rule 8013(f) governs the form of a

107 motion, response, or reply.

108 (2) Paper Copies of Other Documents. If a paper

109 copy of any other document may or must be filed, other

110 than a submission under Rule 8014(f), it must comply with

111 subdivision (a), with the following exceptions:

112 (A) A cover is not necessary if the caption

113 and signature page of the paper together contain the

114 information required by subdivision (a)(2). If a

115 cover is used, it must be white.

116 (B) Subdivision (a)(7) does not apply.

117 (3) Other Documents that Are Electronically Filed.

118 Any other document that is filed electronically, other than a

119 submission under Rule 8014(f), must comply with the

120 appearance requirements under paragraph (2).

121 (f) LOCAL VARIATION. A district court or BAP must

122 accept documents that comply with the applicable requirements of

123 this rule. By local rule or order in a particular case, a district court

124 or BAP may accept documents that do not meet all of the

125 requirements of this rule.

COMMITTEE NOTE

This rule is derived primarily from F.R. App. P. 32. Former Rule 8010(c) prescribed page limits for principal briefs and reply briefs. Those limits are now addressed by subdivision (a)(7) of this rule. In addition, the rule incorporates most of the detail of Appellate Rule 32 regarding the appearance and format of briefs, appendices, and other documents, along with new provisions that apply when those documents are filed electronically.

Subdivision (a) prescribes the form requirements for briefs that are

filed in paper form. It incorporates F.R. App. P. 32(a) in all respects except the following: Rule 8015(a)(2) does not include any color requirements for brief covers; (a)(2)(F) requires the cover of a brief to include counsel's email address; and cross-references to the appropriate bankruptcy rules are substituted for references to other Federal Rules of Appellate Procedure.

Subdivision (a)(7) decreases the page limits that were permitted by former Rule 8010(c) – from 50 to 30 pages for a principal brief and from 25 to 15 for a reply brief – to achieve consistency with F.R. App. P. 32(a)(7). It also permits the limits on the length of a brief to be measured by a word or line count, as an alternative to a page limit. By adopting the same limits on brief length that are imposed by the Federal Rules of Appellate Procedure, the amendment seeks to prevent a party whose case is eventually appealed to the court of appeals from having to substantially reduce the length of its brief at that appellate level.

Subdivision (b) adapts for briefs that are electronically filed subdivision (a)'s form requirements. With the use of electronic filing, the method of reproduction, method of binding, and use of paper become irrelevant. Information required on the cover, formatting requirements, and limits on brief length remain the same, however.

Subdivisions (c) and (d) prescribe the form requirements for appendices. Subdivision (c), applicable to appendices in paper form, is derived from F.R. App. P. 32(b), and subdivision (d) adapts those requirements for appendices that are electronically filed.

Subdivision (e), which is based on F.R. App. P. 32(c), addresses the form required for documents – in paper form or electronically filed – that are not otherwise covered by these rules.

Subdivision (f), like F.R. App. P. 32(e), is intended to provide assurance to lawyers and parties that compliance with the form requirements of this rule will allow a brief or other document to be accepted by any district court or BAP. A court may, however, by local rule or by order in a particular case choose to accepts briefs and documents that do not comply with all of this rule's requirements.

Under Rule 8011(e), all briefs and other submissions must be signed by the party filing the document or, if represented, by counsel. If the document is filed electronically, an electronic signature must be provided in accordance with Rule 8011(e).

Rule 8016. Cross-Appeals

1 (a) APPLICABILITY. This rule applies to a case in which
2 a cross-appeal is filed. Rules 8014(a)-(c), 8015(a)(7)(A)-(B), and
3 8018(a) do not apply to such a case, except as otherwise provided
4 in this rule.

5 (b) DESIGNATION OF APPELLANT. The party who
6 files a notice of appeal first is the appellant for purposes of this
7 rule and Rules 8018(b) and 8019. If notices are filed on the same
8 day, the plaintiff, petitioner, applicant, or movant in the proceeding
9 below is the appellant. These designations may be modified by the
10 parties' agreement or by court order.

11 (c) BRIEFS. In a case involving a cross-appeal:

12 (1) *Appellant's Principal Brief*. The appellant must
13 file a principal brief in the appeal. That brief must comply
14 with Rule 8014(a).

15 (2) *Appellee's Principal and Response Brief*. The
16 appellee must file a principal brief in the cross-appeal and
17 must, in the same brief, respond to the principal brief in the
18 appeal. That brief must comply with Rule 8014(a), except
19 that the brief need not include a statement of the case
20 unless the appellee is dissatisfied with the appellant's
21 statement.

22 (3) *Appellant's Response and Reply Brief*. The
23 appellant must file a brief that responds to the principal
24 brief in the cross-appeal and may, in the same brief, reply
25 to the response in the appeal. That brief must comply with
26 Rule 8014(a)(2)-(8) and (10), except that none of the
27 following need appear unless the appellant is dissatisfied
28 with the appellee's statement in the cross-appeal:
29 (A) the jurisdictional statement;
30 (B) the statement of the issues and the
31 applicable standard of appellate review; and
32 (C) the statement of the case.
33 (4) *Appellee's Reply Brief*. The appellee may file a
34 brief in reply to the response in the cross-appeal. That brief
35 must comply with Rule 8014(a)(2)-(3) and (10) and must
36 be limited to the issues presented by the cross-appeal.
37 (d) LENGTH.
38 (1) *Page Limitation*. Unless it complies with
39 paragraphs (2) and (3), the appellant's principal brief must
40 not exceed 30 pages; the appellee's principal and response
41 brief, 35 pages; the appellant's response and reply brief, 30
42 pages; and the appellee's reply brief, 15 pages.
43 (2) *Type-Volume Limitation*.

44 (A) The appellant's principal brief or the
45 appellant's response and reply brief is acceptable if:
46 (i) it contains no more than 14,000
47 words; or
48 (ii) it uses a monospaced face and
49 contains no more than 1,300 lines of text.
50 (B) The appellee's principal and response
51 brief is acceptable if:
52 (i) it contains no more than 16,500
53 words; or
54 (ii) it uses a monospaced face and
55 contains no more than 1,500 lines of text.
56 (C) The appellee's reply brief is acceptable
57 if it contains no more than half of the type volume
58 specified in subparagraph (A).
59 (3) *Certificate of Compliance*. A brief submitted
60 either electronically or in paper form under paragraph (2)
61 must comply with Rule 8015(a)(7)(C).
62 (e) TIME TO SERVE AND FILE A BRIEF. Briefs must
63 be served and filed as follows:
64 (1) the appellant's principal brief, within 30 days
65 after the docketing of notice of transmission of the record

66 or notice of availability of the record;

67 (2) the appellee's principal and response brief,

68 within 30 days after service of the appellant's principal

69 brief;

70 (3) the appellant's response and reply brief, within

71 30 days after service of the appellee's principal and

72 response brief;

73 (4) the appellee's reply brief, within 14 days after

74 service of the appellant's response and reply brief, but at

75 least seven days before scheduled argument unless the

76 district court or BAP, for good cause, allows a later filing.

77 (5) If an appellant or appellee fails to file a

78 principal brief within the time provided by this rule, or

79 within an extended time authorized by the district court or

80 BAP, the appeal or cross-appeal may be dismissed. Unless

81 the district court or BAP orders otherwise, an appellee who

82 fails to file a responsive brief will not be heard at oral

83 argument on the appeal, and an appellant who fails to file a

84 responsive brief will not be heard at oral argument on the

85 cross-appeal.

COMMITTEE NOTE

This rule is modeled on F.R. App. P. 28.1. It governs the timing,

content, length, filing, and service of briefs in bankruptcy cases in which there is a cross-appeal. The former Part VIII rules did not separately address the topic of cross-appeals.

Subdivision (b) prescribes which party is designated the appellant when there is a cross-appeal. Generally, the first to file a notice of appeal will be the appellant.

Subdivision (c) specifies the briefs that are permitted to be filed by the appellant and the appellee. Because of the dual role of the parties to the appeal and cross-appeal, each party is permitted to file a principal brief and a response to the opposing party's brief, as well as a reply brief. For the appellee, the principal brief in the cross-appeal and the response in the appeal are combined into a single brief. The appellant, on the other hand, initially files a principal brief in the appeal and later files a response to the appellee's principal brief in the cross-appeal, along with a reply brief in the appeal. The final brief that may be filed is the appellee's reply brief in the cross-appeal.

Subdivision (d), which prescribes page limits for briefs, is adopted from F.R. App. P. 28.1(e). It applies to briefs that are filed electronically, as well as those filed in paper form. Like Rule 8015(a)(7), it imposes limits measured either by number of pages or number of words or lines of text.

Subdivision (e) governs the time for filing briefs in cases in which there is a cross-appeal. It adapts the provisions of F.R. App. P. 28.1(f). It further authorizes the dismissal of an appeal or cross-appeal if the appellant or cross-appellant fails to timely file a principal brief, and it denies oral argument to a party who fails to file a responsive brief unless the district court or BAP orders otherwise.

Rule 8017. Brief of an Amicus Curiae

1 (a) WHEN PERMITTED. The United States or its officers
2 or agencies or a state may file an amicus-curiae brief without the
3 consent of the parties or leave of court. Any other amicus curiae
4 may file a brief only by leave of court or if the brief states that all
5 parties have consented to its filing. On its own motion, and with
6 notice to all parties to an appeal, the district court or BAP may
7 request a brief by an amicus curiae.
8 (b) MOTION FOR LEAVE TO FILE. The motion must
9 be accompanied by the proposed brief and state:
10 (1) the movant's interest; and
11 (2) the reason why an amicus brief is desirable and
12 why the matters asserted are relevant to the disposition of
13 the appeal.
14 (c) CONTENT AND FORM. An amicus brief must
15 comply with Rule 8015. In addition to the requirements of Rule
16 8015, the cover of an amicus brief must identify the party or
17 parties supported and indicate whether the brief supports
18 affirmance or reversal. If an amicus curiae is a corporation, the
19 brief must include a disclosure statement like that required of
20 parties by Rule 8012. An amicus brief need not comply with Rule
21 8014, but must include the following:

22 (1) a table of contents, with page references;
23 (2) a table of authorities listing cases alphabetically
24 arranged, statutes, and other authorities, with references to
25 the pages of the brief where they are cited;
26 (3) a concise statement of the identity of the amicus
27 curiae, its interest in the case, and the source of its
28 authority to file;
29 (4) unless the amicus curiae is one listed in the first
30 sentence of subdivision (a), a statement that indicates:
31 (A) whether a party's counsel authored the
32 brief in whole or in part;
33 (B) whether a party or a party's counsel
34 contributed money that was intended to fund
35 preparation or submission of the brief; and
36 (C) the name of any person other than the
37 amicus curiae, its members, or its counsel who
38 contributed money that was intended to fund
39 preparation or submission of the brief;
40 (5) an argument, which may be preceded by a
41 summary and need not include a statement of the applicable
42 standard of review; and
43 (6) a certificate of compliance, if required by Rule

44 8015(a)(7)(C) or 8015(b).

45 (d) LENGTH. Except by the district court's or BAP's

46 permission, an amicus brief must be no more than one-half the

47 maximum length authorized by these rules for a party's principal

48 brief. If the court grants a party permission to file a longer brief,

49 that extension does not affect the length of an amicus brief.

50 (e) TIME FOR FILING. An amicus curiae must file its

51 brief, accompanied by a motion for filing when necessary, no later

52 than seven days after the principal brief of the party being

53 supported is filed. If an amicus curiae does not support either

54 party, it must file its brief no later than seven days after the

55 appellant's principal brief is filed. The district court or BAP may

56 grant leave for later filing, specifying the time within which an

57 opposing party may answer.

58 (f) REPLY BRIEF. Except by the district court's or

59 BAP's permission, an amicus curiae may not file a reply brief.

60 (g) ORAL ARGUMENT. An amicus curiae may

61 participate in oral argument only with the district court's or BAP's

62 permission.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 29. The former Part VIII rules did not address the participation by an amicus curiae in a bankruptcy appeal.

Subdivision (a) adopts the provisions of F.R. App. P. 29(a). In addition, it authorizes the district court or BAP on its own motion – with notice to the parties – to request the filing of a brief by an amicus curiae.

Subdivisions (b)-(g) adopt F.R. App. P. 29(b)-(g).

Rule 8018. Serving and Filing Briefs; Appendices

1 (a) TIME TO SERVE AND FILE A BRIEF. Unless the
2 district court or BAP by local rule or by order in a particular case
3 excuses the filing of briefs or specifies different time limits:
4 (1) The appellant must serve and file a brief within
5 30 days after the docketing of notice of transmission of the
6 record or notice of the availability of the record.
7 (2) The appellee must serve and file a brief within
8 30 days after service of the appellant's brief.
9 (3) The appellant may serve and file a reply brief
10 within 14 days after service of the appellee's brief, but a
11 reply brief must be filed at least seven days before
12 scheduled argument unless the district court or BAP, for
13 good cause, allows a later filing.
14 (4) If an appellant fails to file a brief within the
15 time provided by this rule, or within an extended time
16 authorized by the district court or BAP, the appeal may be
17 dismissed. An appellee who fails to file a brief will not be
18 heard at oral argument unless the district court or BAP
19 grants permission.
20 (5) If the district court or BAP has a mediation
21 procedure applicable to bankruptcy appeals, the clerk of the

22 district court or BAP must notify the parties promptly after
23 docketing the appeal (1) of the requirements of the
24 mediation procedure and (2) of any effect the mediation
25 procedure has on the time for filing briefs in the appeal.
26 (b) DUTY TO SERVE AND FILE APPENDIX TO
27 BRIEF.
28 (1) Subject to subdivision (e) and Rule 8009(d), the
29 appellant must serve and file with its principal brief
30 excerpts of the record as an appendix, which must include
31 the following:
32 (A) the relevant entries in the bankruptcy
33 docket;
34 (B) the complaint and answer or other
35 equivalent filings;
36 (C) the judgment, order, or decree from
37 which the appeal is taken;
38 (D) any other orders, pleadings, jury
39 instructions, findings, conclusions, or opinions
40 relevant to the appeal;
41 (E) the notice of appeal; and
42 (F) any relevant transcript or portion
43 thereof.

44 (2) The appellee may also serve and file with its
45 brief an appendix that contains material required to be
46 included by the appellant or relevant to the appeal or cross-
47 appeal, but omitted by appellant.
48 (3) The appellant as cross-appellee may also serve
49 and file with its response brief an appendix that contains
50 material relevant to matters raised initially by the principal
51 brief in the cross-appeal, but omitted by the cross-
52 appellant.
53 (c) FORMAT OF APPENDIX. The appendix must begin
54 with a table of contents identifying the page at which each part
55 begins. The relevant docket entries must follow the table of
56 contents. Other parts of the record must follow chronologically.
57 When pages from the transcript of proceedings are placed in the
58 appendix, the transcript page numbers must be shown in brackets
59 immediately before the included pages. Omissions in the text of
60 documents or of the transcript must be indicated by asterisks.
61 Immaterial formal matters, such as captions, subscriptions,
62 acknowledgments, and the like, must be omitted.
63 (d) APPENDIX EXHIBITS. Exhibits designated for
64 inclusion in the appendix may be reproduced in a separate volume
65 or volumes, suitably indexed.

66 (e) APPEAL ON THE ORIGINAL RECORD WITHOUT

67 AN APPENDIX. The district court or BAP may, either by rule for

68 all cases or classes of cases or by order in a particular case,

69 dispense with the appendix and permit an appeal to proceed on the

70 original record, with the submission of any relevant parts of the

71 record that the district court or BAP orders the parties to file.

COMMITTEE NOTE

This rule is derived from former Rule 8009 and F. R. App. P. 30 and 31. Like former Rule 8009, it addresses the timing of serving and filing briefs and appendices, as well as the content and format of appendices. It retains the bankruptcy practice of permitting the appellee to file its own appendix, rather than requiring the appellant to include in the appendix it files matters designated by the appellee.

Rule 8016 governs the timing of serving and filing briefs when a cross-appeal is taken. This rule's provisions about appendices apply to all appeals, including cross-appeals.

Subdivision (a) retains the provision of former Rule 8009 that allows the district court or BAP to dispense with briefing or to provide different time periods than the ones specified by this rule. It increases some of the time periods for filing briefs from the periods prescribed by the former rule, while still retaining shorter time periods than some provided by F.R. App. P. 31(a). The time for filing the appellant's brief is increased from 14 to 30 days after the docketing of the notice of the transmission of the record or notice of the availability of the record. That triggering event is equivalent to docketing the appeal under former Rule 8007. Appellate Rule 31(a)(1), by contrast, provides the appellant 40 days after the record is filed to file its brief. The shorter time period for bankruptcy appeals reflects the frequent need for greater expedition in the resolution of bankruptcy appeals, while still providing the appellant a more realistic time period to prepare its brief than the former rule provided.

Subdivision (a)(2) similarly expands the time period for filing the appellee's brief from 14 to 30 days after the service of the appellant's brief. This period is the same as the period provided by F.R. App. 31(a)(1).

Subdivision (a)(3) retains the 14-day time period for filing a reply brief that the former rule prescribed, but it qualifies that period to ensure that the final brief is filed at least seven days before oral argument.

Subdivision (a)(4) is new. Based on F.R. App. P. 31(c), it provides for actions that may be taken – dismissal of the appeal or denial of participation in oral argument – if the appellant or appellee fails to file its brief.

Subdivision (a)(5) is also new. If a district court or BAP has a mediation procedure that is applicable to bankruptcy appeals, the clerk of the district court or BAP must advise the parties – promptly after the docketing of the appeal – that such a procedure applies, what its requirements are, and how the procedure affects the timing of the filing of briefs in the appeal.

Subdivisions (b) and (c) govern the content and format of the appendix to a brief. Subdivision (b) is similar to former Rule 8009(b), although it adds a provision permitting an additional appendix by the appellant as cross-appellee. Subdivision (c) is derived from F.R. App. P. 30(d).

Subdivision (d), which addresses the inclusion of exhibits in the appendix, is derived from F.R. App. P. 30(e).

Rule 8011 governs the methods of filing and serving briefs and appendices. It authorizes the district court or BAP to require the submission of paper copies of documents that are filed electronically.

Rule 8019. Oral Argument

1 (a) PARTY'S STATEMENT. Any party may file, or a
2 district court or BAP may require, a statement explaining why oral
3 argument should, or need not, be permitted.
4 (b) PRESUMPTION OF ORAL ARGUMENT AND
5 EXCEPTIONS. Oral argument must be allowed in every case
6 unless the district judge or all of the judges of the BAP assigned to
7 hear the appeal determine, after examination of the briefs and
8 record, that oral argument is unnecessary because
9 (1) the appeal is frivolous;
10 (2) the dispositive issue or issues have been
11 authoritatively decided; or
12 (3) the facts and legal arguments are adequately
13 presented in the briefs and record and the decisional
14 process would not be significantly aided by oral argument.
15 (c) NOTICE OF ARGUMENT; POSTPONEMENT. The
16 district court or BAP must advise all parties of the date, time, and
17 place for oral argument, and the time allowed for each side. A
18 motion to postpone the argument or to allow longer argument must
19 be filed reasonably in advance of the hearing date.
20 (d) ORDER AND CONTENTS OF ARGUMENT. The
21 appellant opens and concludes the argument. Counsel must not

22 read at length from briefs, the record, or authorities.

23 (e) CROSS-APPEALS AND SEPARATE APPEALS. If

24 there is a cross-appeal, Rule 8016(b) determines which party is the

25 appellant and which is the appellee for the purposes of oral

26 argument. Unless the district court or BAP directs otherwise, a

27 cross-appeal or separate appeal must be argued when the initial

28 appeal is argued. Separate parties should avoid duplicative

29 argument.

30 (f) NONAPPEARANCE OF A PARTY. If the appellee

31 fails to appear for argument, the district court or BAP may hear

32 appellant's argument. If the appellant fails to appear for argument,

33 the district court or BAP may hear the appellee's argument. If

34 neither party appears, the case will be decided on the briefs unless

35 the district court or BAP orders otherwise.

36 (g) SUBMISSION ON BRIEFS. The parties may agree to

37 submit a case for decision on the briefs, but the district court or

38 BAP may direct that the case be argued.

39 (h) USE OF PHYSICAL EXHIBITS AT ARGUMENT;

40 REMOVAL. Counsel intending to use physical exhibits other than

41 documents at the argument must arrange to place them in the

42 courtroom on the day of the argument before the court convenes.

43 After the argument, counsel must remove the exhibits from the

44 courtroom unless the district court or BAP directs otherwise. The

45 clerk may destroy or dispose of the exhibits if counsel does not

46 reclaim them within a reasonable time after the clerk gives notice

47 to remove them.

COMMITTEE NOTE

This rule generally retains the provisions of former Rule 8012 and adds much of the additional detail of F.R. App. P. 34. By incorporating the more detailed provisions of the appellate rule, Rule 8019 promotes national uniformity regarding oral argument in bankruptcy appeals.

Subdivision (a), like F.R. App. P. 34(a)(1), now allows a party to submit a statement explaining why oral argument is or is not needed. It also authorizes a court to require this statement. Former Rule 8012 only authorized statements explaining why oral argument should be allowed.

Subdivision (b) retains the reasons set forth in former Rule 8012 for the district court or BAP to conclude that oral argument is not needed.

The remainder of this rule adopts the provisions of F.R. App. P. 34(b)-(g), with one exception. Rather than requiring the district court or BAP to hear appellant's argument if the appellee does not appear, subdivision (e) authorizes the district court or BAP to go forward with the argument in the appellee's absence. Should the court decide, however, to postpone the oral argument in that situation, it would be authorized to do so.

Rule 8020. Frivolous Appeals and Other Misconduct

1 (a) FRIVOLOUS APPEALS. If the district court or BAP
2 determines that an appeal from a judgment, order, or decree of a
3 bankruptcy court is frivolous, it may, after a separately filed
4 motion or notice from the court and reasonable opportunity to
5 respond, award just damages and single or double costs to the
6 appellee.
7 (b) OTHER MISCONDUCT. The district court or BAP
8 may discipline or sanction an attorney or party appearing before it
9 for other misconduct, including failure to comply with any court
10 order. First, however, the court must afford the attorney or party
11 reasonable notice, opportunity to show cause to the contrary, and,
12 if requested, a hearing.

COMMITTEE NOTE

This rule is derived from F.R. App. P. 38 and 46(c). Sanctions for both frivolous appeals and other misconduct may be imposed on parties as well as on counsel. Failure to comply with a court order, for which sanctions may be imposed, may include a failure to comply with a local court rule.

Rule 8021. Costs

1 (a) AGAINST WHOM ASSESSED. The following rules
2 apply unless the law provides or the district court or BAP orders
3 otherwise:
4 (1) if an appeal is dismissed, costs are taxed against
5 the appellant, unless the parties agree otherwise;
6 (2) if a judgment, order, or decree is affirmed, costs
7 are taxed against the appellant;
8 (3) if a judgment, order, or decree is reversed, costs
9 are taxed against the appellee;
10 (4) if a judgment, order, or decree is affirmed or
11 reversed in part, modified, or vacated, costs are taxed only
12 as the district court or BAP orders.
13 (b) COSTS FOR AND AGAINST THE UNITED
14 STATES. Costs for or against the United States, its agencies, or
15 officers may be assessed under subdivision (a) only if authorized
16 by law.
17 (c) COSTS TAXABLE ON APPEAL TO THE DISTRICT
18 COURT OR BAP. The bankruptcy clerk must tax the following
19 costs in favor of the party entitled to costs under this rule:
20 (1) costs incurred in the production of any required
21 copies of a brief, appendix, exhibit, or the record;

22 (2) costs incurred in the preparation and

23 transmission of the record;

24 (3) the cost of the reporter's transcript if necessary

25 for the determination of the appeal;

26 (4) premiums paid for supersedeas bonds or other

27 bonds to preserve rights pending appeal; and

28 (5) the fee for filing the notice of appeal.

29 (d) BILL OF COSTS; OBJECTIONS. A party who wants

30 costs taxed must, within 14 days after entry of judgment on appeal,

31 file with the bankruptcy clerk, with proof of service, an itemized

32 and verified bill of costs. Objections must be filed within 14 days

33 after service of the bill of costs, unless the court extends the time.

COMMITTEE NOTE

This rule is derived from former Rule 8014 and F.R. App. P. 39. It retains the former rule's authorization for taxing appellate costs against the losing party and its specification of the costs that may be taxed. Taxable costs do not include attorney's fees. The rule also incorporates some of the additional details regarding the taxing of costs contained in F.R. App. P. 39. Consistent with former Rule 8014, the clerk of the bankruptcy court has the responsibility for taxing all costs. Subdivision (b) is added to clarify that additional authority is required for the taxation of costs by or against federal governmental parties.

Rule 8022. Motion for Rehearing.

1 (a) TIME TO FILE; CONTENTS; RESPONSE; ACTION
2 BY THE DISTRICT COURT OR BAP.
3 (1) *Time.* Unless the time is shortened or extended
4 by order or local rule, any motion for rehearing by the
5 district court or BAP must be filed within 14 days after
6 entry of judgment on appeal.
7 (2) *Contents*. The motion must state with
8 particularity each point of law or fact that the movant
9 believes the district court or BAP has overlooked or
10 misapprehended and must argue in support of the motion.
11 Oral argument is not permitted.
12 (3) *Response*. Unless the district court or BAP
13 requests, no response to a motion for rehearing is
14 permitted. But ordinarily, rehearing will not be granted in
15 the absence of such a request.
16 (4) *Action by the District Court or BAP*. If a
17 motion for rehearing is granted, the district court or BAP
18 may do any of the following:
19 (A) make a final disposition of the appeal
20 without reargument;
21 (B) restore the case to the calendar for

22 reargument or resubmission; or

23 (C) issue any other appropriate order.

24 (b) FORM OF MOTION; LENGTH. The motion must

25 comply in form with Rule 8013(f)(1) and (2). Copies must be

26 served and filed as provided by Rule 8011. Unless the district

27 court or BAP by local rule or order provides otherwise, a motion

28 for rehearing must not exceed 15 pages.

COMMITTEE NOTE

This rule is derived from former Rule 8015 and F.R. App. P. 40. It deletes the provision of former Rule 8015 regarding the time for appeal to the court of appeals because the matter is addressed by F.R. App. P. 6(b)(2)(A).

Rule 8023. Voluntary Dismissal

1 The clerk of the district court or BAP must dismiss an
2 appeal if the parties to the appeal file a signed dismissal agreement
3 specifying how costs are to be paid and pay any fees that are due.
4 An appeal may be dismissed on the appellant's motion on terms
5 agreed to by the parties or fixed by the district court or BAP.

COMMITTEE NOTE

This rule is derived from former Rule 8001(c) and F.R. App. P. 42. The provision of the former rule regarding dismissal of appeals in the bankruptcy court prior to docketing of the appeal has been deleted. Now that docketing occurs promptly after a notice of appeal is filed, *see* Rules 8003(d) and 8004(c), there is little likelihood that an appeal will be voluntarily dismissed before docketing.

The rule retains the provision of the former rule that the clerk of the district court or BAP must dismiss an appeal upon the parties' agreement. District courts and BAPs continue to have discretion to dismiss an appeal on an appellant's motion. Nothing in the rule prohibits a district court or BAP from dismissing an appeal for other reasons authorized by law, such as the failure to prosecute an appeal.

Rule 8024. Duties of Clerk on Disposition of Appeal

1 (a) ENTRY OF JUDGMENT ON APPEAL. The clerk of
2 the district court or BAP must prepare, sign, and enter the
3 judgment following receipt of the opinion of the district court or
4 BAP or, if there is no opinion, following the instruction of the
5 district court or BAP. The notation of a judgment in the docket
6 constitutes entry of judgment.
7 (b) NOTICE OF AN ORDER OR JUDGMENT.
8 Immediately upon the entry of a judgment or order, the clerk of the
9 district court or BAP must transmit a notice of the entry to each
10 party to the appeal, to the United States trustee, and to the
11 bankruptcy clerk, together with a copy of any opinion respecting
12 the judgment or order, and must make a note of the transmission in
13 the docket.
14 (c) RETURN OF RECORD. If any original documents
15 were transmitted as the record on appeal, they must be returned to
16 the bankruptcy clerk on disposition of the appeal.

COMMITTEE NOTE

This rule is derived from former Rule 8016, which was adapted from F.R. App. P. 36 and 45 (c) and (d). The rule is reworded to reflect that often the record will not be physically transmitted to the district court or BAP and thus there will be no documents to return to the bankruptcy clerk. Other changes to the former rule are stylistic.

Rule 8025. Stay of District Court or BAP Judgment

1 (a) AUTOMATIC STAY OF JUDGMENT ON APPEAL.
2 Unless the district court or BAP orders otherwise, its judgment is
3 stayed for 14 days after entry of the judgment.
4 (b) STAY PENDING APPEAL TO THE COURT OF
5 APPEALS.
6 (1) On motion and notice to the parties to the
7 appeal, the district court or BAP may stay its judgment
8 pending an appeal to the court of appeals.
9 (2) The stay must not extend beyond 30 days after
10 the judgment of the district court or BAP is entered unless
11 the period is extended for cause shown.
12 (3) If, before the expiration of a stay entered
13 pursuant to this subdivision, there is an appeal to the court
14 of appeals by the party who obtained the stay, the stay
15 continues until final disposition by the court of appeals.
16 (4) A bond or other security may be required as a
17 condition of the grant or continuation of a stay of the
18 judgment.
19 (5) A bond or other security may be required if a
20 trustee obtains a stay, but a bond or security may not be
21 required if a stay is obtained by the United States or its

22 officer or agency, or at the direction of any department of
23 the Government of the United States.
24 (c) AUTOMATIC STAY OF ORDER, JUDGMENT, OR
25 DECREE OF BANKRUPTCY COURT. If the district court or
26 BAP enters a judgment affirming an order, judgment, or decree of
27 the bankruptcy court, a stay of the district court's or BAP's
28 judgment automatically stays the bankruptcy court's order,
29 judgment, or decree for the duration and to the extent of the
30 appellate stay.
31 (d) POWER OF COURT OF APPEALS NOT LIMITED.
32 This rule does not limit the power of a court of appeals or any of
33 its judges to do the following:
34 (1) stay a judgment pending appeal;
35 (2) stay proceedings during the pendency of an
36 appeal;
37 (3) suspend, modify, restore, vacate, or grant a stay
38 or an injunction during the pendency of an appeal; or
39 (4) make any order appropriate to preserve the
40 status quo or the effectiveness of any judgment to be
41 entered.

COMMITTEE NOTE

This rule is derived from former Rule 8017. Most of the changes to the former rule are stylistic. Subdivision (c) is new. It provides that if a district court or BAP affirms the bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree that is affirmed on appeal is automatically stayed to the same extent as the stay of the appellate judgment.

Rule 8026. Rules by Circuit Councils and District Courts; Procedure When There is No Controlling Law

1 (a) LOCAL RULES BY CIRCUIT COUNCILS AND
2 DISTRICT COURTS.
3 (1) Circuit councils that have authorized a BAP
4 pursuant to 28 U.S.C. § 158(b) may make and amend rules
5 governing practice and procedure for appeals from
6 judgments, orders, or decrees of bankruptcy courts to the
7 BAP. District courts may make and amend rules governing
8 practice and procedure for appeals from judgments, orders,
9 or decrees of bankruptcy courts to the district courts. Local
10 rules must be consistent with, but not duplicative of, Acts
11 of Congress and these Part VIII rules.
12 (2) Local rules must conform to any uniform
13 numbering system prescribed by the Judicial Conference of
14 the United States.
15 (3) A local rule imposing a requirement of form
16 must not be enforced in a way that causes a party to lose
17 any right because of a nonwillful failure to comply.
18 (b) PROCEDURE WHEN THERE IS NO
19 CONTROLLING LAW.
20 (1) A district judge or BAP may regulate practice
21 in any manner consistent with federal law, applicable

22 federal rules, the Official Forms, and local rules.

23 (2) No sanction or other disadvantage may be

24 imposed for noncompliance with any requirement not in

25 federal law, applicable federal rules, the Official Forms, or

26 local rules unless the alleged violator has been furnished in

27 the particular case with actual notice of the requirement.

COMMITTEE NOTE

This rule is derived from former Rule 8018. The changes to the former rule are primarily stylistic.

Rule 8027. Suspension of Rules in Part VIII

1 In the interest of expediting decision or for other cause in a
2 particular case, the district court or BAP, or where appropriate the
3 court of appeals, may suspend the requirements or provisions of
4 the rules in Part VIII, except Rules 8001, 8002, 8003, 8004, 8005,
5 8006, 8007, 8012, 8020, 8024, 8025, 8026, and 8027.

COMMITTEE NOTE

This rule is derived from former Rule 8019 and F.R. App. P. 2. In order to promote uniformity of practice and compliance with statutory authority, the rule includes a more extensive list of requirements that may not be suspended than either the former rule or the Rules of Appellate Procedure provide. Rules that may not be suspended are those governing the following:

- scope of the rules; definition of "BAP"; method of transmission;
- time for filing a notice of appeal;
- taking an appeal as of right;
- taking an appeal by leave;
- election to have appeal heard by district court instead of BAP;
- certification of direct appeal to court of appeals;
- stay pending appeal;
- corporate disclosure statement;
- sanctions for frivolous appeals and other misconduct;
- clerk's duties on disposition of appeal;
- stay of district court's or BAP's judgment;
- local rules; and
- suspension of Part VIII rules.